International Investment Law and the Evolving Codification of Foreign Investors' Responsibilities by Intergovernmental Organizations

by

Jean-Michel Marcoux
B.A., Université Laval, 2009
M.A., Université Laval, 2011

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Supervisory Committee

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Abstract

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In a context of neoliberal globalization, have the processes of elaboration and implementation of foreign investors' responsibilities by intergovernmental organizations reached the realm of legality? By relying on an analytical framework and a methodology that combine international law with international relations, the present interdisciplinary dissertation provides a twofold answer to this question. At a macro-level, it demonstrates that the normative integration of foreign investors' responsibilities in international investment law is fragmented and consistent with the interests of the most powerful actors. At a micro-level, it relies on the interactional theory of international law to assess the normative character of several international instruments elaborated and implemented by intergovernmental organizations. By shedding light on the sense of obligation that each instrument generates, the analysis shows that such a codification process is marked by relations of power between international actors and has resulted in several social norms, with relatively few legal norms.

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Acknowledgments

I like to think about this PhD dissertation as a journey. The following chapters are the result of many discussions with inspiring people and several hours of research, which brought me to a point that I could never have imagined when I began the project in September 2013. It has also led me to many places around the world. Research and writing of the dissertation occurred in Geneva, Montreal, New York, Paris, Quebec City and Waterloo. I was also fortunate to present my work in various conferences and workshops that were held in Liverpool, Ottawa, Quebec City, Toronto and Waterloo. Now that the journey has come to an end, there are several people and institutions that I would like to thank for their contribution along the way.

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I believe that a key contribution of this dissertation relies on the inclusion of the perspective from individuals working for intergovernmental organizations involved in the codification of foreign investors' responsibilities. In this regard, I am indebted to the twenty individuals who graciously agreed to participate in the research project and shared their views with respect to the subject at hand. Their knowledge and their willingness to generously engage with the questions that were asked during the semi-structured interviews provide a unique character to this dissertation that could not have been possible without them.

The University of Victoria's Faculty of Law constitutes a motivating intellectual environment that supports interdisciplinary research and critical thinking. I hope that the present dissertation faithfully reflects the richness of this institution in this regard. Moreover, the Faculty of Law has generously provided financial support to conduct the aforementioned semi-structured interviews and to participate in academic conferences. This support is gratefully acknowledged.

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Introduction

In his seminal book *The Great Transformation: The Political and Economic Origins of Our Time*, Karl Polanyi aptly described how groups negatively impacted by self-regulating markets seek reform.[1] Relying on lessons drawn from the history of the nineteenth century, Polanyi argued that dynamics of modern societies are characterized by a double movement according to which efforts to establish a self-regulating market relying on *laissez-faire* and free trade conflict with a spontaneous movement of self-protection that emerges through various instruments of intervention.[2] With growing international economic relations, one can only be struck by the accuracy of the analysis offered by this author more than seventy years ago. The need to incorporate social concerns often appears as a constant that must be addressed in parallel to any efforts to facilitate international economic relations.

International investment law evidences such a double movement. The very inception of international investment agreements ("IIAs") has been driven by a will to change relationships between states and foreign investors, with a view to increasing legal security for the latter and encouraging the flow of private capital to developing countries.[3] Alongside these efforts to provide legal security to investments in capital-importing states, there are long-standing concerns with respect to the negative impacts that foreign investors can produce in the environment and communities in which they operate. One specific moment when such concerns have been addressed can be traced back to a report on the impact of multinational corporations in world development published by the Department

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[1] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 2d ed (Boston: Beacon Press, 2001 [1944]).

[2] *Ibid* at 138-139.

[3] See Hartley W Shawcross, "The Problems of Foreign Investment in International Law" (1961) 102 Rec des Cours 335 at 342–343. For the inception of IIAs, see e.g. Jeswald W Salacuse, "The Treatification of International Investment Law" (2007) 13 Law & Bus Rev Am 155 at 156-158; Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009) at 41–43; Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2d ed (Oxford: Oxford University Press, 2012) at 6–8.

of Economic and Social Affairs of the United Nations ("UN") in 1973.[4] Recognizing the contribution of these private actors in terms of economic development, the report nonetheless exhibited skepticism regarding the extent to which the conduct of these actors could be regulated.[5] More specifically, it questioned "whether a set of institutions and devices can be worked out which will guide the multinational corporations' exercise of power and introduce some form of accountability to the international community into their activities".[6] This concern has then manifested in efforts to address foreign investors' responsibilities. Since the 1970s, intergovernmental organizations, multi-stakeholders initiatives and private enterprises have thus adopted multiple instruments to influence the conduct of private investors when the latter are operating abroad.[7]

While such initiatives demonstrate efforts to counterbalance the protections international investment law grants to foreign investors, it becomes of the utmost relevance to scrutinize this evolving codification[8] of foreign investors' responsibilities. More precisely, considering the existence of a double movement in international investment law, it is now opportune to take a closer look at this process to assess its normative character and to question whether these norm making processes have resulted in foreign investors having international legal obligations. Prior to delving into the bulk of the analysis, this introductory chapter describes the various components constituting the research question (1), addresses the specific contribution of the dissertation (2) and provides a brief overview of the upcoming chapters (3).

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[4] Department of Economic and Social Affairs, *Multinational Corporations in World Development* (New York: United Nations, 1973).

[5] *Ibid* at 2.

[6] *Ibid* at 2.

[7] For a summary of the broad range of initiatives that address foreign investors' responsibilities, see UNCTAD, *World Investment Report 2011: Non-Equity Modes of International Production and Development* (New York and Geneva: United Nations, 2011) at 111-120.

[8] According to the *Statute of the International Law Commission*, "[t]he expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive [s]tate practice, precedent and doctrine". See *Establishment of an International Law Commission*, GA Res 174(II), UNGAOR, 2d Sess, UN Doc A/519, (1948) 105. It is here submitted that such a broad concept of "codification" can be used to refer to various attempts at elaborating an authoritative statement of standards of appropriate conduct pertaining to the activities of foreign investors under international law.

1. Framing the Analysis

With a view to analyzing the normative character of international initiatives that are emerging to address the general lack of accountability of foreign investors under international law, the question that animates the present dissertation can be posited as follows: In a context of neoliberal globalization, have the processes of elaboration and implementation of foreign investors' responsibilities by intergovernmental organizations reached the realm of legality? In order to provide solid grounds to the upcoming analysis, this section addresses the context of neoliberal globalization (1.1), the focus on intergovernmental organizations[9] (1.2), the instruments taken into account (1.3) and the concept of norms (1.4).

1.1 The Context of Neoliberal Globalization

Any analysis of the codification of foreign investors' responsibilities that does not acknowledge the broader context in which this process occurs risks obfuscating crucial variables that must be taken into account. It is by bearing this aspect in mind that the research question underlying the present dissertation explicitly refers to the overarching context of neoliberal globalization that can affect the various initiatives elaborated and implemented by intergovernmental organizations. More specifically, situating the issue at hand in this context emphasizes the influence of the numerous actors that participate in the globalization process, as well as the uneasy relationship between attempts at holding

[9] The term "international organization" is often used to describe "an organization set up by agreement between two or more states". See Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev ed (London: Routledge, 1997) at 92. Similarly, Klabbers considers the concept of "international organization" as being highly fluid, but nevertheless stresses that such an organization is generally created between states, on the basis of a treaty and possesses at least one organ with a distinct will. See Jan Klabbers, *An Introduction to International Organizations Law*, 3d ed (Cambridge: Cambridge University Press, 2015) at 6–14 [Klabbers, *An Introduction*]. In order to distinguish organizations established by states from nongovernmental organizations that operate internationally, the present dissertation uses the term "intergovernmental organization". Such a distinction is also in line with Article 2 of the *Vienna Convention on the Law of Treaties*, which expressly provides that "international organization means an intergovernmental organization". See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 2(1)(i). See also Klabbers, *An Introduction*, *ibid* at 7.

private investors accountable for harm caused abroad and policies reflecting neoliberal ideas.

Anchoring the present analysis in the context of globalization provides a basis for considering power relations between state and non-state actors that are often avoided in traditional legal studies of foreign investors' responsibilities in international law. Following Held and his collaborators, globalization can be defined as "a process (or set of processes) which embodies a transformation in the spatial organization of social relations and transactions – assessed in terms of their extensity, intensity, velocity and impact – generating transcontinental and interregional flows and networks of activity, interaction, and the exercise of power".[10] Given that international lawmaking occurs in the broader context of globalization, this definition suggests that the design and the implementation of international norms are also deeply integrated into processes of the transformation of social relations and the exercise of power. What is more, without dismissing the role of state actors, previous research on global governance sheds light on the direct participation of non-state actors with respect to the elaboration and the implementation of norms in an era of globalization.[11] With respect to international investment law, several authors thus identify capital-exporting states, capital-importing states, intergovernmental organizations, foreign investors and nongovernmental organizations ("NGOs") as playing a crucial role in the international lawmaking process.[12] Restated, international lawmaking occurring in a

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[10] David Held et al, *Global Transformations: Politics, Economics and Culture* (Cambridge: Polity Press, 1999) at 16. See also James Tully, *Public Philosophy in a New Key*, Vol II (Cambridge: Cambridge University Press, 2008) at 58; Michael Zürn, "Globalization and Global Governance" in Walter Carlsnaes, Thomas Risse & Beth A Simmons, eds, *Handbook of International Relations*, 2d ed (London: Sage Publications, 2013) 401 at 402.

[11] See e.g. Zürn, *ibid* at 411; Thomas Risse, "Transnational Actors and World Politics" in Walter Carlsnaes, Thomas Risse & Beth A Simmons, eds, *Handbook of International Relations*, 2d ed (London: Sage Publications, 2013) 426 at 436–437 and 439-441.

[12] See e.g. Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) at 93–102; Peter T Muchlinski, *Multinational Enterprises and the Law*, 2d ed (Oxford: Oxford University Press, 2007) at 82–85 [Muchlinski, *Multinational Enterprises*]; Peter Muchlinski, "Policy Issues" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 3 at 7 [Muchlinski, "Policy Issues"]; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 3d ed (Cambridge: Cambridge University Press, 2010) at 6; Peter T Muchlinski, "Regulating Multinationals: Foreign Investment, Development, and the Balance of Corporate and Home Country Rights and Responsibilities in a Globalizing World" in José E Alvarez et al, eds, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: Oxford University Press, 2011) 30 at 31; John H Dunning & Sarianna M Lundan, "The Changing Political Economy of Foreign Investment: Finding a Balance Between Hard and Soft Forms of Regulation" in José E Alvarez et al, eds, *The Evolving*

context of globalization is necessarily characterized by social interactions and relations of power between state and non-state actors that must be openly integrated into the analysis of the evolving codification of foreign investors' responsibilities.

Another aspect of the analysis that is highlighted by explicitly referring to the context of neoliberal globalization relates to the uneasy relationship between neoliberalism and the codification process. At this point, it must be mentioned that the use of the word "neoliberalism" is not here understood as a pejorative term in itself. Of course, some authors denounce the agenda that was imposed on less developed countries to strongly criticize neoliberalism.[13] Other authors consider the exacerbation of social and economic crises as being intrinsically related to neoliberalism.[14] In contrast to studies that criticize the negative impacts resulting from the implementation of neoliberal policies, the term is merely employed to position the codification of foreign investors' responsibilities into the current prevailing ideological and political context.[15]

With respect to its intellectual roots, neoliberalism emerges as a reinvention of the liberal ideology by drawing on the work of Friedrich August von Hayek and the Mont Pelerin Society.[16] Following the predominance of Keynesian policies that inspired a more controlled form of capitalism from 1945 to 1975, a new wave of liberal thinkers started challenging the ideas of the social democratic state and attempted to adapt classical liberal doctrine to the emerging context of globalization.[17] While an exploration of the various

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International Investment Regime: Expectations, Realities, Options (Oxford: Oxford University Press, 2011) 125 at 128.

[13] See e.g. Simon Lee & Stephen McBride, "Introduction: Neo-Liberalism, State Power and Global Governance in the Twenty-First Century" in Simon Lee & Stephen McBride, eds, *Neo-Liberalism, State Power and Global Governance* (Dordrecht: Springer, 2007) 1 at 3 and 13-16; Manfred B Steger & Ravi K Roy, *Neoliberalism: A Very Short Introduction* (Oxford: Oxford University Press, 2010) at 19.

[14] See e.g. Leo Panitch, "Rethinking the Role of the State" in James H Mittleman, ed, *Globalization: Critical Reflections* (Boulder, CO: Lynne Rienner Publishers, 1996) 83 at 98.

[15] See Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015) at 8–9 and 16 [Sornarajah, *Resistance and Change*].

[16] See e.g. Phillip G Cerny, Georg Menz & Susanne Soederberg, "Different Roads to Globalization: Neoliberalism, the Competition State, and Politics in a More Open World" in Susanne Soederberg, Georg Menz & Phillip G Cerny, eds, *Internalizing Globalization: The Rise of Neoliberalism and the Decline of National Varieties of Capitalism* (New York: Palgrave Macmillan, 2005) 1 at 10–11; Rachel S Turner, *Neo-liberal Ideology: History, Concepts and Policies* (Edinburgh: Edinburgh University Press, 2008) at 1–14; Steger & Roy, *supra* note 13 at 15.

[17] See e.g. Steger & Roy, *ibid* at 5-9; Turner, *ibid* at 4.

core principles of neoliberalism is beyond the ambit of the present dissertation,[18] it is worth emphasizing that its advocates portray globalized free markets and minimal state intervention as indispensable tools for the realization of a better functioning economy, in addition to the protection of private property that characterizes classical liberalism.[19] Ultimately, neoliberalism relates to an "ideal of the 'self-regulation market' as the main engine powering the individual's rational pursuit of wealth".[20]

Beyond the ideas that characterize neoliberalism, policies adopted in a context of neoliberal globalization are extensively based on privatization, liberalization and deregulation.[21] Particularly relevant for present purposes, Cerny and his collaborators note that neoliberal policies geared toward the establishment of an open world economy entail an acceptance of a leading role for multinational corporations as partners in the quest for economic growth in both developed and developing countries.[22] It is plain that the adoption of IIAs according substantive protections and procedural rights to foreign investors fits these policies squarely, forming an integral part of the broader neoliberal trend in which the codification of foreign investors' responsibilities is evolving.[23] By contrast, international initiatives elaborated and implemented by intergovernmental organizations to hold private investors accountable for harm caused abroad do not sit well with policies that

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[18] For useful summaries, see Cerny et al., *supra* note 16 at 14-19; Turner, *ibid* at 4-5; Steger & Roy, *ibid* at 11-15.

[19] See Sol Picciotto, "Introduction: What Rules for the World Economy?" in Sol Picciotto & Ruth Mayne, eds, *Regulating International Business: Beyond Liberalization* (New York: St. Martin's Press, 1999) 1 at 2 and 4-6; Lee & McBride, *supra* note 13 at 5-6; Turner, *ibid* at 115 and 132-136; Steger & Roy, *ibid* at 3, 5 and 11.

[20] See e.g. Steger & Roy, *ibid* at 2.

[21] See Cerny et al., *supra* note 16 at 9-10; David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005) at 65; Lee & McBride, *supra* note 13 at 5; Steger & Roy, *ibid* at 14; Peter Muchlinski, "The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World" (2011) 18 Ind J Global Legal Stud 665 at 666 [Muchlinski, "The Changing Face"]; Celine Tan, "Navigating New Landscapes: Socio-Legal Mapping of Plurality and Power in International Economic Law" in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (New York: Routledge, 2013) 19 at 27–28; Sornarajah, *Resistance and Change*, *supra* note 15 at 11-13.

[22] Cerny et al., *ibid* at 15-16.

[23] See Muchlinski, "The Changing Face", *supra* note 21 at 666-667; Sornarajah, *Resistance and Change*, *supra* note 15 at 13.

reflect the neoliberal ideal of self-regulation[24] and can even be considered as a departure from these policies.[25] This inherent contradiction between efforts to liberalize international economic relations and the codification of foreign investors' responsibilities, as well as the necessity of accounting for relations of power between actors involved in the globalization process, justify the relevance of considering the context of neoliberal globalization.

1.2 Intergovernmental Organizations as Normative Sites

Despite the existence of multi-stakeholder and private initiatives with respect to corporate social responsibility, the research question is deliberately limited to the consideration of normative developments occurring under the auspices of intergovernmental organizations. Far from pretending to account for all possible avenues for imposing responsibilities on private investors operating abroad, the focus of the present analysis is to critically assess what intergovernmental organizations have accomplished so far. In fact, although the need for an international response to tackle the general lack of accountability of foreign investors under international law is advanced by several authors,[26] the dissertation's focus on intergovernmental organizations results primarily from a pragmatic choice to delimit the scope of the analysis. Such a pragmatic choice is justified by the fact that various intergovernmental organizations receive an "agency" by their member states to address the question of foreign investors' responsibilities.[27] Since the aforementioned report from the UN Department of Economic and Social Affairs in 1973,

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[24] See Thomas W Wälde, "Non-Conventional Views on Effectiveness: The Holy Grail of Modern International Lawyers: The New Paradigm - A Chimera - Or a Brave New World in the Global Economy" (1999) 4 Austrian Rev Int'l & Eur L 164 at 169–170.

[25] See Muchlinski, "The Changing Face", *supra* note 21 at 690-692.

[26] See e.g. Sarah Joseph, "Taming the Leviathans: Multinational Enterprises and Human Rights" (1999) 46:02 Nethl Int'l L Rev 171 at 174; Steven R Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111:3 Yale LJ 443 at 448; Surya Deva, "Human Rights Violations by Multinational Corporations and International Law: Where from Here" (2003) 19 Conn J Int'l L 1 at 4 and 56; Surya Deva, "Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should Bell the Cat" (2004) 5 Melb J Int'l L 37 at 45.

[27] See Peter Muchlinski, "Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by Intergovernmental Organisations" (2003) 3 Non-St Actors & Int'l L 123 at 145 [Muchlinski, "Human Rights"]; Muchlinski, "Policy Issues", *supra* note 12 at 8.

international instruments codifying foreign investors' responsibilities have been elaborated and implemented under the auspices of organizations like the Organisation for Economic Co-operation and Development ("OECD"), the International Labour Organization ("ILO"), the UN and the World Bank Group.

Scholars in international law and international relations theory shed light on the role of intergovernmental organizations with respect to the elaboration and the implementation of international norms. Some international law scholars thus stress that these organizations are authorized by states to accomplish only a limited set of actions, ranging from the elaboration of international treaties to the adoption of hortatory initiatives.[28] However, other authors underscore that the scope of the authority granted by member states to intergovernmental organizations often evolves through time and according to changing circumstances.[29] Moreover, drawing on international relations theory, several authors emphasize the ability of intergovernmental organizations to socialize states according to the norms prevailing in these organizations.[30] In this regard, Barnett and Finnemore posit that intergovernmental organizations "are more than the reflection of state preferences and … they can be autonomous and powerful actors in global politics".[31]

Furthermore, while some authors tend to present such organizations as elaborating norms that are solely dictated by states,[32] the growing role of non-state actors in the

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[28] See Malanczuk, *supra* note 9 at 92-93; José E Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005) at 8 and 15 [Alvarez, *International Organizations*]; Ian Johnstone, "Law-Making in International Organizations: Perspectives from IL/IR Theory" in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013) 266 at 269–276; Klabbers, *An Introduction*, *supra* note 9 at 154-188.

[29] See e.g. José E Alvarez, "International Organizations: Then and Now" (2006) 100:2 Am J Int'l L 324 at 326 and 328 [Alvarez, "International Organizations"]; Jan Wouters & Philip De Man, "International Organizations as Law-Makers" in Jan Klabbers & Åsa Wallendahl, eds, *Research Handbook on the Law of International Organizations* (Northampton: Edward Elgar, 2011) 190 at 192–193 and 197; Johnstone, *ibid* at 268.

[30] See generally Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996); Brian Greenhill, *Transmitting Rights: International Organizations and the Diffusion of Human Rights Practices* (New York: Oxford University Press, 2015).

[31] Michael N Barnett & Martha Finnemore, "The Politics, Power, and Pathologies of International Organizations" (1999) 53 Int'l Organization 699 at 700.

[32] See e.g. Gunther Teubner, "'Global Bukowina': Legal Pluralism in World Society" in Gunther Teubner, ed, *Global Law Without a State* (Aldershot: Dartmouth, 1997) 3 at 7; Kenneth W Abbott & Duncan Snidal, "Why

lawmaking process that occurs in intergovernmental organizations is extensively discussed in the literature from both disciplines.[33] As summarized by Alvarez, intergovernmental organizations "have transformed the processes by which international norms are produced, the nature of the actors that produce these rules, as well as the content of much of general public international law itself".[34] Taking these specificities of intergovernmental organizations seriously thus implies that the analysis of these organizations as normative sites is at odds with a strict legal positivist approach.[35]

In the specific case of the regulation of foreign investors, Muchlinski emphasizes that the quasi-legislative power of intergovernmental organizations exists "over and outside" the states that constitute the organization.[36] While state representatives are often involved in the elaboration of international initiatives that address the lack of accountability of foreign investors,[37] experts and civil society organizations also play a substantial role in this task.[38] Overall, given that state and non-state actors both play a crucial role in the international lawmaking processes occurring in intergovernmental organizations, norms that are developed in these forums with respect to foreign investors' responsibilities are better conceptualized through the lenses of an analytical approach that explicitly accounts for the potential emergence of norms beyond the traditional limits of the state.

States Act through Formal International Organizations?" (1998) 42 J Conflict Res 3 at 15–16; Tan, *supra* note 21 at 22.

[33] See Barnett & Finnemore, *supra* note 31 at 714-715; Alvarez, "International Organizations", *supra* note 29 at 332-333; Wouters & De Man, *supra* note 29 at 209-210; Johnstone, *supra* note 28 at 269; Lisa L Martin & Beth A Simmons, "International Organizations and Institutions" in Walter Carlsnaes, Thomas Risse & Beth A Simmons, eds, *Handbook of International Relations*, 2d ed (London: Sage Publications, 2013) 326 at 342.

[34] Alvarez, *International Organizations*, *supra* note 28 at 17. See also Alvarez, "International Organizations", *ibid* at 326.

[35] See Alvarez, *International Organizations*, *ibid* at 48-49.

[36] Muchlinski, "Human Rights", *supra* note 27 at 145; Muchlinski, *Multinational Enterprises*, *supra* note 12 at 84; Muchlinski, "Policy Issues", *supra* note 12 at 8.

[37] See August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 37 at 44.

[38] See e.g. Susan Ariel Aaronson, "Global Corporate Social Responsibility Pressures and the Failure to Develop Universal Rules to Govern Investors and States" (2002) 3 J World Investment 487 at 493; Todd Weiler, "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order" (2004) 27 B C Int'l & Comp L Rev 429 at 435; Ralph G Steinhardt, "Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 177 at 206.

1.3 International Instruments Included in the Analysis

Given that the present dissertation assesses the normative character of initiatives codifying foreign investors' responsibilities in international law, the selection of international instruments that constitute the focus of the research question must be clarified. In addition to limiting the analysis to initiatives adopted by intergovernmental organizations, five other criteria are considered. First, this analysis is limited to instruments that have been *adopted* by an intergovernmental organization. Even if they might be considered to explain the normative development that led to other initiatives, any instruments whose negotiations have not been finalized (*e.g.* the UN *Code of Conduct on Transnational Corporations*)[39] are not fully taken into account in the present analysis. Second, in order to limit the scope of instruments considered, this examination focuses on *multilateral* intergovernmental organizations in contrast to regional intergovernmental organizations. Third, the instruments must provide specific *standards of conduct* that are expected from foreign investors. By contrast, a mere declaration of the necessity of addressing the lack of accountability of foreign investors is not sufficient to be included in the present research.[40] Fourth, an *extraterritorial dimension* must also underlie the scope of the instruments. While there are other examples of international initiatives that require action by states against legal persons,[41] this research is limited to norms that are specifically applicable to investors when they are operating in a host state that differs from their state of origin. Fifth, for pragmatic reasons pertaining to the conduct of the research, this dissertation is limited to instruments adopted *before April 2016* (*i.e.* the date when the bulk of the collection of data has been completed). Amidst the initiatives that meet these criteria, a total of nine distinct instruments are considered for present purposes (see Table 1 on the following page).

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[39] *Code of Conduct on Transnational Corporations (Draft)*, 1990, UN Doc E/1990/94 [*UN Draft Code of Conduct*].

[40] See e.g. EC, Commission, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility* (Brussels: EC, 2011).

[41] For an analysis of these instruments, see Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford: Oxford University Press, 2006) at 247–252.

Table 1 - Instruments Analyzed in the Dissertation

Intergovernmental organization	Name of the instrument	First version	Latest version
OECD	*Guidelines for Multinational Enterprises*	1976	2011
	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	1997	N/A
	Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions	2009	2010
ILO	*Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*	1977	2006
UN	Global Compact	2000	2004
	Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights	2003	N/A
	United Nations Convention Against Corruption	2003	N/A
	Guiding Principles on Business and Human Rights	2011	N/A
World Bank Group	*International Finance Corporation's Performance Standards on Environmental and Social Sustainability*	2006	2012

The OECD has been particularly active in elaborating international initiatives that concern foreign investors' responsibilities.[42] After its first adoption in 1976, the *OECD Guidelines for Multinational Enterprises* ("*OECD Guidelines*")[43] went through various revisions. While the most recent version of these guidelines was adopted in 2011,[44] considerable changes were made to this instrument in 2000.[45] An international agreement pertaining to the fight against corruption was also adopted under the auspices of the OECD. While being addressed to states, the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ("*OECD Anti-Bribery Convention*")[46]

[42] Given that the member states of the OECD are not limited to a specific region, this intergovernmental organization is considered as a multilateral one for present purposes. As emphasized by Böhmer, "the OECD has moved beyond geography and away from its original focus towards a criterion of 'likemindeness' and economic criteria for the selection of potentially new members". See Alexander Böhmer, "Organisation for Economic Co-operation and Development" in Christian Tietje & Alan Brouder, eds, *Handbook of Transnational Economic Governance Regimes* (Leiden: Martinus Nijhoff Publishers, 2009) 227 at 239.

[43] *Declaration on International Investment and Multinational Enterprises*, 21 June 1976, Doc No C(76)99/FINAL (1976), Annex 1.

[44] *Declaration on International Investment and Multinational Enterprises*, 25 May 2011, Doc No C/MIN(2011)11/FINAL (2011), Annex 1.

[45] *Declaration on International Investment and Multinational Enterprises*, 27 June 2000, Doc No C(2000)96/REV1 (2000), Annex 1.

[46] *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, 37 ILM 1 (entered into force 15 February 1999).

requires the establishment of the liability for legal persons involved in corrupt practices. More recently, these efforts to curb corruption led to the adoption of another instrument that also meet the criteria elaborated above, namely the *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* ("*OECD 2009 Recommendation*").[47]

The ILO has also adopted and implemented international instruments that meet the criteria mentioned above. Shortly after the adoption of the first version of the *OECD Guidelines*, the ILO elaborated the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* ("*ILO Tripartite Declaration*")[48] in 1977. Substantial modifications were subsequently made to this declaration in 2000 and in 2006.[49] While the small number of initiatives arising from this intergovernmental organization contrasts with what can be observed in other forums, it must be stressed that the ILO focuses primarily on the area of labour rights and thus covers only a limited range of foreign investors' responsibilities.

Other UN agencies have been involved in the codification process of foreign investors' responsibilities beside the ILO. Nine years after the failed attempt at adopting a code of conduct,[50] the UN Secretary-General announced the elaboration of an initiative directly addressed to businesses and entitled the UN Global Compact.[51] Several efforts were also deployed in the UN Sub-Commission on the Promotion and the Protection of Human Rights ("Sub-Commission") to adopt the *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*

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[47] *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 26 November 2009, Doc No C(2009)159/REV1/FINAL (amended on 18 February 2010, Doc No C(2010)19).

[48] *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, November 1977, 17 ILM 422.

[49] *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, November 2000, 41 ILM 186; *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, March 2006, online: ILO <http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm> (accessed 14 September 2016).

[50] See *UN Draft Code of Conduct*, *supra* note 39.

[51] United Nations Global Compact, online: United Nations Global Compact <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (accessed 14 September 2016).

("*UN Norms*")[52] in 2003. While this instrument has later been considered as having "no legal standing" by the UN Human Rights Commission,[53] it has nevertheless been adopted by the sub-commission, thus remaining an integral part of the codification process that occurred at the UN. Another initiative that meets the selection criteria can be found in the *United Nations Convention Against Corruption* ("*UNCAC*"),[54] which also requires the establishment of the liability of legal persons for participation in corruption. Finally, while this instrument is currently drawing considerable attention from various international actors and experts, the *Guiding Principles on Business and Human Rights* ("*UN Guiding Principles*")[55] developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises are also included in this dissertation.

Another intergovernmental organization that has adopted instruments to codify foreign investors' responsibilities is the World Bank Group. While similar initiatives have later been adopted by other agencies of this intergovernmental organization, the International Finance Corporation ("IFC") established standards that must be met by foreign investors when they are responsible for the implementation and the operation of a project financed by this agency. In this regard, the *International Finance Corporation's Performance Standards on Social & Environmental Sustainability* ("*IFC Performance Standards*")[56] were adopted in 2006 and a revised version entered into application in 2012.[57]

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[52] *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, 2003, UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

[53] *Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights*, ESC Dec 2004/116, UNESCOR, 2004, Supp No 3, UN Doc E/CN.4/2004/127, 332 at 333.

[54] *United Nations Convention Against Corruption*, 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005).

[55] Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 2011, UN Doc A/HRC/17/31.

[56] *International Finance Corporation's Performance Standards on Social & Environmental Sustainability*, 30 April 2006, online: IFC <http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Our+Approach/Risk+Management/Performance+Standards/> (accessed 14 September 2016).

[57] *International Finance Corporation's Performance Standards on Environmental and Social Sustainability*, 1 January 2012, online: IFC

When considering this pool of instruments, it clearly appears that the bulk of the international initiatives that are adopted by intergovernmental organizations to codify foreign investors' responsibilities are informal to the extent that they fall beyond the formal sources of international law. More precisely, most of these instruments do not fit within the traditional sources of international law that are enumerated in Article 38(1) of the *Statute of the International Court of Justice* (*i.e.* treaties, international customary law and general principles of international law).[58] In this regard, Pauwelyn refers to the concept of "output informality" to account for instruments resulting from international cooperation that do not "lead to a formal treaty or any other traditional source of international law, but rather to a guideline, standard, declaration, or even more informal policy coordination or exchange".[59] Regardless of their formal status under international law, it must be stressed that a detailed examination of this pool of international instruments is essential to understand the direction toward which the codification process that is occurring within intergovernmental organizations is pointing.

1.4 Norms as a Key Concept

Strongly related to the informal character of several international instruments that are examined in this analysis, the research question implicitly refers to international norms.[60] In fact, one must turn toward a concept that encompasses the plurality of initiatives elaborated and implemented by various actors in intergovernmental

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<http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Our+Approach/Risk+Management/Performance+Standards/> (accessed 14 September 2016).

[58] See *Statute of the International Court of Justice*, 26 June 1945, 59 US Stat 1031 (entered into force 24 October 1945), art 38(1).

[59] Joost Pauwelyn, "Informal International Lawmaking: Framing the Concept and Research Questions" in Joost Pauwelyn, Ramses A Wessel & Jan Wouters, eds, *Informal International Lawmaking* (Oxford: Oxford University Press, 2012) 13 at 15. See also Joost Pauwelyn, "Is It International Law or Not, and Does It Even Matter?" in Joost Pauwelyn, Ramses A Wessel & Jan Wouters, eds, *Informal International Lawmaking* (Oxford: Oxford University Press, 2012) 125 at 126–127. For a rationalist account of informal agreements, see also Charles Lipson, "Why are Some International Agreements Informal?" (1991) 45:4 Int'l Organization 495.

[60] For another discussion on the relevance of "norms", see Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford: Oxford University Press, 2015) at 3.

organizations. Given that the pool of instruments that constitute the focus of this dissertation includes both formal and informal sources of international law that result from the work of state and non-state actors, identifying a concept that includes all these instruments is necessary. It is in this regard that the concept of "norm" – which is defined by Finnemore and Sikkink as "a standard of appropriate behavior for actors with a given identity"[61] – stems at the core of this analysis.

More specifically, an important part of the present dissertation aims to position the selected international instruments on a continuum that varies from social norms to legal norms. Although some international relations authors submit that the distinction between these two types of norms remains unclear,[62] the distinctive character of legal norms as "binding" is extensively discussed by international legal scholars. Beyond some basic treatises on international law that prefer to address the formal sources of international law as objects of study rather than delving into a definition of this phenomenon,[63] Malanczuk maintains that "what distinguishes the rules and principles of international law from 'mere morality' is that they are accepted in practice as legally binding by states in their intercourse because they are useful to reduce complexity and uncertainty in international relations".[64] Similarly, d'Aspremont maintains that "bindingness" constitutes the very DNA of the discipline of international law.[65] While maintaining that legal norms are not solely embedded in the formal sources of international law, Brunnée and Toope also argue that the singularity of legal norms stems from the sense of obligation that they generate.[66]

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[61] Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52 Int'l Organization 887 at 891.

[62] See e.g. Martha Finnemore, "Are Legal Norms Distinctive?" (2000) 32 NYU J Int'l L & Pol 699 at 703.

[63] See e.g. Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008), Chapter 1.

[64] Malanczuk, *supra* note 9 at 6-7.

[65] See generally Jean d'Aspremont, *Bindingness*, ACIL Research Paper 19 (Amsterdam, 2015).

[66] Jutta Brunnée & Stephen J Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum J Transnat'l L 19 at 56 [Brunnée & Toope, "International Law and Constructivism"]; Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) at Chapter 1 [Brunnée & Toope, *Legitimacy and Legality*]; Jutta Brunnée & Stephen J Toope, "Interactional International Law: An Introduction" (2011) 3 Int'l Theory 307 at 307 [Brunnée & Toope, "Interactional"]; Jutta Brunnée & Stephen J Toope, "Constructivism and International Law" in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013) 119 at 135.

Overall, despite some variations regarding the source of this binding character among these authors, legal norms are characterized by an uneasiness to circumvent compliance with these standards of behavior.

As a result of this distinctive binding character, legal norms are often perceived as holding a different status from social norms in ordering the conduct of international actors. Although recognizing that law is not the only form of normative claim in the international arena, Shelton argues that "[l]aw … is often deemed a necessary, if usually insufficient, basis for ordering behavior".[67] Schultz also maintains that international actors have a different relationship to legal rules than to other types of rules.[68] He thus posits eight rhetorical effects that our collective conscience associates to law, including the perception of law as a superior mode of social regulation.[69] Along these lines, Kratochwil argues that the relevance of speaking of a distinct legal character of norms is primarily justified by the distinct use of legal norms when actors are making decisions.[70] Following these propositions, the relevance of determining whether international norms belong to the realm of social norms or legal norms is justified by the different perception of legal norms with respect to their capacity to ordering the conduct of international actors.

This important distinction between social norms and legal norms becomes essential when assessing the normative character of international instruments codifying foreign investors' responsibilities. In fact, analyzing whether such instruments belong to the realm of legality and can more effectively order the conduct of international actors can be accomplished by scrutinizing the sense of obligation emanating from the elaboration and the implementation of these initiatives, regardless of their formal or informal character under international law. To put it differently, the concept of norm that lies at the heart of the research question invites a nuanced analysis of the sense of obligation the results from

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[67] Dinah Shelton, "Introduction: Law, Non-Law and the Problem of 'Soft-Law'" in Dinah Shelton, ed, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000) 1 at 8.

[68] Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford: Oxford University Press, 2014) at 24.

[69] *Ibid* at 38-44.

[70] Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1991) at 42.

international instruments rather than a strict focus on the form in which these initiatives occurring in intergovernmental organizations are embedded.

Using such a sense of obligation to determine the legal character of a norm suggests that informal international instruments can be considered as legal norms. By the same token, relying on this distinctive character ultimately implies that formal international instruments do not automatically belong to the realm of legality. Although such a statement can appear as relatively contentious, the key element to avoid confusion is that the concept of legal norm used for present purposes is not conflated to the law applied by an international tribunal that can only rely on the formal sources of public international law. As emphasized by Schultz, "[i]t does not follow from the fact that a norm is *law* that it is justiciable, invokable, applicable before international courts and tribunals: it may be law but not be recognized by the legal system of international law".[71] In other words, an international norm can hold a legal nature even if it cannot expressly be applied by an international tribunal. To the extent that it creates a sense of obligation amidst international actors, such an international norm can be considered as an international legal norm.

Another aspect that must be emphasized at this point is that the present attempt at positioning nine international instruments on a continuum that varies from social norms to legal norms concerns each instrument as a whole. In other words, an international instrument that sets standards of appropriate behavior for private actors operating abroad is considered as an international norm for present purposes, either social or legal. Although some provisions may generate a stronger sense of obligation than other aspects that are included within the same initiative, such a distinction has generally not been made in the following chapters. In fact, the information that allows analyzing the elaboration and the implementation of international instruments often relates to these initiatives in their entirety, thus making it more accurate to consider each instrument as an international norm in itself.

The deliberate choice of relying on the concept of norms to analyze the international instruments at hand is also justified by a will to avoid semantic issues related to the use of the binary classification between "soft law" and "hard law". Beyond the unequivocal

[71] Schultz, *supra* note 68 at 11.

rejection of the existence of soft law by some international legal scholars,[72] it remains difficult to determine the scope and meaning of this term when one considers the various interpretations that are found in the literature.[73] Some international legal scholars rely on soft law to account for international instruments that fall beyond the formal sources of international law and that are thus perceived as "non-binding" under the traditional international law sources doctrine.[74] By contrast, other authors acknowledge that formal international instruments – *e.g.* international treaties – can also be considered as soft law if they are worded in vague and hortatory terms.[75] These authors present a more nuanced distinction between soft law and hard law as being different points on a spectrum of

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[72] See Prosper Weil, "Towards Relative Normativity in International Law?" (1983) 77 Am J Int'l L 413 at 413-423. See also generally Jan Klabbers, "The Redundancy of Soft Law" (1996) 65:2 Nordic J Int'l L 167; Kal Raustiala, "Form and Substance in International Agreements" (2005) 99:3 Am J Int'l L 581.

[73] For a summary of these interpretations, see Rose, *supra* note 60 at 15-19.

[74] See generally Hartmut Hillgenberg, "A Fresh Look at Soft Law" (1999) 10:3 Eur J Int Law 499; Moshe Hirsch, "Sources of International Investment Law" in Andrea K Bjorklund & August Reinisch, eds, *International Investment Law and Soft Law* (Northampton: Edward Elgar, 2012) 9; Andrea K Bjorklund, "Assessing the Effectiveness of Soft Law Instruments in International Investment Law" in Andrea K Bjorklund & August Reinisch, eds, *International Investment Law and Soft Law* (Northampton: Edward Elgar, 2012) 51; Kate Miles, "Soft Law Instruments in Environmental Law: Models for International Investment Law?" in Andrea K Bjorklund & August Reinisch, eds, *International Investment Law and Soft Law* (Northampton: Edward Elgar, 2012) 82. See also Geoffrey Palmer, "New Ways to Make International Environmental Law" (1992) 86 Am J Int'l L 259 at 269; Jean Galbraith & David Zaring, "Soft Law as Foreign Relations Law" (2014) 99 Cornell L Rev 735 at 739-740. This interpretation is summarized as a positivist approach by Shaffer & Pollack. See Gregory C Shaffer & Mark A Pollack, "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance" (2009) 94 Minn L Rev 706 at 713 [Shaffer & Pollack, "Hard vs. Soft Law"]; Gregory C Shaffer & Mark A Pollack, "Hard and Soft Law" in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013) 197 at 198 [Shaffer & Pollack, "Hard and Soft Law"].

[75] See generally Kenneth W Abbott & Duncan Snidal, "Hard and Soft Law in International Governance" (2000) 54:3 Int'l Organization 421 [Abbott & Snidal, "Hard and Soft Law"]; Melaku Geboye Desta, "Soft Law in International Law: An Overview" in Andrea K Bjorklund & August Reinisch, eds, *International Investment Law and Soft Law* (Northampton: Edward Elgar, 2012) 39. See also Richard R Baxter, "International Law in 'Her Infinite Variety'" (1980) 29 ICQL 549 at 554 and 560-562; Tadeusz Gruchalla-Wesierski, "A Framework for Understanding Soft Law" (1984) 30 McGill L J 37 at 46; Gunther F Handl, "A Hard Look at Soft Law - Remarks by Professor Handl" (1988) 82 Am Soc Int'l L Rev 371 at 372; W Michael Reisman, "A Hard Look at Soft Law - Remarks by W. Michael Reisman" (1988) 82 Am Soc Int'l L Rev 373 at 374; Pierre Marie Dupuy, "A Hard Look at Soft Law - Remarks by Pierre Marie Dupuy" (1988) 82 Am Soc Int'l L Rev 381 at 385-386; Christine Chinkin, "A Hard Look at Soft Law - Remarks by Christine Chinkin" (1988) 82 Am Soc Int'l L Rev 389 at 389; Christine M Chinkin, "The Challenge of Soft Law: Development and Change in International Law" (1989) 38 ICQL 850 at 851-852; Pierre-Marie Dupuy, "Soft Law and the International Law of the Environment" (1991) 12 Mich J Int'l L 420 at 430; Alan E Boyle, "Some Reflections on the Relationship of Treaties and Soft Law" (1999) 48 ICQL 901 at 901-902; Shelton, *supra* note 67 at 6; Christine Chinkin, "Normative Development in the International Legal System" in Dinah Shelton, ed, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000) 21 at 27-31; Johnstone, *supra* note 28 at 274; Arnold N Pronto, "Understanding the Hard/Soft Distinction in International Law" (2015) 48 Vand J Transnat'l L 941 at 948.

commitment instead of a binary choice.[76] Through an application of different variables, other authors even conclude that "most international law is 'soft' in distinctive ways".[77] Although the idea of a spectrum of commitment remains fairly consistent with the distinction between social norms and legal norms used for present purposes, the uneasy cohabitation of these different meanings within the same concept of "soft law" necessarily brings ambiguity and complicates its application. It is therefore with a view to avoiding such ambiguity that the question animating the analysis departs from the more common distinction between soft law and hard law by relying on the broader concept of norm.

The discussion above frames the aspects of the codification of foreign investors' responsibilities that are included in the upcoming analysis. By explicitly referring to the context of neoliberal globalization, the dissertation's analysis aims to stress that this codification is anchored in a social process marked by relations of power and does not sit well with policies that are characterized by liberalization and deregulation. Furthermore, instead of solely accounting for the relationship between these instruments and the formal sources of international law, the present analysis of the normative character of international instruments adopted under the auspices of intergovernmental organizations is intended to illuminate the sense of obligation (or lack thereof) that emanates from these initiatives. Crucially, by considering the active role of state and non-state actors in developing norms that transcend formal sources of international law and that are developed in intergovernmental organizations, this framing points toward an analysis that departs from a positivist approach and that requires tools reaching beyond the sole discipline of international law.

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[76] See Abbott & Snidal, "Hard and Soft Law", *supra* note 75 at 422; Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2008) at 144; Andrew T Guzman & Timothy L Meyer, "International Soft Law" (2010) 2 J Legal Analysis 171 at 173. This interpretation is summarized as a rational institutionalist approach by Shaffer & Pollack. See Shaffer & Pollack, "Hard vs. Soft Law", *supra* note 74 at 714-716; Shaffer & Pollack, "Hard and Soft Law", *supra* note 74 at 199-202; Pronto, *ibid* at 950-955.

[77] See Abbott & Snidal, "Hard and Soft Law", *ibid* at 421.

2. A Contribution to an Ongoing Discussion

As the literature review that is offered in Chapter 1 demonstrates, the present dissertation addresses a topic that is already extensively discussed in the literature and that involves several factors which cannot be adequately understood by relying on a unique discipline. This dissertation thus seeks to grant an equal importance to the emergence of various normative developments and to the interplay of power relations between actors that are involved in the international lawmaking process. In this regard, a claim to bring an original contribution to the analysis of foreign investors' responsibilities in international law is primarily grounded in the interdisciplinary character of the present research. More specifically, such an interdisciplinary research provides a contextualized analysis of the normative integration of foreign investors' responsibilities in international investment law and a nuanced understanding of the normative character of existing initiatives elaborated under the auspices of intergovernmental organizations.

As emphasized by Banakar and Travers, interdisciplinarity allows combining "knowledge, skills and forms of research experience from two (or several) disciplines in an attempt to transcend some of the theoretical and methodological limitations of the disciplines in question and create a basis for developing a new form of analysis".[78] Although some authors maintain that such cross-fertilization among different disciplines is rare or even illusionary,[79] seeking to adopt an interdisciplinary approach is a convenient avenue to ensure an original contribution to the analysis of an already extensively discussed topic.

In this regard, this dissertation fits within the broader denomination of a socio-legal approach. The latter can be generally distinguished from other interdisciplinary approaches by considering not only the text of international instruments, but also the broader context

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[78] Reza Banakar & Max Travers, "Law, Sociology and Method" in Reza Banakar & Max Travers, eds, *Theory and Methods in Socio-Legal Research* (Portland: Hart Publishing, 2005) 1 at 5.

[79] See Jack M Balkin, "Interdisciplinarity as Colonization" (1996) 53 Wash & Lee L Rev 949 at 957–960; Andrea Bianchi, "Reflexive Butterfly Catching: Insights from a Situated Catcher" in Joost Pauwelyn, Ramses A Wessel & Jan Wouters, eds, *Informal International Lawmaking* (Oxford: Oxford University Press, 2012) 200 at 205–206.

in which these instruments are elaborated and implemented.[80] Addressing the contribution of a socio-legal approach with respect to international economic law, Perry-Kessaris summarizes the relevance of considering this context in the following terms: "[T]hose who take a socio-legal approach always set out to explore the actors, actions and interactions that form its context. This requires more than a legal analysis …. It requires an exploration of law's 'link with reality'".[81] Along the same lines, Merry emphasizes that socio-legal scholarship allows focusing on relations of power among legal actors, processes of meaning making and legal consciousness, as well as the impact of social structures on informal processes.[82] Such an invitation to consider the context in which international norms are elaborated and implemented is also depicted as a particularly convenient means to generate new insights regarding long-term processes and informal instruments in international law.[83] While some authors limit socio-legal studies to an interdisciplinary approach that extensively draws from sociology,[84] others refer to the potential contribution that can be brought by other disciplines from social sciences in order to scrutinize this context.[85]

It is with a view of combining law with another discipline from social sciences that the present dissertation focuses on the integration of international law with the sub-discipline of political science that relates to international relations. The articulation of these

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[80] See generally Moshe Hirsch, "The Sociology of International Law: Invitation to Study International Rules in Their Social Context" (2005) 55 UTLJ 891 [Hirsch, "The Sociology of International Law"]. See also Math Noortmann, "Towards an Interdisciplinary Approach to Non-State Participation in the Formation of Global Law and Order" in Jean d'Aspremont, ed, *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (New York: Routledge, 2011) 76 at 78; Amanda Perry-Kessaris, "What Does it Mean to Take a Socio-Legal Approach to International Economic Law?" in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (New York: Routledge, 2013) 3 at 6.

[81] Perry-Kessaris, *ibid* at 8 [footnote omitted].

[82] Sally Engle Merry, "International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism" in Michael A Helfand, ed, *Negotiating State and Non-State Law: The Challenge of Global and Local Pluralism* (Cambridge: Cambridge University Press, 2015) 59 at 61-62.

[83] Hirsch, "The Sociology of International Law", *supra* note 80 at 893-895.

[84] See generally Banakar & Travers, *supra* note 78; Hirsch, "The Sociology of International Law", *ibid*.

[85] Julius Stone, "Problems Confronting Sociological Enquiries Concerning International Law" (1956) 89 Rec des Cours 61 at 65; Perry-Kessaris, *supra* note 80 at 6; Sabine Frerichs, "Law, Economy and Society in the Global Age: A Study Guide" in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (New York: Routledge, 2013) 36 at 40.

two disciplines has drawn several scholars' attention for more than twenty years.[86] Of course, one can perceive a fundamental difference between international law and international relations with respect to the object of inquiry that is generally examined. While the former provides a deeper knowledge of international norms and institutions, the latter intends to explain the behavior of international actors and the decision-making process leading to these norms.[87] Nevertheless, it has often been repeated that a complete analysis of one of these two objects cannot be conducted in isolation of the other.[88] Some even argue that international law and international relations are now increasingly perceived as a single or a hybrid discipline.[89] Although several studies addressing the articulation of these two disciplines are characterized by an unequal application of international relations theories and methods to international legal issues,[90] some authors are now urging for analyses that draw from analytical tools of both disciplines.[91] In line with such suggestions,

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[86] Dunoff and Pollack trace back the roots of interdisciplinary efforts between international law and international relations to the end of the Cold War. See Jeffrey L Dunoff & Mark A Pollack, "International Law and International Relations: Introducing an Interdisciplinary Dialogue" in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013) 3 at 3 [Dunoff & Pollack, "International Law and International Relations"]. For other works on the interdisciplinary literature on international law and international relations, see generally Kenneth W Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers" (1989) 14 Yale J Int'l L 335; Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 Am J Int'l L 205; Anne-Marie Slaughter, "Liberal International Relations Theory and International Economic Law" (1995) 10 Am U J Int'l L & Pol'y 717; Anne-Marie Slaughter, Andrew S Tulumello & Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92 Am J Int'l L 367; Yasuaki Onuma, "International Law in and with International Politics: The Functions of International Law in International Society" (2003) 14 Eur J Int Law 105; Oona Anne Hathaway & Harold Hongju Koh, *Foundations of International Law and Politics* (New York: Foundation Press, 2005); Thierry Lapointe & Rémi Bachand, "Introduction - Le décloisonnement du droit international et des relations internationales : l'apport des approches critiques" (2008) 39:1 Études internationales 5; Emilie M Hafner-Burton, David G Victor & Yonathan Lupu, "Political Science Research on International Law: The State of the Field" (2012) 106 Am J Int'l L 47.

[87] See Kratochwil, *supra* note 70 at 1; Hathaway & Koh, *ibid* at 1; Hafner-Burton et al, *ibid* at 48.

[88] See Slaughter et al, *supra* note 86 at 372; Judith Goldstein et al, "Introduction: Legalization and World Politics" (2000) 54 Int'l Organization 385 at 387; Hathaway & Koh, *ibid* at 1; Lapointe & Bachand, *supra* note 86 at 5-6.

[89] See Hathaway & Koh, *ibid* at 2; Ignacio de la Rasilla del Moral, "Interdisciplinary and Critical Knowledge Creation Processes in International Human Rights" in Ludovic Hennebel & Hélène Tigroudja, eds, *Les critiques du droit international des droits de l'homme* (Paris: Pedone, forthcoming).

[90] For example, Abbott suggests that international relations theory "incorporates just those modes of inquiry and analysis in which [international law] scholarship has been weakest". See Abbott, *supra* note 86 at 340. Moreover, Slaughter focuses on links between these two disciplines by demonstrating "how international relations theory can contribute to international law". See Slaughter, *supra* note 86 at 718-721.

[91] Dunoff & Pollack, "International Law and International Relations", *supra* note 86 at 11-18; Jeffrey L Dunoff & Mark A Pollack, "Reviewing Two Decades of IL/IR Scholarship: What We've Learned, What's Next" in

the present dissertation assumes that an avowed consideration of normative developments and relations of power requires a genuine combination of analytical tools from international law and international relations.

In order to capture the normative character of the numerous initiatives that constitute this codification process, this analysis also rigorously applies an analytical framework to a relatively large pool of instruments.[92] While some highly relevant studies aim to shed light on the "bindingness" of a specific instrument,[93] this dissertation intends to provide a more robust understanding of the legal character of existing international instruments by contrasting their content, as well as contextualizing them amidst the interactions that result from their elaboration and their implementation. Applying the same analytical criteria to a set of instruments that are determined beforehand thus allows for more nuanced conclusions to be drawn with respect to the evolution of the codification process that is occurring under the auspices of intergovernmental organizations.

One last way in which the present dissertation differs from some works on this topic relates to the consideration of the international legal personality of foreign investors. The literature review that is provided in the following chapter includes some examples of studies that tackle the general lack of accountability of foreign investors under international law by stressing the need to recognize these private actors as subjects of international law. By contrast, following some authors that are also cited in the literature review, the present study does not exclude the relevance of a more orthodox approach according to which foreign investors' responsibilities could be indirectly imposed on these actors through the establishment of obligations for states in various international instruments.

Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013) 626 at 649–653.

[92] A study conducted by Deva also offers a systematic analysis of various regulatory initiatives by applying a specific analytical framework. See Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London: Routledge, 2012) at 46–63. However, the five "differentiating variables" that are considered in his framework – *i.e.* source, content, targeting approach, level of operation and nature – can only provide a taxonomy of existing initiatives and fail to fully capture their normative character. An alternative analytical framework is thus provided in Chapter 2 of the dissertation.

[93] See e.g. Leyla Davarnejad, "In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes under the OECD Guidelines for Multinational Enterprises" (2011) 2011 J Disp Resol 351; Justine Nolan, "The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 138.

Above all, through an interdisciplinary analysis of foreign investors' responsibilities under international law, this study is marked with a hope to identify promising avenues to move forward in holding powerful foreign investors accountable. It is believed that a better understanding of the normative integration of such responsibilities in international investment law and the sense of obligation resulting from current international instruments is a crucial step that has yet to be taken. The following chapters thus, hopefully, reflect a creative analysis of existing initiatives that will ultimately lead to a much-needed progress in the regulation of the international community.

3. The Dissertation in a Nutshell

The present dissertation reflects all the aforementioned aspects pertaining to the framing of the research and the contribution that it brings to the state of knowledge regarding foreign investors' responsibilities in international law. It unfolds in three parts that are strongly interrelated with a view to offering a comprehensive understanding of the evolving codification process that is taking place under the auspices of intergovernmental organizations. This final section of the general introduction thus provides a brief overview of each part and highlights key results that emerge from this analysis.

The analytical foundations that underlie the whole dissertation are provided in Part I. In order to situate the present effort with previous studies that are related to the question at hand, Chapter 1 offers a literature review of the broader issue of foreign investors' responsibilities in international law. After clustering previous studies in three broad categories (*i.e.* a legal positivist approach, a legal pluralist approach and critical perspectives), the literature review illustrates that a genuine contribution requires an interdisciplinary approach accounting for normative developments that are occurring under the auspices of intergovernmental organizations and relations of power between actors involved in the international lawmaking process.

In this regard, Chapter 2 articulates an interdisciplinary analytical framework that combines a legal pluralist approach from international law with a critical constructivist approach from international relations theory. While the legal pluralist approach accounts

for the emergence of normative orders that are developed by state and non-state actors, the critical constructivist approach stresses the influence of the most powerful actors in the mutual constitution between agents and structures in the international lawmaking process. Given that legal pluralism and constructivism are already articulated in the interactional theory of international law, the analytical framework extensively draws from the work of Brunnée and Toope.[94]

The last component of the analytical foundations of the dissertation is the methodology on which the rest of the examination relies. Echoing the interdisciplinary character of the analysis, Chapter 3 suggests a methodology that integrates the method that is traditionally encountered in international legal scholarship with a critical discourse analysis. Of course, a considerable part of the present dissertation relies on a thorough examination of the content of international agreements, resolutions, reports and decisions from international bodies with a view to better understand the codification process at hand. However, such examination is supplemented by a critical discourse analysis in order to illuminate the extent to which discourses held by various actors involved in the international lawmaking process reflect inherent relations of power.

Part II delves into the analysis of the subject at hand by addressing the codification of foreign investors' responsibilities at a macro-level. More specifically, this part focuses on the context of neoliberal globalization by examining the degree of normative integration of foreign investors' responsibilities in international investment law. Relying on a legal pluralist approach and a traditional method in international law, Chapter 4 thus accounts for the emergence of normative orders for various areas (*i.e.* human rights, environmental harm, labour rights and corruption) in which foreign investors' activities can entail negative impacts. After identifying these normative orders, the chapter proceeds by examining whether such responsibilities are normatively integrated into IIAs provisions and decisions reached by international investment arbitration tribunals. Chapter 4 demonstrates that the degree of normative integration is weak for foreign investors' responsibilities in the areas of human rights, environmental harm and labour rights. Interestingly, although instances

[94] Brunnée & Toope, "International Law and Constructivism", *supra* note 66; Brunnée & Toope, *Legitimacy and Legality*, *supra* note 66; Brunnée & Toope, "Interactional", *supra* note 66.

of such integration are relatively rare, the prohibition of corruption appears to be more strongly integrated into international investment law.

In order to supplement this macro-level analysis with an explicit consideration of power relations that characterize the international lawmaking process, Chapter 5 draws from a critical constructivist approach and a critical discourse analysis to assess the consistency between the most powerful actors' interests and the degree of normative integration of foreign investors' responsibilities in international investment law. Relying on publicly available statements from state and non-state actors pertaining to the codification of foreign investors' responsibilities in the four aforementioned areas, this analysis shows that consultations conducted under the auspices of intergovernmental organizations with respect to the codification of foreign investors' responsibilities inevitably reproduce relations of power between the actors involved. While many capital-exporting states and foreign investors are strongly opposed to the imposition of foreign investors' responsibilities in the areas of human rights, environmental protection and labour rights, these powerful actors are more willing to support such responsibilities in the area of corruption. In light of these findings, this chapter concludes that the fragmented normative integration of foreign investors' responsibilities in international investment law generally reflects the interests of the most powerful actors that are involved in the international investment lawmaking process.

Part III of the dissertation adopts a micro-level of analysis and seeks to position each international instrument elaborated and implemented under the auspices of intergovernmental organizations on a continuum varying from social norms to legal norms. Each chapter of this part draws from the interactional theory of international law and combines a traditional method in international law with a critical discourse analysis. More specifically, after emphasizing the efforts of this intergovernmental organization to promote free market and neoliberal policies, Chapter 6 focuses on international instruments arising from the OECD's activities. Since the adoption of their first version, the *OECD Guidelines* have become a widely disseminated social norm and have moved closer to the realm of legality. However, the persistent opposition from powerful actors to depart from an instrument whose observance is voluntary and the absence of recognition of any binding character to the *OECD Guidelines* impede their consideration as an international legal

norm. By contrast, efforts devoted by the OECD to prohibit corruption have led to the development of instruments that generate a sense of obligation. The *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* both rely on the support from powerful actors with respect to the elaboration and the implementation of international instruments that address the liability of legal persons for the bribery of foreign public officials in international business transactions. Regardless of their different form under international law, Chapter 6 argues that the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* are international legal norms.

Chapter 7 continues the micro-level analysis of the codification of foreign investors' responsibilities by considering the work accomplished by the ILO. Although the tripartite structure of this intergovernmental organization provides a unique institutional context to elaborate such norms, the ILO is often considered as struggling to implement standards that effectively influence the conduct of international actors in a context of neoliberal globalization. In this regard, the analysis of the *ILO Tripartite Declaration* demonstrates that the elaboration and the implementation of this informal international instrument has led to a social norm that hardly achieves to influence the behavior of international actors. In addition to efforts from powerful actors to preserve its voluntary character and various issues with respect to its provisions, the *ILO Tripartite Declaration* now appears to be in the shadow of other international instruments codifying foreign investors' responsibilities.

After contextualizing these instruments amidst the historical efforts to establish a New International Economic Order, four different international instruments elaborated and implemented under the auspices of various UN agencies are examined throughout Chapter 8. First, while this initiative has always been intended as a learning platform to encourage responsible business conduct, an interactional account of the UN Global Compact unsurprisingly highlights a widely disseminated social norm that nevertheless remains far from being a legal norm. Second, even if the members of the UN Sub-Commission proposed to elaborate an international binding instrument, the stark opposition from powerful actors and various issues with respect to the provisions of the *UN Norms* have prevented this instrument to reach the threshold of legality. The current absence of a sustained practice even sheds doubts over the status of the *UN Norms* as an international

social norm nowadays. Third, the analysis of the *UN Guiding Principles* suggests that the support from powerful actors involved in the elaboration and the implementation of this instrument is strongly related to the avowed intent of the Special Representative not to impose additional legal obligations to states and business enterprises. However, the absence of a voluntary character to the corporate responsibility to respect human rights and some aspects of the current practice underlying this instrument could eventually bring this social norm closer to the realm of legality. Fourth, the flexibility characterizing its provisions and the elaboration of an implementation mechanism focusing primarily on dialogue for best practices render the *UNCAC* as a strong social norm that generally fails to meet the threshold of legality. Despite its formal character under international law, the *UNCAC* cannot be considered as a genuine legal norm according to an interactional account of international law.

Finally, Chapter 9 addresses the specific case of performance standards adopted by an institution of the World Bank Group, namely the IFC. The support of the various institutions of the World Bank Group for the protection of international investment is undeniable. Yet, an interesting identity shift toward an increasing consideration of environmental and social sustainability has paved the way to the elaboration of instruments like the *IFC Performance Standards*. While these standards articulating responsibilities for private enterprises that operationalize a project funded by the IFC are not enshrined in a formal international agreement, they unambiguously constitute an international legal norm for the IFC and its clients. In addition to the initial will to elaborate an international instrument whose observance is mandatory to obtain funding from the IFC, Chapter 9 highlights the legitimacy of these standards and the emergence of a practice that is geared toward compliance.

Chapter 1 – Foreign Investors' Responsibilities in International Law: A Literature Review

Introduction

The question of foreign investors' responsibilities in international law has already been extensively discussed by academics and practitioners. In fact, as the codification of foreign investors' responsibilities evolves, the pool of studies that address the topic continually expands and now encompasses a very dense literature. Attempting to provide an exhaustive survey of this literature is not practical and probably unhelpful for present purposes. Such a survey would only drown the reader in a long but still incomplete list of references without explaining how each study relates to the others. Rather, in order to illustrate how the present dissertation provides a fresh look at the subject at hand, a comprehensive discussion of the main approaches that characterize existing studies is more appropriate. It is in this regard that the literature review is organized. More specifically, the literature developed in international law and international relations can be usefully clustered in roughly three categories: a legal positivist approach (1), a legal pluralist approach (2) and critical perspectives (3).

1. The Legal Positivist Approach

Amidst the numerous studies completed by scholars and practitioners to address the issue of foreign investors' responsibilities in international law, some authors openly favor a state-centric perspective. Relying on the premise that international law is generally addressed to states and that individuals can be held liable for violations only in exceptional circumstances,[1] the legal positivist approach is primarily characterized by a focus on states'

[1] See Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev ed (London: Routledge, 1997) at 100; Sarah Joseph, "Taming the Leviathans: Multinational Enterprises and Human Rights" (1999) 46:02 Nethl Int'l L Rev 171 at 175 [Joseph, "Taming the Leviathans"]; Simon Chesterman, "Oil and Water: Regulating the Behavior of Multinational Enterprises through Law" (2004) 36 NYU J Int'l L & Pol 307 at 309–310; Olivier De Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press,

responsibilities under international law. The question whether home states[2] have any duties regarding the activities of foreign investors that commit abuses is thus addressed from various angles. Emphasizing that the responsibility of the state emerges only when a wrongful act committed by a private actor can be traced back to the state, several authors conclude that home states can be held liable for private acts of their nationals when they are operating abroad only under a limited set of circumstances.[3] Furthermore, while the duty to regulate the conduct of foreign investors primarily lies with the host state of the

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2005) 227 at 230 [De Schutter, "The Accountability of Multinationals"]; Carlos M Vazquez, "Direct vs. Indirect Obligations of Corporations under International Law" (2005) 43 Colum J Transnat'l L 927 at 955; Robert McCorquodale & Penelope Simons, "Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law" (2007) 70:4 Mod L Rev 598 at 599; Jorge Daniel Taillant & Jonathan Bonnitcha, "International Investment Law and Human Rights" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 59 at 61; Eric de Brabandere, "Non-State Actors and Human Rights: Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participant in the International Legal System" in Jean d'Aspremont, ed, *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (New York: Routledge, 2011) 268 at 271–273; John H Knox, "The Ruggie Rules: Applying Human Rights Law to Corporations" in Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martinus Nijhoff Publishers, 2012) 51 at 55 and 58; Stephanie B Leinhardt, "Some Thoughts on Foreign Investors' Responsibilities to Respect Human Rights" (2013) 10:1 TDM 1 at 1; Markos Karavias, *Corporate Obligations under International Law* (Oxford: Oxford University Press, 2013) at 9 [Karavias, *Corporate Obligations*].

[2] For the purposes of the present dissertation, the term "home state" refers to the state from which a group of companies originates and from which a certain form of control is exercised by a parent company. By contrast, a "host state" is the state in which a foreign investor chooses to establish a subsidiary entity. A similar nuance can be found in Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) at 146–151.

[3] See generally De Schutter, "The Accountability of Multinationals", *supra* note 1. See also Patrick Dumberry & Gabrielle Dumas-Aubin, "When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration" (2012) 13:3 J World Investment & Trade 349 at 354 [Dumberry & Dumas-Aubin, "When and How"]. Other authors appear to be more optimistic about the extent to which home states can be held liable for such violations. See McCorquodale & Simons, *supra* note 1 at 606-623; Vassilis P Tzevelekos, "In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors' Human Rights Abuses That are Not Attributable to It" (2010) 35 Brook J Int'l L 155 at 207–229; Olivier De Schutter, "La responsabilité des États dans le contrôle des sociétés transnationales : Vers une convention international sur la lutte contre les atteintes aux droits de l'homme commises par les sociétés transnationales" in Emmanuel Decaux, ed, *La responsabilité des entreprises mutlinationales en matière de droits de l'homme* (Brussels: Bruylant, 2010) 19 at 68–96 [De Schutter, "La responsabilité"]; Knox, *supra* note 1 at 78-83; Jean-Marie Kamatali, "The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Companies: Is it Time for an ICJ Advisory Opinion?" (2012) 20 Cardozo J Int'l & Comp L 437 at 458–460; Markos Karavias, "Shared Responsibility and Multinational Enterprises" (2015) 62 Neth Int Law Rev 91 at 96 [Karavias, "Shared Responsibility"]; Stéphanie Lagoutte, "New Challenges Facing States within the Field of Human Rights and Business" (2015) 33 Nordic J Hum Rigths 158 at 163–165; Daria Davitti, "Refining the Protect, Respect and Remedy Framework for Business and Human Rights and its Guiding Principles" (2016) 16 Hum Rts L Rev 55 at 59–68; Olivier De Schutter, "Towards a New Treaty on Business and Human Rights" (2016) 1 Bus & Hum Rights J 41 at 45–47 [De Schutter, "Towards a New Treaty"].

investment, there are various examples of publications in which the host state's lack of judicial means or political will to enforce domestic legislation is taken into account.[4] Other authors advance procedural aspects, such as the doctrine of *forum non conveniens*, that are likely to impede the accountability of foreign investors even if the home state had a responsibility to address extraterritorial abuses by their national corporations.[5]

Beyond the strict consideration of states' responsibilities, some work included in the legal positivist approach also slightly depart from this highly state-centric approach and underscore the existence of responsibilities for foreign investors under international law for a limited number of conducts. It is in this regard that the distinction between direct and indirect responsibilities becomes relevant to address.[6] For example, many studies highlight the existence of formal international agreements that *indirectly* impose responsibilities on private actors by requiring states to establish the liability of legal persons for the bribery of foreign officials or transnational organized crime.[7] Although some authors appear to be

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[4] See Joseph, "Taming the Leviathans", *supra* note 1 at 177; Sarah Joseph, "An Overview of the Human Rights Accountability of Multinational Enterprises" in Menno T Kamminga & Saman Zia-Zarifi, eds, *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) 75 at 78 [Joseph, "An Overview"]; Chesterman, *supra* note 1 at 311 and 315; De Schutter, "The Accountability of Multinationals", *ibid* at 235-240; McCorquodale & Simons, *ibid* at 600; De Schutter, "La responsabilité", *ibid* at 25-44; Kamatali, *ibid* at 448; Tzevelokos, *ibid* at 207; de Brabandere, *supra* note 1 at 270; Dumberry & Dumas-Aubin, "When and How", *ibid* at 351; Patrick Dumberry & Gabrielle Dumas-Aubin, "How to Impose Human Rights Obligations on Corporation under Investment Treaties? Pragmatic Guidelines for the Amendment of BITs" (2012) 4 Yearbook of Int'l Inv L & Pol'y 569 at 571 [Dumberry & Dumas-Aubin, "How to Impose"].

[5] See Joseph, "Taming the Leviathans", *ibid* at 178; Joseph, "An Overview", *ibid* at 79; Chesterman, *ibid* at 315-318.

[6] See generally Vazquez, *supra* note 1.

[7] See Joseph, "Taming the Leviathans", *supra* note 1 at 184; Giorgio Sacerdoti, "The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: An Example of Piece-Meal Regulation of Globalisation" (1999) 9 Italian YB Int'l L 26 at 35 [Sacerdoti, "The 1997"]; Joseph, "An Overview", *supra* note 4 at 86-87; Enery Quinones, "L'évolution du droit international en matière de corruption : La convention de l'OCDE" (2003) 49:1 AFDI 563 at 566; Roger S Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 Wayne L Rev 161 at 176; Harold Hongju Koh, "Separating Myth from Reality About Corporate Responsibility Litigation" (2004) 7:2 J Int Economic Law 263 at 265; Vazquez, *ibid* at 934; De Schutter, "The Accountability of Multinationals", *supra* note 1 at 234; Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford: Oxford University Press, 2006) at 241 and 248-251 [Clapham, *Human Rights Obligations*]; Olivier De Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in Olivier De Schutter, ed, *Transnational Corporations and Human Rights* (Portland: Hart Publishing, 2006) 1 at 37–38 [De Schutter, "The Challenge"]; Giorgio Sacerdoti, "Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice" (2009) 24:2 ICSID Rev 565 at 571 [Sacerdoti, "Corruption"]; Karavias, *Corporate Obligations*, *supra* note 1 at 63-67; Dumberry & Dumas-Aubin, "When and How", *supra* note 3 at 354; Marco Arnone & Leonardo S Borlini, *Corruption: Economic Analysis and International Law* (Northampton: Edward Elgar, 2014) at 371–376.

more optimistic with respect to the possibility of private actors bearing *direct* international duties,[8] it has also been argued that neither international treaties nor international customary law imposes any direct responsibilities on foreign investors pertaining to human rights or criminal law.[9] In other words, when considering the nuance between direct and indirect foreign investors' responsibilities, the legal positivist approach generally concludes that these private actors can only be held indirectly liable under international law for a limited number of abuses related to their activities abroad.

What is more, some works related to this category of the literature focus more closely on instruments elaborated by intergovernmental organizations that specifically codify foreign investors' responsibilities. Considerable efforts to scrutinize the content of these instruments and the language that is used in their provisions have thus emerged in the literature.[10] The implementation mechanisms and follow-up procedures that are

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[8] See Jordan J Paust, "Human Rights Responsibilities of Private Corporations" (2002) 35 Vand J Transnat'l L 801 at 810; Clapham, *Human Rights Obligations*, *ibid* at 266-267; Barbara K Woodward, "Non-State Actor Responsibilities: Obligations, Monitoring and Compliance" in Noemi Gal-Or, Cedric Ryngaert & Math Noortmann, eds, *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (Leiden: Brill Nijhoff, 2015) 29 at 49; Jordan J Paust, "Responsibilities of Armed Opposition Groups and Corporations for Violations of International Law and Possible Sanctions" in Noemi Gal-Or, Cedric Ryngaert & Math Noortmann, eds, *Responsibilities of the Non-State Actorin Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (Leiden: Brill Nijhoff, 2015) 105 at 109; Andrew Clapham, "Human Rights Obligations for Non-State Actors: Where Are We Now?" in Fannie Lafontaine & François Larocque, eds, *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (forthcoming) [Clapham, "Human Rights Obligations"].

[9] See Karavias, *Corporate Obligations*, *supra* note 1 at 67 and 114-115; Karavias, "Shared Responsibility", *supra* note 3 at 101.

[10] See Henri Schwamm, "The OECD Guidelines for Multinational Enterprises" (1978) 12 J World Trade L 342 at 344–348; Theo W Vogelaar, "The OECD Guidelines: Their Philosophy, History, Negotiation, Form, Legal Nature, Follow-up Procedures and Review" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 127 at 136; Hans Günter, "The Tripartite Declaration of Principles (ILO): Standards and Follow-Up" in *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 155 at 159–163; Sacerdoti, "The 1997", *supra* note 7 at 35-45; Lisa Miller, "No More 'This for That'? The Effect of the OECD Convention on Combating Bribery of Froeign Public Officials in International Business Transactions" (2000) 8 Cardozo J Int'l & Comp L 139 at 141–150; Pia Acconci, "The Promotion of Responsible Business Conduct and the New Text of the Guidelines for Multinational Enterprises" (2001) 2 J World Investment 123 at 136-140; Rebecca M Wallace & Olga Martin-Ortega, "The UN Norms: A First Step to Universal Regulation of Transnational Corporations' Responsibilities for Human Rights?" (2004) 26 Dublin U L J 304 at 308–311; Clapham, *Human Rights Obligations*, *supra* note 7 at 201-237; Leyla Davarnejad, "The Impact of Non-State Actors on the International Law Regime of Corporate Social Responsibility: Blessing or Curse?" in Math Noortmann & Cedric Ryngaert, eds, *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers* (Farnham: Ashgate Pubishing, 2010) 41 at 52–55 [Davarnejad, "The Impact"]; Tineke Lambooy, "Corporate Due Diligence as a Tool to Respect Human Rights" (2010) 28 Neth Q Hum Rts 404 at 429–441.

established through these initiatives are also examined closely by several authors.[11] These studies can nevertheless be differentiated from the other approaches below by one key aspect: legal positivists are prompt to stress the "soft law" or "non-binding" character of instruments that fall beyond the scope of the formal sources of international law and thus recognize only a limited contribution of these initiatives.[12] To put it differently, the legal positivist approach to analyzing the emergence of foreign investors' responsibilities adopts a more traditional international law perspective, without expressly acknowledging the normative contribution of initiatives that fall beyond international treaties, international customary law and general principles of law.

With that being said, it is worth emphasizing that conclusions with respect to the "binding" character of an international instrument can sometimes lack consistency from one author to another. While legal positivists generally consider that the *Guidelines for Multinational Enterprises* adopted by the Organization for Economic Co-operation and Development ("*OECD Guidelines*")[13] are not formally binding in international law, a

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[11] See Vogelaar, *ibid* at 137; Günter, *ibid* at 163-173; Sacerdoti, "The 1997", *supra* note 7 at 45-48; James Salzman, "Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development" (2000) 21 Mich J Int'l L 769 at 790–793; Acconci, *ibid* at 140-143; De Schutter, "The Accountability of Multinationals", *supra* note 1 at 305-306; Clapham, *Human Rights Obligations*, *ibid* at 201-237; Joost Pauwelyn, "Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy" in Susan Rose-Ackerman & Paul Carrington, eds, *Anti-Corruption Policy: Can International Actors Play a Constructive Role* (Durham: Carolina Academic Press, 2013) 247 at 250–252; Rachel Brewster, "The Domestic and International Enforcement of the OECD anti-Bribery Convention" (2014) 15 Chi J Int'l L 84 at 106–108.

[12] See Schwamm, *supra* note 10 at 343; Vogelaar, *ibid* at 127 and 132-136; Günter, *ibid* at 156; Joseph, "Taming the Leviathans", *supra* note 1 at 181-183; Joseph, "An Overview", *supra* note 4 at 84; Jan Huner, "The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises" in Menno T Kamminga & Saman Zia-Zarifi, eds, *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) 197 at 200; Chesterman, *supra* note 1 at 328; Acconci, *ibid* at 124-125 and 140-141; Salzman, *ibid* at 791-793; Wallace & Martin-Ortega, *supra* note 10 at 312-315; De Schutter, "The Challenge", *supra* note 7 at 2-17; Clapham, *Human Rights Obligations*, *ibid* at 201-202, 212-213, 225 (although Clapham appears to be more optimistic about the normative influence of the *UN Norms* at 237); Tzevelokos, *supra* note 3 at 162-167; de Brabandere, *supra* note 1 at 273-276; Kamatali, *supra* note 3 at 449; Leinhardt, *supra* note 1 at 2-3; Gita Kothari, "L'élaboration des principes et standards à l'intention des entreprises : l'approche innovante de l'OCDE" in Hervé Ascensio & Nicola Bonucci, eds, *Le pouvoir normatif de l'OCDE* (Paris: Éditions A. Pedone, 2014) 99 at 100; Knox, *supra* note 1 at 54 and 69; Dumberry & Dumas-Aubin, "When and How", *supra* note 3 at 351 and 355-357; Karavias, *Corporate Obligations*, *supra* note 1 at 73-83; Lagoutte, *supra* note 3 at 178; David M Ong, "Regulating Environmental Responsibility for the Multinational Oil Industry: Continuing Challenges for International Law" (2015) 11 Int'l J L in Context 153 at 156-157; Woodward, *supra* note 8 at 47; Barnali Choudhury, "Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements", U Penn J Int'l L (forthcoming).

[13] For the current version of this instrument, see *Declaration on International Investment and Multinational Enterprises*, 25 May 2011, Doc No C/MIN(2011)11/FINAL (2011), Annex 1.

limited number of studies nevertheless intend to show how this instrument could be considered as "legally binding".[14] Such examples fit squarely the legal positivist approach to the extent that they stress procedural aspects that could lead to the imposition of duties on states to regulate foreign investors' activities. Davarnejad thus suggests that the *OECD Guidelines* acquire a legal status merely because this instrument is associated with a "legally binding decision" that requires member states to establish National Contact Points.[15] Relying on the same decision to establish these institutions, Robinson contends that the maladministration of National Contact Points can lead to state responsibility of OECD members under international law.[16] In fact, Robinson considers that "the current *per se* binding and presumably 'hard law' character of the [*OECD Guidelines*] implementation regime in relation to OECD Member States, although within a traditional [corporate social responsibility] context, is therefore somewhat unique".[17]

Beyond efforts to analyze the binary character – *i.e.* either "binding" or "non-binding" – of international instruments, some legal positivist studies that address the elaboration of international initiatives within intergovernmental organizations also discuss negotiation processes that preceded the adoption of these instruments.[18] However, in contrast to the works of legal pluralists and critical scholars discussed below, most of these studies do not account for the direct influence of non-state actors and inherent relations of power that can steer the outcome of this international lawmaking process. At best, some authors recognize that the development of a specific initiative relied on the consultation of various stakeholders, without openly acknowledging that non-state actors played any

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[14] See generally Davarnejad, "The Impact", *supra* note 10; Scott Robinson, "International Obligations, State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime" (2014) 30 Utrecht J Int'l & Eur L 68.

[15] Davarnejad, "The Impact", *ibid* at 53-54.

[16] See generally Robinson, *supra* note 14.

[17] *Ibid* at 69.

[18] In addition to the other references cited in this paragraph, see Schwamm, *supra* note 10 at 348-349; Vogelaar, *supra* note 10 at 130-135; Philippa Webb, "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" (2005) 8 J Int Economic Law 191 at 205–222. See also generally Dimitri Vlassis, "Challenges in the Development of International Criminal Law: The Negotiations of the United Nations Convention Against Transnational Organized Crime and the United Nations Convention Against Corruption" in Cherif M Bassiouni, ed, *International Criminal Law*, 3d ed (Leiden: Martinus Nijhoff Publishers, 2008) 907.

particular role in actually shaping this process.[19] Thus, one of the common examples addressed in the literature is the disagreement between developing and developed states during the negotiation of *Code of Conduct on Transnational Corporations* within the United Nations ("UN").[20] Another example can be found in publications that present the United States as being the main driver in the adoption of international agreements to address foreign bribery and illicit payments, without explicitly considering the *de facto* participation of non-state actors during the negotiations that led to these instruments.[21]

Analyses that are anchored in international investment law also appear as a breeding ground for the consideration of foreign investors' responsibilities through a legal positivist lens. In this respect, general publications pertaining to the law of investment treaties[22] and studies that address the consistency of international investment law with the concept of sustainable development[23] tangentially discuss the issue of foreign investors'

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[19] See Vogelaar, *ibid* at 132; Huner, *supra* note 12 at 203; De Schutter, "The Challenge", *supra* note 7 at 11.

[20] See Paul Lansing & Alex Rosaria, "An Analysis of the United Nations Proposed Code of Conduct for Transnational Corporations" (1990) 14 World Competition 35 at 37–38 and 40-41; Malanczuk, *supra* note 1 at 102-103; De Schutter, "The Challenge", *ibid* at 2-3; Karl P Sauvant, "The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned" (2015) 16 J World Investment & Trade 11 at 20–27 and 38-56.

[21] While Seymour acknowledges that "American businessmen who feel they are being held to a uniquely absurd standard of conduct has reached the ears of many in government", the author maintains that the United States was the "the principal force favoring swift conclusion of a convention" and thus neglects the direct influence of private actors at the international level. See Bruce Seymour, "Illicit Payments in International Business: National Legislation, International Codes of Conduct, and the Proposed United Nations Convention" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 219 at 232. See also Sacerdoti, "The 1997", *supra* note 7 at 30; Hilmar Raeschke-Kessler & Dorothee Gottwald, "Corruption" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 584 at 588; Quinones, *supra* note 7 at 564-565; Sacerdoti, "Corruption", *supra* note 7 at 566 and 583-586; Jan Wouters, Cedric Ryngaert & Ann Sofie Cloots, *The Fight Against Corruption in International Law*, SSRN Scholarly Paper ID 2274775 (Rochester, NY: Social Science Research Network, 2012) at 5–13 and 25; Arnone & Borlini, *supra* note 7 at 209-216 and Chapter 10; Brewster, *supra* note 11 at 97-100.

[22] See Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009) at 64; Céline Lévesque & Andrew Newcombe, "The Evolution of IIA Practice in Canada and the United States" in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (New York: Routledge, 2013) 25 at 31; Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2d ed (Oxford: Oxford University Press, 2012) at 25–27.

[23] See Andrew Newcombe, "Sustainable Development and Investment Treaty Law" (2007) 8 J World Investment & Trade 357 at 397 and 404-406 [Newcombe, "Sustainable Development"]; Taillant & Bonnitcha, *supra* note 1 at 58-60 and 74; Marie-Claire Cordonier Segger & Andrew Newcombe, "An Integrated Agenda for Sustainable Development in International Investment Law" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 101 at 123–124 and 139-140; Roland Kläger, "'Fair and Equitable Treatment' and Sustainable Development" in Marie-Claire Cordonier Segger, Markus W

responsibilities. For example, despite occasional references to sustainable development principles in international investment agreements ("IIAs"),[24] some authors conclude that these agreements do not generally require states to impose any responsibilities on their national investors when they are operating abroad.[25] Furthermore, examples in the literature analyze the relatively limited circumstances in which international investment arbitration tribunals can consider a wrongdoing by a foreign investor when assessing the legality of a measure challenged by the investor itself.[26] Although they remain highly

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Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 241 at 255–258; Marie-Claire Cordonier Segger & Duncan French, "Governing Investment in Sustainable Development: Investment Mechanisms in Sustainable Developent Treaties and Voluntary Instruments" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 646 at 666–667 and 673-674; Markus W Gehring & Avidan Kent, "Sustainable Development and IIAs: From Objective to Practice" in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (New York: Routledge, 2013) 284 at 297–300; Karsten Nowrot, "How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?" (2014) 15 J World Investment & Trade 612 at 635–640.

[24] See generally UNCTAD, *International Investment Agreements: Key Issues*, Vol II (New York and Geneva: United Nations, 2004); OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (Paris: OECD, 2008); Kathryn Gordon & Joachim Pohl, "Environmental Concerns in International Investment Agreements: A Survey" (2011) OECD Working Paper on International Investment No 2011/1; Kathryn Gordon, Joachim Paul & Marie Bouchard, "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey" (2014) OECD Working Paper on International Investment No 2014/1; UNCTAD, *Taking Stock of IIA Reform*, IIA Issues Note, 2016, No 1 (2016).

[25] See Newcombe, "Sustainable Development", *supra* note 23 at 397; Ole Kristian Fauchald, "International Investment Law and Environmental Protection" (2007) 17 Yearbook of Int'l Env L 3 at 39–41; Cordonier Segger & Newcombe, *supra* note 23 at 123-124 and 139-140; Vid Prislan & Ruben Zandvliet, "Mainstreaming Sustainable Development Into International Investment Agreements: What Role for Labor Provisions?" in Rainer Hoffmann, Christian Tams & Stephan W Schill, eds, *International Investment Law and Development* (Northampton: Edward Elgar, 2015) 390 at 416.

[26] See Raeschke-Kessler & Gottwald, *supra* note 21 at 591-613; Clara Reiner & Christoph Schreuer, "Human Rights and International Investment Arbitration" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 82 at 89–93; Ioana Knoll-Tudor, "The Fair and Equitable Treatment Standard and Human Rights Norms" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 310 at 335–342; Mohamed Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?" (2009) 24 ICSID Review 116 at 128–134; Sacerdoti, "Corruption", *supra* note 7 at 576-578; Dumberry & Dumas-Aubin, "When and How", *supra* note 3 at 360-371; Dumberry & Dumas-Aubin, "How to Impose", *supra* note 4 at 589-594; Richard Kreindler, "Competence-Competence in the Face of Illegality in Contracts and Arbitration Agreements" (2012) 361 Rec des Cours 131 at 247–248 and 406-428. See also generally Peter Muchlinski, "'Caveat Investor'? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard" (2006) 55:3 ICQL 527; Riccardo Pavoni, "Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 525; Andrew Newcombe, "Investor Misconduct: Jurisdiction, Admissibility or Merits?" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 187; Jason Webb Yackee, "Investment Treaties and Investor Corruption:

relevant to account for developments that are occurring in international investment law, it must be noted that these legal positivist studies exclusively rely on treaty provisions that are elaborated by states and decisions from international investment arbitration tribunals.

It is also worth mentioning that the adoption of a legal positivist stance does not imply a lack of creativity to elaborate potential reforms to hold private investors accountable for harm caused abroad. Once again, it must be noted that such suggestions to steer the conduct of foreign investors often proceed through requirements concerning states. In this regard, the possibility of expanding the responsibilities of home states that indirectly cover extraterritorial activities of foreign investors is often advanced in the legal positivist approach.[27] Furthermore, the idea of an international treaty where states would agree to establish an international tribunal modeled on the structure of the International Criminal Court is often discussed through a legal positivist approach.[28] The same can be said about the renewed attempt at elaborating a formal international treaty on the issue of

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An Emerging Defense for Host States" (2012) 52 Va J Int'l L 723; Cameron A Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims" (2012) 3:2 J Int'l Dispute Settlement 329; Tamar Meshel, "The Use and Misuse of the Corruption Defence in International Investment Arbitration" (2013) 30:3 J Int'l Arb 267; Andrew Newcombe, "Investor Misconduct" in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (New York: Routledge, 2013) 195; Zachary Douglas, "The Enforcement of Environmental Norms in Investment Treaty Arbitration" in *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge: Cambridge University Press, 2013) 415; Pauwelyn, *supra* note 11 at 257-261; Adriana Espinosa González, "The Assessment of Corporate Conduct Towards Human Rights in Investor-State Disputes Settlement: Why We Should (and Can) Mix the Sheep and the Goats" in Jernej Letnar Černič & Tara Van Ho, eds, *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Legal Publishers, 2013) 367; Cecily Rose, "Questioning the Role of International Arbitration in the Fight against Corruption" (2014) 31:2 J Int'l Arb 183; Carolyn B Lamm, Brody K Greenwald & Kristen M Young, "From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption" (2014) 29 ICSID Review 328; Joe Tirado, Matthew Page & Daniel Meagher, "Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship" (2014) 29 ICSID Review 493; Thomas Kendra & Anna Bonini, "Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus?" (2014) 31 J Int'l Arb 439; Jarrod Hepburn, "In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration" (2014) 5 J Int'l Dispute Settlement 531; Tamar Meshel, "Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond" (2015) 6 J Int Disp Settlement 277; Dai Tamada, "Investors' Responsibility Toward Host-States? Regulation of Corruption in Investor-State Arbitration" in Noemi Gal-Or, Cedric Ryngaert & Math Noortmann, eds, *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (Leiden: Brill Nijhoff, 2015) 203; Jorge E Viñuales, "Investor Diligence in Investment Arbitration: An Overview of Sources and Arguments" in Andrea Gattini, ed, *General Principles of Law and International Investment Arbitration* (forthcoming).

[27] See Joseph, "Taming the Leviathans", *supra* note 1 at 183-184; Joseph, "An Overview", *supra* note 4 at 85-87; Vazquez, *supra* note 1 at 958.

[28] See Joseph, "Taming the Leviathans", *ibid* at 184-185; Joseph, "An Overview", *ibid* at 87-88.

business and human rights under the auspices of the UN.[29] More recently, one author argued that an advisory opinion of the International Court of Justice on companies' human rights responsibilities would be of the utmost relevance at this point.[30] Others advance the idea of including aspects that transcend investment issues, without fully modifying the state-centered structure of these agreements.[31]

In sum, the legal positivist approach has considerable explanatory force to explain the weak potential application of international law to hold private investors accountable for harm caused abroad and the content of current instruments that do not fall under the scope of formal sources of international law. However, these analyses of current options and reforms to hold foreign investors accountable rely primarily on a state-centric view of international law. Therefore, the legal positivist approach often emphasizes the "non-binding" character of many initiatives elaborated by intergovernmental organizations and neglects the normative contribution that such instruments can bring to the codification process of foreign investors' responsibilities. With respect to international investment law, such examinations address the issue of foreign investors' responsibilities by considering the evolution of the treaty practice and decisions of international investment arbitration tribunals. Given that authors related to this approach ignore the role of non-state actors in the elaboration and the implementation of these instruments, as well as the relations of power that can steer such processes, this first approach sharply contrasts with the legal pluralist approach and the critical perspectives detailed below.

2. The Legal Pluralist Approach

By contrast to the legal positivist approach described above, the legal pluralist approach strongly relies on the consideration of international norms that are developed

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[29] See generally De Schutter, "Towards a New Treaty", *supra* note 3. See also Lagoutte, *supra* note 3 at 178-179; Clapham, "Human Rights Obligations", *supra* note 8.

[30] See Kamatali, *supra* note 3 at 453-563.

[31] See generally Choudhury, *supra* note 12; Dumberry & Dumas-Aubin, "How to Impose", *supra* note 4; Patrick Dumberry & Gabrielle Dumas-Aubin, "A Few Pragmatic Observations on How BITs Should be Modified to Incorporate Human Rights Obligations" (2014) 11:1 TDM 1.

beyond the limits of the state.[32] In a way that echoes political scientists who consider the role of state and non-state actors in the regulation of the global economy,[33] several scholars thus analyze the general lack of accountability of foreign investors by leaving more room for the role of non-state actors to fill this regulatory gap.[34] Some examples are worth citing

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[32] For a more detailed discussion on legal pluralism, see Chapter 2.

[33] See e.g. Robert O'Brien, "NGOs, Global Civil Society and Global Economic Regulation" in Sol Picciotto & Ruth Mayne, eds, *Regulating International Business: Beyond Liberalization* (New York: St. Martin's Press, 1999) 257 at 259–265; William H Meyer & Boyka Stefanova, "Human Rights, the UN Global Compact, and Global Governance" (2001) 34 Cornell Int'l LJ 501 at 515; John H Dunning & Sarianna M Lundan, "The Changing Political Economy of Foreign Investment: Finding a Balance Between Hard and Soft Forms of Regulation" in José E Alvarez et al, eds, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: Oxford University Press, 2011) 125 at 144–145; Mark B Taylor, "The Ruggie Framework: Polycentric Regulation and the Implications for Corporate Social Responsibility" (2011) 5 Nordic J Applied Ethics 9 at 10–11 [Taylor, "The Ruggie Framework"]; Lucio Baccaro & Valentina Mele, "For Lack of Anything Better? International Organizations and Global Corporate Codes" (2011) 89:2 Public Administration 451 at 451. See also generally Matthias Hofferberth et al, "Multinational Enterprises as 'Social Actors'—Constructivist Explanations for Corporate Social Responsibility" (2011) 25 Global Soc 205.

[34] In addition to the other references cited in this paragraph, see Georg Kell & John Gerard Ruggie, "Global Markets and Social Legitimacy: The Case for the 'Global Compact'" (1999) 8:3 Transnat'l Corp 102 at 106–111; David Weissbrodt, "The Beginning of a Sessional Working Group on Transnational Corporations within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities" in Menno T Kamminga & Saman Zia-Zarifi, eds, *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) 119 at 128 [Weissbrodt, "The Beginning"]; John Braithwaite & Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) at 7–10; John Gerard Ruggie, "The Theory and Practice of Learning Networks: Corporate Social Responsibility and the Global Compact" (2002) 5 J Corp Citizenship 27 at 33 [Ruggie, "Theory and Practice"]; Todd Weiler, "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order" (2004) 27 B C Int'l & Comp L Rev 429 at 434–435; Vaughan Lowe, "Corporations as International Actors and International Law Makers" (2004) 14 Italian YB Int'l L 23 at 26–31; John J Kirton & Michael J Trebilcock, "Introduction: Hard Choices and Soft Law in Sustainable Global Governance" in John J Kirton & Michael J Trebilcock, eds, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Farnham: Ashgate Pubishing, 2004) 3 at 10; Christopher Wilkie, "Enhancing Global Governance: Corporate Social Responsibility and the International Trade and Investment Framework" in John J Kirton & Michael J Trebilcock, eds, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Farnham: Ashgate Pubishing, 2004) 288 at 297–300; August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 37 at 43–46; Zerk, *supra* note 2 at 93-102; David Kinley & Rachel Chambers, "The UN Human Rights Norms for Corporations: The Private Implications of Public International Law" (2006) 6 Hum Rts L Rev 447 at 449; Jacob Gelfand, "The Lack of Enforcement in the United Nations Draft Norms: Benefit or Disadvantage?" in Olivier De Schutter, ed, *Transnational Corporations and Human Rights* (Portland: Hart Publishing, 2006) 313 at 330–331; Larry Catá Backer, "Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsility in International Law" (2006) 37 Colum Hum Rts L Rev 287 at 308–321 [Backer, "Multinational Corporations, Transnational Law"]; John Gerard Ruggie, "Business and Human Rights: The Evolving International Agenda" (2007) 101:4 Am J Int'l L 819 at 824 [Ruggie, "Business and Human Rights"]; David B Hunter, "Civil Society Networks and the Development of Environmental Standards at International Financial Institutions" (2008) 8 Chi J Int'l L 437 at 452–462; Joseph E Stiglitz, "Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Framework in a Globalized World Balancing Rights with Responsibilities" (2008) 23 Am U Int'l L Rev 451 at 481–482; Karin Buhmann, "Regulating Corporate Social and Human Rights Responsibilities at the UN Plane: Institutionalising New Forms of Law and Law-Making Approaches" (2009) 78 Nordic J Int'l L 1 at 11–12 and 29-30 [Buhmann, "Regulating"]; Radu Mares, "Global Corporate Social Responsibility, Human Rights and Law: An Interactive Regulatory Perspective on the Voluntary-Mandatory Dichotomy"

here. In developing a theory of responsibility for private economic actors under international law, Ratner highlights that such an attempt should not rely on a unilateral imposition of rules on corporations.[35] According to him, "[w]herever lawmaking occurs, the detailed elaboration of norms must directly involve all interested actors, whether governments, businesses, or human rights groups".[36] Similarly, with respect to the international human rights regime, Alston stresses that ensuring the accountability of all

(2010) 1 Transn'l Legal Theory 221 at 224–225 [Mares, "Global Corporate"]; Sarah Fick Vendzules, "The Struggle for Legitimacy in Environmental Standards Systems: The OECD Guidelines for Multinational Enterprises" (2010) 21 Colo J Int'l Envtl L & Pol'y 451 at 452 and 483; Andreas Georg Scherer & Dorothée Baumann, "The Role of Transnational Corporation in the Process of Legalization: Insights from Economics and Corporate Social Responsibility" in Christian Brütsch & Dirk Lehmkuhl, eds, *Law and Legalization in Transnational Relations* (New York: Routledge, 2007) 202 at 202; Andrea K Bjorklund, "Improving the International Investment Law and Policy System, Report of the Rapporteur - Second Columbia International Investment Conference: What's Next in International Investment Law and Policy?" in José E Alvarez et al, eds, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: Oxford University Press, 2011) 213 at 236; Larry Catá Backer, "Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order" (2011) 18:2 Indiana Journal of Global Legal Studies 751 at 771–777 [Backer, "Private Actors"]; Larry Catá Backer, "On the Evolution of the United Nations' 'Protect-Respect-Remedy' Project: The State, the Corporation and Human Rights in a Global Governance Context" (2011) 9 Santa Clara J Int'l L 37 at 42 and 68 [Backer, "On the Evolution"]; Jarrod Hepburn & Vuyelwa Kuuya, "Corporate Social Responsibility and Investment Treaties" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 589 at 590; John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W. W. Norton & Company, 2013) at xxii [Ruggie, *Just Business*]; Sandrine Maljean-Dubois & Vanessa Richard, "The Applicability of International Environmental Law to Private Enterprises" in Jorge E Viñuales & Pierre-Marie Dupuy, eds, *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge: Cambridge University Press, 2013) 69 at 81–82; John Gerard Ruggie, "Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization" in César Redorguez-Garavito, ed, *Business and Human Rights: Beyond the End of the Beginning* (forthcoming) [Ruggie, "Regulating Multinationals"]; John Gerard Ruggie, "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights" (2014) 20 Global Governance 5 at 8-10 [Ruggie, "Global Governance"]; Jamie Darin Prenkert & Scott J Shackelford, "Business, Human Rights, and the Promise of Polycentricity" (2014) 47 Vand J Transnat'l L 451 at 455 and 468-469; Stavros-Evdokimos Pantazopoulos, "Towards a Coherent Framework of Transnational Corporations' Responsibility in International Environmental Law" (2013) 24 YB Int'l Env L 131 at 154-160; Khalil Hamdani & Lorraine Ruffing, *United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest* (London: Routledge, 2015) at 245. See also generally, Gunther Teubner, "Self-Constitutionalizing TNCs?: On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct" (2011) 18:2 Ind J Global Legal Stud 617; Michael K Addo, "The Reality of the United Nations Guiding Principles on Business and Human Rights" (2014) 14 Hum Rts L Rev 133 at 145-146; Jernej Letnar Černič, "An Elephant in a Room of Porcelain: Establishing Corporate Responsibility for Human Rights" in Jernej Letnar Černič & Tara Van Ho, eds, *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Legal Publishers, 2015) 131 at 133; Anita Ramasastry, "Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability" (2015) 14 J Hum Rights 237 at 249 and 252 [Ramasastry, "Corporate Social Responsibility"].

[35] Steven R Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111:3 Yale LJ 443 at 451.

[36] *Ibid* at 451.

major actors necessitates a particular focus on the role played by non-state actors such as transnational corporations, private voluntary groups and intergovernmental organizations.[37]

In this regard, the legal pluralist approach can be distinguished from the positivist stance by the emphasis on the negotiating and drafting processes that underlie the adoption of specific international instruments. Previous works thus provide extensive details pertaining to actors involved in discussions that occurred under the auspices of intergovernmental organizations.[38] For example, the various actors consulted to elaborate

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[37] Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 3 at 6.

[38] See Alexis M Taylor, "The UN and the Global Compact" (2000) 17 NYL Sch J Hum Rts 975 at 980–983; Robert D Tronnes, "Ensuring Uniformity in the Implementation of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" (2000) 33 Geo Wash J Int'l L & Ecn 97 at 111; Betty King, "The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations" (2001) 34 Cornell Int'l LJ 481 at 483; Kenneth W Abbott & Duncan Snidal, "Values and Interests: International Legalization in the Fight against Corruption" (2002) 31:S1 J Legal Stud S141 at S158–S176; Susan Ariel Aaronson, "Global Corporate Social Responsibility Pressures and the Failure to Develop Universal Rules to Govern Investors and States" (2002) 3 J World Investment 487 at 493; Julie Campagna, "United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers" (2003) 37 J Marshall L Rev 1205 at 1207–1208 and 1229; Elisa Morgera, "An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead up to the 2006 Review" (2006) 18 Geo Int'l Envtl L Rev 751 at 753–756 [Morgera, "An Environmental Outlook"]; Zerk, *supra* note 2 at 244-262; Kinley & Chambers, *supra* note 34 at 456-459 and 462-464; Backer, "Multinational Corporations, Transnational Law", *supra* note 34 at 356-357; David Kinley, Justine Nolan & Nathalie Zerial, "The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations" (2007) 25 Company & Securities LJ 30 at 33–37; Natalie L Bridgeman & David B Hunter, "Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism" (2008) 20 Geo Int'l Envtl L Rev 187 at 189; Afshin Akhtarkhavari, "The Global Compact, Environmental Principles, and Change in International Environmental Politics" (2009) 38 Denv J Int'l L & Pol'y 277 at 283–284; Buhmann, "Regulating", *surpa* note 34 at 41-43 and 46-47; Leyla Davarnejad, "In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes under the OECD Guidelines for Multinational Enterprises" (2011) 2011 J Disp Resol 351 at 355 and 360 [Davarnejad, "In the Shadow"]; Laurence Dubin, "L'élaboration des principes à l'intention des entreprises multinationales par l'OCDE ou comment globaliser la régulation du comportement d'un acteur global?" in Hervé Ascensio & Nicola Bonucci, eds, *Le pouvoir normatif de l'OCDE* (Paris: Éditions A. Pedone, 2014) 113 at 118–121; Alice De Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Northampton: Edward Elgar, 2011) at 52 [De Jonge, *Transnational Corporations*]; Backer, "On the Evolution", *supra* note 34 at 45-50; Radu Mares, "Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress" in Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martinus Nijhoff Publishers, 2012) 1 at 5–7 [Mares, "Business and Human Rights"]; Pini Pavel Miretski & Sascha-Dominik Bachmann, "The UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights': A Requiem" (2012) 17 Deakin L Rev 5 at 27–34; Karin Buhmann, "The Development of the 'UN Framework': A Pragmatic Process Towards a Pragmatic Output" in Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martinus Nijhoff Publishers, 2012) 85 at 85 and 93-104 [Buhmann, "The Development"]; Veronika Haász, "The Role of National Human Rights Institutions in the Implementation of the UN Guiding Principles" (2013) 14 Hum

the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* ("*UN Norms*")[39] and the *Guiding Principles on Business and Human Rights* ("*UN Guiding Principles*")[40] are extensively discussed by individuals who played a primary role in the development of these initiatives.[41] Such examples clearly demonstrate how state and non-state actors contribute to the elaboration of international norms to address foreign investors' responsibilities.

In addition to the acknowledgement of the role played by non-state actors, the pluralist approach is characterized by an explicit recognition of the normative value and legitimacy of instruments that fall beyond formal sources of international law. It is in this regard that international initiatives that emerge from intergovernmental organizations are often considered as being an integral part of a broader normative framework applicable to foreign investors' activities and that generates a regulatory dynamic.[42] As emphasized by Zerk:

Rights Rev 165 at 166; Susan Ariel Aaronson & Ian Higham, "Putting the Blame on Governments: Why Firms and Governments have Failed to Advance the Guiding Principles on Business and Human Rights" in Kurt Mills & David Jason Karp, eds, *Human Rights Protection in Global Politics: Responsibilities of States and Non-State Actors* (New York: Palgrave Macmillan, 2015) 113 at 125–127. See generally Susan Ariel Aaronson & Ian Higham, "'Re-righting Business': John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms" (2013) 35 Hum Rts Q 333.

[39] *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, 2003, UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

[40] Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 2011, UN Doc A/HRC/17/31.

[41] For the elaboration of the *UN Norms*, see David Weissbrodt & Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) 97:4 Am J Int'l L 901 at 903–907 [Weissbrodt & Kruger, "Norms"]; David Weissbrodt & Muria Kruger, "Human Rights Responsibilities of Businesses as Non-State Actors" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 315 at 332–338 [Weissbrodt & Kruger, "Human Rights Responsibilities"]. For the elaboration of the *UN Guiding Principles*, see e.g. Ruggie, *Just Business*, *supra* note 34 at 141-148; Ruggie, "Regulating Multinationals", *supra* note 34; Ruggie, "Global Governance", *supra* note 34 at 8-10.

[42] See Hans W Baade, "The Legal Effects of Codes of Conduct for Multinational Enterprises" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 3 at 10; Kell & Ruggie, *supra* note 34 at 103-104; Braithwaite & Drahos, *supra* note 34 at 10; Meyer & Stefanova, *supra* note 33 at 503-504 and 515; Weissbrodt & Kruger, "Norms", *ibid* at 913-915; Weiler, *supra* note 34 at 435; Wilkie, *supra* note 34 at 290-291; Ralph G Steinhardt, "Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 177 at 175–176; Weissbrodt & Kruger, "Human Rights Responsibilities", *ibid* at 318; Nils Rosemann, "Business Human Rights Obligations - The 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'" (2005) 23 Nordic J Hum Rigths 47 at 56; Zerk, *supra* note 2 at 2; Gelfand, *supra* note 34 at 332; Kinley & Chambers, *supra* note 34 at 450 and 461; Backer, "Multinational Corporations, Transnational Law", *supra* note 34 at 357; Peter T Muchlinski, *Multinational Enterprises and the Law*, 2d ed (Oxford:

> While the regulatory methods are still very much open to negotiation, considerable effort has already been invested at international level in devising 'soft law' standards for multinationals. … *None of these involves any formal enforcement measures as yet, but this does not mean that they are not legally significant*.[43]

Once again, some authors scrutinize more closely the content of these instruments.[44] Others appear to be particularly optimistic regarding their implementation even if most of the current initiatives do not include a formal adjudication procedure.[45] Cross-references

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Oxford University Press, 2007) at 110–112 [Muchlinski, *Multinational Enterprises*]; Ruggie, "Business and Human Rights", *supra* note 34 at 833-835 and 839; Kinley, Nolan & Zerial, *supra* note 38 at 31; Bridgeman & Hunter, *supra* note 38 at 190; Akhtarkhavari, *supra* note 38 at 311-312; Miretski & Bachmann, *supra* note 38 at 40-41; Larry Catá Backer, "From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' 'Protect, Respect and Remedy' and the Construction of Inter-Systemic Global Governance" (2012) 25 Global Bus & Dev L J 69 at 80 and 86 [Backer, "From Institutional Misalignments"]; Buhmann, "Regulating", *supra* note 34 at 37-39, 43-44 and 47-48; Mares, "Global Corporate", *supra* note 34 at 225-232; Vendzules, *supra* note 34 at 454; De Jonge, *Transnational Corporations*, *supra* note 38 at 29; Taylor, "The Ruggie Framework", *supra* note 33 at 22; Hepburn & Kuuya, *supra* note 34 at 590; Baccaro & Mele, *supra* note 33 at 464; Backer, "Private Actors", *supra* note 34 at 773; Backer, "On the Evolution", *supra* note 34 at 43; Ursula A Wynhoven, "The Protect-Respect-Remedy Framework and the United Nations Global Compact" (2011) 9 Santa Clara J Int'l L 81 at 93–99; Bjorklund, *supra* note 34 at 73; August Reinisch & Andrea K Bjorklund, "Soft Codification of International Investment Law" in Andrea K Bjorklund & August Reinisch, eds, *International Investment Law and Soft Law* (Northampton: Edward Elgar, 2012) 305 at 312–313; Peter Muchlinski, "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation" (2012) 22 Bus Ethics Q 145 at 146 [Muchlinski, "Implementing"]; Mares, "Business and Human Rights", *supra* note 38 at 28-37; Robert C Blitt, "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance" (2012) 48 Tex Int'l L J 33 at 43; Ruggie, *Just Business*, *ibid* at 170-202; Elisa Morgera, "From Corporate Social Responsibility to Accountability Mechanisms" in Pierre-Marie Dupuy & Jorge E Viñuales, eds, *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge: Cambridge University Press, 2013) 321 at 337–349; Maljean-Dubois & Richard, *supra* note 34 at 89-93; Rae Lindsay et al, "Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles" (2013) 6:1 J World Energy Law Bus 2 at 52–53 and 64-65; Ruggie, "Regulating Multinationals", *supra* note 34; Birgitte Egelund Olsen & Karsten Engsig Sørensen, "Strengthening the Enforcement of CSR Guidelines: Finding a New Balance between Hard Law and Soft Law" (2014) 41 Legal Issues Ecn Int 9 at 10 and 33; Pantazopoulos, *supra* note 34 at 139 and 152-153; Olga Martin-Ortega, "Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?" (2013) 31:4 Neth Q Hum Rts 44 at 53; Prenkert & Shackelford, *supra* note 34 at 469 and 486-487; Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford: Oxford University Press, 2015) at 3–4; Hamdani & Ruffing, *supra* note 34 at 247. Campagna goes even as far as suggesting that the *UN Norms* are "legally binding" and that they "[obligate] transnational corporations and other business entities to respect, protect and fulfill human rights". See Campagna, *supra* note 38 at 1205 and 1229.

[43] Zerk, *ibid* at 243 [emphasis added].

[44] See Weissbrodt & Kruger, "Norms", *supra* note 41 at 912-913; Kinley & Chambers, *supra* note 34 at 451-456 and 466-476; Morgera, "An Environmental Outlook", *supra* note 38 at 756-763; Backer, "Multinational Corporations, Transnational Law", *supra* note 34 at 333-355; Taylor, "The Ruggie Framework", *supra* note 33 at 15-19; De Jonge, *Transnational Corporations*, *supra* note 38 at Chapter 2; Miretski & Bachmann, *supra* note 38 at 17-27; Backer, "From Institutional Misalignments", *supra* note 42 at 99-151; Blitt, *supra* note 42 at 43-50; Muchlinski, "Implementing", *supra* note 42 at 147-150; Lindsay et al., *supra* note 42 at 8-32; Černič, "An Elephant", *supra* note 34 at 149-155.

[45] See Weissbrodt & Kruger, "Norms", *ibid* at 915-921; Akhtarkhavari, *supra* note 38 at 293-301; Vendzules, *supra* note 34 at 461-463; Roya Ghafele & Angus Mercer, "'Not Starting in the Sixth Gear': An Assessment

between international initiatives that codify foreign investors' responsibilities and states' practice are also addressed in the literature.[46] Although one can identify studies mentioning that these instruments remain formally "non-binding"[47] or have a mixed record when it comes to their effectiveness,[48] legal pluralist studies all emphasize the relevance of a plurality of initiatives even if the latter fall beyond the scope of formal sources of international law.

Most importantly, beyond the mere recognition of the normative value of these international instruments, several studies related to the legal pluralist approach are characterized by an assumption that current initiatives have a beneficial impact on the development of international law and can potentially lead to the adoption of "harder"

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of the U.N. Global Compact's Use of Soft Law as a Global Governance Structure for Corporate Social Responsibility" (2010) 17 UC Davis J Int'l L & Pol'y 41 at 50–53; Davarnejad, "In the Shadow", *supra* note 38 at 385; De Jonge, *Transnational Corporations*, *ibid* at 29. See also generally Gefion Schuler, "Effective Governance through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises" in Armin von Bogdandy et al, eds, *The Exercise of Public Authority by International Institutions* (Dordrecht: Springer, 2010) 197; Haász, *supra* note 38; Egelund Olsen & Ensig Sørensen, *supra* note 42; Julia Motte-Baumvol, "Le réglement des différends à l'intention des entreprises multinationales: quelques réflexions à partir des principes directeurs de l'OCDE" (2014) 118 RGDIP 303 at 320-330.

[46] See Morgera, "An Environmental Outlook", *supra* note 38 at 771-773; Vendzules, *ibid* at 474-476 and 486-487; Taylor, "The Ruggie Framework", *supra* note 33 at 23-24; De Jonge, *Transnational Corporations*, *ibid* at 45, 51 and 56; Backer, "On the Evolution", *supra* note 34 at 43-44; Mares, "Business and Human Rights", *supra* note 38 at 7; Blitt, *supra* note 42 at 50-51; Lindsay et al., *supra* note 42 at 4-5; Ruggie, "Regulating Multinationals", *supra* note 34; Ruggie, "Global Governance", *supra* note 34 at 11-12; Martin-Ortega, *supra* note 42 at 57-71. Se generally Wynhoven, *supra* note 42.

[47] See Meyer & Stefanova, *supra* note 33 at 515; Ruggie, "Theory and Practice", *supra* note 34 at 31; Peter Muchlinski, "Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by Intergovernmental Organisations" (2003) 3 Non-St Actors & Int'l L 123 at 128–129 [Muchlinski, "Human Rights"]; Steinhardt, *supra* note 42 at 204; Mary E Footer, "Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment" (2009) 18 Mich St U Coll L J Int'l L 33 at 58–61 [Footer, "Bits and Pieces"]; Ghafele & Mercer, *supra* note 45 at 44; Schuler, *supra* note 45 at 221; Vendzules, *ibid* at 460-461; Hepburn & Kuuya, *supra* note 34 at 592-594; Taylor, "The Ruggie Framework", *ibid* at 22; De Jonge, *Transnational Corporations*, *ibid* at 41-42; Backer, "From Institutional Misalignments", *supra* note 42 at 74-75; Miretski & Bachmann, *supra* note 38 at 34; Buhmann, "The Development", *supra* note 38 at 88; Motte-Baumvol, *supra* note 45 at 305; Ruggie, "Regulating Multinationals", *ibid*; Egelund Olsen & Ensig Sørensen, *supra* note 42 at 10 and 33; Martin-Ortega, *ibid* at 53.

[48] See Baade, *supra* note 42 at 5-6; Aaronson, *supra* note 38 at 499; Weiler, *supra* note 34 at 434-435; Reinisch, *supra* note 34 at 52-53; Morgera, "An Environmental Outlook", *supra* note 38 at 764; Bridgeman & Hunter, *supra* note 38 at 207-216; Baccaro & Mele, *supra* note 33 at 463; Bjorklund, *supra* note 34 at 230 and 240-241; Alice De Jonge, "Transnational Corporations and International Law: Bringing TNCs Out of the Accountability Vacuum" (2011) 7:1 Crit Perspectives Int'l Bus 66 at 72 [De Jonge, "Transnational Corporations"]; De Jonge, *Transnational Corporations*, *ibid* at 30 and 33; Prenkert & Shackelford, *supra* note 34 at 486-487.

norms.[49] One of the most striking statements that render this potential transformation is provided by Muchlinski: "The very fact that an increasing number of non-binding codes is being drafted and adopted in this area, suggests a growing interest among important groups and organizations … and *is leading to the establishment of a rich set of sources from which new binding standards can emerge*".[50] In the same vein, Steinhardt compares the ongoing developments pertaining to human rights responsibilities of foreign investors to the emergence of the ancient *lex mercatoria*.[51] A third example is provided by Ruggie, the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises ("Special Representative"). Reflecting on the elaboration of the *UN Guiding Principles*, Ruggie mentions that his goal was to develop a "politically authoritative" initiative from which legal developments would

[49] In addition to the other references cited in this paragraph, see Baade, *ibid* at 7, 13 and 23; Weissbrodt & Kruger, "Norms", *supra* note 41 at 915; Weissbrodt & Kruger, "Human Rights Responsibilities", *supra* note 41 at 339 and 350; Zerk, *supra* note 2 at 243 and 262-277; Kinley & Chambers, *supra* note 34 at 483-488; Gelfand, *supra* note 34 at 315; Backer, "Multinational Corporations, Transnational Law", *supra* note 34 at 380-381; Footer, "Bits and Pieces", *supra* note 47 at 61-62; Buhmann, "Regulating", *supra* note 34 at 52; Ghafele & Mercer, *supra* note 45 at 60; Vendzules, *supra* note 34 at 454; Hervé Ascensio, "Le Pacte mondial et l'apparition d'une responsabilité inernationale des entreprises" in Laurence Boisson de Chazournes & Emmanuelle Mazuyer, eds, *Le Pacte mondial des Nations unies 10 ans après - The Global Compact of the United Nations 10 Years After* (Brussels: Bruylant, 2011) 167 at 173–179; Wynhoven, *supra* note 42 at 89; Miretski & Bachmann, *supra* note 38 at 35; Mares, "Global Corporate", *supra* note 34 at 243-244, 252 and 257; Taylor, "The Ruggie Framework", *supra* note 33 at 27; Bjorklund, *ibid* at 245; Hepburn & Kuuya, *supra* note 34 at 606; Dubin, *supra* note 38 at 128; Buhmann, "The Development", *supra* note 38 at 86; Blitt, *supra* note 42 at 41 and 57; Muchlinski, "Implementing", *supra* note 42 at 157; Maljean-Dubois & Richard, *supra* note 34 at 94; Vincent Chetail, "The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward" in Denis Alland et al, eds, *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff Publishers, 2014) 105 at 118–119; Egelund Olsen & Ensig Sørensen, *supra* note 42 at 11; Pantazopoulos, *supra* note 34 at 153; Martin-Ortega, *supra* note 42 at 57 and 74; Mary E Footer, "Human Rights Due Diligence and the Responsible Supply of Minerals from Conflict-affected Areas: Towards a Normative Framework" in Jernej Letnar Černič & Tara Van Ho, eds, *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Legal Publishers, 2015) 179 at 227–228; Humberto Fernando Cantú Rivera, "Business & Human Rights: From a 'Responsibility to Respect' to Legal Obligations and Enforcement" in Jernej Letnar Černič & Tara Van Ho, eds, *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Legal Publishers, 2015) 303 at 310–312; Arnaud Poitevin, "Des « prérequis » pour la levée de fonds sur les marchés internationaux : Les normes environnementales et sociales des institutions financières internationales et leurs sanctions" (2015) JDI 527; Ramasastry, "Corporate Social Responsibility", *supra* note 34 at 244.

[50] Muchlinski, *Multinational Enterprises*, *supra* note 42 at 112 [emphasis added]. See also Muchlinski, "Human Rights", *supra* note 47 at 128-129 and 143-145; Peter Muchlinski, "Policy Issues" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 3 at 7 and 17-18.

[51] Steinhardt, *supra* note 42 at 221-226.

follow.[52] To put it differently, these authors believe that the accumulation of initiatives that codify foreign investors' responsibilities will eventually lead to the adoption of legal norms to govern the activities of these private actors when they are operating abroad.

Another aspect that emerges from the legal pluralist approach is the categorization of foreign investors' responsibilities in terms of specific areas for which the activities of these actors can produce negative impacts. As it is further discussed in the chapter developing the analytical framework of this dissertation, legal pluralism offers a conception of international law in which functionally differentiated normative orders emerge without being hierarchically organized. With respect to foreign investors' responsibilities, various initiatives that relate to a specific area can thus be clustered and considered as integral parts of a functionally differentiated normative order that addresses the general lack of accountability of foreign investors under international law. Thus, Muchlinski provides a comprehensive content analysis of several international instruments that codify standards in the areas of labour relations,[53] human rights[54] and environmental issues.[55]

In line with this classification, the examination of the consistency between international investment law and other norms pertaining to areas in which the activities of these private actors can cause harm also falls into the legal pluralist approach. Instead of identifying examples of IIAs provisions and decisions from international investment arbitration tribunals in which issues that transcend the protection of investment are mentioned, these studies seek to explain the deeper interaction between international investment law and other normative orders.[56] For example, Dupuy explicitly questions the

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[52] Ruggie, *Just Business*, *supra* note 34 at xlvi.

[53] Muchlinski, *Multinational Enterprises*, *supra* note 42 at Chapter 12; Peter Muchlinski, "Corporate Social Responsibility" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 637 at 646–654 [Muchlinski, "Corporate Social Responsibility"].

[54] Muchlinski, *Multinational Enterprises*, *ibid* at Chapter 13; Muchlinski, "Corporate Social Responsibility", *ibid* at 654-662.

[55] Muchlinski, *Multinational Enterprises*, *ibid* at Chapter 14; Muchlinski, "Corporate Social Responsibility", *ibid* at 662-673.

[56] In addition to the other references cited in this paragraph, see generally Rémi Bachand, Martin Gallié & Stéphanie Rousseau, "Droit de l'investissement et droits humains dans les Amériques" (2003) 49 AFDI 575; James D Fry, "International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity" (2007) 18 Duke J Comp & Int'l L 77; Jan Wouters & Nicolas Hachez, "When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured"

wholly autonomous or fragmented character of international investment law and human rights law by considering the origins of these normative orders, their content and their procedural means of adjudication.[57] Along the same lines, with a view to explaining the reluctance to consider human rights issues in international investment disputes, Hirsch maintains that this general lack of consideration results from a "socio-cultural distance" between these branches of international law.[58]

One can also identify other legal pluralist studies that address the issue of foreign investors' responsibilities within the broader context of international investment law. In this regard, some authors appear to be particularly optimistic about the influence of *amicus curiae* to foster the consideration of foreign investors' responsibilities in international investment arbitration.[59] Moreover, in line with other studies that stress the normative character of instruments adopted under the auspices of intergovernmental organizations, Tanzi argues that such instruments provide "an authoritative ground to arbitrators for assessing the lawfulness of the State's regulatory measures adopted in the pursuit of public

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(2009) 3 Hum Rts & Int'l Legal Discourse 301; Luke Eric Peterson, *Human and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration* (Montreal: Rights and Democracy, 2009); Abdullah Al Faruque, "Mapping the Relationship between Investment Protection and Human Rights" (2010) 11 J World Investment & Trade 539; Jorge E Viñuales, "Foreign Investment and the Environment in International Law: An Ambiguous Relationship" (2010) 80:1 BYIL 244 [Viñuales, "Foreign Investment"]; Timothy G Nelson, "Human Rights Law and BIT Protection: Areas of Convergence" (2011) 12 J World Investment & Trade 27; Yannick Radi, "Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox" (2012) 37 NCJ Int'l L & Com Reg 1107; Aurora Voiculescu, "Human Rights, Corporate Social Responsibility and International Economic Law: Strong Answers to Strong Questions?" in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (New York: Routledge, 2013) 222.

[57] Pierre-Marie Dupuy, "Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 45 at 46.

[58] Moshe Hirsch, "The Sociology of International Investment Law" in Zachary Douglas, Joost Pauwelyn & Jorge E Viñuales, eds, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: Oxford University Press, 2014) 143 at 148–158. In previous studies, Hirsch argues that the general reluctance of arbitrators to consider human rights issues is related to different normative and institutional concepts that characterize international investment law and human rights law. See Moshe Hirsch, "Investment Tribunals and Human Rights: Divergent Paths" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 97 at 107–113.

[59] See Footer, "Bits and Pieces", *supra* note 47 at 46-57; Julien Cantegreil, "Implementing Human Rights in the NAFTA Regime - The Potential of a Pending Case: Glamis Corp v USA" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 366 at 388–389; Viñuales, "Foreign Investment", *supra* note 56 at 273-278.

interest".[60] All these analyses rely on core assumptions of legal pluralism, at least implicitly, in order to address the interface between foreign investors' responsibilities and international investment law.

With respect to suggestions of reforms that seek to impose responsibilities on foreign investors under international law, several discussions pertaining to the international legal personality of these actors emerge throughout the legal pluralist approach.[61] Some authors thus argue that nothing in principle prevents the recognition of a certain form of international legal personality for private actors by the international community.[62] In this regard, Ratner derives norms of corporate responsibility that could be ultimately applied to foreign investors through various means of implementation.[63] Contending that "international law has always evolved and adapted to changing global realities",[64] de Jonge advances some principles that are modeled on the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*[65] and that seek to impose direct duties on foreign investors under international law.[66] Others also suggest the elaboration of a wholly independent mechanism that could address allegations of harm caused by foreign investors' activities and potentially hold these actors directly accountable.[67] When it comes to analyzing how foreign investors' responsibilities relate to international investment law, several authors related to the legal pluralist approach submit that the text of IIAs could be amended to institutionalize a form of direct liability for foreign investors.[68]

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[60] Attila Tanzi, "On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector" (2012) 11 L & Practice of Int'l Courts & Trib 47 at 72.

[61] For a summary of the doctrinal debate pertaining to the international legal personality of foreign investors, see Chetail, *supra* note 49 at 107-119. However, it must be stressed that Chetail does not suggest that addressing the lack of accountability of foreign investors necessarily requires recognition of their alleged international legal personality. Chetail, *ibid* at 120.

[62] See e.g. Ratner, *supra* note 35 at 465-467; Zerk, *supra* note 2 at 72-76 and 304-306; Buhmann, "Regulating", *supra* note 34 at 14; Muchlinski, "Implementing", *supra* note 42 at 154.

[63] Ratner, *ibid* at 496-524.

[64] De Jonge, "Transnational Corporations", *supra* note 48 at 66.

[65] International Law Commission, "Draft Articles on Responsibility of States for International Wrongful Acts – Report of the International Law Commission on the Work of its Fifty-Third Session" (UN Doc A56/10) in *Yearbook of the International Law Commission 2001*, vol 2, part 2 (New York: UN, 2001).

[66] See generally De Jonge, "Transnational Corporations", *supra* note 48 at 77-83.

[67] See Bridgeman & Hunter, *supra* note 38 at 218-235; Pantazopoulos, *supra* note 34 at 139.

[68] See Weiler, *supra* note 34 at 437-440; Reinisch, *supra* note 34 at 82-83; Stiglitz, *supra* note 34 at 538; Peter T Muchlinski, "Regulating Multinationals: Foreign Investment, Development, and the Balance of Corporate

Overall, legal pluralist studies contribute to the analysis of foreign investors' responsibilities by providing an extensive examination of international initiatives that seek to address the lack of accountability of these actors. While the consideration of norms emerging beyond the limits of the state entails a richer analysis of the codification process of foreign investors' responsibilities, the legal pluralist approach nonetheless tends to adopt an overly optimistic belief that the accumulation of these normative developments will ultimately lead to the adoption of formal sources of international law. This approach also addresses the issue of foreign investors' responsibilities in regard to international investment law. By focusing on the emergence of functionally differentiated normative orders and the role of *amicus curiae*, the legal pluralist approach offers various attempts at examining the interaction between this branch of international law and the responsibilities of private actors in various areas. The explicit recognition of the influence of non-state actors in the international lawmaking process also pushes toward the imposition of direct responsibilities for foreign investors, either through independent international mechanisms or by amending IIAs provisions. Yet, this thorough consideration of normative developments and potential reforms does not fully consider the possible opposition of powerful actors that could impede the codification process of foreign investors' responsibilities. This aspect is addressed more extensively in perspectives that critically assess foreign investors' responsibilities in international law.

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and Home Country Rights and Responsibilities in a Globalizing World" in José E Alvarez et al, eds, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: Oxford University Press, 2011) 30 at 49 and 56-58; Peter Muchlinski, "The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World" (2011) 18:2 Ind J global Legal Stud 665 at 702–703; Anthony J VanDuzer, Penelope Simons & Mayeda Graham, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (London: Commonwealth Secretariat, 2013) at 254–262; Eva Van der Zee, "Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law?" (2013) 40 LIEI 33 at 51–57. See also generally Patrick Dumberry, "Corporate Investors' International Legal Personality and their Accountability for Human Rights Violations under IIAs" in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (New York: Routledge, 2013) 179.

3. Critical Perspectives

Following the legal pluralist approach in international law, critical perspectives also emphasize the influence of non-state actors in shaping international norms. In fact, analyses that adopt a critical view of foreign investors' responsibilities in international law often stress the participation of several actors in consultation and negotiation processes preceding the adoption of instruments that codify these responsibilities.[69] However, instead of

[69] See Sten Niklasson, "The OECD Guidelines for MNEs and the UN Draft Code of Conduct: Some Political Considerations" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 141 at 141; Jonathan I Charney, "Transnational Corporations and Developing Public International Law" (1983) 1983:4 Duke LJ 748 at 755–756; Stephen Tully, "The 2000 Review of the OECD Guidelines for Multinational Enterprises" (2001) 50 Int'l & Comp L Quart 394 at 394–395; Muthucumaraswamy Sornarajah, "Economic Neo-Liberalism and the International Law on Foreign Investment" in Anthony Anghie et al, eds, *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff Publishers, 2003) 173 at 176 [Sornarajah, "Economic Neo-Liberalism"]; Hevina S Dashwood, "Corporate Social Responsibility and the Evolution of International Norms" in John J Kirton & Michael J Trebilcock, eds, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Farnham: Ashgate Pubishing, 2004) 189 at 190 [Dashwood, "Corporate Social Responsibility"]; David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44 Va J Int'l L 931 at 933 and 1022; Sean D Murphy, "Taking Multinational Corporate Codes of Conduct to the Next Level" (2005) 43 Colum J Transnat'l L 389 at 401; A Claire Cutler, "Transnational Business Civilization, Corporations, and the Privatization of Global Governance" in Christopher May, ed, *Global Corporate Power* (Boulder, CO: Lynne Rienner Publishers, 2006) 199 at 200 [Cutler, "Transnational Business Civilization"]; Surya Deva, "Global Compact: A Critique of the U.N.'s Public-Private Partnership for Promoting Corporate Citizenship" (2006) 34 Syracuse J Int'l L & Com 107 at 115 [Deva, "Global Compact"]; Susanne Soederberg, "Taming Corporations or Buttressing Market-Led Development? A Critical Assessment of the Global Compact" (2007) 4 Globalizations 500 at 505; Stefan Fritsch, "The UN Global Compact and the Global Governance of Corporate Social Responsibility: Complex Multilateralism for a More Human Globalisation?" (2008) 22:1 Global Soc 1 at 4–6 and 13-14; A Claire Cutler, "Constituting Capitalism: Corporations, Law, and Private Transnational Governance" (2009) 5 STAIR 99 at 100–106 [Cutler, "Constituting Capitalism"]; Rachel J Anderson, "Toward Global Corporate Citizenship: Reframing Foreign Direct Investment Law" (2009) 18 Mich St U Coll L J Int'l L 1 at 23; Peter Muchlinski, "Multinational Enterprises as Actors in International Law: Creating 'Soft Law' Obligations and 'Hard Law' Rights" in Math Noortmann & Cedric Ryngaert, eds, *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers* (Farnham: Ashgate Pubishing, 2010) 9 at 9 [Muchlinski, "Multinational Enterprises as Actors"]; David Bilchitz & Surya Deva, "The Human Rights Obligations of Business: A Critical Framework for the Future" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 1 at 4–10; Karin Buhmann, "Navigating from 'Train Wreck' to being 'Welcomed': Negotiation Strategies and Argumentative Patterns in the Development of the UN Framework" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 29 at 30 [Buhmann, "Navigating"]; Carlos López, "The 'Ruggie Process': From Legal Obligations to Corporate Social Responsibility?" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 58 at 69–73; Surya Deva, "Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 78 at 83–86 [Deva, "Treating Human Rights"]; Justine Nolan, "The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge:

suggesting that the mere accumulation of normative developments necessarily leads toward the elaboration of legal norms imposing more responsibilities on foreign investors, critical perspectives openly recognize that inherent relations of power between actors involved in international lawmaking can disrupt this process.

More specifically, critical perspectives include international legal scholars who explain the general lack of accountability of foreign investors by shedding light on the capacity of these private actors and their home states to influence the outcome of the lawmaking process.[70] Arguing that the international community should permit foreign investors to participate directly in the development of norms that have the potential to affect their interests, Charney stresses that failure to include foreign investors in the norm development process motivates these actors "to use their power and transnationality to frustrate attempts to enforce these norms".[71] More recently, Sornarajah considers foreign investors as playing a primary role in delaying "the formation of binding rules through the formulation of soft law prescriptions".[72] While the work of Muchlinski is cited in the legal

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Cambridge University Press, 2013) 138 at 140–141; Anita Ramasastry, "Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 162 at 164–172 [Ramasastry, "Closing the Governance Gap"]; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013) at 226 [Miles, *Origins*]; Surya Deva, "Multinationals, Human Rights and International Law: Time to Move beyond the 'State-Centric' Conception" in Jernej Letnar Černič & Tara Van Ho, eds, *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Legal Publishers, 2015) 27 at 45 [Deva, "Multinationals, Human Rights"]; Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014) at 79–177.

[70] In addition to the other references cited in this paragraph, see Kinley & Tadaki, *ibid* at 955; Murphy, *ibid* at 395-396; Evaristus Oshionebo, "The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities" (2007) 19 Fla J Int'l L 1 at 3–4 and 31-33; Robert McCorquodale, "Corporate Social Responsibility and International Human Rights Law" (2009) 87 Journal of Business Ethics 385 at 387; Patricia Feeney, "Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda" (2009) 6:11 SUR Int'l J Hum Rts 161 at 162–163; Anderson, *ibid* at 1-2; David Weissbrodt, "The Sub-Commission Principles on the Responsibility of Transnational Corporations in Regard to Human Rights" in Emmanuel Decaux, ed, *La responsabilité des entreprises mutlinationales en matière de droits de l'homme* (Brussels: Bruylant, 2010) 103 at 115–117 [Weissbrodt, "The Sub-Commission"]; Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015) at 63–64; Daniel Augenstein & David Kinley, "Beyond the 100 Acre Wood: In which International Human Rights Law Finds New Ways to Tame Global Corporate Power" (2015) 19 Int'l J Hum Rights 828 at 829 and 832 [Augenstein & Kinley, "Beyond the 100"].

[71] Charney, *supra* note 69 at 777.

[72] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 3d ed (Cambridge: Cambridge University Press, 2010) at 146 [Sornarajah, *International Law*]. Surprisingly, Sornarajah seems to be slightly more optimistic with respect to foreign investors' responsibilities in the area of human rights

pluralist approach above, this author also presents some analyses that fit more squarely into the critical approaches in the specific case of foreign investors' responsibilities.[73] Providing an explanation for the "non-binding" character of international standards that address the lack of accountability of foreign investors, this author reaches the following conclusion: "That these standards are mainly non-binding comes not from the fact that corporations are not subjects of international law but from *the role that corporate interests play in the evolution of this system*. How firms lobby home and host states and intergovernmental organizations … is a key element here".[74] In striking contrast with legal pluralist studies suggesting that the codification process can lead to the adoption of formal sources of international law, critics contend that the current divergence in the interests of actors involved ultimately compromises this possibility.[75]

In addition to analyses that are offered by international legal scholars, critical perspectives also include an important contribution of academics from international relations. Beyond the agency of foreign investors to promote international norms that address the lack of accountability of foreign investors,[76] several critics maintain that these powerful actors' interests are mirrored in the international lawmaking process pertaining to foreign investors' responsibilities.[77] Cutler summarizes this influence by emphasizing its relationship with neoliberalism:

> *Corporations themselves are responding to calls for corporate accountability and responsibility by developing 'soft,' nonbinding legal codes to foreclose the development of hard, binding international law*. The [corporate social responsibility] movement is an integral element of the reconfiguration of political

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and environmental protection. In fact, he suggests that "litigation strategies and political pressure will direct the law towards establishing firm principles of liability for violations of human rights and environmental standards by multinational corporations". See Sornarajah, *International Law*, *ibid* at 150.

[73] See generally Peter T Muchlinski, "'Global Bukowina' Examined: Viewing the Multinational Enterprises as a Transnational Law-making Community" in Gunther Teubner, ed, *Global Law Without a State* (Aldershot: Dartmouth, 1997) 79; Muchlinski, "Multinational Enterprises as Actors", *supra* note 69.

[74] Muchlinski, "Multinational Enterprises as Actors", *ibid* at 10 [emphasis added]. See also *ibid* at 17-28.

[75] See Kinley & Tadaki, *supra* note 69 at 952; Murphy, *supra* note 69 at 396 and 422-423.

[76] See generally Hevina S Dashwood, "Canadian Mining Companies and Corporate Social Responsibility: Weighing the Impact of Global Norms" (2007) 40:1 Can J Pol Sc 129.

[77] In addition to the other references cited in this paragraph, see Ruth Mayne, "Regulating TNCs: The Role of Voluntary and Governmental Approaches" in Sol Picciotto & Ruth Mayne, eds, *Regulating International Business: Beyond Liberalization* (New York: St. Martin's Press, 1999) 235 at 239–241; Michael Blowfield, "Corporate Social Responsibility: The Failing Discipline and Why It Matters for International Relations" (2005) 19 Int'l Rel 173 at 181–186; Fritsch, *supra* note 69 at 11-13.

> authority associated more generally with the contemporary historical bloc. Indeed, there are clear links between the [corporate social responsibility] movement, alongside the increasing multiplicity of sources of and mechanisms for corporate governance, and political economic changes brought about by the neoliberal discipline of global capitalism.[78]

After stressing the contribution of transnational corporations in reproducing capitalism, Cutler also maintains that "[l]ate capitalism and postmodern governance is predicated upon a dialectic of *soft, permissive, and self-regulatory standards governing corporate responsibilities* and *hard disciplines governing corporate rights*".[79] In the same vein, Clapp stresses the role of businesses in the creation and maintenance of private international norms regarding environmental governance.[80]

In line with these critiques of the general lack of accountability of foreign investors under international law, the literature includes examples of studies that focus on the influence of powerful actors' interests for the elaboration of more specific instruments.[81] For example, the influence of business interests in the adoption of international agreements on the prohibition of corruption of foreign officials is examined by several authors.[82] Moreover, the elaboration of the *UN Guiding Principles* is extensively scrutinized according to critical lenses.[83] Thus, Bilchitz and Deva contend the following:

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[78] Cutler, "Transnational Business Civilization", *supra* note 69 at 214 [emphasis added]. See also A Claire Cutler, "Private International Regime and Interfirm Cooperation" in Rodney Bruce Hall & Thomas J Biersteker, eds, *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2003) 23 at 35.

[79] Cutler, "Constituting Capitalism", *supra* note 69 at 108-109 [emphasis added]. See also A Claire Cutler, "Legal Pluralism as the 'Common Sense' of Transnational Capitalism" (2013) 3:4 Oñati S-L Series 719 at 730 and 733.

[80] See generally Jennifer Clapp, "The Privatization of Global Environmental Governance: ISO 14000 and the Developing World" in David L Levy & Peter J Newell, eds, *The Business of Global Environmental Governance* (Cambridge, MA: MIT Press, 2005) 223.

[81] In addition to the other references cited in this paragraph, see generally Niklasson, *supra* note 69. See also Arghyríos A Fatouros, "The UN Code of Conduct on Transnational Corporations: A Critical Discussion of the First Drafting Phase" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 103 at 106–108 and 118; Sorcha Macleod & Douglas Lewis, "Transnational Corporations: Power, Influence and Responsibility" (2004) 4 Global Soc Pol'y 77 at 80–82; Soederberg, *supra* note 69 at 507-510; Florian Wettstein, "Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment" (2015) 14 J Hum Rights 162 at 163.

[82] See Ramasastry, "Closing the Governance Gap", *supra* note 69 at 174 and 181-183.

[83] In addition to the other references cited in this paragraph, see Penelope Simons, "International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights" (2012) 3:1 J Hum R and Env't 5 at 10–12 and 34; López, *supra* note 69 at 70; Deva, "Treating Human Rights", *supra* note 69 at 85-86; Simons & Macklin, *supra* note 69 at 84. See also generally Buhmann, "Navigating", *supra* note 69.

> "[t]he business sector not only enjoyed proximity with the [Special Representative], but its voices also seemingly had more influence on the text of the Framework and the [*UN Guiding Principles*] as compared to the voices of [nongovernmental organizations]. Human rights in the context of business thus hardly remained as 'trumps', because *the business sector was able to negotiate narrow and non-binding human rights standards*".[84]

Through a discourse analysis of the argumentative structures that underlie the elaboration of this initiative, Buhman also maintains that support for the *UN Guiding Principles* results from the strategic use of language that appeals to the business community.[85]

To be clear, it must be noted that none of the authors from the legal positivist and the legal pluralist approaches denies that foreign investors are powerful actors in contrast to numerous capital-importing states and nongovernmental organizations.[86] In positing his theory of corporate responsibility for human rights protection, Ratner maintains that "[c]orporations are powerful global actors that some states lack the resources or will to control".[87] Similarly, Weissbrodt and Kruger consider transnational corporations and other business enterprises as being "some of the most powerful non-state actors in the world".[88] However, in striking contrast to the other approaches discussed above, authors related to critical perspectives posit that the international lawmaking process inescapably mirrors the interests of powerful private actors and capital-exporting states.

Another aspect that is reflected in studies related to critical perspectives of foreign investors' responsibilities in international law is the inadequacy of these initiatives to

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[84] Bilchitz & Deva, *supra* note 69 at 8-9 [footnotes omitted, emphasis added].

[85] Buhmann, "Navigating", *supra* note 69.

[86] In addition to the other references cited in this paragraph, see Joseph, "Taming the Leviathans", *supra* note 1 at 172; Joseph, "An Overview", *supra* note 4 at 75; Weissbrodt, "The Beginning", *supra* note 34 at 122; Paust, *supra* note 8 at 802; Campagna, *supra* note 38 at 1220 and 1223; Wallace & Martin-Ortega, *supra* note 10 at 315; Alston, *supra* note 37 at 19; Rosemann, *supra* note 42 at 49; Vazquez, *supra* note 1 at 948-949; Zerk, *supra* note 2 at 310; Kinley & Chambers, *supra* note 34 at 450 and 497; Stiglitz, *supra* note 34 at 481-482; Buhmann, "Regulating", *supra* note 34 at 7; Tzevelokos, *supra* note 3 at 230; Davarnejad, "The Impact", *supra* note 10 at 41; Weissbrodt, "The Sub-Commission", *supra* note 70 at 104; Dunning & Lundan, *supra* note 33 at 139; de Brabandere, *supra* note 1 at 270; Backer, "Private Actors", *supra* note 34 at 771-772; De Jonge, "Transnational Corporations", *supra* note 48 at 66-67; Kamatali, *supra* note 3 at 461; Pantazopoulos, *supra* note 34 at 137; Buhmann, "The Development", *supra* note 38 at 92; Černič, "An Elephant", *supra* note 34 at 133; Blitt, *supra* note 42 at 36-37; Karavias, *Corporate Obligations*, *supra* note 1 at 2; Arnone & Borlini, *supra* note 7 at 367; Karavias, "Shared Responsibility", *supra* note 3 at 92. See also generally Backer, "Multinational Corporations, Transnational Law", *supra* note 34; Choudhury, *supra* note 12.

[87] Ratner, *supra* note 35 at 461.

[88] Weissbrodt & Kruger, "Norms", *supra* note 41 at 901; Weissbrodt & Kruger, "Human Rights Responsibilities", *supra* note 41 at 315.

change the conduct of private actors. While it must be noted that some authors recognize a certain normative value to instruments developed by intergovernmental organizations,[89] most critics nevertheless stress the need to recognize the limits of instruments whose observance remains voluntary and urge the development of initiatives with a "more binding character".[90] More specifically, some authors criticize the choice of words that are included in international instruments (*e.g.* "should", "due diligence" and "sphere of influence") and the operational difficulties resulting from these provisions.[91] The limits of follow-up mechanisms that are provided by the instruments and the lack of implementation by states

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[89] See Surya Deva, "UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction" (2004) 10 ILSA J Int'l & Comp L 493 at 496–501 [Deva, "UN's Human Rights"]; Ilias Bantekas, "Corporate Social Responsibility in International Law" (2004) 22 BU Int'l LJ 309 at 319; Oshionebo, *supra* note 70 at 11 and 30; Jernej Letnar Černič, "Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises" (2008) 3 Hanse L Rev 71 at 82 and 97-98 [Černič, "OECD Guidelines"]; Jernej Letnar Černič, "Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" (2009) 6 Miskolc J Int'l L 24 at 33 [Černič, "ILO Tripartite"]; Nolan, *supra* note 69 at 160-161; Simons & Macklin, *supra* note 69 at 92-175; Deva, "Multinationals, Human Rights", *supra* note 69 at 29; Robert C Bird, Daniel R Cahoy & Lucien J Dhooge, "Corporate Voluntarism and Liability for Human Rights in a Post-Kiobel World" (2014) 102 Ken L J 1 at 17.

[90] See Mayne, *supra* note 77 at 248-253; Surya Deva, "Human Rights Violations by Multinational Corporations and International Law: Where from Here" (2003) 19 Conn J Int'l L 1 at 17–21 [Deva, "Human Rights Violations"]; Kinley & Tadaki, *supra* note 69 at 949-951; Dashwood, "Corporate Social Responsibility", *supra* note 69 at 200; Christopher N Franciose, "Critical Assessment of the United States' Implementation of the OECD Guidelines for Multinational Enterprises, A" (2007) 30 B C Int'l & Comp L Rev 223 at 235; Oshionebo, *ibid* at 6-9 and 37; Fritsch, *supra* note 69 at 21-24; Kavaljit Singh, "Corporate Accountability: Is Self-Regulation the Answer?" in Gary Teeple & Stephen McBride, eds, *Relations of Global Power: Neoliberal Order and Disorder* (Toronto: University of Toronto Press, 2011) 60 at 67; Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London: Routledge, 2012) at 80-117; Bilchitz & Deva, *supra* note 69 at 13 and 25; López, *supra* note 69 at 72; Deva, "Treating Human Rights", *supra* note 69 at 103; Sally Wheeler, "Corporate Respect for Human Rights: As Good as it Gets?" in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (New York: Routledge, 2013) 209 at 212 [Wheeler, "Corporate Respect"]. See also generally David Bilchitz, "A Chasm Between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRGS's Framework and the Guiding Principles" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 107.

[91] See Tully, *supra* note 69 at 396-400; Deva, "UN's Human Rights", *supra* note 89 at 501-513; Deva, "Global Compact", *supra* note 69 at 129-133; McCorquodale, *supra* note 70 at 391-393; Nicola Jägers, "UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability?" (2011) 29:2 Neth Q Hum Rts 159 at 161–163; Deva, "Treating Human Rights", *ibid* at 91-103; Nolan, *supra* note 69 at 159; Wheeler, "Corporate Respect", *ibid* at 219-220; Simons & Macklin, *supra* note 69 at 95, 98-99. See also generally Sabine Michalowski, "Due Diligence and Complicity: A Relationship in Need of Clarification" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 218; Bird et al, *supra* note 89 at 25-41; Sally Wheeler, "Global Production, CSR and Human Rights: The Courts of Public Opinion and the Social Licence to Operate" (2015) 19 Int'l J Hum Rights 757 at 765–770.

are also highlighted in several studies.[92] To put it differently, without necessarily linking the outcome of the international lawmaking process to the influence of powerful actors, some authors related to critical perspectives openly challenge the *status quo* with respect to the general lack of accountability of foreign investors under international law.

When critics specifically link the issue of foreign investors' responsibilities to a broader analysis of international investment law, several authors maintain that current rules regulating foreign capital rely on structures that perpetuate power inequalities between the various actors involved.[93] Sornarajah thus provides one of the clearest examples in this respect as he discusses the influence of foreign investors to shape international investment rules:

> As the power of multinational corporations increases, developed states will continue to espouse their interests not only because of the enormous power that these corporations achieve through lobbying but also because it is in their interests to do so. … *The multinational corporations themselves must be seen as distinct bases of power capable of asserting their interests through the law. Their individual economic resources far exceed those of many sovereign states*. *Their collective power to manipulate legal outcomes must be conceded*.[94]

The analysis completed by Miles on the origins of international investment law is also worth noting.[95] In addition to recognizing the normative character of various initiatives that are emerging regarding foreign investors' responsibilities,[96] her examination of the "unresponsiveness" of international investment law to the negative impact of foreign

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[92] See Tully, *ibid* at 400-402; Deva, "UN's Human Rights", *ibid* at 513-522; Bantekas, *supra* note 89 at 343-345; Deva, "Global Compact", *ibid* at 133-143 and 146-148; Franciose, *supra* note 90 at 229-235; Oshionebo, *supra* note 70 at 16-19 and 22; Černič, "OECD Guidelines", *supra* note 89 at 82-97; Černič, "ILO Tripartite", *supra* note 89 at 28-32; McCorquodale, *supra* note 70 at 393-395; Michalowski, *ibid* at 231; Simons & Macklin, *supra* note 69 at 105-113. See also generally Aishwarya Padmanabhan, "Human Rights and Corporations: An Evaluation of the Accountability and Responsibility of MNCs under the ILO Framework" (2011) 42 J Corp Citizenship 8; Bernadette Maheandiran, "Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System Under the OECD Guidelines for Multinational Enterprises" (2015) 20 Harv Neg L Rev 205.

[93] In addition to the other references cited in this paragraph, see Sornarajah, "Economic Neo-Liberalism", *supra* note 69 at 176; Anderson, *supra* note 69 at 6-14; Asha Kaushal, "Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime" (2009) 50 Harv Int'l LJ 491 at 500. See also generally Muthucumaraswamy Sornarajah, "A Justice-Based Regime for Foreign Investment Protection and the Counsel of the Osgoode Hall Statement: Foreign Investment and the Osgoode Hall Statement" (2012) 3:4 Global Policy 463 [Sornarajah, "Justice-Based Regime"]; David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (New York: Palgrave Macmillan, 2013).

[94] Sornarajah, *International Law*, *supra* note 72 at 5 [footnote omitted, emphasis added].

[95] Miles, *Origins*, *supra* note 69.

[96] *Ibid* at Chapter 4.

investors' activities is grounded in an explicit consideration of the "traditional patterns of assertion of power and response to power that have characterised the evolution of international investment regimes".[97] Also with respect to the consideration of foreign investors' responsibilities in international investment law, Harrison shows that *amicus curiae* that raise human rights arguments are unlikely to influence the outcome of investment disputes in a significant manner due to fundamental problems that are inherent to this procedural mechanism.[98]

Just like the legal positivist and the legal pluralist approaches, critical perspectives also elaborate reforms that seek to balance the power of foreign investors. For example, emphasizing the advantage of the latter when negotiating with many host states, Bantekas contends that these private actors possess "implied responsibilities" that must be taken into account.[99] Echoing legal pluralists who advocate for imposing direct responsibilities to foreign investors, Deva maintains that the prevailing approach has failed to deliver appropriate results and that foreign investors "should fall directly within the jurisdiction of international regulatory institutions".[100] Other critics maintain that current international initiatives could be improved by considering a more orthodox approach in which states have responsibilities to exert control on the extraterritorial activities of their powerful corporate nationals rather than solely considering the elaboration of responsibilities that are directly applicable to foreign investors.[101]

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[97] *Ibid* at 125-126 and Chapter 3.

[98] James Harrison, "Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 396 at 414–418.

[99] Bantekas, *supra* note 89 at 314-316.

[100] Deva, "Human Rights Violations", *supra* note 90 at 3. See also Deva, "Human Rights Violations", *ibid* at 48-56; Deva, "Multinationals, Human Rights", *supra* note 69 at 48.

[101] See Sornarajah, *International Law*, *supra* note 72 at 144-171. See also generally Surya Deva, "Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should Bell the Cat" (2004) 5 Melb J Int'l L 37; Daniel Augenstein & David Kinley, "When Human Rights 'Responsibilities' Become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations" in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 269; Simons & Macklin, *supra* note 69 at Chapter 5; Augenstein & Kinley, "Beyond the 100", *supra* note 70 at 840-842.

With respect to international investment law, while some critics advocate for the direct imposition of human rights duties on foreign investors through IIAs provisions,[102] others call for a serious reorientation of international investment law with a view to taking into account issues that transcend the protection of foreign investment.[103] It is in this context that several scholars signed the *Osgoode Hall Public Statement on the International Investment Regime*[104] in August 2010. In its preamble, this statement mentions that supporters of this document "have a shared concern for the harm done to public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability".[105]

While publications that can be included in this approach avowedly recognize the influence of non-state actors in shaping international norms, scholars related to critical perspectives primarily consider inherent relations of power in the evolving codification of foreign investors' responsibilities. By the same token, the critical stance implies an emphasis on the limitations of current international instruments that address the general lack of accountability of foreign investors under international law. Thus, critical perspectives avoid the relatively optimistic presumption that underlies the legal pluralist approach with respect to the normative contribution of existing instruments. When analyses specifically focus on international investment law, such efforts argue that it reproduces relations of power and call for the explicit inclusion of foreign investors' responsibilities in IIAs with a view to balancing their bargaining power.

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[102] See Anderson, *supra* note 69 at 29-30; Megan Wells Sheffer, "Bilateral Investment Treaties: A Friend or Foe to Human Rights?" (2011) 39 Denv J Int'l L & Pol'y 483 at 507–520; Simons, *supra* note 83 at 18; Simons & Macklin, *ibid* at 95.

[103] Sornarajah, "Justice-Based Regime", *supra* note 93 at 464.

[104] *Public Statement on the International Investment Regime*, August 2010, online: Transnational Dispute Management <https://www.transnational-dispute-management.com/article.asp?key=1657> (accessed 14 September 2016).

[105] *Ibid*, Preamble.

Conclusion

As highlighted by the voluminous literature cited in this chapter of the dissertation, it is plain that the topic of foreign investors' responsibilities in international law is very broad and addressed from various angles. Yet, none of the aforementioned approaches and perspectives seems to be sufficient to capture all the crucial aspects that form an integral part of the evolving codification process at hand. The legal positivist approach offers thorough examinations of the extent to which foreign investors have some responsibilities in a limited number of instances, as well as developments occurring in international investment rules and principles. However, this approach tends to disregard the normative character of initiatives that fall beyond the scope of formal sources of international law and the role of non-state actors in the international lawmaking process. While these aspects are recognized in the legal pluralist approach, such studies appear to be particularly optimistic with respect to the effectiveness of these initiatives to steer the conduct of foreign investors and influence international investment law. Finally, critical perspectives contrast with the optimistic point of view of the legal pluralist approach by stressing relations of power that shape the international lawmaking process, without fully scrutinizing the complex normative developments pertaining to foreign investors' responsibilities and their interaction with international investment law. Therefore, despite the abundance of publications devoted to this topic, there is still some room for research that combines more than one approach and that offers a richer analysis of foreign investors' responsibilities in international law.[106]

It is by bearing this aspect in mind that the present dissertation aims to contribute to the ongoing discussion. In order to address crucial aspects of the evolving codification process of foreign investors' responsibilities by intergovernmental organizations, one must now turn to an approach that accounts for the normative developments emerging from

[106] It is worth noting that one can find a very limited number of recent studies that seem to combine a legal pluralist approach and a critical perspective on foreign investors' responsibilities. See Karin Buhmann, "Balancing Power Interests in Reflexive Law Public-Private CSR Schemes: The Global Compact and the EU's Multi-Stakeholder Forum on CSR" in Karin Buhmann, Lynn Roseberry & Motte Morsing, eds, *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (New York: Palgrave Macmillan, 2011) 77; Miles, *Origins*, *supra* note 69; Simons & Macklin, *supra* note 69 at Chapter 3.

intergovernmental organizations, as well as relations of power between state and non-state actors that influence the outcome of this international lawmaking process. While extensively drawing from previous works on this topic and acknowledging the contribution of each approach to the discussion, the present dissertation explicitly seeks to integrate more factors to the analysis with a view to shedding a new light on foreign investors' responsibilities under international law. The following chapters pertaining to the analytical framework and the methodology that underlie the dissertation are thus crafted in this regard.

Chapter 2 – An Interdisciplinary Analytical Framework

Introduction

Any assessment of foreign investors' responsibilities under international investment law requires an analysis that explicitly addresses normative developments and relations of power underlying the codification process occurring in intergovernmental organizations. While this ambit is easily stated, one must nonetheless elaborate a framework that provides relevant analytical tools to conduct such an examination. The present chapter demonstrates that the articulation of an interdisciplinary analytical framework drawing from international law and international relations provides a sound basis on which a richer understanding of this codification process must rely.

Defined broadly, the analytical framework on which this examination relies combines a *legal pluralist approach* with a *critical constructivist approach*. Drawing from the relevant theoretical literature in international law and international relations, this chapter integrates different theories that fit these broader approaches and explains their contribution to the present analysis. Furthermore, in line with the aim of conducting an examination that focuses on the context of neoliberal globalization in which foreign investors operate as well as specific international instruments that codify their responsibilities, the articulation of the analytical framework operates at two different levels. At the *macro-level of analysis*, this chapter sheds light on the necessary integration of legal pluralism and critical constructivism to pinpoint key factors that influence the normative integration of foreign investors' responsibilities in international investment law (1). At the *micro-level of analysis*, in order to assess whether international norms have reached the realm of legality, the analytical framework draws from an interactional theory of international law[1] that already combines legal pluralism and constructivism (2). This chapter concludes by providing a brief discussion on other interdisciplinary theories that

[1] See Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) [Brunnée & Toope, *Legitimacy and Legality*].

appear to be relevant to conduct the analysis at hand, but that suffer from limitations that impede their applications for present purposes (3).

1. Foreign Investors' Responsibilities in a Context of Neoliberal Globalization: A Macro-Level Analysis

At the macro-level, the present analysis aims to assess the normative integration of foreign investors' responsibilities in international investment law. It is posited that such a normative integration operates in a particular context of neoliberal globalization that is characterized by two contradictory trends. On the one hand, state and non-state actors remain particularly active in influencing normative developments that are occurring in intergovernmental organizations to address negative impacts that result from private investors' activities abroad.[2] This codification thus evidences a normative plurality in international law in terms of actors and issues that are addressed in the margin of international investment law. On the other hand, foreign investors exert considerable efforts to lobby states and intergovernmental organizations to orient normative developments in a way that remains as business friendly as possible.[3] An analytical framework that integrates legal pluralism (1.1) with a critical constructivist approach (1.2) thus provides relevant insights to better understand how foreign investors' responsibilities are being shaped in a context of neoliberal globalization.

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[2] See Peter T Muchlinski, *Multinational Enterprises and the Law*, 2d ed (Oxford: Oxford University Press, 2007) at 81–85 [Muchlinski, *Multinational Enterprises*]; Peter Muchlinski, "Policy Issues" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 3 at 6–10; Peter Muchlinski, "Corporate Social Responsibility" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *supra* note 5, 637 at 645–673; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 3d ed (Cambridge: Cambridge University Press, 2010) at 61.

[3] See Muchlinski, *Multinational Enterprises*, *ibid* at 82; Sornarajah, *ibid* at 62-63.

1.1 Addressing the Emergence of Normative Developments: The Relevance of a Legal Pluralist Approach

In its original form, legal pluralism highlights the coexistence of more than one legal order in the same social field.[4] Despite this straightforward purpose, the use of this analytical approach is changing. After having provided a breeding ground for analyzing intersections of Indigenous law and European law, legal pluralism now also accounts for the existence of various normative sites beyond the official legal order in non-colonized societies.[5] In both instances, legal pluralism remains driven by a clear rejection of the "ideology of legal centralism"[6] and the hierarchical normative ordering inherent to legal positivism. Furthermore, given its ability to explain the complexity of the emergence of norms, this approach is often perceived as essential to describe the normative context in a post-modern society[7] and highly relevant to analyze law as a social phenomenon.[8]

The theoretical work relating to legal pluralism within the borders of states can be transposed to analyze the development of norms in a context of neoliberal globalization. Under appellations like "transnational legal pluralism",[9] "global legal pluralism"[10] or "law

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[4] See John Griffiths, "What Is Legal Pluralism?" (1986) 24 J Legal Pluralism & Unofficial L 1 at 2; Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law & Soc'y Rev 869 at 870 [Merry, "Legal Pluralism"]; Brian Z Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27 JL & Soc'y 296 at 298 [Tamanaha, "Non-Essentialist"]; Barbara Oomen, "The Application of Socio-Legal Theories of Legal Pluralism to Understanding the Implementation and Integration of Human Rights Law" (2014) 4 Eur J Hum Rights 471 at 474.

[5] See Griffiths, *ibid* at 4; Boaventura de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14:3 JL & Soc'y 279 at 280–281 [de Sousa Santos, "Law"]; Merry, "Legal Pluralism", *ibid* at 872-873; Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" (1992) 13 Cardozo L Rev 1443 at 1443 [Teubner, "Two Faces"]; Tamanaha, "Non-Essentialist", *ibid* at 298; Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall LJ 167 at 168; Richard Nobles & David Schiff, *Observing Law Through Systems Theory* (Portland: Hart Publishing, 2013) at 88.

[6] See Griffiths, *ibid* 3. See also Merry, "Legal Pluralism", *ibid* at 874; Teubner, "Two Faces", *ibid* at 1448; Tamanaha, "Non-Essentialist", *ibid* at 299.

[7] See de Sousa Santos, "Law", *supra* note 5 at 297; Tamanaha, "Non-Essentialist", *ibid* 296-297.

[8] See Tamanaha, "Non-Essentialist", *ibid* at 296; Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 Sydney L Rev 375 at 390 [Tamanaha, "Understanding"].

[9] See generally Peer Zumbansen, "Transnational Legal Pluralism" (2010) 1 Trans'l Legal Theory 141 [Zumbansen, "Transnational Legal Pluralism"]; Peer Zumbansen, "Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism" (2012) 21 Transnat'l L & Contemp Probs 305 [Zumbansen, "Defining the Space"].

[10] See generally Paul Schiff Berman, "Global Legal Pluralism" (2007) 80 S Cal L Rev 1155 [Berman, "Global Legal Pluralism"]; Ralf Michaels, "Global Legal Pluralism" (2009) 5:1 Ann Rev L Soc Science 243; Paul Schiff Berman, "The New Legal Pluralism" (2009) 5:1 Ann Rev L Soc Science 225 [Berman, "New Legal

and globalization"[11], this transposition leads to a new "turn"[12] or "wave"[13] in legal pluralism. Echoing the core assumptions that are found at the domestic level, the reliance on a legal pluralist approach to analyze international law is grounded in the study of *norms emerging beyond the state*. It thus implies a significant departure from a conception that is limited to norms that are articulated by states entities and embedded in traditional sources of international law.[14] More specifically, a legal pluralist approach accentuates the participation of a broad range of non-state actors – *e.g.* nongovernmental organizations, multinational corporations, trade associations, Indigenous communities and networks of activists – in the elaboration of international norms that can potentially be considered as legal norms.[15]

Pluralism"]. See also Sabine Frerichs, "Law, Economy and Society in the Global Age: A Study Guide" in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (New York: Routledge, 2013) 36 at 42–43; Oomen, *supra* note 4 at 475; Paul Schiff Berman, "Non-State Lawmaking through the Lens of Global Legal Pluralism" in Michael A Helfand, ed, *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge: Cambridge University Press, 2015) 15 [Berman, "Non-State Lawmaking"].

[11] See generally Paul Schiff Berman, "From International Law to Law and Globalization" (2005) 43 Colum J Transnat'l L 485 [Berman, "From International Law"].

[12] See Gunther Teubner, "'Global Bukowina': Legal Pluralism in World Society" in Gunther Teubner, ed, *Global Law Without a State* (Aldershot: Dartmouth, 1997) 3 at 4 [Teubner, "Global Bukowina"].

[13] See Tamanaha, "Understanding", *supra* note 8 at 386. *Contra* Michaels, *supra* note 10 at 245.

[14] See Jean-Philippe Robé, "Multinational Enterprises: The Constitution of a Pluralistic Legal Order" in Gunther Teubner, ed, *Global Law Without a State* (Aldershot: Dartmouth, 1997) 45 at 49 and 54-56; Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2d ed (Markham: LexisNexis Butterworths, 2002) at 85 [de Sousa Santos, *Toward a New Legal Common Sense*]; Gunther Teubner, "Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?" in Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds, *Transnational Governance and Constitutionalism* (Portland: Hart Publishing, 2004) 3 at 16 [Teubner, "Societal Constitutionalism"]; Andreas Fischer-Lescano & Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" (2004) 25 Mich J Int'l L 999 at 1009–1012; Berman, "From International Law", *supra* note 11 at 487 and 552; Berman, "Global Legal Pluralism", *supra* note 10 at 169-170; Tamanaha, "Understanding", *ibid* at 387-390; Berman, "New Legal Pluralism", *supra* note 10 at 226; Zumbansen, "Defining the Space", *supra* note 9 at 317; Celine Tan, "Navigating New Landscapes: Socio-Legal Mapping of Plurality and Power in International Economic Law" in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (New York: Routledge, 2013) 19 at 25; André Nollkaemper, "Inside or Out: Two Types of International Legal Pluralism" in Jan Klabbers & Touko Piiparinen, eds, *Normative Pluralism and Internatinal Law: Exploring Global Governance* (Cambridge: Cambridge University Press, 2013) 94 at 115–116; Michael A Helfand, "Introduction" in Michael A Helfand, ed, *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge: Cambridge University Press, 2015) 1 at 2; Berman, "Non-State Lawmaking", *supra* note 10 at 15.

[15] See Berman, "From International Law", *ibid* at 507-508 and 538-540; Berman, "Global Legal Pluralism", *ibid* at 1175; Berman, "New Legal Pluralism" *ibid* at 229-230 and 232-233; Larry Catá Backer, "Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order" (2011) 18 Ind J Global Legal Stud 751 at 755–756 and 778-779; Tan, *ibid* at 22-23. See also generally Robé, *ibid*; Peter T Muchlinski, "'Global Bukowina' Examined: Viewing the Multinational Enterprises as a Transnational Law-making Community" in Gunther Teubner, ed,

By the same token, legal pluralism implies a reconsideration of the traditional role of the state in the international lawmaking process. Some authors thus question whether the state-law nexus is appropriate in the current governance context.[16] For example, Teubner maintains that a new body of global law mainly rises from the periphery of transnational actors, in a setting that is characterized by a lack of leadership from states.[17] Situating legal pluralism in the context of globalization, Tamanaha points out that "states have lost their capacities to guide or protect their economies, as virtually every state is now deeply enmeshed in and subject to the vagaries of hyper-competitive, free wheeling global markets".[18]

At this point, it must nevertheless be stressed that such conclusions pertaining to the loss of leadership from states in developing international rules and principles are more nuanced by other authors. In fact, this role remains a prominent theme in several legal pluralist studies.[19] According to Robé, "[t]he nation-state may thus be perceived as an obsolescent form of social order, although it is not completely obsolete and may never become so".[20] Similarly, Bianchi recognizes that "[a]lthough [law enforcement] processes are still predominantly state-centered, both the development of consistent practices of intervention by non-state actors, and the legitimacy that their actions have recently acquired, may ultimately undermine the states' monopoly in the production and

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Global Law Without a State (Aldershot: Dartmouth, 1997) 79 [Muchlinski, "'Global Bukowina'"]; Nollkaemper, *ibid* at 116; Prabhakar Singh & Sonja Kübler, "Constitutionalism and Pluralism: Two Ways of Looking at Internationalism" in Prabhakar Singh & Benoît Mayer, eds, *Critical International Law: Postrealism, Postcolonialism, and Transnationalism* (New Delhi: Oxford University Press, 2014) 304 at 305–306 and 316.

[16] See Zumbansen, "Transnational Legal Pluralism", *supra* note 9 at 174; Zumbansen, "Defining the Space", *supra* note 9 at 310; Sally Engle Merry, "International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism" in Michael A Helfand, ed, *Negotiating State and Non-State Law: The Challenge of Global and Local Pluralism* (Cambridge: Cambridge University Press, 2015) 59 at 62 [Merry, "International Law and Sociolegal Scholarship"].

[17] Teubner, "Global Bukowina", *supra* note 12 at 4-5. See also Gunther Teubner, "Breaking Frames: Economic Globalization and the Emergence of Lex Mercatoria" (2002) 5 Eur J Soc Theory 199 at 200 and 206 [Teubner, "Breaking Fames"]; Teubner, "Societal Constitutionalism", *supra* note 14 at 7-8.

[18] Tamanaha, "Understanding", *supra* note 8 at 386.

[19] See Berman, "Global Legal Pluralism", *supra* note 10 at 1177; Michaels, *supra* note 10 at 251; Backer, *supra* note 15 at 778-779; Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 5; Tan, *supra* note 14 at 25; Berman, "Non-State Lawmaking", *supra* note 10 at 15-16 and 18.

[20] Robé, *supra* note 14 at 68.

implementation of international norms".[21] Instead of totally neglecting the role of the state in elaborating international norms, these nuances suggest that the pluralization of actors involved in the international lawmaking process requires an analytical framework that accounts for the participation of non-state actors in developing these norms in addition to the role of the state.[22]

Another feature of the international legal pluralist approach is the importance granted to the development of a *plurality of normative orders*. Given the active participation of state and non-state actors in the international lawmaking process, one witnesses the emergence of various bodies of norms that are tied to specific areas of regulation, without being fully coordinated one with another.[23] Grounding their research in systems theory,[24] some authors thus maintain that each of these international normative orders is self-organized through ongoing globalized processes.[25] However, it must be noted

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[21] Andrea Bianchi, "Globalization of Human Rights: The Role of Non-state Actors" in Gunther Teubner, ed, *Global Law Without a State* (Aldershot: Dartmouth, 1997) 179 at 180.

[22] However, it must be noted that a recognition of the pluralization of actors involved in the international lawmaking process does not necessarily lead to a recognition that international legal norms can exist beyond the formal sources of international law. According to d'Aspremont, while states cannot be perceived as the most important norm-setters on the international plane anymore, he maintains that they still "hold a grip on norm-making processes at the international level". See Jean d' Aspremont, "From a Pluralization of International Norm-making Processes to a Pluralization of the Concept of International Law" in Joost Pauwelyn, Ramses A Wessel & Jan Wouters, eds, *Informal International Lawmaking* (Oxford: Oxford University Press, 2012) 185 at 185 [d'Aspremont, "From a Pluralization"]. See also Jean d'Aspremont, "Cognitive Conflicts and the Making of International Law: From Empirical Concord to Conceptual Discord in Legal Scholarship" (2013) 46 Vand J Transnat'l L 1119 at 1123–1129. Most importantly, this author warns against a pluralization of the concept of international law itself. According to him, "international legal scholars studying the normative activities taking place outside the traditional remit of international law are often induced to loosen their concept of international law with a view to broadening the span of their discipline" (d'Aspremont, "From a Pluralization", *ibid*, at 186-187).

[23] See Robé, *supra* note 14 at 70; de Sousa Santos, *Toward a New Legal Common Sense*, *supra* note 14 at 89; Berman, "New Legal Pluralism", *supra* note 10 at 238; Fischer-Lescano & Teubner, *supra* note 14 at 1009; Teubner, "Societal Constitutionalism", *supra* note 14 at 8; Tamanaha, "Understanding", *supra* note 8 at 387; Jan Klabbers & Touko Piiparinen, "Introduction to the Volume" in Jan Klabbers & Touko Piiparinen, eds, *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge: Cambridge University Press, 2013) 1 at 6 [Klabbers & Piiparinen, "Introduction"]; Jan Klabbers & Touko Piiparinen, "Normative Pluralism: An Exploration" in Jan Klabbers & Touko Piiparinen, eds, *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge: Cambridge University Press, 2013) 13 at 14 and 21 [Klabbers & Piiparinen, "Normative Pluralism"]; Helfand, *supra* note 14 at 2.

[24] A discussion on systems theory is provided in section 3.1.

[25] See e.g. Teubner, "Global Bukowina", *supra* note 12 at 4; Julia Black, "Constitutionalising Self-Regulation" (1996) 59 Mod L Rev 24 at 44–45; Fischer-Lescano & Teubner, *supra* note 14 at 1008-1009; Teubner, "Societal Constitutionalism", *supra* note 14 at 8; Backer, *supra* note 15 at 760; Cecilia Juliana Flores Elizondo, "Reflexive International Economic Law: Balancing Economic and Social Goals in the Construction of Law" in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (New York: Routledge, 2013) 118 at 119.

that many studies of international norms elaborated by non-state actors share an emphasis on the development of a plurality of normative orders without specifically adopting an approach that is consistent with systems theory.[26] Rather than advocating for a strict bottom-up perspective of the international lawmaking process that highlights the emergence of various local laws, a legal pluralist approach that does not rely on a systems theory can thus primarily focus on the "internal differentiation of global law".[27] Despite this divergence within the same broader approach, suffice it to say that legal pluralists generally understand international law as including a distinction between areas that are economic in nature – *e.g.* trade, investment and finance – and others that relate to wider social concerns – *e.g.* human rights, environmental protection and labour rights.[28]

Strongly related to the emergence of various normative orders, another element that characterizes an international legal pluralist approach is the general lack of hierarchy and coordination between such normative orders. It is on this point that the idea of *fragmentation* becomes relevant. Amidst the involvement of numerous non-state actors and the lack of leadership from states, an unavoidable form of inconsistency is expected in the development of international norms.[29] According to Koskenniemi and Leino, "it may be accepted that political communities have become more heterogeneous, their boundaries much more porous, than assumed by the received image of sovereignty and the international order, and that *the norms they express are fragmentary, discontinuous, often* ad hoc *and without definite hierarchical relationship*".[30] Such developments even led the International Law Commission to address the question of fragmentation and to characterize it as the emergence of specialized and relatively autonomous spheres of social action and structures.[31] While some international legal authors take issue with a view that depicts

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[26] See Michaels, *supra* note 10 at 247.

[27] See *ibid* at 247.

[28] See Flores Elizondo, *supra* note 25 at 120.

[29] See Teubner, "Global Bukowina", *supra* note 12 at 5; Tamanaha, "Understanding", *supra* note 8 at 387; Berman, "Global Legal Pluralism", *supra* note 10 at 1192; Michaels, *supra* note 10 at 249; Berman, "New Legal Pluralism", *supra* note 10 at 238; Flores Elizondo, *ibid* at 120; Klabbers & Piiparinen, "Introduction", *supra* note 23 at 5-6.

[30] Martti Koskenniemi & Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15 Leiden J In't L 553 at 557–558 [emphasis added].

[31] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 2006, UN Doc A/CN.4/L.682 at para 8.

international law as being fragmented,[32] such concerns clearly fall beyond the scope of this dissertation. Rather than suggesting that fragmentation is a plague that necessarily impedes the functioning of international law, suffice it to say that an international legal pluralist approach suggests that a weak normative compatibility between various normative orders often appears as the only achievable situation.[33]

Yet, while providing a rationale to explain the weak normative compatibility between different normative orders, an international legal pluralist approach only weakly accounts for the profound roots of this phenomenon. In general, some authors point out that the lack of normative integration between various areas of international law results from different normative commitments held by various actors involved in the international lawmaking process.[34] For example, Koskenniemi and Leino perceive this fragmentation as being an expression of political pluralism at the international level.[35] De Sousa Santos argues that the evolution of law's potential is strongly related to the political mobilization of social competing forces.[36] Seeking to identify an explanation that reaches beyond a "political foundation for legal norms collision",[37] Fischer-Lescano and Teubner address this fragmentation by highlighting deeper contradictions between normative orders. According to these authors, "the fragmentation of law is the epiphenomenon of real-world constitutional conflicts, as legal fragmentation is – mediated via autonomous legal regimes – a legal reproduction of collisions between the diverse rationalities within global society".[38]

Although such accounts correctly suggest that weak normative compatibility results from diverging interests and more profound rationalities between actors involved in the international lawmaking process, legal pluralism seems to assume that these interests are

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[32] See e.g. William W Burke-White, "International Legal Pluralism" (2004) 25 Mich J Int'l L 963.

[33] See Fischer-Lescano & Teubner, *supra* note 14 at 1004.

[34] See Koskenniemi & Leino, *supra* note 30 at 561; Fischer-Lescano & Teubner, *ibid* at 1000-1004; Tamanaha, "Understanding", *supra* note 8 at 400; Berman, "New Legal Pluralism", *supra* note 10 at 238.

[35] Koskenniemi & Leino, *ibid* at 561.

[36] De Sousa Santos, "Law", *supra* note 5 at 294; de Sousa Santos, *Toward a New Legal Common Sense*, *supra* note 14 at 85.

[37] Fischer-Lescano & Teubner, *supra* note 14 1003.

[38] *Ibid* at 1017.

equally represented in the various conflicting normative orders. Of course, one can identify some examples in which legal pluralists openly acknowledge the power of some actors to shape international norms to ensure that they conform their own interests.[39] Analyses that specifically focus on the active role of multinational enterprises in the international lawmaking process are prompt to emphasize such relations of power.[40] It must nonetheless be underscored that the international legal pluralist approach generally avoids explaining which interests are ultimately served by this weak normative integration.

In sum, the transposition of the legal pluralist approach to analyze international law pinpoints the crucial role played by non-state actors, the appearance of a plurality of normative orders and the inevitable weak compatibility between these normative orders. Against this background, legal pluralism seems to have the potential to conveniently illuminate the context in which initiatives are being developed by state and non-state actors in intergovernmental organizations to address foreign investors' responsibilities in the areas of human rights, environmental protection, labour rights and corruption. However, despite the capacity of this analytical approach to pinpoint that such normative orders can be incompatible with international investment rules and principles, the most common explanation that is identified to explain this outcome depends upon diverging interests and rationalities of actors involved. With a view to providing a more complete picture of the weak normative integration of foreign investors' responsibilities in international investment law, one must supplement the legal pluralist approach with a critical constructivist component that accounts for the role of powerful actors that shape these normative developments.

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[39] See de Sousa Santos, *Toward a New Legal Common Sense*, *supra* note 14 at 98; Tamanaha, "Understanding", *supra* note 8 at 402; Oomen, *supra* note 4 at 489-490; Klabbers & Piiparinen, "Normative Pluralism", *supra* note 23 at 28-29.

[40] See Robé, *supra* note 14 at 70-71; Muchlinski, "'Global Bukowina'", *supra* note 15 at 80 and 85-101; Adelle Blackett, "Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct" (2001) 8 Ind J Global Legal Stud 401 at 430–431; Klabbers & Piiparinen, "Normative Pluralism", *ibid* at 29.

1.2 Taking Relations of Power Seriously: The Inclusion of a Critical Constructivist Approach

Although taking into account the development of various types of norms that are initiated by state and non-state actors is a key element to analyze the problematic at hand, the articulation of the analytical framework would be incomplete without acknowledging that these actors do not hold the same level of power in international relations. One must thus keep in mind that normative transformations occurring in international economic law result from contests of power between actors seeking to ensure that regulatory changes remain consistent with their own goals.[41] Beyond the mere recognition that diverging interests and rationalities are at play, international legal scholarship must seek to unmask power dynamics that are inherent in normative developments.[42] As mentioned by Kurki and Sinclair, "[l]aw *is* rules and norms, but *also* a social and human institution, an enshrinement of other forms of power and a form of power in itself".[43]

Of course, one could be tempted to draw from the discipline of international law and supplement the legal pluralist framework provided above with a critical international law approach.[44] Such a critical approach primarily aims to identify relations of power reproduced in international norms and institutions.[45] However, it is here submitted that

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[41] See John Braithwaite & Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) at 19; David Schneiderman, "Power and Production in Global Legal Pluralism: An International Political Economy Approach" in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (New York: Routledge, 2013) 98 at 99 [Schneiderman, "Power and Production"]; Tan, *supra* note 14 at 28-30.

[42] See generally Tan, *ibid*; Schneiderman, "Power and Production", *ibid*. See also Milja Kurki & Adriana Sinclair, "Hidden in Plain Sight: Constructivist Treatment of Social Context and its Limitations" (2010) 47 Int'l Politics 1 at 16-18; Merry, "International Law and Sociolegal Scholarship", *supra* note 16 at 61.

[43] Kurki & Sinclair, *ibid* at 17 [emphasis in the original].

[44] See generally Martti Koskenniemi, "The Politics of International Law" (1990) 1 Eur J Int Law 4; Rémi Bachand, "Pour une théorie critique en droit international" in Rémi Bachand, ed, *Théories critiques et droit international* (Brussels: Bruylant, 2013) 115; Sébastien Jodoin & Katherine Lofts, "What's Critical about Critical International Law? Reflections on the Emancipatory Potential of International Legal Scholarship" in Prabhakar Singh & Benoît Mayer, eds, *Critical International Law: Postrealism, Postcolonialism, and Transnationalism* (New Delhi: Oxford University Press, 2014) 326. See also the discussion on the relevance of transnationalism as a critical international law approach to analyze private capital in Prabhakar Singh & Benoît Mayer, "Introduction: Thinking International Law Critically - One Attitude, Three Perspectives" in Prabhakar Singh & Benoît Mayer, eds, *Critical International Law: Postrealism, Postcolonialism, and Transnationalism* (New Delhi: Oxford University Press, 2014) 1 at 19–21.

[45] See Bachand, *ibid* at 127; Jodoin & Lofts, *ibid* at 326.

relations of power between international actors are better analyzed through a discipline whose primary object of study is the behavior of actors rather than the content and the application of international rules.[46] The inclusion of a critical constructivist approach from international relations theory allows a consideration of the behavior and interests of international actors involved in the international lawmaking process, thus providing a more complete account of the normative integration of foreign investors' responsibilities in international investment law.

While mainstream constructivism often appears as the most appropriate international relations theory to account for the influence of international norms in world politics,[47] three key characteristics of this approach are worth noting for present purposes. First, although some constructivists maintain that states are the dominant subjects in international relations,[48] most modern studies conducted according to this approach scrutinize the *influence of non-state actors* in world politics.[49] Second, instead of focusing on material forces as the fundamental fact about society, constructivists grant an extensive importance to *ideas, norms, knowledge and culture*.[50] Third, the constructivist ontology

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[46] See section 2 of the Introduction.

[47] See Anthony Clark Arend, "Do Legal Rules Matter? International Law and International Politics" (1998) 38 Va J Int'l L 107 at 129–133; Adriana Sinclair, *International Relations Theory and International Law: A Critical Approach* (Cambridge: Cambridge University Press, 2010) at 1.

[48] See e.g. Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999) at 8–10.

[49] See Oona Anne Hathaway & Harold Hongju Koh, *Foundations of International Law and Politics* (New York: Foundation Press, 2005) at 132 and 134; Sinclair, *supra* note 47 at 144; Michael Webb, "Defining the Boundaries of Legitimate State Practice: Norms, Transnational Actors and the OECD's Project on Harmful Tax Competition" (2004) 11 Rev Int'l Pol Ecn 787 at 792; Emanuel Adler, "Constructivism in International Relations: Sources, Contributions and Debates" in Walter Carlsnaes, Thomas Risse & Beth A Simmons, eds, *Handbook of International Relations*, 2d ed (London: Sage Publications, 2013) 112 at 133 [Adler, "Constructivism in International Relations"]. See also generally Matthias Hofferberth et al, "Multinational Enterprises as 'Social Actors'—Constructivist Explanations for Corporate Social Responsibility" (2011) 25 Global Soc 205.

[50] See Wendt, *supra* note 48 at 23-24; Martha Finnemore & Kathryn Sikkink, "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics" (2001) 4:1 Ann Rev Pol Science 391 at 392-393 [Finnemore & Sikkink, "Taking Stock"]; Webb, *ibid* at 791; James Fearon & Alexander Wendt, "Rationalism v. Constructivism: A Skeptical View" in Walter Carlsnaes, Thomas Risse & Beth A Simmons, eds, *Handbook of International Relations* (Thousand Oaks: Sage Publications, 2003) 52 at 57; Jutta Brunnée & Stephen J Toope, "Constructivism and International Law" in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013) 119 at 121 [Brunnée & Toope, "Constructivism and International Law"]; Adler, "Constructivism in International Relations", *ibid* at 123.

focuses on the *mutual constitution of agents and social structures*.[51] On the one hand, constructivists assume that international actors hold a prominent role in shaping international norms through social interaction and practice.[52] As underscored by Wendt, "structure exists, has effects, and evolves only because of agents and their practices".[53] On the other hand, while other international relations approaches consider interests and preferences as given, constructivism explicitly acknowledges the dynamic elaboration of the identity and interests of international actors through international norms.[54] Without pretending that the latter directly cause behavior, constructivists consider these norms as acting upon actors' identities and indirectly informing their actions.[55] To put it differently, constructivism provides important insights to analyze the participation of state and non-state actors in the elaboration of international norms, as well as the extent to which these norms influence the identities and the interests of these actors.

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[51] See Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996) at 25 and 129-130 [Finnemore, *National Interests*]; Arend, *supra* note 47 at 125 and 129; Wendt, *supra* note 48 at Chapter 4; Jutta Brunnée & Stephen J Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum J Transnat'l L 19 at 32 [Brunnée & Toope, "International Law and Constructivism"]; Finnemore & Sikkink, "Taking Stock", *supra* note 50 at 393; Fearon & Wendt, *ibid* at 58; Christian Reus-Smit, "Introduction" in Christian Reus-Smit, ed, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) at 3 [Reus-Smit, "Introduction"]; Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (New York: Routledge, 2005) at 4 and 11-12 [Adler, *Communitarian International Relations*]; Hathaway & Koh, *supra* note 49 at 111; Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 14; Adler, "Constructivism in International Relations", *ibid* at 121; Hélène Mayrand, "L'apport mutuel entre constructivism et théories critiques" in Rémi Bachand, ed, *Théories critiques et droit international* (Brussels: Bruylant, 2013) 147 at 152.

[52] See Arend, *ibid* at 127-128; Finnemore, *National Interests*, *ibid* at 24-25; Brunnée & Toope, "International Law and Constructivism", *ibid* at 28; Reus-Smit, "Introduction", *ibid* at 3; Brunnée & Toope, "Constructivism and International Law", *supra* note 50 at 129.

[53] Wendt, *supra* note note 48 at 185.

[54] See Finnemore, *National Interests*, *supra* note 51 at 14-15; Arend, *supra* note 47 at 130-133; Wendt, *ibid* at 20 and 171-178; John Gerard Ruggie, "What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge" (1998) 52 Int'l Organization 855 at 862–864; Brunnée & Toope, "International Law and Constructivism", *supra* note 51 at 20; Fearon & Wendt, *supra* note 50 at 57; Reus-Smit, "Introduction", *supra* note 51 at 21-22; Christian Reus-Smit, "Society, Power, and Ethics" in Christian Reus-Smit, ed, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) at 273; Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 12; Jutta Brunnée & Stephen J Toope, "Interactional International Law: An Introduction" (2011) 3 Int'l Theory 307 at 308 [Brunnée & Toope, "Interactional International Law"]; Hofferberth et al, *supra* note 49 at 211; Adler, "Constructivism in International Relations", *supra* note 49 at 123; Brunnée & Toope, "Constructivism and International Law", *supra* note 50 at 121.

[55] See Friedrich Kratochwil & John Gerard Ruggie, "International Organization: A State of the Art on an Art of the State" (1986) 40 Int'l Organization 753 at 767; Arend, *ibid* at 125; Finnemore, *National Interests*, *ibid* at 27; Wendt, *ibid* at 20; Brunnée & Toope, "International Law and Constructivism", *ibid* at 38; Reus-Smit, "Introduction", *ibid* at 22; Brunnée & Toope, "Constructivism and International Law", *ibid* at 124.

Yet, mainstream constructivism is sometimes depicted as putting forward a perspective of social constructions that is too consensual and that obscures the extent to which actors' interests are not equally represented.[56] Of course, one must recall that constructivism has its intellectual roots in critical social theory.[57] As emphasized by Cox, critical theory "does not take institutions and social power relations for granted but calls them into question by concerning itself with their origins and how they might be in the process of changing".[58] Taken in a broad sense, critical theory thus departs from a state-centric perspective by adopting a pluralist and socially constructed view of reality that sits well with constructivism.[59] However, an explicit consideration of inherent power relations beyond the aspects that are highlighted by mainstream constructivism is best pointed out by the addition of an openly critical component to this approach. Therefore, by granting a less autonomous role to ideas and norms from power in shaping social interactions, critical constructivism becomes a different strand that is premised on the assumption that constructions of reality "reflect, enact and reify relations of power".[60] In addition to stressing the need to depart from a state centric view of international relations,[61] such a critical approach offers a prime consideration of the influence of most powerful actors' interests in the mutual constitution of agents and social structures.[62]

Without being explicitly labeled as related to a critical constructivist approach, works of authors adopting a political economy approach that specifically focuses on the role of interests in shaping legal rules, as well as the impact that international law has on

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[56] See Sinclair, *supra* note 47 at 25; Webb, *supra* note 49 at 792-793. See also generally Kurki & Sinclair, *supra* note 42.

[57] See Richard Price & Christian Reus-Smit, "Dangerous Liaisons? Critical International Theory and Constructivism" (1998) 4:3 Eur J Int Law 259 at 266–270; Arend, *supra* note 47 at 125; Mayrand, *supra* note 51 at 155-157.

[58] Robert W Cox, "Social Forces, States, and World Orders: Beyond International Relations Theory (1981)" in Robert W Cox & Timothy J Sinclair, eds, *Approaches to World Order* (Cambridge: Cambridge University Press, 1996) 85 at 89 [emphasis added].

[59] See Price & Reus-Smit, *supra* note 57 at 261; Thierry Lapointe & Rémi Bachand, "Introduction - Le décloisonnement du droit international et des relations internationales : l'apport des approches critiques" (2008) 39:1 Études internationales 5 at 10.

[60] See Finemore & Sikkink, "Taking Stock", *supra* note 50 at 398.

[61] See Robyn Eckersley, "Soft Law, Hard Politics, and the Climate Change Treaty" in Christian Reus-Smit, ed, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) at 94.

[62] See Finemore & Sikkink, "Taking Stock", *supra* note 50 at 398; Eckersley, *ibid* at 80-82.

regulating relations of power between actors in a given field, remain highly relevant for present purposes.[63] For example, by avowedly encouraging a critical and social examination of international political economy,[64] investigations that analyze the emergence of *private authority in global governance* are grounded in the "pluralization" of sources and subjects of legal regulation.[65] In a way that remains in line with the mutual constitution of agents and structures on the constructivist approach, the concept of private authority embraces the socially constructed character of international law.[66] Beyond the *de facto* influence of non-state actors in shaping the regulatory framework that is formally established by states, this concept highlights that private actors are perceived by the governed as holding a certain form of legitimate authority.[67] Restated, private authority suggests that norms are increasingly elaborated by non-state actors and that this involvement can ultimately influence the interests and the behavior of actors that are concerned by these norms.

Most importantly, investigations of private authority explicitly consider political contestations occurring between actors involved in the international lawmaking process.[68]

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[63] See Lapointe & Bachand, *supra* note 59 at 11; Edward S Cohen & A Claire Cutler, "Law, Contestation and Power in the Global Political Economy: An Introduction" (2013) 3 Oñati S-L Series 611 at 616.

[64] See A Claire Cutler, "The Privatization of Authority in the Global Political Economy" in Gary Teeple & Stephen McBride, eds, *Relations of Global Power: Neoliberal Order and Disorder* (Toronto: University of Toronto Press, 2011) 41 at 41–42 [Cutler, "Privatization of Authority"].

[65] See Sol Picciotto, "Introduction: What Rules for the World Economy?" in Sol Picciotto & Ruth Mayne, eds, *Regulating International Business: Beyond Liberalization* (New York: St. Martin's Press, 1999) 1 at 9; Robert O'Brien, "NGOs, Global Civil Society and Global Economic Regulation" in Sol Picciotto & Ruth Mayne, eds, *Regulating International Business: Beyond Liberalization* (New York: St. Martin's Press, 1999) 257 at 261; A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003) at 2 and 21-24 [Cutler, *Private Power*]; Rodney Bruce Hall & Thomas J Biersteker, "The Emergence of Private Authority in the International System" in Rodney Bruce Hall & Thomas J Biersteker, eds, *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2003) 3 at 4; A Claire Cutler, "Constituting Capitalism: Corporations, Law, and Private Transnational Governance" (2009) 5 STAIR 99 at 100 and 102 [Cutler, "Constituting Capitalism"].

[66] See Cutler, *Private Power*, *ibid* at 103.

[67] See A Claire Cutler, "Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy" (2001) 27:2 Rev Int'l Stud 133 at 137 and 143-144 [Cutler, "Critical Reflections"]; A Claire Cutler, "Law in the Global Polity" in Morten Ougaard & Richard Higgott, eds, *Towards a Global Polity* (New York: Routledge, 2002) 58 at 73 [Cutler, "Law in the Global Polity"]; Cutler, *Private Power*, *ibid* at 21; Hall & Biersteker, *supra* note 65 at 4-5; A Claire Cutler, "Private International Regime and Interfirm Cooperation" in Rodney Bruce Hall & Thomas J Biersteker, eds, *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2003) 23 at 33 [Cutler, "Private International Regime"].

[68] See Cutler, "Privatization of Authority", *supra* note 64 at 48.

The concept of private authority thus posits that the increasing role of private actors in this process serves the most powerful actors' interests and transforms relations of power in the global political economy.[69] As summarized by Cutler:

> Private authority is best regarded as a mode of regulation that is specific to global political economy under conditions of late capitalism and postmodernity. Late capitalist regulation is reflected in the increasing recourse to legal forms *to facilitate the displacement of welfare states by competition states through liberalization, deregulation, and privatization*; … and in the *soft re-regulation of labour relations, consumer protection, environmental practices, and corporate ethics*.[70]

This increasing private authority in global governance is also discussed as one of the main themes of the literature on *new constitutionalism*.[71] While the latter broadly aims to account for the influence of neoliberalism in shaping international institutions and in constraining regulatory measures that can be adopted by states,[72] some authors seek to "reveal and question the purposes and interests served by new constitutionalism as a political and social project".[73] Echoing concerns raised in investigations of private

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[69] See Cutler, "Critical Reflections", *supra* note 67 at 148; Cutler, *Private Power*, *supra* note 65 at 2; Cutler, "Private International Regime", *supra* note 67 at 31; Cutler, "Constituting Capitalism", *supra* note 65 at 102; Cutler, "Privatization of Authority", *ibid*.

[70] Cutler, "Privatization of Authority", *ibid* 51 [emphasis added]. See also Cutler, "Law in the Global Polity", *supra* note 67 at 71-72; Cutler, *Private Power*, *ibid* at 25-32; ; Cutler, "Private International Regime", *ibid* at 35.

[71] See Cutler, *Private Power*, *ibid* at 12; Stephen McBride, "The New Constitutionalism: International and Private Rule in the New Global Order" in Gary Teeple & Stephen McBride, eds, *Relations of Global Power: Neoliberal Order and Disorder* (Toronto: University of Toronto Press, 2011) 19 at 21; Stephen Gill & A Claire Cutler, "New Constitutionalism and World Order: General Introduction" in Stephen Gill & A Claire Cutler, eds, *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014) 1 at 7; A Claire Cutler, "New Constitutionalism and the Commodity Form of Global Capitalism" in Stephen Gill & A Claire Cutler, eds, *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014) 45 at 45–46. For analyses that specifically address international investment law, see David Schneiderman, "Investment Rules and the New Constitutionalism" (2000) 25 Law & Soc Inquiry 757 [Schneiderman, "Investment Rules"]; Schneiderman, "Power and Production", *supra* note 41 at 114-115; David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (New York: Palgrave Macmillan, 2013) at 15–17 [Schneiderman, *Resisting*]; David Schneiderman, "How to Govern Differently: Neo-Liberalism, New Constitutionalism and International Investment Law" in Stephen Gill & A Claire Cutler, eds, *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014) 165.

[72] See Schneiderman, "Investment Rules", *ibid* at 758-759; Stephen Gill, *Power and Resistance in the New World Order*, 2d ed (New York: Palgrave Macmillan, 2008) at 138–139 and 175; McBride, *ibid* at 21 and 35; Schneiderman, "Power and Production", *ibid* at 114; Schneiderman, *Resisting*, *ibid* at 15-16; Stephen Gill, "Market Civilization, New Constitutionalisim and World Order" in Stephen Gill & A Claire Cutler, eds, *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014) 29 at 38 [Gill, "Market Civilization"].

[73] See Gill & Cutler, *supra* note 71 at 3.

authority in global governance, this critical perspective argues that laws and mechanisms of governance reflect "a specific complex of dominant forms of political agency, as well as a set of actors, practices and forces of political and civil society – particularly large corporations".[74] In line with the aforementioned "soft re-regulation" identified by Cutler, new constitutionalism thus highlights the dialectic existence of "hard" rights for foreign investors and "soft" responsibilities that relate to their activities abroad.[75] Given the increased participation of powerful actors in domains that were traditionally addressed by public authority, this literature thus predicts that the influence of private actors in the international lawmaking process is likely to prevent the elaboration of initiatives that go against their interests.

Ultimately, the inclusion of a critical constructivist approach in the present analytical framework suggests that the international lawmaking process in a context of neoliberal globalization is extensively guided by the most powerful actors' interests. The participation of state and non-state actors in the social construction of international legal structures reproduces relations of power existing between these actors. While a legal pluralist approach allows a consideration of conflicting normative developments that can be explained by the presence of diverging interests between states and non-state actors, critical constructivism pinpoints that this weak normative compatibility is inevitably consistent with the interests of the most powerful actors involved in the international lawmaking process. When applying these premises to the analysis of the codification of foreign investors' responsibilities at a macro-level of analysis, this critical constructivist approach suggests that the integration of such responsibilities in international investment law is subject to the most powerful actors' interests that are participating in the lawmaking process. The integration of legal pluralism and critical constructivism at the macro-level of analysis thus ensures a consideration of normative developments that does not overlook underlying relations of power.

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[74] See *ibid* at 4. See also Gill, "Market Civilization", *supra* note 72 at 35.

[75] See Gill & Cutler, *supra* note 71 at 13 and 16-17.

2. International Instruments to Codify Foreign Investors' Responsibilities: A Micro-Level Analysis

In addition to scrutinizing the normative integration of foreign investors' responsibilities in international investment law, this dissertation aims to provide a richer account of the elaboration and the implementation of international instruments under the auspices of intergovernmental organizations to address the general lack of accountability of foreign investors under international law. While the analysis conducted at the macro-level partly relies on a legal pluralist approach that openly acknowledges the emergence of legal norms from a plurality of sources and covering various areas, some authors warn that legal pluralists are often "unable to identify a clear line to separate legal from non-legal normative orders".[76] Bearing this concern in mind, this part of the analytical framework seeks to provide relevant tools to conduct such an examination.

At a micro-level of analysis, this dissertation seeks to assess whether international instruments codifying foreign investors' responsibilities have resulted in mere social norms or genuine legal norms. More specifically, it is argued below that this analysis can be conducted by drawing from the interactional theory of international law developed by Brunnée and Toope.[77] By assuming that law is a process under construction, the interactional theory stresses that the distinctiveness of law rests in a sense of obligation that is deemed to emerge when social norms are grounded in shared understandings, respect a set of criteria of legality and are applied according to a practice of legality.[78] Given that this theory relies on the core assumptions of legal pluralism (2.1) and (critical) constructivism (2.2), it remains entirely consistent with the interdisciplinary character of the present analytical framework.

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[76] See Tamanaha, "Understanding", *supra* note 8 at 393.

[77] Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1.

[78] See Brunnée & Toope, "International Law and Constructivism", *supra* note 51 at 47; Brunnée & Toope, *Legitimacy and Legality*, *ibid* at 15 and 23; Brunnée & Toope, "Interactional International Law", *supra* note 54 at 309; Brunnée & Toope, "Constructivism and International Law", *supra* note 50 at 134-35.

2.1 The Interactional Theory of International Law and Legal Pluralism

In order to analyze whether specific international initiatives can be considered as legal norms, the interactional theory of international law is deeply anchored in a legal pluralist approach. While legal pluralism avowedly acknowledges that the elaboration of norms is not limited to the domain of the state, the interactional theory is premised on the assumption that international law is made by a variety of non-state and state actors – although the latter are perceived as being still dominant.[79] Echoing the plurality of normative orders that characterizes the legal pluralist approach, the interactional theory also explicitly rejects an account of international law that is limited to the doctrine of sources. Without dismissing the importance of state consent and formal sources of international law,[80] this theory contends that "the formal indicator of a rule is not necessarily co-extensive with the legality and practice that generates obligation".[81] While acknowledging that international norms can be embedded in international treaties and customary international law, the interactional theory thus specifies that legal norms can emerge beyond the formal sources of international law. To be clear, nothing suggests that all legal norms that meet the components identified by the interactional theory can become a rule applied in adjudicative international decision-making.[82] Rather, what is emphasized is that such legal norms can nevertheless create a sense of obligation and guide the conduct of international actors regardless of their relationship with formal sources of international law.

It is against this broader and more nuanced legal pluralist background that the interactional theory of international law provides aspects that must be met by a norm in order to create a sense of obligation and to be considered as an integral part of the realm of legality. More specifically, Brunnée and Toope draw on eight *criteria of legality* that were

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[79] See Brunnée & Toope, *Legitimacy and Legality*, *ibid* at 5 and 45.

[80] See Brunnée & Toope, *Legitimacy and Legality*, *ibid* at 7; Jutta Brunnée, "The Sources of International Environmental Law: Interactional Law" in Samantha Besson & Jean d'Aspremont, eds, *Oxford Handbook on the Sources of International Law* (forthcoming).

[81] See Brunnée & Toope, *Legitimacy and Legality*, *ibid* at 8. See also Brunnée & Toope, *Legitimacy and Legality*, *ibid* at 46-52; Brunnée & Toope, "Interactional International Law", *supra* note 54 at 307.

[82] See Brunnée & Toope, *Legitimacy and Legality*, *ibid* at 51.

initially developed by Lon L. Fuller in *The Morality of Law*.[83] Instead of focusing on the forms in which they are presented, the interactional theory posits that adherence to these criteria – *i.e.* promulgation, generality, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy and congruence between rules and official action – more accurately distinguishes legal norms from other types of norms.[84] While Fuller submitted that "[a] total failure in any one of these eight criteria … results in something that is not properly called a legal system at all",[85] the interactional theory maintains that adherence to these criteria ensures that international norms are perceived as legitimate and that they tend to generate a sense of obligation to act accordingly.[86]

Given that the analysis provided in the upcoming chapters substantially relies on these criteria of legality, a more detailed discussion is developed here. On the one hand, some of these criteria refer to positive requirements that must be met. With respect to *promulgation*, international legal norms must be accessible to the public.[87] Although it remains insufficient to create a legal norm, the inclusion of a norm in a formal source of international law plays a considerable role in suggesting that it is considered as such by actors involved in the international lawmaking process.[88] Legal norms must also be *general* to the extent that they apply equally to a specific kind of actors of the international community.[89] Considered as one of the most important aspect of legality, *clarity* ensures that international actors are able to understand what is permitted, prohibited or required by

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[83] Lon L Fuller, *The Morality of Law*, Revised ed (New Haven: Yale University Press, 1969) at 41–91. Interestingly, despite the adoption of an approach avowedly grounded in legal positivism, Schultz also relies on these criteria of legality as "express standards of regulative quality". See Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford: Oxford University Press, 2014) at 159 and 167-184.

[84] See Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 6 and 26.

[85] Fuller, *supra* note 83 at 39.

[86] See Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 30; Brunnée & Toope, "Interactional International Law", *supra* note 54 at 312.

[87] See Brunnée & Toope, *Legitimacy and Legality*, *ibid* at 26.

[88] See *ibid* at 46 and 279.

[89] See *ibid* at 178.

the norm.[90] Furthermore, the criterion of *constancy* requires that international norms must remain relatively stable over time.[91]

On the other hand, these criteria of legality also include some aspects that must be avoided in order to contribute to the emergence of a sense of obligation. In this regard, requiring that norms be *non-retroactive* aims to ensure that actors can take them into account in their decision-making processes.[92] In elaborating these criteria of legality, Fuller unequivocally argued that the adoption of retroactive legislation leads to a problem of due process.[93] Moreover, international legal norms must *not ask the impossible* from international actors and must enunciate requirements that are achievable in the limits of their activities.[94] These criteria of legality also include the *absence of contradiction* in the formulation of the norm. In other words, international legal norms should not require or permit actors to do something and prohibit a similar action at the same time.[95]

A considerable importance must be granted to the last criterion of legality that is included in the interactional theory of international law, namely *congruence between rules and official action*. Fuller himself considered this criterion as the most complex of all the criteria of legality.[96] When analyzing the extent to which norms are designed to ensure such congruence, one must thus examine procedural devices that are elaborated to implement them.[97] This inevitably leads to the role of sanctions and enforcement mechanisms in international law. However, Brunnée and Toope provide a more nuanced account of this role in their interactional theory of international law:

> [I]nteractionalism also illustrates why the *absence of sanctions can nonetheless amount to a weakness of international law*: not because enforcement is needed to compel actors, but because failure to enforce can be indicative of a *lack of 'congruence' between existing norms and international practice*. So long as legal interactions maintain that congruence, there will be little need for sanctions, be they social or material in nature. But when significant instances of non-

[90] See Fuller, *supra* note 83 at 63; Brunnée & Toope, *Legitimacy and Legality*, *ibid* at 26.

[91] See Brunnée & Toope, *Legitimacy and Legality*, *ibid* at 26.

[92] See *ibid* at 26.

[93] Fuller, *supra* note 83 at 52.

[94] See Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 26.

[95] See Fuller, *supra* note 83 at 66; Brunnée & Toope, *Legitimacy and Legality*, *ibid* at 26.

[96] Fuller, *ibid* at 81.

[97] *Ibid* at 81.

> compliance by one or more actors meet with no, or only selective, responses … interactional law will come under increasing strain.[98]

For present purposes, the consideration of procedural aspects that relate to the implementation of international norms can thus be analyzed to assess the extent to which these norms are designed to generate such congruence between rules and official action.

To conclude with respect to the contribution of legal pluralism in the interactional theory of international law, it is worth noting that the reliance on criteria of legality provides an essentialist character to the definition of law offered by this theory. Tamanaha clarifies the meaning of this essentialist nature as being grounded in the assumption that "law is a fundamental category which can be identified and described, or an essentialist notion which can be internally worked on until a pure (de-contextualized) version is produced".[99] In other words, legal norms are partly defined as bearing internal features that must be met in order to be considered as such, regardless of the context in which these norms are elaborated. However, despite the inclusion of these criteria of legality to distinguish a legal norm from a social norm, the interactional theory of international law goes beyond the elaboration of a mere essentialist conception of law. The integration of a constructivist component to this interdisciplinary theory provides solid grounds to contextualize the elaboration of norms at the international level and to openly address interactions that characterize this process in addition to the contribution of a legal pluralist approach.

2.2 The Interactional Theory of International Law and (Critical) Constructivism

Although a certain form of social interaction is key in the legal pluralist approach,[100] it is by drawing from constructivism that Brunnée and Toope address this interaction in their theory. Arguing that the dominant rationalist approach to international

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[98] Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 113-114 [emphasis added].

[99] Tamanaha, "Non-Essentialist", *supra* note 4 at 299.

[100] See Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 20; Moshe Hirsch, "The Sociology of International Investment Law" in Zachary Douglas, Joost Pauwelyn & Jorge E Viñuales, eds, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: Oxford University Press, 2014) 143 at 143.

relations obscures the sense of obligation that emerges from international law by considering primarily states' interest calculations, proponents of the interactional theory rely on a constructivist approach to show international law's potential in socializing actors and shaping their interests.[101] Such a potential to socialize actors refers to the mainstream constructivist's assumption pertaining to the mutual constitution of agents and structures discussed above.[102] More specifically, two components of the interactional theory of international law – *i.e.* shared understandings and practice of legality – emphasize the role of interactions in creating a sense of obligation that characterizes legal norms. The integration of a constructivist approach thus provides an interdisciplinary character to this theory and appears as a key element to identify the emergence of legal norms.

The constructivist approach is extensively used in the interactional theory to account for *shared understandings* in which legal norms must be embedded. Amidst the various concepts that are explored by Brunnée & Toope to explain the emergence of shared understandings, three concepts are particularly relevant for present purposes. First, while mainstream constructivists are often interested in tracing the process through which international norms emerge,[103] the interactional theory draws from the work of Finnemore and Sikkink pertaining to *norm entrepreneurs* that are involved in a norm life cycle.[104] According to these authors, international actors that are dissatisfied with existing norms can choose to come together and seek to convince a critical mass of actors to ensure the emergence of a new norm.[105] Once a tipping point is reached, the cycle enters in a norm cascade through which norm leaders that have endorsed an emerging norm seek to socialize other actors to accept it and act as followers. Finally, after the norm acquires a taken-for-

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[101] See Brunnée & Toope, *Legitimacy and Legality*, *ibid* at 12-13. For another perspective that highlights the general relevance of repeated interactions between state and non-state actors, see Harold Hongju Koh, "Trasnational Legal Process - The 1994 Roscoe Pound Lecture" (1996) 75 Neb L Rev 181 at 203–205.

[102] See section 1.2.

[103] See Martin Weber, "Between 'Isses' and 'Oughts': IR Constructivism, Critical Theory, and the Challenge of Political Philosophy" (2014) 20:2 European Journal of International Relations 516 at 520.

[104] See Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 57-58; Brunnée & Toope, "Interactional International Law", *supra* note 54 at 310.

[105] For the rest of the paragraph, see Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52 Int'l Organization 887 at 895–905; Finemore & Sikkink, "Taking Stock", *supra* note 50 at 400.

granted quality, the cycle concludes with the internalization of the norm by a majority of actors involved in the process.

Second, the account of the construction of shared understandings in the interactional theory of international law partly relies on the concept of *epistemic communities*.[106] Drawing on the work of Haas,[107] Brunnée and Toope define such communities as "knowledge-based networks, most often focused on scientific, economic or technical matters".[108] Given that the members of epistemic communities enjoy a considerable level of authority, they participate in a collective learning process and succeed to generate knowledge that can be embraced by decision-makers.[109] Such knowledge can in turn can play a crucial role in the elaboration of international norms by contributing to the emergence of shared understandings between international actors.[110]

Third, Brunnée and Toope argue that the concept of *communities of practice* is particularly relevant to explain how shared understandings can emerge around a specific issue.[111] According to Adler, the mutual constitution between agents and structures that characterizes the constructivist approach mainly occurs through actions of such communities.[112] More specifically, Adler refers to communities of practice as consisting of "people who are informally as well as contextually bound by a shared interest in learning and applying a common practice".[113] To a certain extent, these communities can thus be perceived as mediators between agents and structures to ensure a mutual constitution and the emergence of shared understandings around a specific issue.[114] Particularly relevant for present purposes, Brunnée and Toope contend that intergovernmental organizations

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[106] Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 59-62.

[107] Peter M Haas, "Introduction: Epistemic Communities and International Policy Coordination" (1992) 46 Int'l Organization 1.

[108] Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 59.

[109] *Ibid* at 59-60.

[110] *Ibid* at 60.

[111] *Ibid* at 62.

[112] Adler, *Communitarian International Relations*, *supra* note 51 at 12. See also Harlan Grant Cohen, "International Precedent and the Practice of International Law" in Michael A Helfand, ed, *Negotiating Stae and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge: Cambridge University Press, 2015) 172 at 183-186.

[113] Adler, *Communitarian International Relations*, *ibid* at 15.

[114] See *ibid* at 14-15.

contribute to building spaces for interaction and allow for the emergence of communities of practice.[115]

Although Brunnée and Toope discuss the concept of communities of practice to account for the generation of shared understandings, this concept is also relevant to illuminate the *practice of legality* that is required for the emergence of a sense of obligation that characterizes legal norms.[116] In this regard, the authors warn that legal norms do not emerge whenever a community of practice grows around a specific issue. Rather, "[o]nly when there is a practice of legality, built around Fuller's eight criteria of legality, can shared understandings, be they procedural or substantive, modest or ambitious, be produced, maintained or altered".[117] Therefore, referring to communities of practice is highly relevant to analyze the practice of legality that is required to distinguish legal norms from social norms according to the interactional theory of international law.

In order to ensure internal consistency within the present analytical framework and to include an explicit consideration of the role of inherent power relations in social interactions, the integration of a critical component to the mainstream constructivist approach found in the interactional theory of international law is essential. As one scrutinizes the emergence of shared understandings between the various actors involved in the international lawmaking process and the practice of legality according to which such norms are applied, a critical constructivist approach requires a particular focus on the extent to which these social interactions reproduce inequalities of power between actors involved. Despite the reliance of the interactional theory on a more traditional version of the constructivist approach, there are no insurmountable obstacles that would prevent the amendment of this framework with a view to emphasizing how powerful actors seek to influence the outcome of this process.[118] Interestingly, Brunnée and Toope acknowledge that "powerful actors will be disproportionately influential in shaping the content of legal regimes, both to protect and advance their interests, and to instantiate and perpetuate their

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[115] Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 100 and 356.

[116] Brunnée & Toope, "Interactional International Law", *supra* note 54 at 313.

[117] Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 69; Brunnée & Toope, "Interactional International Law", *ibid* at 313.

[118] See Mayrand, *supra* note 51 at 170-171.

power".[119] Therefore, mirroring the analysis that is conducted at the macro-level, the present analytical framework suggests scrutinizing more carefully the influence of powerful actors in the elaboration and the implementation of instruments in intergovernmental organizations to codify foreign investors' responsibilities.

In addition to the essentialist character of the definition of international law that is offered by the inclusion of criteria of legality in the interactional theory, the consideration of shared understandings and the practice of legality that draws from constructivism in international relations theory echoes a conventionalist concept of law. According to Tamanaha, such a conventionalist conception considers law as "whatever people identify and treat through their social practices as 'law'".[120] A conventionalist conception of law is thus necessary to avoid analytical problems resulting from a mere essentialist conception that assumes the possibility of identifying and describing law as a fundamental and de-contextualized category.[121] Since law must be understood as a social construct, it becomes paramount to analyze it according to its context and to consider law as a practice.[122] To put it differently, by relying on a (critical) constructivist approach to analyze social interactions that are related to the elaboration and the implementation of legal norms, the interactional theory of international law encompasses key analytical tools that fit a more complete conception of law reaching beyond an essentialist approach.

Overall, the interactional theory provides a rich and nuanced conception of international law that is genuinely rooted in an interdisciplinary approach. Drawing from legal pluralism and constructivism, it offers a conception of law that is both essentialist and conventionalist. By slightly amending this theory to include a critical component, the interactional theory of international law becomes an analytical tool of the utmost relevance to analyze the extent to which international norms elaborated and implemented under the auspices of intergovernmental organizations to set foreign investors' responsibilities constitute social norms or legal norms.

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[119] Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 82.

[120] Tamanaha, "Non-Essentialist", *supra* note 4 at 313.

[121] See *ibid* at 299.

[122] See *ibid* at 313-314.

3. Addressing Other Potential Interdisciplinary Avenues

While the aim of this chapter is to articulate an interdisciplinary framework to analyze the evolving codification of foreign investors' responsibilities, such an attempt would be incomplete without addressing other interdisciplinary theories and concepts that also seek to operationalize several aspects that characterize international legal norms. Beyond the relevance of the interactional theory of international law to assess whether international norms are moving toward the realm of legality, *systems theory* (3.1) and the *concept of legalization* (3.2) are two alternative avenues that are extensively discussed in the literature. However, given that these avenues provide only a narrow set of criteria to identify legal rules and cannot easily account for inherent relations of power, such frameworks do not provide a rich account of the process through which social norms can become legal norms.

3.1 Systems Theory

As discussed in the first part of this chapter, systems theory can be applied to international law in order to explain the rise of functionally differentiated and self-reproducing normative orders. In addition to advocating for a theory of legal pluralism that accounts for the development of "global law", Teubner accentuates the need to turn to an analysis of discourses in order to identify which norms belong to the realm of legality.[123] Relying primarily on sociology and drawing from Luhman's idea that legal systems are "normatively closed and cognitively open",[124] systems theory suggests that a binary code of legal/non-legal is sufficient to distinguish legal norms from other social norms.[125]

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[123] Teubner, "Global Bukowina", *supra* note 12 at 4.

[124] Niklas Luhmann, "Operational Closure and Structural Coupling: The Differentiation of the Legal System" (1992) 13 Cardozo L Rev 1419 at 1427.

[125] See Teubner, "Global Bukowina", *supra* note 12 at 12; See also Luhman, *ibid* at 1427; Teubner, "Two Faces", *supra* note 5 at 1451; Teubner, "Breaking Frames" *supra* note 17 at 207; Gunther Teubner, "Self-Constitutionalizing TNCs?: On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct" (2011) 18:2 Ind J Global Legal Stud 617 at 626–627; Nobles & Schiff, *supra* note 5 at 109-119; Flores Elizondo, *supra* note 25 at 119.

Furthermore, the interaction between the surrounding environment and the legal system is explained through the concept of "structural coupling", which relates to the process from which a norm enters the legal system and operates within the binary code.[126] Sidestepping from a functionalist distinction, Teubner thus maintains that "any communication that observes action under the legal code constitutes an integral part of the legal discourse".[127]

Despite the compelling applicability of this analytical framework within a broader legal pluralist approach, one can argue that the criterion that allows determining which norms possess a legal character remains relatively thin. Teubner himself appears to be fully conscious of this lack of details pertaining to this distinction, arguing that "[t]he *entre-deux* might turn out to be a fatal trap".[128] At the end of the day, the unique criterion that is provided by systems theory for separating the legal from the non-legal "identifies as law whatever social actors themselves discuss in legal terms".[129] Even if the consideration of discourses ensures that norms falling beyond the scope of formal sources of international law can be considered as legal norms,[130] the analyst is left with poor guidance to assess how social norms are actually reaching the realm of legality. What is more, systems theory does not seem to identify any tools to account for inherent relations of power that can steer the international lawmaking process. In fact, despite the recognition that social actors hold a primary role in considering which norms fall under the scope of legal norms, this theory does not provide enough room to differentiate the influence of the most powerful actors in this observation of a legal code.

To put it differently, although systems theory fits the legal pluralist approach that underlies the present analytical framework, the lack of a rich set of aspects that distinguish legal norms and a possibility to account for the influence of the most powerful actors in the international lawmaking process sharply contrasts with the interactional theory of

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[126] See Luhman, *ibid* at 1432-1433; Teubner, "Two Faces", *ibid* at 1446.

[127] Teubner, "Two Faces", *ibid* at 1459.

[128] Teubner, "Breaking Frames", *supra* note 17 at 203.

[129] See Tamanaha, "Non-Essentialist", *supra* note 4 at 311. See also Roger Cotterrell, "Transnational Networks of Community and International Economic Law" in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (New York: Routledge, 2013) 133 at 137. *Contra* Nobles & Schiff, *supra* note 5 at 96.

[130] See Nobles & Schiff, *ibid* at 97.

international law. As a result, this alternative interdisciplinary avenue must be left aside for the purpose of assessing whether international norms elaborated and implemented under the auspices of intergovernmental organizations to set foreign investors' responsibilities have reached the realm of legality.

3.2 Legalization

The concept of legalization can also be considered in the case at hand. This framework results from the interdisciplinary work of scholars in international law and international relations who aim to explain three dimensions according to which the institutionalization of world politics varies.[131] Within this framework, "obligation" captures whether an instrument falls under the scope of formal sources of international law, as well as the language that is used in an international agreement.[132] In addition to this dimension, "precision" refers to the degree of definition of provisions and "delegation" accounts for the establishment of a third party that interprets or makes new rules. Moreover, this framework assumes that each dimension varies along a continuum that ranges from "low" to "high".[133] Without fully exploring "the binding quality of law",[134] the concept of legalization nonetheless implicitly acknowledges that an international instrument that is characterized by a high level of each dimension appears to be closer to a legal norm than a mere social norm.

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[131] See generally Kenneth W Abbott, "The Many Faces of International Legalization" (1998) 92 Am Soc Int'l L Rev 57; Kenneth W Abbott et al, "The Concept of Legalization" (2000) 54:3 Int'l Organization 401; Judith Goldstein et al, "Introduction: Legalization and World Politics" (2000) 54:3 Int'l Organization 385; For more recent discussions pertaining to this concept, see Louis Bélanger & Kim Fontaine-Skronski, "'Legalization' in international relations: A conceptual analysis" (2012) 51 Social Science Information 238; Kenneth W Abbott & Duncan Snidal, "Law, Legalization, and Politics: An Agenda for the Next Generation of IL/IR Scholars" in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013) 33.

[132] For a description of the three dimensions, see Abbott et al, *ibid* at 401-402. See also Abbott, *ibid* at 59; Christian Brütsch & Dirk Lehmkuhl, "Complex Legalization and the Many Moves to Law" in Christian Brütsch & Dirk Lehmkuhl, eds, *Law and Legalization in Transnational Relations* (New York: Routledge, 2010) 9 at 9.

[133] See Abbott et al, *ibid* at 404. See also Abbott, *ibid* at 59; Brütsch & Lehmkhul, *ibid* at 9

[134] See Abbott & Snidal, *supra* note 131 at 38.

The application of this framework to the case at hand faces unavoidable limits. In fact, the incompatibility between the concept of legalization and the core assumptions of the present dissertation is even deeper than in the case of systems theory. Although authors involved in the elaboration of the legalization concept suggest that it must be understood as a dynamic process through which law changes and develops,[135] the most important flaw of this concept is its reliance on a positivist conception of international law. Echoing the distinction made by Hart pertaining to primary rules and secondary rules that are necessary for the existence of a legal order,[136] Abbott and his collaborators highlight that the dimension of obligation that is included in this analytical framework relies on the idea that secondary rules can "confer power to create, extinguish, modify, and apply primary rules".[137] To put it differently, the concept of legalization favors a hierarchical elaboration of international law,[138] which does not fully capture the pluralist context of the international lawmaking process according to which foreign investors' responsibilities seem to be codified under the auspices of intergovernmental organizations.

Moreover, although it goes beyond a thin distinction grounded on a binary code,[139] the framework of legalization offers only a narrow conception of international law. In fact, the three dimensions that are used to identify which aspects of international relations are "legalized" – *i.e.* obligation, precision and delegation – can only account for the level of institutionalization or legal bureaucratization according to which a political issue is framed.[140] None of these three dimensions allows taking into account any form of interactions occurring between actors involved in this process of institutionalization. Therefore, in contrast to the rationalist perspective that underlies many applications of the concept of legalization,[141] authors like Finnemore and Toope advocate for the need to offer

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[135] *Ibid* at 34.

[136] H L A Hart, *The Concept of Law*, 2d ed (Oxford: Oxford University Press, 1994) at 116.

[137] Abbott et al., *supra* note 131 at 403 [citation omitted].

[138] See Brunnée & Toope, "International Law and Constructivism", *supra* note 51 at 72; Brütsch & Lehmkuhl, *supra* note 132 at 22-25.

[139] See Abbott & Snidal, *supra* note 131 at 45.

[140] See Martha Finnemore & Stephen J Toope, "Alternatives to 'Legalization': Richer Views of Law and Politics" (2001) 55:3 Int'l Organization 743 at 744; Lapointe & Bachand, *supra* note 59 at 8; Sinclair, *supra* note 47 at 17.

[141] See Abbott, *supra* note 131 at 58.

a richer perspective of international law that takes into account the process according to which international norms are developed and applied.[142] Adopting a more critical approach, Cohen and Cutler point out that the concept of legalization "misses the central role of non-state and private, corporate actors and processes in shaping the role and mobilization of law".[143]

To be clear, analytical tools offered by the systems theory and the concept of legalization are compatible with the idea that legal norms are not solely stipulated in formal sources of international law. With that being said, the problematic that is examined at the micro-level of analysis requires an analytical framework that permits the consideration of a more nuanced distinction between social and legal norms than the single criterion offered by systems theory. Furthermore, the highly pluralist context in which the norms that are considered in the present dissertation evolve necessitates the rejection of the positivist assumptions on which the concept of legalization is based. Although the interdisciplinary character of these theories is worth noting, it must be stressed that these avenues do not provide the nuanced analytical framework that is needed for the purposes of the research question at hand.

Conclusion

The articulation of the present analytical framework implies the integration of various theories from international law and international relations that do not seem to easily coexist at first sight. Yet, the various elements of the analytical framework that underlie the dissertation's analysis can all be related to the core assumptions of the broader legal pluralist and critical constructivist approaches. At a macro-level of analysis, the combination of legal pluralism and critical constructivism ensures a fuller account of the normative integration of foreign investors' responsibilities in international investment law. While legal pluralism provides analytical tools to address the emergence of a plurality of normative orders regarding various areas of foreign investors' responsibilities in parallel

[142] Finnemore & Toope, *supra* note 140 at 750-751. See also Reus-Smit, "Introduction", *supra* note 51 at 11; Brütsch & Lehmkuhl, *supra* note 132 at 11-12.

[143] Cohen & Cutler, *supra* note 63 at 614.

to international investment law, critical constructivism suggests that inherent relations of power inevitably influence this normative integration. At a micro-level of analysis, the integration of legal pluralism and constructivism in the interactional theory of international law offers key elements to consider in order to assess the evolution of norms that set foreign investors' responsibilities. By slightly amending the interactional theory of international law to reflect the critical constructivist approach, one can include the consideration of power relations between actors involved in shaping shared understandings and the practice of legality that are required to create a sense of obligation. Finally, the discussion above stresses that the interactional theory of international law is more appropriate than other interdisciplinary frameworks – *i.e.* systems theory and the concept of legalization – to analyze the normative character of instruments that codify foreign investors' responsibilities.

Thus, this interdisciplinary analytical framework allows generating two hypotheses that are tested through the examination developed in Part II and Part III of the present dissertation. First, as far as the macro-level of analysis is concerned, the integration of a legal pluralist approach with a critical constructivist approach suggests that a strong normative integration of foreign investors' responsibilities within international investment law is only possible in areas for which such a normative integration remains consistent with the interests of the most powerful actors. Second, with respect to the micro-level of analysis, the interactional theory of international law identifies that international instruments developed through intergovernmental organizations can become legal norms only if they rely on shared understandings between powerful actors, fulfill specific criteria of legality and are applied according to a practice of legality by powerful. Put together, the aspects that are highlighted in these two hypotheses allows completing an original analysis of the evolving codification of foreign investors' responsibilities by intergovernmental organizations that accounts for the relevance of normative developments as well as relations of power underlying the codification process.

Chapter 3 – An Interdisciplinary Methodology

Introduction

Having identified the need for an interdisciplinary analysis and developed an analytical framework, the next aspect that must be discussed prior to delving into the examination of the codification process of foreign investors' responsibilities is the methodology that underlies this inquiry. As the previous chapter pinpoints key aspects that must be considered to develop a richer understanding of this codification process through an explicit consideration of normative developments and relations of power, an additional conceptual step must be taken to further explain how this consideration is materialized in the present study. It is in this regard that this chapter presents the methods that are needed to complete the analysis and the sources from which data is retrieved.

In line with the interdisciplinary character of this research, the methodology that is articulated below draws from a *traditional method in international law* and a *critical discourse analysis*. With a view to remaining consistent with the pattern employed to explain the analytical framework of the present dissertation, this chapter proceeds according to the same distinction pertaining to different levels of analysis. With respect to the *macro-level of analysis*, the integration of the two aforementioned methods is essential to test whether foreign investors' responsibilities are normatively integrated in international investment law only for areas in which such an integration remains consistent with most powerful actors' interests (1). At the *micro-level of analysis*, a combination of a traditional method in international law and critical discourse analysis is also required to question the presence of shared understandings, criteria of legality and a practice of legality that are necessary conditions for international instruments codifying foreign investors' responsibilities to be considered as legal norms (2). Finally, in order to adopt a reflexive approach and address limits to the analysis that can be anticipated from the outset, the third section of this chapter openly addresses assumptions and biases that are at play in the treatment of the data used to complete the present study (3).

1. The Normative Integration of Foreign Investors' Responsibilities in International Investment Law: A Methodology for a Macro-Level Analysis

Recalling that one of the goals of the present analysis is to position the evolving codification of foreign investors' responsibilities in the broader context of neoliberal globalization, the first part of the present discussion must be geared toward the use of methodological tools at the macro-level of analysis. The previous chapter shows that a combination of a legal pluralist approach and a critical constructivist approach suggests that the normative integration of foreign investors' responsibilities in international investment law is likely to remain consistent with the interests of the most powerful actors. Testing such a hypothesis nevertheless requires a two-pronged examination. On the one hand, reliance on a traditional legal method appears particularly relevant to assess the normative compatibility between international investment law and other normative orders addressing foreign investors' responsibilities. This method allows tracking the emergence of normative orders for various areas in which foreign investors' activities can produce negative impacts, as well as the consideration of these norms in international investment agreements ("IIAs") and decisions reached by international investment arbitration tribunals (1.1). On the other hand, a critical discourse analysis conveniently highlights the consistency between the degree of normative integration of foreign investors' responsibilities in international investment law and the positions of the most powerful actors involved in the international lawmaking process (1.2).

1.1 Traditional Method in International Law

From the outset, the legal pluralist component of the analytical framework provided in the previous chapter posits an inevitable weak normative compatibility between various normative orders that are developed by state and non-state actors. In an attempt at exploring a methodology of normative pluralism, Piiparinen suggests that "it is necessary to go beyond the descriptive level of global complexity and explore those normative orders that underlie that seemingly anarchical and complex world, because only then is it possible to

understand the real dynamics and mechanisms of globalization".[1] With respect to the codification of foreign investors' responsibilities, such a suggestion can be conducted by scrutinizing the degree of integration (*i.e.* weak or strong) between normative orders that are addressing standards of appropriate conduct for private actors operating abroad and international investment law. Given that assessing such a normative integration must be partly grounded in a thorough examination of the content of various international materials, a traditional method in international law becomes relevant to study this codification process. While this approach does not raise any specific methodological concerns that need to be addressed here, suffice it to say that it generally refers to several international agreements, decisions from international adjudication forums, resolutions and reports. More specifically, examining the content of international materials is relevant for three aspects that constitute an integral part of the macro-level of analysis.

First, the examination of the provisions of the international instruments adopted by intergovernmental organizations to codify foreign investors' responsibilities allows *identifying different normative orders* covering areas for which the activities of these actors can produce social and environmental negative impacts. At this point, the idea is not to focus on the elaboration and the implementation processes of any specific international instrument codifying foreign investors' responsibilities. While these individual instruments are extensively discussed at the micro-level of analysis, the assessment of the normative integration of such responsibilities in international investment law is conducted according to broader normative orders. More precisely, the macro-level of analysis focuses on four distinct areas that each constitutes a normative order that is emerging in parallel to international investment law through formal and informal international instruments: human rights, environmental protection, labour rights and the prohibition of corruption.[2]

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[1] Touko Piiparinen, "Exploring the Methodology of Normative Pluralism in the Global Age" in Jan Klabbers & Touko Piiparinen, eds, *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge: Cambridge University Press, 2013) 35 at 42.

[2] The choice of these areas is partly inspired by the work of Muchlinski and other authors. See Peter T Muchlinski, *Multinational Enterprises and the Law*, 2d ed (Oxford: Oxford University Press, 2007) at 473–574; Peter Muchlinski, "Policy Issues" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 3 at 37; Peter Muchlinski, "Corporate Social Responsibility" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 637 at 645–673; Lucio Baccaro & Valentina Mele, "For Lack of Anything Better? International Organizations and Global Corporate Codes" (2011) 89 Public Administration 451 at 462; Patrick Dumberry & Gabrielle Dumas-

Clustering the content of these instruments according to the areas that are covered is convenient to account for different degrees of integration regarding these four areas of responsibilities.

Second, after identifying different areas of foreign investors' responsibilities that are covered by various international instruments, one can assess the extent to which these normative orders are taken into account in *IIAs provisions*. In order to achieve this task, the analysis extensively relies on reports that are published by intergovernmental organizations. The Organization for Economic Co-operation and Development ("OECD")[3] and the United Nations Conference on Trade and Development ("UNCTAD")[4] have released several publications to identify examples of provisions that are included in IIAs and that address issues transcending international investment protection. Furthermore, a publication prepared for the Commonwealth Secretariat,[5] as well as other references in international investment law,[6] are also particularly useful to identify recent innovations in states' practice that fit present purposes. After identifying IIAs provisions that address foreign investors' responsibilities from these reports and publications, it nevertheless remains important to scrutinize other agreements signed by the same state parties to capture more recent instances of these innovations. The present study thus relies on a combination of primary and secondary materials in international law to evaluate the normative integration of foreign investors' responsibilities in IIAs.

Third, a traditional method in international law is also fruitful to assess the extent to which *international investment arbitration tribunals* refer to negative impacts related to

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Aubin, "How to Impose Human Rights Obligations on Corporations under Investment Treaties? Pragmatic Guidelines for the Amendment of BITs" (2012) 4 Yearbook of Int'l Inv L & Pol'y 569 at 581.

[3] OECD, *International Investment Perspectives* (Paris: OECD, 2006); OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (Paris: OECD, 2008); Kathryn Gordon & Joachim Pohl, "Environmental Concerns in International Investment Agreements: A Survey" (2011) OECD Working Paper on International Investment No 2011/1; Kathryn Gordon, Joachim Pohl & Marie Bouchard, "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey" (2014) OECD Working Paper on International Investment No 2014/1.

[4] UNCTAD, *International Investment Agreements: Key Issues*, Vol II (New York and Geneva: United Nations, 2004); UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (New York and Geneva: United Nations, 2012).

[5] Anthony J VanDuzer, Penelope Simons & Mayeda Graham, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (London: Commonwealth Secretariat, 2013).

[6] See section 1 of the literature review presented in Chapter 1.

foreign investors' activities when reaching a decision in an international investment dispute. In order to track such references in the myriad international investment arbitration decisions, this study partly relies on the subject navigator and the full text search engine of the *Investor-State Law Guide* database.[7] The latter covers an impressive amount of international investment treaty arbitration documents – *e.g.* decisions and *amicus curiae* briefs – and offers various tools to identify excerpts in dealing with foreign investors' responsibilities. Several publications from international legal scholars addressing the interaction between international investment law and other areas of international law are also instrumental in identifying key decisions for present purposes.[8] Once again, with a view to exploring differences with respect to the degree of normative integration from one area of foreign investors' responsibilities to another, this analysis is presented according to the various areas for which foreign investors' activities can produce negative social and environmental impacts.

In sum, accounting for the emergence of normative orders addressing foreign investors' responsibilities, as well as the extent to which these normative orders are considered in IIAs and international investment arbitration, is made possible through a traditional legal method. Considering the content of international instruments, IIAs, decisions from international investment arbitration tribunals and reports from intergovernmental organizations thus appear as an appropriate method to assess the normative integration of foreign investors' responsibilities in international investment law. However, in line with the interdisciplinary character of this methodology, a more complete understanding of the codification of foreign investors' responsibilities in a context of neoliberal globalization must go beyond the content of these international materials and address other aspects of this normative integration's context.

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[7] Investor-State Law Guide, online: ISLG <http://investorstatelawguide.com> (accessed 14 September 2016).

[8] See section 1 and section 2 of the literature review presented in Chapter 1.

1.2 Critical Discourse Analysis

Recalling that the analysis of the normative integration of foreign investors' responsibilities in international investment law must unmask relations of power underlying such an integration, a traditional method in international law has to be supplemented by another method that sheds light on the various actors' positions. In fact, in order to identify which interests are served by the current degree of consideration of foreign investors' responsibilities in international investment law, one must turn to a method that allows accounting for power relations that are inherent to the international lawmaking process occurring in intergovernmental organizations. It is in this regard that a critical branch of discourse analysis is integrated to the methodology on which the present study relies.

From the outset, it is worth noting that a consideration of discourses to scrutinize emerging normative orders fits squarely the constructivist approach that is integrated to the analytical framework described in the previous chapter. As emphasized by Finnemore: "[N]orms may be articulated in *discourse*. … Because they are intersubjective and collectively held, norms are often the subject of discussion among actors".[9] What is more, in a recent study that specifically concerns the framework developed by the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Buhmann underscores that "discourse analysis is a method for studying processes related to the establishment of societal constructs, for example policies, norms, and normative concepts such as corporate social responsibility".[10] To put it differently, given that a (critical) constructivist approach stresses the mutual constitution of agents and social structures, one must turn toward a means that materializes how this relation between international actors and norms operates. While discourse analysis is described as a qualitative method that focuses on a linguistic

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[9] Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996) at 23–24 [emphasis added].

[10] Karin Buhmann, "Navigating from 'Train Wreck' to being 'Welcomed': Negotiation Strategies and Argumentative Patterns in the Development of the UN Framework" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 29 at 32 [emphasis added].

description of speeches and various types of written documents,[11] this method appears as being highly appropriate to examine discursive materials and unpack the role of norms in the international realm.[12]

However, in order to specifically address the extent to which power relations between various international actors are reproduced in discourses, a critical component must be added to this mainstream method. Combining the relevance of discourses in shaping reality[13] with the critical theory paradigm in qualitative research,[14] critical discourse analysis aims to illuminate ideologies and relations of power that underpin various forms of statements and practices.[15] What is more, the same method acknowledges that discourses inevitably become instruments of power as well as a starting point for

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[11] See Alan Bryman, *Social Research Methods* (Oxford: Oxford University Press, 2001) at 360; Mary Seneviratne, "Researching Ombudsmen" in Reza Banakar & Max Travers, eds, *Theory and Method in Socio-Legal Research* (Portland: Hart Publishing, 2005) 161 at 170; Bettina Lange, "Researching Discourse and Behaviour as Elements of Law in Action" in Reza Banakar & Max Travers, eds, *Theory and Method in Socio-Legal Research* (Portland: Hart Publishing, 2005) 175 at 179. For an even broader conception of what can be analyzed through discourse analysis, see Iver B Neumann, "Discourse Analysis" in Audie Klotz & Deepa Prakash, eds, *Qualitative Methods in International Relations: A Pluralist Guide* (New York: Palgrave Macmillan, 2008) 61 at 63.

[12] See Antje Wiener, "Enacting Meaning-In-Use: Qualitative Research on Norms and International Relations" (2009) 35 Rev Int'l Stud 175 at 178.

[13] See Jennifer Milliken, "The Study of Discourse in International Relations: A Critique of Research and Methods" (1999) 5 Eur J Int'l Rel 225 at 229; Lange, *supra* note 11 at 182-183; Csilla Weninger, "Critical Discourse Analysis" in Lisa M Given, ed, *The SAGE Encyclopedia of Qualitative Research Methods* (Thousand Oaks: Sage Publications, 2008) 146 at 146.

[14] See Gilbert Weiss & Ruth Wodak, "Theory, Interdisciplinarity and Critical Discourse Analysis" in Gilbert Weiss & Ruth Wodak, eds, *Critical Discourse Analysis: Theory and Interdisciplinarity* (New York: Palgrave Macmillan, 2003) 1 at 5–6; Jerry Willis, Muktha Jost & Rema Nilakanta, *Foundations of Qualitative Research: Interpretive and Critical Approaches* (Thousand Oaks: Sage Publications, 2007) at 81–91; Jean J Schensul, "Methodology, Methods, and Tools in Qualitative Research" in Stephen D Lapan, Marylynn T Quartaroli & Frances Julia Riemer, eds, *Qualitative Research: An Introduction to Methods and Designs* (San Francisco: Jossey-Bass, 2012) 69 at 77–78; Karyn Cooper & Robert E White, *Qualitative Research in the Post-Modern Era: Contexts of Qualitative Research* (London: Springer, 2012) at 18-19.

[15] See Teun A Van Dijk, "Critical Discourse Analysis" in Deborah Schiffrin, Deborah Tannen & Heidi H Hamilton, eds, *The Handbook of Discourse Analysis* (Malden: Blackwell Publishing, 2001) 352 at 354–355; Ian Parker, "Discovering Discourses, Tackling Texts" in William K Carroll, ed, *Critical Strategies for Social Research* (Toronto: Canadian Scholars' Press Inc., 2004) 252 at 259; Lilie Chouliaraki & Norman Fairclough, "The Critical Analysis of Discourse" in William K Carroll, ed, *Critical Strategies for Social Research* (Toronto: Canadian Scholars' Press Inc., 2004) 262 at 267; Weiss & Wodak, *ibid* at 12; Weninger, *supra* note 13 at 147; Jonathan Potter, "Discourse Analysis" in Lisa M Given, ed, *The SAGE Encyclopedia of Qualitative Research Methods* (Thousand Oaks: Sage Publications, 2008) 218 at 220; Ruth Wodak & Michael Meyer, "Critical Discourse Analysis: History, Agenda, Theory, and Methodology" in Ruth Wodak & Michael Meyer, eds, *Methods in Critical Discourse Analysis* (Thousand Oaks: Sage Publications, 2009) 1 at 8–10. Although they refer to discourse analysis in general, other authors stress the relevance of studying dominating and hegemonic discourses. See Milliken, *supra* note 13 at 230; Lange, *supra* note 11 at 177-178; Neumann, *supra* note 11 at 70.

resistance.[16] Wodak and Meyer summarize the core aspects of critical discourse analysis in a way that is worth citing at length:

> [T]he defining features of [critical discourse analysis] are its concern with power as a central condition in social life, and its effort to develop a theory of language that incorporates this as a major premise. Closely attended to are not only the notion of struggles for power and control, but also the intertextuality and recontextualization of competing discourses in various public spaces and genres. … Power does not necessarily derive from language, but language can be used to challenge power, to subvert it, to alter distributions of power in the short and the long term. Language provides a finely articulated vehicle for differences in power in hierarchical social structures.[17]

The notion of discourse that underlies this method remains broadly defined. In addition to numerous types of statements that are included in this concept, several authors rely on a Foucauldian perspective and emphasize that regulated social practices fall under the scope of the analysis.[18] For present purposes, suffice it to say that critical discourse analysis is applicable to statements and discursive practices that range from political speeches to documents published by public authorities and interview transcripts.[19] Once the discourses are gathered, they can be coded to identify larger chunks in order to detect certain patterns and themes in the data.[20] In fact, assuming that discourses present coherent systems of meanings, their content can be grouped according to the topic that is referred to.[21] These patterns and themes are then usually analyzed to highlight specific functions of the discourse.[22]

Critical discourse analysis nevertheless entails limitations that are inherent to the use of this method. Like any other forms of textual analysis, the validity of critical

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[16] See Weiss & Wodak, *ibid* at 15; Wodak & Meyer, *ibid* at 6.

[17] Wodak & Meyer, *ibid* at 10 [references omitted].

[18] The conception of discourse as a practice can be found directly from the work of Foucault. See Michel Foucault, *L'archéologie du savoir* (Paris: Gallimard, 1969) at 98–101; Michel Foucault, "Politics and the Study of Discourse" in Graham Burchell, Colin Gordon & Peter Miller, eds, *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991) 53 at 61 and 63. Other authors also emphasize this aspect in their work. See Weiss & Wodak, *supra* note 14 at 13; Parker, *supra* note 15 at 258; Potter, *supra* note 15 at 220; Wodak & Meyer, *ibid* at 5-6. For the link between Foucault's concept of discourse and a more traditional discourse analysis, see Lange, *supra* note 11 at 177; Wiener, *supra* note 12 at 186.

[19] See Weninger, *supra* note 13 at 146.

[20] See Lange, *supra* note 11 at 186 and 191.

[21] See Parker, *supra* note 15 at 255.

[22] See Lange, *supra* note 11 at 192-194.

discourse analysis remains vulnerable to the perspective of the researcher who is conducting the analysis.[23] The critical stance adopted by a researcher who follows this method is also likely to influence the collection and the analysis of data.[24] To put it differently, the choice of discourses that are included in a study and the conclusions that are drawn from these discourses cannot be separated from the goals that are sought by the researcher. It is plain that the present dissertation is no exception to these potential limitations. Therefore, the last section of this methodological chapter addresses potential biases that are inherent to the present study.[25]

Beyond this general discussion pertaining to critical discourse analysis, it is also worth identifying the sources of discourses that are used in the present research to assess the extent to which the degree of integration of foreign investors' responsibilities in international investment law reflects the most powerful actors' interests. As underscored in the introduction of this dissertation, this study focuses on efforts deployed by several types of actors – *i.e.* capital-exporting states, capital-importing states, intergovernmental organizations, foreign investors and nongovernmental organizations – to influence the codification of foreign investors' responsibilities. Interactions occurring between these actors often materialize through statements submitted as a part of consultation processes or through summaries of these submissions by intergovernmental organizations. As a result, several documents are made publicly available by these organizations and provide discursive materials that can be examined according to a critical discourse analysis.

More specifically, at a macro-level of analysis, the present study focuses on consultation processes addressing the broader issue of the codification of foreign investors' responsibilities in international law, rather than a specific instrument developed in an intergovernmental organization. Three sets of statements are thus relevant for present purposes. First, after affirming that the *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights* ("*UN*

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[23] See Sharon Lockyer, "Text Analysis" in Lisa M Given, ed, *The SAGE Encyclopedia of Qualitative Research Methods* (Thousand Oaks: Sage Publications, 2008) 865 at 865. For additional details pertaining to validity, see Schensul, *supra* note 14 at 84.

[24] See Weninger, *supra* note 13 at 147.

[25] See Chouliaraki & Fairclough, *supra* note 15 at 270; Lockyer, *supra* note 23 at 865-866; Wodak & Meyer, *supra* note 15 at 7-8.

Norms")[26] did not have any legal standing, the Human Rights Commission requested the compilation of a report on such responsibilities by the Office of the United Nations High Commissioner on Human Rights in 2004.[27] Although the *UN Norms* are extensively discussed throughout various submissions, several statements submitted by state and non-state actors for this report address broader implications of private actors' responsibilities in the areas of human rights, environmental protection and labour rights.[28] Second, a 2001 report of an intergovernmental open-ended expert group pertaining to the relevance of addressing corruption through a formal international instrument provides a useful summary of discussions that were held under the auspices of the UN between state actors.[29] Third, in 2008, the OECD collected several statements from various non-state organizations that responded to a consultation paper addressing the potential revision of instruments regarding the area of anti-bribery and the prohibition of corruption.[30] Taken as a whole, these consultation processes offer a pool of discursive materials that highlight the interests of state and non-state actors in encouraging or discouraging initiatives to hold private investors accountable for harm caused abroad in all the relevant areas that fall under the scope of the present study.

To be clear, this examination of the normative integration of foreign investors' responsibilities in international investment law does not seek to establish any causal links between such a normative integration and most powerful actors' actions. Nothing in the present dissertation aims at demonstrating that powerful state or non-state actors involved in the international lawmaking process succeeded in preventing the consideration of

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[26] *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, 2003, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2.

[27] *Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights*, ESC Dec 2004/116, UNESCOR, 2004, Supp No 3, UN Doc E/CN.4/2004/127, 332 at 333.

[28] See Office for the United Nations High Commissioner for Human Rights, *Stakeholder Submissions to the Report of the High Commissioner for Human Rights on the Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author).

[29] *Report of the Meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument Against Corruption*, 2001, UN Doc No A/AC.260/2.

[30] OECD, *Review of the OECD Anti-Bribery Instruments: Compilation of Responses to Consultation Papers* (Paris: OECD, 2008).

foreign investors' responsibilities in a specific IIA or influencing the outcome of a decision reached by an international investment arbitration tribunal. The determination of such a causal link between international actors' interests and the outcome of the international investment lawmaking process would require information that relates to the negotiation of specific international investment agreements or details that cannot be found in decisions from international investment arbitration tribunals. Such a daunting task is beyond the scope of the present dissertation.

Rather, the present study intends to demonstrate the *consistency* between the extent to which foreign investors' responsibilities are considered in international investment law and most powerful actors' interests. In fact, explaining such a consistency, rather than attempting to find causality, remains in line with the critical constructivist approach that is integrated to this dissertation. For example, Finnemore and Sikkink maintain that understanding the constitution of things reaches beyond mere description and is essential to explain behavior and political outcomes for constructivists.[31] In other words, rather than pretending to establish that most powerful actors' actions directly cause a weak normative integration of foreign investors' responsibilities in international investment law, this study relies on critical discourse analysis to demonstrate that the degree of this integration remains consistent with the position of the most powerful actors involved in the international lawmaking process.

From the discussion above, it is plain that a macro-level of analysis of the codification of foreign investors' responsibilities in international law benefits from an interdisciplinary methodology that combines a traditional legal method and a critical discourse analysis. While an examination of international materials is entirely appropriate to identify normative orders addressing different areas of foreign investors' responsibilities and their integration in international investment law, critical discourse analysis provides tools that are necessary to highlight the reproduction of power relations and underlying interests in the discourses of actors involved in the international lawmaking process. A

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[31] Martha Finnemore & Kathryn Sikkink, "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics" (2001) 4:1 Ann Rev Pol Science 391 at 394. See also Emanuel Adler, "Constructivism in International Relations: Sources, Contributions and Debates" in Walter Carlsnaes, Thomas Risse & Beth A Simmons, eds, *Handbook of International Relations*, 2d ed (London: Sage Publications, 2013) 112 at 121.

combination of these two methods illuminates the extent to which the degree of normative integration of foreign investors' responsibilities in international law remains consistent with the interests of specific actors.

2. International Instruments Codifying Foreign Investors' Responsibilities as Legal Norms: A Methodology for a Micro-Level Analysis

The third part of the present dissertation adopts a narrower level of analysis in order to assess the normative character of specific international instruments designed and implemented under the auspices of intergovernmental organizations. While the interactional theory of international law posits that legal norms are characterized by three aspects – *i.e.* shared understandings, criteria of legality and practice of legality – that are necessary to generate a sense of obligation, a traditional legal method and critical discourse analysis emerge as convenient tools to assess whether a norm has entered the realm of legality. Given its focus on the content of various international materials, the traditional method in international law allows tracing the emergence of international norms, analyzing their consistency with the criteria of legality that are mentioned in the interactional theory of international law and examining the practice according to which they are applied (2.1). Moreover, a critical discourse analysis highlights relations of power influencing the development of shared understandings and the practice of legality that characterize international legal norms (2.2).

2.1 Traditional Method in International Law

While the reliance on a traditional legal method at the macro-level of analysis accounts for the emergence of broader normative orders addressing various areas for which foreign investors' activities can produce negative impacts, this method can also be used to focus on the development of specific international instruments adopted by intergovernmental organizations. A closer examination of international materials surrounding the elaboration and the implementation of international instruments codifying

foreign investors' responsibilities is thus relevant to determine whether each instrument has reached the realm of legality. In fact, this method can be applied to assess the presence of each component of the interactional theory of international law discussed in the previous chapter.

With respect to *shared understandings* between actors involved in the international lawmaking process, the interactional theory of international law stresses the relevance of tracking the emergence of each international instrument that is included in the present dissertation. In this regard, the upcoming analysis partly focuses on resolutions and decisions elaborated under the auspices of intergovernmental organizations before the adoption of a specific international instrument to codify foreign investors' responsibilities. By focusing on which state and non-state actors instigated these resolutions and decisions, it thus becomes possible to identify norms entrepreneurs and members of an epistemic community that supported the elaboration of a specific initiative seeking to regulate the conduct of foreign investors. Given that the current versions of several international instruments result from revision processes that occurred in intergovernmental organizations, it is also worth analyzing prior versions to capture any changes in the provisions of these instruments that would suggest shifts in shared understandings during these revision processes.

A traditional method in international law is also appropriate to assess adherence of each international instrument to the eight *criteria of legality – i.e.* promulgation, generality, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy and congruence between rules and official action – that are included in the interactional theory of international law. In this regard, the provisions of international instruments constituting the primary focus of the present analysis must be closely examined to determine whether they meet these criteria. It must nevertheless be noted that adherence to these criteria of legality cannot be evaluated according to a mere checklist. In fact, a relative approach appears to be more appropriate than an absolute one to conduct the present analysis. While an instrument sometimes unequivocally fails to meet a specific criterion (*e.g.* promulgation of the international instrument), adherence to other criteria might be more conveniently assessed by contrasting the provisions of different instruments. For example, the extent to which an instrument is clear or does not ask the impossible might be better understood by

explicitly referring to provisions of another instrument codifying foreign investors' responsibilities.

Finally, a *practice of legality* that is necessary to maintain a sense of obligation characterizing legal norms can also be observed through a consideration of the content of international materials. More precisely, it is worth scrutinizing potential cross-references between the various initiatives that are elaborated and implemented in intergovernmental organizations. One can thus expect some references to specific initiatives in the preambles or in provisions of other international instruments. Furthermore, references to a specific instrument in reports adopted by other intergovernmental organizations that are dealing with issues pertaining to the conduct of foreign investors evidence a certain form of practice of legality that can consolidate a sense of obligation to apply the provisions of an international instrument.

Overall, adopting a method that is generally reflected in international law scholarship proves to be relevant to determine whether international instruments constitute social norms or legal norms. Analyzing the provisions of instruments codifying foreign investors' responsibilities, as well as the content of other international materials surrounding the elaboration and the implementation of these instruments, is paramount to identify a potential sense of obligation emanating from international norms. Once again, this method must nevertheless be crossed with other methodological tools to fully account for relations of power that are at play in this evolving codification process.

2.2 Critical Discourse Analysis

In line with the reliance on critical discourse analysis at a macro-level, the same method can also be used to shed light on relations of power characterizing the elaboration and the implementation of specific instruments by intergovernmental organizations to codify foreign investors' responsibilities. More specifically, critical discourse analysis is particularly relevant to account for the influence of inherent relations of power in the emergence of shared understandings and the practice of legality. The integration of such a method at the micro-level of analysis thus allows an explicit consideration of the extent to

which most powerful actors' interests encourage or impede the creation of a sense of obligation that could emanate from international instruments. Without repeating the discussion pertaining to critical discourse analysis developed above, some aspects regarding the concrete application of this method and the collection of data at the micro-level of analysis are worth noting.

As underscored in the previous chapter, the interactional theory of international law highlights the role of norm entrepreneurs, epistemic communities and communities of practice in shaping *shared understandings* in which legal norms are deeply grounded. Therefore, the upcoming analysis relies on discursive materials produced by state and non-state actors during the elaboration of specific instruments adopted under the auspices of intergovernmental organizations. The language found in statements, press releases, reports and summaries of negotiation processes produced by intergovernmental organizations can thus be analyzed with a view to identifying the extent to which these discourses reflect relations of power that underlie the international lawmaking process. While a presentation of these discursive materials is not required at this point of the dissertation, more details are provided in the upcoming chapters that focus more specifically on international instruments codifying foreign investors' responsibilities.

Similar discourses are also considered to assess the influence of most powerful actors' interests in shaping the emergence of a *practice of legality*. While the previous chapter points out the essential role played by communities of practice to sustain a sense of obligation that characterizes international legal norms, critical discourse analysis illuminates power relations that are likely to influence the type of practice according to which an international instrument is applied. It is in this regard that various statements and reports from international actors discussing the interpretation and the implementation of initiatives are worth considering through the lenses of this method. Relying on the aforementioned broader definition of discourse, it is presumed that these documents can be examined through a critical discourse analysis to reveal the extent to which the interpretation of these instruments reproduces asymmetries of power and most powerful actors' interests. Once again, further details pertaining to sources of these discourses are provided in the third part of the present dissertation.

Despite the presence of various sources of discourses to substantiate this analysis, it must be noted that such discursive materials are not necessarily available for each international instrument that is considered under this research. Moreover, the development of norms appears as a complex process that is often not fully captured in the documents that emanate from intergovernmental organizations. In this regard, it is worth emphasizing that conversations with insiders are generally considered as revealing a more complete and diversified perspective than what can be found in publicly available documents or through mere observation of people.[32] As a result, legal pluralists and critical researchers often turn to interviews as a technique to collect data.[33] In the case at hand, critical discourse analysis based on publicly available documents is thus supplemented by semi-structured interviews conducted with individuals involved in the elaboration and the implementation of these international instruments. More specifically, a thorough examination of semi-structured interviews transcripts according to a critical discourse analysis sheds light on whether discourses of individuals from intergovernmental organizations reflect relations of power that are at play in the codification of foreign investors' responsibilities.

In general, interviews provide more flexibility than other methods to gather qualitative data. For example, in terms of commitments for the researcher and participants, interviews are conducted within shorter periods of time than research based on ethnography.[34] Flexibility also depends upon the type of interviews that is considered. While structured interviews are conducted according to a rigid set of questions that must be covered, totally unstructured interviews tend to be very similar to conversations.[35] Therefore, semi-structured interviews appear as a balanced solution that nonetheless remains open-ended and geared toward the participant's point of view.[36] Given that such

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[32] See Bryman, *supra* note 11 at 329; Seneviratne, *supra* note 11 at 169.

[33] See Schensul, *supra* note 14 at 77; Barbara Oomen, "The Application of Socio-Legal Theories of Legal Pluralism to Understanding the Implementation and Integration of Human Rights Law" (2014) 4 Eur J Hum Rights 471 at 491–492.

[34] See Bryman, *supra* note 11 at 312. In the specific context of intergovernmental organizations, see Joseph A Conti & Moira O'Neil, "Studying Power: Qualitative Methods and the Global Elite" (2007) 7:1 Qualitative Research 63 at 70.

[35] See Bryman, *ibid* at 314-315; Schensul, *supra* note 14 at 89.

[36] See Bryman, *ibid* at 313; Lioness Ayres, "Semi-Structured Interview" in Lisa M Given, ed, *The SAGE Encyclopedia of Qualitative Research Methods* (Thousand Oaks: Sage Publications, 2008) 811 at 811.

interviews are articulated around a set of core topics, this method to collect data also seems particularly appropriate for studies that compare different cases.[37] Overall, semi-structured interviews are deemed to generate rich and detailed answers without losing the focus of the research.[38]

Yet, relying on semi-structured interviews to gather information also implies limitations. The most important roadblock for present purposes pertains to the availability of professionals working in intergovernmental organizations. The reliance on semi-structured interviews is premised on the assumption that participants hold information regarding the codification process of foreign investors' responsibilities and that they are available to share it. However, as demonstrated by a study completed by Conti and O'Neil, accessing individuals from intergovernmental organizations can be quite challenging.[39] The limited time available for interviews is also highlighted as a recurring problem.[40] Moreover, the criterion of reliability is often encountered in the literature to emphasize the extent to which data could be obtained in a replication of the original study.[41] Considering that semi-structured interviews rely on insights gathered directly from participants, reliability strongly depends upon the reconstruction by the researcher of the information gathered from the interviewees.

After balancing the flexibility that is provided by this method to gather qualitative data with its potential limitations, it nonetheless appears that semi-structured interviews can be used to collect additional information and to strengthen the analysis at the micro-level. More precisely, the present study benefits from a total of 20 semi-structured interviews that have been conducted with individuals from four intergovernmental organizations – *i.e.* the OECD, the UN, the International Labour Organization and the World Bank Group – that adopted international instruments considered within the scope of this project. In order to recruit participants, emails have been sent to potential interviewees

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[37] See Bryman, *ibid* at 315; Schensul, *supra* note 14 at 94.

[38] See Bryman, *ibid* at 313 and 315.

[39] Conte & O'Neil, *supra* note 34.

[40] See *ibid* at 71.

[41] See Lange, *supra* note 11 at 184.

and a snowball sampling has been used,[42] as the participation of the first interviewees was confirmed. Discussions with the interviewees have focused on the existence of shared understandings between the various actors involved in the elaboration of the instruments, as well as a practice of legality (or lack thereof) characterizing the actions of actors since the adoption of the instruments. Particular attention has been paid when elaborating the interview guide in order to orient the discussions toward the relative influence of different actors involved in the elaboration and the implementation of the instruments within intergovernmental organizations. Interviews have also been recorded and transcribed with a view to increasing the reliability of the data.[43] Furthermore, following suggestions found in the literature,[44] transcripts have been made available for comments from participants. Recalling the workload of professionals involved in intergovernmental organizations, participants have been informed that their comments had to be provided within a period of two weeks to be taken into account in the analysis of data.

In sum, relying on a critical discourse analysis to emphasize inherent relations of power in the international lawmaking process allows providing a more complete picture of the codification of foreign investors' responsibilities by intergovernmental organizations at a micro-level of analysis. Scrutinizing publicly available discursive materials and transcripts from semi-structured interviews stresses the positions of the most powerful actors as they seek to shape shared understandings and the practice of legality that characterize legal norms. Juxtaposed to a traditional method of international law focusing primarily on the content of various international materials, this interdisciplinary methodology offers a richer analysis to assess whether international instruments meet crucial requirements that are pointed out by the interactional theory of international law and have entered the realm of legality.

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[42] See Bryman, *supra* note 11 at 324.

[43] See *ibid* at 321-322.

[44] See Lange, *supra* note 11 at 184.

3. Disclosing Potential Biases: A Reflexive Methodology

Having detailed the methods and sources of data that underlie the upcoming analysis, the final part of this methodology chapter aims to situate more accurately the researcher conducting the examination and to shed light on factors that influence the choices stated above. As emphasized by Chouliaraki and Fairclough, "[c]ritical social research should be reflexive, so part of the analysis should be a reflexion on the position from which it is carried out".[45] I am fully aware that the analysis of any object of inquiry implies that the individual conducting the examination inevitably carries professional presuppositions, cultural biases and personal experience.[46] Far from discrediting the analysis of the codification of foreign investors' responsibilities by intergovernmental organizations, I perceive this section as offering elements that strengthen the argument by acknowledging aspects that are at play in the collection and the analysis of data. In fact, strong assumptions pertaining to the influence of discourses in the international lawmaking process underlie my choice of a critical discourse analysis. Aspects related to my educational background, as well as my opinion on the general lack of accountability of private investors for harm caused abroad, are crucial elements justifying methodological choices that must also be mentioned at this point.

The most important point that must be disclosed relates to *assumptions regarding the role of discourses* in the international lawmaking process that takes place under the auspices of intergovernmental organizations. Two types of assumptions are worth mentioning for present purposes. On the one hand, a consideration of discursive materials is premised on the assumption that one can identify international actors' interests and perceptions of existing power relations through statements that these actors make. I thus consider discourses as a means to translate such relations of power and to ultimately account for which actors are steering the outcome of the lawmaking process. On the other hand, the fact that this methodology partly focuses on critical discourse analysis implies an

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[45] Chouliarki & Fairclough, *supra* note 15 at 270. See also Van Dijk, *supra* note 15 at 352-353; Wodak & Meyer, *supra* note 15 at 7.

[46] See Wodak & Meyer, *ibid* at 7; Schensul, *supra* note 14 at 71 and 86; Andrea Bianchi, "Reflexive Butterfly Catching: Insights from a Situated Catcher" in Joost Pauwelyn, Ramses A Wessel & Jan Wouters, eds, *Informal International Lawmaking* (Oxford: Oxford University Press, 2012) 200 at 203.

assumption according to which such discourses play a key role in shaping international norms. In contrast to perceiving discourses as fulfilling merely a representational function, I assume that they accomplish social actions and that they can generate effects in the social world.[47] What is more, a critical researcher must be aware that methods are devices that have the ability to enact political worlds and that they can help bring into being what they discover.[48] To put it differently, I acknowledge that the crucial role granted to critical discourse analysis in the present study is partly grounded in the assumption that such discourses produce concrete impacts on the international lawmaking process and that their consideration in the present analysis can even reinforce their influence in producing these concrete effects.

Methodological choices pertaining to the present study are also strongly related to my *educational background*. I was trained in interdisciplinary programs that combine international law and political science. As emphasized in previous chapters, I intend to approach the problematic at hand by thoroughly examining normative developments occurring in intergovernmental organizations *and* their consistency with the most powerful actors' interests in shaping these developments. To be clear, I do not seek to outweigh ongoing normative developments by considerations of power. Nor do I intend to conduct an analysis that denies the crucial role played by inherent power relations in the international lawmaking process. I am firmly convinced that both aspects are crucial in providing a better understanding of the codification of foreign investors' responsibilities and I have struggled to keep this balance throughout the present dissertation. The choice of combining a method that is traditionally used by international legal scholars and a critical discourse analysis should be viewed as reflecting this attempt at finding such a balance.

In order to respond to potential concerns with respect to the validity of results from the critical analysis, I agree that my *personal opinion* pertaining to the codification of foreign investors' responsibilities must also be disclosed. Following the description

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[47] See Milliken, *supra* note 13 at 229; Lange, *supra* note 11 at 182-183.

[48] See Claudia Aradau & Jef Huysmans, "Critical Methods in International Relations: The Politics of Techniques, Devices and Acts" (2014) 20 Eur J Int'l Rel 596 at 603. For an account of the socially produced character of critical discourse analysis, see Van Dijk, *supra* note 15 at 352-353.

provided by Willis and his collaborators of the critical researcher in social science,[49] I do not pretend to be totally objective about my approach to this study. Numerous allegations of human rights violations and environmental harm caused by private investors operating abroad are extensively documented.[50] In light of these allegations, the current international legal framework undoubtedly appears to be ill-suited to fully address many of the negative impacts that foreign investors can produce for communities in which they operate. I thus strongly suspect that the most powerful actors in international relations deploy considerable efforts to preserve the *status quo*, preventing a deeper normative integration of foreign investors' responsibilities in international investment law and the elaboration of international instruments that generate a genuine sense of obligation to steer the conduct of foreign investors. To put it bluntly, this whole analysis is driven by a profound will to shed light on the lacunas of current initiatives that allow such an unacceptable situation to persist. For these reasons, I maintain that it is appropriate to adopt a critical approach that illuminates relations of power underlying the evolving codification process of foreign investors' responsibilities.

With that being said, this critical approach has been carefully managed when interviewing individuals from intergovernmental organizations. Conti and O'Neil argue that an honest display of politics to the interviewees may provoke defensiveness from participants or an early ending to the discussion.[51] I have thus sought to ensure that my interventions during the interviews did not explicitly demonstrate the critical approach of the analysis. The questions that have been asked were therefore worded in terms of the relative influence of various actors rather than the reproduction of power relations and inequalities. Such distinctions have been carefully included in the interview guide that has been used to conduct the interviews.

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[49] Willis, Jost & Nilakanta, *supra* note 14 at 85.

[50] See e.g. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development – Addendum – Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, 2008, UN Doc A/HRC/8/5/Add.2. Other studies addressing such alleged violations are discussed in Chapter 4 of the present dissertation.

[51] Conti & O'Neil, *supra* note 34 at 75.

To be clear, the adoption of a reflexive methodology is meant to strengthen the present analysis rather than weaken it. After explaining how a traditional method in international law and critical discourse analysis are both relevant to conduct an analysis of the evolving codification of foreign investors' responsibilities by intergovernmental organizations, it is only appropriate to fully address concerns that could be raised to challenge methodological choices and the validity of the upcoming analysis. By establishing key assumptions that underlie the present dissertation and characteristics of the researcher that are likely to have influenced the analysis, this part of the methodology chapter is meant to transparently disclose the angle from which I approach the problematic.

Conclusion

The analysis of the codification of foreign investors' responsibilities occurring in intergovernmental organizations that is developed in the present dissertation seeks to offer a contribution to the ongoing discussion by explicitly addressing normative developments and relations of power that influence this codification process. In order to achieve this objective, an interdisciplinary methodology is paramount. At a macro-level of analysis, this chapter demonstrates how the combination of a traditional method in international law with a critical discourse analysis ensures a more complete examination of the normative integration of foreign investors' responsibilities in international law. While closely examining the content of international materials is necessary to account for the emergence of normative orders establishing foreign investors' responsibilities in various areas, the same method is also key to assess the consideration of these responsibilities in IIAs and decisions from international investment arbitration tribunals. Moreover, relying on a critical discourse analysis ensures an explicit consideration of the most powerful actors' interests in encouraging or impeding such a normative integration in international investment law. At the micro-level of analysis, the same methods can be used to assess whether international instruments developed by intergovernmental organizations constitute social norms or legal norms. A traditional legal method and a critical discourse analysis thus appear relevant to examine various facets of the emergence of shared understandings,

criteria of legality and a practice of legality that must be met by international legal norms. Finally, the inclusion of a discussion pertaining to potential biases underlying the choices of these methods can strengthen the analysis by addressing concerns regarding the validity of the upcoming analysis. Combined to the literature review and the analytical framework that are provided in previous chapters, this interdisciplinary methodology completes the foundations on which the analysis of the evolving codification of foreign investors' responsibilities by intergovernmental organizations relies.

Chapter 4 – The Normative Integration of Foreign Investors' Responsibilities in International Investment Law

Introduction

Recalling that Part II of the present dissertation seeks to offer a macro-level analysis of the evolving codification of foreign investors' responsibilities in the context of neoliberal globalization, it is worth examining the normative integration of these responsibilities in international investment law. It is plain that concerns regarding the lack of accountability of foreign investors remain of the utmost relevance when one looks at current discussions in this branch of international law. Among the several critiques that have been voiced with respect to international investment law,[1] the asymmetry of obligations in international investment agreements ("IIAs")[2] is a recurring theme.[3] While

[1] For a summary of these critiques, see Andrew Newcombe, "Sustainable Development and Investment Treaty Law" (2007) 8 J World Investment & Trade 357 at 365–366 [Newcombe, "Sustainable Development"]; Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009) at 63–64; José E Alvarez, "The Public International Law Regime Governing International Investment" (2009) 344 Rec des Cours 193 at 246–259 [Alvarez, "The Public International Law"]; Marie-Claire Cordonier Segger & Andrew Newcombe, "An Integrated Agenda for Sustainable Development in International Investment Law" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 101 at 113.

[2] For the purpose of this research, international investment agreements ("IIAs") generally include bilateral investment treaties ("BITs") as well as chapters from free trade agreements ("FTAs") that focus on investment.

[3] See e.g. José E Alvarez, "Critical Theory and the North American Free Trade Agreement's Chapter Eleven" (1996) 28 U of Miami Inter-Am L Rev 303 at 309-310; Susan Ariel Aaronson, "Global Corporate Social Responsibility Pressures and the Failure to Develop Universal Rules to Govern Investors and States" (2002) 3 J World Investment 487 at 487; Joseph E Stiglitz, "Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Framework in a Globalized World Balancing Rights with Responsibilities" (2008) 23 Am U Int'l L Rev 451 at 536; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007) at 98; Peter Muchlinski, "Policy Issues" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 3 at 37 [Muchlinski, "Policy Issues"]; Peter Muchlinski, "Corporate Social Responsibility" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 637 at 638 [Muchlinski, "Corporate Social Responsibility"]; Rachel J Anderson, "Toward Global Corporate Citizenship: Reframing Foreign Direct Investment Law" (2009) 18 Mich St U Coll L J Int'l L 1 at 6–7; Jan Wouters & Nicolas Hachez, "When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured" (2009) 3 Hum Rts & Int'l Legal Discourse 301 at 302; Asha Kaushal, "Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime" (2009) 50 Harv Int'l LJ 491 at 513; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 3d ed (Cambridge: Cambridge University Press, 2010) at 144; Abdullah Al Faruque, "Mapping the Relationship

these agreements subject host states to specific rules pertaining to the protection of foreign investors and investments,[4] IIAs are generally silent as far as the responsibilities of foreign

between Investment Protection and Human Rights" (2010) 11 J World Investment & Trade 539 at 442–443; Leyla Davarnejad, "The Impact of Non-State Actors on the International Law Regime of Corporate Social Responsibility: Blessing or Curse?" in Math Noortmann & Cedric Ryngaert, eds, *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers* (Farnham: Ashgate Pubishing, 2010) 41 at 42; Peter T Muchlinski, "Regulating Multinationals: Foreign Investment, Development, and the Balance of Corporate and Home Country Rights and Responsibilities in a Globalizing World" in José E Alvarez et al, eds, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: Oxford University Press, 2011) 30 at 31 [Muchlinski, "Regulating Multinationals"]; Brigitte Stern, "The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate" in José E Alvarez et al, eds, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: Oxford University Press, 2011) 174 at 189; Andrea K Bjorklund, "Improving the International Investment Law and Policy System, Report of the Rapporteur - Second Columbia International Investment Conference: What's Next in International Investment Law and Policy?" in José E Alvarez et al, eds, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: Oxford University Press, 2011) 213 at 215; Patrick Dumberry & Gabrielle Dumas-Aubin, "When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration" (2012) 13:3 J World Investment & Trade 349 at 349–350. [Dumberry & Dumas-Aubin, "When and How"]; Patrick Dumberry & Gabrielle Dumas-Aubin, "How to Impose Human Rights Obligations on Corporations under Investment Treaties? Pragmatic Guidelines for the Amendment of BITs" (2012) 4 Yearbook of Int'l Inv L & Pol'y 569 at 569 and 573 [Dumberry & Dumas-Aubin, "How to Impose"]; Patrick Dumberry, "Corporate Investors' International Legal Personality and their Accountability for Human Rights Violations under IIAs" in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (New York: Routledge, 2013) 179 at 179; Andrew Newcombe, "Investor Misconduct" in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (New York: Routledge, 2013) 195 at 195 [Newcombe, "Investor Misconduct"]; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013) at 125–154 [Miles, *Origins*]; Sandrine Maljean-Dubois & Vanessa Richard, "The Applicability of International Environmental Law to Private Enterprises" in Jorge E Viñuales & Pierre-Marie Dupuy, eds, *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge: Cambridge University Press, 2013) 69 at 74; Eva Van der Zee, "Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law?" (2013) 40 LIEI 33 at 34; Stephanie B Leinhardt, "Some Thoughts on Foreign Investors' Responsibilities to Respect Human Rights" (2013) 10:1 TDM 1 at 1 and 7; Kathryn Gordon, Joachim Pohl & Marie Bouchard, "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey" (2014) OECD Working Paper on International Investment No 2014/1 at 5; Karsten Nowrot, "How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?" (2014) 15 J World Investment & Trade 612 at 619; Patrick Dumberry & Gabrielle Dumas-Aubin, "A Few Pragmatic Observations on How BITs Should be Modified to Incorporate Human Rights Obligations" (2014) 11:1 TDM 1 at 2 [Dumberry & Dumas-Aubin, "A Few Pragmatic"]; Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015) at 20 [Sornarajah, *Resistance and Change*]; Jorge E. Viñuales, "Investor Diligence in Investment Arbitration: An Overview of Sources and Arguments" in Andrea Gattini, ed, *General Principles of Law and International Investment Arbitration* (forthcoming) [Viñuales, "Investor Diligence"]. See also generally Todd Weiler, "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order" (2004) 27 B C Int'l & Comp L Rev 429; Peter Muchlinski, "Multinational Enterprises as Actors in International Law: Creating 'Soft Law' Obligations and 'Hard Law' Rights" in Math Noortmann & Cedric Ryngaert, eds, *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers* (Farnham: Ashgate Pubishing, 2010) 9.

[4] See Jeswald W Salacuse, "The Treatification of International Investment Law" (2007) 13 Law & Bus Rev Am 155 at 156; Newcombe & Paradell, *supra* note 1 at 43; Muchlinski, "Regulating Multinationals", *ibid* at 34-35.

investors and home states are concerned.[5] For these reasons, authors like Ratner maintain that these agreements remain "heavily skewed in favor of international investors".[6] Along the same lines Miles criticizes the unresponsiveness of international investment law to the impact of investors' activities in local communities and the environment of the host state.[7] In other words, there are many voices advocating for the development of substantive standards to ensure a more balanced approach between the protection accorded to foreign investors and their responsibilities.

The present chapter's contribution with respect to the broader aim of the dissertation lies in its focus on the way IIAs and international investment arbitration currently address the lack of accountability of foreign investors. Previous studies emphasize the general interaction between international investment law and other non-investment issues.[8] For example, some authors highlight the extent to which international

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[5] See Peter T Muchlinski, *Multinational Enterprises and the Law*, 2d ed (Oxford: Oxford University Press, 2007) at 84 [Muchlinski, *Multinational Enterprises*]; James D Fry, "International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity" (2007) 18 Duke J Comp & Int'l L 77 at 103; Muchlinski, "Policy Issues", *supra* note 3 at 7; Luke Eric Peterson, *Human and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration* (Montreal: Rights and Democracy, 2009) at 12 and 14; Jorge Daniel Taillant & Jonathan Bonnitcha, "International Investment Law and Human Rights" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 59 at 65; Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2d ed (Oxford: Oxford University Press, 2012) at 25; Yannick Radi, "Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox" (2012) 37 NCJ Int'l L & Com Reg 1107 at 1110; UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (New York and Geneva: United Nations, 2012) at 103-104 [UNCTAD, *WIR 2012*].

[6] Steven R Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111:3 Yale LJ 443 at 459.

[7] Miles, *Origins*, *supra* note 3 at 125-126. See also Alain Pellet, "Notes sur la 'fragmentation' du droit international : Droit des investissements internationaux et droits de l'homme" in Denis Alland et al, eds, *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff Publishers, 2014) 757 at 770-774.

[8] See e.g. Fry, *supra* note 5; Ole Kristian Fauchald, "International Investment Law and Environmental Protection" (2007) 17 Yearbook of Int'l Env L 3; Moshe Hirsch, "Interactions Between Investment and Non-Investment Obligations" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 154 [Hirsch, "Interactions"]; Pierre-Marie Dupuy, "Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 45; Jorge E Viñuales, "Foreign Investment and the Environment in International Law: An Ambiguous Relationship" (2010) 80 BYIL 244 [Viñuales, "Foreign Investment"]; Bruno Simma, "Foreign Investment Arbitration: A Place for Human Rights?" (2011) 60 ICLQ 573; Timothy G Nelson, "Human Rights Law and BIT Protection: Areas of Convergence" (2011) 12 J World Investment & Trade 27; Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge: Cambridge

human rights law is used in investment arbitration to define the protection accorded to foreign investors.[9] Other scholars address the compatibility between IIAs and measures adopted by states to comply with obligations from other branches of international law.[10] While these studies are extensively cited through the current analysis, this research primarily aims to offer a better understanding of normative developments with respect to situations in which foreign investors' activities are specifically related to harms caused in the areas of human rights, environmental protection, labour rights and corruption.

This chapter combines a legal pluralist approach[11] and a traditional method in international law[12] to account for normative orders that emerge within intergovernmental organizations, in parallel to international investment law. In light of the elements related to the analytical framework underlying this dissertation, a legal pluralist approach provides a breeding ground to account for the role of intergovernmental organizations in the international lawmaking process. Instruments that are developed within these organizations to address the lack of accountability of private firms operating abroad can be considered as international norms, regardless of their relation with the formal sources of international law. Drawing from a thorough analysis of these international instruments' provisions, these instruments can be clustered in functionally differentiated normative orders that are emerging and that can be categorized according to various areas of foreign investors' responsibilities. Given the lack of coordination between these normative orders and international investment law, a legal pluralist approach suggests that a weak normative compatibility should be expected between international investment law and foreign investors' responsibilities that are codified by intergovernmental organizations.

After analyzing the emergence of several normative orders according to various areas of foreign investors' responsibilities (1), the normative integration of these

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University Press, 2012); Sornarajah, *Resistance and Change*, *supra* note 3 at 314-342; Sarah Joseph, "Human Rights and International Economic Law" (2016) 7 Eur YB Int'l Ecn L 461 at 476–481.

[9] See e.g. Fry, *ibid* at 83-96; Wouters & Hachez, *supra* note 3 at 304-308; Peterson, *supra* note 5 at 23-26; Kulick, *ibid* at 271-276; Pellet, *supra* note 7 at 765-768.

[10] See e.g. Hirsch, "Interactions", *supra* note 8 at 155; Dupuy, *supra* note 8 at 53-55; Wouters & Hachez, *ibid* at 308-340; Peterson, *ibid* at 26-42. See also generally Nelson, *supra* note 8.

[11] See section 1.1 of Chapter 2.

[12] See section 1.1 of Chapter 3.

responsibilities in international investment law is then examined in light of IIA provisions (2). Decisions reached by international investment arbitrators when dealing with foreign investors' activities that have negative effects on the environment and the communities in which they operate are also examined (3). The analysis leads to the conclusion that the normative integration of foreign investors' responsibilities in international investment law is generally weak in contrast to the protection states provide to foreign investment for all areas of foreign investors' responsibilities that are taken into account. However, in light of relatively few examples in which the prohibition of corruption is firmly considered in IIAs and in international investment arbitration, this normative integration is nevertheless stronger with respect to the area of corruption. In other words, instead of suggesting that foreign investors' responsibilities are totally absent from international investment law, considering the normative integration of these responsibilities as fragmented reflects more accurately the practice of states and international investment arbitration tribunals.

Before developing the argument any further, it must be emphasized that the current analysis differs from studies that address the conflict of norms.[13] While the theory of norm conflict presents incompatibility as a situation in which applying one legal norm necessarily implies the violation of another, such incompatibility is limited to instances in which a simultaneous observation of two legal norms by the same actor is impossible.[14] In the case at hand, the analysis of the integration of foreign investors' responsibilities within international investment law requires a more flexible conception of compatibility. The present analysis focuses on the interaction between international obligations of *states* under international investment law and other norms that relate to the conduct of *foreign investors*. Instead of assessing whether emerging norms seeking to hold foreign investors accountable under international law conflict with international investment law, the aim of this chapter is to account for the extent to which these different responsibilities coexist under

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[13] See generally Rémy Bachand, Martin Gallié & Stéphanie Rousseau, "Droit de l'investissement et droits humains dans les Amériques" (2003) 49 AFDI 575; Jörg Kammerhofer, "The Theory of Norm Conflict Solutions in International Investment Law" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 83; Jan Klabbers & Silke Trommer, "Peaceful Coexistence: Normative Pluralism in International Law" in Jan Klabbers & Touko Piiparinen, eds, *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge: Cambridge University Press, 2013) 67. See also Al Faruque, *supra* note 3 at 548-549; Viñuales, "Foreign Investment", *supra* note 8 at 253-254 and 284.

[14] See Kammerhofer, *ibid* at 85-86.

international investment law. Restated, the idea is to assess the extent to which states obligations under international investment law can be interpreted in light of any foreign investors' responsibilities in various areas, as expressed in emerging functionally differentiated normative orders. Instead of scrutinizing potential conflicts of norms, one can thus consider various degrees of normative integration – *i.e.* weak or strong – between different normative orders.

1. The Codification of Foreign Investors' Responsibilities as Functionally Differentiated Normative Orders

In line with the postulate that intergovernmental organizations can generate international norms without being strictly controlled by states, this section seeks to demonstrate that the initiatives developed by these organizations and considered for the purposes of the present dissertation establish functionally differentiated normative orders with respect to foreign investors' responsibilities. At this point, it must be stressed that the analysis remains at the macro-level and that this chapter does not focus on the instruments in themselves. While the elaboration and the implementation of these instruments is scrutinized more closely in Part III of the dissertation, the purpose of this section is to highlight the emergence of normative orders in parallel to international investment law. As emphasized above, specific areas in which private investors can cause harms when they operate abroad are considered for the purpose of this research. In addition to the codification of standards regarding human rights (1.1), several intergovernmental organizations have adopted various initiatives with respect to environmental protection (1.2) and labour rights (1.3). What is more, informal international instruments and formal international treaties have been negotiated under the auspices of multilateral intergovernmental organizations regarding corruption (1.4).

1.1 Human Rights

While the negative impact that foreign investors can have on human rights is extensively documented,[15] intergovernmental organizations have included provisions concerning these potential human rights violations in various international initiatives. Several agencies of the United Nations ("UN") have been particularly active in establishing human rights standards to be observed by private firms when operating abroad. For example, human rights standards are included in the two first principles of the UN Global Compact, which ask businesses to respect the protection of internationally proclaimed human rights and to refrain from being complicit in human rights abuses.[16] More detailed initiatives contribute to the elaboration of this normative order as well. Although this instrument has not been adopted by the UN Commission of Human Rights,[17] the Sub-commission on the Promotion and the Protection of Human Rights elaborated the *Norms on the Responsibilities of Transnational Corporation and Other Business Enterprises with*

[15] See e.g. Sarah Joseph, "Taming the Leviathans: Multinational Enterprises and Human Rights" (1999) 46:02 Nethl Int'l L Rev 171 at 173–174 [Joseph, "Taming the Leviathans"]; Sarah Joseph, "An Overview of the Human Rights Accountability of Multinational Enterprises" in Menno T Kamminga & Saman Zia-Zarifi, eds, *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) 75 at 76 [Joseph, "An Overview"]; Jordan J Paust, "Human Rights Responsibilities of Private Corporations" (2002) 35 Vand J Transnat'l L 801 at 817–818; Surya Deva, "Human Rights Violations by Multinational Corporations and International Law: Where from Here" (2003) 19 Conn J Int'l L 1 at 7–8; Weiler, *supra* note 3 at 433-434; David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44 Va J Int'l L 931 at 933–934; Ilias Bantekas, "Corporate Social Responsibility in International Law" (2004) 22 BU Int'l LJ 309 at 327–331; Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *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*, 2008, UN Doc A/HRC/8/5 at para 52 [SRSG, *Report 2008*]; Davarnejad, *supra* note 3 at 44-45; John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W. W. Norton & Company, 2013) at 3–19; Tineke Lambooy, "Corporate Due Diligence as a Tool to Respect Human Rights" (2010) 28 Neth Q Hum Rts 404 at 426–427; Anthony J VanDuzer, Penelope Simons & Mayeda Graham, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (London: Commonwealth Secretariat, 2013) at 295.

[16] United Nations Global Compact, online: United Nations Global Compact <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (accessed 14 September 2016), Principles 1 and 2 [UN Global Compact].

[17] *Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights,* ESC Dec 2004/116, 2004, Supp No 3, UN Doc E/CN.4/2004/127, 332 at 333.

regard to Human Rights ("*UN Norms*")[18] in 2003. The *Guiding Principles on Business and Human Rights* ("*UN Guiding Principles*")[19] of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises ("Special Representative") have also been adopted in 2011 and are now considered by some as being the most authoritative instrument with respect to human rights.[20]

Another intergovernmental organization that has addressed foreign investors' responsibilities with respect to the issue of human rights is the International Labour Organization ("ILO"). Despite a more specific focus on labour rights, the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* ("*ILO Declaration*") includes a provision pertaining to human rights. In fact, paragraph 8 of this instrument provides that all parties concerned by the *ILO Declaration* "should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations".[21]

In addition to these initiatives elaborated and implemented by subsidiary agencies of the UN and the ILO, the Organisation for Economic Co-operation and Development ("OECD") has contributed to the emergence of norms regarding foreign investors' responsibilities in this area. Since 2000, the *OECD Guidelines for Multinational Enterprises* ("*OECD Guidelines*") emphasize that enterprises should "[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments".[22] Moreover, in 2011, the OECD opted for the

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[18] *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, 2003, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 [*UN Norms*]. See also Muchlinski, *Multinational Enterprises*, *supra* note 5 at 519-524; Miles, *Origins*, *supra* note 3 at 229-230.

[19] Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 2011, UN Doc A/HRC/17/31 [*UN Guiding Principles*].

[20] See Olivier De Schutter, "Foreword: Beyond the Guiding Principles" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) xv at xvii.

[21] *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, March 2006, online: ILO <http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm> (accessed 14 September 2016) at para 8 [*ILO Declaration*].

[22] *Declaration on International Investment and Multinational Enterprises*, 27 June 2000, Doc No C(2000)96/REV1 (2000), Annex 1 at para II.2 [*OECD Guidelines 2000*]; *Declaration on International*

inclusion of a whole chapter on human rights within the most recent version of this instrument.[23] After emphasizing that states have the duty to protect human rights, this instrument mentions some standards that should be observed by enterprises, "within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as domestic laws and regulations".[24] Interestingly, in the commentaries included to this chapter on human rights, the OECD specifically acknowledges the work of the Special Representative, noting that the standards found in the *OECD Guidelines* remain "in line" with the *UN Guiding Principles*.[25]

Another intergovernmental organization that has codified standards pertaining to human rights and whose instruments are considered for present purposes is the International Financial Corporation ("IFC"), which is a member of the World Bank Group. Among the eight standards that are included in the *Performance Standards on Environmental and Social Sustainability* ("*IFC Performance Standards"*), various elements relate to the issues of community health, safety, security, land acquisition, involuntary resettlement and Indigenous peoples.[26]

Investment and Multinational Enterprises, 25 May 2011, Doc No C/MIN(2011)11/FINAL (2011), Annex 1 at para II.A.2 [*OECD Guidelines 2011*].

[23] *OECD Guidelines 2011*, *ibid*, Chapitre IV. See also VanDuzer et al, *supra* note 15 at 296; Van der Zee, *supra* note 3 at 40.

[24] *OECD Guidelines 2011*, *ibid*, chapeau of Chapter IV.

[25] OECD, *OECD Guidelines for Multinational Enterprises, 2011 Edition* (Paris: OECD, 2011), Commentary 36 [*OECD Guidelines 2011 – Commentaries*].

[26] *IFC Performance Standards on Social & Environmental Sustainability*, 30 April 2006, online: International Finance Corporation <http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Our+Approach/Risk+Management/Performance+Standards/> (accessed 14 September 2016), Performance Standards 4, 5 and 7 [*IFC Performance Standards 2006*]; *IFC Performance Standards on Environmental and Social Sustainability*, 1 January 2012, online: International Finance Corporation <http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Our+Approach/Risk+Management/Performance+Standards/> (accessed 14 September 2016), Performance standards 4, 5 and 7 [*IFC Performance Standards 2012*].

1.2 Environmental Protection

The activities of foreign investors can also have a considerable impact on the environment in which these actors operate.[27] In this regard, the pollution caused by these actors, as well as the limits that are posed to the enjoyment of a clean and healthy environment, are extensively discussed in the literature.[28] Echoing these worries, almost all the initiatives adopted under the auspices of the UN with respect to the lack of accountability of private firms operating abroad explicitly address responsibilities to conduct their activities in a way that ensures the protection of the environment. In fact, three principles of the UN Global Compact concern broad engagements for businesses regarding the environment – *i.e.* supporting a precautionary approach to environmental challenges, promoting greater environmental responsibility and encouraging environmental friendly technology.[29] Although the main focus of the *UN Norms* remains on human rights, this instrument also includes a provision that emphasizes environmental protection responsibilities.[30]

As far as the OECD is concerned, the protection of the environment was included in the original version of the *OECD Guidelines* adopted in 1976.[31] The 1991 revision also devoted a whole chapter of standards pertaining to this area.[32] In its most recent version,

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[27] See e.g. Joseph, "Taming the Leviathans", *supra* note 15 at 173; Joseph, "An Overview", *supra* note 15 at 76; UNCTAD, *International Investment Agreements: Key Issues*, Vol II (New York and Geneva: United Nations, 2004) at 80 [UNCTAD, *International Investment Agreements*]; Kinley & Tadaki, *supra* note 15 at 934; Davarnejad, *supra* note 3 at 44; Miles, *Origins*, *supra* note 3 at 130; VanDuzer et al, *supra* note 15 at 295.

[28] See Paust, *supra* note 15 at 818.

[29] UN Global Compact, *supra* note 16, Principles 7-9.

[30] "Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development". *UN Norms*, *supra* note 18 at para 14.

[31] *Declaration on International Investment and Multinational Enterprises*, 21 June 1976, Doc No C(76)99/FINAL (1976), Annex 1, General Policies at para 2 [*OECD Guidelines 1976*].

[32] See Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) at 249; Muchlinski, *Multinational Enterprises*, *supra* note 5 at 569-570; Muchlinski, "Corporate Social Responsibility", *supra* note 3 at 666.

Chapter VI of these guidelines stipulates that enterprises should take due account of the need to protect the environment and ensure that their activities are conducted in a manner that contributes to sustainable development.[33] In the commentaries to this instrument, the OECD emphasizes that aspects included through these provisions merely reflect principles and objectives that are contained in other international instruments without necessarily being addressed to private firms.[34]

The protection of the environment is also present in the initiatives elaborated and implemented by the IFC. Although some minor word changes are noticeable when one contrasts the two versions that have been adopted by this agency of the World Bank Group, it is plain that this area of foreign investors' responsibilities is included in the *IFC Performance Standards*.[35] According to the current version of this instrument, private firms that are responsible for a project covered by this institution must apply standards related to resource efficiency, pollution prevention, biodiversity conservation as well as sustainable management of living natural resources.[36]

1.3 Labour Rights

While being closely related to potential violations of human rights, alleged abuses of labour rights by foreign investors are also extensively documented.[37] It thus appears as quite unsurprising that various efforts seek to steer the conduct of private firms in this specific area. Amongst the different intergovernmental organizations participating in the elaboration of this normative order, the ILO has played a prominent role. In fact, in its most recent form, the *ILO Declaration* encompasses substantive principles in the fields of

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[33] *OECD Guidelines 2011*, *supra* note 22, Chapter VI.

[34] *OECD Guidelines 2011 – Commentaries*, *supra* note 25, Commentary 60.

[35] *IFC Performance Standards 2006*, *supra* note 26; *IFC Performance Standards 2012*, *supra* note 26.

[36] *IFC Performance Standards 2012*, *ibid*, Performance Standards 3 and 6.

[37] See e.g. Joseph, "Taming the Leviathans", *supra* note 15 at 173; Joseph, "An Overview", *supra* note 15 at 76; Paust, *supra* note 15 at 817 and 819; Bantekas, *supra* note 15 at 333; SRSG, *Report 2008*, *supra* note 15 at para 52.

employment, training of workers, conditions of work and life, as well as industrial relations.[38]

Beyond the initiatives elaborated and implemented by the ILO, several instruments adopted within the broader UN system relating to labour rights are also worth noting. More specifically, four principles of the UN Global Compact specifically concern the recognition of the freedom of association, the elimination of forced labour, the abolition of child labour and the elimination of discrimination regarding employment.[39] Most of these principles are also reflected in the *UN Norms*, which include more detailed provisions pertaining to the rights of workers that must be respected by private firms.[40] Although such aspects are not expressly addressed under a specific part of the *UN Guiding Principles*, the Special Representative has also referred to fundamental rights set out by the ILO when designing his principles for the corporate responsibility to respect human rights.[41]

In a way that mirrors the consideration of the other areas in which foreign investors' activities can produce negative effects, the *OECD Guidelines* also include a chapter concerning labour rights under the heading "Employment and Industrial Relations".[42] As far as the standards that are included in this instrument are concerned, the OECD refers to the role of the ILO in elaborating international labour standards and fundamental rights at work.[43] It also emphasizes that the role of the *OECD Guidelines* is to promote observance of these standards among private firms.[44] After acknowledging the existence of the *ILO Declaration*, the commentaries to this instrument mention that the latter and the *OECD Guidelines* both "refer to the behavior expected from enterprises and are intended to parallel and not conflict with each other".[45]

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[38] *ILO Declaration*, *supra* note 21 at para 7. See also Muchlinski, *Multinational Enterprises*, *supra* note 5 at 479-506; Muchlinski, "Corporate Social Responsibility", *supra* note 3 at 648.

[39] UN Global Compact, *supra* note 16, Principles 3-6.

[40] *UN Norms*, *supra* note 18, Part D.

[41] *UN Guiding Principles*, *supra* note 19, Principle 12.

[42] *OECD Guidelines 1976*, *supra* note 31; *OECD Guidelines 2000*, *supra* note 22, Chapter IV; *OECD Guidelines 2011*, *supra* note 22, Chapter V.

[43] *OECD Guidelines 2011 – Commentaries*, *supra* note 25, Commentary 48.

[44] *Ibid*, Commentary 48.

[45] *Ibid*, Commentary 48.

In addition to the aforementioned intergovernmental organizations, the IFC has also chosen to address the role of private investors in protecting labour rights. The second standard included in the *IFC Performance Standards* explicitly "recognizes that the pursuit of economic growth through employment creation and income generation should be accompanied by protection of fundamental rights of workers".[46] Private actors that are responsible for a project covered by the IFC must also meet requirements related to working conditions and management of worker relationship, protection of the work force, occupational health and safety, workers engaged by third parties and supply chain.[47]

1.4 Corruption

Another area in which foreign investors' activities can harm third parties is the corruption of foreign officials. Even though the negative impact of corrupt practices may not be as apparent as the three previous areas, corruption can be highly damaging for a community in which foreign investors operate.[48] For example, beyond the distortion that is brought in terms of market competition, corrupt practices is deemed to negatively affect social development.[49] In order to tackle this issue, intergovernmental organizations have adopted instruments that include provisions addressing corruption. The UN Global

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[46] *IFC Performance Standards 2012*, *supra* note 26, Performance standard 2 [footnote omitted].

[47] *Ibid,* Performance standard 2.

[48] See Joseph, "Taming the Leviathans", *supra* note 15 at 174; Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford: Oxford University Press, 2015) at 4–6.

[49] See Robert D Tronnes, "Ensuring Uniformity in the Implementation of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" (2000) 33 Geo Wash J Int'l L & Ecn 97 at 102–109; Enery Quinones, "L'évolution du droit international en matière de corruption : La convention de l'OCDE" (2003) 49:1 AFDI 563 at 563; UNCTAD, *International Investment Agreements*, *supra* note 27 at 155; Giorgio Sacerdoti, "Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice" (2009) 24:2 ICSID Rev 565 at 565; Cameron A Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims" (2012) 3:2 J Int'l Dispute Settlement 329 at 330 [Miles, "Corruption"]; Jan Wouters, Cedric Ryngaert & Ann Sofie Cloots, *The Fight Against Corruption in International Law*, SSRN Scholarly Paper ID 2274775 (Rochester, NY: Social Science Research Network, 2012) at 9–11; Sagar Kulkarni, "Enforcing Anit-Corruption Measures Through International Investment Arbitration" (2013) 10:3 TDM 1 at 8–10; Tidarat Sinlapapiromsuk, "The Legal Consequences of Investor Corruption in Investor-State Dispute: How Should the System Proceed?" (2013) 10:3 TDM 1 at 2; VanDuzer et al, *supra* note 15 at 338-340.

Compact[50], the *OECD Guidelines*[51] and the *OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*[52] are examples of informal initiatives constituting an integral part of the normative order that seeks to combat corruption and bribery. What is more, in contrast to other areas in which foreign investors' activities can entail negative effects, the prohibition of corruption has been addressed through formal sources of international law. At the multilateral level, the OECD[53] and the UN[54] have deployed considerable efforts to elaborate and implement international treaties in this regard. The relevance of these initiatives lies in the inclusion of provisions that impose an obligation on states to establish the liability of legal persons that are involved in the corruption of foreign public officials.[55]

In sum, in line with the assumptions of a legal pluralist approach, all of these instruments contribute to the creation of functionally differentiated normative orders that establish standards applicable to foreign investors. These norms have been elaborated and revised by intergovernmental organizations with a view to filling a normative gap that is not addressed within international investment law. Such efforts have thus emerged in parallel to international investment rules and principles to address the general lack of accountability of foreign investors in the areas of human rights, environmental protection, labour rights and corruption. In order to assess the extent to which these normative orders

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[50] UN Global Compact, *supra* note 16, Principle 10

[51] *OECD Guidelines 2000*, *supra* note 22, Chapter VI; *OECD Guidelines 2011*, *supra* note 22, Chapter VII.

[52] *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 26 November 2009, Doc No C(2009)159/REV1/FINAL (amended on 18 February 2010, Doc No C(2010)19).

[53] *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, 37 ILM 1 (entered into force 15 February 1999) [*OECD Convention on Bribery*].

[54] *United Nations Convention Against Corruption*, 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005) [*UNCAC*]; *United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003) [*UNCATOC*]. While the latter concerns transnational organized crime more broadly, it considers corruption as one of the offences that falls under the scope of application of the convention (see arts 5, 6, 8 and 23).

[55] *OECD Convention on Bribery,* supra note 53, art 2; *UNCATOC*, *ibid*, art 10; *UNCAC, ibid*, art 26. See also Joseph, "Taming the Leviathans", *supra* note 15 at 184; August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 37 at 60; Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford: Oxford University Press, 2006) at 248–252; Zerk, *supra* note 32 at 286-287; Sacerdoti, *supra* note 49 at 572; Markos Karavias, *Corporate Obligations under International Law* (Oxford: Oxford University Press, 2013) at 63–66.

are normatively integrated to international investment law, the analysis can now proceed with an examination of how this branch of international law deals with foreign investors' responsibilities.

2. Addressing the Lack of Accountability of Foreign Investors in IIAs

IIAs stand as an appropriate starting point to analyze the integration of the aforementioned normative orders within international investment rules and principles. The *Investment Policy Framework for Sustainable Development* elaborated by the United Nations Conference for Trade and Development ("UNCTAD") is a prominent example of the changing landscape with respect to the inclusion of foreign investors' responsibilities in these agreements.[56] With the objective of providing guidance on investment policies with respect to the negotiation of IIAs, the UNCTAD makes the following recommendation:

> In the detailed design of provisions in investment agreements between countries, policymakers need to incorporate sustainability development considerations, addressing concerns related to policy space (e.g., through reservations and exceptions), *balanced rights and obligations of States and investors (e.g., through encouraging compliance with [corporate social responsibility] standards)*, and effective investment promotion (e.g., through home-country measures).[57]

Along the same lines, the *World Investment Report 2015* emphasizes that setting responsibilities on the part of investors in IIAs is a key element to reform the governance of international investment.[58]

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[56] UNCTAD, *WIR 2012*, *supra* note 5 at 97-164.

[57] *Ibid* at 132 [emphasis added]. An updated version was launched in 2015: UNCTAD, *Investment Policy Framework for Sustainable Development* (New York and Geneva: United Nations, 2015) at 33, 35 and 77-78.

[58] UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (New York and Geneva: United Nations, 2015) at 128. See also UNCTAD, *Taking Stock of IIA Reform*, IIA Issues Note, 2016, No 1 (2016) [UNCTAD, *Taking Stock*]. A will to ensure that "[i]nvestment policies should promote and facilitate the observance by investors of international best practices and applicable instruments of responsible business conduct and corporate governance" can also be found in a more recent document adopted by the G20. See G20, *Guiding Principles for Global Investment Policymaking* (10 July 2016), online: Investment Policy Hub <http://investmentpolicyhub.unctad.org/Upload/Documents/Annex%20III%20G20%20Guiding%20Principles%20for%20Global%20Investment%20Policymaking.pdf> (accessed 14 September 2016) at para VIII.

Relying on UNCTAD's recommendations, this section focuses on the current practice of states when drafting IIAs. Although a survey completed by the OECD in 2014 suggests that provisions generally relating to the advancement of sustainable development or to the promotion of responsible business conduct have become a dominant treaty practice in recent years, only 12% of IIAs include such provisions.[59] Even if this practice appears to be relatively scarce, an exhaustive presentation of formulations that are included in IIAs to account for any issues that transcend investment protection is beyond the scope of this research.[60] Rather, the analysis focuses on provisions that specifically address harms related to foreign investors' activities. While states can choose to include an obligation to maintain existing standards that are applicable to foreign investors (2.1), there are also some examples in which foreign investors' responsibilities are directly taken into account (2.2) or states recall the consequences of corrupt practices by foreign investors (2.3). Overall, such provisions suggest that the normative integration of foreign investors' responsibilities in IIAs remains generally weak, but somehow stronger with respect to the area of corruption.

2.1 The Obligation Not to Lower Existing Standards

One aspect that is reflected in the practice of several states and that can be linked to an attempt at addressing harms related to foreign investors' activities is the use of "no lowering of standards" clauses.[61] More specifically, various provisions found in IIAs are

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[59] See Gordon, Pohl & Bouchard, *supra* note 3 at 5.

[60] See OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (Paris: OECD, 2008) at 135-240 [OECD, *International Investment Law*]; Kathryn Gordon and Joachim Pohl, "Environmental Concerns in International Investment Agreements: A Survey" (2011) OECD Working Paper on International Investment No 2011/1; Markus W Gehring & Avidan Kent, "Sustainable Development and IIAs: From Objective to Practice" in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (New York: Routledge, 2013) 284; Gordon, Pohl & Bouchard, *ibid*; UNCTAD, *Taking Stock*, *supra* note 58.

[61] See UNCTAD, *International Investment Agreements*, *supra* note 27 at 91-92, 122-123 and 149; Fauchald, *supra* note 8 at 39-41; Muchlinski, *Multinational Enterprises*, *supra* note 5 at 564; Muchlinski, "Corporate Social Responsibility", *supra* note 3 at 671; Mary E Footer, "Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment" (2009) 18 Mich St U Coll L J Int'l L 33 at 43–44; Wouters & Hachez, *supra* note 3 at 338; Chester Brown, "Bringing Sustainable Development Issues before Investment Treaty Tribunals" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International,

geared toward ensuring the application of domestic legislation with respect to health, environmental protection and labour rights. One typical example can be found in Article 1114(2) of the *North American Free Trade Agreement* ("*NAFTA*"):

> The Parties *recognize that it is inappropriate* to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, *it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement*.[62]

Such a practice is relatively limited when compared to the total number of IIAs. Out of a sample of 2 107 agreements, the aforementioned survey completed by the OECD in 2014 shows that 82 IIAs and models of bilateral investment treaties ("BITs") include a provision that aims to foster the application of domestic legislation when regulating foreign investors.[63] Even if the procedure pertaining to the settlement of possible breaches of this obligation is not included in all these IIAs, similar "no lowering of standards" clauses appear to be particularly common in IIAs involving Austria, Belgium/Luxembourg, Canada, Chile, Colombia, Japan, Mexico, Peru and the United States.[64]

Other instances that are not cited within this OECD study include similar provisions. For example, the economic partnership agreement ("EPA") signed between the European Community and Caribbean Forum ("CARIFORUM") mentions that the state parties "shall ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural

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2011) 175 at 178–179; Jarrod Hepburn & Vuyelwa Kuuya, "Corporate Social Responsibility and Investment Treaties" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 589 at 600; Vid Prislan & Ruben Zandvliet, "Mainstreaming Sustainable Development Into International Investment Agreements: What Role for Labor Provisions?" in Rainer Hoffmann, Christian Tams & Stephan W Schill, eds, *International Investment Law and Development* (Northampton: Edward Elgar, 2015) 390 at 397–398.

[62] *North American Free Trade Agreement*, 17 December 1992, 32 ILM 289 (entered into force 1 January 1994), art 1114(2) [emphasis added] [*NAFTA*].

[63] Gordon, Pohl & Bouchard, *supra* note 3 at 16. See also OECD, *International Investment Perspectives* (Paris: OECD, 2006) at 157; Gordon & Pohl, *supra* note 60 at 13 and 23; OECD, *International Investment Law*, *supra* note 60 at 146; VanDuzer et al, *supra* note 15 at 324-325 and 349.

[64] Gordon & Pohl, *ibid*; Gordon, Pohl & Bouchard, *ibid*.

diversity".[65] More recent agreements involving the European Union ("EU") also include an article addressing the obligation to uphold domestic legislation in the areas of environmental protection and labour rights.[66] Finally, the Southern African Development Community ("SADC") model BIT encompasses the same type of recognition not to relax domestic and labour legislation.[67]

Not only do such provisions remain an indirect way to address harms caused by foreign investors,[68] but their potential effect is also greatly affected by the words chosen by states.[69] In fact, the terms that are generally used in these clauses considerably differ from the provisions granting protection to foreign investors. On the one hand, by merely stating that it is "inappropriate" to lower standards in order to attract foreign investment, these provisions are limited to a "best efforts" approach.[70] On the other hand, in the few instances in which IIAs include a mechanism that can be used in the advent that one of the state parties lowers its standards, such a procedural provision remains particularly weak.[71] In contrast to the investor-state dispute settlement mechanism that is often included in IIA, the enforcement of this provision relies merely on "consultations" that are geared toward "avoiding any such encouragement".[72]

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[65] *Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Members, of the other part*, 15 October 2008, 289 OJ 3, art 73 [*EC-CARIFORUM EPA*]. Another similar provision is provided at art 193.

[66] *Free Trade Agreement between the European Union and its Members, of the one Part, and the Republic of Korea, of the other Part*, 6 October 2010, 127 OJ 6 (entered into force July 2011), art 13.7 [*EU-South Korea FTA*]; *Trade Agreement between the European Union and its Members, of the one Part, and Colombia and Peru, of the other Part*, 26 June 2012, online: EU <http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147704.pdf> (accessed 14 September 2016), art 277(1)-(2).

[67] Southern African Development Community, *SADC Model Bilateral Investment Treaty Template* (July 2012), online: International Institute for Sustainable Development <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> (accessed 14 September 2016), art 22(2) [*SADC Model BIT*].

[68] See Raymond Clémençon, "Foreign Direct Investment and Global Environmental Protection - Why Environmentalists Should Favour Multilateral Investment Rules" (2000) 1 J World Investment 199 at 218; Hepburn & Kuuya, *supra* note 61 at 601; Kulick, *supra* note 8 at 70; VanDuzer et al, *supra* note 15 at 351.

[69] See Kulick, *ibid* at 70-71; Prislan & Zandvliet, *supra* note 61 at 399-400.

[70] See UNCTAD, *International Investment Agreements*, *supra* note 27 at 92; Fauchald, *supra* note 8 at 39; Muchlinski, "Corporate Social Responsibility", *supra* note 3 at 671; Peter Muchlinski, "Regulating Multinational Enterprises" (2016) 7 Eur YB Int'l Ecn L 391 at 413.

[71] See UNCTAD, *International Investment Agreements*, *ibid* at 92.

[72] *NAFTA*, *supra* note 62, art 1114(2).

With that being said, there is at least one provision relating to measures adopted by states to limit the negative impact of foreign investors' activities that is worth mentioning. In a BIT signed between Bangladesh and Turkey in 2012, both states agreed that "[e]ach Contracting Party shall reserve the right to exercise all legal measures in case of loss, destruction, damages with regard to its public health or life or the environment by investments of the investors of the other Contracting Party".[73] Clearly, the adoption of such measures reaches far beyond an hortatory requirement not to lower existing standards. Such a provision can even be considered as an interesting avenue to indirectly address foreign investors' responsibilities under international investment law in the areas of human rights, environmental protection and labor rights. However, beyond this fairly unusual instance, the overwhelming majority of provisions that relate to actions by states to limit the negative impact of foreign investors' activities by not lowering existing standards do not ensure a strong normative integration of foreign investors' responsibilities in IIAs.

2.2 Provisions on Foreign Investors' Responsibilities

With a view to tackling harms related to foreign investors' activities through a more direct mechanism, states can choose among various possibilities to explicitly account for the responsibilities of these private actors within IIAs. More specifically, three different avenues are discernable from the current practice of states: addressing these issues in the preamble of IIAs; including a general reference to foreign investors' responsibilities in a separate provision of the agreement; and referring to specific instruments adopted by multilateral intergovernmental organizations and that codify standards of appropriate behavior for private actors operating abroad.

As far as the first option is concerned, the signatory states of an IIA can choose to acknowledge the relevance of foreign investors' responsibilities in the *preamble of the*

[73] *Agreement between the Government of the Republic of Turkey and the Government of People's Republic of Bangladesh concerning the Reciprocal Promotion and Protection of Investments*, 12 April 2012, online: Investment Policy Hub <http://investmentpolicyhub.unctad.org/Download/TreatyFile/274> (accessed 14 September 2016), art 4(2).

agreement.[74] While a clear reference to these responsibilities is far less frequent than the several instances where states have used the language of preambles to emphasize their capacity to regulate,[75] some examples are worth noting. In this regard, the relevance of corporate social responsibility has been acknowledged in the preamble of several free trade agreements ("FTAs") signed by the European Free Trade Association.[76] According to a similar approach, the preamble of four FTAs between Canada and Latin American countries include an encouragement for enterprises to respect corporate social responsibility norms.[77] The preamble of a BIT signed between Switzerland and Kosovo

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[74] See Muchlinski, "Policy Issues", *supra* note 3 at 38; Muchlinski, "Regulating Multinationals", *supra* note 3 at 47; Barnali Choudhury, "Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements" U Penn J Int'l L (forthcoming).

[75] See Gordon & Pohl, *supra* note 60; Stern, *supra* note 3 at 189-191.

[76] *Free Trade Agreement between the Republic of Colombia and the EFTA States*, 25 November 2008, online: EFTA <http://www.efta.int/media/documents/legal-texts/free-trade-relations/colombia/EFTA-Colombia%20Free%20Trade%20Agreement%20EN.pdf> (accessed 14 September 2016) (entered into force 1 July 2011), Preamble [*EFTA-Colombia FTA*]; *Free Trade Agreement between the Republic of Albania and the EFTA States*, 17 December 2009, online: EFTA <http://www.efta.int/free-trade/free-trade-agreements/media/documents/legal-texts/free-trade-relations/albania/EFTA-Albania%20Free%20Trade%20Agreement.pdf> (accessed 14 September 2016) (entered into force 1 November 2010), Preamble; *Free Trade Agreement between the EFTA States and the Republic of Serbia*, 17 December 2009, online: EFTA <http://www.efta.int/media/documents/legal-texts/free-trade-relations/serbia/EFTA-Serbia%20Free%20Trade%20Agreement.pdf> (accessed 14 September 2016) (entered into force 1 October 2010), Preamble; *Free Trade Agreement between the EFTA States and Ukraine*, 24 June 2010, online: EFTA <http://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/ukraine/EFTA-Ukraine%20Free%20Trade%20Agreement.pdf> (accessed 14 September 2016) (entered into force 1 June 2012), Preamble; *Free Trade Agreement between the Republic of Peru and the EFTA States*, 14 July 2010, online: EFTA <http://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/peru/EFTA-Peru%20Free%20Trade%20Agreement%20EN.pdf> (accessed 14 September 2016) (entered into force 1 July 2011), Preamble; *Free Trade Agreement between the EFTA States and Hong Kong*, *China*, 21 June 2011, online: EFTA <http://www.efta.int/media/documents/legal-texts/free-trade-relations/hong-kong-china/EFTA-Hong%20Kong%20China%20Free%20Trade%20Agreement.pdf> (accessed 14 September 2016) (entered into force 1 October 2012), Preamble; *Free Trade Agreement between the EFTA States and Montenegro*, 14 November 2011, online: EFTA <http://www.efta.int/media/documents/legal-texts/free-trade-relations/montenegro/montenegro-main-agreement.pdf> (accessed 14 September 2016) (entered into force 1 September 2012), Preamble [*EFTA-Montenegro FTA*]; *Free Trade Agreement between the EFTA States and Bosnia and Herzegovina*, 24 June 2013, online: EFTA <http://www.efta.int/media/documents/legal-texts/free-trade-relations/bosnia-and-herzegovina/bosnia-and-herzegovina-fta.pdf> (accessed 14 September 2016) (entered into force: 1 January 2015), Preamble [*EFTA-Bosnia and Herzegovina FTA*]; *Free Trade Agreement between the EFTA and the Central American States*, 24 June 2013, online: EFTA <http://www.efta.int/media/documents/legal-texts/free-trade-relations/central-america/EFTA-Central-America-free-trade-agreement.pdf> (accessed 14 September 2016), Preamble. See also UNCTAD, *World Investment Report 2011: Non-Equity Modes of International Production and Development* (New York and Geneva: United Nations, 2011) at 120; VanDuzer et al, *supra* note 15 at 300.

[77] *Free Trade Agreement between Canada and the Republic of Peru*, 29 May 2008, Can TS 2009 No 15 (entered into force 1 August 2009), Preamble [*Canada-Peru FTA*]; *Free Trade Agreement between Canada and the Republic of Colombia*, 21 November 2008, Can TS 2011 No 11 (entered into force 15 August 2011), Preamble [*Canada-Colombia FTA*]; *Free Trade Agreement between Canada and the Republic of Panama*,

also refers to the aim of encouraging investors to respect corporate social responsibility norms and principles that are internationally recognized.[78] More recently, the preamble of the draft model BIT adopted by Norway in 2015 emphasizes the importance of corporate social responsibility[79] and a call to encourage enterprises "to respect internationally recognized guidelines and principles of corporate social responsibility" has been included in the preamble of the *Comprehensive Economic and Trade Agreement* ("*CETA*") between Canada and the EU.[80] In a way that focuses on "obligations" rather than "corporate social responsibility", the preamble of the SADC model BIT emphasizes that the parties are "[s]eeking an overall balance of the rights and obligations among the State Parties, the investors and the investments".[81] Although the language included in preamble can be used by investment arbitration tribunals to illuminate the object and the purpose of IIAs,[82] it must be noted that current examples are particularly broad and do not offer any specific guidance with respect to the content of such responsibilities.

A second option considered by states is the inclusion of *separate provisions* within IIAs that detail more precisely how various actors should address foreign investors' responsibilities.[83] One of the earliest examples of such a provision can be found in the

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14 May 2010, Can TS 2013 No 9 (entered into force 1 April 2013), Preamble [*Canada-Panama FTA*]; *Free Trade Agreement between Canada and the Republic of Honduras*, 5 November 2013, Can TS 2014 No 23 (entered into force 1 October 2014), Preamble [*Canada-Honduras FTA*]. See also *Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments*, 20 April 2015, online: Global Affairs Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/burkina-faso-text.aspx?lang=eng> (accessed 14 September 2016), Preamble [*Canada-Burkina Faso BIT*].

[78] *Accord entre la Confédération suisse et la République du Kosovo concernant la promotion et la protection réciproque des investissements*, 27 October 2011, online: Confédération suisse <http://www.admin.ch/opc/fr/official-compilation/2012/3733.pdf> (accessed 14 September 2016) (entered into force 13 June 2012), Preamble.

[79] Norway, *Agreement between the Kingdom of Norway and ____ for the Promotion and the Protection of Investment* (13 May 2015), online: Government of Norway <https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf> (accessed 14 September 2016) [*Norway Model BIT*].

[80] *Comprehensive Trade and Economic Agreement (CETA) between Canada, of the one Part, and the European Union, of the other Part*, 29 February 2016, online: European Commission's Directorate General for Trade <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf> (accessed 14 September 2016), Preamble [*CETA*].

[81] *SADC Model BIT*, *supra* note 67.

[82] See e.g. Newcombe & Paradell, *supra* note 1 at 113-116.

[83] See Muchlinski, "Policy Issues", *supra* note 3 at 38; Muchlinski, "Regulating Multinationals", *supra* note 3 at 47.

Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference ("*OIC IIA*") that was signed in 1981.[84] Article 9 of this agreement thus provides the following:

> The *investor shall be bound* by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order and morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.[85]

While the possibility of imposing direct obligations on foreign investors to that extent is highly contentious in international investment law,[86] such a provision demonstrates an early attempt at further integrating foreign investors' responsibilities within IIAs.

Despite this example, the majority of IIA provisions address foreign investors' responsibilities in a less concrete way. Canadian FTAs signed with Latin American countries and Korea thus include an article on corporate social responsibility amidst the standards pertaining to the protection accorded to foreign investment:

> Each Party *should encourage* enterprises operating within its territory or subject to its jurisdiction to *voluntarily incorporate* internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. *The Parties remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies*.[87]

While this practice was initially limited to the investment chapter of FTAs, recent Canadian BITs and the Canadian BIT model also include a similar provision on corporate social responsibility.[88] A shorter clause can even be found in the *Trans-Pacific Partnership*

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[84] *Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference*, 5 June 1981, online: Investment Policy Hub: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2399> (accessed 14 September 2016) (entered into force 23 September 1986).

[85] *Ibid*, art 9 [emphasis added].

[86] See generally Dumberry & Dumas-Aubin, "When and How", *supra* note 3; Dumberry, *supra* note 3.

[87] *Canada-Peru FTA*, *supra* note 77, art 810 [emphasis added]. See also *Canada-Colombia FTA*, *supra* note 77, art 816; *Canada-Panama FTA*, *supra* note 77, art 9.17; *Canada-Honduras FTA*, *supra* note 77, art 10.16; *Free Trade Agreement between Canada and the Republic of Korea*, 11 March 2014, Can TS 2015 No 3 (entered into force 1 January 2015), art 8.16 [*Canada-Korea FTA*].

[88] *Agreement between the Government of Canada and the Government of the Republic of Benin on the Promotion and Reciprocal Protection of Investments*, 8 January 2013, Can TS 2014 No 13 (entered into force: 12 May 2014), art 16 [*Canada-Benin BIT*]; *Agreement between Canada and the Republic of Cameroon for the Promotion and Protection of Investments*, 3 March 2014, online: Global Affairs Canada

between Canada and eleven other states.[89] However, it must be stressed that other provisions of these FTAs and BITs often limit the potential effect of this clause. In fact, the investor-state dispute settlement mechanism established in most of these agreements specifically mentions that an investor cannot submit a claim pertaining to the obligation of the state with respect to the promotion of corporate social responsibility.[90] When IIAs expressly allow addressing such a concern, the option available is limited to a Committee on Investment that acts as a forum for the states to consult on various investment-related issues.[91]

Although the practice chosen by the United States slightly differs from the Canadian one, it nevertheless also constitutes an instance of a weak normative integration of foreign investors' responsibilities. Instead of including a separate provision in the

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<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/cameroon-agreement-cameroun.aspx?lang=eng> (accessed 14 September 2016), art 15(2) [*Canada-Cameroon BIT*]; *Agreement between Canada and the Federal Republic of Nigeria for the Promotion and Protection of Investments*, 6 May 2014, online: Global Affairs Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/nigeria-agreement-nigerie.aspx?lang=eng> (accessed 14 September 2016), art 16 [*Canada-Nigeria BIT*]; *Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments*, 1 September 2014, Can TS 2015 No 6 (entered into force: 7 April 2015), art 16 [*Canada-Serbia BIT*]; *Agreement between Canada and the Republic of Senegal for the Promotion and Protection of Investments*, 27 November 2014, 6 May 2014, online: Global Affairs Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/senegal-agreement.aspx?lang=eng> (accessed 14 September 2016) (entered into force 5 August 2016), art 16 [*Canada-Senegal BIT*]; *Agreement between Canada and Mali for the Promotion and Protection of Investments*, 28 November 2014, Can TS 2016 No 5 (entered into force 8 June 2016), art 15(2) [*Canada-Mali BIT*]; *Agreement between the Government of Canada and the Government of the Republic of Côte d'Ivoire for the Promotion and Protection of Investments*, 30 November 2014, Can TS 2015 No 19 (entered into force: 14 December 2015), art 15(2) [*Canada-Côte d'Ivoire BIT*]; *Canada-Burkina Faso BIT*, *supra* note 77, art 16; Canada, *Agreement between Canada and ____ for the Promotion and Protection of Investments* (25 August 2014) (on file with the author), art 16 [*Canada Model BIT*].

[89] "The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntary incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party": *Trans-Pacific Partnership*, 4 February 2016, online: New Zealand Foreign Affairs and Trade <https://www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership/> (accessed 14 September 2016), art 9.17.

[90] *Canada-Peru FTA*, *supra* note 77, arts 819(1) and 820(1); *Canada-Colombia FTA*, *supra* note 77, arts 819 and 820; *Canada-Panama FTA*, *supra* note 77, arts 9.20(1)-(2) and 9.21(1); *Canada-Honduras FTA*, *supra* note 77, arts 10.19(1) and 10.20(1); *Canada-Korea FTA*, *supra* note 87, arts 8.18 and 8.19(1); *Canada-Benin BIT*, *supra* note 88, arts 23(1)(a) and 23(2)(a); *Canada-Cameroon*, *supra* note 88, arts 20(1)(a) and 20(2)(a); *Canada-Nigeria BIT*, *supra* note 88, arts 21(1)(a) and 21(2)(a); *Canada-Serbia BIT*, *supra* note 88, arts 21(1)(a) and 21(2)(a); *Canada-Senegal BIT*, *supra* note 88, arts 21(1)(a) and 21(2)(a); *Canada-Mali*, *supra* note 88, arts 20(1)(a) and 20(2)(a); *Canada-Côte d'Ivoire BIT*, *supra* note 88, arts 20(1)(a) and 20(2)(a); *Canada Model BIT*, *supra* note 88, arts 21(1)(a) and 21(2)(a).

[91] *Canada-Peru FTA*, *ibid* art 817(2); *Canada-Colombia FTA*, *ibid*, art 817(3). See also Hepburn & Kuuya, *supra* note 61 at 602.

investment chapter of FTAs, this country has sporadically opted for an even broader reference to principles of corporate social responsibility in a different chapter that focuses on the environment. Some agreements thus include the following text: "[E]ach Party *should encourage* enterprises operating within its territory or jurisdiction to *voluntarily incorporate* sound principles of corporate stewardship in their internal policies, such as those principles or agreements that have been endorsed by both Parties".[92]

The EU has also adopted some IIAs that fit this development. In the aforementioned EPA signed with the CARIFORUM states, the parties agree to take measures that are necessary to frame the conduct of the investors.[93] Such measures must ensure that investors' activities remain in accordance with labour standards and that they do not circumvent international environmental obligations arising from agreements to which the states are parties.[94] What is more, while articulating the European international investment policy in 2011, the European Parliament has reiterated "its call for a corporate social responsibility clause and effective social and environmental clauses to be included in every FTA the EU signs".[95] In 2013, the European Parliament recalled this statement in the context of the negotiations for a BIT between the EU and China.[96] It will thus be interesting to observe whether future IIAs adopted by the EU will go beyond the language found in the *CETA* preamble and refer to foreign investors' responsibilities in a separate provision.

African states have opted for instruments that integrate such responsibilities more deeply. The *Common Market for Eastern and Southern Africa (COMESA) Agreement on*

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[92] *United States–Singapore Free Trade Agreement*, 6 May 2003, 42 ILM 1026 (entered into force 1 January 2004), art 18.9 [*USA-Singapore FTA*] [emphasis added]; *United States–Chile Free Trade Agreement*, 6 June 2003, 42 ILM 1026 (entered into force 1 January 2004), art 19.10. See also Cordonier Segger & Newcombe, *supra* note 1 at 140; VanDuzer et al, *supra* note 15 at 353.

[93] *EC-CARIFORUM EPA*, *supra* note 65, art 72. See also Viñuales, "Foreign Investment", *supra* note 8 at 289-290; VanDuzer et al, *ibid* at 328 and 354.

[94] *EC-CARIFORUM EPA*, *ibid*, art 72(2)-72(3).

[95] European Parliament, *Resolution of 6 April 2011 on the Future European International Investment Policy*, online: European Parliament <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0141+0+DOC+XML+V0//EN> (accessed 14 September 2016) at para 27. See also Joshua Waleson, "Corporate Social Responsibility in EU Comprehensive Free Trade Agreements: Towards Sustainable Trade and Investment" (2015) 42 Legal Issues Ecn Int 143 at 154.

[96] European Parliament, *Resolution of 9 October 2013 on the EU-China Negotiations for a Bilateral Investment Agreement*, online: European Parliament <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-411> (accessed 14 September 2016) at paras K and 33 [European Parliament, *Resolution of 9 October 2013*].

a Common Investment Area thus includes a provision related to recommendations made by a committee in regard to the development of minimum standards with respect to several investment-related issues.[97] The list of these issues includes environmental and social impact assessments, labour standards, respect for human rights, conduct in conflict zones and corruption.[98] To a certain extent, this investment agreement also reflects the approach in the *OIC IIA* by the inclusion of a provision stating that "COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made".[99]

Along the same lines, the SADC model BIT echoes this latter attempt at imposing direct obligations on foreign investors by elaborating several provisions that address the responsibilities of private actors.[100] For example, the effects of investment on third persons, the local community and the environment are explicitly taken into account in the non-discrimination standard.[101] Furthermore, this model includes obligations for the investors in regard to compliance with domestic law,[102] provision of information to the host state,[103] environmental and social impact assessments,[104] environmental management,[105] corporate governance standards,[106] investor liability,[107] transparency,[108] as well as human rights, environmental protection and labour rights.[109] It is also recognized that the determination of a breach of these obligations by an investor shall be taken into account by the tribunal

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[97] *Investment Agreement for the COMESA Common Investment Area*, 2007, online: Trade Law Centre <http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf> (accessed 14 September 2016), art 7.2 [*COMESA Investment Agreement*].

[98] *Ibid*, art 7.2.

[99] *Ibid*, art 13.

[100] UNCTAD, *WIR 2012*, *supra* note 5 at 89; Sornarajah, *Resistance and Change*, *supra* note 3 at 359-361.

[101] *SADC Model BIT*, *supra* note 67, art 4(1) and 4(2).

[102] *Ibid*, art 11.

[103] *Ibid*, art 12.

[104] *Ibid*, art 13.

[105] *Ibid*, art 14.

[106] *Ibid*, art 16.

[107] *Ibid*, art 17.

[108] *Ibid*, art 18.

[109] *Ibid*, art 15.

in an investment dispute.[110] Another model BIT that includes a similar chapter on foreign investors' obligations has been adopted by India in 2015, with provisions pertaining to compliance with domestic laws and corporate social responsibility.[111]

A third option that has been considered by drafters of IIAs to address foreign investors' responsibilities is a direct *reference to instruments* that are adopted by multilateral intergovernmental organizations and codifying standards of appropriate conduct for private actors operating abroad.[112] Some documents providing a basis for the negotiations of IIAs are thus worth considering. For example, the European Parliament refers to these types of international instruments in its resolution adopted to steer the negotiations of a BIT between the EU and China. In addition to reiterating its call for a corporate social responsibility clause discussed above, the European Parliament mentions that such a clause has to be in line with the *UN Guiding Principles*.[113] It also affirms "that investors should, respectively, apply the *ILO Tripartite Declaration on Multinational Enterprises and Social Policy* and the *OECD Guidelines for Multinational Enterprises*".[114] Along the same lines, in its recommendations to the European Commission on the negotiations for the *Transatlantic Trade and Investment Partnership*, the European Parliament recommends to "address investors' obligations and responsibilities by referring, inter alia, to the OECD principles for multinational enterprises and to the UN principles on [b]usiness and human rights as benchmarks".[115] Beyond the EU, Article 31 of the model BIT developed by Norway establishes an obligation on states "to *encourage* investors to conduct their investment activities in compliance with the OECD Guidelines for

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[110] *Ibid*, art 19(1).

[111] India, *Bilateral Investment Treaty between the Government of the Republic of India and _____* (28 December 2015), online: Investment Policy Hub <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560> (accessed 14 September 2016), arts 11-12 [*India Model BIT*].

[112] See Muchlinski, "Policy Issues", *supra* note 3 at 38; Muchlinski, "Regulating Multinationals", *supra* note 3 at 48; Van der Zee, *supra* note 3 at 54.

[113] European Parliament, *Resolution of 9 October 2013*, *supra* note 96 at para 33.

[114] *Ibid* at para 33.

[115] European Parliament, *Report Containing the European Parliament's Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership*, 1 June 2015, online: European Parliament <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0175+0+DOC+PDF+V0//EN> (accessed 14 September 2016) at para 1(d)(xiii).

Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and to participate in the United Nations Global Compact".[116]

In addition to these references included in instruments intended to guide the negotiations of IIAs, some formal international treaties explicitly mention international instruments adopted by intergovernmental organizations regarding foreign investors' responsibilities. Some countries have chosen to mention such international instruments in the preamble of IIAs. For example, the preamble of recent BITs signed by Austria includes an explicit reference to the *OECD Guidelines* and to the UN Global Compact.[117] Several IIAs adopted by the EFTA also refer to these two instruments in their preamble[118] and the preamble of the *CETA* includes a reference to the *OECD Guidelines*.[119]

Other IIAs refer to international instruments codifying foreign investors' responsibilities in a separate provision of the agreement. Thus, among the numerous annexes and joint declarations adopted with the agreement establishing an association between the European Community and the Republic of Chile, the parties agreed to "remind their multinational enterprises of their recommendation to observe the *OECD Guidelines for Multinational Enterprises*, wherever they operate".[120] Entitled "Promotion of Investments", Article 2 of the BIT between the Netherlands and the United Arab Emirate mentions that "[e]ach Contracting Party shall promote as far as possible and in accordance with their domestic laws the application of the *OECD Guidelines for Multinational Enterprises* to the extent that this is not contrary to their domestic laws".[121] Interestingly,

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[116] *Norway Model BIT*, *supra* note 79, art 31 [emphasis added].

[117] *Agreement between the Government of the Republic of Kosovo and the Government of the Republic of Austria on Promotion and Protection of Investments*, 22 January 2010, online: Ministry of Foreign Affairs <http://www.mfa-ks.net/repository/docs/Marrveshja_Ks-Aus_(anglisht).pdf> (accessed 14 September 2016), Preamble; *Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Republic of Tajikistan*, 15 December 2010, online: Investment Policy Hub <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3308> (accessed 14 September 2016) (entered into force: 21 December 2012), Preamble.

[118] *EFTA-Colombia FTA*, *supra* note 76, Preamble; *EFTA-Montenegro FTA*, *supra* note 76, Preamble; *EFTA-Bosnia and Herzegovina FTA*, *supra* note 76, Preamble.

[119] *CETA*, *supra* note 80, Preamble.

[120] *Agreement Establishing an Association between the European Community and its Member States, of the one Part, and the Republic of Chile, of the other Part*, 30 December 2002, OJ, L/352 (entered into force 1 February 2003) at 1444.

[121] *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the United Arab Emirates*, 26 November 2013, online: Investment Policy Hub

such references are sometimes depicted as a potential avenue to "harden" the instruments developed within intergovernmental organizations and to ensure a stronger effect of such initiatives in international investment law.[122]

Although the negotiation of treaties that expressly incorporate foreign investors' responsibilities appears as a relevant way to counter the unbalanced character of international investment law, most of the current provisions demonstrate the difficulty in addressing this issue.[123] In fact, several authors argue that these provisions are likely to complicate the adoption of IIAs.[124] With relatively few exceptions,[125] one must thus not be surprised to see that the issue of foreign investors' responsibilities is often addressed through hortatory language that merely exposes general commitments from the signatory states.[126] Moreover, the inclusion of such provisions does not impose concrete obligations on states to develop laws on foreign investors' responsibilities and does not generally require investors to adopt a specific conduct that is in line with these standards.[127] Taken together, such limitations support the argument that the normative integration of foreign investors' responsibilities in IIAs remains relatively weak.

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/4774> (accessed 14 September 2016), art 2(3).

[122] See Footer, *supra* note 61 at 61; Van der Zee, *supra* note 3 at 51-52.

[123] See Céline Lévesque & Andrew Newcombe, "The Evolution of IIA Practice in Canada and the United States" in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (New York: Routledge, 2013) 25 at 31.

[124] See e.g. Muchlinski, "Regulating Multinationals", *supra* note 3 at 46-47; Bjorklund, *supra* note 3 at 230.

[125] See the discussions pertaining to the *OIC IIA*, the *EC-CARIFORUM EPA*, the *COMESA Investment Agreement*, the *SADC Model BIT* and the *India Model BIT* above.

[126] See Wouters & Hachez, *supra* note 3 at 342-343; Hepburn & Kuuya, *supra* note 61 at 605; Lévesque & Newcombe, *supra* note 123 at 31; VanDuzer et al, *supra* note 15 at 308; Van der Zee, *supra* note 3 at 53; Rafael Peels & Anselm Schneider, "The Potential Role of the ILO to Enhance Institutional Coherence on CSR in International Trade and Investment Agreements" in Roger Blanpain, ed, *Protecting Labour Rights in a Multi-Polar Supply Chain and Mobile Global Economy* (Alphen aan den Rijn: Kluwer Law International, 2015) 139 at 140.

[127] See Peterson, *supra* note 5 at 15; Footer, *supra* note 61 at 35; Hepburn & Kuuya, *ibid* at 605; VanDuzer et al, *ibid* at 353 and 370; Dumberry & Dumas-Aubin, "How to Impose", *supra* note 3 at 580 and 588; Dumberry, *supra* note 3 at 191; Prislan & Zandvliet, *supra* note 61 at 416; Dumberry & Dumas-Aubin, "A Few Pragmatic", *supra* note 3 at 5 and 11.

2.3 A Stronger Integration of the Prohibition of Corruption in IIAs

The two previous sub-sections demonstrate that the obligation not to lower existing standards and the direct consideration of foreign investors' responsibilities render a generally weak normative integration of such responsibilities with respect to human rights, environmental protection and labour rights. In contrast to these areas in which foreign investors' activities can generate negative effects, the responsibilities of these private actors regarding corruption are more firmly taken into account in some IIAs. Although relatively few examples currently exist, the terms employed in these IIAs demonstrate a stronger normative integration as far as this normative order is concerned.

In fact, some states have chosen to use IIAs with a view to stressing their obligations under international agreements pertaining to the prohibition of corruption and the actions that are required to prosecute this crime. For example, while the FTA between the EU and South Korea solely focuses on corruption in pharmaceutical and health care sectors,[128] Article 21.5 of the *United States-Singapore FTA* states that "[e]ach party reaffirms its firm existing commitment to the adoption, maintenance, and enforcement of effective measures, *including deterrent penalties*, against bribery and corruption in international business transactions".[129] The EPA between the European Community and CARIFORUM states also obliges the parties to adopt measures that prohibit corruption and hold investors liable for any corrupt practices in regard to their investment.[130] In contrast to other references to the obligations of the state parties to combat bribery and corruption within IIAs,[131] these provisions specifically address the punishment of this conduct and suggest a stronger normative integration of foreign investors' responsibilities in this regard.

One of the most vivid example of such a strong normative integration can be found in the *CETA*.[132] Rather than emphasizing an obligation for states to prosecute this crime,

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[128] *EU-South Korea FTA*, *supra* note 66, Annex 2-D, art 4.

[129] *USA-Singapore FTA*, *supra* note 92, art 21.5 [emphasis added]. See also Newcombe, "Sustainable Development", *supra* note 1 at 396; Newcombe, "Investor Misconduct", *supra* note 3 at 210.

[130] *EC-CARIFORUM EPA*, *supra* note 65, art 72.

[131] See OECD, *International Investment Law*, *supra* note 60 at 146-147.

[132] *CETA*, *supra* note 80.

this agreement specifically addresses the issue of corruption within the provisions that relate to the scope of the resolution of investment disputes between investors and states. More specifically, paragraph 8.18(3) provides that "an investor may not submit a claim under this [s]ection if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process".[133] Although apparently limited to the pre-establishment phase of the investment, this provision unambiguously imposes an obligation for investors not to rely on corruption in order to seek redress under the investor-state arbitration mechanism established by the *CETA*.

In sum, although several normative developments evidence an integration of foreign investors' responsibilities within IIAs, most of these provisions strikingly differ from the protection that is accorded by states to these private actors. When one considers IIAs that are currently into force, it is plain that provisions preventing an inconsistent application of domestic standards and addressing the issue of foreign investors' responsibilities are often framed in hortatory terms. This trend is nevertheless different in the area of corruption, in which a limited number of states recall their engagements to prosecute corrupt practices and emphasize that investments made through corruption cannot be the object of an international arbitration claim. As far as the provisions of IIAs are concerned, the normative integration of foreign investors' responsibilities in international law thus remains relatively weak in areas that fall beyond the scope of corruption.

3. International Investment Arbitration and Harms Related to Foreign Investors' Activities

In addition to the examination of IIAs, an analysis of the normative integration of foreign investors' responsibilities in international investment law must consider developments occurring within international investment arbitration. Of course, the jurisdiction of an international investment arbitration tribunal is often limited to analyzing

[133] *Ibid*, art 18.8(3).

a potential violation of provisions that are found in IIAs.[134] Consequently, given that IIAs generally do not address foreign investors' responsibilities, the conduct of an investor would not normally constitute the basis of an international investment dispute. Yet, given that the conduct of investors can arise as a defense of respondent states,[135] it becomes paramount to scrutinize how tribunals deal with the negative impact that foreign investors' activities can have in local communities and the environment.[136] To be clear, this section does not address every instance in which a state adopted a measure that could be defended on grounds that transcend international investment rules and principles.[137] Rather, the decisions that are analyzed below are limited to examples in which the negative impact of the claimant's activities and conduct were raised in the defense of the respondent state.

The examination of such cases shows differences in the way tribunals have considered various areas of foreign investors' responsibilities. In some instances, the reasoning of these tribunals has taken into account the possibility for the host state to limit the negative impact of foreign investors' activities in the areas of human rights and environmental protection (3.1). However, while third parties have brought concerns pertaining to human rights and environmental protection in *amicus curiae* submissions,

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[134] See Clara Reiner & Christoph Schreuer, "Human Rights and International Investment Arbitration" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 82 at 83; Newcombe & Paradell, *supra* note 1 at 91; Peterson, *supra* note 5 at 43; Alvarez, "The Public International Law", *supra* note 1 at 457; Dumberry & Dumas-Aubin, "When and How", *supra* note 3 at 359; Radi, *supra* note 5 at 1122-1123.

[135] See generally Peter Muchlinski, "'Caveat Investor'? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard" (2006) 55:3 ICQL 527; Newcombe, "Investor Misconduct", *supra* note 3; Sornarajah, *Resistance and Change*, *supra* note 3 at 300-346.

[136] Knoll-Tudor makes a useful difference between two situations in which human rights-based arguments are made by the host state. First, a host state can argue that it had to breach a provision of an IIA in order to respect an international obligation. Second, a state can justify a violation of a standard following a violation of human rights by the investor. This research focuses primarily on the second situation. See Ioana Knoll-Tudor, "The Fair and Equitable Treatment Standard and Human Rights Norms" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 310 at 339. See also Cherie Booth, "Is There a Place for Human Rights Considerations in International Arbitration?" (2009) 24:1 ICSID Review 109 at 111–113.

[137] For an analysis of these cases, see e.g. Hirsch, "Interactions", *supra* note 8 at 173; Peterson, *supra* note 5 at 26-42; Reiner & Schreuer, *supra* note 134 at 89-90; Moshe Hirsch, "Investment Tribunals and Human Rights: Divergent Paths" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 97 at 89–105 [Hirsch, "Investment Tribunals"]; Riccardo Pavoni, "Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 525; Kulick, *supra* note 8, Part II; Tamar Meshel, "Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond" (2015) 6 J Int Disp Settlement 277.

several tribunals have avoided engaging with these adverse effects (3.2). In contrast to this inconstant consideration of the negative impact of foreign investors' activities in the areas of human rights and environmental protection by international investment arbitration tribunals, clear evidence that the claimant had been involved in corrupt practices has played a more significant and constant role in influencing the outcome of international investment disputes (3.3). Ultimately, such a difference shows that the normative integration of foreign investors' responsibilities in international investment arbitration remains relatively weak in contrast to protections granted to foreign investors and fragmented between the various areas of responsibilities.

3.1 Some Considerations of Human Rights and Environmental Issues

Before delving into the analysis of instances in which international investment arbitration tribunals have not fully considered the negative impact related to foreign investors' activities, it must be emphasized that other tribunals have left more room to adverse effects pertaining to human rights and environmental protection. On several occasions, tribunals have had to decide on the legality of measures adopted by a respondent state to limit harms related to foreign investors' activities in these areas. While the complexity of these cases cannot be fully captured in this section, the argument presented below seeks to identify the adverse effects that have been addressed by the contested measure and the extent to which tribunals have demonstrated responsiveness regarding these effects in their decision. As suggested by the decisions below, some tribunals have openly considered the host state's intent to regulate foreign investors' activities in order to limits their negative impact on human rights and the environment.

One of the earliest instances where such a negative impact has been taken into account can be found in *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* ("*Southern Pacific Properties*").[138] In this dispute, an agreement between the investor and the Egyptian General Organization for Tourism and Hotels provided the

[138] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (1992), Award, 8 ICSID Review 328 (International Centre for Settlement of Investment Disputes) [*Southern Pacific Properties*].

incorporation of a joint venture company to develop tourist complexes near pyramids in Egypt.[139] When a project related to this joint venture was considered as posing a threat to undiscovered antiquities,[140] a public agency withdrew its former approval of the project and a presidential decree cancelled a previous authorization to use part of the lands for tourist activities.[141] Although the tribunal found that "[t]he obligation to pay fair compensation in the event of expropriation applies equally where antiquities are involved",[142] the tribunal explicitly considered the negative impact of the investment when valuing the claimant's loss. The tribunal thus agreed with the respondent state's contention that "the project was located in an area where the [c]laimants should have known there was a risk that antiquities would be discovered".[143]

In *Emilio Agustín Maffezini v Kingdom of Spain*, the claimant challenged an environmental impact assessment required by a Spanish agency for an investment related to the production and distribution of chemical products.[144] According to the foreign investor, there had been pressures to make the investment before the assessment was completed and additional costs were related to this process.[145] After reviewing the applicable legislation, the tribunal concluded that an environmental impact assessment procedure was "basic for the adequate protection of the environment and the application of appropriate preventive measures",[146] and that the host state could not be held responsible for decisions taken by the investor regarding this procedure.[147]

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[139] *Ibid* at para 43.

[140] *Ibid* at para 62.

[141] *Ibid* at paras 64-65.

[142] *Ibid* at para 159.

[143] *Ibid* at para 251.

[144] *Emilio Agustin Maffezini v Kingdom of Spain* (2000), Award, 5 ICSID Rep 419 (International Centre for the Settlement of Investment Disputes).

[145] *Ibid* at para 65.

[146] *Ibid* at para 67.

[147] *Ibid* at para 71.

Environmental concerns were also at stake in *Parkerings-Companiet AS v Republic of Lithuania*.[148] In that case, a municipality rejected a multi-storey car parks project and refused to conclude specific agreements with the foreign investor's subsidiary.[149] When the municipality authorized another company to build a car park on the same site, the claimant alleged that the host state had violated its most-favored-nation treatment obligation.[150] While the claimant argued that both projects were facing similar circumstances,[151] the tribunal stressed that host state's departments and commissions had already raised environmental concerns pertaining to the project.[152] Ultimately, the tribunal concluded that a differentiated treatment between two foreign investors was not in breach of the most-favored-nation treatment clause of the IIA given the large opposition and adverse effects related to the claimant's project.[153]

In *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* ("*Biwater*"), the investor claimed that the termination of a concession for water distribution amounted to expropriation, as well as a breach of several state's obligations under international law and domestic law.[154] In the opinion of the respondent state, the measures that were taken were justified by the poor contractual performance of the investor.[155] Several briefs from third parties were also submitted to the tribunal with a view to emphasizing the responsibilities of the private company.[156] While the tribunal acknowledged the arguments provided by these *amicus curiae*,[157] it upheld the investor claim in regard to the breach of several

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[148] *Parkerings-Companiet AS v Republic of Lithuania* (2007), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita0619.pdf> (accessed 14 September 2016) (International Centre for the Settlement of Investment Disputes).

[149] *Ibid* at para 363.

[150] *Ibid* at paras 363 and 374.

[151] *Ibid* at para 364.

[152] *Ibid* at para 385.

[153] *Ibid* at paras 392, 395 and 396. See also Pavoni, *supra* note 137 at 544.

[154] *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (2008), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita0095.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) at paras 15-16 [*Biwater*]. See also Taillant & Bonnitcha, *supra* note 5 at 75-76.

[155] *Biwater*, *ibid* at para 461.

[156] *Ibid* at paras 370-391. See also Footer, *supra* note 61 at 54-55; Kulick, *supra* note 8 at 254-255.

[157] Biwater, *ibid* at paras 392 and 601.

obligations by the state.[158] However, the tribunal emphasized that the loss incurred by the investor was not related to the measures adopted by the respondent state.[159] In reaching this decision, the tribunal appears to have indirectly considered the conduct of the investor to rule that no damages should be paid to the investor.[160] The claimant's mismanagement thus played a role in the decision of the arbitration tribunal, although limited to the determination of the damages that should be paid by the host state.

Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentine Republic and *AWG Group v Argentine Republic* ("*Suez et al.*") also relate to a concession for water distribution and waste water treatment services.[161] Among the various aspects that were raised by the respondent state to justify the termination of the concession, concerns regarding the level of nitrates in the water were advanced.[162] When assessing whether the termination of the concession violated Argentina's obligation to guarantee fair and equitable treatment to the claimants, the tribunal mentioned the following:

> The alleged high nitrate levels in the water may indeed have been an unjustified pretext. Nonetheless, *there is evidence in the record that such high levels may have existed*. Whether Argentina breached the Concession Contract by terminating it is a matter for the dispute resolution procedures provided in that contract. *In viewing the circumstances as a whole and the situation that existed at the time of the termination*, the tribunal finds that the record is insufficient to establish that Argentina's treatment of the Claimant's investment in terminating the Concession attained the level of violating the fair and equitable standards required by the three applicable BITs.[163]

Although other measures adopted by Argentina were found to be in violation of its obligations under international investment law,[164] it appears that the tribunal considered

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[158] *Ibid* at paras 485, 519 and 814.

[159] *Ibid* at para 805.

[160] *Ibid* at para 486.

[161] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentine Republic* and *AWG Group v Argentine Republic* (2010), Decision on Liability, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita0826.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) [*Suez et al*]. See also Attila Tanzi, "On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector" (2012) 11 L & Practice of Int'l Courts & Trib 47 at 55–64.

[162] *Suez et al*, *ibid* at paras 36 and 52.

[163] *Ibid* at para 246.

[164] *Ibid* at para 247.

the foreign investors' responsibility to provide water meeting acceptable levels of nitrate among the circumstances surrounding the measure that was challenged by the claimants.

Similarly, in *Impregilo S.p.A v Argentine Republic* ("*Impregilo*"), the tribunal relied on a provision from a concession contract for water distribution according to which the concessionaire had to "perform all tasks related to service provision required under the applicable laws to guarantee effective supply to [u]sers, the *protection of public health* and the *rational use of resources*".[165] When addressing the reasons that led to the termination of the concession, the tribunal also referred to several elements recalling that the concessionaire had failed to comply with drinking water and sewerage services quality levels.[166] In light of the reasons provided by the respondent state to support the termination of the concession contract, the tribunal concluded that such termination did not constitute an expropriation.[167] Furthermore, after finding acts of the host states that violated the standard of fair and equitable treatment, the tribunal was unable to conclude that the concession would have been profitable for the foreign investor.[168] Thus, when calculating damages applicable to the case at hand, the tribunal partly relied on the responsibility of the foreign investor in the failure of the concession.[169]

Three additional cases related to the safety of products manufactured by foreign investors suggest that some tribunals have taken into account the impact of foreign investors' activities when assessing a measure challenged by a claimant. In *Chemtura Corporation v Canada*, the foreign investor challenged measures related to the registration of lindane, a pesticide produced by the claimant and whose use was found to entail risks for the environment and for human health.[170] After stressing that its role was not to

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[165] *Impregilo S.p.A. v Argentine Republic* (2011), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita0418.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) at para 232 [emphasis added].

[166] *Ibid* at paras 263 and 265.

[167] *Ibid* at para 283.

[168] *Ibid* at para 375.

[169] *Ibid* at para 378.

[170] *Chemtura Corporation v Canada* (2010), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf> (accessed 14 September 2016) (UNCITRAL) at paras 32 and 44 [*Chemtura*]. See also Kulick, *supra* note 8 at 257-258; Sornarajah, *Resistance and Change*, *supra* note 3 at 336.

determine whether the use of lindane was dangerous,[171] the tribunal maintained that these registration measures were in line with legitimate regulatory concerns and the host state's international commitments.[172] By balancing the evidence presented by both parties, the tribunal thus acknowledged that a measure adopted to regulate negative effects resulting from the claimant's activities was consistent with the host state's obligations under international investment law.

The legality under international investment law of host state's measures intended to ensure the safety of products provided by a foreign investor has also been evidenced by *Spyridon Roussalis v Romania*.[173] Among the measures that were challenged by the claimant in that case, Spyridon Roussalis alleged that various orders from host state's agencies pertaining to its food outlet and refrigerated food warehouse constituted a violation of standards included in an IIA.[174] To justify the measures that it adopted, the respondent state stressed that the investor's facilities did not comply with food safety regulations and that the measures were taken due to serious public health considerations.[175] The tribunal concluded that "suspending or revoking operating permits may be regarded as a reasonable and appropriate measure to penalize serious irregularities to the food and safety regulations".[176] As a result, the claimant failed to prove that the measures at hand were unjustifiable, disproportionate or discriminatory.[177]

In *Apotex Holdings Inc. and Apotex Inc. v United States of America*, agencies of the respondent states found that drugs produced in facilities operated by Apotex Inc. did not meet current good manufacturing practices and thus prevented the US branch indirectly

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[171] *Chemtura*, *ibid* at para 134.

[172] *Ibid* at paras 147, 216 and 266.

[173] *Spyridon Roussalis v Romania* (2011), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita0723.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes).

[174] *Ibid* at paras 631-632.

[175] *Ibid* at paras 642 and 664.

[176] *Ibid* at para 687.

[177] *Ibid* at para 680.

owned by Apotex Holdings Inc. from receiving these drugs for sale in the United States.[178] Even after emphasizing that it did not receive any evidence that these drugs had caused actual harm to any patient,[179] the tribunal considered the failure of the claimants to address problems related to their manufacturing practices when analyzing the circumstances of the treatment granted to the investors.[180] The tribunal also took into account the claimants' own recognition of material deficiencies occurring in Apotex Inc.'s facilities when assessing whether measures adopted by the host state were consistent with the fair and equitable treatment provision in *NAFTA*.[181]

The recognition of the host state capacity to adopt measures aimed at limiting negative effects of foreign investors' activities can also be found in recent international investment disputes involving extractive firms, although in a subtler way. In *Burlington Resources Inc. v Republic of Ecuador* ("*Burlington*"), the respondent state sought to justify the physical occupation of two exploration and exploitation areas in which the claimant had acquired interests by relying on environmental harms that could have resulted from the shutdown of oil wells.[182] Even if the tribunal was not convinced that such abandonment would have entailed environmental damages and decided that the physical occupation ultimately amounted to an expropriation,[183] it is worth noting that it nevertheless included potential negative effects on the environment in its analysis. In fact, rather than disregarding the relevance of these potential harms, the tribunal concluded that there was a lack of evidence pertaining to any significant risk of environmental damages.[184]

The consideration of environmental harms resulting from the activities of an extractive firm in Ecuador is even more vivid in the more recent interim decision on an

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[178] *Apotex Holdings Inc. and Apotex Inc v United States of America* (2014), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/italaw3324.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes Additional Facility) at paras 2.18, 2.21, 2.24.

[179] *Ibid* at para 3.62.

[180] *Ibid* at para 8.76.

[181] *Ibid* at para 9.60.

[182] *Burlington Resources Inc v Republic of Ecuador* (2012), Decision on Liability, online: italaw <http://www.italaw.com/sites/default/files/case-documents/italaw1094_0.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) at paras 169 and 501-502.

[183] *Ibid* at para 537.

[184] *Ibid* at para 526.

environmental counterclaim in *Perenco Ecuador Limited v Republic of Ecuador* ("*Perenco*").[185] Amidst a dispute related to breaches by Ecuador of its obligations under an IIA and participation contracts signed by the claimant,[186] the respondent state alleged the existence of an "environmental catastrophe" in the area operated by the investor.[187] Even if this dispute is still pending, several excerpts from the interim decision demonstrate an unambiguous responsiveness from the tribunal to address the negative impact related to extractive activities. In the introduction of its interim decision, the tribunal mentioned that it "agrees that if a legal relationship between an investor and the [s]tate permits the filing of a claim by the [s]tate for environmental damage caused by the investor's activities and such a claim is substantiated, the [s]tate is entitled to full reparation in accordance with the requirements of the applicable law".[188] Most importantly, while highlighting several flaws in the investor's environmental practices (*e.g.* failure to conduct biennial environmental audits, irregularities in management of drill cuttings and mud pits, irregularities in wastewater treatment, contaminated soils and irregular waste and chemical management),[189] the tribunal held that it will not dispose of this claim on a simple burden of proof approach.[190]

In *Gold Reserve Inc. v Bolivarian Republic of Venezuela* ("*Gold Reserve*"), the respondent state sought to justify the revocation of a construction permit by raising the negative effects of mining activities on the environment and the populations located near a mining project.[191] In this regard, the tribunal provided the following statement:

> *The Tribunal acknowledges that a State has a responsibility to preserve the environment and protect local populations living in the area where mining activities are conducted*. However, this responsibility does not exempt a State

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[185] *Perenco Ecuador Limited v Republic of Ecuador* (2015), Interim Decision on the Environmental Counterclaim, online: italaw <http://www.italaw.com/sites/default/files/case-documents/italaw6315.pdf> (accessed 14 September 2016) (International Centre for the Settlement of Investment Disputes).

[186] *Ibid* at para 4.

[187] *Ibid* at para 34.

[188] *Ibid* at para 34.

[189] *Ibid* at paras 406-446.

[190] *Ibid* at para 407.

[191] *Gold Reserve Inc. v Bolivarian Republic of Venezuela* (2014), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/italaw4009.pdf> (accessed 14 September 2016) (International Centre for the Settlement of Investment Disputes Additional Facility) at paras 593-594.

> from complying with its commitments to international investors by searching ways and means to satisfy *in a balanced way* both conditions.[192]

By insisting on the importance of balancing such concerns with the host state's obligations under the IIA, the tribunal avoided suggesting that such obligations prevent the consideration of adverse effects related to foreign investors' activities. The tribunal also mentioned that the respondent state had the opportunity to assess the environmental impact of the project prior to delivering the construction permit.[193] At the end of the day, the tribunal's finding that the revocation violated the fair and equitable treatment is thus more related to the host state's failure to assess this impact appropriately than to a lack of consideration of foreign investors' responsibilities.[194]

A similar conclusion can be found in a more recent investment dispute between a Canadian mining company and Venezuela. In *Crystallex International Corporation v Bolivarian Republic of Venezuela* ("*Crystallex*"), the foreign investor challenged the denial of an environmental permit to mining exploitation among others.[195] According to the respondent state, the reasons justifying such a denial included concerns for the environment and Indigenous communities surrounding the area.[196] Even if the tribunal found that the denial of the environmental permit amounted to a breach of the respondent state's obligations pertaining fair and equitable treatment[197] and expropriation,[198] it nevertheless emphasized the right of the state to address the negative environmental impact of the foreign investor's activities:

> There is no question that Venezuela had the right (and the responsibility) to raise concerns relating to global warming, environmental issues in respect of the Imataca Reserve, biodiversity, and other related issues. The [t]ribunal, however, believes that the way they were put forward by Venezuela in the [p]ermit denial

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[192] *Ibid* at para 595 [emphasis added].

[193] *Ibid* at para 596

[194] *Ibid* at para 600.

[195] *Crystallex International Corporation v Bolivarian Republic of Venezuela* (2016), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf> (accessed 14 September 2016) (International Centre for the Settlement of Investment Disputes Additional Facility) at para 7.

[196] *Ibid* at paras 44 and 324.

[197] *Ibid* at para 623.

[198] *Ibid* at para 718.

> letter present significant elements of arbitrariness and evidences of lack of transparency and consistency.[199]

In *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware v Government of Canada* ("*Bilcon*"), the majority of the tribunal also concluded that the treatment by Canada of the investors' proposal to operate a quarry and a marine terminal constituted breaches of provisions pertaining to the minimum standard of treatment and the national treatment.[200] Among others, the tribunal found that the reliance on the concept of "community core values" in the environmental assessment of the project was unprecedented and constituted a violation of the fair and equitable treatment.[201] Even if one arbitrator considered these efforts to be largely insufficient,[202] it must nevertheless be noted that the majority of the tribunal emphasized the right of the respondent state to limit the negative environmental and social impact of the investment. As mentioned by the majority of the tribunal:

> To avoid any possible misunderstanding, the [t]ribunal has absolutely no doubt that the extent to which community members value various assessable components can be an entirely legitimate part of an environmental assessment. … The [t]ribunal takes issue with the 'community core values' approach as presented and applied by the [Joint Review Panel], not with the notion that the valuation placed on assessable components can be an integral part of conducting a proper assessment, including the assessment of social effects.[203]

To a certain extent, despite its findings of a violation of *NAFTA* provisions, such an award can thus be considered as an example of a normative integration of foreign investors' responsibilities.

A highly anticipated decision involving a tobacco company can also be considered as an instance in which an international investment arbitration tribunal has demonstrated

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[199] *Ibid* at para 591.

[200] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware v Government of Canada* (2015), Award on Jurisdiction and Liability, online: italaw <http://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf> (accessed 14 September 2016) (UNCITRAL) [*Bilcon*, Award on Jurisdiction and Liability].

[201] *Ibid* at paras 450-452 and 503-543.

[202] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware v Government of Canada* (2015), Dissenting Opinion of Professor Donald McRae, online: italaw <http://www.italaw.com/sites/default/files/case-documents/italaw4213.pdf> (accessed 14 September 2016) (UNCITRAL) at paras 44-51.

[203] *Bilcon*, Award on Jurisdiction and Liability, *supra* note 200 at para 531.

significant responsiveness to the negative impact of the claimants' activities. In *Philip Morris Brands SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, the tribunal had to decide whether various tobacco-control measures adopted by the respondent state constituted violations of an IIA signed between Uruguay and Switzerland.[204] After emphasizing the highly addictive and lethal impact of cigarettes,[205] the tribunal often stressed the ability of the respondent state to adopt public health measures. For example, when assessing whether the measures adopted by Uruguay amounted to an expropriation, the tribunal concluded that they were "a valid exercise by Uruguay of its police powers for the protection of public health [and that they could not] constitute an expropriation of the [c]laimants' investment".[206] Similarly, with respect to the fair and equitable treatment of the investment, the tribunal maintained that "the present case concerns a legislative policy decision taken against the background of a strong scientific consensus as to the lethal effects of tobacco".[207] It then concluded that "[s]ubstantial deference is due in that regard to national authorities' decisions as to the measures which should be taken to address an acknowledged and major public health problem".[208]

At this point, it must be emphasized that the consideration of the adverse impact of foreign investors' activities in international investment arbitration does not guarantee that the tribunal decides the claim in favor of the respondent state. As mentioned above, the tribunals in *Southern Pacific Properties*, *Biwater*, *Suez et al.*, *Impregilo*, *Burlington*, *Gold Reserve*, *Crystallex* and *Bilcon* all concluded that the respondent state had breached its obligations under international investment law. Nevertheless, these cases include some excerpts where tribunals have taken into account certain forms of foreign investors' responsibilities. These tribunals have demonstrated responsiveness regarding the

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[204] *Philip Morris Brands SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (2016), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) at para 9.

[205] *Ibid* at paras 74 and 133.

[206] *Ibid* at para 307.

[207] *Ibid* at para 418.

[208] *Ibid* at para 418.

possibility for respondent states to adopt measures that seek to limit the negative impact of foreign investors' activities even when claims primarily focus on issues that reach beyond the environmental or human rights nature of the measures at hand (*e.g.* due process). A strong normative integration of foreign investors' responsibilities in international investment arbitration depends upon the extent to which tribunals acknowledge such a possibility in their reasoning.

Clearly, it would be inaccurate to conclude that all international investment arbitration tribunals have neglected negative effects related to foreign investors' activities when assessing whether a measure had breached a host state's obligations in international investment law. Some tribunals have explicitly acknowledged that the regulation of adverse effects related to foreign investors' activities could remain consistent with IIA provisions or could be considered to prevent the payment of damages. Although such decisions point toward a strong normative integration of foreign investors' responsibilities in international investment arbitration, this integration is seriously put into question when one considers decisions reached by other tribunals.

3.2 The Avoidance of Human Rights and Environmental Issues

In contrast to the aforementioned decisions, several tribunals have given priority to the protections accorded in IIAs and refrained from explicitly taking into account foreign investors' responsibilities in their reasoning. The lack of consideration for harms related to foreign investors' activities in several cases shows that such responsibilities in the areas of human rights and environmental protection are still far from being firmly integrated in international investment arbitration.

For example, in *Compañía del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica* ("*Santa Elena*"),[209] a dispute resulted from the compensation to be paid for the expropriation of a property that was supposed to be developed as a touristic resort and a

[209] *Compañía del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica* (2000), Award, 39 ILM 1317 (International Centre for Settlement of Investment Disputes Additional Facility) at para 50 [*Santa Elena*]. See also Hirsch, "Interactions", *supra* note 8 at 168-170; Pavoni, *supra* note 137 at 537-538; Kulick, *supra* note 8 at 234-237; Sornarajah, *Resistance and Change*, *supra* note 3 at 334.

residential community by the investor.[210] In the decree adopted by the respondent state, it was expressly mentioned that the purpose of the expropriation was to protect the flora and fauna in the region.[211] However, the tribunal unequivocally disregarded the environmental justifications underlying the direct expropriation. Prior to determining the amount of the compensation to be paid by the respondent state, the tribunal mentioned the following consideration:

> While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of compensation to be paid for the taking. *That is, the purpose of protecting the environment for which the property was taken does not alter the legal character of the taking for which adequate compensation must be paid*.[212]

Twelve years after *Santa Elena*, another investment dispute involving Costa Rica was decided without fully taking into account the negative environmental effects of a foreign investment. In *Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica*, the claimants challenged measures adopted by the host state with respect to properties that they owned in the vicinity of the nesting habitat of an endangered turtle species.[213] The respondent state alleged that the protection of nesting sites from human activity and beachside development was essential to protect the leatherback turtle.[214] The tribunal began its analysis by noting that "[w]hile the subject of the protection of endangered species is an important one, the [t]ribunal finds that the crucial elements of this dispute involve more mundane issues of fact and law as they relate to the legality of the actions in dispute between the [p]arties".[215] Despite a brief consideration of the environmentally-sensitive surroundings in determining the fair-market value of the investment,[216] the tribunal chose to rely on the *Santa Elena* award to recall that the intent of the host state when adopting an

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[210] *Santa Elena*, *ibid* at paras 16 and 54.

[211] *Ibid* at para 18.

[212] *Ibid* at para 71 [emphasis added].

[213] *Marion Unglaube and Reinhard v Republic of Costa Rica* (2012), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita1052.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) at para 37.

[214] *Ibid* at para 102.

[215] *Ibid* at para 167.

[216] *Ibid* at para 309.

expropriatory measure was less important than the impact of the measure on the investment.[217]

Specific measures adopted by Mexico in regard to the treatment and management of hazardous waste have also been challenged by foreign investors in several cases. In *Metalclad Corporation v Mexico*, public authorities partly relied on environmental justifications to deny a municipal construction permit to the foreign investor.[218] According to the tribunal, the decision of public authorities was influenced by the "ecological concerns regarding the environmental effect and impact on the site and surrounding communities".[219] Although the tribunal avowedly recognized the existence of such issues, it ruled that the denial of permit by the host state breached provisions pertaining to fair and equitable treatment and expropriation of *NAFTA*.[220] More specifically, according to the tribunal:

> Even if Mexico is correct that a municipal construction permit was required, the evidence also shows that, as to hazardous waste evaluations and assessments, the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations. Consequently, *the denial of the permit by the [m]unicipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill, was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site*.[221]

Furthermore, in *Técnicas Medioambientales Tecmed S.A. v Mexico*, the tribunal assessed the legality of the refusal to renew an existing federal operating license to an investor operating a hazardous waste facility.[222] One of the arguments raised by the respondent state to justify its measure was the negative attitude of the community with

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[217] *Ibid* at paras 217-218.

[218] *Metalclad Corporation v Mexico* (2001), Award, 40 ILM 36 (International Centre for Settlement of Investment Disputes Additional Facility) at para 50 [*Metalclad*].

[219] *Ibid* at para 92. See also Bachand et al, *supra* note 13 at 594; Pavoni, *supra* note 137 at 552; Kulick, *supra* note 8 at 238.

[220] *Metalclad*, *ibid* at paras 101 and 104-107. See also Pavoni, *ibid* at 551.

[221] *Metalclad*, *ibid* at para 86. See also para 106.

[222] *Técnicas Medioambientales Tecmed S.A. v Mexico* (2004), Award, 43 ILM 133 (International Centre for Settlement of Investment Disputes Additional Facility) at para 39 [*Tecmed*]. See also Pavoni, *supra* note 137 at 551.

respect to the investor's operations.[223] However, echoing the *Santa Elena* award, the arbitration tribunal concluded that measures that seek to prevent harms related to a foreign investor's activities must nonetheless meet the requirements of the IIA:

> [W]e find no principle stating that regulatory administrative actions are *per se* excluded from the scope of the [a]greement, *even if they are beneficial to society as a whole – such as environmental protection* – particularly if the negative or economic impact of such actions on the financial position of the investor is sufficient to neutralize the value, or economic or commercial use of its investment without receiving any compensation whatsoever.[224]

Other environmental issues regarding a foreign investment were at stake in *Empresas Lucchetti, S.A. and Lucchetti Peru S.A. v Republic of Peru*.[225] In that case, the respondent state annulled permits granted for the construction of an industrial pasta plant located near a protected wetland, arguing that such activities could pose environmental problems.[226] Although the tribunal decided that it lacked jurisdiction because the dispute had crystallized before the entry into force of the applicable IIA,[227] it nevertheless clearly disregarded the relevance of environmental harms related to the claimants' activities in reaching this decision: "The Tribunal does not need to examine the possible motives for the administrative measures in relation to the plant …. It is sufficient to note that there were a series of administrative measures that negatively affected the progress of construction".[228]

In contrast to the aforementioned claims that were filed against Argentina with respect to water concessions, the case of *Azurix Corp v Republic of Argentina* is one in which the foreign investor's responsibility was not fully taken into account by the

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[223] *Tecmed*, *ibid* at para 49. See also Hirsch, "Interactions", *supra* note 8 at 171; Kulick, *supra* note 8 at 245-246.

[224] *Tecmed*, *ibid* at para 121 [emphasis added]. See also Miles, *Origins*, *supra* note 3 at 164-165.

[225] *Empresas Lucchetti, S.A. and Lucchetti Peru S.A. v Republic of Peru* (2005), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita0275.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes).

[226] *Ibid* at paras 18-19.

[227] *Ibid* at para 53 and 58.

[228] *Ibid* at para 29.

tribunal.[229] Among the various measures that were challenged by the claimant, one was related to the quality of water that was supplied by the investor. Following an algae bloom in a water reservoir, public authorities issued regulations to order a 100% discount on invoices for services provided by the investor during the contamination period.[230] According to the respondent state, the investor was responsible for guaranteeing an efficient provision of water to users, the protection of public health and the rational use of resources.[231] When analyzing the legality of the measure adopted by the host state, the tribunal highlighted the disregard of the public authorities' contribution with respect to the algae incident.[232] In fact, the tribunal ruled that "governments have to be vigilant and protect public health of citizens but the statements and actions of the provincial authorities contributed to the crisis rather than assisting in solving it".[233] Therefore, when discussing whether the series of measures adopted by the respondent state was tantamount to expropriation, the tribunal argued that "the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but *whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim*".[234] Although the state retains the ability to limit harms related to the activities of a foreign investor, such a conclusion suggests that the measure can only be legal if it does not frustrate the interests of the private actor.

The primary focus of some investment arbitration tribunals on the protection accorded to foreign investors is also exemplified by *Glamis Gold, Ltd. v United States of America*.[235] In this case, the claimant challenged delays by federal agencies in analyzing a mining project and environmental regulations requiring the complete backfilling of open-

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[229] *Azurix Corp v Republic of Argentina* (2006), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita0061.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) [*Azurix*].

[230] *Ibid* at paras 124-126. See also Bachand et al, *supra* note 13 at 599; Kulick, *supra* note 8 at 297-298; Miles, *Origins*, *supra* note 3 at 160.

[231] *Azurix*, *ibid* at para 129.

[232] *Ibid* at para 144.

[233] *Ibid* at para 144.

[234] *Ibid* at para 310 [emphasis added].

[235] *Glamis Gold, Ltd v United States of America* (2009), Award, 48 ILM 1039 (UNCITRAL) [*Glamis*].

pit mines located near a Native American sacred site.[236] Interestingly, several third parties used *amicus curiae* submissions to address issues pertaining to the responsibilities of the investor in that case.[237] For example, the submission from the Quechan Indian Nation argued that the tribunal should interpret the provisions of the IIA in light of Indigenous peoples' rights[238] and emphasized the emergence of corporate social responsibility norms at the international level.[239] Environmental organizations also pointed out negative effects related to hard rock mining in another *amicus curiae* submission.[240] Ultimately, the tribunal dismissed the claim.[241] Despite a brief consideration of harms related to the proposed mining project to conclude that the measures adopted by the host states were not arbitrary,[242] it nonetheless clearly appears that the human rights and environmental aspects related to the activities of the private actor were not generally taken into account in the final award. In referring to these issues, the tribunal stated:

> The Tribunal is aware that the decision in this proceeding has been awaited by private and public entities concerned with environmental regulation, the interests of [I]ndigenous peoples, and the tension sometimes seen between private rights in property and the need of the State to regulate the use of the property. However, given the Tribunal's holdings, *the Tribunal is not required to decide many of the most controversial issues raised in this proceeding.* The Tribunal observes that a few awards have made statements not required by the case before it. *The Tribunal does not agree with this tendency; it believes that its case specific mandate and*

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[236] *Ibid*, at para 11. See also Julien Cantegreil, "Implementing Human Rights in the NAFTA Regime - The Potential of a Pending Case: Glamis Corp v USA" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 366 at 372; Åna Romson, "International Investment Law and the Environment" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 37 at 41; Kulick, *supra* note 8 at 281-284.

[237] *Glamis*, *ibid* at paras 267-286; See also James Harrison, "Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 396 at 403; Peterson, *supra* note 5 at 35-36; Footer, *supra* note 61 at 49-51.

[238] *Glamis Gold, Ltd v United States of America* (2006), Quechan Indian Nation Supplemental Non-Disputing Party Submission, online: USTR <http://www.state.gov/documents/organization/75016.pdf> (accessed 14 September 2016) (UNCITRAL) at 1.

[239] *Ibid* at 12-13.

[240] *Glamis Gold, Ltd v United States of America* (2006), Sierra Club and Earthworks Non-Disputing Party Submission, online: USTR <http://www.state.gov/documents/organization/74832.pdf> (accessed 14 September 2016) (UNCITRAL) at paras 3-4.

[241] *Glamis*, *supra* note 235 at paras 14, 18, 26, 534-536 and 830.

[242] *Ibid* at para 805.

> *the respect demanded for the difficult task faced squarely by some future tribunal instead argues for it to confine its decision to the issues presented.*[243]

Another example of the weak normative integration of foreign investors' responsibilities in the areas of human rights can be found in a procedural order regarding the arbitration proceedings in *Bernhard Von Pezold and others v Republic of Zimbabwe* ("*Von Pezold*") and *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v Republic of Zimbabwe* ("*Border Timbers*").[244] Through this order, an application by a human rights non-governmental organization and Indigenous communities was denied by the tribunal in a case involving questions of access to land in Zimbabwe. In addition to noting that the circumstances of the application gave rise to "legitimate doubts as to the independence or neutrality of the [p]etitioners",[245] the tribunal unambiguously stressed that it was not persuaded that the consideration of international human rights law was part of its mandate.[246] More specifically, the tribunal did not consider that the proposed submission would address "a matter within the scope of the dispute", recalling that "[t]he disputes in these conjoined arbitrations arise out of the allegedly unlawful measures taken by the [r]espondent against the [c]laimants and their investments".

Such a narrow perspective as to what should be taken into account by an international investment arbitration tribunal was echoed in a final award related to this dispute.[247] The latter involved land policies adopted by Zimbabwe with a view to favoring black Indigenous peoples.[248] Despite acknowledging that the case at hand was rooted in

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[243] *Ibid* at para 8 [emphasis added]. See also Footer, *supra* note 61 at 42; Viñuales, "Foreign Investment", *supra* note 8 at 271-272.

[244] *Bernhard Von Pezold and others v Republic of Zimbabwe and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v Republic of Zimbabwe* (2012), Procedural Order No 2, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita1043.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes).

[245] *Ibid* at para 56.

[246] *Ibid* at para 59.

[247] *Bernhard Friedrich Arnd Rüdiger Von Pezold and others v Republic of Zimbabwe* (2015), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes).

[248] *Ibid* at para 3.

deep context and history,[249] the tribunal sought to frame the dispute as being solely limited to international investment law. As mentioned by the tribunal in the introduction of the award:

> Oftentimes during these proceedings, members of the [t]ribunal had to remind themselves that their remit was not one of a commission of inquiry into what has been described as the 'March of History', but rather *strictly that of an [a]rbitral [t]ribunal mandated to adjudicate a dispute or disputes in accordance with the Convention of the International Centre for Settlement of Investment Disputes … and applicable law*.[250]

Relying on the aforementioned cases, two conclusions can be drawn. First, *amicus curiae* submissions present a procedural means through which third parties can address human rights and environmental protection issues within international investment arbitration.[251] However, as demonstrated by the procedural order in *Von Pezold* and *Border Timber*, the authorization to submit an *amicus curiae* brief remains far from automatic. Furthermore, the approval to submit these briefs appears to be primarily driven by efforts to increase transparency rather than to include foreign investors' responsibilities in the reasoning of the arbitrators.[252] Even when submissions are authorized, tribunals are not obliged to consider, either explicitly or implicitly, arguments that are provided by *amicus curiae*.[253] Given that these briefs generally appear to have little effects, if any, on the outcome of a particular case, addressing foreign investors' responsibilities through these submissions falls short of ensuring a strong normative integration of these responsibilities in international investment arbitration.

Second, several tribunals have purposely ignored adverse effects related to private actors' activities when addressing an investor claim based on an IIA. There has been a reluctance and non-engagement by some investment arbitration tribunals with issues

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[249] *Ibid* at para 2.

[250] *Ibid* at para 4 [emphasis added].

[251] Although the final award was not released at the time of writing this chapter, an *amicus curiae* submission also raised several environmental and human rights issue in the *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*. See *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador* (2010), Submission of Amici by the Fundación Pachamama and the International Institute for Sustainable Development, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita0166.pdf> (accessed 14 September 2016) (UNCITRAL) at para 3.4.

[252] See Reiner & Schreuer, *supra* note 134 at 93.

[253] See *Glamis*, *supra* note 235 at paras 8 and 274. See also Harrison, *supra* note 237 at 415; Dumberry & Dumas-Aubin, "When and How", *supra* note 3 at 371; Leinhardt, *supra* note 3 at 9-10.

pertaining to human rights and environmental protection in several instances.[254] When a measure had been adopted by a host state to limit harms related to foreign investors' activities in these areas, several arbitration tribunals have decided that the protection accorded to foreign investment should prevail. Despite a more nuanced approach adopted by other tribunals, the lack of consideration of the negative impact of foreign investors' activities in several instances suggests an overall weak normative integration of human rights and environmental issues in international investment arbitration.

3.3 A More Constant Consideration of the Prohibition of Corruption

In a way that sharply contrasts with the lack of constancy of investment arbitration tribunals to account for harmful foreign investors' activities in the areas of human rights and environmental protection, evidence of corrupt practices by foreign investors has had a more significant influence on the outcome of international investment disputes. It must be noted that such practices often fall under the broader categories of "investor misconduct" and "investor diligence", which can be understood as including fraud and illegality.[255] Recalling that the present research focuses on foreign investors' responsibilities for harms caused in the communities in which they operate, this section is limited to cases where investment arbitration tribunals have had to deal with allegations of corruption on the claimant's part.[256]

Although the majority of the tribunal in *Southern Pacific Properties* only tangentially addressed allegations of corruption,[257] a dissenting arbitrator emphasized that

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[254] See Reiner & Schreuer, *supra* note 134 at 90; Hirsch, "Investment Tribunals", *supra* note 137 at 106-107; Sornarajah, *supra* note 3 at 472; Taillant & Bonnitcha, *supra* note 5 at 78; Kulick, *supra* note 8 at 258 and 300; Miles, *Origins*, *supra* note 3 at 210; Leinhardt, *ibid* at 10-11; VanDuzer et al, *supra* note 15 at 256-257.

[255] See Newcombe, "Investor Misconduct", *supra* note 3 at 196; Andrew Newcombe, "Investor Misconduct: Jurisdiction, Admissibility or Merits?" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 187 at 188 [Newcombe, "Investor Misconduct: Jurisdiction"]; Viñuales, "Investor Diligence", *supra* note 3.

[256] For an analysis of cases that imply fraudulent and illegal acts from the investor, see generally Newcombe, "Investor Misconduct", *ibid*; Jarrod Hepburn, "In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration" (2014) 5 J Int'l Dispute Settlement 531.

[257] *Southern Pacific Properties*, *supra* note 138 at para 204.

overlooking the significance of such allegations seemed "not to be in consistence with the due legal protection of the *[r]espondent's inherent right of defense*".[258] After explicitly referring to the provision of the *OECD Guidelines* regarding the prohibition of corruption and considering efforts made by the respondent state to provide evidence of corrupt practices adopted by the claimant, the dissenting arbitrator maintained that a closer scrutiny of these allegations was necessary.[259] Subsequently, several tribunals have referred to the importance of addressing allegations of corrupt practices, as well as the impact of these practices if the respondent state could provide evidence that they were related to the investment.[260]

This impact appears to be even more concrete when considering cases in which tribunals have found such evidence. In *World Duty Free Company Limited v Republic of Kenya* ("*World Duty Free*"),[261] the investment arbitration tribunal's jurisdiction was based

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[258] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (1992), Dissenting Opinion, 8 ICSID Review 400 (International Centre for Settlement of Investment Disputes) at 401 [emphasis added].

[259] *Ibid* at 462-466.

[260] See *Wena Hotels LTD. v Arab Republic of Egypt* (2000), Award, 41 ILM 896 (International Centre for Settlement of Investment Disputes) at para 111; *International Thunderbird Gaming Corporation v United Mexican States* (2005), Separate Opinion, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita0432.pdf> (accessed 14 September 2016) (UNCITRAL) at para 112; *F-W Oil Interests v Trinidad Tobago* (2006), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita0350.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) at para 212; *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v Democratic Republic of the Congo* (2008), Decision on Jurisdiction and Admissibility, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita0016.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) at paras 52-54; *TSA Spectrum de Argentina S.A v Argentine Republic* (2008), Award, 48 ILM 496 (International Centre for Settlement of Investment Disputes) at paras 174-176; *Waguih Elie George Siag and Clorinda Vecci v the Arab Republic of Egypt* (2009), Dissenting Opinion of Professor Francisco Orrego Vicuña, online : italaw <http://www.italaw.com/sites/default/files/case-documents/ita0786_0.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) at para 17; *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v Kyrgyz Republic* (2009), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita1074.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) at paras 41-43; *Gustav F W Hamester GmbH& Co KG v Republic of Ghana* (2010), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita0396.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) at para 123; *Niko Resources (Bangladesh) Ltd v People's Republic of Bangladesh et al* (2013), Decision on Jurisdiction, online: italaw <http://www.italaw.com/sites/default/files/archive/italaw1561_0.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) at paras 434 and 440-441; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines* (2014), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/italaw4114.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) at para 479.

[261] *World Duty Free Company Limited v Republic of Kenya* (2006), Award, 46 ILM 339 (International Centre for Settlement of Investment Disputes) [*World Duty Free*].

on a contract between an investor and the host state, without relying on an IIA.[262] While the investor alleged that the respondent state expropriated its investment, a submission from the investor showed that the latter made a "personal contribution" of US$2 million to the President of the Republic of Kenya in order to contract.[263] In deciding that a contract obtained through acts of bribery prevented an investor claim, the tribunal made the following statement:

> [I]n light of domestic laws and *international conventions relating to corruption*, and in light of the decisions taken in the matter by courts and international tribunals, *this Tribunal is convinced that bribery is contrary to international public policy of most, if not all States, or to use another formula, to transnational public policy*. Thus, *claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal*.[264]

Of particular relevance for present purposes is the fact that the tribunal in *World Duty Free* extensively relied on international treaties and other international instruments addressing the prohibition of corruption to affirm the existence of an international public policy against corruption.[265] The codification process developed in parallel to international investment law thus played an undeniable role in consolidating an international norm against corruption that reached the status of international public policy and that ultimately led to the dismissal of the foreign investor's claim.

Seven years after *World Duty Free*, *Metal-Tech Ltd. v Republic of Uzbekistan* ("*Metal-Tech*") demonstrated the influence of the prohibition against corruption in the

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[262] See Mohamed Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?" (2009) 24 ICSID Review 116 at 132–133; Miles, "Corruption", *supra* note 49 at 354-356; Jason Webb Yackee, "Investment Treaties and Investor Corruption: An Emerging Defense for Host States" (2012) 52 Va J Int'l L 723 at 730–732; Tamar Meshel, "The Use and Misuse of the Corruption Defence in International Investment Arbitration" (2013) 30:3 J Int'l Arb 267 at 275 [Meshel, "The Use"]; Aloysius Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration" (2013) 10:3 TDM 1 at 15–28; Joe Tirado, Matthew Page & Daniel Meagher, "Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship" (2014) 29 ICSID Review 493 at 495; Carolyn B Lamm, Brody K Greenwald & Kristen M Young, "From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption" (2014) 29 ICSID Review 328 at 329.

[263] *World Duty Free, supra* note 261 at para 66.

[264] *Ibid* at para 157 [emphasis added]. See also Newcombe, "Sustainable Development", *supra* note 1 at 396; Dupuy, *supra* note 8 at 60; Newcombe, "Investor Misconduct: Jurisdiction", *supra* note 255 at 196-197; Dolzer & Schreuer, *supra* note 5 at 96-97; Newcombe, "Investor Misconduct", *supra* note 3 at 206.

[265] *World Duty Free*, *ibid* at paras 143-145. See also Llamzon, *supra* note 262 at 22.

context of an investment dispute based on an IIA.[266] In that case, the investor claimed that Uzbekistan had breached its obligations with respect to non-discrimination, full protection and security, expropriation, as well as fair and equitable treatment.[267] However, the respondent state challenged the jurisdiction of the tribunal by alleging that the claimant "engaged in corruption and made fraudulent and material misrepresentations to gain approval for its investment".[268] After emphasizing that the prohibition of corruption by the host state remained consistent with international law and the laws of several states,[269] the tribunal found evidence of corruption by the investor and ruled that the investment was implemented in a way that was inconsistent with the legality requirement found in the BIT.[270] Ultimately, these findings entailed a lack of jurisdiction of the tribunal.[271] In the conclusion of the award, the tribunal emphasized the importance of dismissing a claim pertaining to an investment that was made through corruption as follows:

> While reaching the conclusion that the claims are barred as a result of corruption, the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. … The idea, however, is not to punish one party at the cost of the other, but *rather to ensure the promotion of the rule of law, which entails that a court or a tribunal cannot grant assistance to a party that has engaged in a corrupt act*.[272]

More recently, allegations of corrupt practices by a foreign investor have played a more nuanced role in *Hesham Talaat M. Al-Warraq v Republic of Indonesia* ("*Al-Warraq*").[273] Given the complexity of the allegations at hand, the tribunal initially decided

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[266] *Metal-Tech Ltd. v Republic of Uzbekistan* (2013), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf> (accessed 14 September 2016) (International Centre for the Settlement of Investment Disputes) [*Metal-Tech*]. See also Cecily Rose, "Circumstantial Evidence, Adverse Influences, and Findings of Corruption: Metal-Tech Ltd. v. The Republic of Uzbekistan" (2014) 15 J World Investment & Trade 747 [Rose, "Circumstantial Evidence"]; Lamm et al, *supra* note 262 at 329.

[267] *Metal-Tech*, *ibid* at para 107.

[268] *Ibid* at para 110.

[269] *Ibid* at paras 290-292.

[270] *Ibid* at para 372.

[271] *Ibid* at para 373.

[272] *Ibid* at para 389 [emphasis added].

[273] *Hesham Talaat M. Al-Warraq v Republic of Indonesia* (2014), Final Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf> (accessed 14 September 2016) (UNCITRAL) [*Al-Warraq*, Final Award]. See also generally Andrew Newcombe & Jean-Michel Marcoux,

that parties' claims regarding allegations of corruption and the solicitation of bribes had to be dealt with at the merits phase of the arbitration.[274] In the final award, the tribunal concluded that the respondent state's failure to comply with basic elements of justice when conducting a criminal proceeding against the foreign investor violated the fair and equitable treatment that the claimant was entitled to receive by virtue of the most-favored-nation treatment provision found in the applicable IIA.[275] Although the final award does not focus directly on the claimant's conviction for corruption under Indonesian law, the tribunal relied on the effect of Article 9 of the *OIC IIA* to conclude that claimant's fraudulent acts were prejudicial to the public interest.[276] As a result, the claimant was "prevented from pursuing his claim for fair and equitable treatment" and could not request compensation under the applicable IIA.[277] Put simply, the tribunal emphasized that "the doctrine of '*clean hands*' render[ed] the Claimant's claim inadmissible".[278]

In addition to the three aforementioned cases, the practice of corruption arguably played an indirect role with respect to the outcome of the *Siemens AG v Argentina* case.[279] Although the investor was awarded more than US$200 million by an international investment tribunal, several allegations of investor corrupt practices were revealed by foreign anti-corruption agencies.[280] While the decision was subject to a revision proceeding under Article 51 of the *Convention on the Settlement of Investment Disputes between States*

"Hesham Talaat M. Al-Warraq v Republic of Indonesia: Imposing International Obligations on Foreign Investors" (2015) 30 ICSID Review 525.

[274] *Hesham Talaat M. Al-Warraq v Republic of Indonesia* (2012), Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility, online: italaw <http://www.italaw.com/sites/default/files/case-documents/italaw3174_0.pdf> (accessed 14 September 2016) (UNCITRAL) at para 99.

[275] *Al-Warraq*, Final Award, *supra* note 273 at paras 555 and 621.

[276] *Ibid* at paras 632 and 634-640.

[277] *Ibid* at paras 648 and 652.

[278] *Ibid* at para 646 [emphasis in the original].

[279] *Siemens A.G. v Argentine Republic* (2007), Award, 14 ICSID Reports 518 (International Centre for Settlement of Investment Disputes).

[280] For the information pertaining to this paragraph, see Yackee, *supra* note 262 at 724-725; Joost Pauwelyn, "Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy" in Susan Rose-Ackerman & Paul Carrington, eds, *Anti-Corruption Policy: Can International Actors Play a Constructive Role* (Durahm: Carolina Academic Press, 2013) 247 at 262; Tirado et al, *supra* note 262 at 507-509; Thomas Kendra & Anna Bonini, "Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus?" (2014) 31 J Int'l Arb 439 at 444–445.

and Nationals of Other States,[281] Siemens chose to abandon the award. Overall, the agreement reached between the investor and Argentina suggests that the practice of corruption by the private actor would have had an impact on the procedure and that the outcome of the revision process was predictable.

Similarly, allegations of corrupt practices played an indirect but decisive role in the international investment dispute between companies incorporated in the Netherlands and the Republic of Azerbaijan.[282] While the tribunal in *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v Republic of Azberijan* ("*Azpetrol*") had to determine whether the parties had previously reached an agreement to settle the case,[283] this settlement agreement followed an application by the respondent state to dismiss the proceedings on the grounds of admission of bribery by the claimant.[284] Once the tribunal concluded that the parties had reached a binding settlement agreement, it emphasized that the claimants "did not contest that the terms of the settlement would have finally disposed all matters in dispute".[285] Once again, the outcome of the dispute in *Azpetrol* suggests that admission of corruption by the claimant had a considerable effect with respect to the protection that can be sought by a foreign investor under international investment arbitration.

Of course, some might suggest that the outcome of cases like *World Duty Free* and *Metal-Tech* neglects the involvement of state officials in corruption and can ultimately be counterproductive in fighting corruption.[286] In line with *Al-Warraq*, some stress the need to consider allegations of corrupt acts perpetrated by the claimant as a question of admissibility of the claim or at the merits stage of the arbitration.[287] While they are crucial

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[281] *Convention on the Settlement of Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159 (entered into force: 14 October 1966), art 51.

[282] *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v Republic of Azberijan* (2009), Award, online: italaw <http://www.italaw.com/sites/default/files/case-documents/ita0059.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) [*Azpetrol*]. See also Kendra & Bonini, *supra* note 280 at 449-450.

[283] *Azpetrol*, *ibid* at para 1.

[284] *Ibid* at para 7.

[285] *Ibid* at para 105.

[286] See Meshel, "The Use", *supra* note 262 at 274; Kulick, *supra* note 8 at 321; Kulkarni, *supra* note 49 at 43.

[287] See *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines* (2007), Dissenting Opinion of Mr. Bernardo M. Cremades, online: italaw <http://www.italaw.com/sites/default/files/case-

to consider when reflecting on the role of international investment arbitration in the fight against corruption, these issues fall beyond the analysis of the normative integration of foreign investors' responsibilities in international investment law.[288]

Overall, the constancy of the approach taken by tribunals when dealing with corrupt practices is striking in contrast to the consideration of human rights and environmental issues. Although this consideration of corrupt practices by investment arbitration tribunals extensively depends upon evidentiary issues,[289] the impact of this finding on international investment arbitration is unequivocal: an investor resorting to corruption loses the ability to seek redress.[290] Llamzon summarizes this impact in the following terms:

> For those who maintain that investment arbitration is an unfair system that is skewed in favor of the foreign investors, the idea that corruption has been actively and frequently used by States *against* investors, that this defense can potentially negate any and all claims made by investors if successful, *and* that there would be no such preclusive effect if corruption was invoked by the investor, may come as a surprise.[291]

Even without explicit IIA provisions with respect to the prohibition of corrupt acts by foreign investors, many tribunals have emphasized that such an outcome directly results from the wide consensus with respect to the prohibition of corruption as being an integral

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documents/ita0340.pdf> (accessed 14 September 2016) (International Centre for Settlement of Investment Disputes) at paras 37-38 and 40; Newcombe, "Investor Misconduct: Jurisdiction", *supra* note 255 at 198-200; Kulick, *supra* note 8 at 332-341; Kulkarni, *ibid* at 24-27; Sinlapapiromsuk, *supra* note 49 at 28-29.

[288] For an analysis of various procedural issues pertaining to allegations of corruption, see generally Richard Kreindler, "Legal Consequences of Corruption in International Investment Arbitration: An Old Challenge with New Answers" in Laurent Lévy & Derains Yves, eds, *Liber Amicorum en l'honneur de Serge Lazareff* (Paris: Editions Pedone, 2011) 383 [Kreindler, "Legal Consequences"]; Newcombe, "Investor Misconduct: Jurisdiction", *ibid*; Miles, "Corruption", *supra* note 49. See also Richard Kreindler, "Competence-Competence in the Face of Illegality in Contracts and Arbitration Agreements" (2012) 361 Rec des Cours 131 at 418–422 [Kreindler, "Competence-Competence"]; Pauwelyn, *supra* note 280 at 260-261; Kulkarni, *ibid* at 27-32; Tirado et al, *supra* note 262 at 494-500; Lamm et al, *supra* note 262 at 342-349; Kendra & Bonini, *supra* note 280.

[289] See generally Cecily Rose, "Questioning the Role of International Arbitration in the Fight against Corruption" (2014) 31:2 J Int'l Arb 183. See also Kreindler, "Legal Consequences", *ibid* at 387; Sophie Nappert, "Nailing Corruption: Thoughts for a Gardener - A Comment on World Duty Free Company Ltd v the Republic of Kenya" (2013) 10:3 TDM 1 at 5–7; Kulkarni, *ibid* at 32-35; Rose, "Circumstantial Evidence", *supra* note 266 at 754; Tirado et al, *ibid* at 496-498; Lamm et al, *ibid* at 330-341.

[290] See Kreindler, "Competence-Competence", *supra* note 288 at 413; Miles, "Corruption", *supra* note 49 at 330; Llamzon, *supra* note 262 at 5; Lamm et al, *ibid* at 239; Hepburn, *supra* note 256 at 555; Dai Tamada, "Investors' Responsibility Toward Host-States? Regulation of Corruption in Investor-State Arbitration" in Noemi Gal-Or, Cedric Ryngaert & Math Noortmann, eds, *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (Leiden: Brill Nijhoff, 2015) 203 at 204 and 213.

[291] Llamzon, *ibid* at 38-39 [emphasis in the original and footnotes omitted].

part of international public policy, as evidenced by several international instruments codifying the prohibition of corruption.[292] Ultimately, the cases summarized above demonstrate that foreign investors' responsibilities in the area of corruption are more strongly integrated within international investment arbitration than allegations of human rights violations and environmental harms.

Conclusion

An assessment of the normative integration of foreign investors' responsibilities within international investment law is a key step in understanding the quest for the redress of imbalances between foreign investors' protections and obligations. Regardless of their formal status in international law, several instruments adopted within intergovernmental organizations pertaining to foreign investors' responsibilities can be considered through the lenses of a legal pluralist approach and a traditional method in international law. These instruments evidence the emergence of functionally differentiated normative orders that have been developed in parallel to international investment law and that aim to address the lack of accountability of foreign investors in the areas of human rights, environmental protection, labour rights and corruption.

Recalling the weak normative compatibility predicted by a legal pluralist approach, one must be cautious in assessing the degree of normative integration of foreign investors' responsibilities in international investment law. Drawing on the progress that was made in this regard, one could be satisfied with current normative developments and conclude that efforts to address the lack of accountability of these private actors found its place amidst international investment rules and principles. Two conclusions can nonetheless be drawn from the analysis above. First, the consideration of foreign investors' responsibilities is relatively weaker than the investment protection that is accorded by states under IIAs.

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[292] See Pierre Lalive, "Ordre public transnational (ou réellement international) et arbitrage international" (1986) 3 Rev arb 329 at 337 and 357-359; Sacerdoti, *supra* note 49 at 578; Kreindler, "Legal Consequences", *supra* note 288 at 383 and 388; Miles, "Corruption", *supra* note 49 at 333; Kreindler, "Competence-Competence", note 288 at 245 and 386; Kulick, *supra* note 8 at 317; Llamzon, *ibid* at 21-22; Sinlapapiromsuk, *supra* note 49 at 5-13; Tamada, *supra* note 290 at 204.

When one scrutinizes the obligation of states to apply existing standards and the inclusion of references to foreign investors' responsibilities in IIAs, it is plain that most of these developments are expressed in hortatory language and that their application relies on uncertain enforcement mechanisms. One must go beyond the mere occurrence of provisions relating to corporate social responsibility and look at their normative potential. Despite a more obvious consideration of foreign investors' responsibilities in some instances, this weak normative integration is also demonstrated in the disengagement of several international investment arbitration tribunals with the negative effects of foreign investors' activities in terms of human rights and environmental protection when analyzing the legality of measures adopted by host states.

Second, some differences nonetheless remain with respect to the degree of integration between the various areas for which private actors can produce adverse effects on the host state. In contrast to provisions pertaining to foreign investors' responsibilities in the areas of human rights, environmental protection and labour rights, there is a limited number of examples that demonstrate a stronger normative integration of concerns pertaining to the consequences of corruption within IIAs. Furthermore, while the consideration of corrupt practices by the claimant has influenced the outcome of international investment disputes on a more constant basis, the negative impact produced by foreign investors' activities in other areas was not taken into account by several tribunals. In other words, the normative integration of foreign investors' responsibilities within international investment law remains fragmented when one considers the varying degrees of integration between the various areas of such responsibilities.

Some authors argue that the approach adopted for corruption could be expanded to other types of violations and provide suggestions as how IIAs could be drafted in this regard.[293] To put it differently, the stronger normative integration that can be observed in the case of the prohibition of corruption should be applied to other functionally differentiated normative orders that have emerged to address the lack of accountability of foreign investors. While this solution appears as ideal, a legal pluralist approach

[293] Dumberry & Dumas-Aubin, "When and How", *supra* note 3 at 365; Dumberry & Dumas-Aubin, "How to Impose", *supra* note 3 at 577-589; Patrick Dumberry & Gabrielle Dumas-Aubin, "The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law" (2013) 10:1 TDM 1 at 9–10; Dumberry & Dumas-Aubin, "A Few Pragmatic", *supra* note 3 at 3-12 and 15.

emphasizes that the weak normative compatibility between normative orders is ultimately grounded in the diverging interests of the actors that are involved in the international lawmaking process. A fuller account of the varying degrees of the normative integration between the areas that are included in the present analysis thus requires a critical interdisciplinary approach that illuminates the relations of power at play. In order to provide a more complete examination of this normative integration of foreign investors' responsibilities in international investment law within the broader context of neoliberal globalization, the next chapter of the dissertation focuses on relations of power that are inherent in the ongoing codification process and that influence such integration.

Chapter 5 – Inherent Relations of Power and Interests in the Codification of Foreign Investors' Responsibilities

Introduction

A macro-level analysis of the evolving codification of foreign investors' responsibilities in a context of neoliberal globalization would be incomplete without an explicit consideration of power relations that underlie the elaboration of rules pertaining to international investment and foreign investors. In line with the weak compatibility between functionally differentiated normative orders posited by the legal pluralist approach, the analysis provided in the previous chapter suggests a weak integration of foreign investors' responsibilities in international investment law for the areas of human rights, environmental protection and labour rights. However, references to the necessity of punishing corrupt practices by foreign investors in some international investment agreements ("IIAs") as well as the constancy with which international investment arbitration tribunals have dealt with evidence of corrupt practices by claimants remain puzzling. In light of these findings, one must go beyond the legal pluralist approach to account for elements driving this fragmented normative integration of foreign investors' responsibilities in international investment law.

This chapter explores inherent relations of power and the interests of powerful actors involved in international investment lawmaking to explain this fragmentation. From the outset, it is widely acknowledged that multiple actors are actively involved in the development of norms pertaining to the regulation of international investment.[1] Even if

[1] See e.g. Peter T Muchlinski, *Multinational Enterprises and the Law*, 2d ed (Oxford: Oxford University Press, 2007) at 82–85 [Muchlinski, *Multinational Enterprises*]; Peter Muchlinski, "Policy Issues" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 3 at 7 [Muchlinski, "Policy Issues"]; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 3d ed (Cambridge: Cambridge University Press, 2010) at 6 [Sornarajah, *The International Law*]; Peter T Muchlinski, "Regulating Multinationals: Foreign Investment, Development, and the Balance of Corporate and Home Country Rights and Responsibilities in a Globalizing World" in José E Alvarez et al, eds, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: Oxford University Press, 2011) 30 at 31 [Muchlinski, "Regulating Multinational"]. For the involvement of various actors in the involvement of norms that specifically concern corporate social responsibility, see e.g. Jennifer A Zerk, *Multinationals and Corporate Social Responsibility:*

most countries act as both importers and exporters of foreign direct investment ("FDI"), the interests of states hosting stocks of foreign capital can clash with the interests of states that are the home of numerous foreign investors.[2] This international investment lawmaking process also includes non-state actors. As emphasized by Muchlinski, "[t]he major investors, in particular [multinational enterprises], are at the heart of legal developments in this field, even if they are not formally its subjects".[3] Furthermore, amidst their activities in various branches of international law, nongovernmental organizations ("NGOs") can contest existing rules in international investment law and attempt to influence the adoption of specific instruments.[4] Finally, consistent with the fact that several initiatives have been developed within intergovernmental organizations, the latter also play an undeniable role in the elaboration of rules regulating international investment.[5]

Acknowledging that a plurality of actors can play a role in the international lawmaking process that occurs in intergovernmental organizations must nevertheless come with the recognition that potential conflicts are likely to emerge and that the most powerful actors can disproportionally influence its outcome.[6] It is in this regard that the adoption of

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Limitations and Opportunities in International Law (Cambridge: Cambridge University Press, 2006) at 93–102.

[2] See Sornarajah, *The International Law*, *ibid* at 6.

[3] Muchlinski, "Policy Issues", *supra* note 1 at 7. See also Muthucumaraswamy Sornarajah, "Economic Neo-Liberalism and the International Law on Foreign Investment" in Anthony Anghie et al, eds, *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff Publishers, 2003) 173 at 176 [Sornarajah, "Economic Neo-Liberalism"]; Muchlinski, *Multinational Enterprises*, *supra* note 1 at 82.

[4] See e.g. Muchlinski, "Policy Issues", *ibid* at 8; Muchlinski, *Multinational Enterprises*, *ibid* at 83; Sornarajah, *The International Law*, *supra* note 1 at 61.

[5] See Muchlinski, *Multinational Enterprises*, *ibid* at 84-85; Muchlinski, "Policy Issues", *ibid* at 8.

[6] See John Braithwaite & Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) at 19; A Claire Cutler, "Law in the Global Polity" in Morten Ougaard & Richard Higgott, eds, *Towards a Global Polity* (New York: Routledge, 2002) 58 at 61; A Claire Cutler, "The Privatization of Authority in the Global Political Economy" in Gary Teeple & Stephen McBride, eds, *Relations of Global Power: Neoliberal Order and Disorder* (Toronto: University of Toronto Press, 2011) 41 at 50; Celine Tan, "Navigating New Landscapes: Socio-Legal Mapping of Plurality and Power in International Economic Law" in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (New York: Routledge, 2013) 19 at 22 and 28; David Schneiderman, "Power and Production in Global Legal Pluralism: An International Political Economy Approach" in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (New York: Routledge, 2013) 98 at 108 [Schneiderman, "Power and Production"]; Edward S Cohen & A Claire Cutler, "Law, Contestation and Power in the Global Political Economy: An Introduction" (2013) 3 Oñati S-L Series 611 at 616; A Claire Cutler, "Legal Pluralism as the 'Common Sense' of Transnational Capitalism" (2013) 3:4 Oñati S-L Series 719 at 724–725 [Cutler, "Legal Pluralism"]; Ian Johnstone, "Law-Making in International Organizations: Perspectives from IL/IR Theory" in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge

a critical approach appears as a useful tool to supplement the analysis begun in the previous chapter. In order to account for inherent relations of power and conflicting interests that underlie consultations regarding the codification of foreign investors, this chapter combines a critical constructivist approach with a critical discourse analysis. In addition to acknowledging the role of non-state actors in international relations, the critical constructivist approach sheds light on the influence of the most powerful actors' interests in the mutual constitution of agents and social structures like international norms.[7] With a view to examining this mutual constitution, publicly available statements submitted by actors participating in consultation processes led by intergovernmental organizations can be thoroughly scrutinized by using a critical discourse analysis.[8]

The analysis presented below firmly supports the proposition that consultations pertaining to the codification of foreign investors' responsibilities are characterized by attempts from powerful actors to safeguard their interests. Once again, it must be stressed that the analysis offered in this chapter approaches the codification of foreign investors' responsibilities from a macro-level perspective and does not focus on any specific initiatives. After identifying which actors appear as the most powerful protagonists with respect to the elaboration of rules regulating international investment and foreign investors (1), this chapter sheds light on interests and power relations underlying the codification of foreign investors' responsibilities in various areas. While several actors support the adoption of international legal norms codifying foreign investors' responsibilities in the areas of human rights, environmental protection and labour rights, other actors that can directly influence the outcome of the international investment lawmaking process seek to discourage the adoption of these initiatives (2). By contrast, an analysis of the discourse of actors involved in consultations concerning the prohibition of corruption suggests that such efforts are in line with the interests of actors that can exercise direct power over the regulation of international investment, amidst broad support from other actors (3). Combined with the examination provided in the previous chapter, the analysis below shows

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University Press, 2013) 266 at 285. In the specific case of corporate social responsibility, see Michael Blowfield, "Corporate Social Responsibility: The Failing Discipline and Why It Matters for International Relations" (2005) 19 Int'l Rel 173.

[7] See section 1.2 of Chapter 2.

[8] For a detailed discussion about critical discourse analysis, see section 1.2 of Chapter 3.

that the extent to which foreign investors' responsibilities are normatively integrated in international investment law is consistent with most powerful actors' interests that are expressed in consultations occurring under the auspices of intergovernmental organizations.

1. A Preliminary Step: Relations of Power in International Investment Lawmaking

In order to assess how powerful actors use consultations pertaining to the codification of foreign investors' responsibilities to safeguard their interests, one must first be able to determine which actors can be considered as the most powerful protagonists in the international investment lawmaking process. While some authors are prompt to suggest that markets and multinational enterprises are becoming more powerful than states,[9] scrutinizing the power of the various actors involved in this process requires a more nuanced consideration of different ways actors can influence each other. Drawing from differentiated conceptions of power in international relations elaborated by Barnett and Duvall,[10] this section accounts for various relations of power between actors involved in the elaboration of rules related to international investment.

In line with the core premises of the constructivist approach,[11] Barnett and Duvall define power as "the production, in and through social relations, of effects that shape the capacities of actors to determine their circumstances and fate".[12] More specifically, these authors provide four different concepts of power.[13] *Compulsory power* is thus presented as a situation characterized by interactions in which one previously constituted actor has a

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[9] See e.g. Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996) at 29; Jordan J Paust, "Human Rights Responsibilities of Private Corporations" (2002) 35 Vand J Transnat'l L 801 at 802.

[10] Michael Barnett & Raymond Duvall, "Power in International Politics" (2005) 59:1 Int'l Organization 39.

[11] This consistency between constructivism and the conception of power offered by Barnett and Duvall is highlighted in Emanuel Adler, "Constructivism in International Relations: Sources, Contributions and Debates" in Walter Carlsnaes, Thomas Risse & Beth A Simmons, eds, *Handbook of International Relations*, 2d ed (London: Sage Publications, 2013) 112 at 125.

[12] Barnett & Duvall, *supra* note 10 at 42.

[13] For the rest of this paragraph, see Barnett & Duvall, *ibid* at 43.

direct control over another. When international actors exercise an indirect control over others through an institutional intermediary or through diffuse interactions, such situations reflect *institutional power*. Beyond the possibility of describing power as an attribute of particular actors and their interactions, Barnett and Duvall also consider conceptions of power as a process of constituting what actors are as social beings. Therefore, they refer to the constitution of subjects' capacities in direct relations to one another as *structural power*. When this constitution is socially diffuse and produces subjectivity mainly through systems of knowledge and discursive practices, it can be referred to as *productive power*.

Before analyzing the types of relations between actors involved in the international investment lawmaking process, it is worth recalling that the present dissertation is premised on the idea that globalization constitutes a process of social transformations.[14] Therefore, this section primarily focuses on the constitutive relationships between the various actors involved in the making of rules regulating international investment and foreign investors. Instead of perceiving the relationships at hand as interactions between already constituted subjects as posited in the conceptions of compulsory power and institutional power, this analysis assumes that actors are generally shaped and influenced as the lawmaking process evolves. Notwithstanding one instance of institutional power that is addressed below, the present discussion thus primarily focuses on structural power and productive power resulting from the constitutive relationships between actors involved.

Several examples found in the literature suggest that capital-exporting states exercise *structural power* over capital-importing states. In fact, identities and interests of states are strongly shaped by the social position that they occupy.[15] Acting as the home states of foreign investors, capital-exporting states perceive foreign investment as a means to increase trade with host states, secure procurement in natural resources for their economy and ensure the repatriation of parts of the profits earned by national investors.[16] By contrast, interests of capital-importing states appear to be primarily related to

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[14] See the discussion at section 1.1 of the Introduction.

[15] See Barnett & Duvall, *supra* note 10 at 53.

[16] See Muchlinski, *Multinational Enterprises*, *supra* note 1 at 86; Jeswald W Salacuse, "The Treatification of International Investment Law" (2007) 13 Law & Bus Rev Am 155 at 39–40; Sornarajah, *The International Law*, *supra* note 1 at 5; Vassilis P Tzevelekos, "In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors' Human Rights Abuses That are Not Attributable to It" (2010) 35 Brook J Int'l L 155 at 207.

opportunities in creating links with world markets and improving their balance of payments.[17] Amidst these different interests, capital-exporting states are thus particularly active in securing the adoption of IIAs to safeguard the interests of their national investors.[18] The ability of these states to directly negotiate such agreements with other states that agree to grant protections to foreign investment is widely acknowledged as showing the pressure that capital-exporting states can exert and the asymmetric nature of their relations with capital-importing states.[19] Arguments found in the literature regarding the extent to which international investment rules reflect the national constitutional systems

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[17] See Salacuse, *ibid* at 38; Karl P Sauvant, "The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned" (2015) 16 J World Investment & Trade 11 at 59.

[18] See Peter T Muchlinski, "'Global Bukowina' Examined: Viewing the Multinational Enterprises as a Transnational Law-making Community" in Gunther Teubner, ed, *Global Law Without a State* (Aldershot: Dartmouth, 1997) 79 at 91 [Muchlinski, "Global Bukowina"]; Andrew Newcombe, "Sustainable Development and Investment Treaty Law" (2007) 8 J World Investment & Trade 357 at 363; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007) at 23; Natalie L Bridgeman & David B Hunter, "Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism" (2008) 20 Geo Int'l Envtl L Rev 187 at 197–198; Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009) at 41 and 43; José E Alvarez, "The Public International Law Regime Governing International Investment" (2009) 344 Rec des Cours 193 at 264–265 [Alvarez, "The Public International Law"]; Sornarajah, *The International Law*, *supra* note 1 at 5 and 62; Peter Muchlinski, "Multinational Enterprises as Actors in International Law: Creating 'Soft Law' Obligations and 'Hard Law' Rights" in Math Noortmann & Cedric Ryngaert, eds, *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers* (Farnham: Ashgate Pubishing, 2010) 9 at 15 [Muchlinski, "Multinational Enterprises as Actors"]; Abdullah Al Faruque, "Mapping the Relationship between Investment Protection and Human Rights" (2010) 11 J World Investment & Trade 539 at 541; Megan Wells Sheffer, "Bilateral Investment Treaties: A Friend or Foe to Human Rights?" (2011) 39 Denv J Int'l L & Pol'y 483 at 491; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013) at 115–116; A Claire Cutler, "Human Rights Promotion through Transnational Investment Regimes: An International Political Economy Approach" (2013) 1:1 Politics and Governance 16 at 22 [Cutler, "Human Rights"]; Zeng Huaqun, "Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice" (2014) 17 J Int Economic Law 299 at 304; Sauvant, *ibid* at 23; Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015) at 31 [Sornarajah, *Resistance and Change*].

[19] See Steven R Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111:3 Yale LJ 443 at 458–459; Sornarajah, "Economic Neo-Liberalism", *supra* note 3 at 180-182; Muchlinski, *Multinational Enterprises*, *supra* note 1 at 117; Newcombe, *ibid* at 363; Van Harten, *ibid* at 23; Bridgeman & Hunter, *ibid* at 198; Newcombe & Paradell, *ibid* at 43; Rachel J Anderson, "Toward Global Corporate Citizenship: Reframing Foreign Direct Investment Law" (2009) 18 Mich St U Coll L J Int'l L 1 at 6–9; Asha Kaushal, "Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime" (2009) 50 Harv Int'l LJ 491 at 496 and 499; Alvarez, "The Public International Law", *ibid* at 253-256 and 267-268; Tzevelekos, *supra* note 16 at 207; Faruque, *ibid* at 540; Sheffer, *ibid* at 492-493; Miles, *ibid* at 118; David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (New York: Palgrave Macmillan, 2013) at 2 [Schneiderman, *Resisting Economic Globalization*]; Huaqun, *ibid* at 302 and 306.

of capital-exporting states also evidence the structural power of these countries over capital-importing states.[20]

Structural power also characterizes the relationship of foreign investors over capital-importing states. One crucial element to understand the constitutive relationship between these actors is the need of capital-importing states to create new jobs, bring new technology and skills to their territory, develop their natural resources and strengthen their local industries.[21] While capital-importing states compete to attract foreign investments on their territory,[22] foreign investors often succeed to "make contracts and agreements with agencies in host country governments in order to obtain special privileges and benefits that they would not otherwise have – a dynamic that seems to have existed since the advent of foreign investment".[23] Even if a change of government in a host state can considerably

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[20] See José E Alvarez, "Critical Theory and the North American Free Trade Agreement's Chapter Eleven" (1996) 28 U of Miami Inter-Am L Rev 303 at 312 [Alvarez, "Critical Theory"]; David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008) at 56-62; Schneiderman, *Resisting Economic Globalization*, *ibid* at 6-7; Schneiderman, "Power and Production", *supra* note 6 at 103; David Schneiderman, "How to Govern Differently: Neo-Liberalism, New Constitutionalism and International Investment Law" in Stephen Gill & A Claire Cutler, eds, *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014) 165 at 172; David Schneiderman, "Global Constitutionalism and International Economic Law: The Case of International Investment Law" (2016) 7 Eur YB Int'l Ecn L 23 at 32–33.

[21] See Nathan M Jensen, "Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment" (2003) 57 Int'l Organization 587 at 589; Muchlinski, *Multinational Enterprises*, *supra* note 1 at 85 and 87-88; Salacuse, *supra* note 16 at 38; Muchlinski, "Regulating Multinationals", *supra* note 1 at 35; Bridgeman & Hunter, *supra* note 18 at 196; Alice De Jonge, "Transnational Corporations and International Law: Bringing TNCs Out of the Accountability Vacuum" (2011) 7:1 Crit Perspectives Int'l Bus 66 at 67; Schneiderman, *Resisting Economic Globalization*, *ibid* at 132-133; Stephen Wilks, *The Political Power of the Business Corporation* (Cheltenham: Edward Elgar, 2013) at 63; Khalil Hamdani & Lorraine Ruffing, *United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest* (London: Routledge, 2015) at 45.

[22] See Strange, *supra* note 9 at 9; Jensen, *ibid* at 589; Todd Weiler, "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order" (2004) 27 B C Int'l & Comp L Rev 429 at 433; Olivier De Schutter, "Le responsabilité des États dans le contrôle des sociétés transnationales : Vers une convention international sur la lutte contre les atteintes aux droits de l'homme commises par les sociétés transnationales" in Emmanuel Decaux, ed, *La responsabilité des entreprises mutlinationales en matière de droits de l'homme* (Brussels: Bruylant, 2010) 19 at 28–29; Zerk, *supra* note 1 at 154; Anderson, *supra* note 19 at 11; Sheffer, *supra* note 18 at 492; Schneiderman, *Resisting Economic Globalization*, *ibid* at 131; Wilks, *ibid* at 46.

[23] See Salacuse, *supra* note 16 at 39. See also Muchlinski, "Global Bukowina", *supra* note 18 at 90; Ratner, *supra* note 19 at 460; Ilias Bantekas, "Corporate Social Responsibility in International Law" (2004) 22 BU Int'l LJ 309 at 314; Vaughan Lowe, "Corporations as International Actors and International Law Makers" (2004) 14 Italian YB Int'l L 23 at 23; Carlos M Vazquez, "Direct vs. Indirect Obligations of Corporations under International Law" (2005) 43 Colum J Transnat'l L 927 at 931; Joseph E Stiglitz, "Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Framework in a Globalized World Balancing Rights with Responsibilities" (2008) 23 Am U Int'l L Rev 451 at 476–477; Bridgeman & Hunter, *supra* note 18 at 197-198; Anderson, *ibid* at 12; Sornarajah, *The International Law*, *supra* note 1 at 5; De Schutter, *ibid* at 32-33; Jorge E Viñuales, "Foreign Investment and the Environment in International Law:

affect the dynamics of power,[24] foreign investors and capital-importing states generally enter in a relatively close relationship that evidences the structural power that these private actors can directly exercise. Addressing this power relation in stronger terms, Malanczuk highlights "the dominance of [transnational corporations] in national economies, in contract negotiations and in other respects concerning company interests, including interference in domestic politics of the host state".[25] One can even suggest that the economic influence of foreign investors allows them to resist sanctions adopted by host states or that the latter do not have the resources to appropriately monitor corporate conduct.[26] It must also be underscored that this structural power of foreign investors is not exercised solely over developing countries. When facing the proposition of a large

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An Ambiguous Relationship" (2010) 80:1 BYIL 244 at 249; Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2d ed (Oxford: Oxford University Press, 2012) at 21. Arato even argues that, thanks to international investment rules, these contracts ultimately become international legal instruments with priority over conflicting national law, thus conferring to multinational corporations a direct lawmaking capacity. See generally Julian Arato, "Corporations as Lawmakers" (2015) 56 Harv Int'l L J 229.

[24] See Faruque, *supra* note 18 at 540; Dolzer & Schreuer, *ibid* at 22; Cutler, "Human Rights", *supra* note 18 at 25.

[25] Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev ed (London: Routledge, 1997) at 102–103. See also Sten Niklasson, "The OECD Guidelines for MNEs and the UN Draft Code of Conduct: Some Political Considerations" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 141 at 141; Surya Deva, "Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should Bell the Cat" (2004) 5 Melb J Int'l L 37 at 50 [Deva "Acting Extraterritorially"]; A Claire Cutler, "Transnational Business Civilization, Corporations, and the Privatization of Global Governance" in Christopher May, ed, *Global Corporate Power* (Boulder, CO: Lynne Rienner Publishers, 2006) 199 at 205 [Cutler, "Transnational Business Civilization"]; Sornarajah, *The International Law*, *supra* note 1 at 61; Schneiderman, *Resisting Economic Globalization*, *supra* note 19 at 133.

[26] See Sarah Joseph, "Taming the Leviathans: Multinational Enterprises and Human Rights" (1999) 46:02 Nethl Int'l L Rev 171 at 176 [Joseph, "Taming the Leviathans"]; Sarah Joseph, "An Overview of the Human Rights Accountability of Multinational Enterprises" in Menno T Kamminga & Saman Zia-Zarifi, eds, *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) 75 at 78 [Joseph, "An Overview"]; Ratner, *supra* note 19 at 462; Surya Deva, "Human Rights Violations by Multinational Corporations and International Law: Where from Here" (2003) 19 Conn J Int'l L 1 at 49; Deva, "Acting Extraterritorrially", *supra* note 25 at 64; Sean D Murphy, "Taking Multinational Corporate Codes of Conduct to the Next Level" (2005) 43 Colum J Transnat'l L 389 at 392–393 and 398; Cutler, "Transnational Business Civilization", *ibid* at 207; Robert McCorquodale & Penelope Simons, "Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law" (2007) 70:4 Mod L Rev 598 at 599–600; Stiglitz, *supra* note 23 at 478; Bridgeman & Hunter, *supra* note 18 at 196; Jan Wouters & Nicolas Hachez, "When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured" (2009) 3 Hum Rts & Int'l Legal Discourse 301 at 341; Tzevelekos, *supra* note 16 at 160 and 207; De Jonge, *supra* note 21 at 67; Eric de Brabandere, "Non-State Actors and Human Rights: Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participant in the International Legal System" in Jean d' Aspremont, ed, *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (New York: Routledge, 2011) 268 at 270; Sornarajah, *Resistance and Change*, *supra* note 18 at 21.

investment on its territory, several countries are ready to offer incentives and adopt a legal framework that is consistent with the interests of the foreign investor.[27]

Recalling Vernon's idea of "obsolescing bargain",[28] one could be tempted to suggest that there is a temporal aspect to the relation of power between capital-importing states and foreign investors. According to Vernon, "almost from the moment that the signatures have dried on the document, powerful forces go to work that quickly render the agreements obsolete in the eyes of the government".[29] However, there are at least two elements that must be recalled with respect to such a potential evolution of power relations. First, Vernon relies on such an obsolescing bargain to explain the situation of foreign investors operating in a fairly singular sector of the economy, namely the raw material industry.[30] There is a very unique sense of dependence that can emerge in states whose economy extensively depends upon the extractive industry and that can prompt a shift in the power relations for this specific sector.[31] Second, rather than being applicable to the majority of capital-importing states, the obsolescing bargain appears to be limited to "less developed countries" that are struggling with the implementation of the rule of law.[32] Vernon himself acknowledges that "[i]f the raw material operation is located in an advanced country, that change in perception generally makes no great difference to the relation between governments and raw material enterprises".[33] Considering the very unique set of conditions that can lead to a shift in the power relations between these actors over time, it is here submitted that the relationship between foreign investors and capital-importing states is generally characterized by structural power of the private actors over the states.

The relationship existing between foreign investors and capital-exporting states is also marked by *structural power* held by the former over the latter. In fact, in addition to

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[27] See Salacuse, *supra* note 16 at 39; Dolzer & Schreuer, *supra* note 23 at 21.

[28] Raymond Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises* (New York: Basic Books, Inc, 1971) at 46–53.

[29] *Ibid* at 47.

[30] *Ibid* at 26-59.

[31] *Ibid* at 52.

[32] *Ibid* at 48.

[33] *Ibid* at 48.

the influence of foreign investors in shaping the legal framework of capital-importing states, some authors stress the efforts of these private actors to lobby their home states with a view to ensuring that the development of the law furthers their interests and remains business friendly.[34] Given the aforementioned benefits that home states can gain through investments made by their nationals abroad, some states can fear persistent threats from foreign investors and be reluctant to adopt any sort of legislation that would impose additional costs to these private actors.[35] According to Charney, given that "[o]ne country usually cannot unilaterally regulate [transnational corporations] power and behavior, even the western developed countries have an interest in these developments".[36] Another aspect of this structural power of foreign investors over capital-exporting states can be found in the often-emphasized active role that is now played by these private actors in commercial diplomacy and the negotiation of IIAs.[37]

What is more, foreign investors' efforts to lobby their home states to ensure that developments pertaining to the regulation of international investment remain consistent with their own interests is accompanied by an indirect influence of foreign investors on normative developments occurring in intergovernmental organizations. In fact, such a *productive power* of foreign investors can be understood as operating in addition to the more direct influence exercised by these private actors on states. For example, the

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[34] See Jonathan I Charney, "Transnational Corporations and Developing Public International Law" (1983) 1983:4 Duke LJ 748 at 751; Muchlinski, "Global Bukowina", *supra* note 18 at 80 and 91-92; Bantekas, *supra* note 23 at 315; Van Harten, *supra* note 18 at 19; Muchlinski, *Multinational Enterprises*, *supra* note 1 at 82 and 85; Stiglitz, *supra* note 23 at 477; Muchlinski, "Policy Issues", *supra* note 1 at 7; A Claire Cutler, "Constituting Capitalism: Corporations, Law, and Private Transnational Governance" (2009) 5 STAIR 99 at 102–103; Newcombe & Paradell, *supra* note 18 at 47; Sornarajah, *The International Law*, *supra* note 1 at 5 and 62-63; Muchlinski, "Multinational Enterprises as Actors", *supra* note 18 at 10 and 15-16; Schneiderman, *Resisting Economic Globalization*, *supra* note 19 at 133; Wilks, *supra* note 21 at 43; Miles, *supra* note 18 at 115; Cutler, "Human Rights", *supra* note 18 at 22.

[35] See Muchlinski, "Global Bukowina", *ibid* at 91; Joseph, "Taming the Leviathans", *supra* note 26 at 176-177; Ratner, *supra* note 19 at 463; Murphy, *supra* note 26 at 395-396 and 423; Zerk, *supra* note 1 at 154; Cutler, "Transnational Business Civilization", *supra* note 25 at 201; Thomas Risse, "Transnational Actors and World Politics" in Walter Carlsnaes, Thomas Risse & Beth A Simmons, eds, *Handbook of International Relations*, 2d ed (London: Sage Publications, 2013) 426 at 431; Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014) at 273.

[36] Charney, *supra* note 34 at 749. See also Muchlinski, *Multinational Enterprises*, *supra* note 1 at 116; August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 37 at 77.

[37] See Van Harten, *supra* note 18 at 38; Sornarajah, *The International Law*, *supra* note 1 at 62; Miles, *supra* note 18 at 116.

participation of these private actors in intergovernmental organizations regarding the elaboration of standards applicable to the mining sector has been identified in the literature and echoes this productive power of foreign investors.[38] Stressing the necessity of side-stepping from a positivist approach of international law, Muchlinski also pinpoints the role of foreign investors in shaping the international lawmaking process in the following terms:

> [Multinational enterprises] can be seen as 'law-makers' even though the traditional law-making process of international law does not formally accord any status to such entities in that process. However, it is on the process of influencing state policy and state practice, *and the agendas of intergovernmental organizations*, in relation to corporate interests that the law-making function of firms is to be seen.[39]

In addition to power emerging from ongoing relationships that shape identities and interests of actors involved in this international lawmaking process, another type of power that foreign investors hold can occur at a specific point in this process. It is in this regard that access to an international dispute settlement mechanism granted to foreign investors in several IIAs constitutes an instance of *institutional power*. In fact, the investor-state dispute settlement mechanism that is provided in several IIAs entails that consent of the parties to international investment arbitration occurs whenever a foreign investor whose investment is protected by the treaty submits a request for arbitration.[40] Of course, given that this interaction depends upon the existence of a specific institution, the power that is exercised through this channel remains more diffuse than the aforementioned structural relations. However, the existence of such an avenue to resolve an international investment dispute undoubtedly shifts the balance of power in favor of foreign investors. According to Schneiderman, "[f]oreign investors thus are able to thwart policy directions taken by states in circumstances where, in the past, the inter-state system would have managed disagreement via diplomacy or simply would have looked the other way".[41] Furthermore,

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[38] See Hevina S Dashwood, "Canadian Mining Companies and Corporate Social Responsibility: Weighing the Impact of Global Norms" (2007) 40:1 Can J Pol Sc 129 at 132.

[39] Muchlinski, "Multinational Enterprises as Actors", *supra* note 18 at 10 [emphasis added].

[40] See e.g. Newcombe, *supra* note 18 at 364; Newcombe & Paradell, *supra* note 18 at 44; Sornarajah, *The International Law*, *supra* note 1 at 306-307; Dolzer & Schreuer, *supra* note 23 at 254-264.

[41] Schneiderman, *Resisting Economic Globalization*, *supra* note 19 at 6. See also Luke Eric Peterson, *Human and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration* (Montreal: Rights and Democracy, 2009) at 15–16; Kaushal, *supra* note 19 at 498 and 512; Cutler, "Human Rights", *supra* note 18 at 19-20.

the fact that foreign investors are considered as full and equal parties in international investment arbitration proceedings implies that these private actors play an undeniable role in shaping international investment law.[42]

Beyond the power held by capital-exporting states and foreign investors, a certain form of *productive power* is also acknowledged for NGOs. Here, it must be noted that the present analysis considers both organizations representing business interests and organizations focusing primarily on public interests.[43] Furthermore, while Barnett and Duvall consider the deployment of normative resources by NGOs to compel states or multinational enterprises to alter their policies or conduct as reflecting a compulsory power,[44] the involvement of these NGOs in the international investment lawmaking process is considerably different from these direct interactions. In fact, the power of NGOs on this social process is far more diffuse than power exercised by foreign investors and states.[45] For example, while focusing primarily on the protection of social rights and the environment in an attempt to limit corporate power in international investment law,[46] several public interest NGOs are mostly recognized for their capacity of providing additional expertise and making procedures more transparent.[47] Beside their notorious

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[42] See Alvarez, "Critical Theory", *supra* note 20 at 305; Patrick Dumberry & Érik Labelle-Easthaugh, "Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration" in Jean d'Aspremont, ed, *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (New York: Routledge, 2011) 360 at 360.

[43] This nuance is also mentioned in Muchlinski, "Regulating Multinationals", *supra* note 1 at 32.

[44] Barnett & Duvall, *supra* note 10 at 50 and 60. For other authors who address this potential direct influence of NGOs on multinational enterprises in different terms, see also Joseph, "An Overview", *supra* note 26 at 80-82; Ratner, *supra* note 19 at 533.

[45] See Muchlinski, *Multinational Enterprises*, *supra* note 1 at 105; Sornarajah, *Resistance and Change*, *supra* note 18 at 30.

[46] See Muchlinski, *Multinational Enterprises*, *ibid* at 83 and 85; Muchlinski, "Policy Issues", *supra* note 1 at 8; Sornarajah, *The International Law*, *supra* note 1 at 6 and 67-68; Muchlinski, "Regulating Multinationals", *supra* note 1 at 32.

[47] See Malanczuk, *supra* note 25 at 97; Robert O'Brien, "NGOs, Global Civil Society and Global Economic Regulation" in Sol Picciotto & Ruth Mayne, eds, *Regulating International Business: Beyond Liberalization* (New York: St. Martin's Press, 1999) 257 at 263-265; Risse, *supra* note 35 at 434. The role of NGOs in increasing transparency is also recognized in international investment arbitration. See Brigitte Stern, "The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate" in José E Alvarez et al, eds, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: Oxford University Press, 2011) 174 at 187–188.

impact on negotiations around the failed *OECD Multilateral Agreement on Investment*,[48] their role in the field of regulating international investment and foreign investors thus mainly relates to placing certain ideas and issues on the political agenda of states and intergovernmental organizations.[49]

Several intergovernmental organizations – *e.g.* the United Nations ("UN"), the Organisation for Economic Co-operation and Development ("OECD"), the International Labour Organization ("ILO") and agencies of the World Bank Group – also hold *productive power* over the elaboration of rules regulating international investment and foreign investors. While their participation in this social process leads them to revise instruments that they had previously adopted,[50] such organizations bring their expertise in a diffuse way.[51] For example, commenting on the UN Global Compact, Barnett and Duvall echo the role of intergovernmental organizations in opening a discursive space "in which various actors are produced as subjects empowered legitimately to comment on their performance".[52] Adopting a critical stance to account for this diffuse influence, Cutler mentions that organizations like the OECD generate the material and ideological foundations that contribute to the global expansion of capitalism.[53] However, the influence of intergovernmental organizations does not seem to be as robust as the one generated by other actors involved in this process. After stressing the quasi-legislative power of these organizations in the development of norms pertaining to international investment law, Muchlinski recalls their "history of frequent failure in relation to the adoption of

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[48] See e.g. O'Brien, *ibid* at 258; Van Harten, *supra* note 18 at 22; Peterson, *supra* note 41 at 11; Peter Muchlinski, "Corporate Social Responsibility" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 637 at 642; Sornarajah, *The International Law*, *supra* note 1 at 67; Muchlinski, "Multinational Enterprises as Actors", *supra* note 18 at 16; Muchlinski, "Regulating Multinationals", *supra* note 1 at 42-43; John H Dunning & Sarianna M Lundan, "The Changing Political Economy of Foreign Investment: Finding a Balance Between Hard and Soft Forms of Regulation" in José E Alvarez et al, eds, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: Oxford University Press, 2011) 125 at 149; Miles, *supra* note 18 at 118.

[49] See Muchlinski, *Multinational Enterprises*, *supra* note 1 at 83; Muchlinski, "Policy Issues", *supra* note 1 at 8; Muchlinski, "Regulating Multinationals", *ibid* at 34; Risse, *supra* note 35 at 436.

[50] Such revisions and cross-references between instruments adopted under the auspices of intergovernmental organizations are examined in Part III of the present dissertation.

[51] See Sornarajah, *The International Law*, *supra* note 1 at 65.

[52] Barnett & Duvall, *supra* note 10 at 61.

[53] Cutler, "Legal Pluralism", *supra* note 6 at 727.

international rules in this area",[54] as well as the institutional limits regarding their potential actions.[55]

What the existing literature pertaining to international investment law suggests is that capital-exporting states and foreign investors are perceived as holding enough power to directly shape the lawmaking process. In addition to productive power and institutional power held by foreign investors, both capital-exporting states and foreign investors are the sole actors that can exercise structural power over other protagonists involved in this process. By contrast, while NGOs and intergovernmental organizations hold productive power and are able to bring specific aspects to the forefront of the discussions, their positions appear to be limited to an indirect influence on normative developments if they fail to secure support from other powerful actors. Having noted the ongoing exercise of power that is inherent to the relations between actors involved in the regulation of international investment, it becomes relevant to assess how these power relations operate in the specific context of consultations regarding the codification of foreign investors' responsibilities by intergovernmental organizations.

2. Conflicting Interests: Human Rights, Environmental Protection and Labour Rights

A closer look at the interests of actors involved in the codification of foreign investors' responsibilities occurring in intergovernmental organizations is a crucial step to provide a macro-level analysis of this codification. Therefore, this section critically analyzes statements provided by various actors during a consultation process that was launched by the UN High Commissioner on Human Rights ("UNHCHR") in 2004.[56] Even

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[54] Muchlinski, *Multinational Enterprises*, *supra* note 1 at 84; Muchlinski, "Policy Issues", *supra* note 1 at 8. See also Peter Muchlinski, "Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by Intergovernmental Organisations" (2003) 3 Non-St Actors & Int'l L 123 at 124 [Muchlinski, "Human Rights, Social Responsibility"].

[55] Muchlinski, "Human Rights, Social Responsibility", *ibid* at 145-151.

[56] Office for the United Nations High Commissioner for Human Rights, *Stakeholder Submissions to the Report of the High Commissioner for Human Rights on the Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author). The submissions were also extensively analyzed in Larry Catá Backer, "Multinational

if these statements were submitted more than ten years ago, it must be stressed that they bear a unique relevance for present purposes. While several consultation processes have been held since then, the efforts triggered by the UNHCHR sought to address a broad range of existing initiatives and were not limited to a specific set of standards.[57] Moreover, although the primary focus of the consultations concerned the protection of human rights, several actors expressed their views on issues regarding foreign investors' responsibilities in the areas of environmental protection and labour rights.

In line with the premises of the critical constructivist approach, these statements provide a valuable resource to emphasize the role of state and non-state actors in these consultations, as well as the extent to which participants in this lawmaking process considered norms that were already elaborated under the auspices of intergovernmental organizations. Most importantly, a critical analysis of these statements sheds light on conflicting interests and relations of power that were inherent in this consultation process. Several NGOs and some states hosting considerable stocks of FDI advocated for the adoption of legal norms to hold foreign investors accountable in the areas of human rights, environmental protection and labour rights (2.1). However, this position encountered the opposition of foreign investors, private interest NGOs, capital-exporting states and intergovernmental organizations that backed existing initiatives and advocated for *status quo* (2.2).

2.1 A Push for International Legal Norms

Amidst the various actors that participated in the consultations launched by the UNHCHR, several *public interest NGOs* strongly advocated for the development of more stringent standards that could balance the power of foreign investors. Some statements, like the one provided by the Fédération internationale des ligues des droits de l'Homme, thus

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Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law" (2006) 37 Colum Hum Rts L Rev 287.

[57] See Sub-commission on the Promotion and Protection of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights*, 2005, UN Doc E/CN.4/2005/91 at para 1.

echoed the aforementioned structural power of foreign investors: "Every day, human rights are violated with the complicity or the active participation of corporate actors which are *insufficiently regulated by their home State,* because the *States where they operate cannot impose on them effective regulations in the social, environmental or human rights fields*".[58] In the same vein, others appeared to worry about the extent to which foreign investors could hamper the elaboration of legal norms establishing responsibilities for private actors. This aspect was put forward by Christian Aid, which argued that "[b]usiness … has consistently used [corporate social responsibility] to block attempts to establish the

[58] Fédération internationale des ligues des droits de l'Homme, *Contribution of the FIDH to the Consultation of the OHCHR on the Human Rights Responsibilities of Business* (September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) [emphasis added]. See also ActionAid International, *ActionAid International's Submissions to the Office of the UN High Commissioner for Human Rights on the 'Responsibilities of Transnational Corporations and related Business Enterprises with Regard to Human Rights* (29 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Amnesty International, *Submission by Amnesty International under Decision 2004/16 on the 'Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights'* (September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Australian Human Rights Centre, *Submission concerning the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* (29 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); CAFOD, *CAFOD's Submission on the Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Christian Aid, *Behind the Mask: The Real Face of CSR*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at 53; International Commission of Jurists, *Submission to the United Nations Office if the High Commissioner for Human Rights on Business and Human Rights* (26 October 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); International Network for Economic, Social and Cultural Rights, *Steps Toward Corporate Accountability for Human Rights: ESCR-Net Report to OHCHR on the Human Rights Responsibilities of Business* (September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); International Service for Human Rights, *Submission to the Office of the High Commissioner for Human Rights: The Responsibilities of Transnational Corporations and other related Business Enterprises with regard to Human Rights* (October 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Mineral Policy Institute et al, *Submission to the UN Office of the High Commissioner for Human Rights on 'The Norms on the Responsibilities of Transnational Corporations and other Business Entities with regards to Human Rights'*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Oxfam, *Submission by Oxfam International under Decision 2004/116 on the 'Responsibilities of Transnational Corporations and related Business Enterprises with regards to Human Rights'* (17 November 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author).

mandatory international regulation of companies' activities".[59] In other words, concerns pertaining to relations of power were unequivocally reproduced in several statements submitted by these NGOs.

Beyond the expression of such concerns, several public interest NGOs also sought to provide concrete reasons justifying the need for the adoption of legal norms that could steer the conduct of private investors when operating abroad. In addition to statements recalling several negative effects of foreign investors' activities,[60] the need for balancing legal protections granted to foreign investors with legal obligations was recalled on several instances. After highlighting that foreign investors' responsibilities were not established in an enforceable legal framework, a submission provided by MISEREOR and other collaborators thus stressed "an obvious need to match the rights of companies with responsibilities".[61]

Another recurring theme that can be identified from the discourse of public interest NGOs is the strong skepticism of these organizations regarding the effectiveness of voluntary initiatives adopted by private actors. While acknowledging that these private initiatives rendered a certain awareness of businesses regarding their responsibilities,[62] most public interest NGOs maintained that they remained insufficient to address the negative impact of foreign investors' activities and could not be considered as an

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[59] Christian Aid, *ibid* at 2.

[60] For example, Greenpeace maintained that "[t]he ongoing tragedy of Bhopal shows most clearly that the world needs a global binding instrument for corporate accountability and liability". See Greenpeace, *Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author). See also Mineral Policy Institute et al, *supra* note 58.

[61] MISEREOR et al, *The Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author). See also Déclaration de Berne, *Contribution de la Déclaration de Berne à la consultation du Haut-Commissariat des Nations Unies au droits de l'Homme sur les responsabilités des sociétés transnationales et autres enterprises en matière de droits de l'Homme* (September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author).

[62] See MISEREOR et al, *ibid*; Christian Aid, *supra* note 58 at 15; Rights and Accountability in Development et al, *Joint Submission to OHCHR on the Human Rights Responsibilities of Business* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); CAFOD, *supra* note 58.

appropriate substitute for regulation.[63] It is in this regard that Oxfam submitted the following statement:

> *So far Oxfam remains unconvinced that industry-led voluntary codes can address these issues*. The obvious problem is that they are voluntary. There is little evidence, even where there is good monitoring and verification that the human rights performance of companies has markedly improved as a result. From the point of view of the victims of human rights violations and exploitation by business, *legislative protection backed by action must be preferable to voluntary processes*.[64]

Although fewer participants relied on this argument, a limited group of public interest NGOs also stressed the need to adopt legal norms in order to create a level-playing field between private actors. More specifically, the International Commission of Jurists pointed out that a "common, minimum standard [would] create a level-playing field for all companies, while leaving ample scope for the more enlightened and progressive companies to adopt higher standards".[65] Furthermore, as mentioned by the Mineral Policy Institute and its collaborators, "[t]he absence of a universal normative frameworks addressing human rights responsibilities of corporations creates an uneven playing field which advantages unscrupulous companies profiting from human rights violations and undermines the activities of those corporations committed to addressing human rights impacts of their operations".[66]

In addition to these public interest NGOs, at least one *private interest NGO* also appeared to be in favor of adopting legal norms regarding foreign investors' responsibilities in the areas of human rights, environmental protection and labour rights. After recalling the relevance of "mandatory efforts in order to achieve sustainable change and to raise the

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[63] See MISEREOR et al, *ibid*; Christian Aid, *ibid* at 15; Human Rights Watch, *Statement on the United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights to the Office of the United Nations High Commissioner for Human Rights* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Mineral Policy Institute et al, *supra* note 58; International Commission of Jurists, *supra* note 58; Rights and Accountability in Development et al, *ibid*; CAFOD, *ibid*; Déclaration de Berne, *supra* note 61.

[64] Oxfam, *supra* note 58 [emphasis added].

[65] International Commission of Jurists, *supra* note 58.

[66] Mineral Policy Institute et al, *supra* note 58.

minimum standard of acceptable behaviour",[67] the Business Leaders Initiative on Human Rights thus argued the following:

> We see that it is in our *interests*, as well as those of wider society, to better understand the ways in which civil, political, economic, social and cultural rights can be supported within our companies and across our business sectors. The prime responsibility for upholding these rights lie with governments, but *we are also interested in exploring where the boundaries of our responsibility might lie to help implement these rights*. We believe that this does not detract from the central role of government as the main duty bearer for fulfilling human rights, rather it reinforces it.[68]

As far as *states* are concerned, the support for the adoption of additional international norms pertaining to foreign investors' responsibilities did not clearly emerge as a prime consideration for all capital-importing states. In fact, several net capital importers that participated in the consultations were members of the European Union ("EU") and submitted a joint statement that was more in line with the interests of this net capital-exporting entity.[69] Others, like Syria, avoided a discussion on international legal norms applicable to private firms by stressing that "[t]ransnational corporations and business enterprises conduct their activities in accordance with the ordinances, laws and regulations in force in the country in the same way as do other national enterprises".[70] Croatia, which had not acceded to the EU at the time of the consultations, similarly mentioned that "all commercial subjects … are obliged to respect and enforce the legislation of the Republic of Croatia whether they are national or multinational entities".[71]

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[67] See Business Leaders Initiative on Human Rights, *Submission to the Office of the UN High Commissioner for Human Rights relating to the 'Responsibilities of Transnational Corporations and related Business enterprises with regard to Human Rights'* (28 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author).

[68] Business Leaders Initiative on Human Rights, *ibid* [emphasis added].

[69] The position of the EU is discussed in the following section. These capital-importing states are Belgium, Czech Republic, Hungary and Poland. For all these states, at the moment of the submission of the statements, their FDI outward stocks were lower than their FDI inward stocks. See OECD StatExtract, *Foreign Direct Investment FDI Series of BOP and IIP Aggregates*, online: OECD <http://stats.oecd.org/Index.aspx?DataSetCode=FDI_BOP_IIP#> (accessed 14 September 2016).

[70] Syria, *Permanent Mission of the Syrian Arab Republic to the United Nations Office at Geneva* (12 July 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author).

[71] Croatia, *Permanent Mission of the Republic of Croatia to the United Nations Office* (27 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author).

To be clear, no net capital importer that submitted a statement to this consultation process appeared to be specifically in favor of adopting legal norms pertaining to foreign investors' responsibilities.[72]

It would thus be inaccurate to suggest that all capital-importing states supported the elaboration of such legal norms. In fact, some capital-importing states that can also be considered as developing countries preferred to focus on the implementation of domestic laws and regulations rather than supporting an international initiative. The weak participation of these capital-importing states in this consultation process can nevertheless be related to the weak structural power that they hold when it comes to the elaboration of international norms pertaining to human rights, environmental protection and labor rights.[73] In other words, regardless of the focus by some states on domestic laws and regulations, the silence of several capital-importing states can be considered as reflecting inherent relations of power in the international lawmaking process.

Moreover, the position of some net exporters of capital hosting considerable stocks of FDI was far more nuanced. It is in this regard that, to a certain extent, countries like Norway and Canada supported the development of additional international norms pertaining to foreign investors and human rights.[74] For example, Norway maintained that there was "a need for norms from which directives for concrete actions and omissions by

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[72] For example, Australia was a net importer of capital in 2004 and appeared to disagree with the adoption of legal norms regarding foreign investors' responsibilities: "The Australian Government is strongly committed to the principle that guidelines for Corporate Social Responsibility (CSR) should be voluntary. … We believe the way to ensure a greater business contribution to social progress is not through more norms and prescriptive regulations, but through encouraging awareness of societal values and concerns through voluntary initiatives". See Australia, *Comments by Australia in respect of the Report Requested from the Office of the High Commissioner for Human Rights by the Commission on Human Rights in its Decision 2004/116 of 20 April 2004 on Existing Initiatives and Standards relating to the Responsibility of Transnational Corporations and related Business Enterprises with Regard to Human Rights* (8 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author). See also OECD StatExtract, *supra* note 69.

[73] In fact, the only developing countries that submitted a statement for this consultation process are Croatia, Cuba, Czech Republic, Hungary, Mauritius, Philippines, Poland and Syria. What is more, out of these eight states, three submitted a statement that was prepared by the European Union (*i.e.* Czech Republic, Hungary and Poland).

[74] In 2004, at the moment of the submission of the statements, the FDI inward stocks of Canada were of US$315 billion (in comparison to FDI outward stocks of US$373 billion). The FDI inward stocks of Norway were of US$85 trillion (in comparison to FDI outward stocks of US$89 trillion). See OECD StatExtract, *supra* note 69.

companies can be derived".[75] Similarly, Canada identified the lack of "an authoritative document outlining the full range of human rights considerations or principles companies should take into account when investing" as a gap of the existing framework.[76]

Overall, it is plain that a mix of state and non-state actors sought to show their support for the elaboration of international norms that would hold investors accountable when operating abroad. While the discourse of public interest NGOs reflected manifest concerns with respect to the power that foreign investors hold over states, legal norms were perceived as a more effective way than existing initiatives to balance this power. Although some support can be found in a private interest NGO and some states that host considerable stocks of FDI, this position was mainly advocated by actors that do not exercise direct power in the elaboration of rules governing international investment and foreign investors.

2.2 Strong Reactions and Doubts from Powerful Actors

In striking contrast with proponents of the adoption of additional international norms addressing the general lack of accountability of foreign investors, some actors used the same consultation process to articulate their opposition. Among these actors, *foreign investors* and *private interest NGOs* were prompt to dismiss any form of international legal norms that would directly apply to their activities. Interestingly, it is worth noting that these actors implicitly acknowledged the constitutive role of existing initiatives in shaping their identities and interests. For example, according to Shell:

> The [Shell General Business Principles] guides the day-to-day business and activities of Shell companies and these need to keep pace with *external principles and codes that help shape our business environment*, for example in relation to human rights these include … the UN Global Compact (2000), the *OECD*

[75] Norway, *Decision 2004/116 – Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (4 November 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author).

[76] Canada, *Submission of Canada to the High Commissioner of Human Rights on the Responsibilities of Business Enterprises with regard to Human Rights*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at para 4.3.

Guidelines for Multinational Enterprises (2001), the *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (2000).[77]

Additionally, after citing the *OECD Guidelines for Multinational Enterprises*[78] and the UN Global Compact,[79] the International Chamber of Commerce stated that "*[s]uch voluntary initiatives serve many constructive and useful purposes*, including setting aspirational goals that organizations can work to achieve, coordinating policies among various organizations, communicating the commitment of an organization to a policy or position, and providing guidance to organizations seeking to improve their own performance".[80]

Further to this recognition of existing initiatives, the discourse of foreign investors and private interest NGOs can be understood as seeking to preserve the structural power of foreign investors over capital-importing states and capital-exporting states. In addition to depicting foreign investors as entities that "can effectively put in practice their voluntary commitment to respecting human rights through the application of their own business principles",[81] several actors alleged that the protection of human rights had to remain the sole responsibility of states. It is in this regard that BP made the following statement: "In general, *accountability should not be given to an actor who does not have the capacity to fulfill that accountability*. Business cannot and should not be held accountable for what is

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[77] Shell, *Request from the Office of the UN High Commissioner for Human Rights* (24 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) [emphasis added]. This consideration of existing standard is also reflected in other submissions from foreign investors. See Pfizer, *Letter from Chuck Hardwick* (29 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Gap, *Letter from Wilma Walace* (28 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author).

[78] For the most recent version of this instrument, see *Declaration on International Investment and Multinational Enterprises*, 25 May 2011, Doc No C/MIN(2011)11/FINAL (2011), Annex 1.

[79] United Nations Global Compact, online: United Nations Global Compact <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (accessed 14 September 2016).

[80] International Chamber of Commerce, *Request for Input on Report concerning the 'Responsibilities of Transnational Corporations and related Enterprises with regard to Human Rights* (7 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) [emphasis added]. See also United States Council for International Business, *Submission to the High Commissioner for Human Rights for the Report on the 'Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights'*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author).

[81] See International Chamber of Commerce, *ibid*. See also Pfizer, *supra* note 77; United States Council for International Business, *ibid*.

the role of government".[82] Through such a discourse, foreign investors and private interest NGOs perpetuated the power imbalance characterizing the structural relations between these private actors and states related to their operations.

In this regard, both foreign investors and NGOs representing the interests of businesses stressed the need to maintain voluntary initiatives. Arguing that no "one size fits all approach" was available to regulate foreign investors' activities, Shell argued that "there is an important role for voluntary codes of practice that can help create that solid foundation of good practice in the field of human rights and environmental performance and that enable business to push back the boundaries of social and environmental performance and operate at the cutting edge".[83] Some actors, like the United States Centre for International Business, argued that "[v]oluntary instruments also help to maintain a process of innovation that is a critical aspect in the development and implementation of corporate responsibility programs and initiatives".[84]

It must also be noted that foreign investors and private interest NGOs benefited from the support of *capital-exporting states* throughout the consultation process launched by the UNHCHR. In fact, important net exporters of capital have been particularly active in demonstrating their disagreement with the adoption of legal standards seeking to steer the conduct of foreign investors. Of particular relevance for present purposes are the statements that were submitted by the United States and members of the EU.[85] In line with the positions adopted by economic private actors, these states acknowledged the influence of existing initiatives with respect to the codification of foreign investors' responsibilities. For example, discussing the increasing awareness of human rights and business enterprises,

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[82] BP, *Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (1 October 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author). See also International Chamber of Commerce, *ibid*; International Organisation of Employers, *Letter from Antonio Peñalosa* (29 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Pfizer, *ibid*; United States Council for International Business, *ibid*.

[83] Shell, *supra* note 77.

[84] United States Council for International Business, *supra* note 80. See also BASF, *Comments on the UN Draft Norms*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author).

[85] Even if some of its members that submitted a statement were net importers of capital, the EU was a net exporter of capital in 2004. The FDI outward stocks of the EU were of US$5,263 million, in comparison to FDI inward stocks of US$4,805 million. See OECD StatExtract, *supra* note 69.

the EU member states mentioned that "[t]his tendency is closely related to the fact that the issue of [corporate social responsibility] acquired importance on the political agenda, and that work to formulate standards, principles, and guidelines has taken place in many fora, including in the United Nations, OECD, and the European Union itself".[86] The structure that was developed regarding the codification of foreign investors' responsibilities was thus considered as having had an undeniable impact on the identities and the interests of several actors.

However, capital-exporting states were also largely in favor of initiatives whose application remained voluntary. One glaring example of such a position can be found in the statement submitted by the United States:

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[86] Statements submitted by member states of the EU were identical in this regard. See Austria, *Austrian Reply to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at para 2; Belgium, *Response from the Permanent Mission of Belgium to the United Nations* (4 October 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at para 2; Czech Republic, *Reply of the Government of Czech Republic to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at para 2; Denmark, *Reply of Denmark to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (1 October 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at para 2; Greece, *EU to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at para 2; Hungary, *Reply of the Government of Hungary to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at para 2; Italy, *EU Reply to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (29 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at para 2; Luxemburg, *Reply by Luxembourg to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (29 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at para 2; Netherlands, *Reply of the Netherlands to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (29 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at para 2; Poland, *Reply of the Government of the Republic of Poland to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at para 2.

> [I]t is the view of the United States that *voluntary, collaborative efforts* to leverage public-private partnerships are the best means for both encouraging responsible business practices by the private sector in this area and for the promotion and protection of human rights. *Any exercised design to impose artificial 'norms and responsibilities' on business enterprises has … no basis in fact, no basis in law and is doomed from the outset*.[87]

Far from merely expressing its support for voluntary initiatives, the extent to which the United States rejected the direct imposition of international legal norms on foreign investors contributed to depict the latter as actors that can hardly be regulated under international law.

Moreover, in a way that mirrors the position of foreign investors and private interest NGOs, several capital-exporting states recalled that the protection of human rights had to be considered as the sole responsibility of states under international law. After stressing "that the prime responsibility for the protection and promotion of human rights rests with States",[88] the EU underscored that "*[t]ransnational corporations and other business enterprises shall respect local legislation and regulations*, to the extent that local legislation or regulations do not make business an accomplice to human rights violations".[89] The United States even pushed this argument further: "While it is true that private entities have been alleged to have been complicit in, or even aided, human rights abuses committed by governments, *the fundamental cause of such abuses has been the action or inaction of the government, not the private entity*".[90] Such statements extensively support *status quo* and undeniably preserve the power imbalance existing between foreign investors and capital-importing states.

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[87] United States of America, *Re: Note Verbale from the OHCHR of August 3, 2004 (GVA2537)* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) [emphasis added].

[88] See Austria, *supra* note 86 at para 3; Belgium, *supra* note 86 at para 3; Czech Republic, *supra* note 86 at para 3; Denmark, *supra* note 86 at para 3; Greece, *supra* note 86 at para 3; Hungary, *supra* note 86 at para 3; Italy, *supra* note 86 at para 3; Luxembourg, *supra* note 86 at para 3; Netherlands, *supra* note 86 at para 3; Poland, *supra* note 86 at para 3. See also Norway, *supra* note 75; United Kingdom, *The Responsibilities of Transnational Corporations and related Business Enterprises with Regard to Human Rights*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author).

[89] See Austria, *ibid* at para 3; Belgium, *ibid* at para 3; Czech Republic, *ibid* at para 3; Denmark, *ibid* at para 3; Greece, *ibid* at para 3; Hungary, *ibid* at para 3; Italy, *ibid* at para 3; Luxembourg, *ibid* at para 3; Netherlands, *ibid* at para 3; Poland, *ibid* at para 3 [emphasis added].

[90] United States of America, *supra* note 87 [emphasis added].

Along the same lines, *intergovernmental organizations* seemed to express some uncertainty with respect to the extent to which any international instruments codifying foreign investors' responsibilities could depart from voluntary initiatives. Without necessarily positioning themselves against international legal norms that seek to address the general lack of accountability of foreign investors, some intergovernmental organizations questioned their feasibility. For example, the ILO summarized this uncertainty in the following terms:

> It therefore would appear useful to ensure that in further consideration of the issue of human rights and business, attention is paid to both the *possibility* and the *desirability* of attempting to impose international legal obligations on non-state actors, particularly business enterprises, under (1) general international public law and (2) international law in the field of human rights and labour.[91]

In sum, these consultations regarding the codification of foreign investors' responsibilities in the areas of human rights, environmental protection and labour rights were characterized by irreconcilable interests. On the one hand, it is plain that the push for departing from existing initiatives and adopting international legal norms that codify foreign investors' responsibilities mostly came from public interest NGOs, with other actors also demonstrating encouragement for additional international norms on this matter. On the other hand, several foreign investors, private interest NGOs and capital-exporting states backed existing voluntary initiatives, while intergovernmental organization expressed some hesitation regarding the adoption of legal norms. By combining these conflicting interests with the relations of power that are at play in the international investment lawmaking process, one finds a compelling argument to explain the weak normative integration of these concerns in international investment law. The general reliance on hortatory language in IIAs and that lack of constancy of international investment arbitration tribunals when dealing with foreign investors' responsibilities in these areas are thus entirely consistent with the interests of actors that can exercise a direct impact on the outcome of this lawmaking process.

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[91] International Labour Office, *Letter from Mr. Zdzislaw Kedzia* (2 August 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) [emphasis added].

3. Serving the Interests of Powerful Actors (and Others as Well): The Prohibition of Corruption

While the analysis of consultations related to foreign investors' responsibilities in areas examined above sheds light on strong reactions from powerful actors to counter concerns from other participants, examining consultations regarding the prohibition of corruption reveals a strikingly different context. Discussions that have generally addressed the elaboration and the implementation of anti-corruption initiatives under the auspices of intergovernmental organizations – *i.e.* the 2001 UN *Report of the Meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption*[92] as well as statements submitted during a consultation process launched by the OECD in 2008[93] – are particularly relevant to account for this different context.

Once again, discursive materials emerging from such discussions demonstrate the active participation of state and non-state actors in these consultations, as well as the constitutive relationship existing between actors and norms concerning the prohibition of corrupt acts by foreign investors. However, with respect to the interests that were put forward throughout these discussions, one must go beyond the confluence of support from the various actors involved. This section thus shows that foreign investors, private interest NGOs and capital-exporting states mainly perceived corrupt acts as preventing the establishment of a competitive level-playing field and thus supported the development of legal norms in this area (3.1). By contrast, support provided by other actors was chiefly motivated by a will to tackle broader negative effects of corruption on society (3.2).

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[92] *Report of the Meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument Against Corruption*, 2001, UN Doc No A/AC.260/2 [*Intergovernmental Open-Ended Expert Group Report*].

[93] OECD, *Review of the OECD Anti-Bribery Instruments: Compilation of Responses to Consultation Papers* (Paris: OECD, 2008) [*OECD Review*].

3.1 Securing a Level-Playing Field

Even if *foreign investors* and *private interest NGOs* explicitly sought to discourage the adoption of international legal norms to hold private actors accountable in several areas, these actors nevertheless perceived anti-corruption initiatives as a means to further their interests. From the outset, it must be noted that during the discussions held under the auspices of the UN and the OECD, several actors acknowledged the relevance of existing initiatives in shaping the identities and the interests of international actors. For example, the International Chamber of Commerce addressed the instruments adopted by the OECD and the work of its Working Group on Bribery and in International Business Transactions in the following terms:

> From a business perspective, it clearly appears that the adoption of the [i]nstruments and the work performed by the Working Group during a period of more than ten years *has produced substantial and irreversible effects on the way international bribery is treated*: the criminalization of bribery of foreign public officials is now general in the OECD area and tax deductions for bribe payments are generally disallowed.[94]

Some actors also explicitly recognized the mutual reinforcement between international instruments adopted by the OECD and other initiatives developed by the private sector. In this regard, the International Chamber of Commerce also stated its belief that "the effectiveness of the [i]nstruments should also be measured by the considerable work accomplished, since the adoption of the [i]nstruments, by the private sector through corporate codes of conduct aiming at complying with the standards, laid down in the [i]nstruments, and through integrity programs".[95]

Beyond the recognition of this effectiveness, it must be noted that the primary reason underlying the commitment of foreign investors and private interest NGOs was the concern to level the playing field for foreign investors seeking to enter new markets. Such concerns were summarized by the Conseil français des investisseurs en Afrique, according to whom "[t]he fact that companies from emerging countries are not necessarily sued for international contract-related bribes *induces serious competition distortions* (to the

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[94] See *ibid* at 118 [emphasis added]. See also the statement submitted by the Business and Industry Advisory Committee at 106-107.

[95] See *ibid* at 118.

detriment of companies that chose integrity) while impeding the reduction of corruption in weak governance countries".[96] In a similar way, the Business and Industry Advisory Committee stressed that "more needs to be done to effectively curb corruption and *provide a real level[-]playing field for international business* across OECD countries and in particular outside the OECD".[97] As a result, all foreign investors and private interest NGOs called upon an expansion of existing international norms with a view to improving the enforcement of current instruments,[98] including more effectively major emerging countries,[99] addressing passive corruption[100] and targeting the private-to-private corruption issue.[101]

In contrast to other areas in which foreign investors' activities can produce a negative impact, *capital-exporting states* also approached the prohibition of corruption from a radically different stance. In addition to emphasizing the need for compatibility with principles found in existing anti-corruption instruments,[102] several concerns articulated by foreign investors and private interest NGOs were echoed in the discourse of capital-exporting states. For example, as far as improving the enforcement of current instruments is concerned, the intergovernmental open-ended expert group reported that "the States members of the European Union expressed the view that the new instrument could be nothing else but a convention, *should contain both preventive and enforcement measures* and follow a multidisciplinary approach".[103] Furthermore, the same report mentions that "the members of the Union underlined that *as many countries as possible* should be able to subscribe to the commitment to be expressed in the new instrument".[104]

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[96] See *ibid* at 113 [emphasis added].

[97] See *ibid* at 107 [emphasis added].

[98] See *ibid*. See the statements from the Business and Industry Advisory Committee (at 108-109) and the Conseil français des investisseurs en Afrique (at 114).

[99] See *ibid*. See the statements from the Business and Industry Advisory Committee (at 108) and the International Chamber of Commerce (at 119).

[100] See *ibid*. See the statements from the Business and Industry Advisory Committee (at 109), the Conseil français des investisseurs en Afrique (at 113) and the International Federation of Consulting Engineers (at 127).

[101] See *ibid.* See the statement from the International Chamber of Commerce at 122.

[102] See *Intergovernmental Open-Ended Expert Group Report*, *supra* note 92 at para 16.

[103] See *ibid* at para 16 [emphasis added].

[104] See *ibid* at para 16 [emphasis added].

Although not explicitly mentioned in these consultation processes, the prominent role of the United States and its national investors in order to secure an international treaty pertaining to corruption is extensively discussed in the literature.[105] Abbott and Snidal thus view the elaboration of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*[106] as resulting from a combination of interests and values pushed by different actors.[107] These authors present foreign investors as "interests actors" whose actions were prominently motivated by preventing the negative impact of corruption on competition.[108] Ratner also compellingly highlights the difference between corruption and other areas of foreign investors' responsibilities by stressing the "clear *interest of corporations* from states that banned bribery in creating an international regime that would eliminate their competitive disadvantage – *a factor missing from the human rights dynamics*".[109]

Above all, the analysis above shows that one cannot bluntly suggest that foreign investors, private interest NGOs and capital-exporting states constantly sought to hamper the codification of foreign investors' responsibilities. The consultation processes that occurred under intergovernmental organizations regarding the area of corruption were unambiguously anchored in demands from these actors to adopt international legal norms to secure a level-playing field serving their interests. What emerges as the key element from this discourse analysis is thus that such normative developments benefited from a

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[105] See Bruce Seymour, "Illicit Payments in International Business: National Legislation, International Codes of Conduct, and the Proposed United Nations Convention" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 219 at 220; Philip M Nichols, "Regulating Transnational Bribery in Times of Globalization and Fragmentation" (1999) 24 Yale J Int'l L 257 at 289; Kenneth W Abbott & Duncan Snidal, "Values and Interests: International Legalization in the Fight against Corruption" (2002) 31:S1 J Legal Stud S141 at S161–S163; Harold Hongju Koh, "Separating Myth from Reality About Corporate Responsibility Litigation" (2004) 7:2 J Int Economic Law 263 at 274; Backer, *supra* note 56 at 154-155; De Schutter, *supra* note 22 at 31-32; Jan Wouters, Cedric Ryngaert & Ann Sofie Cloots, *The Fight Against Corruption in International Law*, SSRN Scholarly Paper ID 2274775 (Rochester, NY: Social Science Research Network, 2012) at 6–8; Anita Ramasastry, "Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 162 at 174.

[106] *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, 37 ILM 1 (entered into force 15 February 1999).

[107] Abbott & Snidal, *supra* note 105.

[108] *Ibid* at S145.

[109] Ratner, *supra* note 19 at 483 [emphasis added].

crucially needed support from actors holding enough power to shape international rules applicable to international investment and foreign investors.

3.2 Addressing the Broader Implications of Corruption

Further to the support of these actors to develop and implement international legal norms prohibiting corruption, one can hardly be surprised that other participants in these discussions also advocated for such norms. It must nevertheless be noted that the reasons underlying the backing from public interest NGOs, capital-importing states and intergovernmental organizations considerably differ from the focus on securing a competitive level-playing field. In fact, an examination of the discourse from these actors demonstrates that they addressed the influence of existing instruments and that they were concerned about broader effects of corrupt practices perpetrated by foreign investors.

Several *public interest NGOs* thus implicitly referred to the constitutive role of international norms prohibiting corruption. For example, Public Concern at Work mentioned that the variety of instruments adopted by the OECD "have been extremely important *in changing public and organisational attitudes to bribery* over the last decade".[110] By contrast, Transparency International offered a mixed account of these results:

> The ultimate objective of the Convention is to *change corporate culture and stimulate effective anticorruption compliance programs*. Based on [Transparency International]'s extensive relations with the business community, we do not believe that a sea-change in corporate behaviour has taken place. A considerable number of large multinationals have taken action, but progress is uneven and incomplete. A higher and more consistent level of enforcement will be needed *to change corporate culture*.[111]

Regardless of diverging views pertaining to the effectiveness of existing initiatives, both statements recognize the potential influence of international norms on the identities and interests of agents.

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[110] See *OECD Review*, *supra* note 93 at 93 [emphasis added].

[111] See *ibid* at 97 [emphasis added].

Furthermore, the various aspects put forward by public interest NGOs demonstrate the need to address corporate liability and the broad scope of concerns that were considered to support the adoption and implementation of international legal norms to fight corruption. Particularly relevant for present purposes are statements that unambiguously refer to corporate liability for acts of corruption. Transparency International thus addressed the "increasing recognition that to deal with complex crimes such as foreign bribery, corporations should be held liable not only for affirmative derelictions but for lack of supervision or control".[112] Expressing concerns that some states had not effectively established the liability of legal persons for corrupt practices, the Trade Union Advisory Committee recalled that "[b]ribery of a foreign public official is a crime that is almost always committed by employees on behalf of and for the benefit of their companies".[113] Moreover, further to organizations that raised concerns pertaining to the protection of whistleblowers,[114] the Global Organisation of Parliamentarians against Corruption described corruption governance as "the greatest hindrance to the development of prosperity in the world".[115]

As far as *capital-importing states* are concerned, an important element that can be identified from the discourse of these actors is that it also addressed issues reaching beyond the competitive concerns put forward by other participants. For example, capital-importing states implicitly expressed issues pertaining to the structural power of capital-exporting states. The aforementioned intergovernmental open-ended expert group thus reported that Egypt, speaking on behalf of the Group of 77 and China, stressed the importance of including in a legal instrument a chapter on mutual legal assistance and cooperation that would foster international cooperation.[116] The Group of Asian and Pacific states, represented by Jordan, also "believed that the scope of application of the new convention must be responsive to the concerns of all States, particularly on the sensitive issue of *sovereign equality, territorial integrity and non-interference in the domestic affairs of*

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[112] See *ibid* at 101.

[113] See *ibid* at 141.

[114] See *ibid*. See the statements from Public Concern at Work (at 94), the Open Democracy Advice Centre (at 95) and Transparency International (at 100-101).

[115] See *ibid* at 92.

[116] See *Intergovernmental Open-Ended Expert Group Report*, *supra* note 92 at para 14.

States".[117] Furthermore, as reported by the intergovernmental open-ended expert group, Uruguay spoke on behalf of the Group of Latin American and Caribbean states and "confirmed the commitment of the members of the Group to participate actively in the fight against corruption and stressed the need to codify and strengthen international rules against the phenomenon *in order to ensure transparency in both the public and the private sector*".[118]

Finally, some *intergovernmental organizations* also participated in these consultations related to the codification of foreign investors' responsibilities in the area of corruption. Echoing the implicit consideration of the constitutive effect of existing international initiatives, the Group of States against Corruption from the Council of Europe argued that "the OECD anti-bribery instruments have no doubt been instrumental in increasing awareness of the fact that bribery of foreign public officials is not a normal way of doing business".[119] What is more, the discourse of at least one intergovernmental organization reflected broader social concerns related to corruption. The intergovernmental open-ended expert group thus cited the following statement from the Executive Director of the UN Office for Drug Control and Crime Prevention: "Corruption was as much a reality in industrialized countries as in countries with economies in transition and developing countries. … Over time, corrupt practices reinforced poverty by making services available only to those who could afford them".[120]

To conclude this section, while all state and non-state actors involved in these consultations ultimately agreed on the necessity of international legal norms to prohibit the corruption of public agents by foreign investors, it must be stressed that they held somehow different positions. Foreign investors, private interest NGOs and capital-exporting states extensively decried the negative impact that corruption can have on competition between private actors seeking to invest in a host state. By contrast, other actors justified their support by stressing broader implications of corruption. Beyond the mere confluence of

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[117] See *ibid* at para 18 [emphasis added].

[118] See *ibid* at para 15 [emphasis added].

[119] See *OECD Review*, *supra* note 93 at 78. See also the statement from the International Monetary Fund Staff at 81.

[120] See *Intergovernmental Open-Ended Expert Group Report*, *supra* note 92 at para 8.

support, it must be noted that the prohibition of corruption was perceived as serving the interests of actors holding enough power to exercise a more direct influence on the elaboration of international rules. Of particular relevance for present purposes, the support from these powerful actors for international legal norms prohibiting corrupt practices perpetrated by foreign investors is consistent with the stronger normative integration of these responsibilities in international investment law demonstrated in the previous chapter.

Conclusion

The analysis above suggests that capital-exporting states and foreign investors are the only actors involved in the international investment lawmaking process that hold enough structural power to exercise a direct influence on the elaboration of rules regulating international investment. Far from neglecting the productive power held by NGOs and intergovernmental organizations, it is plain the indirect influence exercised by other actors is generally outweighed by the various types of power held by foreign investors and capital-exporting states. When applied to consultations regarding the codification of foreign investors' responsibilities by intergovernmental organizations, this analysis demonstrates an unavoidable reproduction of power relations and diverging interests. In line with the premises of the critical constructivist approach, the reliance on a critical discourse analysis has proven to be relevant to evidence the role of state and non-state actors in these consultations. Capital-importing states, capital-exporting states, foreign investors, NGOs and intergovernmental organizations have all voiced their concerns with respect to the codification of foreign investors' responsibilities in distinct areas. Furthermore, in light of several references to existing initiatives, their discourse suggests a mutual constitution between the actors and the various instruments seeking to tackle the general lack of accountability of foreign investors under international law.

Most importantly, it is plain that this mutual constitution of agents and social structures encompasses efforts from the most powerful actors involved in these discussions to safeguard their interests. With respect to the areas of human rights, environmental protection and labour rights, the examination of statements from various actors evidences

clashing interests. Some NGOs and states hosting a considerable level of FDI stocks argued in favor of additional international norms to hold foreign investors accountable. However, several foreign investors, private interest NGOs, capital-exporting states and intergovernmental organizations either seemed to be reluctant to depart from current voluntary initiatives or squarely rejected the potential adoption of legal norms for this purpose. By contrast, all actors involved in consultations pertaining to the codification of foreign investors' responsibilities in the area of corruption stressed the relevance of international legal norms in this regard. Amidst various actors that were concerned by the broader negative impact of corrupt acts perpetrated by private actors, foreign investors, private interest NGOs and capital-exporting states mainly asked for the establishment of a competitive level-playing field. At the end of the day, the only area for which the elaboration of international legal norms pertaining to foreign investors' responsibilities was perceived as serving the interests of the most powerful actors is the prohibition of corruption.

This account of power relations and distinct interests bears direct implications in the analysis of the normative integration of foreign investors' responsibilities in international investment law. The consistency between most powerful actors' interests and the extent to which foreign investors' responsibilities are integrated in international investment law is striking. The weak consideration of such responsibilities in the areas of human rights, environmental protection and labour rights echoes the reluctance of foreign investors, private interest NGOs, capital-exporting states and intergovernmental organizations exhibited during previous consultations. Furthermore, the stronger normative integration of the prohibition of corruption reflects the general support for international legal norms in this area by the actors that are able to exercise a more direct influence on the international investment lawmaking process.

Any suggestion of transposing the deeper normative integration of foreign investors' responsibilities regarding the prohibition of corruption to other areas must not obfuscate inherent relations of power and conflicting interests. As this examination of consultations pertaining to the general codification of foreign investors' responsibilities demonstrates, discussions around the adoption of international legal norms engage the interests of various actors involved in the international investment lawmaking process and

are unlikely to reach a successful outcome without support from the most powerful protagonists. Yet, maintaining that foreign investors and capital-exporting states always reject the adoption of any responsibilities for foreign investors lacks evidential support. Rather, whenever international legal norms are perceived as serving their interests, these powerful actors are likely to back the adoption and the application of these norms. The examination of inherent relations of power and conflicting interests in the codification of foreign investors' responsibilities thus calls for numerous nuances. Before delving into the analysis of the normative character of each instrument elaborated and applied under the auspices of intergovernmental organizations, these nuances provide key contextual elements of an evolving codification embedded in a context of neoliberal globalization.

Chapter 6 – Organisation for Economic Co-operation and Development

Introduction

While positioning the evolving codification of foreign investors' responsibilities within a broader context of neoliberal globalization offers important insights from a macro-level perspective, the analysis of this international phenomenon would be incomplete without a closer look at specific instruments elaborated and implemented under the auspices of intergovernmental organizations. After demonstrating that the fragmented normative integration of foreign investors' responsibilities in international investment law is consistent with the most powerful actors' interests in the international lawmaking process, Part III of the dissertation moves the analysis to a micro-level to assess the normative character of international instruments codifying foreign investors' responsibilities. By relying on the interactional theory of international law presented in Chapter 2 and the interdisciplinary method developed in Chapter 3, the remaining chapters of the dissertation thus assess whether international norms elaborated and implemented by intergovernmental organizations have reached the realm of legality.

The present chapter kicks off this micro-level analysis by examining international instruments emanating from the Organisation for Economic Co-operation and Development ("OECD"). With the adoption of the first version of the *OECD Guidelines for Multinational Enterprises* ("*OECD Guidelines*") in 1976,[1] this intergovernmental organization has been particularly active in the codification of foreign investors' responsibilities for more than forty years. In parallel to the numerous aspects that are included in this broad instrument, the OECD has also contributed to the elaboration and the implementation of international instruments related to the specific area of corruption.

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[1] The *OECD Guidelines for Multinational Enterprises* are included in Annex 1 of the *Declaration on International Investment and Multinational Enterprises*. For the first version, see *Declaration on International Investment and Multinational Enterprises*, 21 June 1976, Doc No C(76)99/FINAL (1976) [*OECD Guidelines 1976*]. For the most recent version, see *Declaration on International Investment and Multinational Enterprises*, 25 May 2011, Doc No C/MIN(2011)11/FINAL (2011) [*OECD Guidelines 2011*].

The OECD hosted the negotiation of the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ("*OECD Anti-Bribery Convention*")[2] in 1997 and has adopted the *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* ("*OECD 2009 Recommendation*")[3] in 2009.

Following a brief analysis of the elaboration and implementation processes of norms under the auspices of the OECD (1), this chapter positions these three international instruments on a continuum varying from social norms to legal norms. With respect to the *OECD Guidelines*, the analysis demonstrates that this instrument remains a widely used social norm that has moved closer to the threshold of legal norms, without having entered the realm of legality (2). By contrast, both the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* appear as international norms that have succeeded in generating a genuine sense of obligation and that can be categorized as legal norms (3).

1. The OECD: A Plurality of Norms and the Promotion of Neoliberal Policies

In order to better assess the normative character of international instruments codifying foreign investors' responsibilities that have been elaborated and implemented by the OECD, it is worth considering the broader normative process that usually takes place in this intergovernmental organization. According to the *Convention on the Organisation for Economic Co-operation and Development* ("*Convention on the OECD*"),[4] the normative acts that can be adopted by this intergovernmental organization are diverse.[5]

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[2] *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, 37 ILM 1 (entered into force 15 February 1999) [*OECD Anti-Bribery Convention*].

[3] *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 26 November 2009, Doc No C(2009)159/REV1/FINAL (amended on 18 February 2010, Doc No C(2010)19) [*OECD 2009 Recommendation*].

[4] *Convention on the Organisation for Economic Co-operation and Development*, 14 December 1960, Can TS 1961 No 18 (entered into force 30 September 1961) [*Convention on the OECD*].

[5] See e.g. James Salzman, "Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Developement" (2000) 21 Mich J Int'l L 769 at 779–781; Hervé Ascensio, "Les normes produites à l'OCDE et les formes de normativité" in Hervé Ascensio & Nicola Bonucci, eds, *Le pouvoir normatif de l'OCDE* (Paris: Éditions A. Pedone, 2014) 7 at 7.

Article 5 provides that the OECD can take *decisions*, make *recommendations* to member states and enter into *agreements* with member states, non-member states and intergovernmental organizations.[6] While these three acts are all sources of international norms, it must be noted that only decisions taken by the OECD are expressly deemed to "be binding on all the Members", "except as otherwise provided".[7] Although not explicitly mentioned in the *Convention on the OECD*, the work of this intergovernmental organization has also led to the adoption of other forms of instruments, such as declarations, model conventions, good practice guidance and tools.[8] To put it differently, the various types of initiatives that can be adopted by the OECD do not entail an equal level of formal obligation and undoubtedly reach beyond the formal sources of international law.[9]

An interesting aspect of the OECD as a normative site is also reflected in the way this organization seeks to ensure the continuing elaboration and implementation of these norms by embedding them in a broader process.[10] The initial adoption of international norms by the OECD is thus often complemented by subsequent reviews, other instruments to supplement the original initiatives and an implementation process relying on peer review. With respect to the latter, pressure exercised by other members of the OECD is often described as a flexible implementation process that operates even despite the lack of formal international instruments and that relies more on persuasion than sanction.[11] Regardless of the informal character of several international instruments adopted under the

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[6] *Convention on the OECD*, *supra* note 4, art 5.

[7] *Ibid*, art 5(a).

[8] See Ascensio, *supra* note 5 at 8.

[9] See *ibid* at 8-9 and 11.

[10] See *ibid* at 14-15.

[11] See e.g. Tony Porter & Michael Webb, "Role of the OECD in the Orchestration of Global Knowledge Networks" in Rianne Mahon & Stephen McBride, eds, *The OECD and Transnational Governance* (Vancouver: UBC Press, 2008) 43 at 49; Alexander Böhmer, "Organisation for Economic Co-operation and Development" in Christian Tietje & Alan Brouder, eds, *Handbook of Transnational Economic Governance Regimes* (Leiden: Martinus Nijhoff Publishers, 2009) 227 at 231; Nicola Bonucci & Jean-Marc Thouvenin, "L'OCDE, site de gouvernance globale?" in Hervé Ascensio & Nicola Bonucci, eds, *Le pouvoir normatif de l'OCDE* (Paris: Éditions A. Pedone, 2014) 25 at 33; Catherine Kessedjian, "Éloge du foisonnement (du désordre) fructueux" in Hervé Ascensio & Nicola Bonucci, eds, *Le pouvoir normatif de l'OCDE* (Paris: Éditions A. Pedone, 2014) 143 at 148.

auspices of the OECD, the analysis of their normative character must thus be conducted by considering their inclusion within this broad and complex process.[12]

Another aspect that must be mentioned with respect to the norms that are elaborated and implemented by the OECD is the considerable use of non-state actors' expertise, while maintaining a clear prominence on the role of states. As early as 1962, the OECD granted a specific consultative status to both the Business and Industry Advisory Committee ("BIAC") and the Trade Union Advisory Committee ("TUAC").[13] This inclusion of non-state actors has been complemented with a more regular participation of non-governmental organizations ("NGOs") in the work of the Investment Committee through OECD Watch since 2003.[14]

In line with the importance granted in the present dissertation to the influence of the context of neoliberal globalization and the adoption of an analytical framework partly inspired by critical constructivism, it is also worth noting that the member states participate in consolidating the OECD's specific identity. In addition to being described as a club of industrialized and developed countries,[15] the OECD seeks to bring "a sense of identity for members as it develops policy prescriptions appropriate for liberal-democratic countries that see themselves as world leaders".[16] According to Porter and Webb, in line with the crucial role played by the peer review mechanism in the activities of the OECD, member states can thus be perceived as engaging with the work of the OECD because of their identification with the norms and values that the intergovernmental organization represents.[17] More specifically, OECD members devote considerable efforts to promote principles of free market and neoliberal policies.[18] With respect to international investment,

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[12] See Ascensio, *supra* note 5 at 22.

[13] See Salzman, *supra* note 5 at 785-788; Böhmer, *supra* note 11 at 230; Ascensio, *ibid* at 18.

[14] See e.g. Böhmer, *ibid* at 230; Ascensio, *ibid* at 19.

[15] See e.g. Salzman, *supra* note 5 at 776-777; David Metcalfe, "The OECD Agreement to Criminalize Bribery: A Negotiation Analytic Perspective" (2000) 5 Int'l Negotiation 129 at 135; Bonucci & Thouvenin, note 11 at 34.

[16] See Porter & Webb, *supra* note 11 at 43.

[17] *Ibid* at 43 and 47. See also Michael Webb, "Defining the Boundaries of Legitimate State Practice: Norms, Transnational Actors and the OECD's Project on Harmful Tax Competition" (2004) 11 Rev Int'l Pol Ecn 787 at 792.

[18] See e.g. Salzman, *supra* note 5 at 775; Böhmer, *supra* note 11 at 228. However, Böhmer suggests that such a focus on free market economy is recently "nuanced with environmental and equity considerations".

this organization is thus particularly active in promoting free movement of capital and "consciously set[s] out to redefine the logic of appropriate policy choices in regulating investment".[19]

The OECD thus appears as a highly relevant normative site with respect to the evolving codification of foreign investors' responsibilities in a context of neoliberal globalization. In addition to developing various norms and implementing them through an innovative follow-up mechanism, this intergovernmental organization relies on the participation of state and non-state actors. It is against this institutional context that the analysis of the *OECD Guidelines*, the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* must be undertaken.

2. The *OECD Guidelines*

The *OECD Guidelines* are a highly comprehensive instrument in terms of the codification of foreign investors' responsibilities. Currently, the instrument includes chapters that address issues such as disclosure of information, human rights, employment and industrial relations, the environment, bribery, consumer interests, science and technology, competition and taxation.[20] The analysis of the normative character of the *OECD Guidelines* nevertheless requires a closer look at their content and the interactions between international actors involved in their elaboration and implementation. While it is undeniable that they are taken into account by several actors and have proven to be useful to solve specific issues pertaining to activities of many foreign investors, this section argues that the *OECD Guidelines* fail to generate a sense of obligation and have not reached the realm of legality. More specifically, although most actors agree on the aspects included within the scope of this instrument, the analysis below sheds light on the absence of shared understandings with respect to the nature of this initiative (2.1). Moreover, beyond tensions with some criteria of legality posited by the interactional theory of international law (2.2),

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[19] See Russell Alan Williams, "The OECD and Foreign Investment Rules: The Global Promotion of Liberalization" in Rianne Mahon & Stephen McBride, eds, *The OECD and Transnational Governance* (Vancouver: UBC Press, 2008) 117 at 118.

[20] *OECD Guidelines 2011*, *supra* note 1, Chapters III-XI.

this absence of a sense of obligation is primarily reflected in the lack of a practice of legality between the actors involved in the implementation of the *OECD Guidelines* (2.3).

2.1 Shared Understandings: Diverging Views on the Nature of the Instrument

With respect to the *OECD Guidelines*, it is widely acknowledged that the OECD member states acted as *norm entrepreneurs* to secure the adoption of an international instrument codifying foreign investors' responsibilities before other intergovernmental organizations.[21] Following the launch of negotiations of a *Code of Conduct on Transnational Corporations* at the United Nations ("UN"), several capital-exporting states sought to develop an international instrument limited to recommendations formulated by governments to multinational enterprises.[22] More specifically, in line with the

[21] See Mark R Joelson, "The Proposed International Codes of Conduct as Related to Restrictive Business Practices" (1976) 8 L & Pol'y in Int'l Bus 837 at 862; Roger Blanpain, "The OECD Guidelines for Multinational Enterprises - The Badger Case" (1978) 126 J Royal Soc'y Arts 326 at 328; Sten Niklasson, "The OECD Guidelines for MNEs and the UN Draft Code of Conduct: Some Political Considerations" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 141 at 141; Peter T Muchlinski, "'Global Bukowina' Examined: Viewing the Multinational Enterprises as a Transnational Law-making Community" in Gunther Teubner, ed, *Global Law Without a State* (Aldershot: Dartmouth, 1997) 79 at 95–96; Steven R Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111:3 Yale LJ 443 at 457; Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford: Oxford University Press, 2006) at 201–202; Elisa Morgera, "An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead up to the 2006 Review" (2006) 18 Geo Int'l Envtl L Rev 751 at 753–754 [Morgera, "An Environmental Outlook"]; Olivier De Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in Olivier De Schutter, ed, *Transnational Corporations and Human Rights* (Portland: Hart Publishing, 2006) 1 at 2–3 [De Schutter, "The Challenge"]; Peter T Muchlinski, *Multinational Enterprises and the Law*, 2d ed (Oxford: Oxford University Press, 2007) at 658–659; Peter Muchlinski, "Multinational Enterprises as Actors in International Law: Creating 'Soft Law' Obligations and 'Hard Law' Rights" in Math Noortmann & Cedric Ryngaert, eds, *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers* (Farnham: Ashgate Pubishing, 2010) 9 at 17; Kavaljit Singh, "Corporate Accountability: Is Self-Regulation the Answer?" in Gary Teeple & Stephen McBride, eds, *Relations of Global Power: Neoliberal Order and Disorder* (Toronto: University of Toronto Press, 2011) 60 at 61; Alice De Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Northampton: Edward Elgar, 2011) at 41; Karl P Sauvant, "The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned" (2015) 16 J World Investment & Trade 11 at 22–23 and 31; Khalil Hamdani & Lorraine Ruffing, *United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest* (London: Routledge, 2015) at 84 and 111; Bernadette Maheandiran, "Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System Under the OECD Guidelines for Multinational Enterprises" (2015) 20 Harv Neg L Rev 205 at 213.

[22] See *OECD Guidelines 1976*, *supra* note 1, Preamble at para 6. See also Hans W Baade, "The Legal Effects of Codes of Conduct for Multinational Enterprises" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 3 at 6; Theo W Vogelaar, "The OECD Guidelines: Their Philosophy, History, Negotiation, Form, Legal Nature, Follow-up Procedures and

aforementioned promotion of liberal policies that characterizes the OECD, these norm entrepreneurs sought to combine the issue of controlling foreign investors' activities with a desire to liberalize capital export and to protect foreign investment in capital-importing states.[23] Therefore, the *OECD Guidelines* constitute an integral part of a broader *Declaration on International Investment and Multinational Enterprises*,[24] which includes aspects related to national treatment of foreign investment and international investment incentives in addition to the *OECD Guidelines*. It is also worth noting that the *OECD Guidelines* were elaborated by the Committee on International Investment and Multinational Enterprises (now the Investment Committee) between March 1975 and May 1976, with the close collaboration of BIAC and TUAC.[25] Even though some authors report that the governments of Sweden and the Netherlands favored a more formal document to address foreign investors' responsibilities, the majority of the member states opted for an informal and flexible instrument.[26]

An ongoing evolution of the *OECD Guidelines* also characterizes this instrument. So far, these guidelines have been reviewed five times since the adoption of their original version in 1976.[27] For example, these reviews have led to the inclusion of a provision with

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Review" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 127 at 129; Gefion Schuler, "Effective Governance through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises" in Armin von Bogdandy et al, eds, *The Exercise of Public Authority by International Institutions* (Dordrecht: Springer, 2010) 197 at 202–203; Maheandiran, *ibid* at 214.

[23] See e.g. Henri Schwamm, "The OECD Guidelines for Multinational Enterprises" (1978) 12 J World Trade L 342 at 343.

[24] For the current version, see *Declaration on International Investment and Multinational Enterprises*, 25 May 2011, C/MIN(2011)11/FINAL (2011).

[25] See e.g. Vogelaar, *supra* note 22 at 132; Elisa Morgera, "OECD Guidelines for Multinational Enterprises" in Thomas Hale & David Held, eds, *Handbook of Transnational Governance: Institutions and Innovations* (Cambridge: Polity Press, 2011) 314 at 317 [Morgera, "OECD Guidelines"].

[26] See e.g. Schwamm, *supra* note 23 at 348-349; Vogelaar, *ibid* at 131; Hamdani & Ruffing, *supra* note 21 at 112.

[27] See *Declaration on International Investment and Multinational Enterprises*, 13 June 1979, Doc No C(79)102/FINAL (1979); *Declaration on International Investment and Multinational Enterprises*, 17 May 1984, Doc No C/MIN(84)6(FINAL) (1984); *Declaration on International Investment and Multinational Enterprises*, 5 June 1991, Doc No C/MIN(91)7 (1991) [*OECD Guidelines 1991*]; *Declaration on International Investment and Multinational Enterprises*, 27 June 2000, Doc No C(2000)96/REV1 (2000); *OECD Guidelines 2011*, *supra* note 1. For comments on these reviews, see e.g. Stephen Tully, "The 2000 Review of the OECD Guidelines for Multinational Enterprises" (2001) 50 Int'l & Comp L Quart 394 at 394–395; Pia Acconci, "The Promotion of Responsible Business Conduct and the New Text of the Guidelines for Multinational Enterprises" (2001) 2 J World Investment 123 at 128–129 and 136–143; Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*

respect to the establishment of National Contact Points ("NCPs") by adhering countries in 1984,[28] a chapter on the environment in 1991[29] and procedural guidance to deal with issues arising from the implementation of the *OECD Guidelines* in specific instances in 2000.[30] Furthermore, the current version of the *OECD Guidelines* includes a specific chapter on human rights, a new approach to due diligence and responsible supply chain management, as well as a more detailed procedure regarding specific instances.[31] However, throughout all these review processes, the explicit "voluntary and not legally enforceable"[32] character of this instrument has remained firmly preserved.

A considerable *community of practice* has also emerged around the subsequent reviews of the *OECD Guidelines*. For example, prior to the latest review of this instrument, the OECD called upon the active involvement of several states and non-state actors. Member states, BIAC, TUAC, OECD Watch, interested non-adhering countries and intergovernmental organizations are thus all cited in the *Terms of Reference* that have been prepared for this review.[33] Scrutinizing various statements provided by these actors during the two most recent reviews of this international instrument, as well as information from

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(Cambridge: Cambridge University Press, 2006) at 249–251; Jan Huner, "The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises" in Menno T Kamminga & Saman Zia-Zarifi, eds, *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) 197 at 203–205; Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London: Routledge, 2012) at 80–82 and 85-88 [Deva, *Regulating*]; John Ruggie & Tamary Nelson, "Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges" (2015) Corporate Social Responsibility Initiative Working Paper at 1-3; Maheandiran, *supra* note 21 at 214-215.

[28] See *Second Revised Decision of the Council on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises*, June 1984, Doc No C(84)90 (1984) at paras 1-2.

[29] See *OECD Guidelines 1991*, *supra* note 27.

[30] The Procedural Guidance is attached to the *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, 27 June 2000, Doc No (2000)96/FINAL.

[31] *OECD Guidelines 2011*, *supra* note 1, Chapter IV and paras II(A)(10)-II(A)(13); *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, 25 May 2011, Doc No C/MIN(2011)11/FINAL (2011), Procedural Guidance at para I(C)(3) [*Decision on the OECD Guidelines 2011*].

[32] This language is still present in the current version of the *OECD Guidelines*. See *OECD Guidelines 2011*, *ibid* at para I(1).

[33] See OECD, Investment Division, *Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises* (Paris: OECD, 2010) at 7-8 [OECD, *Terms of Reference*]. See also De Jonge, *supra* note 21 at 52; Morgera, "OECD Guidelines", *supra* note 25 at 318; Laurence Dubin, "L'élaboration des principes à l'intention des entreprises multinationales par l'OCDE ou comment globaliser la régulation du comportement d'un acteur global?" in Hervé Ascensio & Nicola Bonucci, eds, *Le pouvoir normatif de l'OCDE* (Paris: Éditions A. Pedone, 2014) 113 at 119–120.

participants in semi-structured interviews, is a valuable tool to assess whether these various actors have succeeded in reaching any shared understandings that are necessary to generate a sense of obligation.

In light of these statements, it is plain that members of the community of practice have reached solid shared understandings regarding the matters that must be addressed through the *OECD Guidelines*. One example that illustrates this consensus concerns the aspects included in this instrument following its review in 2011. In fact, the inclusion of a human rights chapter, as well as the elaboration of an approach to due diligence and responsible supply chain management, were strongly linked to the work of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises ("Special Representative") at the UN.[34] After the adoption of the revised instrument, the BIAC mentioned the following:

> During this process significant changes were made to the Guidelines, particularly in the fields of human rights, due diligence, supply chains and procedural guidance. Thus the process came close to a substantive revision. Although the new text increases the expectations put on business in a number of aspects, the central concerns of business have been addressed in a constructive way. BIAC is therefore in a position to state that it can accept the final text as negotiated by OECD member states.[35]

Along the same lines, OECD Watch "welcome[d] the changes to the *OECD Guidelines* that confirm and broaden the scope of the instrument to the global activities and all business relationships of [multinational enterprises]".[36]

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[34] OECD, *Remarks at OECD Investment Committee Professor John G. Ruggie, Special Representative of the UN Secretary-General for Business and Human Rights* (4 October 2010), online: Spectrum <http://spectrumsdkn.org/en/library/rights-library/68-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/file> (accessed 14 September 2016); Special Representative of the UN Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, *Updating the Guidelines for Multinational Enterprises: Discussion Paper* (30 June 2010), online: OECD <http://www.oecd.org/daf/inv/mne/45545887.pdf> (accessed 14 September 2016) at paras 5 and 12. See also OECD, *Terms of Reference*, *ibid* at 3.

[35] BIAC, *BIAC Statement on the Adoption of the Update of the OECD Guidelines for Multinational Enterprises at the OECD Ministerial Council Meeting on 25-26 May 2011* (May 2011), online: BIAC <http://biac.org/wp-content/uploads/2014/05/9-25-26-May-2011-BIAC-Statement-on-the-Adoption-of-the-Update-of-the-OECD-Guidelines-for-Multinational-Enterprises-at-the-OECD-Ministerial-Council-Meeting1.pdf> (accessed 14 September 2016).

[36] OECD Watch, *OECD Watch Statement on the Update of the OECD Guidelines for MNEs: Improved Content and Scope, but Procedural Shortcomings Remain* (25 May 2011), online: OECD Watch <http://oecdwatch.org/publications-en/Publication_3675> (accessed 14 September 2016).

By contrast, a sharp divide has persisted regarding the legal nature of this instrument through the review processes. On the one hand, representatives of the private sector and some adhering countries have constantly stressed that such an instrument had to remain voluntary.[37] For example, in the summary of proceedings of a conference that preceded the review of the *OECD Guidelines* in 2000, a representative of BIAC recalled that "[c]onfidence building and trust amongst all adherents to the Guidelines should not be threatened, and suggestions with respect to *making the Guidelines a binding instrument would not be productive* in this regard".[38] On the other hand, several public interest NGOs, TUAC and other adhering countries advocated for a formal instrument and a stronger initiative.[39] Following the adoption of the *OECD Guidelines* in 2000, a coalition of several NGOs thus mentioned that its members were "disappointed that the OECD Governments chose a combination of voluntary low level standards with a weak implementation mechanism, which in some ways offers the worst of both worlds".[40] Belgium, also mentioned that it would have preferred to provide a more strict character to ensure respect of the *OECD Guidelines*.[41] With respect to the most recent review process, EarthRights International published a press release in which it stated that "even if their substance were exactly as human rights and labor organizations wished, the Guidelines would remain simply another aspirational document without a functioning mechanism to encourage compliance and resolve disputes".[42]

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[37] See Tully, *supra* note 27 at 396. For more details pertaining to the lack of shared understandings on this point during the initial elaboration and previous revision processes, see Vogelaar, *supra* note 22 at 131.

[38] See OECD, Committee on International Investment and Multinational Enterprises, *Conference on the OECD Guidelines for Multinational Enterprises: Summary of Proceedings*, Doc No DAFFE/IME(98)18 (1998) at 28 [emphasis added].

[39] In addition to the discourses mentioned in this paragraph, see OECD, *Information Meeting with Non-Members on the OECD Declaration for International Investment and Multinational Enterprises and the Guidelines for Multinational Enterprises* (Paris: OECD, 2000) at para 28. See also Sorcha Macleod & Douglas Lewis, "Transnational Corporations: Power, Influence and Responsibility" (2004) 4 Global Soc Pol'y 77 at 80–82; Tully, *supra* note 27 at 402-403; John Evans & Kirstine Drew, "The OECD Guidelines for Multinational Enterprises: Responsible Conduct in a Global Context" in Hervé Ascensio & Nicola Bonucci, eds, *Le pouvoir normatif de l'OCDE* (Paris: Éditions A. Pedone, 2014) 129 at 132–133.

[40] See OECD, Directorate for Financial, Fiscal and Enterprise Affairs, *OECD Guidelines for Multinational Enterprises: Statements Made on the Adoption of the Review 2000* (Paris: OECD, 2000) at 22 [OECD, *Statements Review 2000*].

[41] "La Belgique aurait souhaité donner un caractère plus strict au respect des Principes directeurs. Elle peut, néanmoins, comprendre que d'autres participants ne partagent pas son point de vue". See *ibid* at 8.

[42] EarthRights International, News Release, "OECD Guidelines Update: Substantive Improvements, Procedural Disappointments" (25 May 2011), online: EarthRights International

These opposing views pertaining to the legal nature of the *OECD Guidelines* have also been echoed by some interviewees. As stated by one of them:

> I think that the whole – let's say – crowd involved in the negotiations, it's gotten a lot more sophisticated. If I compare the 2000 review with the 2011 update, I think there's no comparison in terms of the level of sophistication. People know a lot more now than they did back in 2000. But there's still – there's this business community that wants us to say this is a voluntary instrument and the NGOs want us to say: 'Oh! You got a soft law mediation process… Why don't you have a more binding structure, international structure, etc.' You know, that's the usual stuff that we get.[43]

Recalling the position of trade unions following the adoption of the first version of the *OECD Guidelines*, another interviewee mentioned that "[b]ecause they were voluntary, the trade unions in the OECD area were very skeptical about it".[44]

One key element that is illuminated through the use of a critical discourse analysis is the *relations of power* between the various members of the community of practice that are emphasized in some statements related to the review of the *OECD Guidelines*.[45] For example, in the aforementioned statement from a coalition of public interests NGOs following the review of this instrument in 2000, these organizations maintained that:

> [g]overnments have accepted the argument *put forcefully by business* during the review that the Guidelines should not be 'mandatory in fact or effect'. The undersigned NGOs believe that this concession is fundamentally out of step with the experience and expectations of many communities around the world who face enormous obstacles and even dangers in holding multinationals to account for their damaging acts or omissions.[46]

Beyond a mere divergence of views with respect to the nature of the *OECD Guidelines*, it is worth noting that the refusal to depart from a voluntary initiative appears to be primarily supported by powerful actors involved in the elaboration of this instrument.

Overall, the fact that the OECD member states acted as norm entrepreneurs that sought to counter normative developments occurring in other intergovernmental

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<https://www.earthrights.org/campaigns/oecd-guidelines-update-substantive-improvements-procedural-disappointments> (accessed 14 September 2016).

[43] Interview 6.

[44] Interview 17.

[45] Such relations of power have also been discussed in previous studies. See e.g. Niklasson, *supra* note 21 at 141.

[46] See OECD, *Statements Review 2000*, *supra* note 40 at 23 [emphasis added].

organizations by adopting an instrument whose voluntary observance has been preserved through several reviews is particularly instructive to assess the sense of obligation that emanates from the *OECD Guidelines*. Despite a consensus with respect to the expansion of the scope of this initiative, the analysis of discourses submitted in recent review processes and semi-structured interviews strongly suggests that diverging views remain between the members of this community of practice with respect to the legal nature of this instrument. To put it differently, there is a clear lack of shared understandings regarding the possibility of making the *OECD Guidelines* a legally binding instrument.

2.2 Criteria of Legality: A Fairly Legitimate, but Voluntary Initiative

Determining whether the *OECD Guidelines* have moved toward the realm of legal norms also implies a consideration of their provisions and related commentaries to see if this international initiative meets the criteria of legality included in the international theory of international law. As shown in the present section, the *OECD Guidelines* meet most of these criteria and thus appear as a fairly legitimate norm. However, a potential contradiction between the objective of the instrument and its explicit voluntary character, as well as a procedural means that can only weakly address conduct of foreign investors that is inconsistent with the *OECD Guidelines*, create a tension that can ultimately affect the emergence of a sense of obligation from this international instrument.

With respect to *promulgation*, it is beyond question that the *OECD Guidelines* are not included in a formal international agreement or any other normative acts authorized by the constituent convention of the OECD.[47] As mentioned above, this instrument is found in Annex 1 of the *Declaration on International Investment and Multinational Enterprises*.[48] As emphasized by the Chair of the drafting group of the first version of the *OECD Guidelines*, declarations at the OECD generally "constitute a solemn form of understanding on principles, without stipulating strict commitments on behalf of the

[47] See Baade, *supra* note 22 at 13 and 19; Vogelaar, *supra* note 22 at 132-133; Leyla Davarnejad, "In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes under the OECD Guidelines for Multinational Enterprises" (2011) 2011 J Disp Resol 351 at 357 [Davarnejad, "In the Shadow"].

[48] For the most recent version, see *OECD Guidelines 2011*, *supra* note 1.

participating parties".[49] It must nevertheless be noted that these guidelines are extensively disseminated and remain accessible to the public. In addition to being published by the OECD, adhering countries seem to devote several efforts to promote this instrument. As reported by the OECD in 2014, NCPs established by adhering countries distribute brochures on the *OECD Guidelines* and develop promotional tools for various stakeholders, among others.[50]

A particular concern for the *general* application of the *OECD Guidelines* can be found in various provisions of their first chapter, which enunciates the concepts and the principles underlying the whole instrument. Paragraph I(6) of the initiative thus mentions that "[g]overnments wish to encourage the widest possible observance of the *Guidelines*".[51] Moreover, the same paragraph stresses that "[w]hile it is acknowledged that small- and medium-sized enterprises may not have the same capacities as larger enterprises, governments adhering to the *Guidelines* nevertheless encourage them to observe the *Guidelines'* recommendations to the fullest extent possible".[52] In light of the global nature of multinational enterprises' operations, the *OECD Guidelines* also call upon adhering countries "to encourage the enterprises operating on their territories to observe the *Guidelines* wherever they operate, while taking into account the particular circumstances in each host country".[53]

The *OECD Guidelines* also seem to live up to the requirement of *clarity*. Even though some authors argue that the content of this instrument remains broad and open to interpretation,[54] it is here submitted that several specifications prevent the *OECD Guidelines* to fall below what would be required to constitute a legitimate norm. Of course,

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[49] Vogelaar, *supra* note 22 at 132.

[50] OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2014: Responsible Business Conduct by Sector* (Paris: OECD, 2014) at 23-24 [*OECD Guidelines Annual Report 2014*]. *Contra* Susan Ariel Aaronson, "Global Corporate Social Responsibility Pressures and the Failure to Develop Universal Rules to Govern Investors and States" (2002) 3 J World Investment 487 at 94.

[51] *OECD Guidelines 2011*, *supra* note 1 at para I(6).

[52] *Ibid* at para I(6).

[53] *Ibid* at para I(3). This global character of this instrument is also discussed in Clapham, *supra* note 21 at 203.

[54] See e.g. Niklasson, *supra* note 21 at 144; Schuler, *supra* note 22 at 209; Davarnejad, "In the Shadow", *supra* note 47 at 352. See also generally Birgitte Egelund Olsen & Karsten Engsig Sørensen, "Strengthening the Enforcement of CSR Guidelines: Finding a New Balance between Hard Law and Soft Law" (2014) 41 Legal Issues Ecn Int 9 at 23–24.

the fact that a specific definition of multinational enterprises is excluded from this instrument can be pointed out as a considerable weakness.[55] However, the additional information provided to emphasize the numerous sectors in which these enterprises can operate, their presence in various states, the potential exercise of influence among the numerous entities and various forms of ownership all contribute to provide a clear sense of these actors.[56] Furthermore, a total of 106 commentaries have been adopted to provide additional information regarding the provisions of this instrument.[57] For example, while some authors maintain that the process and principles underlying the concept of "due diligence" are not adequately defined in the *OECD Guidelines*,[58] the commentaries provide a relatively detailed definition of this term.[59] Where appropriate, several commentaries also refer to other formal and informal international instruments to explain the content of the *OECD Guidelines*.[60]

Another criterion that is included in the interactional theory of international law relates to the *constancy* of norms over time. While important amendments have been introduced to the text of the *OECD Guidelines* through various review processes, such amendments do not seem to have profoundly affected their constant character. At least throughout the first three reviews, it appears that the constancy of the *OECD Guidelines* has been taken into account "as their effective application depends in part on their stability".[61] With respect to the addition of a chapter on human rights, such an important

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[55] See Schuler, *ibid* at 209.

[56] See *OECD Guidelines 2011*, *supra* note 1 at para I(4).

[57] OECD, *OECD Guidelines for Multinational Enterprises, 2011 Edition* (Paris: OECD, 2011), Note by the Secretariat [*OECD Guidelines 2011 – Commentaries*].

[58] See Deva, *Regulating*, *supra* note 27 at 86; Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014) at 99 and 103.

[59] *OECD Guidelines 2011 – Commentaries*, *supra* note 57 at para 14. It has also been suggested that the flexibility surrounding the due diligence approach was similar to the use of the standard of fair and equitable treatment in international investment law and could not be considered as a major flaw in itself. See Dubin, *supra* note 33 at 125-126.

[60] *OECD Guidelines 2011 – Commentaries*, *ibid* at paras 7, 10, 29, 36, 39, 48, 49, 51-54, 56-58, 60, 65, 68, 76, 77, 79-81, 87, 96, 99 and 104-106. See also Schuler, *supra* note 22 at 209-211; Davarnejad, "In the Shadow", *supra* note 47 at 356.

[61] See OECD, *The OECD Guidelines for Multinational Enterprises*, Doc No OECD/GD(97)40 (1997). See also Tully, *supra* note 27 at 394-395.

addition relies primarily on the work undertaken by the Special Representative.[62] Rather than being an attempt to weaken the legitimacy of this international initiative by threatening its stability, the various reviews have been intended to reflect structural changes occurring in the international business environment as well as normative developments in other intergovernmental organizations involved in the codification of foreign investors' responsibilities.[63]

Requiring that norms be *non-retroactive* aims to ensure that actors can take them into account in their decision-making processes. Given that nothing in the *OECD Guidelines* explicitly deals with temporal issues, this criterion of legality seems to be easily met. It is also worth noting that at least one NCP that was responsible for the interpretation of these recommendations decided that the application of the 2000 version of the *OECD Guidelines* was not appropriate when considering conduct that occurred before the adoption of this version.[64]

In light of the nature of multinational enterprises' activities and the number of entities upon which they exercise various forms of control, the consideration of feasible requirements is particularly relevant to ensure that international instruments do *not ask the impossible*. In addition to provisions calling upon governments' cooperation when private actors are confronted to conflicting requirements,[65] the commentaries pertaining to the chapter on the disclosure of information unambiguously state that "[d]isclosure recommendations are not expected to place unreasonable administrative or cost burdens on enterprises".[66] Moreover, the aforementioned concept of due diligence that is included in the latest version of the *OECD Guidelines* ensure a realist character to the recommendations that are included in this instrument. While subjecting the conduct of human rights due diligence to several conditions (*i.e.* the size of the private entity, the

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[62] See section 2.1.

[63] See *OECD Guidelines 2011*, *supra* note 1, Preface, at para 2. See also Sarah Fick Vendzules, "The Struggle for Legitimacy in Environmental Standards Systems: The OECD Guidelines for Multinational Enterprises" (2010) 21 Colo J Int'l Envtl L & Pol'y 451 at 462–463.

[64] See OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2008: Employment and Industrial Relations* (Paris: OECD, 2008) at 38 [*OECD Guidelines Annual Report 2008*].

[65] *OECD Guidelines 2011*, *supra* note 1 at paras I(2) and I(8).

[66] *OECD Guidelines 2011 – Commentaries*, *supra* note 57 at para 30.

nature and context of operations and the severity of the risks of adverse human rights impacts),[67] the *OECD Guidelines* expressly provide that seeking to prevent or mitigate an adverse impact directly linked to the activities of multinational enterprises "is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship".[68]

While the *OECD Guidelines* do not include any provisions that stand in direct contradiction, there is at least one element that creates a tension regarding the *absence of contradiction*. Among others, the Preface of this instrument stresses that "[t]he *Guidelines* aim to ensure that the operations of these enterprises are in harmony with government policies"[69] and that "[g]overnments adhering to the *Guidelines* are committed to continuous improvement of both domestic and international policies with a view to improving the welfare and living standards of all people".[70] Yet, the ubiquitous voluntary character of this initiative may contradict, to a certain extent, such noble objectives.[71] To put it differently, the *OECD Guidelines* recognize the necessity to tackle an important issue, but rely on recommendations whose observance remain strictly voluntary to address it. Although this tension does not equal to imposing contradicting requirements to the same actor, it can be perceived as a certain form of contradiction that dwells within this international initiative.

Finally, when analyzing the extent to which the *OECD Guidelines* are designed to ensure *congruence* between rules and official action, it is worth noting that some aspects of this instrument ensure the establishment of a procedure related to this criterion of legality. The *Decision of the Council on the OECD Guidelines for Multinational Enterprises* ("*Decision on the OECD Guidelines*") provides that adhering countries shall establish NCPs in order to contribute "to the resolution of issues that arise relating to the implementation of the *Guidelines* in specific instances".[72] According to the procedural

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[67] *OECD Guidelines 2011*, *supra* note 1 at para IV(5).

[68] *Ibid* at para II(A)(12).

[69] *Ibid*, Preface at para 1.

[70] *Ibid*, Preface at para 9.

[71] See *ibid* at para I(1).

[72] *Decision on the OECD Guidelines 2011*, *supra* note 31 at para I(1). Regarding the formal character of the *Decision on the OECD Guidelines*, see Davarnejad, "In the Shadow", *supra* note 47 at 357; Morgera, "OECD Guidelines", *supra* note 25 at 315-316; Ascensio, *supra* note 5 at 22; Donald J Johnston, "Promoting Corporate Responsibility: The OECD Guidelines for Multinational Enterprises" in Ramon Mullerat, ed,

guidance attached to the *Decision on the OECD Guidelines*, NCPs are expected to make the results of the procedures they facilitate publicly available, "taking into account the need to protect sensitive business and other stakeholder information".[73] NCPs are thus expected to issue a statement when they decide that issues raised do not merit any further consideration[74] or when no agreement can be reached between the parties involved in a specific instance, including when "one party is unwilling to participate in the procedure".[75] A report must also be prepared when the parties involved reach an agreement on the issues raised.[76] Moreover, the *Decision on the OECD Guidelines* provides that the Investment Committee is responsible for clarification of the *OECD Guidelines*".[77] Ultimately, in order to improve the implementation procedure of the *OECD Guidelines*, the facilitation of voluntary peer evaluations by the Investment Committee has been established in the most recent procedural guidance attached to the *Decision on the OECD Guidelines*.[78]

While procedural devices are established to address instances of non-compliance with the recommendations stated in the *OECD Guidelines*, the extent to which these procedures provide an appropriate response to such instances is questionable. In fact, nothing in the *OECD Guidelines* or the *Decision on the OECD Guidelines* expressly requires NCPs or the Investment Committee to determine the compliance of a multinational enterprise with the recommendations stated in this international initiative.[79] Moreover, no

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Corporate Social Responsibility: The Corporate Governance of the 21st Century, 2d ed (Alphen aan den Rijn: Kluwer Law International, 2011) 275 at 277 and 279; Gita Kothari, "L'élaboration des principes et standards à l'intention des entreprises : l'approche innovante de l'OCDE" in Hervé Ascensio & Nicola Bonucci, eds, *Le pouvoir normatif de l'OCDE* (Paris: Éditions A. Pedone, 2014) 99 at 99; Scott Robinson, "International Obligations, State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime" (2014) 30 Utrecht J Int'l & Eur L 68 at 70–71; Maheandiran, *supra* note 21 at 214.

[73] *Decision on the OECD Guidelines 2011*, *ibid*, Procedural Guidance at para I(C)(3).

[74] *Ibid*, Procedural Guidance at para I(C)(3)(a).

[75] *Ibid*, Procedural Guidance at para I(C)(3)(c).

[76] *Ibid*, Procedural Guidance at para I(C)(3)(b).

[77] *Ibid* at para II(4).

[78] *Ibid*, Procedural Guidance at para II(5)(c).

[79] See e.g. Sarah Joseph, "Taming the Leviathans: Multinational Enterprises and Human Rights" (1999) 46 Nethl Int'l L Rev 171 at 183; Salzman, *supra* note 5 at 791; Tully, *supra* note 27 at 400; David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44 Va J Int'l L 931 at 950; Jernej Letnar Černič, "Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises" (2008) 3 Hanse L Rev 71 at 86; Vendzules, *supra* note 63 at 461, 467 and 479; Davarnejad, "In the Shadow", *supra* note 47

direct sanctions are provided for multinational enterprises that refuse to participate in a procedure related to a specific instance beyond the issuance of a statement by an NCP.[80] The voluntary character of this procedure is made clear in the commentary on the procedural guidance for the Investment Committee that is attached to the *Decision on the OECD Guidelines*, which states:

> Statements and reports on the results of the proceedings made publicly available by the NCPs could be relevant to the administration of government programmes and policies. In order to foster policy coherence, NCPs are encouraged to inform these government agencies of their statements and reports when they are known by the NCP to be relevant to a specific agency's policies and programmes. *This provision does not change the voluntary nature of the* Guidelines.[81]

In other words, despite considerable institutional arrangements and details with respect to their functioning,[82] these procedural devices are not intended to specifically determine any breaches of the *OECD Guidelines*.

The assessment of the content of the *OECD Guidelines* through the lens of the criteria of legality provided by the interactional theory of international law thus suggests a fairly legitimate instrument, with some nuances that must be made with respect to the criteria of contradiction and congruence. As mentioned above, the express voluntary character of the instrument does not sit well with its objective and remains in tension with the possibility of addressing adequately significant instances of non-compliance. However,

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at 364; Deva, *Regulating*, *supra* note 27 at 88; Simons & Macklin, *supra* note 58 at 111; Dubin, *supra* note 33 at 114; Julia Motte-Baumvol, "Le réglement des différends à l'intention des entreprises multinationales: quelques réflexions à partir des principes directeurs de l'OCDE" (2014) 118 RGDIP 303 at 320; Vincent Chetail, "The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward" in Denis Alland et al, eds, *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff Publishers, 2014) 105 at 116–117; Sauvant, *supra* note 21 at 32. See also generally Maheandiran, *supra* note 21.

[80] See e.g. Surya Deva, "Human Rights Violations by Multinational Corporations and International Law: Where from Here" (2003) 19 Conn J Int'l L 1 at 21; Olivier De Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 227 at 306; De Schutter, "The Challenge", *supra* note 21 at 4; Zerk, *supra* note 27 at 251-252; Eric de Brabandere, "Non-State Actors and Human Rights: Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participant in the International Legal System" in Jean d'Aspremont, ed, *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (New York: Routledge, 2011) 268 at 275; De Jonge, *supra* note 21 at 172; Černič, *ibid* at 96; Simons & Macklin, *ibid* at 112; Maheandiran, *ibid* at 218; Motte-Baumvol, *ibid* at 320-321; Robinson, *supra* note 72 at 73; Sauvant, *ibid* at 37.

[81] *OECD Guidelines 2011 – Commentaries*, *supra* note 57, Commentary on the Procedural Guidance for the Investment Committee at para 44. See also Acconci, *supra* note 27 at 141.

[82] See Dubin, *supra* note 33 at 114; Motte-Baumvol, *supra* note 79 at 307-320.

it must be stressed that such features of the *OECD Guidelines* do not, in themselves, totally prevent the emergence of a sense of obligation. Rather, as demonstrated in the following section, it is mostly the reliance on such an express voluntary character by members of the community of practice that ultimately leads to the absence of a genuine sense of obligation. It is in this regard that the analysis now turns to an examination of the practice surrounding this international initiative.

2.3 Practice of Legality: Avoiding a Binding Practice

In order to fully enter the realm of legality, the observance of international norms must be considered as mandatory by a community of actors. In addition to scrutinizing the content of international instruments referring to the *OECD Guidelines*, this section thus relies on annual reports prepared by the OECD to account for the activities of NCPs and transcripts from semi-structured interviews in order to shed light on the type of practice characterizing this international initiative.

It is hard to deny that the *OECD Guidelines* have generated a considerable practice.[83] With respect to the specific instances that can be brought to NCPs to address issues pertaining to the implementation of this instrument, a database provided by the OECD included 334 specific instances that have been treated by NCPs as of August 2015.[84] In an encouraging way, the latest annual report on the *OECD Guidelines* stresses that an "unprecedented number of specific instances involving NCP-facilitated mediation helped parties reach an agreement or create an action plan toward the resolution of the specific instance".[85] Furthermore, other international instruments developed under the auspices of intergovernmental organizations refer to the *OECD Guidelines*.[86] It is thus clear that this

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[83] See e.g. De Schutter, "The Challenge", *supra* note 21 at 4; Maheandiran, *supra* note 21 at 216-217; Motte-Baumvol, *ibid* at 306-307; Sauvant, *supra* note 21 at 36.

[84] OECD, *Database of Specific Instances*, online: OECD <http://mneguidelines.oecd.org/database/> (accessed 14 September 2016). For a recent study regarding the patterns of these specific instances, see generally Ruggie & Nelson, *supra* note 27.

[85] *OECD Guidelines Annual Report 2014*, *supra* note 50 at 16.

[86] See e.g. *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights*, 2003, UN Doc E/CN.4//Sub.2/2003/12/Rev.2, Preamble [*UN Norms*]; *Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, 8 June 2006, online: OECD

international norm plays a role in shaping the behavior of several international actors when addressing the need to hold private actors operating abroad accountable.

Yet, this practice has come under considerable critiques.[87] Submissions from TUAC and OECD Watch included in annual reports on the *OECD Guidelines* often emphasize that the practice of some NCPs is not in line with the procedural guidance attached to the *Decision on the OECD Guidelines*. In 2009, TUAC thus reported "that the uneven performance of NCPs is severely undermining the effectiveness of the Guidelines as a whole, with improvements in some being negated by the persistently poor performance of a number of laggards, including Japan, Korea and the US".[88] Addressing this issue in harsher terms, OECD Watch maintained that "[t]he NCPs have given themselves such

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<http://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf> (accessed 14 September 2016) at 9; *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 18 February 2010, Doc No C(2010)19 (2010), Preamble; Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 2011, UN Doc A/HRC/17/31, Commentary on Principle 2 and Commentary on Principle 25; *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence*, 28 June 2012, Doc No C(2012)101 (2012) at para 15; *Recommendation of the Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 17 July 2012, Doc No C(2012)93 (2012), Preamble [*Recommendation on Due Diligence Guidance*].

[87] Several of these critiques have already been discussed in previous studies. See e.g. Kinley & Tadaki, *supra* note 79 at 952; De Schutter, "The Challenge", *supra* note 21 at 8-9; Clapham, *supra* note 21 at 208-209; Morgera, "An Environmental Outlook", *supra* note 21 at 764-771; Christopher N Franciose, "Critical Assessment of the United States' Implementation of the OECD Guidelines for Multinational Enterprises, A" (2007) 30 B C Int'l & Comp L Rev 223 at 229–235; Natalie L Bridgeman & David B Hunter, "Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism" (2008) 20 Geo Int'l Envtl L Rev 187 at 215; Černič, *supra* note 79 at 91-96; Leyla Davarnejad, "The Impact of Non-State Actors on the International Law Regime of Corporate Social Responsibility: Blessing or Curse?" in Math Noortmann & Cedric Ryngaert, eds, *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers* (Farnham: Ashgate Pubishing, 2010) 41 at 57; Singh, *supra* note 21 at 66-67; Davarnejad, "In the Shadow", *supra* note 47 at 366-384; Deva, *Regulating*, *supra* note 27 at 83-85; Elisa Morgera, "From Corporate Social Responsibility to Accountability Mechanisms" in Pierre-Marie Dupuy & Jorge E Viñuales, eds, *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge: Cambridge University Press, 2013) 321 at 346–347 [note 79]; Simons and Macklin, *supra* note 58 at 106-113; Evans & Drew, *supra* note 39 at 130 and 138; Robinson, *supra* note 72 at 72-75; Maheandiran, *supra* note 21 at 217-218.

[88] See OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2009: Consumer Empowerment* (Paris: OECD, 2009) at 83 [*OECD Guidelines Annual Report 2009*]. See also OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2003: Enhancing the Role of Business in the Fight Against Corruption* (Paris, OECD: 2003) at 96 [*OECD Guidelines Annual Report 2003*]; OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2005: Corporate Responsibility in the Developing World* (Paris, OECD: 2005) at 120 [*OECD Guidelines Annual Report 2005*]; OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2006: Conducting Business in Weak Governance Zones* (Paris: OECD, 2006) at 113; OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2007: Corporate Responsibility in the Financial Sector* (Paris, OECD: 2007) at 91 [*OECD Guidelines Annual Report 2007*].

latitude in the way that they operate the Guidelines that NGOs increasingly view the process as an arbitrary, unfair and unpredictable process".[89] Important variations concerning the performance of existing NCPs have also been underlined by several interviewees.[90]

Most importantly, if international actors do not act as if observance of an international instrument is mandatory, it would be inappropriate to conclude that a genuine practice of legality exists. In the case at hand, several discourses demonstrate that the overwhelming majority of interactions within the community of practice are not guided by any sense of obligation. Despite some examples in which NCPs determine violations of the *OECD Guidelines* by a private actor,[91] annual reports on the activities of NCPs abound with examples in which these institutions reiterate the voluntary character of the recommendations included in the *OECD Guidelines*. Several statements from NCPs thus include background information mentioning that the *OECD Guidelines* "establish *non-legally binding principles* covering a broad range of issues in business ethics".[92] In a statement included in the 2005 annual report, the NCP from the United Kingdom stresses that "[t]he purpose of the Guidelines … is not to act as an instrument of sanction nor to hold any company to account".[93] Rather, this procedure is perceived as "a problem solving

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[89] See *OECD Guidelines Annual Report 2005*, *ibid* at 133. See also *OECD Guidelines Annual Report 2009*, *ibid* at 91; OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2010: Corporate Responsibility – Reinforcing a Unique Instrument* (Paris: OECD, 2010) at 117 [*OECD Guidelines Annual Report 2010*].

[90] See Interview 14: "We have a problem with the National Contact Points in that there's a lot of variation in how well they perform. So we have a couple that are really strong performers and then a couple that are basically just non-existing – I think they don't even have a website or a contact address, things like that"; Interview 18: "But the NCP is definitely – that's a model I like a lot. Of course, once you scratch the surface, you realize that it's one thing to have a norm, but it's something else to have a practice"; Interview 19: "And of course, they also have the National Contact Points as sort of a state-based grievance mechanism that provides a form of accountability – weaker in some places and stronger in others – that connects to this."

[91] For example, in a statement from the NCP of the United Kingdom, the latter mentioned that "[i]t is usual practice for the NCP to make determinations of compliance and to issue recommendations in respect of a specific instance on those matters which remain unresolved". See *OECD Guidelines Annual Report 2008*, supra note 64 at 78. See also Bridgeman & Hunter, *supra* note 87 at 214-215; Vendzules, *supra* note 63 at 467; Morgera, "From Corporate Social Responsibility", *supra* note 87 at 347-349.

[92] This formulation can be found in several statements issued by the UK NCP. See e.g. *OECD Guidelines Annual Report 2009*, *supra* note 88 at 31 [emphasis added]. Similar background information has also been systematically in recent statements by the Swiss NCP and the US NCP. See e.g. OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2012: Mediation and Consensus Building* (Paris: OECD, 2012) at 114 and 150 [*OECD Guidelines Annual Report 2012*].

[93] *OECD Guidelines Annual Report 2005*, *supra* note 88 at 76.

mechanism with a view to parties coming to an agreement or for the NCP to make recommendations for future behaviour in similar circumstances".[94] This voluntary character of the procedure steered by NCPs is also highlighted in a statement from the Dutch NCP reproduced in the 2010 annual report:

> The NCP made clear that it is *not in a position to enforce compliance* with local legislation nor can it press for notifiers' specific demands with [Philipinas Shell Petroleum Corporation]. The issues behind the demands can be put on the agenda of a mediatory attempt. The NCP also clarified that the mediation process is *voluntary and it relies on the goodwill of parties to participate in the process*.[95]

Other statements from NCPs unambiguously demonstrate that these institutions have no means to oblige a party to engage in the procedure regarding a specific instance.[96] For example, with respect to a statement by the Canadian NCP regarding the activities of a mining company in Myanmar, the 2005 annual report mentions the following:

> While the NCP held a number of discussion and meetings with each party, separately, and offered to facilitate a dialogue between the two sides, it was *unsuccessful in bringing them together to discuss their differences*. The NCP has informed the parties that it has decided to discontinue its efforts to facilitate a dialogue between them. A letter will be sent to the union and the company indicating that the NCP is bringing the specific instance procedure to a close.[97]

Similarly, in a final statement on a specific instance involving a trade union and business enterprise, the US NCP mentioned that the business enterprise preferred to pursue the issue exclusively under US labor law.[98] As a result, the US NCP "took no immediate action, but indicated to both parties that it would continue monitoring developments in the dispute while considering the preparation of a final report".[99] When facing similar situations, other NCPs merely regretted the unexpected change of commitment of a party.[100]

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[94] *Ibid* at 76.

[95] *OECD Guidelines Annual Report 2010*, *supra* note 89 at 40 [emphasis added].

[96] On the absence of such means, see also Davarnejad, "In the Shadow", *supra* note 47 at 370 and 382-383; Evans & Drew, *supra* note 39 at 135.

[97] *OECD Guidelines Annual Report 2005*, *supra* note 88 at 23-24 [emphasis added].

[98] See *OECD Guidelines Annual Report 2007*, *supra* note 88 at 81-82.

[99] See *ibid* at 81-82. Similar examples involving the US NCP can be found in *OECD Guidelines Annual Report 2012*, *supra* note 92 at 151; *OECD Guidelines Annual Report 2014*, *supra* note 50 at 108-109.

[100] See *OECD Guidelines Annual Report 2010*, *supra* note 89 at 48; OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2011: A New Agenda for the Future* (Paris, OECD: 2011) at 75 [*OECD Guidelines Annual Report 2011*]; OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2013: Responsible Business Conduct in Action* (Paris, OECD: 2013) at 95 [*OECD Guidelines Annual Report 2013*]. By contrast, in a statement published in the 2013 annual report, the Norwegian NCP

Beyond these discourses pertaining to the activities of NCPs, the practice related to the *OECD Guidelines* also includes distinct moments in which the absence of a legal character has been emphasized by several actors. For example, responses following a report by the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of the Congo are a glaring example of the lack of a practice of legality with respect to the *OECD Guidelines*.[101] In its Final Report published in 2002, this panel included a list of business enterprises that were "in violation of the OECD Guidelines for Multinational Enterprises".[102] It also stressed that "[h]ome Governments have the *obligation* to ensure that enterprises in their jurisdiction do not abuse principles of conduct that they have adopted as a matter of law".[103]

While this use of the *OECD Guidelines* to assess the conduct of enterprises operating in the Democratic Republic of the Congo could have contributed to foster a practice of legality, it generated numerous critiques from BIAC and the Investment Committee that implicitly refer to the absence of a sense of obligation emanating from the *OECD Guidelines*. In a letter transferred to the UN Secretary-General, the Chair of the Investment Committee felt the need to clarify the nature and the status of this international instrument. More specifically, the Chair of the Investment Committee recalled that "[w]hile observance of the Guidelines by enterprises is *voluntary and not legally enforceable*, each adhering government has undertaken to establish a National Contact Point that deals with all matters relating to the implementation of the Guidelines in the national context, including specific enquiries regarding the activities of individual enterprises".[104] BIAC also strongly reacted to this use of the *OECD Guidelines* by maintaining its position "that

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concluded that a company "violated the *Guidelines* by refusing to co-operate with the NCP and by not having any strategy on how to react if it becomes aware of human rights risks related to companies in which [it] is investing". See *OECD Guidelines Annual Report 2013*, *ibid* at 96.

[101] See Clapham, *supra* note 21 at 211; Morgera, "An Environmental Outlook", *supra* note 21 at 771-773; Ole Kristian Fauchald, "International Investment Law and Environmental Protection" (2007) 17 Yearbook of Int'l Env L 3 at 43–45; Daniel Leader, "Business and Human Rights - Time to Hold Companies to Account" (2008) 8 Int'l Crim L Rev 447 at 451–452; Černič, *supra* note 79 at 75; Vendzules, *supra* note 63 at 474-476 and 480; Morgera, "OECD Guidelines", *supra* note 25 at 319-320; Kothari, *supra* note 72 at 111.

[102] *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of the Congo*, 2002, UN Doc S/2002/1146 at paras 175, 177 and Annex III.

[103] *Ibid* at 178 [emphasis added].

[104] See *OECD Guidelines Annual Report 2003*, *supra* note 88 at 76-77 [emphasis added].

the NCPs and [the Investment Committee] should continue to clearly reject the use of the Guidelines through the UN 'Panel of Experts' which includes the naming of companies allegedly misbehaving".[105]

The absence of a practice of legality has also been highlighted by many interviewees. After arguing that this international initiative cannot be reduced to a mere voluntary instrument, one of them mentioned the following:

> So, little by little, I think it makes a difference. I don't think there's huge awareness of the Guidelines as an *ex ante* kind of norm thing, among companies, right now. … [F]or the time being, that hasn't turned in to: 'Oh God, we have to do something to comply with the Guidelines'. As a general principle for management, I don't think we're anywhere close to that.[106]

Another participant stressed the concrete consequences that can result from conduct that is inconsistent with the *OECD Guidelines*, while mentioning that the latter fall short of being a legal norm:

> [Y]ou can no longer say there are no consequences, because there are consequences. There are consequences to your reputation; there are consequences in terms of the financial sector asking all kinds of nasty questions; there are consequences in terms of shareholders asking questions; there are consequences when it comes to being allowed to come on trade missions from your government, for example. *It's all rather soft, but the system we have is not a legal system – so there are no appeal mechanisms, there's no legal scrutiny like there is in court. … It's not a real legal thing*.[107]

Of course, one could argue that the nature of the practice has evolved since the latest review of the *OECD Guidelines*. In the first annual report following this review, the OECD cited the adoption of the UN *Guiding Principles for Business and Human Rights* and normative developments that occurred at the International Finance Corporation to stress the existence of a "broadly shared view that corporate responsibility is no longer a matter of voluntary goodwill, but at the very least, a duty not to cause harm or actively contribute to economic, environmental and social progress of host economies".[108] However, this departure from the strict voluntary character of this international initiative has not led to the recognition of any binding character to this instrument. In fact, the same

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[105] See *ibid* at 90.

[106] Interview 6.

[107] Interview 13 [emphasis added].

[108] *OECD Guidelines Annual Report 2011*, *supra* note 100 at 12-13.

annual report describes the *OECD Guidelines* "as the most comprehensive voluntary code of conduct developed by governments in existence today".[109] Even after the most recent amendments to the procedural guidance that ensure the issuance of a statement when no agreement is reached between the parties involved in a specific instance, the OECD has continued to depict such a procedure "as a tool to incentivize cooperation" and as "one factor that might weigh in the cost/benefit analysis of the parties' decision to engage in the NCP procedure".[110] More recently, after recognizing that observance of the *OECD Guidelines* was not "discretionary and optional", the 2014 annual report nevertheless emphasizes the non-legally binding character of this initiative.[111]

Another interesting element that has been introduced following the review of the *OECD Guidelines* in 2011 and that constitutes an integral part of the practice surrounding this instrument is the peer evaluation of NCPs' activities. While the assessment by other members of the OECD can definitely contribute to foster a practice of legality, it must be noted that this mechanism has only been weakly used by adhering countries in the case of NCPs. At the time of writing this chapter, only four NCPs – the ones from the Netherlands, Japan, Norway and Denmark – subjected themselves to such an evaluation process.[112] What is more, the fact that these peer evaluations remain voluntary has been strongly criticized by some members of the community of practice.[113] The difference between such a voluntary evaluation and the more traditional peer review mechanism that is generally found in the OECD is also emphasized in the report related to the peer evaluation of the Japanese NCP: "Unlike traditional OECD peer reviews, this exercise would not be directed at evaluating the performance of an NCP against established benchmarks but, instead it should allow both the reviewed NCP and the other participating NCPs to learn from each

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[109] *Ibid* at 12-13.

[110] *Ibid* at 41.

[111] *OECD Guidelines Annual Report 2014*, *supra* note 50 at 137.

[112] See OECD, *NCP Peer Reviews*, online: OECD <https://mneguidelines.oecd.org/ncppeerreviews.htm> (accessed 14 September 2016).

[113] See e.g. Amnesty International, Press Release, "The 2010-2011 Update of the OECD Guidelines for Multinational Enterprises Has Come to an End: The OECD Must Now Turn Into Effective Implementation" (23 May 2011), online: Amnesty International <http://www.amnesty.org/en/documents/IOR30/001/2011/en/> (accessed 14 September 2016).

other how best to further the objectives of the Guidelines in light of their individual challenges".[114]

With that being said, there is at least one exception to this lack of a legal character that must be noted. In its document entitled *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*,[115] the Canadian government has recently chosen to condition governmental support to the engagement of foreign investors from the extractive industry in the NCP's procedure.[116] After recalling that such participation remains voluntary, this strategy mentions that a decision not to participate in an NCP's procedure entails withdrawal of the Trade Commissioner Service and other forms of support.[117] As stated in the final statement involving China Gold International Resources Corp. Ltd.:

> [Canadian companies] are expected to respect human rights and all applicable laws, and to meet or exceed widely recognized international standards for responsible business conduct, including and in particular the OECD Guidelines for Multinational Enterprises. … As the Company did not respond to the NCP's offer of its good offices, the Company's non-participation in the NCP process will be taken into consideration in any applications by the Company for enhanced advocacy support from the Trade Commissioner Service and/or Export Development Canada (EDC) financial services, should they be made.[118]

It is also worth noting that the outcome of this specific instance was actually considered as a "landmark case" contributing to "increase the sense of obligation" of the *OECD Guidelines* by one interviewee.[119]

Interestingly, the general absence of a practice of legality that is evidenced through discourse analysis also appears to result from *relations of power* underlying the

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[114] OECD, *Japanese NCP: Peer Learning and Review* (Paris: OECD, 2012) at 8.

[115] Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad* (2014), online: Global Affairs Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf> (accessed 14 September 2016) [Canada, *CSR Strategy*].

[116] See Ruggie & Nelson, *supra* note 27 at 21.

[117] Canada, *CSR Strategy*, *supra* note 115 at 12-13.

[118] Canada, *Final Statement on the Request for Review regarding the Operations China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region* (8 April 2015), online: Global Affairs Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng> (accessed 14 September 2016).

[119] Interview 13.

implementation of the *OECD Guidelines*. According to OECD Watch, "[t]he Guidelines were agreed after lengthy negotiations between all the parties but their scope is constantly being eroded seemingly at the behest of business confederations".[120] The alignment of the implementation of the *OECD Guidelines* with the interests of business enterprises is also illuminated in a letter from the Chair of the Investment Committee to BIAC dated from 2002. As stated by the Chair of the Investment Committee:

> Recognising the importance of the business community's support and co-operation to the effectiveness of the Guidelines, delegates agreed on the need for additional efforts to cultivate that support and co-operation. They believe that *BIAC and its affiliates' contribution to the promotion of the Guidelines are the most effective means to encourage voluntary observance of the Guidelines* by the broadest spectrum of individual multinational enterprises.[121]

Beyond the absence of shared understandings with respect to the legal nature of this instrument, the lack of a practice of legality thus partly appears as the result of relations of power and reflects the interests of powerful actors involved in the community of practice that surrounds the *OECD Guidelines*.

To be clear, nothing in the present argumentation aims to deny the concrete consequences that the *OECD Guidelines* can have on the conduct of international actors. It is plain that refusal to engage in a procedure with a NCP can ultimately lead to negative financial, reputational and other social consequences that are taken into account by international actors.[122] Facing such consequences, several actors can thus decide to participate in such a procedure and seek an agreement to solve an issue arising from the implementation of the *OECD Guidelines*. As a social norm, this international initiative thus undoubtedly plays a role in influencing behavior of several actors. However, a closer analysis of the nature of the interactions between members of this community of practice does not permit a conclusion that the majority of these members act according to a practice of legality. At best, the actual practice is characterized by a will to use this international initiative to solve issues occurring in specific instances, with the existence of recent and sporadic examples that point toward an ambiguous sense of obligation around this

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[120] See *OECD Guidelines Annual Report 2005*, *supra* note 88 at 133.

[121] See OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2002: Focus on Responsible Supply Chain Management* (Paris, OECD: 2002) at 36 [emphasis added].

[122] See e.g. Schuler, *supra* note 22 at 200-201; Egelund Olsen & Ensig Sørensen, *supra* note 54 at 31.

international instrument. At worst, it encompasses deliberate efforts to maintain the express voluntary character of the *OECD Guidelines* and avoid the imposition of any direct sanctions to hold private investors accountable for harm caused abroad. Ultimately, while more recent discourses have contributed to slightly depart from the strict voluntary character of the *OECD Guidelines*, nothing from the analysis above allows qualifying this practice as ensuring a genuine sense of obligation that characterizes legal norms.

3. The *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation*

Despite the inclusion of a chapter dealing with anti-bribery in the *OECD Guidelines*, the OECD has served as a normative site to develop other initiatives addressing more specifically this issue. Taken as a whole, the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* thus address aspects such as the definition of bribery of foreign public officials, sanctions, jurisdiction, enforcement, mutual legal assistance, small facilitation payments, reporting of foreign bribery and tax deductibility, among others.[123] In contrast to the *OECD Guidelines*, this section argues that the OECD anti-bribery instruments create a sense of obligation and that they both constitute international legal norms. In fact, notwithstanding some disagreements pertaining to the elements covered within their scope, it is plain that these instruments are embedded in solid shared understandings among international actors involved in their elaboration with respect to the necessity of establishing international legal norms addressing the liability of legal persons for the bribery of foreign public officials (3.1). Moreover, when considered together, nothing in the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* appears as inconsistent with the criteria of legality identified in the interactional theory of international law (3.2). Finally, despite some disappointments pertaining to the number of

[123] See generally *OECD Anti-Bribery Convention*, *supra* note 2; *OECD 2009 Recommendation*, *supra* note 3. The consideration of these two instruments "as a whole" is justified by the close relationship existing between them. According to Rose, establishing a clear distinction between the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* "is somewhat inconsequential". See Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford: Oxford University Press, 2015) at 6.

convictions by domestic courts, the practice surrounding the implementation of these two international instruments is a practice of legality that fosters a sense of obligation for several international actors (3.3).

3.1 Shared Understandings: Powerful (and Less Powerful) Actors Pushing for the Liability of Legal Persons

Analyzing the emergence of OECD instruments focussing on the bribery of foreign officials in international business transactions inevitably leads to the recognition of the role of the United States as a key *norm entrepreneur*. Following the Watergate scandal and the adoption of the *Foreign Corrupt Practice Act* ("*FCPA*"),[124] this state actor sought to obtain a commitment from other states to effectively address the issue of bribery in transnational business transactions through various intergovernmental organizations as early as 1977.[125]

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[124] *Foreign Corrupt Practices Act*, 15 USC § 78 (1977) [*FCPA*]. Many authors link the emergence of formal international agreements prohibiting corruption with the *FCPA*. See e.g. Philip M Nichols, "Regulating Transnational Bribery in Times of Globalization and Fragmentation" (1999) 24 Yale J Int'l L 257 at 286; Robert D Tronnes, "Ensuring Uniformity in the Implementation of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" (2000) 33 Geo Wash J Int'l L & Ecn 97 at 100–102; Metcalfe, *supra* note 15 at 132-133; Kenneth W Abbott & Duncan Snidal, "Values and Interests: International Legalization in the Fight against Corruption" (2002) 31:S1 J Legal Stud S141 at S161–S162; Enery Quinones, "L'évolution du droit international en matière de corruption : La convention de l'OCDE" (2003) 49 AFDI 563 at 565; Christopher K Carlberg, "A Truly Level Playing Field for International Business: Improving the OECD Convention on Combating Bribery Using Clear Standards" (2003) 26 B C Int'l & Comp L Rev 95 at 97–99; Harold Hongju Koh, "Separating Myth from Reality About Corporate Responsibility Litigation" (2004) 7:2 J Int Economic Law 263 at 274; August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 37 at 60; Zerk, *supra* note 27 at 288; Jan Wouters, Cedric Ryngaert & Ann Sofie Cloots, *The Fight Against Corruption in International Law*, SSRN Scholarly Paper ID 2274775 (Rochester, NY: Social Science Research Network, 2012) at 6–10 and 49-51; Anita Ramasastry, "Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 162 at 174; Elizabeth K Spahn, "Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption" (2013) 23 Ind Int'l & Comp L Rev 1 at 11; Marco Arnone & Leonardo S Borlini, *Corruption: Economic Analysis and International Law* (Northampton: Edward Elgar, 2014) at 209–216; Rose, *supra* note 123 at 1 and 63-64.

[125] In a paper prepared in the Department of the Treasury on July 29th, 1977, the United States appeared to be seeking an appropriate forum to negotiate an anti-bribery agreement: "In the event that the U.N. negotiations on an anti-bribery agreement are unsuccessful, we could tackle the issue again in the new forum". See United States of America, Department of State, *Foreign Relations of the United States, 1977-1980*, Vol III (Washington, DC: Department of State, 2013) at 176. See also Giorgio Sacerdoti, "The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: An Example of Piece-Meal Regulation of Globalisation" (1999) 9 Italian YB Int'l L 26 at 30 [Sacerdoti, "The 1997"]; Tronnes, *ibid* at 102; Metcalfe, *ibid* at 132 and 134; Giorgio Sacerdoti, "Corruption in Investment

For example, in a memorandum to the President of the United States in 1980, the Secretary of Commerce and the United States Trade Representative maintained that "[d]iscouraging corruption in international business on the part of foreign firms requires a multilateral agreement" and that the United States has "been pursuing such an agreement actively in the UN, with only marginal success".[126] While the United States primarily sought to limit the comparative advantage granted to foreign private entities not subjected to legislation equivalent to the *FCPA*,[127] these efforts were supported by other non-state actors – *e.g.* development experts and NGOs – who also raised serious concerns regarding the negative impact of corruption for developing countries through the 1980s.[128] In 1989, the United States proposed the creation of an *ad hoc* group under the auspices of the OECD "to examine the feasibility of an international agreement on illicit payments, with a view towards negotiating *a binding agreement* among OECD members on that subject".[129]

Further to the initial push provided by the United States and non-state actors, members of the OECD supported the adoption of a formal international agreement focused on addressing international corruption.[130] After a first recommendation adopted in 1994 and in parallel to a campaign of persuasion led by the public interest NGO Transparency International,[131] the OECD member states elaborated a set of "agreed common elements"

Transactions: Policy Initiatives, Legal Principles and Arbitral Practice" (2009) 24:2 ICSID Rev 565 at 566 [Sacerdoti, "Corruption"]; Spahn, *ibid* at 4-6; Wouters et al, *ibid* at 7 and 25; Ramasastry, *ibid* at 176-177; Rachel Brewster, "The Domestic and International Enforcement of the OECD anti-Bribery Convention" (2014) 15 Chi J Int'l L 84 at 89 and 97-101; Rose, *ibid* at 63-64.

[126] United States of America, Department of State, *ibid* at 740.

[127] See e.g. Tronnes, *supra* note 124 at 102; Metcalfe, *supra* note 15 at 131; Koh, *supra* note 124 at 274; Zerk, *supra* note 27 at 287-288; Wouters et al, *supra* note 124 at 7; Spahn, *supra* note 124 at 5; Ramasastry, *supra* note 124 at 177; Brewster, *supra* note 125 at 99; Rose, *supra* note 123 at 29 and 64.

[128] See e.g. Tronnes, *ibid* at 111; Abbott & Snidal, *supra* note 124 at S159; Spahn, *ibid* at 7.

[129] *United States Proposal on the Issue of Illicit Payments*, 23 March 1989, Doc No C(89)49 (1989), Annex [emphasis added] [*United States Proposal*].

[130] See Otto Dietrich, "OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions" (1998) 3 Austrian Rev Int'l & Eur L 159 at 159–160; Metcalfe, *supra* note 15 at 134; Ramasastry, *supra* note 124 at 177.

[131] *Recommendation of the Council on Bribery in International Business Transactions*, 27 May 1994, Doc No C(94)75/FINAL (1994). See also Sacerdoti, "The 1997", *supra* note 125 at 32-35; Metcalfe, *ibid* at 134; Abbott & Snidal, *supra* note 124 at S165; Mark Pieth, "Multi-Stakeholder Initiatives to Combat Money Laundering and Bribery" in Christian Brütsch & Dirk Lehmkuhl, eds, *Law and Legalization in Transnational Relations* (New York: Routledge, 2007) 81 at 89; Wouters et al, *supra* note 124 at 8; Ramasastry, *ibid* at 181; Rose, *supra* note 123 at 64-65.

for an international convention that were included in the Annex of the *Revised Recommendation of the Council on Combating Bribery in International Business Transactions* in 1997.[132] Among the various aspects that were considered to open negotiations on such an international convention, the OECD member states agreed that "[m]onetary or other civil, administrative or criminal penalties on *any legal person involved*, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe".[133] It is on the basis of these elements that the *OECD Anti-Bribery Convention* was negotiated and ultimately signed in 1997.[134] Most importantly, Article 2 of this formal international agreement provides that "[e]ach Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official".[135]

Another integral part of the OECD anti-bribery instruments relates to the adoption of the *OECD 2009 Recommendation*. In fact, the initial push for this international instrument resulted from a general will to reaffirm the relevance of the *OECD Anti-Bribery Convention* a decade after its signature. Following the *Statement on a Shared Commitment to Fight Against Bribery* adopted by the Ministers of the Parties to the *OECD Anti-Bribery Convention* in November 2007[136] and the *Policy Statement on Bribery in International Business Transactions* adopted by the Working Group on Bribery in International Business Transactions ("Working Group on Bribery") in June 2009,[137] the *OECD 2009 Recommendation* was adopted on 26 November 2009.[138] Annex I of this international instrument thus includes additional detail with respect to the responsibility of legal persons

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[132] *Revised Recommendation of the Council on Combating Bribery in International Business Transactions*, 23 May 1997, Doc No C(97)123/FINAL (1997).

[133] *Ibid*, Annex at para 5.

[134] *OECD Anti-Bribery Convention*, *supra* note 2.

[135] *Ibid*, art 2. For more information on this specific article, see Sacerdoti, "The 1997", *supra* note 125 at 38; Sacerdoti, "Corruption", *supra* note 125 at 571; Markos Karavias, *Corporate Obligations under International Law* (Oxford: Oxford University Press, 2013) at 63–66; Arnone & Borlini, *supra* note 124 at 371.

[136] OECD, *Shared Commitment to Fight Against Foreign Bribery* (Paris: OECD, 2007) [OECD, *Shared Commitment*].

[137] OECD, Working Group on Bribery in International Business Transactions, *Policy Statement on Bribery in International Business Transactions* (Paris: OECD, 2009) [OECD, *Policy Statement*].

[138] *OECD 2009 Recommendation*, *supra* note 3.

for the bribery of foreign public officials in international business transactions.[139] Further to an amendment adopted on 18 February 2010, the *OECD 2009 Recommendation* also includes a second annex entitled *Good Practice Guidance on International Controls, Ethics, and Compliance*.[140] Closely related to the liability of legal persons, this good practice guidance is directly addressed to companies and seeks to contribute to the establishment of various measures geared toward the detection of corrupt practices within business activities.[141] According to the terms found in the introduction of Annex II, this guidance "is intended to serve as *non-legally binding guidance* to companies in establishing effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery".[142]

A closer look at the international actors involved in the consultation process that was initiated by the OECD in January 2008 with a view to reviewing the OECD anti-bribery instruments also allows identifying a vast *community of practice* surrounding the elaboration of these international norms.[143] More specifically, in addition to state actors, this community includes members of the private sector, NGOs, trade unions and representatives from intergovernmental organizations, among others.[144] All these actors have thus been actively involved in discussions related to the reaffirmation of the relevance of the *OECD Anti-Bribery Convention* and have ultimately contributed to the elaboration of the *OECD 2009 Recommendation*. Relying on discourses from members of this community of practice, the remaining part of the present section aims to shed light on the existence of shared understandings regarding the elaboration of these two OECD anti-bribery instruments. It is in this regard that a wide set of publicly available statements are considered as discourses that can be critically analyzed to have a better sense of such shared

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[139] See *ibid*, Annex I at para B. See also De Jonge, *supra* note 21 at 137.

[140] *OECD 2009 Recommendation*, *ibid*, Annex II. See also Arnone & Borlini, *supra* note 124 at 222; Maria Gavouneli, "L'effet normatif des mécanismes de suivi : L'exemple de la lutte contre la corruption" in Hervé Ascensio & Nicola Bonucci, eds, *Le pouvoir normatif de l'OCDE* (Paris: Éditions A. Pedone, 2014) 45 at 52–53.

[141] *OECD 2009 Recommendation*, *ibid*, Annex II, Introduction.

[142] *Ibid*, Annex II, Introduction.

[143] OECD, Working Group on Bribery in International Business Transactions, *Consultation Paper: Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years After Adoption* (Paris: OECD, 2008) [OECD, *Consultation Paper*].

[144] *Ibid* at 3.

understandings: the *United States Proposal on the Issue of Illicit Payment*;[145] the *Statement on a Shared Commitment to Fight Against Bribery*;[146] a consultation paper prepared by the Working Group on Bribery;[147] the collection of responses to the consultation process gathered by the OECD;[148] and the *Policy Statement on Bribery in International Business Transactions*.[149] Where appropriate, these publicly available statements are also supplemented by transcripts from semi-structured interviews.

From the outset, it is worth noting that some statements suggest a lack of shared understandings with respect to the inclusion of specific elements within the scope of these two instruments.[150] For example, during the consultation process that occurred ten years after the signature of the *OECD Anti-Bribery Convention*, the Working Group on Bribery identified some diverging views as far as the inclusion of private sector corruption was concerned:

> [I]n September 2006, the [International Chamber of Commerce] sent a further letter and memorandum repeating its concerns about private sector corruption, which it viewed as being neglected despite its growing adverse impact on world trade and economic progress. … It also stated that it would be appropriate to amend the 1997 Revised Recommendation or adopt a new Recommendation that 'strongly recommends' that each Party to the Convention 'take such legislative and other measures as may be necessary to establish that it is a criminal offence under its law' to engage in bribery in the private sector 'and that this crime, as well as its prosecution, be made a high enforcement priority'. … The Working Group recognises that this issue is not so far in its mandate and is cautious about extending its mandate to cover this issue, a perspective shared by Transparency International…, which stated in its October 2006 recommendations that since coverage of private sector bribery would represent 'a major extension of the scope of the OECD Convention and the workload of the Working Group', action going

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[145] *United States Proposal*, *supra* note 129.

[146] OECD, *Shared Commitment*, *supra* note 136.

[147] OECD, *Consultation Paper*, *supra* note 143.

[148] OECD, *Review of the OECD Anti-Bribery Instruments: Compilation of Responses to Consultation Paper* (Paris: OECD, 2008) [OECD, *Responses to Consultation*]. While these responses have been used in Chapter 5, it must be noted that they also include some aspects that specifically relate to the *OECD Anti-Bribery Convention*. The only statements that are considered for the purposes of the present chapter are the ones that specifically relate to this convention.

[149] OECD, *Policy Statement*, *supra* note 137.

[150] For a broader presentation of issues addressed in the negotiation of the *OECD Anti-Bribery Convention*, see Metcalfe, *supra* note 15 at 136-139.

> beyond a study of this phenomenon 'should be deferred until after the OECD's prohibition against public sector bribery has been successfully implemented'.[151]

In a way that reflects the position adopted by Transparency International, BIAC also expressed some doubts pertaining to the inclusion of bribery occurring solely in the private sector: "While we recognize that private-to-private bribery is an issue that needs to be addressed we question whether the OECD anti-bribery instruments are the means that are best suited to tackle this problem. Inclusion of private-to-private bribery would mean a significant expansion of the scope of the OECD anti-bribery instruments and this would bear the risk to lose focus".[152]

Other statements suggest a lack of shared understandings pertaining to the exclusion of small facilitation payments from the scope of the *OECD Anti-Bribery Convention*. While some states initially pushed for maintaining such an exception in the international agreement, Transparency International recalled that "other anticorruption conventions, adopted after the OECD Convention, do not exempt facilitation payments [and that] a substantial number of OECD states prohibit facilitation payments".[153] Likewise, TUAC emphasized that the "[t]he exception of facilitation payments … has long been a *source of controversy*" and it contended "that it is also a source of potential abuse, confusion and reputational damage".[154] In other words, despite support from a considerable number of actors, the opposition of some states prevented the reach of shared understandings with respect to the inclusion of small facilitation payments in the *OECD Anti-Bribery Convention*.

Regardless of these diverging views, one crucial point on which international actors involved in discussions pertaining to these instruments have reached shared understandings is the elaboration of a strong commitment to establish the liability of legal persons for the bribery of foreign public officials in international business transactions. Constituted from representatives of the *OECD Anti-Bribery Convention* member states, the Working Group

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[151] OECD, *Consultation Paper*, *supra* note 143 at paras 19 and 21. See also the response offered by Transparency International, the International Chamber of Commerce and TUAC in OECD, *Responses to Consultation*, *supra* note 148 at 103, 122-123 and 140; Wouters et al, *supra* note 124 at 76-77.

[152] See OECD, *Responses to Consultation*, *ibid* at 109.

[153] See *ibid* at 102.

[154] See *ibid* at 139 [emphasis added].

on Bribery thus maintained in its consultation paper that the focus on the effectiveness of states' systems for the liability of legal persons "is consistent with the overall focus of the Convention on *deterring, detecting and sanctioning the bribery of foreign public officials through a punitive approach*".[155] Non-state actors have also used the consultation process surrounding the OECD anti-bribery instruments to demonstrate their support to establishing the liability of legal persons. For example, Transparency International highlighted an "*increasing recognition* that to deal with complex crimes such as foreign bribery, *corporations should be held liable* not only for affirmative derelictions but for lack of supervision or control".[156]

Echoing the shared understandings for strong international initiatives dealing with the liability of legal persons for the bribery of foreign public officials, several actors have also emphasized the need to ensure adequate implementation of the OECD anti-bribery instruments. In this regard, Ministers of the *OECD Anti-Bribery Convention* member states expressly committed to "[e]nsure that the standards of the Convention remain at the forefront of the global fight against foreign bribery and that *their enforcement continues to be monitored* by a systematic, effective and adequate review mechanism".[157] One instance of support from the private sector can also be found in a statement offered by the International Chamber of Commerce:

> The effective, continuous and thorough monitoring of the [i]nstruments' implementation, conducted by the Working Group should guarantee the consolidation and enhancement of what has been achieved up to the present date. *The monitoring process played a determining role in the recognition by State Parties of their obligations and responsibilities under the [i]nstruments*. For its part, business reaffirms its readiness to contribute, in any appropriate capacity, to the success of the monitoring of the Instruments.[158]

Such support is also found in statements from public interests NGOs. Transparency International thus advocated for the "[c]ontinuation of a rigorous and adequately funded monitoring program until there is active enforcement by all parties".[159] Finally, the staff of

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[155] OECD, *Consultation Paper*, *supra* note 143 at para 24 [emphasis added].

[156] See OECD, *Responses to Consultation*, *supra* note 148 at 101 [emphasis added].

[157] See OECD, *Shared Commitment*, *supra* note 136 [emphasis added].

[158] See OECD, *Responses to Consultation*, *supra* note 148 at 118 [emphasis added]. See also the response provided by BIAC and the Conseil français des investisseurs en Afrique at 110 and 113-114.

[159] See *ibid* at 97.

the International Monetary Fund also mentioned that the "fair but rigorous monitoring system" of the *OECD Anti-Corruption Convention* "provides Parties with *incentives to properly implement* the Convention" and thus "strongly support[ed] the plans for continued monitoring".[160] Overall, an effective monitoring of the OECD anti-bribery instruments is firmly grounded in shared understandings between states, business actors, public interest NGOs and intergovernmental organizations.

In addition to the general support to address the liability of legal persons for the bribery of foreign officials and to establish a solid monitoring mechanism, relying on a critical discourse analysis allows emphasizing *relations of power* and interests underlying the elaboration of these instruments. In line with its role as a norm entrepreneur, the United States emphasized the capacity of the OECD to influence other international actors and the common interest of capital-exporting states to adopt an international agreement addressing appropriate sanctions to punish corporations involved in bribery in the following terms: "Bribery is a problem of many countries, not just those of the OECD. *But as the U.S. Congress recognized, the OECD has a long history of setting an example for others*. … OECD members have a *common interest* in showing they are committed to ethical business practices abroad by their nationals".[161] Similarly, one interviewee linked the participation of foreign investors in the elaboration of these international instruments with the interests of these private actors:

> [T]they see it as being in their interests as well, so that they can have similar standards across the board. They just have to comply with one standard rather than having to comply and change things depending on which country they are doing business in. And I think that's why so many have turned up to these consultations and want to be involved.[162]

While such statements shed light on the perception from capital-exporting states and foreign investors that these international initiatives are in line with their own interests, the support from these powerful actors is a crucial element of the shared understandings

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[160] See *ibid* at 83 [empahsis added].

[161] *United States Proposal*, *supra* note 129, Annex [emphasis added]. The link between the US economic rhetoric in the area of corruption and the focus of the OECD on economic development is also mentioned by some authors. See Wouters et al, *supra* note 124 at 9. Moreover, Salzman stresses that anti-bribery discussions that occurred in the OECD led to similar discussions in the United Nations. See Salzman, *supra* note 5 at 780 and 840.

[162] Interview 12.

regarding the elaboration of international instruments that address the liability of legal persons for the bribery of foreign public officials

In sum, from the very beginning, international actors involved in the elaboration of OECD instruments designed to address the bribery of foreign public officials in international business transactions have agreed on the necessity to embed the liability of legal persons for such acts in binding international initiatives with an effective implementation mechanism. It is also worth noting that the construction of these shared understandings has reproduced relations of power and that a strong commitment to address the bribery of foreign officials in international business transactions has been perceived as being in line with the interests of powerful actors involved in the elaboration process. Beyond the general support for such initiatives, the weight of powerful members of the community of practice is evidenced though critical discourse analysis and should not be neglected. Ultimately, these shared understandings constitute a breeding ground for the emergence of a sense of obligation emanating from the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation*.

3.2 Criteria of Legality: The Elaboration of Highly Legitimate Norms

In addition to the consideration of interactions among the community of actors surrounding the elaboration of the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation*, analyzing the normative character of the OECD anti-bribery instruments requires the examination of their content against the criteria of legality identified in the interactional theory of international law. As demonstrated in the following paragraphs, when considering the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* as a whole, these international instruments meet all the criteria of legality that are required for legitimate international norms that can potentially create a sense of obligation.

From the outset, these OECD anti-bribery instruments easily meet the criterion of *promulgation*. As far as the *OECD Anti-Bribery Convention* is concerned, this international instrument is a formal international agreement that entered into force on 15 February

1999.[163] Moreover, the Working Group on Bribery provides an updated list of the parties to the *OECD Anti-Bribery Convention* in each of its annual report. This list includes the dates of the deposition of the instrument of ratification, the entry into force of the convention and the entry into force of the implementing legislation for each member state.[164] While the *OECD 2009 Recommendation* falls beyond the scope of the formal sources of international law, this initiative has been adopted pursuant to Article 5 of the *Convention on the OECD* and thus remains one of the normative acts that can be adopted by this intergovernmental organization. Ultimately, these OECD anti-bribery instruments are made available to the public and are easily accessible, thus ensuring that the requirement of promulgation is satisfied.

The requirements established in these two international instruments also appear to be *general*, both with respect to their equal application among member states and to private actors that are indirectly concerned by these instruments. For example, according to the definition of the offence of bribery of foreign public officials included in the *OECD Anti-Bribery Convention*:

> *Each Party* shall take such measures as may be necessary to establish that it is a criminal offence under its law for *any person* intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[165]

Similarly, Section I of the *OECD 2009 Recommendation* stresses that it "shall apply to OECD Member countries and other countries party to the OECD Anti-Bribery Convention", without making any additional differences.[166] The importance granted to a general application is also echoed at Article 5 of the *OECD Anti-Bribery Convention*, which emphasizes that investigation and prosecution of bribery "shall not be influenced by

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[163] *OECD Anti-Bribery Convention*, *supra* note 2.

[164] For the most recent version at the time of writing this chapter, see OECD, Working Group on Bribery, *Annual Report 2014* (Paris: OECD, 2014) at 51 [Working Group Report, *Annual Report 2014*].

[165] *OECD Anti-Bribery Convention*, *supra* note 2, art 1(1) [emphasis added].

[166] *OECD 2009 Recommendation*, *supra* note 3, Section I.

considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".[167]

With that being said, it is also worth noting that the opening of the *OECD Anti-Bribery Convention* to "accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery" creates a certain tension regarding the general character of this international instrument.[168] In fact, the strong link between adherence to this convention and membership to the OECD can appear as limiting the openness of the *OECD Anti-Bribery Convention*. However, as pointed out by Arnone and Borlini, the actual consideration of various requests for accession from non-member states suggests that this tension is somehow mitigated and does not fall below what would be required for this instrument to constitute a general norm.[169]

While international norms are expected to be *clear* in order to be considered as legitimate, nothing in the *OECD Anti-Bribery Convention* or the *OECD 2009 Recommendation* seems to pose a serious concern in this regard.[170] In fact, several terms bearing particular meanings for the purposes of the instrument – *e.g.* "bribery of foreign public official", "complicity", "foreign public official", "foreign country" and "act or refrain from acting in relation to the performance of official duties" – are defined at Article 1 of the *OECD Anti-Bribery Convention*.[171] Furthermore, the latter is accompanied by 37 paragraphs of commentaries adopted by the Negotiating Conference on 21 November 1997 and providing additional definitions of specific terms.[172] Where appropriate, express references in the *OECD Anti-Bribery Convention* commentaries and the *OECD 2009*

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[167] *OECD Anti-Bribery Convention*, *supra* note 2, art 5.

[168] *Ibid*, art 13(2). See also Arnone & Borlini, *supra* note 124 at 225-229.

[169] Arnone & Borlini, *ibid* at 229. See also Sacerdoti, "The 1997", *supra* note 125 at 43.

[170] See e.g. Arnone & Borlini, *ibid* at 313. However, Carlberg suggests that more concrete standards could be adopted with respect to a minimum statute of limitations standard and minimum sanctions for the punishment of natural and legal persons. See Carlberg, *supra* note 124 at 102-110. See also Tronnes, *supra* note 124 at 117-119.

[171] *OECD Anti-Bribery Convention*, *supra* note 2, art 1(4).

[172] *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 21 November 1997 (Paris: OECD, 2011) at paras 5, 12-14, 17-18, 21-22 and 28 [*Commentaries on the OECD Anti-Bribery Convention*]. It must nevertheless be noted that some authors maintain that the weight of the Commentaries is debatable. See Sacerdoti, "The 1997", *supra* note 125 at 34; Arnone & Borlini, *supra* note 124 at 223.

Recommendation to other international instruments developed under the auspices of the OECD also contribute to ensure that these two international instruments live up to the requirement of clarity.[173]

These OECD anti-bribery instruments can also be considered as fairly *constant* instruments. While amendments to the *OECD Anti-Bribery Convention* are possible, they must follow a specific procedure set out at Article 16. In this regard, an amendment submitted by any member state must be submitted to a depository and must be adopted by consensus of the parties, or any other means determined by the parties.[174] The fact that withdrawal of a member state from the *OECD Anti-Bribery Convention* is only effective one year after the date of the receipt of such a notification also contributes to strengthening the constancy of this international instrument.[175] It is also worth noting that the amendment of the *OECD 2009 Recommendation* through the addition of Annex II in 2010 has not led to the modification of any provision of this recommendation and does not seem to have posed any problem with the constant application of this norm.

As far as the fifth criterion of legality is concerned, nothing in the *OECD Anti-Bribery Convention* or the *OECD 2009 Recommendation* expressly addresses temporal issues. As such, it seems appropriate to conclude that these international instruments meet the requirement of *non-retroactivity* included in the interactional theory of international law.

Another aspect that must be met by international norms to be considered as legitimate is that they must not establish requirements *asking for impossible* achievements. In this regard, the two international instruments considered for present purposes extensively call upon the need to take into account differences existing between member states when implementing their provisions. One glaring example of this flexibility can be found in Article 2 of the *OECD Anti-Bribery Convention*, which requires each member state to establish the liability of legal persons for the bribery of foreign public officials "in

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[173] See *Commentaries on the OECD Anti-Bribery Convention*, *ibid* at paras 27, 29, 30, 34; *OECD 2009 Recommendation*, *supra* note 3, Sections III(iii), VII(ii), XI(ii), XI(iii) and XII.

[174] *OECD Anti-Bribery Convention*, *supra* note 2, art 16.

[175] *Ibid*, art 17.

accordance with its legal principles".[176] Through this specification, the member states intend to avoid imposing an impossible requirement on parties for which criminal responsibility is not applicable to legal persons.[177] In such circumstances, these parties "shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials".[178] Other elements that expressly refer to constraints imposed by domestic legal principles and international treaties in these two instruments include issues related to mutual legal assistance,[179] extradition,[180] awareness-raising,[181] tax legislation,[182] reporting of foreign bribery,[183] regulation of financial institutions[184] and public procurements,[185] among others.

In light of the absence of shared understandings with respect to the inclusion of small facilitation payments under the scope of the *OECD Anti-Bribery Convention*, addressing the extent to which the OECD anti-bribery instruments meet the criterion of the *absence of contradiction* requires some nuances. When considering solely the *OECD Anti-Bribery Convention* and its commentaries, one might be surprised to see an exception authorizing such payments. Paragraph 9 of the commentaries to the convention provides the following:

> Small 'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage' … and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of

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[176] *Ibid*, art 2.

[177] See *Commentaries on the OECD Anti-Bribery Convention*, *supra* note 172 at para 20.

[178] See *OECD Anti-Bribery Convention*, *supra* note 2, art 3(2).

[179] See *ibid*, art 9(1).

[180] See *ibid*, art 10(4).

[181] See *OECD 2009 Recommendation*, *supra* note 3, Section III.

[182] See *ibid*, Section III.

[183] See *ibid*, Sections III and IX(i)-IX(ii).

[184] See *ibid*, Section III.

[185] See *ibid*, Section III.

> good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.[186]

Despite these clarifications, it is plain that authorizing facilitations payments "made to induce public officials to perform their function" is in sharp contradiction with the provision of the *OECD Anti-Bribery Convention* that defines the offence of bribery of foreign public officials as including "*any* undue pecuniary … advantage … to a foreign public official … in order that the official act … in relation to the performance of official duties".[187] When considering the *OECD Anti-Bribery Convention* alone, one could thus conclude that it fails to meet the criterion of the absence of contradiction.

Yet, such a failure appears to be considerably diluted when taking into account the content of the *OECD 2009 Recommendation*. In fact, according to Section VI of this instrument, member states should "undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon" and "encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures".[188] What is more, through the *OECD 2009 Recommendation*, the Council of the OECD "urges all countries to raise awareness of their public officials on their domestic bribery and solicitation laws with a view to stopping the solicitation and acceptance of small facilitation payments".[189] At the end of the day, in light of normative developments that occurred after the adoption of the *OECD Anti-Bribery Convention* and given that these two OECD anti-bribery instruments are strongly related, the articulation of the offence of bribery of foreign public officials and the issue of small facilitation payments seem to be more coherent than under the sole consideration of the convention.

Given that the OECD anti-bribery instruments at hands address foreign investors' responsibilities in the area of corruption through a requirement for states to establish the

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[186] *Commentaries on the OECD Anti-Bribery Convention*, *supra* note 172 at para 9. See also Abbott & Snidal, *supra* note 124 at S169; Lisa Miller, "No More 'This for That'? The Effect of the OECD Convention on Combating Bribery of Froeign Public Officials in International Business Transactions" (2000) 8 Cardozo J Int'l & Comp L 139 at 143; Quinones, *supra* note 124 at 566; Wouters et al, *supra* note 124 at 36-37; Rose, *supra* note 123 at 66.

[187] *OECD Anti-Bribery Convention*, *supra* note 2, art 1(1) [emphasis added].

[188] *OECD 2009 Recommendation*, *supra* note 3, Section VI. See also Rose, *supra* note 123 at 70-71.

[189] *OECD 2009 Recommendation*, *ibid*, Section VII.

liability of legal persons, two different aspects with respect to *congruence* between rules and official action must be discussed. First, the implementation of the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* is subjected to a peer review mechanism that is often found within the OECD.[190] Article 12 of the *OECD Anti-Bribery Convention* thus stipulates that, through the work of the Working Group on Bribery, "[t]he Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention".[191] Even if recommendations adopted under the auspices of the OECD are not expressly considered as formal obligations under the *Convention on the OECD*, it is worth noting that the *OECD 2009 Recommendation* is also monitored by the same mechanism. According to Section XIV of this recommendation, the Council thus instructs the Working Group on Bribery to continue the monitoring of these OECD anti-bribery instruments.[192] More specifically, the Working Group on Bribery is tasked with the following:

> Continuation of the programme of rigorous and systematic monitoring of Member countries' implementation of the OECD Anti-Bribery Convention and this Recommendation to promote the full implementation of these instruments, including through an ongoing system of mutual evaluation, where each Member country is examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the Member country in implementing the OECD Anti-Bribery Convention and this Recommendation, and which will be made publicly available.[193]

In other words, significant instances of non-compliance by a member state with the rules elaborated in these instruments – *e.g.* the lack of a domestic legislation establishing liability of legal persons for the bribery of foreign public officials – can thus be addressed through a procedure that is expressly provided in the *OECD Anti-Bribery Convention* and reaffirmed in the *OECD 2009 Recommendation*.

Second, as far as the relationship between member states and foreign investors is concerned, it is also plain that these international instruments seek to foster the enforcement

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[190] See e.g. Sacerdoti, "The 1997", *supra* note 125 at 46-48; Tronnes, *supra* note 124 at 119-125; Quinones, *supra* note 124 at 569-570; Zerk, *supra* note 27 at 287; Gavouneli, *supra* note 140 at 49-50; Rose, *supra* note 123 at 60 and 68-69.

[191] *OECD Anti-Bribery Convention*, *supra* note 2, art 12.

[192] *OECD 2009 Recommendation*, *supra* note 3, Section XIV.

[193] *Ibid*, Section XIV(i).

of sanctions by state officials in order to punish the bribery of foreign public officials in international business transactions. The *OECD Anti-Bribery Convention* thus requires such punishment by "effective, proportionate and dissuasive" criminal or non-criminal sanctions.[194] With respect to enforcement, the same convention stresses that "[i]nvestigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party".[195] Additional details regarding investigation and prosecution are also provided in Annex I of the *OECD 2009 Recommendation*.[196] In other words, while the OECD anti-bribery instruments do not provide any international procedural devices that directly allow addressing an act of corruption by a private actor, the provisions dealing with sanctions and enforcement demonstrate an addition layer of congruence between rules and official action.

In sum, the ongoing normative developments under the auspices of the OECD have led to the elaboration of international norms on the bribery of foreign public officials in international business transactions that easily meet the criteria of legality. Both the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* thus emerge as legitimate norms that, if applied according to a practice of legality, can generate a strong sense of obligation that characterizes legal norms.

3.3 Practice of Legality: The Consolidation of a Sense of Obligation

In addition to the consideration of shared understandings regarding the liability of legal persons for the bribery of foreign public officials and the extent to which the OECD anti-bribery instruments meet a set of criteria of legality, determining the normative character of these international instruments requires a closer analysis of the practice according to which international actors implement these norms. Beyond the mere references to the OECD anti-bribery instruments in other international instruments codifying foreign investors' responsibilities, the present analysis applies a critical

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[194] *OECD Anti-Bribery Convention*, *supra* note 2, art 3(1) and 3(2).

[195] *Ibid*, art 5.

[196] *OECD 2009 Recommendation*, *supra* note 3, Annex I, D.

discourse analysis to documents related to the aforementioned consultation process,[197] the *Mid-Term Study of Phase 2 Reports* prepared by the Working Group on Bribery,[198] publicly available annual reports of the Working Group on Bribery,[199] the *OECD Foreign Bribery Report* that was published in 2014[200] and transcripts from semi-structured interviews.

One component that suggests the emergence of a practice of legality surrounding the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* is the extensive reference to these instruments in other formal and informal international initiatives related to foreign investors' responsibilities. While the *OECD 2009 Recommendation* is expressly mentioned in the most recent version of the commentaries accompanying the *OECD Guidelines*,[201] the *OECD Anti-Bribery Convention* benefits from a broader consideration in several international initiatives. In addition to references in informal instruments elaborated under the auspices of the OECD,[202] this convention is also mentioned in formal and informal initiatives developed by the UN and the European Union.[203]

When considering solely the number of convictions by member states for the bribery of foreign public officials, one could be tempted to conclude that the legal character of the practice surrounding the implementation of these international instruments is somewhat weak. For example, the consultation paper prepared by the Working Group on

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[197] See OECD, *Consultation Paper*, *supra* note 143; OECD, *Responses to Consultation*, *supra* note 148.

[198] OECD, Directorate for Financial, Fiscal and Enterprise Affairs, *Mid-Term Study of Phase 2 Reports: Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Paris: OECD, 2006) [OECD, *Mid-Term Study*].

[199] See OECD, *OECD Working Group on Bribery – Annual Report*, online: OECD <http://www.oecd.org/tax/crime/oecdworkinggrouponbribery-annualreport.htm> (accessed 14 September 2016).

[200] OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (Paris: OECD, 2014) [OECD, *Foreign Bribery Report*].

[201] *OECD Guidelines 2011 – Commentaries*, *supra* note 57 at paras 76, 77 and 80.

[202] See *ibid* at para 76; *Recommendation of the Council on Bribery and Officially Supported Export Credits*, 14 December 2006, Doc No C(2006)163 (2006), Preamble and II(a); *Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 25 May 2009, Doc No C(2009)64 (2009), Preamble; *Recommendation on Due Diligence Guidance*, *supra* note 86, Preamble.

[203] See *UN Norms*, *supra* note 86, Preamble; *United Nations Convention Against Corruption*, 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005), Preamble; *Criminal Law Convention on Corruption*, 27 January 1999, 2216 UNTS 225, STE 173 (entered into force 1 July 2002), Preamble; EC, *Council Framework Decision 2003/568/JHA of 22 July 2003 on Combating Corruption in the Private Sector*, [2003] OJ, L 192/54, Preamble.

Bribery to discuss the first ten years of the *OECD Anti-Bribery Convention* emphasizes that "regrettably few convictions have been obtained as yet by most Parties".[204] In a response to this consultation process, the Asian Development Bank argued that "the effectiveness of the instrument in terms of the number of actual convictions has been unfortunately low".[205] "Notable differences in the way State Parties enforce their national anti-foreign bribery laws" were also pointed out by the International Chamber of Commerce.[206] The data provided by the Working Group on Bribery in its most recent publicly available annual report nevertheless suggests that 333 individuals and 111 entities have been sanctioned under criminal proceedings in 17 Parties since the *OECD Anti-Bribery Convention* entered into force, thus hinting toward the development of a stronger practice.[207]

Most importantly, when analyzing discourses related to the implementation of the OECD anti-bribery instruments, it is plain that members of the community of practice acknowledge a sense of obligation inherent to these international norms. For example, in previous annual reports, the Working Group on Bribery presented the *OECD Anti-Bribery Convention* in the following terms:

> The Anti-Bribery Convention is the only *legally binding instrument* globally to focus primarily on the supply of bribes to foreign public officials in international business transactions. All Convention countries *must* make the bribery of foreign public officials a criminal offence. They are *obligated* to investigate credible allegations and, where appropriate, to prosecute those who offer, promise or give bribes to foreign public officials and to subject those who bribe to effective, proportionate and dissuasive penalties.[208]

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[204] OECD, *Consultation Paper*, *supra* note 143 at 5. See also OECD, Working Group on Bribery, *Annual Report 2008* (Paris: OECD, 2008) at 9 [Working Group Report, *Annual Report 2008*].

[205] See OECD, *Responses to Consultation*, *supra* note 148 at 77. See also the response from the Staff of IMF at 82.

[206] See *ibid* at 118. See also Brewster, *supra* note 125 at 106.

[207] Working Group Report, *Annual Report 2014*, *supra* note 164 at 15. See also OECD, *Foreign Bribery Report*, *supra* note 200 at 7.

[208] Working Group Report, *Annual Report 2014*, *ibid* at 8 [emphasis added]. For similar statements, see also Working Group Report, *Annual Report 2008*, *supra* note 204 at 8; OECD, Working Group on Bribery, *Annual Report 2010* (Paris: OECD, 2010) at 11 [Working Group Report, *Annual Report 2010*]; OECD, Working Group on Bribery, *Annual Report 2011* (Paris: OECD, 2011) at 6 [Working Group Report, *Annual Report 2011*]; OECD, Working Group on Bribery, *Annual Report 2013* (Paris: OECD, 2013) at 6 [Working Group Report, *Annual Report 2013*].

Similar statements can also be found regarding the *OECD 2009 Recommendation*, which was depicted as providing "a series of targeted measures to *enhance Parties' implementation of their Convention obligations* including to better prevent, detect, investigate and prosecute credible allegations of foreign bribery".[209]

In a subtler way, the discourse of the Working Group on Bribery is also instructive to understand the character of the practice surrounding Annex II of the *OECD 2009 Recommendation*. As mentioned above, while it is turned toward private actors and foreign investors, the good practice guidance included in this annex is expressly not intended to be legally binding.[210] However, when addressing the role of this international initiative included in the *OECD 2009 Recommendation*, the Working Group on Bribery explicitly acknowledged its contribution of this initiative to ultimately create a sense of responsibility for compliance with anti-bribery norms:

> The advice that the Good Practice Guidance offers is meant to be flexible and can be adapted by companies of all sizes and from any industry. It emphasizes that, first and foremost, effective internal controls, ethics and compliance programmes are based on a risk assessment that is regularly monitored, re-assessed and adapted according to changing circumstances. It also emphasises the need for strong, explicit and visible support from senior management, and adoption of a clear and visible anti-bribery policy. Effective measures should also instil in all employees *a sense of responsibility for compliance*.[211]

In other words, in addition to the inherent legal character of the practice emanating from the *OECD 2009 Recommendation*, the Working Group on Bribery appears to recognize a certain sense of obligation to a guidance that is not expressly expected to be legally binding.

The peer review mechanism that is used to monitor the implementation of OECD anti-bribery instruments has also often been linked to the existence of states' commitments and obligations to fight the bribery of foreign public officials. As expressed by the Chairperson of the Working Group on Bribery:

> In 2010, we began a new, third-round of intense peer review monitoring evaluations that examine whether and how Convention countries are fulfilling this

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[209] See Working Group Report, *Annual Report 2014*, *ibid* at 10 [emphasis added]. See also Working Group Report, *Annual Report 2011*, *ibid* at 7; Working Group Report, *Annual Report 2013*, *ibid* at 7.

[210] *OECD 2009 Recommendation*, *supra* note 3, Annex II, Introduction.

[211] Working Group Report, *Annual Report 2010*, *supra* note 208 at 13 [emphasis added]. See also Working Group Report, *Annual Report 2013*, *supra* note 208 at 8; Working Group Report, *Annual Report 2014*, *supra* note 164 at 10-11. For a more detailed discussion on the implementation of the guidance at the domestic level, see Rose, *supra* note 123 at 23 and 73-82.

> promise by enforcing the Convention. It is also the first opportunity to examine how countries are transforming the new Anti-Bribery Recommendation and the Good Practice Guidance into action. Through this exercise, we ensure that all … Parties to the Convention *are serious about their commitments and held accountable to their obligations to fight foreign bribery*.[212]

Similarly, the Secretary General of the OECD maintained that "[t]he Working Group's peer reviews—which Transparency International calls the "gold standard" of monitoring—holds Parties *accountable* to their Convention *obligation* to prevent, detect, investigate and prosecute this crime".[213]

The way member states consider recommendations found in peer review reports also suggests the existence of a practice of legality. Of course, some instances where member states have refused to fully integrate recommendations resulting from the peer review process can be identified.[214] However, in the aforementioned consultation paper, the Working Group on Bribery maintained the following: "These reports include *stringent recommendations* for ensuring the full impact of the anti-bribery instruments. … The number and nature of legislative amendments and institutional changes that have been made by Parties in response to the Working Group's recommendations demonstrate the *strength of the peer review process and the commitment of the Parties*".[215] While these reports only lead to the adoption of recommendations, it is here submitted that the successive monitoring and reporting on the implementation of these recommendations through different phases can considerably improve the sense of obligation that characterizes this practice, even if some recommendations are not fully implemented by member states.[216]

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[212] See Working Group Report, *Annual Report 2010*, *ibid* at 4 [emphasis added].

[213] See Working Group Report, *Annual Report 2013*, *supra* note 208 at 2 [emphasis added].

[214] See e.g. OECD, *Mid-Term Study*, *supra* note 198 at paras 75 and 123; OECD, Working Group on Bribery, *Annual Report 2007* (Paris: OECD, 2007) at 41 [Working Group Report, *Annual Report 2007*]; Working Group Report, *Annual Report 2010*, *supra* note 208 at 26. The delayed implementation of the *OECD Anti-Bribery* Convention by the United Kingdom is also used as an example of the limitations of the influence of the Working Group on Bribery by Rose. See Rose, *supra* note 123 at 83-94.

[215] OECD, *Consultation Paper*, *supra* note 143 at 5. See also OECD, *Mid-Term Study*, *ibid* at para 16; OECD, *Consultation Paper*, *ibid* at para 76.

[216] On the expectation of member states to report on the implementation of the recommendations, see Working Group Report, *Annual Report 2007*, *supra* note 214 at 19 and 23; Working Group Report, *Annual Report 2008*, *supra* note 204 at 19-20.

Other aspects of the practice emanating the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* also demonstrate its legal character. For example, discussions pertaining to the accession to the OECD by non-member states have often been related to a commitment from these countries to comply with the *OECD Anti-Bribery Convention*. When addressing the potential accession of five countries to the OECD in 2007, the Working Group on Bribery maintained that:

> [e]ach candidate country will follow an "accession roadmap", which includes the following anti-corruption principles: *compliance with the OECD Anti-Bribery Convention*; a legal framework for combating bribery; criminalisation of bribery of foreign officials; adequate accounting, auditing and tax systems to fight bribery; ability to co-operate with Parties to the Convention; and readiness to participate in the peer review process.[217]

Conditioning accession to the OECD to compliance with an OECD anti-bribery instrument and some requirements that it includes thus clearly strengthens the sense that members of the community of practice have to act according to this international norm.

The legal character of the practice surrounding the OECD anti-bribery instruments is also an important component of the discourse from individuals working in intergovernmental organizations that are involved in the broader codification process of foreign investors' responsibilities. More specifically, several interviewees discussed the efforts of the OECD in the area of corruption as creating concrete "obligations" for states and effectively departing from "voluntary" initiatives.[218] The perspectives offered by some interviewees with respect to the peer review mechanism also demonstrate the sense of obligation that accompanies this procedure to implement the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation*. One interviewee thus presented this mechanism in the following terms:

> It's very hard-hitting – it's much harder hitting in a way than the peer reviews of the Guidelines. … Its very structured and they're trying to push countries forward. … These issues relate to what the Working Group on Bribery views as being non-implementation – let's say non-compliance with certain *commitments* made in the Anti-Bribery Convention or in the Recommendation. … Slowly but surely, it works. Slowly, but surely.[219]

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[217] Working Group Report, *Annual Report 2007*, *ibid* at 26 [emphasis added]. See also Working Group Report, *Annual Report 2008*, *ibid* at 21; Working Group Report, *Annual Report 2010*, *supra* note 208 at 30.

[218] See Interview 6; Interview 11.

[219] Interview 6 [emphasis added].

Another interviewee stressed that "the fact that all these countries are engaged in this ongoing, very rigorous peer review mechanism shows that they are committed to the process and that they are serious about putting in place the laws and processes to prevent bribery. … I think there's enormous power in terms of peer pressure that brings about real positive change as a result of this mechanism".[220] Interestingly, one participant provided some characteristics of the community of practice involved in this peer review in a way that also suggests the existence of a practice of legality: "The people that attend the Working Group on Bribery are *law enforcement people*. … They are adversarial lawyers, they're prosecutors, they're mean – some of them. You know, it's a different kind of mindset. *It's a different community*".[221]

In addition to highlighting that the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* are implemented according to a practice of legality, the critical discourse analysis of statements from the members of this community of practice allows identifying some examples in which the implementation of these instruments is subjected to inherent *relations of power*. While Transparency International maintained that "the Working Group has had the courage to criticize even the most powerful governments",[222] the Corner House emphasized that the peer review mechanism "appears particularly vulnerable when faced with certain Parties that claim the best interest of the [n]ation, either to stop investigations, or to not adapt their legislation accordingly".[223] Moreover, in response to the consultation process that occurred in 2008, representatives from the private sector implicitly suggested that the implementation of the OECD anti-bribery instruments would not be the same without their considerable support. For example, BIAC put forward that "[t]he initiatives undertaken by business are crucial to the success of the Convention" and that "[o]nly the combined effort of business and governments can lead to a significant reduction in the occurrence of bribery".[224] In other words, in addition to relations of power that are inherent to the elaboration of the *OECD Anti-Bribery Convention* and the *OECD*

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[220] Interview 12.

[221] Interview 6 [emphasis added].

[222] See OECD, *Responses to Consultation*, *supra* note 148 at 97.

[223] See *ibid* at 130.

[224] See *ibid* at 107. See also the response from the International Chamber of Commerce at 118-119.

2009 Recommendation, such statements suggest that the sense of obligation that characterizes the practice surrounding these instruments extensively relies upon the support from powerful members of the community of practice.

Overall, while the OECD anti-bribery instruments are anchored in solid shared understandings and meet the criteria of legality's requirements, the previous analysis demonstrates that members of the community of practice surrounding these instruments have also adopted a practice of legality. Through their interactions, these international actors implicitly acknowledge an inherent legal character to these international norms and seem to perceive the recommendations resulting from the peer review mechanism as something that member states ought to act accordingly. Inevitably, the legal character of this practice also appears to be subjected to the support of powerful actors among the community of practice.

Conclusion

In parallel to fostering a sense of identity revolving around the promotion of neoliberal policies and foreign investment, the OECD provides a normative site that has been particularly active in the elaboration of international initiatives seeking to codify foreign investors' responsibilities. Offering a more nuanced analysis of the normative character of the *OECD Guidelines*, the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* thus provides a better understanding of the contribution of this intergovernmental organization within the broader codification process of foreign investors' responsibilities.

Even if the *OECD Guidelines* are not a formal source of international law, it is plain that this international initiative establishes standards of appropriate behavior that can be considered by various international actors. The analysis of the elaboration and the implementation of this international norm also demonstrates that the *OECD Guidelines* have evolved. However, this international initiative fails to generate any sense of obligation that characterizes international legal norms. More specifically, norm entrepreneurs and powerful members of the community of practice have constantly sought to confirm the

voluntary character of this instrument, thus preventing the emergence of shared understandings with respect to the elaboration of an instrument whose observance would be mandatory. While the content of the *OECD Guidelines* meets several criteria of legality that are required to ensure the legitimacy of international norms, their express voluntary character is in tension with its explicit goals and is in line with procedural devices that only allow weak responses to significant instances of non-compliance. Moreover, the overwhelming majority of interactions between members of the community of practice that have emerged around the *OECD Guidelines* evidence a practice according to which the implementation of this instrument is perceived as merely voluntary and non-binding.

By contrast, the analysis above allows concluding that both the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* are characterized by a strong sense of obligation and can thus be considered as international legal norms. Regardless of their different relation with the formal sources of international law, both instruments have fully entered the realm of legality. Further to an initial push by the United States, several international actors have contributed to the emergence of shared understandings regarding the necessity of establishing the liability of legal persons for the bribery of foreign pubic officials in international business transactions. Further to the emergence of these shared understandings, the content of the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* meets all the criteria of legality that ensure the legitimacy of international norms. Moreover, the sense of obligation emanating from these two international instruments is constantly consolidated through a practice of legality between the numerous international actors involved in their implementation process. Cross-references to these OECD anti-bribery instruments in other international instruments, general statements regarding their inherent sense of obligation and the acknowledgement of the contribution of peer review to influence the decisions of member states unambiguously demonstrate the existence of a community of practice that feels bounded by these international norms. Finally, the fact that the elaboration and the implementation of these instruments are perceived as being in line with the interests of the most powerful members of the community of practice surrounding the OECD anti-bribery instruments is a key element that must be taken into account when examining the normative character of these instruments.

Chapter 7 – International Labour Organization

Introduction

A micro-level analysis of the normative character of international instruments elaborated and implemented under the auspices of intergovernmental organizations to codify foreign investors' responsibilities calls upon the consideration of the International Labour Organization's ("ILO") work. While this organization is a specialized agency of the United Nations ("UN"),[1] its relative autonomy from the main organs of the UN entails a different normative process that justifies its consideration as a separate intergovernmental organization.[2] In parallel to normative developments that occurred in other organizations in the 1970s, the ILO initiated the elaboration of an international instrument that includes norms pertaining to the conduct of multinational enterprises with a primary focus on labour rights and social policy. Further to an initial version adopted in 1977, this organization still commits considerable efforts to implement the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* ("*ILO Tripartite Declaration*").[3]

With a view to positioning the *ILO Tripartite Declaration* on a continuum that varies from social norms to legal norms, the present chapter relies on the interactional theory of international law, as well as on a traditional method in international law and a critical discourse analysis.[4] The analysis below suggests that, despite almost forty years of efforts to implement this informal international instrument, the *ILO Tripartite Declaration* has failed to reach the threshold of legality. After contextualizing the elaboration of norms within the ILO's unique tripartite structure (1), this chapter argues that the *ILO Tripartite*

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[1] See United Nations, *The United Nations Today* (New York: United Nations, 2008) at 22.

[2] The instruments adopted by the main organs of the UN are addressed in Chapter 8 of the present dissertation.

[3] For the first version, see *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, November 1977, 17 ILM 422 [*ILO Tripartite Declaration 1977*]. For the most recent version of this instrument, see *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, March 2006, online: ILO <http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm> (accessed 14 September 2016) [*ILO Tripartite Declaration 2006*].

[4] See Chapter 2 and Chapter 3.

Declaration appears as a weak social norm that still struggles to influence the behavior of international actors, let alone to induce any sense of obligation (2).

1. The ILO: Tripartite Norms in a Context of Neoliberal Globalization

Considering the institutional features of the intergovernmental organization from which the *ILO Tripartite Declaration* has emerged ensures a more contextualized analysis of its normative character. Article 19 of the *Constitution of the International Labour Organization* ("*ILO Constitution*")[5] allows the General Conference of representatives of member states ("Conference") to adopt *conventions* as well as *recommendations* "where the subject … is not considered suitable or appropriate at that time for a [c]onvention".[6] While conventions require ratification by member states and enactment of legislation,[7] recommendations must be communicated to all member states "for their consideration with a view to effect being given to it by national legislation or otherwise".[8] Furthermore, through representations of non-observance formulated by industrial associations[9] and complaints filed by member states,[10] several provisions of the *ILO Constitution* intend to foster the implementation of conventions that are adopted by the Conference. By contrast, *declarations* are not expressly addressed in the *ILO Constitution* and are considered as resolutions generally adopted by the Conference with a view to providing an authoritative statement that reaffirms the importance of certain principles and values, without relying on any specific mechanism to foster their implementation.[11]

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[5] *Constitution of the International Labour Organization*, 1 April 1919, 15 UNTS 40 (entered into force 28 June 1919) [*ILO Constitution*].

[6] *Ibid*, art 19(1).

[7] See *ibid*, art 19(5).

[8] See *ibid*, art 19(6). See also Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Oxford: Hart Publishing, 2013) at 38.

[9] See *ILO Constitution*, *ibid*, art 24.

[10] See *ibid*, art 26.

[11] See ILO, *ILO Declarations*, online: ILO <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_428589/lang--en/index.htm> (accessed 14 September 2016) [ILO, "ILO Declarations"].

What underlies this normative function of the ILO is a unique tripartite structure. In contrast to other organizations that have chosen to rely on the expertise of non-state actors after their initial constitution, the *ILO Constitution* established a tripartite Governing Body from its very beginning. Considered as the executive council of the ILO, the Governing Body includes representatives from member states, employers' associations and workers' associations that elaborate proposals before submitting them to the Conference.[12] By placing the representatives of employers and workers on an "equal footing" with government representatives in decision-making,[13] the composition allows a social dialogue that ensures the elaboration and implementation of legitimate labour standards reflecting deliberations between these various parties.[14] From a historical perspective, this tripartite structure is also considered as having played a decisive role in the development and the dissemination of international standards produced by the ILO.[15] Ultimately, the ILO's tripartite structure highlights the relevance of a legal pluralist and constructivist analytical framework that explicitly takes into account the role of private actors in shaping international norms.

While the *ILO Tripartite Declaration* was elaborated in the 1970s, it is worth addressing how this intergovernmental organization has evolved in a context of neoliberal globalization before delving into the analysis of this instrument's normative character. One can identify competing effects that the end of the Cold War produced on the capacity of the ILO to elaborate and implement international norms. According to Maupain, the pluralistic model of the ILO that sought to strike a balance between the interests of workers and employers was opposed to the monolithic conception in the Soviet Bloc countries that focused on the interests of the proletariat.[16] In this regard, the "collapse of the ILO's rival model [deprived] the organisation of an ideological counterweight that had proven to be an

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[12] See *ILO Constitution*, *supra* note 5, art 7(1).

[13] See Maupain, *supra* note 8 at 8.

[14] See *ibid* at 6-7 and 38. See also ILO, *How the ILO Works*, online: ILO <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm> (accessed 14 September 2016).

[15] See Sandrine Kott & Joëlle Droux, "Introduction: A Global History Written from the ILO" in Sandrine Kott & Joëlle Droux, eds, *Globalizing Social Rights: The International Labour Organization and Beyond* (New York: Palgrave Macmillan, 2013) 1 at 7.

[16] Maupain, *supra* note 8 at 24.

essential element of its persuasive powers not only vis-à-vis employers, but with a number of governments as well".[17] While the exacerbation of competition between states with the advent of globalisation has arguably increased the need to agree on some international labour standards,[18] such a declining capacity of persuasion led to a sharp decrease in the will of employers and some governments to engage in the elaboration of international norms under the auspices of this intergovernmental organization. Except in exceptional cases, employers have thus limited their support to international norms geared toward the revision of pre-existing instruments and several governments appeared to be reluctant to adopt new conventions.[19] In other words, the ILO can be perceived as a normative site that is increasingly struggling to elaborate and implement standards in the current context of neoliberal globalization in which it operates.

Overall, the elaboration and the implementation of an international instrument to address potential violations of labour rights through foreign investors' activities like the *ILO Tripartite Declaration* must be analyzed by taking into account the institutional context from which it emerges. In addition to conventions and recommendations that can be adopted by the Conference, this tripartite intergovernmental organization can issue declarations on specific matters. Moreover, amidst doubts pertaining to the extent to which these norms are well-suited to influence the conduct of international actors in a context of neoliberal globalization, an assessment of the normative character of the *ILO Tripartite Declaration* appears as an interesting test in this regard.

2. The *ILO Tripartite Declaration*

While focusing primarily on labour rights, the *ILO Tripartite Declaration* covers crucial aspects pertaining to foreign investors' activities. In this regard, the principles that are included in this informal international instrument address issues of general policies,

[17] *Ibid* at 29.

[18] *Ibid* at 17.

[19] *Ibid* at 43-44.

employment, training, conditions of work and life, as well as industrial relations.[20] The *ILO Tripartite Declaration* nevertheless appears as a weak social norm that bears a limited capacity to influence the behavior of international actors. With respect to shared understandings underlying the elaboration of this instrument, various resolutions and reports demonstrate that several actors have sought to avoid the elaboration of an instrument whose observance would have been mandatory since its inception (2.1). While the provisions of the *ILO Tripartite Declaration* fall short of meeting several criteria of legality (2.2), the analysis below also suggests that the practice according to which this instrument is implemented remains weak and cannot be characterized as implying any legal character (2.3).

2.1 Shared Understandings: Seeking a Non-Mandatory Instrument from the Beginning

In a way that reflects the elaboration of the *Guidelines for Multinational Enterprises* by the Organisation for Economic Co-operation and Development ("*OECD Guidelines*"),[21] several actors within the ILO appear as *norm entrepreneurs* that initially pushed for the elaboration of an international instrument addressing the activities of multinational enterprises in parallel to normative developments occurring under the auspices of the UN. While the preamble of the *ILO Tripartite Declaration* mentions that "various Industrial Committees, Regional Conferences, and the International Labour Conference since the mid-1960s have requested appropriate action by the Governing Body in the field of multinational enterprises and social policy",[22] the active role of capital-importing states and workers' representatives is specifically put forward by various authors.[23] In November 1975, the Governing Body decided to hold a Tripartite Advisory

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[20] See the main parts of the *ILO Tripartite Declaration 2006*, *supra* note 3.

[21] The *OECD Guidelines for Multinational Enterprises* are included in Annex 1 of the *Declaration on International Investment and Multinational Enterprises*. See *Declaration on International Investment and Multinational Enterprises*, 21 June 1976, Doc No C(76)99/FINAL (1976).

[22] *ILO Tripartite Declaration 2006*, *supra* note 3, Preamble.

[23] See e.g. Hans Günter, "The Tripartite Declaration of Principles concerning the Multinational Enterprises and Social Policy (History, Contents, Follow-up and Relationship with Relevant Instruments of Other

Meeting on the relationship of Multinational Enterprises and Social Policy ("Tripartite Advisory Meeting") that "should give policy advice on the usefulness of international principles and possibly make suggestions as regards the form and the actual content of a text embodying such principles".[24] Further to an initial meeting held in 1976, the Tripartite Advisory Meeting recommended to make arrangements in order to elaborate a "non-mandatory" tripartite declaration of principles concerning multinational enterprises and social policy of a "voluntary character" that could be transmitted to the UN "for incorporation in the proposed Code of Conduct".[25] After the preparation of a draft declaration, the Governing Body decided to reconvene the Tripartite Advisory Meeting[26] and to adopt the *ILO Tripartite Declaration* in November 1977.[27]

Further to the adoption of its initial version, and after recognizing that procedures established under the *ILO Constitution* for the application of ratified conventions were "neither directly nor by analogy applicable to the follow-up of a *non-mandatory Declaration*",[28] a follow-up procedure was established in order to invite governments to report periodically on the effect given to the Declaration.[29] With respect to disputes arising

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Organizations)" (1981), online: ILO <http://www.ilo.org/empent/Publications/WCMS_125794/lang--en/index.htm> (accessed 14 September 2016) at 1 [Günter, "Tripartite Declaration"]; Peter T Muchlinski, *Multinational Enterprises and the Law*, 2d ed (Oxford: Oxford University Press, 2007) at 474–475 [Muchlinski, *Multinational Enterprises*]; Peter Muchlinski, "Corporate Social Responsibility" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 637 at 646 [Muchlinski, "Corporate Social Responsibility"].

[24] See ILO, *Progress of ILO Activities on Multinational Enterprises*, 198th Sess, GB.198/5/6 (1975) at para 70. See also Günter, "Tripartite Declaration", *ibid* at 2.

[25] ILO, *Tripartite Advisory Meeting on the Relationship of Multinational Enterprises and Social Policy – Report of the Meeting*, 1976, MNE/1976/D.12, Appendix I at paras 1, 2(a) and 5 [*Tripartite Advisory Meeting – 1976*]. See also Günter, "Tripartite Declaration", *ibid* at 21; Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) at 254; Khalil Hamdani & Lorraine Ruffing, *United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest* (London: Routledge, 2015) at 113.

[26] See ILO, *Reconvened Tripartite Advisory Meeting on the Relationship of Multinational Enterprises and Social Policy*, 1977, MNE/1977/D.8 at para 1 [*Tripartite Advisory Meeting – 1977*].

[27] *ILO Tripartite Declaration 1977*, *supra* note 3.

[28] See ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy: Possibilities of a Follow-up Procedure*, 205th Sess, GB.205/10/2 (1978) at para 2 [emphasis added] [ILO, *Possibilities of a Follow-up*]. See also Hans Günter, "The Tripartite Declaration of Principles (ILO): Standards and Follow-Up" in *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 155 at 165 [Günter, "Standards and Follow-up"]; Günter, "Tripartite Declaration", *supra* note 23 at 11.

[29] See ILO, *Possibilities of a Follow-up*, *ibid* at para 9. See also Günter, "Standards and Follow-up", *ibid* at 166-167; Günter, "Tripartite Declaration", *ibid* at 11; Zerk, *supra* note 25 at 256; Muchlinski, *Multinational Enterprises*, *supra* note 23 at 475; Karl P Sauvant, "The Negotiations of the United Nations Code of Conduct

from the application of the *ILO Tripartite Declaration*, a specific procedure was adopted by the Governing Body in 1986.[30] Further to the adoption of this specific procedure and in contrast to several revision processes that occurred for other international instruments discussed in the present dissertation, the *ILO Tripartite Declaration* was mainly characterized by amendments and addendums related to other ILO instruments referred to or relevant for this declaration.[31] Beyond the inclusion of one annex and two addendums, the text of the *ILO Tripartite Declaration* was thus amended in 2000 and 2006.[32]

Stated according to the terms employed by the interactional theory of international law, participants in the Tripartite Advisory Meeting and other members of the Governing Body that participated in discussions pertaining to subsequent amendments of this instrument are members of a *community of practice* involved in the elaboration of the *ILO Tripartite Declaration*. For example, the Tripartite Advisory Meeting was composed of twenty-four "specialists" from governments, workers' and employers' circles, as well as the Director-General of the ILO and the Executive Director of the UN Centre on Transnational Corporations.[33] With a view to assessing the existence of shared understandings underlying the elaboration of the *ILO Tripartite Declaration*, the remaining of this section critically analyzes the content of the reports that were submitted by the

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on Transnational Corporations: Experience and Lessons Learned" (2015) 16 J World Investment & Trade 11 at 33.

[30] ILO, *Procedure for the Examination of Disputes concerning the Application of the Tripartite Declaration*, 233th Sess, Official Bulletin, Vol LXIX, Series A, No 3 (1986) at 196-197 [ILO, *Procedure for the Examination of Disputes*]. This procedure replaced a less detailed procedure that was adopted in 1980. See ILO, *Procedure concerning the Effect Given to the Declaration*, 214th Sess, Official Bulletin, Vol LXIV, Series A, No 1 (1981) at 89-90. See also Zerk, *ibid* at 257; Muchlinski, *Multinational Enterprises*, *ibid* at 475; Sauvant, *ibid* at 33.

[31] See ILO, *Report of the Committee on Multinational Enterprises*, 231th Sess, Official Bulletin, Vol LXIX, Series A, No 1 (1986) at 15; ILO, *Addendum to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 238th Sess, Official Bulletin, Vol LXXI, Series A, No 1 (1988) at 12 and 50-51; ILO, *Other Questions: Updating of References to Conventions and Recommendations in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 264th Sess, GB.264/MNE/3 (1995); ILO, *Report of the Subcommittee on Multinational Enterprises*, 277th Sess, GB.277/12 (2000) at para 61; ILO, *Promotion of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 295th Sess, GB.295/MNE/1/3 (2006). See also Zerk, *ibid* at 255; Muchlinski, *Multinational Enterprises*, *ibid* at 489; Muchlinski, "Corporate Social Responsibility", *supra* note 23 at 650; Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London: Routledge, 2012) at 90 [Deva, *Regulating Corporate Human Rights*].

[32] *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, November 2000, 41 ILM 186; *ILO Tripartite Declaration 2006*, *supra* note 3.

[33] *Tripartite Advisory Meeting – 1976*, *supra* note 25 at paras 2 and 9.

Tripartite Advisory Meeting in 1976 and 1977,[34] as well as semi-structured interviews that were conducted with individuals working for intergovernmental organizations involved in the codification of foreign investors' responsibilities.

Despite some disagreements pertaining to the content of the international instrument,[35] it is plain from the discourses of various members of the community of practice that the crucial point on which the Tripartite Advisory Meeting failed to reach any agreement relates to the legal nature of the *ILO Tripartite Declaration*. Several capital-exporting states and representatives of employers recalled that they would only support a non-mandatory initiative.[36] For example, according to the first report of the Tripartite Advisory Meeting, the representative of the United States "had serious reservations concerning a proposal that the ILO should prepare guidelines directed at multinational enterprises" and stressed that he would only support a statement of principles that would be "(i) non-discriminatory with regard to international and domestic enterprises; (ii) *voluntary*; (iii) in consonance with relevant national and international law; and (iv) even-handed in assigning responsibilities to multinational enterprises, labour, and governments".[37] Similarly, the employer members of the advisory meeting appeared to be convinced that a tripartite declaration would be harmful unless its principles "*do not bind multinationals* to observance of ILO standards not ratified or accepted by the host country, or introduce a system of standards making existing ILO Conventions and Recommendations applicable only to multinational enterprises," among others.[38]

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[34] *Ibid*; *Tripartite Advisory Meeting – 1977*, *supra* note 26.

[35] For example, while employers considered the application of conditions prevailing in the home country on an international basis as inappropriate, workers argued that multinational enterprises should be expected to set exemplary standards due to their high profits and ability to pay. See *Tripartite Advisory Meeting – 1976*, *supra* note 25 at paras 39 and 41. Moreover, the Tripartite Advisory Meeting reported that "[the Government member for USSR] regretted that much of the draft text was almost identical with the OECD Guidelines for Multinational Enterprises, as this might reflect upon the ILO's capacity to work out solutions". See *Tripartite Advisory Meeting – 1977*, *supra* note 26 at para 9.

[36] In addition to the discourses below, see Günter, "Standards and Follow-up", *supra* note 28 at 157; Günter, "Tripartite Declaration", *supra* note 23 at 3; Muchlinski, "Corporate Social Responsibility", *supra* note 23 at 647-648.

[37] *Tripartite Advisory Meeting – 1976*, *supra* note 25 at para 75 [emphasis added]. This position was also supported by the representative of Japan at para 80.

[38] *Ibid* at paras 84-85 [emphasis added]. See also the position of the International Organisation of Employers at para 121.

By contrast, capital-importing states and workers' associations generally supported the elaboration of a formal convention that would bear a mandatory character.[39] A member of the Mexican government thus stressed that "[a] code of conduct should be in harmony with present international law, as laid down in the new International Economic Order and the Charter of the Rights and Duties of States" and was in favor of "a declaration of principles providing for the control of multinationals, *which would lead up to an ILO Convention*".[40] Along the same lines, the Tripartite Advisory Meeting reported that a worker member "stressed the need in the Latin American context to establish principles which would lead to control of the multinational enterprises through *effective and legally binding* machinery enforceable at the international level".[41] A worker member of the reconvened Tripartite Advisory Meeting even abstained from the adoption of the *ILO Tripartite Declaration*, because the instrument "did not conform to ILO practice, besides being of a *purely voluntary nature* and devoid of influence on any subsequent adoption of a *binding instrument* governing multinational enterprises".[42]

These elements of the Tripartite Advisory Meeting's discussions are also echoed in the discourses of several interviewees. One of them thus underscored that while "the workers group, supported by the developing countries, were pushing … for an international legal convention, … [t]hey were strongly opposed by the employers group and also less than enthusiastic positions by the OECD governments".[43] A similar issue was also summarized by another interviewee in the following terms:

> [Employers] are very much willing to engage in the whole process, but it depends under which terms, I would say. So if this is a purely *voluntary enterprise driven process*, then they don't have any problems to be involved in this process. From the moment that you start to talk about increasing and making that concrete

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[39] In addition to the discourses below, see Günter, "Tripartite Declaration", *supra* note 23 at 3; Kavaljit Singh, "Corporate Accountability: Is Self-Regulation the Answer?" in Gary Teeple & Stephen McBride, eds, *Relations of Global Power: Neoliberal Order and Disorder* (Toronto: University of Toronto Press, 2011) 60 at 65.

[40] *Tripartite Advisory Meeting – 1976*, *supra* note 25 at para 77 [emphasis added].

[41] *Ibid* at para 78 [emphasis added]. See also the position of the World Federation of Trade Unions at para 119.

[42] See *Tripartite Advisory Meeting – 1977*, *supra* note 26 at para 72 [emphasis added].

[43] Interview 17.

> instruments and procedures to talk about responsibilities of private sector, then yes, private sector is more reluctant there.[44]

The same interviewee stressed that the avoidance of a mandatory instrument by employers can also be found in their attempts at "not including procedural mechanisms that make it possible to be held accountable".[45]

One aspect that is particularly explicit in the work of the Tripartite Advisory Meeting is that the discourses of several participants reproduce *relations of power* underlying the elaboration of the international instrument and impeding the reach of shared understandings regarding its legal nature. While the employers maintained that "the impression of ever-growing power of multinational enterprises to override the authority of governments and prevail against the power of national trade unions was not proven and did not justify such action as could only handicap development",[46] other participants in the meeting emphasized the need to contain the power of multinational enterprises through international control. For example, the representative of the Union of Soviet Socialist Republics underscored that "[o]wing to their *economic power* the transnational corporations occupy a *stronger and even predominant position* as compared to the trade unions, and in a number of cases in comparison with governments".[47] The extent to which such relations of power impeded the emergence of shared understandings was particularly manifest at the reconvened Tripartite Advisory Meeting, where a worker representative justified his abstention in a vote pertaining to the *ILO Tripartite Declaration* by expressly relying on the power of multinational enterprises. As reported by the ILO:

> [A worker member] considered that the draft conclusions revealed practically no trace of the original joint views of the Workers' group. The tribute to a positive role of the multinational enterprises in the preamble was ideological and unacceptable. The decisive factor for opposing the *multinationals which in the capitalist world had economic, political and ideological power*, was the mass struggle of the workers, but it was also desirable to elaborate an international instrument to control them; this would be done most appropriately in the United Nations, with the ILO playing its part under UN guidance.[48]

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[44] Interview 3.

[45] *Ibid*.

[46] *Tripartite Advisory Meeting – 1976*, *supra* note 25 at para 112.

[47] *Ibid* at para 76 [emphasis added].

[48] *Tripartite Advisory Meeting – 1977*, *supra* note 26 at para 99 [emphasis added].

In sum, the elaboration process of the *ILO Tripartite Declaration* reflects a serious lack of shared understandings to elaborate a mandatory instrument from the very beginning. While the absence of such an agreement can be found in the conclusions of the Tripartite Advisory Meeting and the decisions pertaining to the adoption of a follow-up procedure, the discourses of the members of the community of practice unambiguously demonstrate divergent views with respect to the legal nature of the *ILO Tripartite Declaration*. Amidst relations of power underlying the elaboration of this instrument, the development of a non-mandatory initiative primarily reflects the interests of powerful states and representatives of the employers, thus seriously impeding any sense of obligation that could emanate from this initiative.

2.2 Criteria of Legality: Tensions and Failures

Regardless of an international instrument's relation with the formal sources of international law, the interactional theory of international law posits that it has to meet a set of criteria of legality in order to be considered as a legal norm. While failure to meet this component of the interactional theory affects the legitimacy of an international initiative, the conclusion that the *ILO Tripartite Declaration*'s has not entered into the realm of legality is partly grounded in tensions and failures that characterize the relation between this initiative and the majority of requirements found in these criteria.

From the outset, suggesting that the informal character of the *ILO Tripartite Declaration* entails a failure to meet the criterion of *promulgation* would be grossly inconsistent with the analysis of the *OECD Guidelines* presented in the previous chapter.[49] In fact, even if the form of this declaration differs from a convention or a recommendation that can be adopted by the Conference, the *ILO Tripartite Declaration* is published by the ILO and is undeniably available to the public. Yet, there is at least one aspect related to the promulgation of this initiative that hints toward the generation of a weak sense of obligation. While the Conference regrouping all states representatives has adopted various

[49] See section 2.2 of Chapter 6.

declarations that "contain symbolic and political undertakings by the member States",[50] the *ILO Tripartite Declaration* is the only declaration that was adopted by the Governing Body.[51] Amidst the various forms that norms elaborated by the ILO can take, the *ILO Tripartite Declaration* thus appears as a *sui generis* instrument that does not sit well with the other initiatives emanating from this intergovernmental organization. As a result, one can note an unavoidable tension with respect to the promulgation of this initiative.

The content of this international instrument suggests a fairly broad application that is in line with the criterion of *generality*. Paragraph 8 of the *ILO Tripartite Declaration* thus stipulates that "*[a]ll the parties* concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards".[52] Another aspect echoing this general character is the inclusion of several provisions that seek to avoid discrimination between multinational enterprises and domestic firms. While Paragraph 11 mentions that "[t]he principles laid down in this Declaration do not aim at introducing or maintaining inequalities of treatment between multinational and national enterprises",[53] other provisions expressly establish similar requirements for both types of enterprises.[54]

To a certain extent, the terms of the *ILO Tripartite Declaration*'s provisions can also be considered as providing sufficient *clarity* to live up to the requirements of the criteria of legality. Despite the absence of a definition of "multinational enterprises", the various aspects that are covered in Paragraph 6 allow a fairly clear understanding of these private firms, at least from an economic perspective.[55] The numerous references to ILO

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[50] See ILO, "ILO Declarations", *supra* note 11.

[51] See *ibid*. See also Hans W Baade, "The Legal Effects of Codes of Conduct for Multinational Enterprises" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 3 at 6; Alice De Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Northampton: Edward Elgar, 2011) at 29 [De Jonge, *Transnational Corporations*]; Maupain, *supra* note 8 at 47.

[52] *ILO Tripartite Declaration 2006*, *supra* note 3 at para 8 [emphasis added].

[53] *Ibid* at para 11.

[54] See e.g. *ibid* at paras 36 and 56. See also Emily Sims, "The ILO Declaration of Principles concerning Multinational Enterprises and Social Policy: Strengths & Provisions" in Roger Blanpain & Michele Colucci, eds, *International Encyclopedia for Labour Law and Industrial Relations* (Alphen aan den Rijn: Kluwer Law International, 2013) 1 at para 18.

[55] See *ILO Tripartite Declaration 2006*, *ibid* at para 6. See also Günter, "Standards and Follow-up", *supra* note 28 at 158; Günter, "Tripartite Declaration", *supra* note 23 at 8.

conventions and recommendations also contribute to improve the overall clarity of this informal international instrument.[56] However, compromises made during the negotiation of some specific provisions have considerably affected this clarity in some instances. For example, Paragraph 27 reads as follow: "Arbitrary dismissal procedures should be avoided".[57] In addition to the absence of information on the meaning of such procedures and the extent to which they "should be avoided", this provision does not include any specific addressees. According to the report of the reconvened Tripartite Advisory Meeting, this phrasing results from a proposal of the representative of the United Kingdom as a response to a wish from the employers "to avoid any implication that special *obligations* were being placed on multinational enterprises".[58] While such an evasive provision considerably affects the clarity of the instrument, the justification underlying its formulation unambiguously demonstrates a will to limit the sense of obligation resulting from the instrument.

Two other criteria do not pose any particular problem with respect to the *ILO Tripartite Declaration*. Given that the amendments adopted since the initial version of this instrument primarily aim to reflect other instruments emanating from this intergovernmental organization, nothing in the subsequent versions of the *ILO Tripartite Declaration* seriously impedes its *constancy*. Moreover, as far as the requirement of *non-retroactivity* is concerned, it is worth noting that nothing in the provisions of this international instrument relates to its temporal application. Therefore, the *ILO Tripartite Declaration* appears to live up to the requirements of these two criteria.

Another criterion that seems to be met by this informal international instrument relates to the establishment of requirements that can be achieved within its subjects' activities *without asking the impossible*. Of course, several provisions of the *ILO Tripartite Declaration* encapsulate enough flexibility to ensure that their demands are feasible. For example, Paragraph 9 urges states "to apply, *to the greatest extent possible*, through their national policies, the principles embodied" in specific ILO conventions and

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[56] See *ILO Tripartite Declaration 2006*, *ibid*, Annex and Addendum I. According to Muchlinski, these international instruments form the "background principles" on which the *ILO Tripartite Declaration* is based. See Muchlinski, *Multinational Enterprises*, *supra* note 23 at 474.

[57] *ILO Tripartite Declaration 2006*, *ibid* at para 27.

[58] *Tripartite Advisory Meeting – 1977*, *supra* note 26 at para 32 [emphasis added].

recommendations.[59] Paragraph 17 mentions that "[b]efore starting operations, multinational enterprises should, *wherever appropriate*, consult the competent authorities and the national employers' and workers' organizations in order to keep their manpower plans, *as far as practicable*, in harmony with national social development policies".[60] However, the absence of an explicit recognition of potential conflicting requirements imposed by domestic legislation and international standards can lead to a tension with respect to this criterion of legality. While the *OECD Guidelines* specify that the observance of this international instrument is not intended to place enterprises in situations where they face conflicting requirements with domestic law,[61] such an articulation is not expressly included in the *ILO Tripartite Declaration*. The aforementioned Paragraph 8 thus calls upon multinational enterprises to obey national law and regulations, as well as to respect relevant international standards.[62] Without asking the impossible, it must be noted that such a provision creates a tension to the extent that it fails to recognize that conflicting requirements may emerge.[63]

When considering the tension between the noble aim of an instrument and its express voluntary character, the issue raised in the previous chapter pertaining to the criterion of *non-contradiction* appears to be even more apparent in the case of the *ILO Tripartite Declaration* than in the *OECD Guidelines*.[64] In the first paragraph of this initiative, it is acknowledged that "the advances made by multinational enterprises in organizing their operations beyond the national framework may lead to *abuse* of concentrations of economic power and to *conflicts* with national policy objectives and with

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[59] *ILO Tripartite Declaration 2006*, *supra* note 3 at para 9 [emphasis added].

[60] *Ibid* at para 17 [emphasis added]. Similar provisions can be found at paras 19, 20, 30, 31, 32 and 37, for example.

[61] *Declaration on International Investment and Multinational Enterprises*, 25 May 2011, Doc No C/MIN(2011)11/FINAL (2011), Annex 1 at para I(2).

[62] *ILO Tripartite Declaration 2006*, *supra* note 3 at para 8.

[63] Interestingly, this feature of the *ILO Tripartite Declaration* can be considered as going beyond the *OECD Guidelines* and ensuring that foreign investors' refer to ILO instruments that have not been ratified by a host state. See Olivier De Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in Olivier De Schutter, ed, *Transnational Corporations and Human Rights* (Portland: Hart Publishing, 2006) 1 at 5–6. By contrast, the same paragraph is sometimes considered as allowing "a very wide discretion … to the investor not to apply best practices but only local practices, which may be inadequate to ensure compliance with 'best practices' standards". See Muchlinski, "Corporate Social Responsibility", *supra* note 23 at 682.

[64] See section 2.2 of Chapter 6.

the interest of the workers".[65] Yet, such abuse of economic power and potential conflicts are solely addressed through principles, "which governments, employers' and workers' organizations and multinational enterprises are *recommended to observe on a voluntary basis*".[66] The voluntary nature of the *ILO Tripartite Declaration* is also recalled in Addendum I and Addendum II of the instrument.[67] As mentioned in the previous chapter, such a situation creates a tension regarding the criterion of non-contradiction and can entail a considerable impact on the normative character of the instrument when international actors rely on this aspect to avoid a binding practice.

Finally, with respect to the criterion of *congruence*, neither of the two aforementioned follow-up mechanisms adopted by the Governing Body constitutes a procedural mechanism that allows addressing significant instances of non-compliance. Regarding the procedure to invite governments to report periodically on the effect given to the *ILO Tripartite Declaration* that was established in 1978, the Governing Body clearly stated that the non-mandatory nature of this initiative prevented the adoption of a procedure pertaining to particular instances of non-compliance.[68] It is also worth noting that these periodical reports have been set aside in 2008[69] and replaced by a different information-gathering process occurring at the regional level that also avoids addressing instances of non-compliance.[70] The absence of consideration for non-compliance can also be found in

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[65] *ILO Tripartite Declaration 2006*, *supra* note 3 at para 1 [emphasis added].

[66] *Ibid* at para 7 [emphasis added]. See also De Schutter, *supra* note 63 at 6.

[67] *ILO Tripartite Declaration 2006*, *ibid*, Addendum I and Addendum II.

[68] ILO, *Possibilities of a Follow-up*, *supra* note 28 at para 14. See also Günter, "Standards and Follow-up", *supra* note 28 at 169-170; Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford: Oxford University Press, 2006) at 216; Zerk, *supra* note 25 at 257; Jernej Letnar Černič, "Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" (2009) 6 Miskolc J Int'l L 24 at 29–30; Aishwarya Padmanabhan, "Human Rights and Corporations: An Evaluation of the Accountability and Responsibility of MNCs under the ILO Framework" (2011) 42 J Corp Citizenship 8 at 10–11; Alice De Jonge, "Transnational Corporations and International Law: Bringing TNCs Out of the Accountability Vacuum" (2011) 7:1 Crit Perspectives Int'l Bus 66 at 73; Sims, *supra* note 54 at para 19; Sauvant, *supra* note 29 at 37.

[69] See ILO, *Proposal for Evaluating the Effect Given to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 301th Sess, GB.301/MNE/4 (2008) at para 13. For an account of the weak participation of states in these periodic reports, see De Jonge, *Transnational Corporations*, *supra* note 51 at 30-31.

[70] See ILO, *Update on the Implementation of the Promotional Framework and Follow-up to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, Including ILO Collaboration with other Intergovernmental and International Organizations*, 325th Sess, GB.325/POL/9 (2015) at para 16.

the *Procedure for the Examination of Disputes concerning the Application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy by Means of Interpretation of its Provisions* ("*Procedure for the Examination of Disputes*") that was adopted in 1986.[71] Given that the purpose of the procedure "is to interpret the provisions of the Declaration when needed to resolve a disagreement on their meaning, arising from an actual situation, between parties to whom the Declaration is commended",[72] it is plain that this mechanism is not geared toward determining whether a party has failed the meet the requirements of the *ILO Tripartite Declaration*. Moreover, Paragraph 2 of this procedure excludes from its scope any interpretation pertaining to national law, ILO conventions and recommendations, as well as freedom of association.[73]

Even if the *ILO Tripartite Declaration* meets the requirements of some criteria of legality, unavoidable issues remain with a majority of them and affect the legitimacy of this international initiative. The uncommon promulgation, the lack of clarity regarding some provisions, the tension pertaining to unaddressed potential conflicting requirements, the contradiction between the acknowledgment of the power of multinational enterprises and the voluntary observance of the principles the instrument encapsulates, as well as the absence of a procedural mechanism to address specific instances of non-compliance all represent tensions and failures regarding the criteria of legality. Taken as a whole, these aspects constitute lacunas that are inherent to the content of the *ILO Tripartite Declaration* and that impede its evolution toward the realm of legality.

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[71] ILO, *Procedure for the Examination of Disputes*, *supra* note 30.

[72] *Ibid* at para 1. See also Günter, "Tripartite Declaration", *supra* note 23 at 12; Sarah Joseph, "Taming the Leviathans: Multinational Enterprises and Human Rights" (1999) 46 Nethl Int'l L Rev 171 at 182–183; Surya Deva, "Human Rights Violations by Multinational Corporations and International Law: Where from Here" (2003) 19 Conn J Int'l L 1 at 12–13; David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44 Va J Int'l L 931 at 950; Clapham, *supra* note 68 at 217; Zerk, *supra* note 25 at 257; Muchlinski, *Multinational Enterprises*, *supra* note 23 at 475; Muchlinski, "Corporate Social Responsibility", *supra* note 23 at 653; Černič, *supra* note 68 at 30-31; De Jonge, *Transnational Corporations*, *supra* note 51 at 30; Padmanabhan, *supra* note 68 at 12; Deva, *Regulating Corporate Human Rights*, *supra* note 31 at 91; Sims, *supra* note 54 at para 19; Sauvant, *supra* note 29 at 37; Hamdani & Ruffing, *supra* note 25 at 116.

[73] ILO, *Procedure for the Examination of Disputes*, *ibid* at para 2. See also Clapham, *ibid* at 217; Padmanabhan, *ibid* at 11.

2.3 Practice of Legality: A Weak and Non-Binding Practice

In addition to a consideration of shared understandings and criteria of legality, a thorough analysis of the *ILO Tripartite Declaration*'s normative character requires an examination of the practice according to which it is implemented. With a view to assessing the sense of obligation that emanates from the *ILO Tripartite Declaration*, this section demonstrates that the practice surrounding this initiative is highly problematic in several respects. While references to this international instrument and use of its procedure pertaining to disputes are relatively scarce, several discourses demonstrate a weak practice that cannot be considered as bearing any legal character.

A traditional method in international law is particularly well-suited to shed light on references to the *ILO Tripartite Declaration* in other international instruments that relate to the evolving codification of foreign investors' responsibilities. In this regard, the commentaries accompanying the *OECD Guidelines* include some paragraphs that expressly refer to the *ILO Tripartite Declaration*, stressing that the *OECD Guidelines*' provisions on employment and industrial relations echo several aspects addressed in the ILO instrument.[74] This practice is also strengthened by a memorandum of understanding pertaining to the implementation of each instrument agreed between the ILO and the OECD in 2011.[75] Moreover, the *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights* refer to the *ILO Tripartite Declaration* in their preamble.[76] However, the fact that other international initiatives – *e.g.* the *Guiding Principles on Business and Human Rights*[77] – do not mention the *ILO*

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[74] OECD, *OECD Guidelines for Multinational Enterprises, 2011 Edition* (Paris: OECD, 2011), Commentaries at paras 48, 49 and 56. See also Günter, "Standards and Follow-up", *supra* note 28 at 175; Günter, "Tripartite Declaration", *supra* note 23 at 15-16; Sims, *supra* note 54 at para 12.

[75] See ILO, *ILO Collaboration with Other Intergovernmental and International Organizations in Promoting the Principles of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 322th Sess, GB.322/POL/8 (2014) at para 27.

[76] *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights*, 2003, UN Doc E/CN.4//Sub.2/2003/12/Rev.2, Preamble.

[77] Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 2011, UN Doc A/HRC/17/31.

Tripartite Declaration suggests that the latter plays a more limited role in contributing to the codification of foreign investors' responsibilities than other initiatives.

Another element pointing toward a weak practice surrounding this international initiative is the limited use of the aforementioned *Procedure for the Examination of Disputes*. According to an internal document provided by an interviewee, only three requests for interpretation that explicitly identified provisions of the *ILO Tripartite Declaration* have resulted in the approval of an interpretation by the Governing Body since the adoption of this instrument.[78] What is more, no interpretation has been formally approved by the Governing Body since 1998, suggesting that this procedure has been largely unemployed and that members of the community of practice have almost given up on relying on this procedure to contribute to the implementation of this international instrument.[79]

Assessing whether the practice according to which the *ILO Tripartite Declaration* is implemented reflects a legal character is nevertheless better achieved by supplementing the traditional method in international law with a critical discourse analysis. Several sources of discourses are thus taken into account for present purposes: summaries of reports on the effect given to the *ILO Tripartite Declaration*;[80] documents from the Governing

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[78] For the interpretations that were approved by the Governing Body, see ILO, *Report of the Committee on Multinational Enterprises*, 229th Sess, Official Bulletin, Vol LXVIII, Series A, No 3 (1985) at 113-114; ILO, *Report of the Committee on Multinational Enterprises*, 239th Sess, Official Bulletin, Vol LXXI, Series A, No 3 (1988) at 138; ILO, *Report on the Subcommittee on Multinational Enterprises*, 272th Sess, Official Bulletin, Vol LXXXI, Series A, No 2 (1998) at 49-50. Two other requests for interpretation were submitted. However, one request was declared non-receivable and the other was submitted to the Governing Body for information only, given that the Subcommittee on Multinational Corporations was unable to approve one of the two conflicting interpretations. See also Zerk, *supra* note 25 at 257; Černič, *supra* note 68 at 31; Padmanabhan, *supra* note 68 at 12; Sims, *supra* note 54 at 21.

[79] See Padmanabhan, *ibid* at 13.

[80] ILO, *Summary of the Reports on the Effect Given to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 1980, GB/MNE/1980/D.1 [ILO, *Summary of First Government Reports*]; ILO, *Summary of Second Government Reports on the Effect Given to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy Submitted to the Committee on Multinational Enterprises*, 224th Sess, GB.224/MNE/1/1/D.1 (1983) [ILO, *Summary of Second Government Reports*]; ILO, *Summary of Third Government Reports on the Effect Given to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy Submitted to the Committee on Multinational Enterprises*, 234th Sess, GB.234/MNE/1/1/D.1 (1986) [ILO, *Summary of Third Government Reports*]; ILO, *Summary of Fourth Government Reports on the Effect Given to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy Submitted to the Committee on Multinational Enterprises*, 244th Sess, GB.244/MNE/1/1/D.1 (1989) [ILO, *Summary of Fourth Government Reports*]; ILO, *Summary of Reports Submitted by Governments and by Employers' and Workers' Organisations for the Fifth Survey on the Effect Given to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy Submitted to the Committee on Multinational Enterprises*, 1992,

Body with respect to requests for interpretation;[81] a summary of proceedings of a tripartite forum on the implementation of the *ILO Tripartite Declaration* held in 2002;[82] documents resulting from a symposium held in 2003;[83] the first report on regional meetings related to the new information-gathering procedure on the implementation of the *ILO Tripartite Declaration*;[84] and semi-structured interviews.

At first sight, some discourses related to the implementation of the *ILO Tripartite Declaration* can send a confusing signal pertaining to the legal character of the practice surrounding this international instrument. In fact, some summaries of reports on the effect given to the *ILO Tripartite Declaration* hint toward a practice of legality. For example, Mexico is considered as having "*observed* the principles of the Declaration and used them as guidelines for the drawing up of investment-related plans and programmes".[85] Along the same lines, the Federated Unions of Employers of Ireland stated that "the vast majority of multinational companies in Ireland act in a manner which is *entirely consistent with the principles in the Declaration*".[86] A stronger sense of obligation granted to the instrument at hand can also be found in some discourses. One summary of reports thus mentions that

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TDME/REP 5 (Rev.) [ILO, *Summary of Fifth Government Reports*]; ILO, *Summary of Reports Submitted by Governments and by Employers' and Workers' Organisations for the Sixth Survey on the Effect Given to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 268th Sess, GB.268/MNE/1/1B (1997) [ILO, *Summary of Sixth Government Reports*]; ILO, *Seventh Survey on the Effect Given to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy: Summary of Reports Submitted by Governments and by Employers' and Workers' Organizations*, 280th Sess, GB.280/MNE/1/2 (2001) [ILO, *Summary of Seventh Government Reports*]; ILO, *Eight Survey on the Effect Given to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy: Summary of Reports Submitted by Governments and by Employers' and Workers' Organizations*, 294th Sess, GB.294/MNE/1/2 (2005) [ILO, *Summary of Eight Government Reports*].

[81] These documents are cited in the text below.

[82] ILO, *Tripartite Forum on Promoting the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy: Summary of Proceedings*, 2002, TFTDME/2002/1 [ILO, *Tripartite Forum – Proceedings*].

[83] ILO, *Follow-up on the Symposium on the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and related Multilateral Initiatives*, 291th Sess, GB.291/MNE/1 (2004) [ILO, *Symposium Follow-up*].

[84] ILO, *Multinational Enterprises, Development and Decent Work: Report on the Promotion and the Application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in the Americas* (Geneva: ILO, 2014) [ILO, *First Report on Regional Meetings*].

[85] See ILO, *Summary of Fifth Government Reports*, *supra* note 80 at 21 [emphasis added].

[86] See ILO, *Summary of First Government Reports*, *supra* note 80 at 10 [emphasis added]. See also other examples in ILO, *Summary of Fifth Government Reports*, *ibid* at 25; ILO, *Summary of Seventh Government Reports*, *supra* note 80 at 51. Some workers' associations also put forward similar conclusions. See ILO, *Summary of Second Government Reports*, *supra* note 80 at 15.

a Swiss multinational enterprise "has stated that it considers it of *great importance* that its subsidiaries *should respect the principles set out in the industrial relations chapter of the Declaration*".[87] When reporting on the regulation of multinational enterprises that are operating in their home states, several actors thus submit that national legislation and general actions are largely consistent with the requirements of the declaration.

In general, such a consistency with the requirements of the *ILO Tripartite Declaration* must nevertheless not be conflated with measures induced by this international instrument *per se*. Given that the *ILO Tripartite Declaration* refers to several conventions and recommendations that have previously required legislative changes, these summaries of reports might reflect a practice of legality that relates more to these other international instruments than to the informal international instrument at hand. In this regard, the Government of Italy stated that "the principles embodied in the Declaration are applied in the country since most of the international labour [c]onventions cited in this instrument have been ratified".[88] Similarly, the Government of Panama reported to have "generally adopted measures to promote secure and stable employment, but not specifically within the framework advocated by the [*ILO Tripartite Declaration*]".[89] Such a nuance was also mentioned by some workers' associations. According to the Swiss Federation of Trade Unions, "[t]here have been no legal provisions established in Switzerland on the basis of the [*ILO Tripartite Declaration*]".[90] In other words, the few examples hinting toward a practice that implicitly acknowledge a legal character to the *ILO Tripartite Declaration* should not be considered as a proof that the members of the community of practice feel bounded to act according to this initiative.

What is more, the legal character of this practice has often been unambiguously rejected when specifically addressing the application of the *ILO Tripartite Declaration* to multinational enterprises operating outside their home country. The situation in Finland was thus described in the following terms:

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[87] ILO, *Summary of Second Government Reports*, *ibid* at 114 [emphasis added]. See also the statement from Kenya in ILO, *Summary of Seventh Government Reports*, *ibid* at 99.

[88] See ILO, *Summary of Fifth Government Reports*, *supra* note 80 at 35.

[89] See ILO, *Summary of Seventh Government Reports*, *supra* note 80 at 150.

[90] See *ibid* at 51. A similar statement was made by Finnish trade unions in ILO, *Summary of Third Government Reports*, *supra* note 80 at 204.

> Finnish enterprises have expanded their international activities, even to the extent that the management of certain branches has been transferred abroad. Expansion has taken place through investment, mergers and take-overs, and it is linked to the changes in the structure of the European economy. Regrettably, *little attention continues to be paid in this process by either the enterprises or government authorities to key principles in the ILO Tripartite Declaration*.[91]

Similarly, the Danish Employers' Organization observed "that neither the ILO Declaration nor the OECD Guidelines gave employees a legal right to demand formal negotiations across national borders",[92] while the General Confederation of Labor in France reported that "[multinational enterprises] of French origin … have not attempted to actively apply the principles of the [*ILO Tripartite Declaration*] either, as they have associated profit growth with reduction in staff".[93]

Comments by various members of the community of practice depicting the *ILO Tripartite Declaration* as a voluntary instrument that primarily seeks to improve a social dialogue also render the general absence of a practice of legality. Such a position was summarized during a symposium that was held in 2003 in the following terms: "Today, the [*ILO Tripartite Declaration*] represents a unique set of guidelines for *voluntary action* on labour issues and the only one agreed to by the social partners on the basis of universal standards. The [*ILO Tripartite Declaration*] seeks to *inspire good policy and practice* in international investment and to promote partnerships based on *social dialogue*".[94] Since the adoption of the initial version, the voluntary nature of this international instrument has also been often considered as a crucial aspect for the support from employers' associations[95] and some states,[96] while being sharply criticized by workers' associations.[97]

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[91] See ILO, *Summary of Fourth Government Reports*, *supra* note 80 at 25 [emphasis added].

[92] See *ibid* at 164. See also ILO, *Summary of Fifth Government Reports*, *supra* note 80 at 206.

[93] See ILO, *Summary of Seventh Government Reports*, *supra* note 80 at 26.

[94] ILO, *Symposium Follow-up*, *supra* note 83 at para 3.

[95] See e.g. ILO, *Summary of First Government Reports*, *supra* note 80 at 9; ILO, *Summary of Third Government Reports*, *supra* note 80 at 19; ILO, *Summary of Fourth Government Reports*, *supra* note 80 at 17-18; ILO, *Summary of Sixth Government Reports*, *supra* note 80; ILO, *Tripartite Forum – Proceedings*, *supra* note 82 at 3.

[96] See e.g. ILO, *Summary of Second Government Reports*, *supra* note 80 at 17-18; ILO, *Summary of Third Government Reports*, *ibid* at 22-23; ILO, *Summary of Fifth Government Reports*, *supra* note 80 at 28-29.

[97] See e.g. ILO, *Summary of First Government Reports*, *supra* note 80 at 12-13; ILO, *Summary of Second Government Reports*, *ibid* at 8 and 12; ILO, *Summary of Third Government Reports*, *ibid* at 17 and 20;

Along the same lines, the United States described this instrument as a "significant complement to underlying legal relationships established by national law, contracts and international law".[98] Such an emphasis on the *ILO Tripartite Declaration*'s distinctiveness from norms that are perceived as legal strongly suggests that this instrument is not applied according to a practice of legality.

In addition to the aforementioned weak use of the *Procedure for Examination of Disputes*, discourses pertaining to the functioning of this procedure also offer important elements that tend to suggest the absence of a practice of legality. For example, the Danish Federation of Trade Unions reportedly stated that "it is extremely difficult to bring to the ILO, and have settled, complaints concerning cases in which a multinational enterprise has failed to comply with the principles of the Declaration".[99] When scrutinizing documents related to deliberations of requests of interpretation under this procedure, it is also plain that several actors sought to avoid any form of practice that would approach a legal setting. During one of these deliberations, the representative of the Government of the United States emphasized that "the Subcommittee was *not a 'quasi-judicial' body* and that it was not the practice of the ILO to issue conclusions relating to the *conduct of individual enterprises*".[100] "Bearing in mind its voluntary character", the same representative stressed that "[t]he Subcommittee should look at the scope and aim of the Tripartite Declaration and not go beyond them".[101] The recognition of the absence of a "legal recourse for failure to comply with the [*ILO Tripartite Declaration*]"[102] and that the role of this instrument is limited to "build up the capacity … to deal with issues"[103] by some interviewees are also in line with the discourses of actors that stressed the absence of a legal character to this procedure.

Another problematic aspect of the practice surrounding this informal international instrument is that several international actors are simply not aware of the *ILO Tripartite*

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[98] See ILO, *Summary of First Government Reports*, *ibid* at 16.

[99] See ILO, *Summary of Fifth Government Reports*, *supra* note 80 at 15, 26 and 330-331.

[100] ILO, *Report of the Subcommittee on Multinational Enterprises*, 264th Sess, GB.264/13 (1995) at paras 28-29 [emphasis added].

[101] *Ibid* at paras 28-29.

[102] Interview 1.

[103] Interview 1. See also Interview 3.

Declaration. For example, in the early years following the adoption of this instrument, the Norwegian Confederation of Trade Unions stated that it does "not have the impression that there is a great deal of interest in the ILO guidelines among Norwegian enterprises", stressing that such a situation is "due to the voluntary nature of the rules".[104] Similarly, the American Federation of Labor and Congress of Industrial Organizations noted that "the Tripartite Declaration is 'virtually unknown' in the US and many enterprises adopt codes of conduct which make no reference to this instrument".[105] Beyond these statements, other activities organized under the auspices of the ILO highlighted the lack of awareness for the *ILO Tripartite Declaration*.[106] Even the most recent regional report resulting from the new information-gathering process regarding the implementation of this informal international instrument includes several excerpts recalling the low level of knowledge pertaining to its existence, "particularly in contrast to the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights".[107] One interviewee echoed this weak awareness in the following terms: "I must confess I'm not sure that many people know about the [*ILO Tripartite Declaration*]. So, to claim it has had a huge contribution would be wishful thinking".[108] In other words, the absence of a practice of legality is partly rooted in the fact that the *ILO Tripartite Declaration* remains in the shadow of other initiatives.

The critical component of the discourse analysis performed for present purposes also allows shedding light on *relations of power* that underlie the implementation of the *ILO Tripartite Declaration* and that are in line with the overall lack of a practice of legality. An explanation of the failure to appropriately address instances of non-compliance with the principles of the declaration can be found in the following statement from the General Union of Workers in Spain: "The non-application of the Tripartite Declaration in Spain is widespread and it would require general political and economic measures to change this

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[104] See ILO, *Summary of First Government Reports*, *supra* note 80 at 12-13; ILO, *Summary of Second Government Reports*, *supra* note 80 at 14-15.

[105] See ILO, *Summary of Sixth Government Reports*, *supra* note 80. A similar situation is depicted by various trade unions in Finland: ILO, *Summary of Seventh Government Reports*, *supra* note 80 at 25.

[106] See ILO, *Tripartite Forum – Proceedings*, *supra* note 82 at 5-7 and 9.

[107] See ILO, *First Report on Regional Meetings*, *supra* note 84 at 47.

[108] Interview 1.

situation. … The Government has not responded to these developments for fear that enterprises would relocate".[109] Along the same lines, the Unitary Confederation of Workers in Costa Rica added that "while the intention behind the Tripartite Declaration is good, it is *difficult to apply in practice*, *precisely because of the nature, practices and employment policies of [multinational enterprises]*, which are guided by the profit motive which leads them to show scant respect for laws, governments and the workers".[110] In other words, the absence of a binding practice related to the *ILO Tripartite Declaration* is often linked to the powerful position of foreign investors amidst the other members of the community of practice.

Despite some discourses that only indirectly reflect a practice of legality related to the *ILO Tripartite Declaration* and some isolated instances of commitment toward the principles that this instrument includes, it would be inappropriate to conclude that the practice according to which international actors implement this initiative reflects a general legal character. The limited number of references in other international instruments, the scarce use of the *Procedure for the Examination of Disputes*, the rejection of an application outside the home state, the constant emphasis on its voluntary character, the avoidance of characterizing the dispute procedure as a legal setting, the low level of awareness and the avowed difficulties regarding its application to powerful actors all suggest that the practice related to this informal international instrument faces crucial problems. While the mere existence of a practice surrounding the *ILO Tripartite Declaration* is weak, it would be inaccurate to conclude that such a practice bears any legal character and contributes to the emergence of a sense of obligation.

Conclusion

Amidst the various international initiatives that emerged in the 1970s, the unique tripartite structure of the ILO allowed an interesting contribution to the evolving codification of foreign investors' responsibilities. In line with the struggle of this

[109] See ILO, *Summary of Sixth Government Reports*, *supra* note 80.

[110] See ILO, *Summary of Second Government Reports*, *supra* note 80 at 8 [emphasis added].

intergovernmental organization to elaborate and implement labour standards in a context of neoliberal globalization, the analysis above demonstrates that this informal international instrument has led to a weak social norm that falls short of meeting several requirements to enter the realm of legality. In light of the inherent relations of power underlying the attempt to embed this norm in shared understandings, it is plain that powerful actors that participated in the elaboration of the *ILO Tripartite Declaration* were opposed to the adoption of principles whose observance would have been mandatory. Moreover, the tensions and failures pertaining to the relationship between several provisions of the *ILO Tripartite Declaration* and the criteria of legality impede a form of legitimacy that characterizes international legal norms. A consideration of other international instruments and discourses of the members of the community of practice that has emerged around the *ILO Tripartite Declaration* also hints toward an initiative that remains in the shadow of other instruments and whose voluntary character is constantly repeated, thus preventing a genuine practice of legality. While it might appear as a useful instrument to reaffirm the legal character of ILO conventions and recommendations, the *ILO Tripartite Declaration* ultimately fails to generate a sense of obligation of its own with respect to the extraterritorial regulation of foreign investors' activities.

Chapter 8 – United Nations

Introduction

The United Nations ("UN") has been created with a view to, among others, "achiev[ing] international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights".[1] The efforts deployed by this intergovernmental organization to address the general lack of accountability of foreign investors at the international level seek to achieve this purpose in a context where powerful private actors operate in various countries. Beyond the specialized agencies that are involved in this codification process and that are analyzed elsewhere in this dissertation,[2] the present chapter continues the micro-level analysis of international instruments that seek to regulate foreign investors' conduct by focusing on initiatives resulting from the work of UN organs.

After the failed attempt at adopting a *Code of Conduct on Transnational Corporations*[3] in the early 1990s, the UN has been involved in the elaboration and the implementation of four initiatives that are particularly relevant for present purposes. Shortly after the launch of the UN Global Compact by the UN Secretary-General in 2000,[4]

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[1] See *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945), art 1 [*UN Charter*]. See also United Nations, *The United Nations Today* (New York: United Nations, 2008) at 5 [United Nations, *UN Today*]; Karin Buhmann, "Regulating Corporate Social and Human Rights Responsibilities at the UN Plane: Institutionalising New Forms of Law and Law-Making Approaches" (2009) 78 Nordic J Int'l L 1 at 6 [Buhmann, "Regulating"].

[2] See Chapter 7 and Chapter 9.

[3] *Code of Conduct on Transnational Corporations (Draft)*, 1990, UN Doc E/1990/94. See also generally Arghyríos A Fatouros, "The UN Code of Conduct on Transnational Corporations: A Critical Discussion of the First Drafting Phase" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 103; Karl P Sauvant, "The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned" (2015) 16 J World Investment & Trade 11.

[4] See United Nations, Press Release, SG/SM/6881, "Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos" (1 February 1999) online: United Nations <http://www.un.org/press/en/1999/19990201.sgsm6881.html> (accessed 14 September 2016) [United Nations, "SG Proposes Global Compact"]; United Nations, Press release, SG/SM/7495, "Secretary-General Welcomes International Corporate Leaders to Global Compact Meeting" (26 July 2000) online: United Nations <http://www.un.org/press/en/2000/20000726.sgsm7495.doc.html> (accessed 14 September 2016) [United Nations, "SG Welcomes"]. For the content of the UN Global Compact, see United

the Sub-Commission on the Promotion and the Protection of Human Rights ("Sub-Commission") deployed considerable efforts to adopt a draft version of the *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights* ("*UN Norms*")[5] in 2003. Although the Commission on Human Rights did not support this initiative, it nevertheless triggered the work of a Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises ("Special Representative") that led to the endorsement by the Human Rights Council – which had replaced the Commission on Human Rights since 2006[6] – of the *United Nations Guiding Principles on Business and Human Rights* ("*UN Guiding Principles*") in 2011.[7] In parallel to the elaboration of these informal international instruments, the *United Nations Convention Against Corruption* ("*UNCAC*") was negotiated under the auspices of the UN and adopted in October 2003.[8]

Considering that such efforts to regulate private firms operating abroad ultimately find their roots in a historical will to establish a new international economic order, the initiatives adopted under the auspices of the UN emerge from a particular institutional context that departs from a general commitment to neoliberal policies (1). Yet, the UN has elaborated and implemented international initiatives that can only be considered as international norms that fail to fully generate a sense of obligation. Intended as a learning platform to influence the conduct of business enterprises, the UN Global Compact is a widely disseminated social norm that unambiguously remains outside the realm of legality (2). Similarly, even if they have been extensively discussed after their adoption by the Sub-Commission, the *UN Norms* have remained a social norm that is now rarely taken into account to steer foreign investors' conduct (3). With respect to the *UN Guiding Principles*,

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Nations Global Compact, online: United Nations Global Compact <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed 14 September 2016) [UN Global Compact].

[5] *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, 2003, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 [*UN Norms*].

[6] See *Human Rights Council*, GA Res 60/251, UNGAOR, 60th Sess, Supp No 49, UN Doc A/RES/60/251 (2006) at para 1 [*Human Rights Council*].

[7] Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 2011, UN Doc A/HRC/17/31 [*UN Guiding Principles*].

[8] *United Nations Convention Against Corruption*, 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005) [*UNCAC*].

this informal instrument emerges as a social norm that nevertheless possesses key elements suggesting a potential evolution toward the threshold of legality (4). Finally, despite its formal character under international law, the *UNCAC* generally appears as a social norm that faces notable issues and fails to fully generate a sense of obligation (5).

1. The UN: Multiple Sources of Norms to Change the Economic Order

Contextualizing the analysis of the normative character of international initiatives elaborated and implemented under the auspices of the UN calls for a consideration of the multiple sources of norms that are found within this intergovernmental organization. Even if the *Charter of the United Nations* ("*UN Charter*") only requires member states to agree to the *decisions* adopted by the UN Security Council,[9] other UN entities can adopt *resolutions* that encompass standards of appropriate conduct for international actors.[10] For example, Article 10 of the *UN Charter* provides that the UN General Assembly "may discuss any questions or any matters within the scope of the present Charter … and may make recommendations to the Members of the United Nations or the Security Council".[11] With respect to the UN Economic and Social Council, Article 62 mentions that its functions include the possibility of making recommendations for the purpose of promoting human rights, as well as preparing draft conventions for submission to the UN General Assembly.[12] The UN Economic and Social Council is also authorized to invite to its deliberation, or consult with, various international actors such as member states, representatives of specialized agencies and non-governmental organizations ("NGOs").[13] Finally, Article 98 stipulates that the UN Secretary-General "shall act [as the chief

[9] *UN Charter*, *supra* note 1, art 25.

[10] For a description of the UN principal organs, see United Nations, *UN Today*, *supra* note 1 at 6-18.

[11] *UN Charter*, *supra* note 1, art 10. For a summary of the various positions pertaining to the normative character of the UN General Assembly resolutions, see Stephen M Schwebel, *Justice in International Law: Selected Writings of Stephen M. Schwebel* (Cambridge: Grotius Publications, 1994) at 499–513.

[12] *UN Charter*, *ibid*, art 62.

[13] See *ibid*, art 69-71. See also Karin Buhmann, "The Development of the 'UN Framework': A Pragmatic Process Towards a Pragmatic Output" in Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martinus Nijhoff Publishers, 2012) 85 at 92 [Buhmann, "The Development"].

administrative officer of the UN] in all meetings of the General Assembly, of the Security Council [and] of the Economic and Social Council, … and shall perform such other functions as are entrusted to him by these organs".[14]

While the Organisation for Economic Co-operation and Development ("OECD") shapes the identity of its member states as promoters of liberal and neoliberal policies,[15] the development of international norms to tackle the misconduct of foreign investors by the UN emerges from a drastically different institutional context.[16] In fact, in addition to the elaboration of two reports addressing the impact of transnational corporations,[17] the UN General Assembly adopted several resolutions affirming the right of states to regulate foreign investors' activities during the 1970s.[18] In the *Declaration on the Establishment of a New International Economic Order*, the UN General Assembly mentioned that such an economic order should be founded on the "regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries".[19] Similarly, the *Charter of Economic Rights and Duties of States* stated that

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[14] *UN Charter*, *ibid*, art 98. See also Schwebel, *supra* note 11 at 302.

[15] See section 1 of Chapter 6.

[16] Some authors thus address the "institutional memory" of the UN with respect to the regulation of transnational corporations. See Khalil Hamdani & Lorraine Ruffing, *United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest* (London: Routledge, 2015) at 250.

[17] Department of Economic and Social Affairs, *Multinational Corporations in World Development* (New York: United Nations, 1973); *The Impact of Transnational Corporations on the Development Process and on International Relations: Report of the Group of Eminent Persons to Study the Role of Multinational Enterprises on Development and on International Relations*, 1974, UN Doc E/5500/Add.1. See also Seymour J Rubin, "Reflections Concerning the United Nations Commission on Transnational Corporations" (1976) 70 Am J Int'l L 73 at 77–78; Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) at 11-12; Hamdani & Ruffing, *ibid* at 9-12 and 44.

[18] For general discussions on these resolutions, see Rubin, *ibid* at 78; Olivier De Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in Olivier De Schutter, ed, *Transnational Corporations and Human Rights* (Portland: Hart Publishing, 2006) 1 at 2–9 [De Schutter, "The Challenge"]; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013) at 95–99; Sauvant, *supra* note 3 at 15-18; Hamdani & Ruffing, *ibid* at 82.

[19] *Declaration on the Establishment of a New International Economic Order*, GA Res 3201(S-VI), UNGAOR, 6th Ext Sess, Supp No 1, UN Doc A/9559, (1974) 3 at para 4(g). See also *Programme of Action on the Establishment of a New International Economic Order*, GA Res 3202(S-VI), UNGAOR, 6th Ext Sess, Supp No 1, UN Doc A/9559, (1974) 5 at para V.

> [e]ach State has the right: (a) [t]o regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformities with its national objectives and priorities[; and] (b) [t]o regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies.[20]

The concerns raised through these resolutions ultimately led to the establishment of an intergovernmental information and research Centre on Transnational Corporations,[21] operating under the guidance of the Commission on Transnational Corporations.[22] The Centre was created in 1974 and conducted its activities in three principal areas (*i.e.* research and information on transnational corporations, technical assistance and intergovernmental support). Of particular relevance for present purposes, the Centre on Transnational Corporations' expertise supported the work of the Commission on Transnational Corporations, which was initially tasked to assist the UN Economic and Social Council "in evolving a set of recommendations which, taken together, would represent the basis for a code of conduct dealing with transnational corporations".[23] However, due to the lack of agreement between international actors with respect to legal nature of the instrument and a considerable shift in the ideological context,[24] such a code of conduct was never adopted. Amidst a broader reform of the UN, the Centre on Transnational Corporations and the

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[20] *Charter of Economic Rights and Duties of States*, GA Res 3281(XXIX), UNGAOR, 29th Sess, Supp No 31, UN Doc A/9631, (1974) 50 at para 2(2).

[21] *The Impact of Transnational Corporations on the Development Process and on International Relations*, ESC Res 1908(LVII), UNESCOR, 1974, UN Doc E/5570, 13 at para 6. For a summary of the history of the Centre on Transnational Corporations, see Hamdani & Ruffing, *supra* note 16 at 13-26.

[22] *The Impact of Transnational Corporations on the Development Process and on International Relations*, ESC Res 1913(LVII), UNESCOR, 1974, Supp No 1A, UN Doc E/5570/Add.1, 3 at para 4 [*Resolution 1913(LVII)*].

[23] See *Resolution 1913(LVII)*, *ibid* at para 3(e). See also Rubin, *supra* note 17 at 87-88; August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 37 at 20; Zerk, *supra* note 17 at 245-248; David Bilchitz & Surya Deva, "The Human Rights Obligations of Business: A Critical Framework for the Future" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 1 at 5; Hamdani & Ruffing, *supra* note 16 at 77-127.

[24] For a recent and comprehensive discussion on the failure of these negotiations, see Sauvant, *supra* note 3 at 38-62.

Commission on Transnational Corporations were abolished in the early 1990s, and their activities were integrated to the United Nations Conference on Trade and Development.[25]

Despite the demise of these agencies and the failure to adopt a code of conduct on transnational corporations, the UN has remained an interesting normative site when it comes to international initiatives related to the conduct of private firms operating abroad. Several organs – the UN Secretary-General, the UN General Assembly and the UN Economic and Social Council – can adopt recommendations that contribute to the emergence of international norms. Furthermore, such recommendations emerge within an institutional context historically marked by an undeniable support for the regulation of foreign investors. Taken as a whole, these aspects provide a breeding ground for the elaboration and the implementation of initiatives like the UN Global Compact, the *UN Norms*, the *UN Guiding Principles* and the *UNCAC*.

2. The UN Global Compact

The first contribution to the codification of foreign investors' responsibilities by the UN since the failure of the *Code of Conduct on Transnational Corporations* is reflected in ten principles enunciated by the UN Secretary-General. More specifically, the UN Global Compact concisely addresses responsibilities of business enterprises in the areas of human rights, labour rights, the environment and anti-corruption.[26] Despite the large network of participants that have committed to implement it, the UN Global Compact remains a social norm that fails to generate any sense of obligation. In fact, the UN Secretary-General has explicitly considered this initiative as a voluntary forum for dialogue since its inception, a characteristic strongly supported by powerful international actors commenting on its elaboration (2.1). Furthermore, a closer look at the provisions of this instrument shows that the UN Global Compact fails to meet several criteria of legality, thus seriously impeding its legitimacy (2.2). Ultimately, in addition to the disengagement of several participants beyond the initial commitment to implement them, the absence of a sense of obligation to

[25] See Hamdani & Ruffing, *supra* note 16 at 20-23.

[26] UN Global Compact, *supra* note 4, Principles 1-10.

comply with the UN Global Compact's principles is found in several discourses from the members of the community of practice surrounding this initiative (2.3).

2.1 Shared Understandings: Establishing a Voluntary Forum for Dialogue

In a way that sharply contrasts with a state-centric view of the international lawmaking process, the emergence of the UN Global Compact primarily results from the efforts of the UN Secretary-General and a limited number of non-state actors who acted as *norm entrepreneurs*. More specifically, this initiative finds its roots in a speech delivered by Kofi Annan at the World Economic Forum in which he called upon business enterprises "to embrace, support and enact a set of core values in the areas of human rights, labour standards, and environmental practices".[27] In order to elaborate this set of core values, the UN Secretary-General relied on the work of a Special Adviser to the UN Secretary-General on the Global Compact.[28] Further to the official launch of this initiative in July 2000,[29] the elaboration of the UN Global Compact also included a tenth principle with respect to the area of anti-corruption in 2004,[30] as well as the elaboration of integrity measures in 2005.[31]

In addition to the work of the UN Secretary-General and his Special Adviser, the UN Global Compact relies on a vast *community of practice* that includes representatives of private companies, government entities, intergovernmental organizations, international business organizations, public interest NGOs, academics and labour organizations, among

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[27] United Nations, "SG Proposes Global Compact", *supra* note 4.

[28] United Nations, *The Global Compact Leaders Summit 2004: Final Report* (New York: United Nations Global Compact Office, 2004) at 25 [United Nations, *Leaders Summit 2004*]. See also Larry Catá Backer, "On the Evolution of the United Nations' 'Protect-Respect-Remedy' Project: The State, the Corporation and Human Rights in a Global Governance Context" (2011) 9 Santa Clara J Int'l L 37 at 47 [Backer, "On the Evolution"].

[29] See United Nations, "SG Welcomes", *supra* note 4.

[30] See United Nations, *Leaders Summit 2004*, *supra* note 28 at 5.

[31] United Nations Global Compact, *Integrity Measures*, online: United Nations Global Compact <https://www.unglobalcompact.org/docs/about_the_gc/Integrity_measures/Integrity_Measures_Note_EN.pdf> (accessed 14 September 2016) [UN Global Compact, *Integrity Measures*]. See also Ursula Wynhoven & Matthias Stausberg, "The United Nations Global Compact's Governance Framework and Integrity Measures" in Andreas Rasche & Georg Kell, eds, *The United Nations Global Compact: Achievements, Trends and Challenges* (Cambridge: Cambridge University Press, 2010) 251 at 258.

others.[32] Critically analyzing statements made by these actors shortly after the launch of this initiative and transcripts from semi-structured interviews allows an assessment of the existence of shared understandings with respect to the elaboration of the UN Global Compact.

It is plain from these discourses that the members of the community of practice failed to reach any shared understandings pertaining to the legal nature of this instrument. While the UN Secretary-General initially sought to establish "a forum for dialogue"[33] and a "learning network that provides a framework through which its participants are able to publicly support a set of universally agreed values",[34] he was firmly supported by private interest NGOs and several states that stressed the voluntary character of the UN Global Compact. For example, in a joint statement from the UN Secretary-General and the International Organization of Employers, these actors "agreed that the Global Compact is not a substitute for other approaches, such as regulation, and that it is a *voluntary initiative* that seeks to motivate employers to act within their sphere of influence".[35] This approach

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[32] See e.g. United Nations, *The Global Compact Leaders Summit 2007 – Facing Realities: Getting Down to Business* (New York: United Nations Global Compact Office, 2007) at 7 [United Nations, *Leaders Summit 2007*]. See also John Gerard Ruggie, "The Theory and Practice of Learning Networks: Corporate Social Responsibility and the Global Compact" (2002) 5 J Corp Citizenship 27 at 33 [Ruggie, "Theory and Practice"]; Surya Deva, "Global Compact: A Critique of the U.N.'s Public-Private Partnership for Promoting Corporate Citizenship" (2006) 34 Syracuse J Int'l L & Com 107 at 115 [Deva, "Global Compact"]; Jean-Philippe Thérien & Vincent Pouliot, "The Global Compact: Shifting the Politics of International Development?" (2006) 12 Global Governance 55 at 56; Afshin Akhtarkhavari, "The Global Compact, Environmental Principles, and Change in International Environmental Politics" (2009) 38 Denv J Int'l L & Pol'y 277 at 283; Johanna Braun & Ingo Pies, "United Nations Global Compact" in Christian Tietje & Alan Brouder, eds, *Handbook of Transnational Economic Governance Regimes* (Leiden: Martinus Nijhoff Publishers, 2009) 255 at 255–257; Hans Corell, "The Global Compact" in Ramon Mullerat, ed, *Corporate Social Responsibility: The Corporate Governance of the 21st Century*, 2d ed (Alphen aan den Rijn: Kluwer Law International, 2011) 265 at 267–269; Andreas Rasche, "'A Necessary Supplement' - What the United Nations Global Compact Is (and Is Not)." in Karin Buhmann, Lynn Roseberry & Motte Morsing, eds, *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (New York: Palgrave Macmillan, 2011) 52 at 58–59; Buhmann, "Regulating", *supra* note 1 at 34.

[33] United Nations, "SG Welcomes", *supra* note 4.

[34] Secretary-General, *Cooperation between the United Nations and All Relevant Partners, in Particular the Private Sector*, 2001, UN Doc A/56/323 at para 86.

[35] United Nations, Press Release, SG/SM/8212-ECO/24, "United Nations Joint Statement on Global Compact by Secretary-General and President of International Organization of Employers (IOE)" (24 April 2002) online: United Nations <http://www.un.org/press/en/2002/sgsm8212.doc.htm> (accessed 14 September 2016) [emphasis added].

was also expressly supported by several member states during a plenary meeting of the UN General Assembly that was held shortly after the launch of the UN Global Compact.[36]

By contrast, public interest NGOs "call[ed] on the United Nations to deliver real corporate accountability in a legal framework" and deplored that the UN Global Compact was defined "neither as a *binding set of regulations* nor as a code of conduct for companies".[37] These criticisms can also be found in the discourse of individuals working for intergovernmental organizations involved in the codification of foreign investors' responsibilities. One participant in the research project has compellingly stated the following: "[T]here are some civil society actors that would like to see binding instruments that are enforceable. … So that is one criticism – you know, possible blue washing, if you want. But, I think we're very clear that our mission is not to be sort of a watchdog organization of companies but more a learning initiative".[38]

It is also worth emphasizing that the absence of shared understandings regarding the legal nature of the UN Global Compact is anchored in discourses that reproduce *relations of power* between international actors. While the UN Secretary-General justified the elaboration of its initiative by emphasizing that "power [of big investors] brings with it great opportunities – and great responsibilities",[39] public interest NGOs maintained that "governments should work together more effectively to reduce corporate influence on government and intergovernmental decision-making processes".[40] Ultimately, critically analyzing the existence of shared understandings between international actors that elaborated or commented on the UN Global Compact demonstrates the most powerful actors' unwillingness to grant any legal character to this initiative.

In sum, several international actors involved in the discussions that followed the elaboration and the launch of the UN Global Compact failed to agree on the nature of this

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[36] See *Towards Global Partnership - 37th Plenary Meeting,* 2001, UN Doc A/56/PV.37. The following member states demonstrated such a support: Republic of Korea (at 7); Ghana (at 8); India (at 10) and Canada (at 17).

[37] EarthRights International, *Joint Civil Society Statement on the Global Compact and Corporate Accountability* (23 June 2004), online: EarthRights International <https://www.earthrights.org/campaigns/joint-civil-society-statement-global-compact-and-corporate-accountability> (accessed 14 September 2016) [EarthRights International, *Joint Civil Society*] [emphasis added].

[38] Interview 10.

[39] United Nations, "SG Proposes Global Compact", *supra* note 4.

[40] EarthRights International, *Joint Civil Society*, *supra* note 37.

initiative. The UN Secretary-General initially depicted it as a voluntary learning forum and this position found support from private interest NGOs and several states. Despite a clear contrast with the position of public interest NGOs, a convergence of views between the main norm entrepreneurs and powerful representatives of the private sector characterizes the elaboration of this international legal norm.

2.2 Criteria of Legality: Multiple Roadblocks

Even if it is plain that several international actors have agreed to elaborate the UN Global Compact as a voluntary forum geared toward dialogue from its inception, the analysis of the normative character of this initiative would be incomplete without an assessment of the relation between its provisions and the criteria of legality advanced in the interactional theory of international law. As emphasized in the present section, the failure of the UN Global Compact to meet the requirements of several criteria thus becomes an additional obstacle that separates this international initiative from the realm of legality.

With respect to *promulgation*, the fact that the UN Global Compact remains an informal instrument that is not expressly provided by the *UN Charter* is undeniable. However, some aspects related to this international initiative ensure that it is made available to the public. Not only is the UN Global Compact widely disseminated through a website,[41] but the UN General Assembly has also constantly referred to and supported this initiative since 2000.[42] Such dissemination and recognition thus ensure that the principles of the UN Global Compact are promulgated to a certain extent.

Moreover, nothing in this international initiative poses any significant issues with respect to the criterion of *generality*. With a Preamble stressing that "[t]he Global Compact

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[41] UN Global Compact, *supra* note 4.

[42] See e.g. *Towards Global Partnerships*, GA Res 56/76, UNGAOR, 56th Sess, Supp No 49, UN Doc A/RES/56/76, (2002), Preamble. More recently, see generally *Towards Global Partnerships: A Principle-Based Approach to Enhanced Cooperation between the United Nations and All Relevant Partners*, GA Res 70/224, UNGAOR, 70th Sess, Supp No 49, UN Doc A/RES/70/224, (2016). See also Deva, "Global Compact", *supra* note 32 at 117-119; Ursula A Wynhoven, "The Protect-Respect-Remedy Framework and the United Nations Global Compact" (2011) 9 Santa Clara J Int'l L 81 at 86; Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London: Routledge, 2012) at 94 [Deva, *Regulating Corporate Human Rights*]; Buhmann, "Regulating", *supra* note 1 at 34.

asks *companies* to embrace, support and enact … a set of core values",[43] the content of this initiative does not expressly limit its application to any specific entities. This general application is also reflected in the broad range of participants in the initiative. As of January 2016, the UN Global Compact was represented by a network of 8 730 active participants that included business enterprises, private interest NGOs, public interest NGOs, academic institutions and public sector organizations.[44] Moreover, given that nothing in the principles enshrined in the UN Global Compact expressly deals with temporal requirements, this international initiative easily meets the requirements related to the criterion of *non-retroactivity*.

However, despite additional information that is made available on its website,[45] the lack of details provided in the UN Global Compact's principles considerably affects its *clarity*.[46] In contrast to other international instruments, each provision of this initiative is summarized in a single sentence or even less. For example, the two principles pertaining to the area of human rights read as follows: "Principle 1: Business should support and respect the protection of internationally proclaimed human rights; and Principle 2: make sure that they are not complicit in human rights abuses".[47] Another element raising issues with respect to the clarity of the UN Global Compact is its reliance on the concept of "sphere of influence" in its Preamble.[48] While the use of a relatively vague term in a

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[43] UN Global Compact, *supra* note 4, Preamble [emphasis added].

[44] See United Nations Global Compact, *Our Participants*, online: United Nations Global Compact <https://www.unglobalcompact.org/what-is-gc/participants> (accessed 14 September 2016) [United Nations Global Compact, *Our Participants*].

[45] United Nations Global Compact, *The Ten Principles of the UN Global Compact*, online: United Nations Global Compact <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed 14 September 2016).

[46] See Sean D Murphy, "Taking Multinational Corporate Codes of Conduct to the Next Level" (2005) 43 Colum J Transnat'l L 389 at 411; Deva, "Global Compact", *supra* note 32 at 129; Evaristus Oshionebo, "The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities" (2007) 19 Fla J Int'l L 1 at 23; Roya Ghafele & Angus Mercer, "'Not Starting in the Sixth Gear': An Assessment of the U.N. Global Compact's Use of Soft Law as a Global Governance Structure for Corporate Social Responsibility" (2010) 17 UC Davis J Int'l L & Pol'y 41 at 53; Deva, *Regulating Corporate Human Rights*, *supra* note 42 at 97; Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014) at 114; Akhtarkhavari, *supra* note 32 at 288; Bilchitz & Deva, *supra* note 23 at 6-7.

[47] UN Global Compact, *supra* note 4, Principle 1 and Principle 2.

[48] *Ibid*, Preamble.

provision does not necessarily entail an unclear international norm,[49] the absence of any express attempts at clarifying this concept is troublesome.

Furthermore, while all the other instruments analyzed in the present dissertation easily meet the criterion of *constancy*, the UN Global Compact is the only one that faces issues in this regard. In fact, when one considers the various publications from the UN with respect to this initiative, the Preamble of the UN Global Compact has not always been included with its principles. For example, in the annual review that was published in 2010, the ten principles of the UN Global Compact are preceded by the following sentence: "[T]he Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption".[50] However, the annual review that was published in 2008, as well as other reports published in 2013 and in 2014, all neglect this Preamble.[51] Given that the latter provides important elements pertaining to the scope of the requirements that are asked to companies, such a lack of constancy is highly problematic as far as the legitimacy of the instrument is concerned.

Strongly related to the failure to meet the two previous criteria, the UN Global Compact can also be perceived as *asking impossible requirements* to its participants. In fact, the inadequacy of the "sphere of influence" concept to clearly define the business relations for which the participants have to implement the content of the UN Global Compact's principles has often been considered as providing a requirement reaching beyond the normal activities of business enterprises.[52] Interestingly, the failure to include the wording of the Preamble in recent publications of the UN Global Compact hints toward a desire to depart from the use of terms that are often perceived as imposing too broad

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[49] See the discussion pertaining to the concept of "due diligence" in section 2.2 of Chapter 6 and in section 4.2 below.

[50] United Nations, *United Nations Global Compact: Annual Review 2010* (New York: United Nations Global Compact Office, 2011) at 10 [United Nations, *Annual Review 2010*].

[51] United Nations, *United Nations Global Compact: Annual Review 2008* (New York: United Nations Global Compact Office, 2009) at 68 [United Nations, *Annual Review 2008*]; United Nations, *Global Corporate Sustainability Report 2013* (New York: United Nations Global Compact Office, 2013) at 26 [United Nations, *Sustainability Report 2013*]; United Nations, *United Nations Global Compact Activity Report 2014* (New York: United Nations Global Compact Office, 2015) at 60.

[52] See Deva, "Global Compact", *supra* note 32 at 132.

requirements on its participants. However, its sporadic inclusion in the UN Global Compact impedes this instrument from ensuring that it remains realistic.

Without encompassing plain *contradictions* between its provisions, the wording chosen in the Preamble of the UN Global Compact does not sit well with the pressing issues that this initiative seeks to address. In his speech to the World Economic Forum, the UN Secretary-General summarized the issues at hand in the following terms:

> The problem is this. The spread of markets outpaces the ability of societies and their political systems to adjust to them, let alone to guide the course they take. History teaches us that such an imbalance between the economic, social and political realms can never be sustained for very long. The industrialized countries learned that lesson in their bitter and costly encounter with the Great Depression.[53]

Unfortunately, an international initiative that merely "asks companies"[54] to behave according to a set of core values is ill-suited to tackle a problem of this magnitude. As mentioned with respect to instruments analyzed in previous chapters, the weakness of the requirements included in the UN Global Compact can ultimately create a tension with this criterion of legality.

Finally, even if integrity measures were adopted after the initial launch of the UN Global Compact, the latter fails to meet the criterion of *congruence*.[55] From the outset, a note on the integrity measures published by the UN Global Compact expressly provides

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[53] United Nations, "SG Proposes Global Compact", *supra* note 4.

[54] UN Global Compact, *supra* note 4, Preamble.

[55] See generally UN Global Compact, *Integrity Measures*, *supra* note 31. See also David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44 Va J Int'l L 931 at 951; Ralph G Steinhardt, "Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 177 at 206; Deva, "Global Compact", *supra* note 32 at 119-120 and 146-147; Oshionebo, *supra* note 46 at 23-25; Zerk, *supra* note 17 at 260; Stefan Fritsch, "The UN Global Compact and the Global Governance of Corporate Social Responsibility: Complex Multilateralism for a More Human Globalisation?" (2008) 22:1 Global Soc 1 at 22–23; Buhmann, "Regulating", *supra* note 1 at 36; Wynhoven & Stausberg, *supra* note 31 at 258-264; Alice De Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Northampton: Edward Elgar, 2011) at 32 [De Jonge, *Transnational Corporations*]; Habib Gherari, "Le profil juridique et politique du Pacte mondial" in Laurence Boisson de Chazournes & Emmanuelle Mazuyer, eds, *Le Pacte mondial des Nations unies 10 ans après - The Global Compact of the United Nations 10 Years After* (Brussels: Bruylant, 2011) 7 at 14–19; Deva, *Regulating Corporate Human Rights*, *supra* note 42 at 93-100; Elisa Morgera, "From Corporate Social Responsibility to Accountability Mechanisms" in Pierre-Marie Dupuy & Jorge E Viñuales, eds, *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge: Cambridge University Press, 2013) 321 at 338–340; Simons & Macklin, *supra* note 46 at 116-120; Miles, *supra* note 18 at 247-248; Menno T Kamminga, "Company Responses to Human Rights Reports: An Empirical Analysis" (2016) 1 Bus & Hum Rights J 95 at 106.

that this initiative "is not designed, nor does it have the mandate or resources, to monitor or measure participants' performance".[56] In fact, most of these integrity measures relate to either the use of the UN Global Compact's logo or to changes in the participation status of business enterprises that fail to submit a "Communication on Progress" that reports on the implementation of the UN Global Compact principles.[57] Furthermore, a dialogue facilitation process has been established to address allegations of systematic and egregious abuses.[58] Although this process is geared toward the provision of guidance and assistance to a participating company that is the subject of such allegations, the note on the integrity measures specifies that the "Global Compact Office will not involve itself in any way in any claims of a legal nature that a party may have against a participating company".[59] Even if the integrity measures provide that a participant refusing to engage in the dialogue facilitation process can see its participation in the UN Global Compact changes,[60] the fact that such a process expressly avoids determining compliance with the principles of this initiative remains a crucial impediment to congruence.

Overall, the numerous issues posed by the provisions of the UN Global Compact with respect to the majority of the criteria of legality advanced in the interactional theory of international law strongly suggest that this international instrument fails to generate a sentiment of legitimacy that characterizes legal norms. Despite its consistency with some requirements (*i.e.* promulgation, generality and non-retroactivity), the failure to sufficiently meet other crucial criteria (*i.e.* clarity, constancy, not asking the impossible, absence of contradiction and congruence) suggests that the UN Global Compact is unlikely to generate any sense of obligation.

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[56] UN Global Compact, *Integrity Measures*, *ibid* at 1.

[57] *Ibid* at 2; United Nations Global Compact, *UN Global Compact Policy on Communicating Progress* (1 March 2013), online: United Nations Global Compact <https://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy.pdf> (accessed 14 September 2016) at 3.

[58] UN Global Compact, *Integrity Measures*, *ibid* at 2-4. See also Wynhoven & Stausberg, *supra* note 31 at 262.

[59] UN Global Compact, *Integrity Measures*, *ibid* at 2-3. See also Wynhoven & Stausberg, *ibid* at 263.

[60] UN Global Compact, *Integrity Measures*, *ibid* at 4. See also Wynhoven & Stausberg, *ibid* at 263; De Jonge, *Transnational Corporations*, *supra* note 55 at 32-33; Alice De Jonge, "Transnational Corporations and International Law: Bringing TNCs Out of the Accountability Vacuum" (2011) 7:1 Crit Perspectives Int'l Bus 66 at 72 [De Jonge, "Transnational Corporations"].

2.3 Practice of Legality: A Vast, but Weak and Non-Binding Practice

Beyond the consideration of interactions that have occurred around the elaboration of the UN Global Compact and the consistency of its provisions with the criteria of legality, several aspects related to the implementation of this initiative shed light on an impressive practice that nevertheless remains problematic and lacks a legal character. In addition to the large number of active participants,[61] other international instruments elaborated by intergovernmental organizations expressly refer to the UN Global Compact. The *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* ("*ILO Tripartite Declaration*"),[62] the *UN Norms*[63] and the *Principles for Responsible Investment in Agriculture and Food Systems* ("*UN PRAI*")[64] thus all implicitly point to the UN Global Compact as a relevant normative development with respect to the codification of foreign investors' responsibilities. This practice is also reflected in other initiatives that are supported by the UN Global Compact itself, such as the *Principles for Responsible Investment* and the *Principles for Responsible Management Education*.[65] Moreover, the various reports summarizing the activities of the UN Global Compact emphasize the

[61] See section 2.2.

[62] *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, March 2006, online: ILO <http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm> (accessed 14 September 2016) at para 2.

[63] *UN Norms*, *supra* note 5, Preamble.

[64] Committee on World Food Security, *Principles for Responsible Investment in Agriculture and Food Systems*, 2014, CFS 2014/41/4/Rev.1 at para 19(A)(v) [*Principles for Responsible Investment in Agriculture*].

[65] These two initiatives were acknowledged by the UN General Assembly. See *Towards Global Partnerships*, GA Res 64/223, UNGAOR, 64th Sess, Supp No 49, UN Doc A/RES/64/223, (2010). See also Deva, "Global Compact", *supra* note 32 at 127-128; Miles, *supra* note 18 at 249-250.

existence of a large network – *e.g.* Global Compact Local Networks[66] – that provides crucial resources and organizes multiple events related to this initiative.[67]

Despite such a vast practice, other elements pertaining to the implementation of the UN Global Compact hide crucial issues. As of January 2016, the database provided on the official website of the UN Global Compact indicates that the 8 730 "active" participants are outweighed by 4 635 "non-communicative participants" and 7 555 "delisted" entities.[68] Furthermore, the response rate to an implementation survey that has been conducted on an annual basis since 2007 roughly oscillates between 15% and 25% of all participants.[69] Beyond the initial enthusiasm to join the UN Global Compact that is demonstrated by the overall number of participants, this quantitative data thus demonstrates a rather weak participation through time.

Moreover, a closer look at the discourses from the members of the community of practice surrounding this instrument strongly suggests that the implementation of this international initiative lacks a legal character. Interestingly, the participation in the UN Global Compact is often depicted as a "commitment". For example, participants are

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[66] See United Nations, *UN Global Compact Annual Review – 2007 Leaders Summit* (New York: United Nations Global Compact Office, 2007) at 19 [United Nations, *Annual Review 2007*]: "The Global Compact's Local Networks remain the most important vehicle for increasing and intensifying the impact of the initiative – by providing on-the-ground support and capacity-building tied to distinct cultural, economic and linguistic needs. … The primary function of Local Networks is to promote the Global Compact principles and facilitate their implementation by participants". See also Akhtarkhavari, *supra* note 32 at 286; Wynhoven, *supra* note 42 at 91; Corell, *supra* note 32 at 271; Braun & Pies, *supra* note 32 at 258; Wagaki Mwangi, Lothar Rieth & Hans Peter Schmitz, "Encouraging Greater Compliance: Local Networks and the United Nations Global Compact" in Thomas Risse-Kappen, Stephen C Ropp & Kathryn Sikkink, eds, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013) 203 at 208–210.

[67] See e.g. United Nations, *Annual Review 2010*, supra note 50 at Annex A and Annex D; United Nations, *Sustainability Report 2013*, *supra* note 51 at 22-23.

[68] United Nations Global Compact, *Our Participants*, *supra* note 44. With respect to the high number of delisted participants, see Deva, "Global Compact", *supra* note 32 at 137-140; Carolyn Y Woo, "Implementing the United Nations Global Compact" in Andreas Rasche & Georg Kell, eds, *The United Nations Global Compact: Achievements, Trends and Challenges* (Cambridge: Cambridge University Press, 2010) 115 at 120; De Jonge, *Transnational Corporations*, *supra* note 55 at 32; Gherari, *supra* note 55 at 29; Deva, *Regulating Corporate Human Rights*, *supra* note 42 at 98-99; Simons & Macklin, *supra* note 46 at 118; Sandrine Maljean-Dubois & Vanessa Richard, "The Applicability of International Environmental Law to Private Enterprises" in Jorge E Viñuales & Pierre-Marie Dupuy, eds, *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge: Cambridge University Press, 2013) 69 at 86.

[69] See United Nations, *Annual Review 2007*, *supra* note 66 at 9; United Nations, *Annual Review 2008*, *supra* note 51 at 17; United Nations, *Annual Review of Business Policies and Actions to Advance Sustainability: 2011 Global Compact Implementation Survey* (New York: United Nations Global Compact Office, 2012) at 2; United Nations, *Sustainability Report 2013*, *supra* note 51 at 6.

considered as making a "[l]eadership *commitment* to mainstream the Global Compact Principles into strategies and operations and to take action in support of broader UN goals in a transparent way".[70] Various declarations issued after the triennial Global Compact Leaders Summits also stressed a will from the participants to "*commit* to continuously advance the implementation of the UN Global Compact and its principles".[71] The requirement to produce a Communication of Progress was even considered as a "*mandatory* disclosure policy" and "a critical component of the Global Compact Integrity Measures".[72]

Despite these semantic choices, the community of practice surrounding the UN Global Compact does not seem to recognize any sense of obligation to specifically act according to the principles that this initiative encapsulates. While the voluntary nature of the instrument was considered as a "crucial success factor" justifying the participation of several actors that attended the Global Compact Leaders Summit in 2004,[73] the same report underscores that public interest NGOs and trade unions "criticized the initiative for what they said was a fundamental *lack of accountability and governance mechanisms to ensure companies follow through on their commitments to the principles*".[74] During a subsequent Global Compact Leaders Summit, the foreign minister of France stressed the need to rethink the UN Global Compact because of the "limits of voluntary engagements", adding that "*eventually* these principles will have to be made *obligatory* for those companies that do not comply".[75]

Beyond the constant emphasis on the UN Global Compact's voluntary character, other elements found in several discourses hint toward the lack of a practice of legality. While considering the dialogue facilitation process as "a transparent means to handle

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[70] See United Nations, *United Nations Global Compact Annual Review: Anniversary Edition* (New York: United Nations Global Compact Office, 2010) at 18 [emphasis added] [United Nations, *Annual Review 2009*].

[71] See the *Shanghai Declaration* at para 6 in United Nations, *Global Compact Summit: China – Building Alliances for a Sustainable Global Economy: Final Report* (New York: United Nations Global Compact Office, 2006) at 31 [emphasis added] [United Nations, *Global Compact Summit: China*]. See also the *New York Declaration by Business* at para 1 in United Nations, *UN Global Compact Leaders Summit 2010: Building a New Era of Sustainability* (New York: United Nations Global Compact Office, 2010) at 52.

[72] See United Nations, *Annual Review 2010*, supra note 50 at 18 [emphasis added].

[73] United Nations, *Leaders Summit 2004*, *supra* note 28 at 6.

[74] *Ibid* at 3 [emphasis added].

[75] United Nations, *Leaders Summit* 2007, *supra* note 32 at 13 [emphasis added].

credible allegations of systematic or egregious abuse of the Global Compact's overall aims and principles by a participating organization",[76] some annual reports also reiterate "the Global Compact's nature as a learning, dialogue and partnership platform as distinct from a certification scheme, compliance-based initiative or adjudicatory body".[77] The failure to ensure that the principles of the UN Global Compact are effectively implemented by the various actors through their supply chains is another recurring theme that demonstrates the absence of a practice of legality.[78]

The social rather than legal nature of the practice regarding the UN Global Compact has been discussed at great length by some interviewees who participated in this research project. In this regard, one participant recalled that the continuous support of the UN General Assembly to the UN Global Compact was primarily related to its voluntary nature: "The Global Compact, as an initiative, has been recognized by the General Assembly. … It started as an initiative of the [Secretary-General], but it has got the intergovernmental stamp of approval as an initiative – but again, *as a voluntary initiative that is a learning platform* and that is engaging and involving companies in the affairs of the UN".[79] When asked whether business enterprises feel bounded to act according to the principles included in this international initiative, another participant answered the following:

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[76] See United Nations, *United Nations Global Compact Activity Report 2013* (New York: United Nations Global Compact Office, 2014) at 28.

[77] United Nations, *Annual Review 2009*, *supra* note 70 at 20. Regarding the focus of the UN Global Compact on learning and dialogue rather than compliance, see Georg Kell & John Gerard Ruggie, "Global Markets and Social Legitimacy: The Case for the 'Global Compact'" (1999) 8:3 Transnat'l Corp 102 at 104; Adelle Blackett, "Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct" (2001) 8 Ind J Global Legal Stud 401 at 442; Ruggie, "Theory and Practice", *supra* note 32 at 31-33; Deva, "Global Compact", *supra* note 32 at 116; Oshionebo, *supra* note 46 at 14-16; Zerk, *supra* note 17 at 100; Braun & Pies, *supra* note 32 at 260; Akhtarkhavari, *supra* note 32 at 293-301; Buhmann, "Regulating", *supra* note 1 at 36-37; Wynhoven & Stausberg, *supra* note 31 at 258; Ghafele & Mercer, *supra* note 46 at 54-56; Radu Mares, "Global Corporate Social Responsibility, Human Rights and Law: An Interactive Regulatory Perspective on the Voluntary-Mandatory Dichotomy" (2010) 1 Transn'l Legal Theory 221 at 256 [Mares, "Global Corporate Social Responsibility"]; Mark B Taylor, "The Ruggie Framework: Polycentric Regulation and the Implications for Corporate Social Responsibility" (2011) 5 Nordic J Applied Ethics 9 at 26; Wynhoven, *supra* note 42 at 83-84; Thomas Hale, "United Nations Global Compact" in Thomas Hale & David Held, eds, *Handbook of Transnational Governance: Institutions and Innovations* (Cambridge: Polity Press, 2011) 350; Gherari, *supra* note 55 at 9; Corell, *supra* note 32 at 270; Rasche, *supra* note 32 at 55 and 57; John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W. W. Norton & Company, 2013) at xxvii [Ruggie, *Just Business*]; Mwangi et al, *supra* note 66 at 218-220.

[78] See United Nations, *Leaders Summit 2004*, *supra* note 28 at 7; United Nations, *Sustainability Report 2013*, *supra* note 51 at 7.

[79] Interview 16 [emphasis added].

> [B]ecause they are voluntary initiatives, I wouldn't say they feel it directly from being a part of our initiative, but … once there's a critical mass of companies that do think in a way, then, you know… So, I think it's a lot of the actors working in concert that really changes these norms that it becomes unacceptable to do something else even if it's not legally binding.[80]

Consistent with the definition of an international social norm, such statements stress the ability of the UN Global Compact to set standards of appropriate conduct, without generating any sense of obligation to act according to its principles.

As far as *relations of power* between members of the community of practice are concerned, the characterization of the UN Global Compact as a forum for dialogue that is geared toward a learning process relies on an implicit recognition of the power of private business enterprises.[81] In a declaration that was adopted at the UN Global Compact Summit in China, several participants thus advanced that "[b]usiness can be an influential and practical force for good" and that "responsible businesses have proven to be a positive force in spurring development and improving human conditions".[82] By contrast, a representative of Oxfam International stressed that the "tremendous power of corporations" implies that "voluntary codes and initiatives are not a substitute for international and national law".[83] While some international actors emphasize that the current practice surrounding the UN Global Compact remains largely insufficient to address the general lack of accountability of powerful business enterprises at the international level, it is plain that these powerful actors are most likely to influence the normative character of this practice.

In line with the efforts of the norm entrepreneurs and powerful members of the community of practice to stress the voluntary character of the UN Global Compact, as well as the inadequacies between its provisions and the criteria of legality, the absence of a practice of legality is quite unsurprising. Of course, the UN Global Compact is well-known and can undoubtedly lead to the inclusion of more sustainable practices in the strategies and operations of business enterprises. However, this international norm struggles to keep

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[80] Interview 10.

[81] See Susanne Soederberg, "Taming Corporations or Buttressing Market-Led Development? A Critical Assessment of the Global Compact" (2007) 4 Globalizations 500 at 507–510.

[82] United Nations, *Global Compact Summit: China*, *supra* note 71 at para 3.

[83] See United Nations, *Leaders Summit 2004*, *supra* note 28 at 21.

its participants active and does not seek to ensure compliance of powerful business actors with the principles that it encompasses. Ultimately, the UN Global Compact is a widely disseminated, but weak and non-binding norm.

3. The *UN Norms*

In parallel to the launch and the implementation of the UN Global Compact, a Sub-Commission operating under the UN Economic and Social Council deployed substantial efforts to elaborate another international instrument. With a view to ensuring that the activities of transnational corporations and other business enterprises are consistent with the promotion and the protection of international human rights law, the *UN Norms* include 23 paragraphs that provide requirements for these private actors in various areas,[84] specifications pertaining to their implementation[85] and definitions.[86] However, with respect to their normative character, the *UN Norms* emerge as a social norm whose brief but existing practice has considerably faded away. The avowed intent of the experts from the Sub-Commission to elaborate a binding instrument clashed with the position of powerful international actors and failed to reach any shared understandings with respect to the legal nature of this initiative (3.1). What is more, tensions and failures of the *UN Norms* provisions regarding several criteria of legality – *i.e.* confusing promulgation, impossible requirements, inherent contradictions and lack of concrete congruence devices – affect the legitimate character of this international instrument (3.2). Although some actors sought to build on the *UN Norms* to develop a genuine legal norm, powerful members of the community of practice impeded this evolution and ultimately prevented any form of practice surrounding this initiative (3.3).

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[84] *UN Norms*, *supra* note 5 at paras 1-14.

[85] *Ibid* at paras 15-19.

[86] *Ibid* at paras 20-23.

3.1 Shared Understandings: Powerful Actors Opposing an Epistemic Community

One particularity of the *UN Norms* is that their elaboration relied on a group of experts that constituted an *epistemic community* without acting as representatives of states.[87] After the establishment of a sessional working group of the Sub-Commission "to examine the working methods and activities of transnational corporations"[88] in 1998, this working group's mandate was extended with a view to drafting relevant human rights norms concerning transnational corporations and other business activities in 2001.[89] In a resolution adopted in 2003, the Sub-Commission approved the *UN Norms* and decided to transmit this instrument to the Commission on Human Rights.[90] However, in 2004, the emergence of this initiative came to an abrupt end. After emphasizing that the *UN Norms*

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[87] See Steinhardt, *supra* note 55 at 206; Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford: Oxford University Press, 2006) at 225–226 [Clapham, *Human Rights Obligations*]; David Kinley & Rachel Chambers, "UN Human Rights Norms for Corporations: The Private Implications of Public International Law, The" (2006) 6 Hum Rts L Rev 447 at 456; Anita Ramasastry, "Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 162 at 169 [Ramasastry, "Closing the Governance Gap"]; Anita Ramasastry, "Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability" (2015) 14 J Hum Rights 237 at 244 [Ramasastry, "Corporate Social Responsibility"].

[88] See *The Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations*, CHR Res 1998/8, 1998, UN Doc E/CN.4/SUB.2/1998/45, 30 at para 4. See also David Weissbrodt, "The Beginning of a Sessional Working Group on Transnational Corporations within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities" in Menno T Kamminga & Saman Zia-Zarifi, eds, *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) 119; David Weissbrodt & Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) 97:4 Am J Int'l L 901 at 903 [Weissbrodt & Kruger, "Norms"]; David Weissbrodt & Muria Kruger, "Human Rights Responsibilities of Businesses as Non-State Actors" in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 315 at 322–328 [Weissbrodt & Kruger, "Human Rights Responsibilities"]; Larry Catá Backer, "Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law" (2006) 37 Colum Hum Rts L Rev 287 at 328–329 [Backer, "Multinational Corporations"].

[89] See *The Effects of the Working Methods and Activities of Transnational Corporations on the Enjoyment of Human Rights*, CHR Res 2001/3, 2001, UN Doc E/CN.4/SUB.2/2001/40, 17 at para 4. The sessional working group was later invited to continue its work in this regard: *The Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations*, CHR Res 2002/8, 2002, UN Doc E/CN.4/SUB.2/2002/46, 24 at para 5.

[90] *Responsibility of Transnational Corporations and other Business Enterprises with regard to Human Rights*, CHR Res 2003/16, 2003, UN Doc E/CN.4/Sub.2/2003/L.11, 52 at paras 1-2.

"contain useful elements and ideas for consideration by the Commission",[91] the Commission on Human Rights mentioned that they had "no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard".[92]

In addition to the work of the epistemic community that pushed for their adoption by the Sub-Commission, the elaboration of the *UN Norms* required the involvement of a broad *community of practice*. In this regard, several reports from the sessional working group suggest that this initiative primarily results from the work of its members, other experts from the Sub-Commission, public interest NGOs, intergovernmental organizations, as well as some private interest NGOs that were involved later in the elaboration process.[93]

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[91] *Responsibilities of Transnational Corporations and and Related Business Enterprises with regard to Human Rights*, ESC Dec 2004/116, 2004, Supp No 3, UN Doc E/CN.4/2004/127, 332, Preamble [*Responsibilities of Transnational Corporations*].

[92] *Ibid* at para (c). See also Murphy, *supra* note 46 at 407; Clapham, *Human Rights Obligations*, *supra* note 87 at 226; Backer, "Multinational Corporations", *supra* note 88 at 331; Kinley & Chambers, *supra* note 87 at 459 and 482; Zerk, *supra* note 17 at 261; John Gerard Ruggie, "Business and Human Rights: The Evolving International Agenda" (2007) 101:4 Am J Int'l L 819 at 821 [Ruggie, "Business and Human Rights"]; Peter Muchlinski, "Corporate Social Responsibility" in Peter Muchlinski, Frederico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 637 at 657–658 [Muchlinski, "Corporate Social Responsibility"]; Buhmann, "Regulating", *supra* note 1 at 42; David Weissbrodt, "The Sub-Commission Principles on the Responsibility of Transnational Corporations in Regard to Human Rights" in Emmanuel Decaux, ed, *La responsabilité des entreprises mutlinationales en matière de droits de l'homme* (Brussels: Bruylant, 2010) 103 at 112 [Weissbrodt, "Sub-Commission"]; Eric de Brabandere, "Non-State Actors and Human Rights: Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participant in the International Legal System" in Jean d'Aspremont, ed, *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (New York: Routledge, 2011) 268 at 274; Michael Karlsson & Max Granström, "Business and Human Rights: The Recent Initiatives of the UN" in Ramon Mullerat, ed, *Corporate Social Responsibility: The Corporate Governance of the 21st Century*, 2d ed (Alphen aan den Rijn: Kluwer Law International, 2011) 285 at 290; John H Knox, "The Ruggie Rules: Applying Human Rights Law to Corporations" in Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martinus Nijhoff Publishers, 2012) 51 at 60; Pini Pavel Miretski & Sascha-Dominik Bachmann, "The UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights': A Requiem" (2012) 17 Deakin L Rev 5 at 17; Deva, *Regulating Corporate Human Rights*, *supra* note 42 at 100; Bilchitz & Deva, *supra* note 23 at 7; Vincent Chetail, "The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward" in Denis Alland et al, eds, *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff Publishers, 2014) 105 at 118; Humberto Fernando Cantú Rivera, "Business & Human Rights: From a 'Responsibility to Respect' to Legal Obligations and Enforcement" in Jernej Letnar Černič & Tara Van Ho, eds, *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Legal Publishers, 2015) 303 at 306.

[93] *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its First Session*, 1999, UN Doc E/CN.4/Sub.2/1999/9 at paras 1-8 [*Sessional Working Group – First Session*]; *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Second Session*, 2000, UN Doc E/CN.4/Sub.2/2000/12 at paras 2-8 [*Sessional Working Group – Second Session*]; *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Third Session*, 2001, UN Doc E/CN.4/Sub.2/2001/9 at paras 2-7 [*Sessional Working Group – Third Session*]; *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Fourth Session*, 2002, UN Doc E/CN.4/Sub.2/2002/13 at

The content of these reports, statements submitted to the UN and transcripts from semi-structured interviews can all be considered as relevant sources of discourses to critically assess the extent to which the *UN Norms* are anchored in shared understandings with respect to their legal nature.

Even if the members of the community of practice were aware that the Sub-Commission was not mandated to elaborate a formal international treaty, several excerpts from the reports of the sessional working group point toward a firm intent to elaborate an international norm that would have been binding or constituted the basis of a legally binding instrument.[94] For example, in its first report, the sessional working group "stressed the fact that the new code of conduct should have a *binding character* and require [transnational corporations] to prepare 'human rights impact assessments' on a regular basis".[95] Along these lines, the working group reported that "a number of members … strongly urged that [the *UN Norms*] should be the basis for a *legally binding code of conduct* for the regulation of the activities of companies".[96] Later in the elaboration process, the main drafter of the *UN Norms* reportedly stated that this instrument "was

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paras 2-7 [*Sessional Working Group – Fourth Session*]. See also Weissbrodt & Kruger, "Norms", *supra* note 88 at 904; Weissbrodt & Kruger, "Human Rights Responsibilities", *supra* note 88 at 323; Rebecca M M Wallace & Olga Martin-Ortega, "The UN Norms: A First Step to Universal Regulation of Transnational Corporations' Responsibilities for Human Rights?" (2004) 26 Dublin U L J 304 at 304-305; David Kinley, Justine Nolan & Nathalie Zerial, "The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations" (2007) 25 Company & Securities LJ 30 at 31; Buhmann, "Regulating", *ibid* at 42; Buhmann, "The Development", *supra* note 13 at 96-98.

[94] In addition to the other reference included in this paragraph, see *Sessional Working Group – Third Session*, *ibid* at para 19; *Sessional Working Group – Fourth Session*, *ibid* at para 27. See also Weissbrodt & Kruger, "Human Rights Responsibilities", *supra* note 88 at 321; Wallace & Martin-Ortega, *ibid* at 312; Carlos M Vazquez, "Direct vs. Indirect Obligations of Corporations under International Law" (2005) 43 Colum J Transnat'l L 927 at 928; Nils Rosemann, "Business Human Rights Obligations - The 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'" (2005) 23 Nordic J Hum Rigths 47 at 48; Peter T Muchlinski, *Multinational Enterprises and the Law*, 2d ed (Oxford: Oxford University Press, 2007) at 532 [Muchlinski, *Multinational Enterprises*]; Miretski & Bachmann, *supra* note 92 at 9; Buhmann, "Regulating", *ibid* at 42; Knox, *supra* note 92 at 54; Ramasastry, "Closing the Governance Gap", *supra* note 87 at 168; Markos Karavias, *Corporate Obligations under International Law* (Oxford: Oxford University Press, 2013) at 77 [Karavias, *Corporate Obligations*]; Cantú Rivera, *supra* note 92 at 306.

[95] *Sessional Working Group – First Session*, *supra* note 93 at para 26 [emphasis added]. See also *Sessional Working Group – Third Session*, *ibid* at 2.

[96] *Sessional Working Group – Second Session*, *supra* note 93 at para 37 [emphasis added].

binding in the sense that it applied human rights law under ratified conventions to the activities of transnational corporations and other business enterprises".[97]

The members of the sessional working group also emphasized the support that they received from public interest NGOs, recalling that "[a] large majority of NGOs stressed the urgent need for a *legally binding instrument* to regulate the activities of [transnational corporations]" and that "[a] voluntary code of conduct was not sufficient".[98] Similarly, the contribution of the *UN Norms* to "codify and distil existing *obligations* under international law as they apply to companies" was applauded in a joint statement signed by 51 public interest NGOs.[99] Some of these actors even advanced the need to establish robust implementation mechanisms to strengthen the normative character of this international initiative. It is in this regard that Human Rights Advocates urged the Sub-Commission to pursue the work of the sessional working group after the adoption of this initiative "to develop complaint procedures independent of the host or home states of transnational corporations to consider the abuses and remedies of violations of the Draft Norms".[100]

However, as the elaboration process evolved, representatives of the private sector vigorously opposed the adoption of a legally binding instrument imposing responsibilities on transnational corporations and other business enterprises.[101] In addition to disagreeing

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[97] *Sessional Working Group – Fourth Session*, *supra* note 93 at para 14. See also *Sessional Working Group – Third Session*, *supra* note 93 at para 24.

[98] *Sessional Working Group – Second Session*, *supra* note 93 at paras 52-53 [emphasis added]. See also Weissbrodt & Kruger, "Norms", *supra* note 88 at 903 and 906-907; Weissbrodt & Kruger, "Human Rights Responsibilities", *supra* note 88 at 327.

[99] See Fédération internationale des ligues des droits de l'homme, *Statement of Support for the UN Human Rights Norms for Business* (18 March 2004), online: FIDH <https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/Statement-of-Support-for-the-UN> (accessed 14 September 2016) [emphasis added].

[100] *Written Statement Submitted by Human Rights Advocates, a Non-Governmental Organization in Special Consultative Status*, 2003, UN Doc E/CN.4/Sub.2/2003/NGO/13 at para 10. See also *Joint Written Statement Submitted by Europe-Third World Centre, a Non-Governmental Organization in General Consultative Status, and American Association of Jurists a Non-Governmental Organization in Special Consultative Status*, 2003, UN Doc E/CN.4/Sub.2/2003/NGO/37 at 6 [*Joint Statement – Europe-Third World Centre and American Association of Jurists*].

[101] This aspect is extensively discussed in the literature. See e.g. Wallace & Martin-Ortega, *supra* note 93 at 305; Kinley & Chambers, *supra* note 87 at 449; Kinley et al, *supra* note 93 at 36; Ruggie, "Business and Human Rights", *supra* note 92 at 821; Buhmann, "Regulating", *supra* note 1 at 44; Julie Campagna, "United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers" (2003) 37 J Marshall L Rev 1205 at 1207–1208; Patricia Feeney, "Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda" (2009) 6:11 SUR Int'l J Hum Rts 161 at 165; Knox, *supra* note 92 at 54; Olivier De Schutter, "Foreword: Beyond the Guiding

with "assertions of company obligations in doubtful contexts", the International Chamber of Commerce and the International Organization of Employers maintained that the "binding and legalistic approach of the draft norms will not meet the diverse needs and circumstances of companies and will limit the innovation and creativity shown by companies in addressing human rights issues".[102] A similar position from private actors was highlighted by the sessional working group of the Sub-Commission in its last report.[103]

Interviews conducted with individuals working for intergovernmental organizations involved in the codification of foreign investors' responsibilities have also highlighted the lack of shared understandings underlying the *UN Norms*. Although some interviewees stressed the support from various public interest NGOs,[104] one participant referred to the diverging positions among the international actors in the following terms:

> There was clearly unhappiness about the process – on how the norms were adopted, or at least proposed. There was also a lot of unhappiness about their content and sort of the structural rigor of the *UN Norms*. So, business associations – particularly the organization of employers, the International Organization of Employers, the International Chamber of Commerce and other business organizations – really took a series of objections to the *UN Norms*. … Trying to elevate the responsibilities of companies to the level of obligations and to the level of duties to protect and to undertake positive obligations and things like that – which I think, upset them. And then there was, as usual, the typical disagreement between the states – you know, the capital-exporting states and the capital-importing states. The consequence, of course, was that there was not enough consensus.[105]

Principles" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) xv at xvi [De Schutter, "Foreword"]; Bilchitz & Deva, *supra* note 23 at 7; Justine Nolan, "The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 138 at 150; Ramasastry, "Closing the Governance Gap", *supra* note 87 at 169; Cantú Rivera, *supra* note 92 at 306.

[102] *Joint Written Statement Submitted by the International Chamber of Commerce and the International Organization of Employers, Non-Governmental Organizations in General Consultative Status*, 2003, UN Doc E/CN.4/Sub.2/2003/NGO/44.

[103] See *Sessional Working Group – Fourth Session*, *supra* note 93 at para 36.

[104] Interview 2.

[105] Interview 9.

In a more succinct way, another interviewee emphasized "a number of very fundamental flaws to [the *UN Norms*] in process and in product"[106] that seriously impeded the success of this initiative.

Not only did the members of the community of practice struggle to reach any shared understandings with respect to the legal nature of the *UN Norms*, but the elaboration process of this international norm was characterized by inherent *relations of power*. For example, the members of the sessional working group mentioned that "the integrated international production systems and the mobility of [transnational corporations] had increased their power of negotiation and reduced the decision-making power of [s]tates, particularly that of developing countries".[107] While public interest NGOs explicitly acknowledged that the political and social influence of transnational corporations "constitute obstacles to an effective control of [transnational corporations] activities",[108] one interviewee stressed that the representatives of the private sector that opposed the elaboration of the *UN Norms* were "a very strong opponent to have".[109] The reproduction of such relations of power in the discourses of various international actors suggests that the opposition from powerful private actors to a legally binding instrument was likely to prevent the emergence of shared understandings with respect to the normative character of the *UN Norms*.

Despite the initial attempt by members of the sessional working group of the Sub-Commission and public interest NGOs to adopt a binding instrument, the elaboration process of the *UN Norms* has been characterized by strong opposition from powerful actors. Beyond this lack of shared understandings among all the members of the community of practice, the fact that powerful representatives of the private sector vigorously opposed the adoption of a legally binding instrument extensively impedes the characterization of the *UN Norms* as an international legal norm.

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[106] Interview 19.

[107] *Sessional Working Group – Second Session*, *supra* note 93 at para 13.

[108] *Joint Statement – Europe-Third World Centre and American Association of Jurists*, *supra* note 100 at 2.

[109] Interview 16.

3.2 Criteria of Legality: Several Issues Affecting the Legitimacy of the *UN Norms*

According to the interactional theory of international law, an international instrument whose provisions meet criteria of legality is a legitimate norm that can potentially generate a sense of obligation. With respect to the *UN Norms*, an examination of their provisions in light of these criteria sheds light on several lacunas. The ambiguous promulgation of the *UN Norms*, the inclusion of requirements that seem to be impossible to meet, inherent contradictions and the absence of concrete devices to address instances of non-compliance all affect the legitimacy of this instrument and impact its potential to emerge as an international legal norm.

Even when considering that informal international instruments can meet the requirement of *promulgation* under specific circumstances, some aspects pertaining to the adoption of the *UN Norms* point toward an important tension. Of course, the approval of the *UN Norms* by the Sub-Commission ensures that this instrument is included in a resolution of this agency and available to the public. However, it must be kept in mind that the mandate of the Sub-Commission was limited to the initiation of studies on the development of legal rules rather than the elaboration of international norms.[110] Combined with the ultimate refusal of the Commission to recognize any legal character to the *UN Norms*,[111] it is difficult to maintain that this initiative has been properly promulgated.

By contrast, the provisions included in the *UN Norms* ensure a *general* character to its requirements.[112] For example, the first paragraph of this instrument provides a general obligation regarding human rights that applies to "transnational corporations and other

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[110] See United Nations, *UN Today*, *supra* note 1 at 248.

[111] *Responsibilities of Transnational Corporations*, *supra* note 91 at para (c).

[112] See Weissbrodt & Kruger, "Norms", *supra* note 88 at 909 and 911; Surya Deva, "Human Rights Violations by Multinational Corporations and International Law: Where from Here" (2003) 19 Conn J Int'l L 1 at 17; Peter Muchlinski, "Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by Intergovernmental Organisations" (2003) 3 Non-St Actors & Int'l L 123 at 137 [Muchlinski, "Human Rights"]; Surya Deva, "UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction" (2004) 10 ILSA J Int'l & Comp L 493 at 500 [Deva, "UN's Human Rights"]; Jacob Gelfand, "The Lack of Enforcement in the United Nations Draft Norms: Benefit or Disadvantage?" in Olivier De Schutter, ed, *Transnational Corporations and Human Rights* (Portland: Hart Publishing, 2006) 313 at 319; Backer, "Multinational Corporations", *supra* note 88 at 337-338; Muchlinski, *Multinational Enterprises*, *supra* note 94 at 519.

business enterprises".[113] Furthermore, the definitions that are included in the last section of this instrument emphasize that "other business enterprises" refers to "*any* business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity".[114] As a result, the *UN Norms* undoubtedly avoid carving out any specific enterprises that would fall beyond the scope of its application.

International norms are also expected to be *clear* in order to induce legitimacy. In this regard, some provisions of the *UN Norms* encompass fairly vague requirements.[115] For example, paragraph 10 of this initiative provides the following:

> Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate.[116]

Moreover, the use of the ambiguous concept of "sphere of activity and influence" that is found in the Preamble of the UN Global Compact raises notable concerns.[117] Notwithstanding these issues, it must be noted that additional information pertaining to these provisions is included in a commentary prepared by the sessional working group of the Sub-Commission.[118] Without offering a response to all ambiguities that can be

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[113] *UN Norms*, *supra* note 5 at para 1.

[114] *Ibid* at para 21 [emphasis added].

[115] See e.g. Wallace & Martin-Ortega, *supra* note 93 at 310; De Schutter, "The Challenge", *supra* note 18 at 21.

[116] *UN Norms*, *supra* note 5 at para 10.

[117] *Ibid* at para 1. On the perception of the notion of "sphere of influence" as being vague, see Deva, "UN's Human Rights", *supra* note 112 at 502-503; Miretski & Bachmann, *supra* note 92 at 25; De Schutter, "The Challenge", *supra* note 18 at 12-13; Kinley et al, *supra* note 93 at 37; De Schutter, "Foreword", *supra* note 101 at xvi; Markos Karavias, "Shared Responsibility and Multinational Enterprises" (2015) 62 Neth Int Law Rev 91 at 112.

[118] *Commentary on the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights*, 2003, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 [*UN Norms Commentary*]. See also Weissbrodt & Kruger, "Human Rights Responsibilities", *supra* note 88 at 326-327; Campagna, *supra* note 101 at 1225-1226.

identified in the *UN Norms*, such a commentary ensures a certain level of clarity that can satisfy this criterion of legality.[119]

Two other criteria do not pose any specific issues with respect to the content of the *UN Norms*. The absence of any change regarding the formulation of their provisions after the adoption by the Sub-Commission guarantees the *constancy* of this international instrument. Moreover, given that the *UN Norms* do not expressly deal with temporal issues, this initiative also easily meets the requirement of *non-retroactivity* that is included in the interactional theory of international law.

With that being said, the three remaining criteria are far more problematic. It has been suggested that the reliance on the concept of "sphere of influence" effectively allows limiting the requirements for transnational corporations and business enterprises to their activities and thus avoiding *asking the impossible*.[120] However, a provision that expressly requires these private actors to "provide workers with remuneration that ensures an adequate standard of living for them *and their families*"[121] can entail responsibilities for transnational corporations that reach beyond their direct control. Along the same lines, a requirement of not being "solicited or expected to give a bribe or other improper advantage to any [public officials]"[122] ultimately seek to impose an obligation on transnational corporations and business enterprises that depends upon actions of a third party.[123]

To the extent that they seek to compile human rights derived from international agreements that must be taken into account by transnational corporations and other business enterprises in their activities,[124] the majority of paragraphs included in this instrument are not *contradictory*. However, some provisions go further by implicitly suggesting that transnational corporations and other business enterprises already hold

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[119] See Kinley & Chambers, *supra* note 87 at 466-467.

[120] See Clapham, *Human Rights Obligations*, *supra* note 87 at 230.

[121] *UN Norms*, *supra* note 5 at para 8 [emphasis added]. See also Gelfand, *supra* note 112 at 321; Deva, *Regulating Corporate Human Rights*, *supra* note 42 at 103.

[122] *UN Norms*, *ibid* at para 11.

[123] Other examples are mentioned in Wallace & Martin-Ortega, *supra* note 93 at 311; Robert C Bird, Daniel R Cahoy & Lucien J Dhooge, "Corporate Voluntarism and Liability for Human Rights in a Post-Kiobel World" (2014) 102 Ken L J 1 at 19–20.

[124] See *UN Norms*, *supra* note 5 at paras 2-12. See also Weissbrodt & Kruger, "Human Rights Responsibilities", *supra* note 88 at 325; Ramasastry, "Corporate Social Responsibility", *supra* note 87 at 244.

obligations to respect human rights under formal international treaties.[125] For example, a paragraph of the Preamble refers to a realisation "that transnational corporations and other business enterprises, their officers and persons working for them *are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties*".[126] A similar tension can be found at Paragraph 14, which provides that "transnational corporations and other business enterprises shall carry out their activities … *in accordance with relevant international agreements*".[127] Considering that such provisions seek to establish obligations for non-state actors by claiming that these actors already have obligations under existing formal international agreements, one can argue that the *UN Norms* rely on an inherent contradiction.[128]

While reaching beyond the UN Global Compact in terms of addressing the necessity to tackle significant instances of non-compliance, the *UN Norms* also fall short of meeting the criterion of *congruence*. In this regard, paragraph 16 of this instrument provides the following:

> Transnational corporations and other business enterprises shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms. This monitoring shall be transparent and independent and take into account input from stakeholders (including non-governmental organizations) and as a result of complaints of violations of these Norms.[129]

Expressly opening the door to address complaints of violations departs from mere requirements to report that can be found in other international initiatives.[130] However, other provisions and elements of the commentary suggest that a specific mechanism as yet to be

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[125] See Weissbrodt & Kruger, "Human Rights Responsibilities", *supra* note 88 at 328; Miretski & Bachmann, *supra* note 92 at 23; Vazquez, *supra* note 94 at 940-947; Deva, *Regulating Corporate Human Rights*, *supra* note 42 at 103.

[126] *UN Norms*, *supra* note 5, Preamble [emphasis added].

[127] *Ibid* at para 14 [emphasis added].

[128] See also Deva, "UN's Human Rights", *supra* note 112 at 511.

[129] *UN Norms*, *supra* note 5 at para 16.

[130] Reporting by transnational corporations and other business enterprises is considered as a part of an initial step toward the implementation of the *UN Norms*. See *ibid* at para 15. See also Deva, "UN's Human Rights", *supra* note 112 at 500; Murphy, *supra* note 46 at 407-408; Muchlinski, "Corporate Social Responsibility", *supra* note 92 at 679-680; Buhmann, "Regulating", *supra* note 1 at 41; De Jonge, *Transnational Corporations*, *supra* note 55 at 37.

determined amidst a plurality of options.[131] The absence a clear procedure to examine compliance of business enterprises' conduct with the *UN Norms* thus seriously impedes congruence between rules and official action.

In addition to a failure to be properly promulgated by the UN Commission on Human Rights, the content of the *UN Norms* falls below the requirements of several criteria of legality. Provisions related to conduct that reach beyond the direct control of transnational corporations and other business enterprises, some contradictions between a need to establish obligations for private actors and assumptions that international treaties already include such obligations, as well as the absence of a concrete mechanism to address significant instances of non-compliance all bear notable impacts on the legitimacy that can be derived from this international instrument.

3.3 Practice of Legality: An Ephemeral and Non-Binding Practice

Despite its express aim to impede any monitoring of the *UN Norms* by the Sub-Commission, Decision 2004/116 of the UN Commission on Human Rights did not totally prevent the emergence of a practice around this instrument.[132] In fact, this decision was accompanied by a request to the Office of the High Commissioner for Human Rights ("OHCHR") to compile a report on the legal status of various international instruments codifying foreign investors' responsibilities.[133] The numerous submissions to the OHCHR thus demonstrate a fairly ephemeral practice surrounding the *UN Norms*.[134] With a view to assessing the character of this practice, this section relies on an analysis of the content of other international instruments codifying foreign investors' responsibilities, as well as a

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[131] *UN Norms Commentary*, *supra* note 118 at para 16(b). See also Weissbrodt & Kruger, "Norms", *supra* note 88 at 917-921; Weissbrodt & Kruger, "Human Rights Responsibilities", *supra* note 88 at 340-349; Deva, "UN's Human Rights", *ibid* at 519-520; Muchlinski, *Multinational Enterprises*, *supra* note 94 at 534; Gelfand, *supra* note 112 at 322-331; Deva, *Regulating Corporate Human Rights*, *supra* note 42 at 105.

[132] *Responsibilities of Transnational Corporations*, *supra* note 91 at para (c).

[133] *Ibid* at para (b).

[134] These statements have been considered in Chapter 5 of the present dissertation. However, given the timing of this consultation process, the *UN Norms* tended to be discussed in greater details in several submissions. To that extent, these statements can be considered as discourses regarding the practice of legality of the *UN Norms*.

critical discourse analysis of these submissions to the OHCHR, reports emanating from the UN that specifically address the nature of the *UN Norms* and semi-structured interviews.

From the outset, the content of other intergovernmental organizations' instruments codifying foreign investors' responsibilities points toward a weak practice as far as the *UN Norms* are concerned. In fact, none of the instruments adopted by the UN or any other intergovernmental organizations considered for present purposes expressly refers to this initiative. The absence of such references strongly suggests that intergovernmental organizations have tended to neglect the contribution of the *UN Norms* in the evolving codification process of foreign investors' responsibilities after the refusal of the UN Commission on Human Rights to recognize any legal standing to this instrument.

When considering the submissions to the OHCHR, two contradictory trends emerge. On the one hand, several public interest NGOs considered this instrument as an initiative that had not yet reached the realm of legality, but that could potentially develop as a legal norm.[135] It is in this regard that the Australian Human Rights Centre maintained

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[135] See e.g. Christian Aid, *Behind the Mask: The Real Face of CSR*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at 53; ActionAid International, *ActionAid International's Submissions to the Office of the UN High Commissioner for Human Rights on the 'Responsibilities of Transnational Corporations and related Business Enterprises with Regard to Human Rights* (29 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); CAFOD, *CAFOD's Submission on the Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at para 15; Fédération internationale des ligues des droits de l'Homme, *Contribution of the FIDH to the Consultation of the OHCHR on the Human Rights Responsibilities of Business* (September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at 6; Human Rights First, *Submission of Human Rights First under Decision 2004/116 concerning the 'Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights'*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Oxfam, *Submission by Oxfam International under Decision 2004/116 on the 'Responsibilities of Transnational Corporations and related Business Enterprises with regards to Human Rights'* (17 November 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Humanist Committee on Human Rights, *Statement HOM on Draft UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); International Network for Economic, Social and Cultural Rights, *Steps Toward Corporate Accountability for Human Rights: ESCR-Net Report to OHCHR on the Human Rights Responsibilities of Business* (September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at 26 and 31; Mineral Policy Institute et al, *Submission to the UN Office of the High Commissioner for Human Rights on 'The Norms on the Responsibilities of Transnational Corporations and other Business Entities with regards to Human Rights'*, online: OHCHR

that "[t]he Norms provide the basis of a global compliance framework that should over time become *legally binding*".[136] "Although the Norms are not a *binding set of standards* and do not themselves have the force of law", Human Rights Watch also considered that "[t]heir analysis and commentary could … provide the conceptual basis for a *binding international instrument* on corporate responsibility since the Norms are an authoritative interpretation of the responsibilities of corporations under international human rights law".[137]

A small group of business enterprises also supported the development of a stronger practice around the *UN Norms*.[138] The Business Leaders Initiative on Human Rights thus initiated a "road-testing of the content of the Norms" in order to "to show ways in which the implementation of human rights might be demonstrated to [their] fellow businesses around the world".[139] GAP Inc. referred to its participation in this initiative as a way to test "the feasibility and appropriateness of the provisions of the *UN Norms* in order to identify concrete and appropriate ways to integrate human rights into business decision-making and to empower and strengthen existing initiatives that are working toward the same goal".[140]

<http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at 1 and 7. This idea can also be found in the literature on the *UN Norms*. See Muchlinski, "Human Rights", *supra* note 112 at 143; Backer, "Multinational Corporations", *supra* note 88 at 332; Kinley & Chambers, *supra* note 87 at 450; Penelope Simons, "International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights" (2012) 3:1 J Hum R and Env't 5 at 7; Ramasastry, "Corporate Social Responsibility", *supra* note 87 at 244.

[136] Australian Human Rights Centre, *Submission concerning the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* (29 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) [emphasis added].

[137] Human Rights Watch, *Statement on the United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights to the Office of the United Nations High Commissioner for Human Rights* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) [emphasis added].

[138] See Kinley et al, *supra* note 93 at 38.

[139] Business Leaders Initiative on Human Rights, *Submission to the Office of the UN High Commissioner for Human Rights relating to the 'Responsibilities of Transnational Corporations and related Business enterprises with regard to Human Rights'* (28 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at 2.

[140] Gap, *Letter from Wilma Walace* (28 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author).

Despite a clear attempt at contributing to the implementation of this instrument, the Business Leaders Initiative on Human Rights ceased its activities in 2009.[141]

On the other hand, the majority of representatives of the private sector and states denied any legal character to the *UN Norms*,[142] thus preventing the emergence of a practice

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[141] See Business and Human Rights Resource Centre, "Business Leaders Initiative on Human Rights", online: Business and Human Rights Resource Centre <http://business-humanrights.org/company-policysteps/other/business-leaders-initiative-on-human-rights-blihr> (accessed 14 September 2016).

[142] See e.g. Pfizer, *Letter from Chuck Hardwick* (29 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); United States Council for International Business, *Submission to the High Commissioner for Human Rights for the Report on the 'Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights'* online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at 4; International Organisation of Employers, *Letter from Antonio Peñalosa* (29 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at 1; Canada, *Submission of Canada to the High Commissioner of Human Rights on the Responsibilities of Business Enterprises with regard to Human Rights*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at para 2.1. Moreover, statements submitted by member states of the EU all mentioned that the "Sub-Commission is a think tank of the Commission on Human Rights made up of independent experts [and that t]he Draft Norms are not legally binding". See Austria, *Austrian Reply to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Belgium, *Response from the Permanent Mission of Belgium to the United Nations* (4 October 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Czech Republic, *Reply of the Government of Czech Republic to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Denmark, *Reply of Denmark to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (1 October 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Greece, *EU to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Hungary, *Reply of the Government of Hungary to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Italy, *EU Reply to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (29 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Luxemburg, *Reply by Luxembourg to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (29 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Netherlands, *Reply of the Netherlands to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (29 September 2004), online: OHCHR

of legality. For example, the United States Council of International Business argued that "the Sub-Commission's draft obfuscated the line between legal requirements and voluntary actions, making it impossible for any company to comply with its requirements".[143] As far as states are concerned, the United States strongly expressed its refusal to consider any form of legal character to the *UN Norms*, mentioning that "[t]he Sub-Commission had no authority to create a set of 'norms', the clearly stated purpose of which is to bind or guide the action of States or of non-State actors".[144] Other states depicted the UN human rights system as "over-stretched" and inadequate to ensure an appropriate monitoring of the *UN Norms*.[145]

A similar tension can be noted in two reports that followed the consultation process operated by the OHCHR. The first one was intended to compile the submissions to the OHCHR and stressed that the views on this initiative were considerably divided.[146] Without acknowledging any legal character to the *UN Norms*, the OHCHR concluded that they deserved encouragement and recommended "to the Commission to maintain the draft Norms among existing initiatives and standards on business and human rights, with a view to their further consideration".[147] In other words, despite the refusal of the UN Commission

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<http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Poland, *Reply of the Government of the Republic of Poland to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author).

[143] United States Council for International Business, *ibid* at 4.

[144] United States of America, *Re: Note Verbale from the OHCHR of August 3, 2004 (GVA2537)* (30 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author). See also Backer, "Multinational Corporations", *supra* note 88 at 377.

[145] See Australia, *Comments by Australia in respect of the Report Requested from the Office of the High Commissioner for Human Rights by the Commission on Human Rights in its Decision 2004/116 of 20 April 2004 on Existing Initiatives and Standards relating to the Responsibility of Transnational Corporations and related Business Enterprises with Regard to Human Rights* (8 September 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author); Canada, *supra* note 142 at para 2.6; Norway, *Decision 2004/116 – Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights* (4 November 2004), online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author) at 2-3.

[146] Sub-commission on the Promotion and Protection of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights*, 2005, UN Doc E/CN.4/2005/91, paras 22 and 52.

[147] *Ibid* at para 52.

on Human Rights to authorize any monitoring of this initiative by the Sub-Commission, such a report left the door open for the development of a practice surrounding the *UN Norms*.

By contrast, a report prepared by the Special Representative during the elaboration of the *UN Guiding Principles* characterized the *UN Norms* as an impractical initiative.[148] Instead of further considering their contribution within his own mandate, the Special Representative provided the following:

> [T]he Norms exercise became engulfed by its own doctrinal excesses. Even leaving aside the highly contentious though largely symbolic proposal to monitor firms and provide for reparation payments to victims, its *exaggerated legal claims* and conceptual ambiguities created confusion and doubt even among many mainstream international lawyers and other impartial observers. Two aspects are particularly problematic in the context of this mandate. One concerns the legal

[148] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, 2006, UN Doc E/CN.4/2006/97 [*Special Representative – Interim Report*]. See also Kinley & Chambers, *supra* note 87 at 460-461; Ruggie, "Business and Human Rights", *supra* note 92 at 822-827; Kinley et al, *supra* note 93 at 32; Feeney, *supra* note 101 at 166; Buhmann, "Regulating", *supra* note 1 at 46; De Brabandere, *supra* note 92 at 274-275; De Jonge, "Transnational Corporations", *supra* note 60 at 74; Miretski & Bachmann, *supra* note 92 at 35; Backer, "On the Evolution", *supra* note 28 at 9; Knox, *supra* note 92 at 61; Karlsson & Granström, *supra* note 92 at 294; Radu Mares, "Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress" in Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martinus Nijhoff Publishers, 2012) 1 at 9–10 [Mares, "Business and Human Rights"]; Simons, *supra* note 135 at 8; Bird et al, *supra* note 123 at 20; Karavias, *Corporate Obligations*, *supra* note 94 at 81; Ruggie, *Just Business*, *supra* note 77 at 47-55; Bilchitz & Deva, *supra* note 23 at 12; Karin Buhmann, "Navigating from 'Train Wreck' to being 'Welcomed': Negotiation Strategies and Argumentative Patterns in the Development of the UN Framework" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 29 at 29–30 and 40-41 [Buhmann, "Navigating"]; Carlos López, "The 'Ruggie Process': From Legal Obligations to Corporate Social Responsibility?" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 58 at 62-63; David Bilchitz, "A Chasm Between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRGS's Framework and the Guiding Principles" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 107 at 110; Nolan, *supra* note 101 at 150; Sally Wheeler, "Corporate Respect for Human Rights: As Good as it Gets?" in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (New York: Routledge, 2013) 209 at 213–214; Jamie Darin Prenkert & Scott J Shackelford, "Business, Human Rights, and the Promise of Polycentricity" (2014) 47 Vand J Transnat'l L 451 at 467; Jernej Letnar Černič & Tara Van Ho, "Introduction" in Jernej Letnar Černič & Tara Van Ho, eds, *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Legal Publishers, 2015) 1 at 3. This critique of the *UN Norms* was in turn criticized by Weissbrodt as demonstrating the Special Representative's "ridiculous and uncritical parroting of the arguments presented by the International Chamber of Commerce". See Weissbrodt, "Sub-Commission", *supra* note 92 at 117.

> authority advanced for the Norms and the other the principle by which they propose to allocate human rights responsibilities between States and firms.[149]

Along these lines, the Special Representative justified the adoption of a new approach by maintaining that "the divisive debate over the Norms obscure[d] rather than illuminate[d] promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect to human rights".[150] Taken as a whole, the discourse of the Special Representative strongly discouraged the use of the *UN Norms*, let alone a practice of legality.

Another source of discourses that demonstrates the absence of a practice of legality related to the *UN Norms* can be found in the semi-structured interviews that have been conducted for the present research. Of course, some participants acknowledged a certain normative contribution from this instrument with respect to the evolving codification of foreign investors' responsibilities.[151] Despite the refusal of the Special Representative to rely on this instrument for his mandate, one participant even suggested that some concepts of the *UN Norms* had had an appreciable impact on the *UN Guiding Principles*.[152] By contrast, the reference to the practice surrounding the *UN Norms* by one participant as "a pretty much disaster"[153] suggests a weak practice that definitely failed to reflect any legal character.

Several discourses that followed the elaboration of the *UN Norms* also reproduce *relations of power* whose consideration contributes to explain the lack of a practice of legality.[154] For example, Christian Aid stressed that representatives of the private sector

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[149] *Special Representative – Interim Report*, *ibid* at para 59 [emphasis added].

[150] *Ibid* at para 69.

[151] Interview 2: "[T]here is sort of a gradual process. Each of the standards slowly improves the game. So I think the Norms had an important role to play in taking steps towards the elaboration of standards and identifying the various implementation mechanisms that were then being discussed. The subsequent work of the OECD, the UN Human Rights Council, can be said to develop those ideas further".

[152] Interview 9.

[153] See Interview 9.

[154] On the role of relations of power in the failure of the *UN Norms*, see Daniel Augenstein & David Kinley, "When Human Rights 'Responsibilities' Become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations" in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 269 at 831 [Augenstein & Kinley, "When Human Rights"]; Daniel Augenstein & David Kinley, "Beyond the 100 Acre Wood: In which International Human Rights Law Finds New Ways to Tame Global Corporate Power" (2015) 19 Int'l J Hum Rights 828 at 831.

"have the power to delay the establishment of binding regulation".[155] Fearing that the implementation of the *UN Norms* by NGOs would be "arbitrary, unjustified and discriminatory", BASF maintained that "the draft norms appear to be driven by an ideological anti-corporate spirit, particularly regarding transnational corporations".[156] Any account of the absence of a practice of legality surrounding this instrument must acknowledge that such an outcome is consistent with the position advanced by the most powerful members of the community of practice.

Overall, despite the initial will of the Sub-commission and support from public interest NGOs to establish a legally binding instrument, the *UN Norms* have fallen short of entering the realm of legality. In addition to a failure to meet several criteria of legality, the opposition of powerful actors and subsequent reports from the UN have played a decisive role in preventing the emergence of shared understandings and a genuine practice of legality. Even if some members of the community of practice initially considered them as providing the basis for a binding instrument, the *UN Norms* have belonged to the realm of social norms and are now an international initiative that has faded away.[157]

4. The *UN Guiding Principles*

Shortly after the brief practice emerging from the *UN Norms*, the Special Representative undertook the elaboration of another initiative that relates to the codification of foreign investors' responsibilities. In this regard, the *UN Guiding Principles* include thirty-one paragraphs and rest on three different pillars: a state duty to protect human rights, a corporate responsibility to respect human rights and access to remedy.[158]

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[155] Christian Aid, *supra* note 135 at 20.

[156] BASF, *Comments on the UN Draft Norms*, online: OHCHR <http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author).

[157] It has even been suggested that the *UN Norms* were "no longer in the picture". See Mary E Footer, "Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment" (2009) 18 Mich St U Coll L J Int'l L 33 at 61.

[158] These are the titles of each pillar included in the *UN Guiding Principles*. See *UN Guiding Principles*, *supra* note 7.

The analysis below suggests that the *UN Guiding Principles* currently exist as a social norm, with a stronger potential to evolve toward the realm of legality than instruments previously elaborated and implemented under the auspices of the UN. From the outset, it is plain that support from powerful international actors for this initiative has depended upon the recognition that the *UN Guiding Principles* do not enshrine any new legal obligations (4.1). However, the legitimacy of this international norm is extensively strengthened by its fulfillment of several criteria of legality (4.2). Furthermore, even if these principles are not currently compulsory, the practice surrounding this instrument contributes to make the *UN Guiding Principles* harder to circumvent and could potentially evolve toward a practice of legality (4.3).

4.1 Shared Understandings: More Than Voluntary, Less than Legal

The *UN Guiding Principles* are characterized by a relatively long period of elaboration that was initiated by the Commission on Human Rights in 2005.[159] By adopting Resolution 2005/69, a group of states requested the UN Secretary-General to appoint a Special Representative with a mandate to "identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights".[160] Among other aspects, this mandate also included some work "on the role of [s]tates in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights".[161] In a way that recalls the *epistemic community* that elaborated the *UN Norms*, the *UN Guiding Principles* also result from the work of a group of experts who did not act as representatives of member states.[162] After the presentation of "a principles-based

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[159] See *Human Rights and Transnational Corporations and other Business Enterprises*, CHR Res 2005/69, UNESCOR, 2005, Supp No 3, UN Doc E/2005/23, 268 [*CHR Resolution 2005/69*]. See also Bilchitz & Deva, *supra* note 23 at 7; Buhmann, "Navigating", *supra* note 148 at 33-34. According to Ruggie, this resolution was led by the United Kingdom and four other core sponsors, namely Argentina, India, Nigeria and the Russian Federation: Ruggie, *Just Business*, *supra* note 77 at xlvii.

[160] *CHR Resolution 2005/*69, *ibid* at para 1(a).

[161] *Ibid* at para 1(b).

[162] See Ruggie, *Just Business*, *supra* note 77 at xx; López, *supra* note 148 at 72; John Gerard Ruggie & John F Sherman III, "Adding Human Rights Punch to the New Lex Mercatoria : The Impact of the UN Guiding

conceptual and policy framework"[163] that was welcomed by the Human Rights Council in 2008,[164] the mandate of the Special Representative was extended with a view to operationalizing further this framework.[165] As a result, the Special Representative presented the *UN Guiding Principles* to the Human Rights Council for consideration in March 2011.[166] Ultimately, in addition to emphasizing the role played by the Special Representative "in generating greater shared understanding of business and human rights challenges among all stakeholders",[167] the Human Rights Council endorsed this informal instrument and decided to establish a Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises ("Working Group") in order to implement the *UN Guiding Principles*.[168]

In addition to the Special Representative and his team, the *community of practice* that contributed to the elaboration of this initiative includes a broad variety of international actors. When introducing the *UN Guiding Principles*, the Special Representative emphasized that these principles had been informed by discussions conducted with representatives of governments, business enterprises and associations, public interest

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Principles on Business and Human Rights on Commercial Legal Practice" (2015) 6 J Int'l Dispute Settlement 455 at 456; John Gerard Ruggie, "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights" (2014) 20 Global Governance 5 at 5 [Ruggie, "Global Governance"].

[163] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *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*, 2008, UN Doc A/HRC/8/5 at para 1 [*Special Representative – 2008a Report*].

[164] See *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, HRC Res 8/7, 2008, UN Doc A/HRC/8/52, 30 at para 1.

[165] *Ibid* at para 4.

[166] *UN Guiding Principles*, *supra* note 7.

[167] *Human Rights and Transnational Corporations and other Business Enterprises*, HRC Res 17/4, 2011, UN Doc A/HRC/RES/17/4 at para 2 [*HRC Resolution 17/4*]. See also Mares, "Business and Human Rights", *supra* note 148 at 6.

[168] *HRC Resolution 17/*4, *ibid* at paras 1 and 6. See also Mares, "Business and Human Rights", *ibid* at 3; Ramasastry, "Corporate Social Responsibility", *supra* note 87 at 248. The mandate of the Working Group was extended in 2014 for a period of three years. See *Human Rights and Transnational Corporations and other Business Enterprises*, HRC Res 26/22, 2014, UN Doc A/HRC/RES/26/22 at para 10 [*HRC Resolution 26/22*]. See also Černič and Van Ho, *supra* note 148 at 4; Cantú Rivera, *supra* note 92 at 308.

NGOs, as well as experts related to various areas.[169] The Special Representative thus identified "an emerging community of actors who, while approaching the challenges from different perspectives, nevertheless are working to improve current practices".[170] More specifically, several actors seized the opportunity to join the consultation process by submitting statements during the mandate of the Special Representative and shortly after the endorsement of the *UN Guiding Principles* by the Human Rights Council. In addition to these submissions, reports prepared by the Special Representative and transcripts from semi-structured interviews constitute discourses that can be critically analyzed to assess the shared understandings on which the *UN Guiding Principles* rely.[171]

One aspect that strikingly distinguishes the elaboration of the *UN Guiding Principles* from previous instruments of the UN is the reliance on extensive consultations and an incremental process that ultimately allowed support from several types of actors.[172] Despite diverging views with respect to issues like states' extraterritorial obligations,[173] the

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[169] *UN Guiding Principles*, *supra* note 7, Introduction at para 10. See also *Special Representative – Interim Report*, *supra* note 148 at para 3; Buhmann, "The Development", *supra* note 13 at 85 and 92; Buhmann, "Navigating", *supra* note 148 at 34.

[170] See Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises – Addendum – Summary of Five Multi-Stakeholder Consultations*, 2008, UN Doc A/HRC/8/5/Add.1 at para 66 [*Special Representative – 2008 Report – Addendum 1*].

[171] For another study related to the *UN Guiding Principles* that also relies on discourse analysis, see Buhmann, "Navigating", *supra* note 148.

[172] See e.g. Buhmann, "Regulating", *supra* note 1 at 46-47; Robert McCorquodale, "Corporate Social Responsibility and International Human Rights Law" (2009) 87 Journal of Business Ethics 385 at 385–386; Robert C Blitt, "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance" (2012) 48 Tex Int'l L J 33 at 42; Buhmann, "The Development", *supra* note 13 at 103; Mares, "Business and Human Rights", *supra* note 148 at 6-7; Deva, *Regulating Corporate Human Rights*, *supra* note 42 at 105; Ruggie, *Just Business*, *supra* note 77 at xiii; Bilchitz & Deva, *supra* note 23 at 2 and 10-12; De Schutter, "Foreword", *supra* note 101 at xviii; Surya Deva, "Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 78 at 81 [Deva, "Treating Human Rights"]; Susan Ariel Aaronson & Ian Higham, "'Re-righting Business': John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms" (2013) 35 Hum Rts Q 333 at 337–345; Michael K Addo, "The Reality of the United Nations Guiding Principles on Business and Human Rights" (2014) 14 Hum Rts L Rev 133 at 136; Ruggie, "Global Governance", *supra* note 162 at 10.

[173] While representatives of the private sector disagreed with the inclusion of such concerns in the *UN Guiding Principles*, other actors advocated for recognition that home states can regulate the extraterritorial activities of business enterprises based on their territory. For the position of representatives of the private sector and states, see e.g. BDA – Confederation of German Employers, *German Employers' Position on the 'Guiding Principles' Proposed by John Ruggie, UN Special Representative for Business and Human Rights* (21 December 2010), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-

respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016) at 3; International Organisation of Employers et al, *Joint IOE-ICC-BIAC Comments on the Draft Guiding Principles on Business and Human Rights* (26 January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016) at 5 [International Organisation of Employers et al, *Special Representative Submission*]; United States Chamber of Commerce Institute for Legal Reform, *Comments on the Draft Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework* (31 January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016) at 20 and 30; Talisman Energy, *Comments on the Mandate for the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* (December 2010), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016) at 5. For the position of public interest NGOs, academics and some states institutions, see MiningWatch Canada, *Comments on the Draft Guiding Principles on Business and Human Rights* (31 January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016); Palestinian Boycott, Divestment and Sanctions National Committee, *Palestinian Civil Society Statement on the Draft Guiding Principles on Business and Human Rights* (January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016); EarthRights International, *Comments of EarthRights International on the Draft Guiding Principles for the Implementation of the United Nations 'Protect, Respect, and Remedy' Framework* (31 January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016) at 1; European Center for Constitutional and Human Rights, *SRSG John Ruggie's Draft Guiding Principles for the Implementation of the United Nations 'Protect, Respect, and Remedy' Framework – Position Paper* (27 January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016) at 10; International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Kenya National Commission on Human Rights, *UN Representative on Business and Human Rights' Draft Guiding Principles for the Implementation of the UN 'Protect, Respect, and Remedy' Framework'* (January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016) at 6; Amnesty International et al, *Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights* (14 January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016) at 1; Oxfam International, *Oxfam International's Perspective on the Draft Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework* (31 January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016). This tension was also acknowledged by the Special Representative. See Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, 2010, UN Doc A/65/310 at para 22.

UN Guiding Principles are often considered as relying on a broad consensus. For example, according to the Special Representative, "there was broad acceptance of the underlying premise of the consultation, that companies have a responsibility to respect human rights, and of due diligence as a useful overarching concept enabling companies to operationalize the responsibility to respect".[174] Moreover, the UN Global Compact Human Rights Working Group commended the Special Representative for its inclusive approach and mentioned that the result of his work enjoyed "the legitimacy and widespread support that is essential for sustainable progress in ensuring respect for human rights in business activities around the world".[175] In other words, the absence of stark opposition from any members of the community of practice suggests that the *UN Guiding Principles* are anchored in solid shared understandings.

Yet, when looking more closely at the statements submitted during the elaboration of this instrument, it must be noted that such an apparent consensus for the *UN Guiding Principles* hides notable divergences with respect to their legal character. As a starting point, it is plain that the Special Representative did not seek to establish any new international legal obligations for either states or business enterprises.[176] Of course, when

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[174] *Special Representative – 2008 Report – Addendum 1*, *supra* note 170 at para 152.

[175] United Nations Global Compact, *Statement by the UN Global Compact Human Rights Working Group to the Special-Representative of the Secretary-General on Business and Human Rights* (January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016).

[176] See Nicola Jägers, "UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability?" (2011) 29:2 Neth Q Hum Rts 159 at 160 [Jägers, "UN Guiding Principles"]; Larry Catá Backer, "From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' 'Protect, Respect and Remedy' and the Construction of Inter-Systemic Global Governance" (2012) 25 Global Bus & Dev L J 69 at 95, 97 and 107-108 [Backer, "From Institutional Misalignments"]; Mares, "Business and Human Rights", *supra* note 148 at 24; Blitt, *supra* note 172 at 43; Ruggie, *Just Business*, *supra* note 77 at 106; Simons, *supra* note 135 at 38; Karavias, *Corporate Obligations*, *supra* note 94 at 82-83; López, *supra* note 148 at 59; Deva, "Treating Human Rights", *supra* note 172 at 93-95; Bilchitz, *supra* note 148 at 118-123; Nolan, *supra* note 101 at 155; Ramasastry, "Corporate Social Responsibility", *supra* note 87 at 247; Simons & Macklin, *supra* note 46 at 96-98; John Gerard Ruggie, "Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization" in César Redorguez-Garavito, ed, *Business and Human Rights: Beyond the End of the Beginning* (forthcoming) at 3 [Ruggie, "Regulating Multinationals"]; Ruggie & Sherman III, *supra* note 162 at 456; Surya Deva, "Multinationals, Human Rights and International Law: Time to Move beyond the 'State-Centric' Conception" in Jernej Letnar Černič & Tara Van Ho, eds, *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Legal Publishers, 2015) 27 at 28–29 [Deva, *Multinationals*]; Mary E Footer, "Human Rights Due Diligence and the Responsible Supply of Minerals from Conflict-affected Areas: Towards a Normative Framework" in Jernej Letnar Černič & Tara Van Ho, eds, *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Legal Publishers, 2015) 179 at 180 [Footer, "Human Rights"]; Andrew Clapham, "Human Rights Obligations for

considering the corporate responsibility to respect human rights as a "baseline expectation"[177] or a "universally applicable human rights responsibility for all companies, in all situations",[178] it is plain that the epistemic community behind the *UN Guiding Principles* sought to depart from an instrument whose observance is merely voluntary. However, in his introduction to this instrument, the Special Representative underscored that "[t]he Guiding Principles' normative contribution lies *not in the creation of new international law obligations* but in elaborating the implications of existing standards and practices for [s]tates and business".[179]

This absence of new legal obligations has been the primary reason explaining the support of several states and business enterprises for this international instrument.[180] For example, a joint statement from the International Organisation of Employers, the International Chamber of Commerce and the Business and Industry Advisory Committee linked the support of business to the *UN Guiding Principles* to the recognition that they were "not a scheme for attributing legal liability or setting *legal norms*, and [that] the corporate responsibility to respect is a *social expectation* but has *no legal implications*".[181] The Commission on Multinational Enterprises of the Confederation of Netherlands'

Non-State Actors: Where Are We Now?" in Fannie Lafontaine & François Laroque, eds, *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (forthcoming).

[177] See *Special Representative – 2008a Report*, *supra* note 163 at para 55; Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Toward Operationalizing the 'Protect, Respect and Remedy' Framework*, 2009, UN Doc A/HRC/11/13 at para 48.

[178] See Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework*, 2010, UN Doc A/HRC/14/27 at para 65.

[179] *UN Guiding Principles*, *supra* note 7, Introduction at para 14 [emphasis added].

[180] In addition to the other examples mentioned in this paragraph, see Prospectors and Developers Association of Canada, *A Submission by the Prospectors and Developers Association of Canada regarding Guiding Principles for the Implementation of the United Nations 'Prospect, Respect and Remedy' Framework* (January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016); United States Chamber of Commerce Institute for Legal Reform, *supra* note 173 at 28; Talisman Energy, *supra* note 173 at 2. See also McCorquodale, *supra* note 172 at 391; Simons, *supra* note 135 at 10-11; Deva, *Regulating Corporate Human Rights*, *supra* note 42 at 109-110; Bilchitz & Deva, *supra* note 23 at 10-11; Nolan, *supra* note 101 at 157.

[181] International Organisation of Employers et al, *Special Representative Submission*, *supra* note 173 at 2 [emphasis added].

Industry and Employers similarly "welcomed the idea of professor Ruggie that the framework supports a company's 'licence to operate' and thus *is not meant to impose direct legal obligations* … on business".[182] Along the same lines, several representatives of business enterprises emphasized the relevance of non-judicial grievance mechanisms to address allegations of human rights violations.[183] Finally, while the European Union limited its consideration of the *UN Guiding Principles* to an "authoritative policy framework",[184] the United Kingdom mentioned that they "are policy guidelines, not all of which necessarily reflect the current state of international law".[185]

By contrast, while demonstrating considerable dissatisfaction with the lack of a legal character to this initiative, several public interest NGOs and some states perceived the work of the Special Representative as a step that could pave the way to the adoption of international legal norms to hold business enterprises accountable.[186] For example, after acknowledging that they constitute "a significant step towards strengthening corporate accountability for human rights abuses", Oxfam International considered that the wording of the *UN Guiding Principles* was "ambiguous in parts and tend[ed] to obscure the

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[182] Commission on Multinational Enterprises of the Confederation of Netherlands' Industry and Employers, *Comments by the Commission on Multinational Enterprises of the Confederation of Netherlands' Industry and Employers VNO-NCW n the Draft UN Guiding Principles or the Implementation of the UN 'Protect, Respect and Remedy' Framework* (31 January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016) [emphasis in the original].

[183] See e.g. *ibid*; International Organisation of Employers et al, *Special Representative Submission*, *supra* note 173 at 14; United States Chamber of Commerce, *Comments of the United States Chamber of Commerce on the Draft Guiding Principles on Business and Human Rights* (31 January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016) at 3.

[184] European Union, *EU Comments on the Draft Guiding Principles for the Implementation of the UN 'Protect, Respect and Remedy' Framework* (31 January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016) at 1.

[185] United Kingdom, *UK Government Comments on the Draft UN Guiding Principles for the Implementation of the 'Protect, Respect and Remedy' Framework* (January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016) at 1.

[186] See Taylor, *supra* note 77 at 19-20.

mandatory nature of [s]tate and business obligations".[187] Along the same lines, the Scottish Human Rights Commission maintained that "the principles must be seen as a foundation from which we can build" and "that nothing in the [*UN Guiding Principles*] should be seen as limiting the further development and application of international human rights law or national law".[188] In more critical terms, after having emphasized that his delegation had constantly sought the elaboration of "a binding legal framework", a representative of Ecuador underscored that the *UN Guiding Principles* "were not binding standards nor did they wish to be; they were simply guidance; they were not mandatory".[189] The need for stronger grievance mechanisms that depart from non-judicial initiatives to specifically address human rights violations was also mentioned in several submissions.[190]

Interviews conducted for the present research project have also highlighted the absence of shared understandings regarding the legal nature of the *UN Guiding Principles*. As summarized by one participant:

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[187] Oxfam International, *supra* note 173.

[188] International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Scottish Human Rights Commission, *UN Representative on Business and Human Rights' Draft Guiding Principles for the Implementation of the UN 'Protect, Respect, and Remedy' Framework'* (January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016) at 39.

[189] See the comments from Ecuador in United Nations Human Rights Office of the High Commissioner, *Council Establishes Working Group on Human Rights and Transnational Corporations and other Business Enterprises* (16 June 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-human-rights-council-establishes-working-group-on-business-human-rights-includes-statements-by-govt-delegations> (accessed 14 September 2016).

[190] See e.g. MiningWatch Canada, *supra* note 173; Palestinian Boycott, Divestment and Sanctions National Committee, *supra* note 173; FIAN International et al, *Statement to the Delegations on the Human Rights Council 2011, 17th Session, Agenda Item 3* (30 May 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/reports-to-un-human-rights-council/2011> (accessed 14 September 2016); European Center for Constitutional and Human Rights, *supra* note 173 at 8; *Written Statement Submitted by Human Rights Advocates Inc., a Non-Governmental Organization in Special Consultative Status*, 2011, UN Doc A/HR/17/NGO/3 at para 6; International Federation of Human Rights et al, *Joint Civil Society Statement on Business and Human Rights to the 17th Session of the UN Human Rights Council* (15 June 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/reports-to-un-human-rights-council/2011> (accessed 14 September 2016); Amnesty International et al, *supra* note 173 at 3; Right Respect et al, *Comments on the 'Guiding Principles for the Implementation of the United Nations 'Protect, Respect Remedy" Framework Developed by the United Nations Special Representative on Transnational Corporations and other Business Enterprises* (13 January 2011), online: Business and Human Rights Resource Centre <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding> (accessed 14 September 2016) at 2-3 and 5.

> I think one of the contentious points – and I think it still exists to this day – has to do with the binding nature of the Guiding Principles. And this was more of an issue from the perspective of some NGOs who wanted a binding treaty that would directly impose binding legal obligations on businesses, that would be a treaty that countries would ratify and then would become law.[191]

Another interviewee considered this division as "the continuation of the polarized bit that sat at the start of [the Special Representative]'s mandate".[192]

Furthermore, the discourses emanating from the elaboration of the *UN Guiding Principles* reproduce inherent *relations of power* between the international actors involved.[193] The Special Representative himself noted that a "rationale for engaging the transnational corporate sector has emerged in the past few years: the sheer fact that it has global reach and capacity and that it is capable of acting at a pace and scale that neither [g]overnments nor international agencies can match".[194] Along the same lines, one interviewee explained the power held by private economic actors in the following terms: "There's a whole sort of movement in civil society on that, but the problem is that business is very influential – not just at the UN, but more importantly at the national level".[195] Power imbalances between states were also acknowledged in at least one statement from the Kenya National Commission on Human Rights, which mentioned that "[d]eveloping countries that are negotiating bilateral trade and/or investment agreements may not be in a position to retain their domestic policy space due to power imbalances and development aid conditionalities".[196] Despite the inclusive character of the consultations driven by the Special Representative, such a recognition of inherent power relations suggests that the position advocated by representatives of the private sector and capital-exporting states were more likely to influence their outcome.

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[191] Interview 4.

[192] Interview 19.

[193] Such relations of power are also identified in various studies. See e.g. Augenstein & Kinley, "When Human Rights, *supra* note 154 at 836; Bilchitz & Deva, *supra* note 23 at 8-10; López, *supra* note 148 at 70; Deva, "Treating Human Rights", *supra* note 172 at 85.

[194] *Special Representative – Interim Report*, *supra* note 148 at para 16 [emphasis omitted].

[195] Interview 16.

[196] International Co-ordinating Committee, Kenya National Commission on Human Rights, *supra* note 173 at 8.

Notwithstanding broad support for this instrument and the efforts of the epistemic community to elaborate an instrument whose observance cannot be considered as merely voluntary, a critical analysis of discourses from international actors involved in the elaboration of the *UN Guiding Principles* suggests two clashing views with respect to their legal character. Although some actors wished for the elaboration of an instrument that could have led to the imposition of concrete obligations for states and business enterprises, powerful actors rallied behind the Special Representative only to the extent that the *UN Guiding Principles* would remain a social norm that would not add any legal obligations. As a result, the elaboration process of the *UN Guiding Principles* has failed to reach shared understandings for a legally binding instrument that would impose obligations to states and business enterprises.

4.2 Criteria of Legality: More Legitimacy than Previous Initiatives

Although shared understandings in which the *UN Guiding Principles* are embedded point toward an international social norm, one crucial element suggesting a potential evolution toward the realm of legality stems from the legitimacy that this initiative generates. The fact that the provisions of this international instrument meet almost all the criteria of legality articulated in the interactional theory of international law is a key element to the emergence of the sense of obligation that characterizes international legal norms.

With respect to *promulgation*, it is unquestionable that the *UN Guiding Principles* remain an informal instrument under international law. As mentioned above, the Special Representative presented this initiative to the Human Rights Council, a subsidiary organ of the UN General Assembly whose mandate is limited to making "recommendations ... for the further development of international law in the field of human rights".[197] Despite the unambiguous role of this council in the elaboration of human rights norms,[198] nothing

[197] See *Human Rights Council*, *supra* note 6 at para 5(c). See also Bertrand G Ramcharan, *The Law, Policy and Politics of the UN Human Rights Council* (Leiden: Brill Nijhoff, 2015) at 1.

[198] See United Nations, *UN Today*, *supra* note 1 at 246; Ramcharan, *ibid* at XI.

in the elaboration of this instrument amounted to the negotiation of a formal international agreement. However, the fact that the Human Rights Council "[w]elcome[d] the work and contributions of the Special Representative … and endorse[d] the Guiding Principles on Business and Human Rights"[199] demonstrates support from the members of the UN and contributes to the promulgation of the initiative.

Another aspect that contributes to foster the legitimacy of the *UN Guiding Principles* relates to their *general* character.[200] The general principles preceding the main paragraphs of the this instrument provide that "[t]hese Guiding Principles apply to *all States* and to *all business enterprises*, both transnational and others, regardless of their size, sector, location, ownership and structure".[201] In addition to extending the duty to protect human rights to all states, the drafters of this instrument have chosen to avoid any distinction between transnational corporations and other business enterprises pertaining to the corporate responsibility to respect human rights.[202] The general principles also call upon the implementation of the *UN Guiding Principles* "in a non-discriminatory manner", with a specific consideration of the most vulnerable groups.[203]

Several elements of the *UN Guiding Principles* also ensure that this informal instrument lives up to the requirement of *clarity*. The Special Representative cautiously included a commentary for each principle, with a view to "further clarifying its meaning and implications".[204] More specifically, even if several authors consider the application of the concept of due diligence as confusing or requiring clarification,[205] the process through

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[199] See *HRC Resolution 17/4*, *supra* note 167 at para 1 [emphasis omitted].

[200] See Taylor, *supra* note 77 at 15.

[201] *UN Guiding Principles*, *supra* note 7, General Principles [emphasis added].

[202] See also *ibid*, Guiding Principle 14.

[203] *Ibid*, General Principles.

[204] *Ibid*, Introduction, at para 14.

[205] See e.g. Mares, "Global Corporate Social Responsibility", *supra* note 77 at 265; López, *supra* note 148 at 61; Deva, "Treating Human Rights", *supra* note 172 at 98-101; Simons & Macklin, *supra* note 46 at 99; Chetail, *supra* note 92 at 128-129; Bird et al, *supra* note 123 at 25-41; Olivier De Schutter, "Towards a New Treaty on Business and Human Rights" (2016) 1 Bus & Hum Rights J 41 at 57. See generally Sabine Michalowski, "Due Diligence and Complicity: A Relationship in Need of Clarification" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) 218; Tara Van Ho, "'Due Diligence' in 'Transitional Justice States': An Obligation for Greater Transparency?" in Jernej Letnar Černič & Tara Van Ho, eds, *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Legal Publishers, 2015) 229.

which business enterprises should carry out due diligence is explained at great length in Guiding Principles 17 to 21 and their related commentaries.[206] Some reports prepared by the Special Representative to present the framework that preceded the *UN Guiding Principles* also provide additional information with respect to human rights due diligence.[207] While a certain level of flexibility around this concept remains, it is here submitted that the efforts deployed by the Special Representative through his mandate contribute to providing enough clarity to meet this criterion of legality.

In a way that echoes the application of the criteria of legality to the majority of instruments codifying foreign investors' responsibilities, the criterion of *constancy* does not encounter any specific obstacles with respect to the *UN Guiding Principles*. The recent elaboration of this instrument has not led to any revision so far, thus avoiding a lack of constancy with respect to its content. Likewise, the absence of temporal considerations throughout the provisions of the *UN Guiding Principles* allows circumventing potential issues pertaining the *retroactive application* of this international norm.

The legitimate character of the *UN Guiding Principles* also results from its provisions that *avoid asking the impossible* to states and business enterprises. In fact, the wording of several provisions found in this instrument demonstrates an express consideration of the variety of situations in which states and business enterprises can operate, without jeopardizing the universal character of the state duty to protect and the corporate responsibility to respect human rights. For example, as far as state-owned enterprises and export credit agencies are concerned, Guiding Principle 4 provides that states "should take additional steps to protect against human rights abuses … including,

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[206] *UN Guiding Principles*, *supra* note 7, Guiding Principles 17-21. See also Taylor, *supra* note 77 at 15; Backer, "From Institutional Misalignment", *supra* note 176 at 130-136; Rae Lindsay et al, "Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles" (2013) 6:1 J World Energy Law Bus 2 at 18–23; Olga Martin-Ortega, "Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?" (2013) 31:4 Neth Q Hum Rts 44 at 55–57; Ruggie, *Just Business*, *supra* note 77 at 114-116; Footer, "Human Rights", *supra* note 176 at 184-188.

[207] *Special Representative – 2008a Report*, *supra* note 163 at paras 56-64; Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Clarifying the Concepts of 'Sphere of Influence' and 'Complicity'*, 2008, UN Doc A/HRC/8/16 at paras 19-25. See also Tineke Lambooy, "Corporate Due Diligence as a Tool to Respect Human Rights" (2010) 28 Neth Q Hum Rts 404 at 433–441; Peter Muchlinski, "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation" (2012) 22 Bus Ethics Q 145 at 149.

where appropriate, by requiring human rights due diligence".[208] Guiding Principle 15 also stipulates that "[i]n order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes *appropriate to their size and circumstances*".[209] The recognition of situations in which conflicting requirements between domestic legislation and international human rights can emerge constitutes another element from the *UN Guiding Principles* that is in line with this criterion of legality. After maintaining that business enterprises should "[c]omply with all applicable laws and respect internationally recognized human rights, wherever they operate",[210] Guiding Principle 23 stipulates that they should "[s]eek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements".[211]

The extent to which the *UN Guiding Principles* meet the criterion pertaining to the *absence of contradiction* is particularly noteworthy. Not only does this instrument exclude any direct contradictions between its provisions, but the tension observed in other initiatives between the pressing need to hold business enterprises accountable and the reliance on a voluntary instrument is obviated.[212] After acknowledging that "[n]othing in these Guiding Principles should be read as creating new international law obligations",[213] this instrument does not rely on a voluntary observance of its principles.[214] In this regard, Guiding Principle 11 provides the following:

> The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights. … Business enterprises may undertake other commitments or activities to support and promote

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[208] *UN Guiding Principles*, *supra* note 7, Guiding Principle 4 [emphasis added]. The extent to which action by states or business enterprises is "appropriate" is also mentioned at Guiding Principles 3(d) and 18(b).

[209] *Ibid*, Guiding Principle 15.

[210] *Ibid*, Guiding Principle 23(a).

[211] *Ibid*, Guiding Principle 23(b). See also Backer, "From Institutional Misalignment", *supra* note 176 at 137; Lindsay et al, *supra* note 206 at 38-39 and 63-64.

[212] See section 2.2 of Chapter 6 and section 2.2 of Chapter 7.

[213] *UN Guiding Principles*, *supra* note 7, General Principles.

[214] See e.g. Florian Wettstein, "Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment" (2015) 14 J Hum Rights 162 at 165; Sally Wheeler, "Global Production, CSR and Human Rights: The Courts of Public Opinion and the Social Licence to Operate" (2015) 19 Int'l J Hum Rights 757 at 764 [Wheeler, "Global Production"]; Černič and Van Ho, *supra* note 148 at 6-7.

> human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations.[215]

While the absence of an express voluntary character to the observance of the corporate responsibility to respect human rights allows a stronger consistency with the criteria of legality, it also implies that international actors cannot rely on any provisions of this instrument to easily circumvent such a responsibility.

The only criterion of legality that is not fulfilled by the *UN Guiding Principles* relates to *congruence*. Of course, the inclusion of several provisions that specifically concern the access to remedy hints toward a consideration of significant instances of non-compliance with the *UN Guiding Principles*.[216] Guiding Principle 25 thus mentions that "[a]s part of their duty to protect against business-related human rights abuse, [s]tates must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy".[217] Other provisions and commentaries address the role of state-based judicial mechanisms, state-based non-judicial grievance mechanisms and non-state-based grievance mechanisms in this regard.[218] However, nothing in the *UN Guiding Principles* amounts to a specific procedural mechanism to determine compliance by business enterprises with the corporate responsibility to respect human rights.[219]

Moreover, another element of the failure to fulfill this criterion of congruence stems in the silence of the *UN Guiding Principles* on the establishment of a procedural device to examine the compliance of states with their duty to protect human rights. Even if the Working Group was established to implement this international instrument, the mandate of this entity is not geared toward the investigation of non-compliance. Rather, as provided in

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[215] *UN Guiding Principles*, *supra* note 7, Guiding Principle 11.

[216] *Ibid*, Guiding Principles 25-31.

[217] *Ibid*, Guiding Principles 25.

[218] *Ibid*, Guiding Principles 26-28. See also Tineke Lambooy, Aikaterini Argyrou & Mary Varner, "An Analysis and Practical Application of the Guiding Principles on Providing Remedies with Special Reference to Case Studies Related to Oil Companies" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press) 329 at 331–335.

[219] See Wettstein, *supra* note 214 at 165-166; Deva, *Regulating Corporate Human Rights*, *supra* note 42 at 114.

Resolution 17/4 of the Human Rights Council, the Working Group is primarily tasked with the general dissemination and promotion of the *UN Guiding Principles*, the dissemination of good practices and lessons learned on their implementation, as well as the promotion of capacity-building and the use of the *UN Guiding Principles*, among others.[220] While part of the mandate of the Working Group involves the conduct of country visits, these visits are not intended to focus on any allegations of human rights violations.[221]

In sum, despite a failure to fulfill the criterion of congruence, an assessment of the provisions of the *UN Guiding Principles* shows that this instrument meets most of the criteria of legality that characterize international legal norms. Of particular interest when considering the potential evolution of this norm is that it implicitly shuts the door to the voluntary observance of its requirements. Bearing in mind that such features are insufficient to guarantee the emergence of a sense of obligation, the analysis of the normative character of *UN Guiding Principles* now turns to the interactions between the members of the community of practice with respect to their implementation.

4.3 Practice of Legality: Making the *UN Guiding Principles* Unavoidable

The analysis of the interactions between international actors that have implemented the *UN Guiding Principles* since 2011 is crucial to determine whether the work of the Special Representative has resulted in a social norm or a legal norm. In addition to references to this international instrument included in other initiatives, these interactions can be analyzed through a critical analysis of discourses from members of the community of practice. Along with the actors previously involved in the elaboration of this instrument, the members of the Working Group established further to the endorsement of the *UN Guiding Principles* by the Human Rights Council constitute an integral part of this community. More specifically, submissions made to the Working Group, reports prepared by the Working Group, National Action Plans elaborated by states, a recent report from an open-ended intergovernmental working group and transcripts from semi-structured

[220] *HRC Resolution 17/4*, *supra* note 167 at para 6.

[221] See Simons, *supra* note 135 at 39; Addo, *supra* note 172 at 138-141.

interviews all constitute discourses that provide insights with respect to the practice surrounding the *UN Guiding Principles*.

Considering that this instrument is relatively recent, the extent to which the *UN Guiding Principles* have been mentioned in other international initiatives codifying foreign investors' responsibilities demonstrates a fairly impressive uptake.[222] In this regard, express references to the work of the Special Representative can be found in the commentaries of the *OECD Guidelines*,[223] the *OECD Due Diligence Guidance for Responsible Supply Chains of Mineral from Conflict-Affected and High-Risk Areas*[224] and the Guidance Notes of the *Performance Standards on Environmental and Social Sustainability* of the International Finance Corporation.[225] Under the auspices of the UN, the *UN PRAI* adopted by the Committee on World Food Security also refers to the *UN Guiding Principles*.[226] One can thus witness a form of convergence toward the *UN Guiding Principles* in the elaboration and the revision of standards concerning extraterritorial activities of private actors by intergovernmental organizations.[227]

Other initiatives have contributed to strengthen the practice around this instrument. In addition to the publication of an interpretative guide on the corporate responsibility to

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[222] See Taylor, *supra* note 77 at 23-24; Mares, "Business and Human Rights", *supra* note 148 at 22; Lindsay et al, *supra* note 206 at 4-5; Martin-Ortega, *supra* note 206 at 57-62; Ruggie, "Regulating Multinationals", *supra* note 176 at 3; Wheeler, "Global Production", *supra* note 214 at 762; Addo, *supra* note 172 at 142-145; Ruggie, "Global Governance", *supra* note 162 at 11-12.

[223] OECD, *OECD Guidelines for Multinational Enterprises, 2011 Edition* (Paris: OECD, 2011), Commentaries at para 36 [*OECD Guidelines 2011 – Commentaries*]. On the alignment of the *OECD Guidelines* on the *UN Guiding Principles*, see Blitt, *supra* note 172 at 50; Ruggie, *Just Business*, *supra* note 77 at 121-122; Simons & Macklin, *supra* note 46 at 101; De Schutter, "Foreword", *supra* note 101 at xvii and xix; Nolan, *supra* note 101 at 159; John Ruggie & Tamary Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges* (2015) Corporate Social Responsibility Initiative Working Paper at 1-3; Footer, "Human Rights", *supra* note 176 at 203-204.

[224] OECD, *OECD Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict-Affected and High-Risk Areas* (Paris: OCDE, 2013) at 13 and 70. See also Footer, "Human Rights", *ibid* at 206-215

[225] *International Finance Corporation's Guidance Note: Performance Standards on Environmental and Social Sustainability*, 1 January 2012, online: IFC <http://www.ifc.org/wps/wcm/connect/e280ef804a0256609709ffd1a5d13d27/GN_English_2012_Full-Document.pdf?MOD=AJPERES> (accessed 14 September 2016) at Guidance Note 45. See also Ruggie, *Just Business*, *supra* note 77 at 122.

[226] *Principles for Responsible Investment in Agriculture*, *supra* note 64 at paras 19(A)(v) and 33.

[227] See *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, 2015, UN Doc A/70/216 at para 7 [*Working Group – 2015 General Assembly Report*]. See also Ruggie & Sherman III, *supra* note 162 at 457-458.

respect human rights by the OHCHR,[228] the Working Group prepared some guidance for states regarding the elaboration of National Action Plans to implement the *UN Guiding Principles* in 2014.[229] The *UN Guiding Principles Reporting Framework* was also launched in February 2015, with a view to providing "clarity, for the first time, on how companies can report in a meaningful and coherent way on their progress in implementing their responsibility to respect human rights".[230] More recently, the *Guide to Implementing the UN Guiding Principles on Business and Human Rights in Investment Policymaking* was published in March 2016 in order to better implement the state duty to protect human rights through any measures related to foreign direct investment.[231] While these tools do not directly address the issue of accountability for a failure to meet the corporate responsibility to respect or the state duty to protect human rights, they nevertheless contribute to expand the practice surrounding this international norm.[232]

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[228] OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (Geneva: United Nations, 2012).

[229] Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (December 2014), online: OHCHR <http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf> (accessed 14 September 2016). The European Union Commission also called upon the adoption of National Action Plans in a communication from 2011: "The Commission … [e]xpects all European enterprises to meet the corporate responsibility to respect human rights, as defined in the UN Guiding Principles [and i]nvites EU Member States to develop by the end of 2012 national plans for the implementation of the UN Guiding Principles". See EC, Commission, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility* (Brussels: EC, 2011) at para 4.8.2. See also Ramasastry, "Corporate Social Responsibility", *supra* note 87 at 249; Claire Methven O'Brien et al, "National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool" (2016) 1 Bus & Hum Rights J 117; Larry Catá Backer, "Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All" (2015) 38 Fordham Int'l LJ 456 at 468–491 [Backer, "Moving Forward"].

[230] *UN Guiding Principles Reporting Framework* (February 2015), online: UN Guiding Principles Reporting Framework <http://www.ungpreporting.org/reporting-framework/> (accessed 14 September 2016). See also Backer, "Moving Forward", *ibid* at 497-512.

[231] LSE Investment and Human Rights Project & Laboratory for Advanced Research on the Global Economy, *Guide to implementing the UN Guiding Principles on Business and Human Rights in Investment Policymaking* (March 2016), online: LSE <http://blogs.lse.ac.uk/investment-and-human-rights/files/2016/02/3689_LSE_UNGPs_Guide_En_FIN_NEW_Web.pdf> (accessed 14 September 2016).

[232] With respect to the *UN Guiding Principles Reporting Framework*, this aspect was discussed in Interview 19: "The company is not always going to be reporting on that mine in Ethiopia that a particular group or organization may care most about, because their global operations are enormous. But, if they are having to give meaningful information about how they generally approach engagement with communities around a mine; or how they generally approach resettlement of communities from plantations; or how they generally approach reducing forced labor in their supply chain… Then your stakeholders in Addis Ababa or Johannesburg or Jakarta can go to them and say: 'This bears no relationship to what you are doing here with us'. And you have a basis for a much better conversation".

Beyond these references in international instruments and the elaboration of subsequent means to further the implementation of the *UN Guiding Principles*, discourses from the members of the community of practice nevertheless demonstrate that the current interactions around this instrument do not reflect a practice of legality. Of course, with respect to the state duty to protect human rights, several statements suggest the existence of obligations that states hold to address human rights violations by business enterprises. The United Kingdom thus considered its National Action Plan as "set[ing] out how the Government has responded to the [*UN Guiding Principles*] and [its] plans for further work to … implement UK Government *obligations* to protect human rights within UK jurisdiction where business enterprises are involved".[233] Lithuania presented its plan as a document specifying "actions, planned or implemented measures and *legislative provisions intended to consolidate Lithuania's duty to protect, defend and respect human rights, as well as to ensure effective remedies*".[234] Moreover, Sweden stressed that it "acts to ensure that state-owned companies set a good example … and that their conduct in general instils public confidence, for example by striving to *comply with* international guidelines such as the UN Guiding Principles".[235]

However, in a way that recalls discourses of international actors addressing the implementation of the *ILO Tripartite Declaration*,[236] this sense of obligation is generally owed to formal human rights international agreements rather than to the *UN Guiding Principles*.[237] For example, without mentioning the *UN Guiding Principles*, the National Action Plan adopted by Denmark emphasizes that this country "is fully *committed to*

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[233] United Kingdom, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* (September 2013), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (accessed 14 September 2016) at 6 [emphasis added] [United Kingdom, *Good Business*].

[234] Lithuania, *Lithuania's National Action Plan on the Implementation of the United Nations Guiding Principles on Business and Human Rights* (February 2015), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (accessed 14 September 2016) at 1[emphasis added].

[235] Sweden, *Action Plan for Business and Human Rights* (August 2015), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (accessed 14 September 2016) at 9 [emphasis added].

[236] See section 2.3 of Chapter 7.

[237] See e.g. Stéphanie Lagoutte, "New Challenges Facing States within the Field of Human Rights and Business" (2015) 33 Nordic J Hum Rigths 158 at 160 and 180.

human rights obligations – both nationally and internationally – and has signed and ratified *many legal instruments*, which belong to various organs, especially the United Nations, the European Union and the Council of Europe".[238] Along the same lines, after highlighting the "*obligation* to provide effective remedies when a company has committed human rights abuses" that is found in the *UN Guiding Principles*, Sweden emphasized that "legal remedies available in the Swedish legal system are *in line with the international human rights conventions* that Sweden has acceded to".[239]

The lack of recognition of a binding character to the corporate responsibility to respect human rights is even more striking. Even if some representatives of the private sector stress a commitment to this responsibility,[240] the Working Group referred to the "business uptake of the Guiding Principles"[241] rather than to a genuine sense of obligation. Moreover, several submissions from business enterprises to the Working Group aimed to emphasize the absence of legal obligations in the *UN Guiding Principles*. A joint statement from the International Employers Organisation, the International Chamber of Commerce and the Business and Industry Advisory Committee thus stressed that these principles "elaborate existing standards and do *not seek to create new international legal obligations or to assign legal liability*".[242] These organizations also recalled the necessity of relying on "dialogue and consultation"[243] in order to sustain the engagement of business enterprises in the implementation of this instrument.

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[238] Denmark, *Danish National Action Plan – Implementation of the UN Guiding Principles on Business and Human Rights* (April 2014), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (accessed 14 September 2016) at 12 [emphasis added] [Denmark, *Danish National Action Plan*].

[239] Sweden, *supra* note 235 at 15 [emphasis added].

[240] See International Council on Mining and Metals, *Submission to UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Overview of ICMM's Activities relating to Human Rights* (December 2011), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/Submissions.aspx> (accessed 14 September 2016) at 1; International Organisation of Employers et al, *Joint Recommendation to the United Nations Working Group on Business and Human Rights* (8 December 2011), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/Submissions.aspx> (accessed 14 September 2016) at 1 [International Organisation of Employers et al, *Working Group Submission*].

[241] *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, 2014, UN Doc A/HRC/26/25 at para 21 [*Working Group – 2014 Report*].

[242] International Organisation of Employers et al, *Working Group Submission*, *supra* note 240 at 2 [emphasis added].

[243] *Ibid* at 2.

Submissions from states and National Action Plans also hint toward the absence of a legal character with respect to the second pillar of the *UN Guiding Principles*. Rather than emphasizing the existence of an obligation, the European Union mentioned "its *expectation* that all European enterprises should meet the corporate responsibility to respect human rights as set out in the Guiding Principles".[244] Similarly, when addressing the potential establishment of "a new statutory obligation on due diligence … for companies when implementing the UN principles on a national level", Finland maintained that "[t]ransforming … due diligence … into a *legally binding obligation* is difficult to envisage".[245] Others, like the Netherlands, expressly referred to the corporate responsibility to respect human rights as a "social responsibility".[246] Employing more explicit terms, Nicaragua considered the "*[n]on-binding* nature of the Framework and Guiding Principles" as an obstacle to the dissemination and implementation of this instrument.[247] It rather suggested to "[d]evelop a universal, legally binding framework that is applicable in the same way to all companies without exception" and to "[i]ncorporate 'the process of due diligence' as part of a universal, legally binding human rights framework for business".[248]

Other aspects of the practice surrounding the *UN Guiding Principles* demonstrate that compliance with this instrument is not perceived as being compulsory. Although the mandate of the Working Group includes the conduct of country visits, the latter are often

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[244] European Union, *Contribution of the European Union before the First Session of the UN Working Group on Human Rights and Transnational Corporations and other Business Enterprises* (6 January 2012), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/Submissions.aspx> (accessed 14 September 2016) at 2 [emphasis added]. See also Sweden, *supra* note 235 at 3; United Kingdom, *Good Business*, *supra* note 233 at 5; Denmark, *Danish National Action Plan*, *supra* note 238 at 22.

[245] Finland, *National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights* (October 2014), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (accessed 14 September 2016) at 25 [emphasis added].

[246] Netherlands, *National Action Plan on Business and Human Rights* (December 2013), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (accessed 14 September 2016) at 1.

[247] International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Nicaragua, *Submissions to the United Nations Working Group on Transnational Corporations and other Business Enterprises* (December 2011), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/Submissions.aspx> (accessed 14 September 2016) at 49 [emphasis added].

[248] *Ibid* at 49-50.

considered as a means to discuss best practices and lessons learned.[249] Rather than providing an opportunity to investigate individual cases of alleged business-related human rights abuses, the Working Group reported that such country visits constituted "an opportunity to help to move a country forward in managing cases of negative impact of business activities".[250] Several members of the community of practice expressed their concerns regarding the absence of consideration for allegations of human rights violations during these country visits.[251]

Ongoing efforts from an Open-Ended Intergovernmental Working Group to elaborate an "international legally binding instrument" on the issue of business enterprises and human rights also implicitly evidences the absence of a practice of legality with respect to the *UN Guiding Principles*.[252] During the first meeting of this intergovernmental working group, the *UN Guiding Principles* were considered by participants and delegations

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[249] See *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, 2012, UN Doc A/HRC/20/29 at para 86. See also Switzerland, *First Submission to the UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* (22 December 2011), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/Submissions.aspx> (accessed 14 September 2016); CIDSE, *Work Programme of the United Nations Working Group on Business and Human Rights* (December 2011), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/Submissions.aspx> (accessed 14 September 2016) at 1-2; International Commission of Jurists, *International Commission of Jurists (ICJ) Submission in Response to Open Call* (December 2011), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/Submissions.aspx> (accessed 14 September 2016) at 2; International Network for Economic, Social and Cultural Rights, *Submission to the Consultation on Operationalizing the Framework for Business and Human Rights Organized by the Office of the High Commissioner for Human Rights* (December 2011), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/Submissions.aspx> (accessed 14 September 2016) [International Network for Economic, Social and Cultural Rights, *Submission*].

[250] *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, 2013, UN Doc A/HRC/23/32 at para 60.

[251] See CIDSE, *supra* note 249 at 1-2; Human Rights Watch, '*Moving from Guidance to Compliance': Human Rights Watch Recommendations to the UN Expert Body on Business and Human Rights* (December 2011), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/Submissions.aspx> (accessed 14 September 2016); International Network for Economic, Social and Cultural Rights, *Submission*, *supra* note 249.

[252] See *Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights*, HRC Res 26/9, 2014, UN Doc A/HRC/RES/26/9. See also Nicola Jägers, "Access to Justice for Victims of Human Rights Abuse: An Echternach-Procession?" (2015) 33 Neth Q Hum Rts 269 at 269–270; Černič and Van Ho, *supra* note 148 at 5; Deva, *Multinationals*, *supra* note 176 at 29; Jernej Letnar Černič, "An Elephant in a Room of Porcelain: Establishing Corporate Responsibility for Human Rights" in Jernej Letnar Černič & Tara Van Ho, eds, *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Legal Publishers, 2015) 131 at 248.

as being "complementary and not in contradiction to a legally binding instrument".[253] One panellist also stressed that the use of the term "responsibility" in the *UN Guiding Principles* fails to entail legal responsibility and legal duty.[254] The absence of a current practice of legality was also implicitly acknowledged by the Working Group in a comment on these ongoing efforts to adopt in a formal international instrument: "Irrespective of whether [s]tates choose to pursue the path of an international legally binding instrument, in the view of the Working Group, *the international community already has conceptual and practical building blocks in the Guiding Principles that can move practice forward* in both the areas of prevention and remedy".[255] While the Working Group recalled the potential evolution of the *UN Guiding Principles*, it nevertheless recognized that they do not currently correspond to an international legally binding instrument.

Although it is plain that the *UN Guiding Principles* are not compulsory for the time being, there are some aspects that contribute to make this international instrument harder to circumvent with respect to the state duty to protect human rights and the corporate responsibility to respect human rights. In a report that was submitted in 2014, the Working Group mentioned that it had sent a number of communications to states and business enterprises "to introduce the core concepts, *obligations*, responsibilities and expectations set out in the Guiding Principles".[256] These communications are merely geared toward obtaining clarifications in response to allegations of violations and are not intended to specifically examine compliance with the *UN Guiding Principles*.[257] However, they have been considered as important tools to obtain a response from international actors on alleged violations.[258] Although they were not expressly mentioned in the initial mandate of the Working Group, these communications have become an integral part of the practice related to the implementation of this instrument and have been specifically mentioned in the

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[253] *Report on the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument*, 2016, UN Doc A/HRC/31/50 at para 24. See also at para 37.

[254] *Ibid* at para 69.

[255] *Working Group – 2014 Report*, *supra* note 241 at para 51.

[256] *Ibid* at para 67 [emphasis added].

[257] *Ibid* at para 68.

[258] *Ibid* at para 74.

resolution of the Human Rights Council that extended the mandate of the Working Group in 2014.[259] Combined with the absence of an express voluntary character to the observance of this instrument, such a procedure at least ensures that compliance with the *UN Guiding Principles* cannot be easily circumvented. The recent consideration by the Working Group of the opportunity for states to report on the implementation of the *UN Guiding Principles* to UN treaty bodies is also an interesting avenue that could consolidate a practice of legality around this instrument.[260]

The discourses of individuals working for intergovernmental organizations involved in the codification of foreign investors' responsibilities also suggest a practice around the *UN Guiding Principles* that currently lacks a legal character, but that nevertheless includes some room for evolution. One interviewee thus acknowledged that "even though the Guiding Principles themselves are not binding directly – they aren't law – they are increasingly reflected in policy and in law and in adjudication and many NGOs are using it in their advocacy".[261] Along the same lines, another participant mentioned that "while the Guiding Principles themselves do not impose legal obligations, the area they cover will either a) already be covered in part or in full – mostly in part – of laws at the national level; or b) if the Guiding Principles' potential is realized, will increasingly be covered at the national level by effective norms and regulations – if and when states start doing their job".[262] In addition to stressing the avowed intent to exclude a voluntary

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[259] *HRC Resolution 26/22*, *supra* note 168 at para 11: "*Encourages* all States, relevant United Nations agencies, funds and programmes, treaty bodies and civil society actors, including non-governmental organizations, as well as public and private businesses to cooperate fully with the Working Group in the fulfilment of its mandate by, inter alia, responding to communications transmitted, and for States to reply favourably to requests for visits by the Working Group".

[260] *Working Group – 2015 General Assembly Report*, *supra* note 227 at para 83. Examples of potential practice that could consolidate a practice of legality can also be found in the literature. See e.g. Jägers, "UN Guiding Principles", *supra* note 176 at 163.

[261] Interview 4. See also Interview 5: "[T]he Guiding Principles aren't law – you know, Special Rapporteurs cannot make law. They certainly could propose things that then should be negotiated. But the plan for the Guiding Principles was never to be law. […] [I]t reflects international law on human rights where it exists and it reflects policy, where it doesn't exist. […] Certainly, many of the policy statements in the Guiding Principles could become law. Whether domestic or international. They could become law. But the idea of the Guiding Principles was clearly to show the reach of the law and then where you could get – where you have very concrete, legitimate, supported policy arguments".

[262] Interview 16.

observance of the *UN Guiding Principles*,[263] several participants depicted this instrument as being part of an "evolutionary process".[264] One interviewee even implicitly suggested that the practice related to this international instrument has already produced appreciable effects on the perceptions of international actors and that the *UN Guiding Principles* could move closer to the realm of legality:

> [W]e are still at that stage where we have to give some hearing to seemingly conflicting social values. Which is why the Guiding Principles could go so far, but not beyond that. Now, of course, that was 2011. If in 2015 we had to reinvent the Guiding Principles, the question would be: 'Would it be the same?'. I suspect not, because I think we have learnt a lot more in four years and the companies were now prepared to understand and give a little bit more room.[265]

In addition to bearing crucial insights with respect to the nature of this practice, the discourses of international actors pertaining to the implementation of the *UN Guiding Principles* also demonstrate inherent *relations of power*. Amnesty International thus identified obstacles to remedies that should be taken into account by the Working Group, namely "challenges presented by the complexity of corporate structures and how these are often used to evade accountability", as well as "imbalances in power and influence between corporate actors and victims and the overall impact that this has on justice".[266] Similarly, when reporting on the effectiveness of non-judicial grievance mechanisms, the Working Group acknowledged some concerns with respect to "structural power imbalances that impair victims' ability to effectively represent themselves".[267] Commenting on the development of initiatives to measure the implementation of the *UN Guiding Principles*,

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[263] *Ibid*: "And the Guiding Principles are different in the sense that they are saying: 'Well, you have this responsibility even if you step up to the plate or even if you don't voluntarily step up. It doesn't mean that you don't have the responsibility. Your responsibility doesn't depend on you sending a letter to the Secretary-General of the UN'. So, that's a big difference." See also Interview 19: "The Guiding Principles are not a voluntary thing you sign up to or choose not to sign up to. They are a statement of existing responsibilities that all companies have. It's not a membership proposition"; Interview 19: "And, what we say very clearly in the Guiding Principles – we never say they are voluntary. They're not voluntary. We say that they are the baseline expectation of every company in every sector in every situation".

[264] Interview 4. Similar ideas were formulated in Interview 9; Interview 16; Interview 18; Interview 19.

[265] Interview 9. See also Interview 18: "Behaviors have changed and are changing based on the Guiding Principles, much faster than any other human rights process I can think of".

[266] Amnesty International, *Letter from Seema Joshi to the Working Group on Human and Transnational Corporaitons and other Business Enterprises* (8 December 2011), online: OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/Submissions.aspx> (accessed 14 September 2016) at 4.

[267] *Working Group – 2014 Report*, *supra* note 241 at para 37.

the Working Group warned that "[i]f the process of developing measurement tools is limited to a small number of experts or institutions, it runs the risk of *replicating existing power relationships* in which potential victims remain voiceless and powerless".[268] Given that foreign investors and business enterprises are perceived as being more powerful than other members of the community of practice, the stronger influence that these actors can have on preventing the emergence of a practice of legality must also be taken into account.

The analysis of the normative character of the *UN Guiding Principles* according to the interactional theory of international law demonstrates that this instrument is an international norm that has not entered the realm of legality. The support granted by powerful actors in the elaboration of this instrument is strongly related to the express recognition by the Special Representative that it does not impose any new legal obligations for states and business enterprises. Despite the position of some actors that perceived them as a first step toward a binding instrument, the *UN Guiding Principles* are not anchored in shared understandings regarding their legal nature. Moreover, even if references to the *UN Guiding Principles* in other international instruments and the elaboration of various tools to facilitate their implementation contribute to the emergence of a vast practice, discourses from the members of the community of practice suggest that powerful actors often recall the absence of new legal obligations from this instrument. Such a practice seriously prevents the emergence of a practice of legality and the generation of any sense of obligation.

However, the adherence to the *UN Guiding Principles* that results from its consistency with almost all the criteria of legality, combined with some practices that contribute to making the observance of these principles unavoidable, sharply contrast with other informal international instruments. To a certain extent, suggesting that an international norm whose support from powerful actors specifically relies on its social nature could potentially evolve toward the realm of legality can appear as a paradox. In fact, the generation of a sense of obligation would require extensive changes with respect to the shared understandings underlying this informal instrument. Yet, given the wide practice surrounding this instrument and the absence of any provisions expressly

[268] *Working Group – 2015 General Assembly Report*, *supra* note 227 at para 59.

mentioning that the observance of this instrument remains voluntary, it is here submitted that such considerable changes are more probable with respect to the *UN Guiding Principles* than any other social norms embedded in informal instruments.

5. The *UNCAC*

The last instrument elaborated and implemented under the auspices of the UN that is considered in this dissertation specifically relates to the area of corruption. Adopted by the UN General Assembly in October 2003 and entered into force in December 2005, the *UNCAC* is a formal international agreement that also codifies foreign investors' responsibilities.[269] Amidst the various aspects included in the scope of this instrument,[270] the latter establishes several offences – *e.g.* bribery of foreign public officials,[271] trading of influence,[272] bribery in the private sector,[273] laundering of proceeds of crime[274] and concealment[275] – that can apply to private actors operating outside their home state. Moreover, the *UNCAC* includes a requirement for states to establish the liability of legal persons for participating in such offences[276] and expressly provides states' jurisdiction for offences that are committed by a national having its habitual residence in their territory.[277] However, despite its formal character under international law, the *UNCAC* is not a legal norm that generates a genuine sense of obligation. Even if international actors have reached shared understandings with respect to the elaboration of a formal international instrument,

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[269] *UNCAC*, *supra* note 8.

[270] The aspects that are covered in the *UNCAC* include preventive measures (Chapter II), criminalization of specific offences (Chapter III), international cooperation (Chapter IV), asset recovery (Chapter V), technical assistance (Chapter VI) and implementation (Chapter VII). See also Jan Wouters, Cedric Ryngaert & Ann Sofie Cloots, *The Fight Against Corruption in International Law*, SSRN Scholarly Paper ID 2274775 (Rochester, NY: Social Science Research Network, 2012) at 16–18.

[271] *UNCAC*, *supra* note 8, art 16(1).

[272] *Ibid*, art 18.

[273] *Ibid*, art 21.

[274] *Ibid*, art 23.

[275] *Ibid*, art 24.

[276] *Ibid*, art 26(1).

[277] *Ibid*, art 42(2)(b).

several states have opted for the adoption of flexible provisions and a vague implementation mechanism (5.1). The social character of this international norm also results from tensions with specific criteria of legality (5.2) and a practice that fails to ensure a proper follow-up on lack of compliance with the requirements of the *UNCAC* (5.3).

5.1 Shared Understandings: Agreeing to a Formal, but Weak Instrument

Several resolutions adopted under the auspices of the UN demonstrate a long history of attempts at tackling the issue of corruption, from the perspectives of both international business transactions and crime prevention.[278] For example, when adopting the *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*,[279] the UN General Assembly requested the examination of ways to promote the criminalization of corruption and bribery in international commercial transactions, "including through legally binding international instruments".[280] However, concrete efforts to elaborate an international agreement on this specific matter emerged in parallel to the negotiations of the *United Nations Convention against Transnational Organized Crime* ("*UNCATOC*").[281] In December 1999, the UN General Assembly requested the *ad hoc* committee tasked with the negotiation of this international agreement

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[278] For a general overview of these efforts, see United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Corruption* (New York: United Nations, 2010) at ix-xliii [*Travaux Préparatoires*]. See also Bruce Seymour, "Illicit Payments in International Business: National Legislation, International Codes of Conduct, and the Proposed United Nations Convention" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Hingham: Kluwer Law and Taxation, 1980) 219 at 231–235; Dimitri Vlassis, "Challenges in the Development of International Criminal Law: The Negotiations of the United Nations Convention Against Transnational Organized Crime and the United Nations Convention Against Corruption" in Cherif M Bassiouni, ed, *International Criminal Law*, 3d ed (Leiden: Martinus Nijhoff Publishers, 2008) 907 at 925–929; Wouters et al, *supra* note 270 at 12-16; Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford: Oxford University Press, 2015) at 99-100.

[279] *United Nations Declaration against Corruption and Bribery International Commercial Transaction*, GA Res 51/191, UNGAOR, 51st Sess, Supp No 49, UN Doc A/RES/51/191, (1997), Annex [*United Nations Declaration against Corruption*]. See also De Jonge, *Transnational Corporations*, *supra* note 55 at 136.

[280] *United Nations Declaration against Corruption*, *ibid* at para 4.

[281] *United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003). This international agreement includes provisions pertaining to the criminalization of corruption (art. 8), measures against corruption (art. 9) and the liability of legal persons for international crimes (art 10). See also Vlassis, *supra* note 278 at 927.

"to explore the desirability of an international instrument against corruption, either ancillary to or independent of the [*UNCATOC*]".[282]

Echoing diplomatic efforts that occurred at the OECD, early attempts to address the issue of corruption under the auspices of the UN benefited from a strong push from the United States, which acted under domestic pressure from private actors further to the adoption of the *Foreign Corrupt Practice Act*.[283] However, given that the resolution recognizing the desirability of "an effective international *legal* instrument against corruption, independent of the [*UNCATOC*]" was adopted without a vote,[284] the member states of the UN General Assembly can all be considered as *norm entrepreneurs* that pushed forward the idea of elaborating the *UNCAC*.[285] More specifically, in its Resolution 55/161, the UN General Assembly requested the UN Secretary-General to convene an intergovernmental open-ended expert group to elaborate the draft terms of reference for the negotiation "of the future *legal* instrument against corruption"[286] and decided to establish an *ad hoc* committee for the negotiation of such an instrument.[287] After the report of the intergovernmental open-ended expert group in 2001,[288] the UN General Assembly adopted the terms of reference for the *UNCAC* and specifically requested the consideration by the *ad hoc* committee of the liability of legal persons, among others.[289] At the end of its seventh session, the *ad hoc* committee approved a draft version of the *UNCAC* and

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[282] *Action against Corruption*, GA Res 54/128, UNGAOR, 54th Sess, Supp No 49, UN Doc A/RES/54/128, (2000) at para 6.

[283] See United States of America, Department of State, *Foreign Relations of the United States, 1977-1980*, Vol III (Washington, DC: Department of State, 2013) at 176. See also Seymour, *supra* note 278 at 226-227 and 232; Philippa Webb, "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" (2005) 8 J Int Economic Law 191 at 192; Ramasastry, "Closing the Governance Gap", *supra* note 87 at 163 and 174-176.

[284] *An Effective Legal Instrument Against Corruption*, GA Res 55/61, UNGAOR, 55th Sess, Supp No 49, UN Doc A/RES/55/61, (2001) at para 1 [emphasis added] [*UNGA Resolution 55/61*].

[285] See Webb, *supra* note 283 at 204; Rose, *supra* note 278 at 3.

[286] *UNGA Resolution 55/61*, *supra* note 284 at para 5 [emphasis added].

[287] *Ibid* at para 7.

[288] *Report of the Meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption*, 2001, UN Doc A/AC.260/2.

[289] *Terms of Reference for the Negotiation of an International Legal Instrument Against Corruption*, GA Res 56/260, UNGAOR, 56th Sess, Supp No 49, UN Doc A/RES/56/260, (2002) at para 3.

submitted it to the UN General Assembly for consideration.[290] In addition to a constant will to elaborate a formal instrument under international law expressly addressing the liability of legal persons for corruption throughout the whole negotiation process, this formal international agreement was adopted on October 31st, 2003[291].

The norm emergence of the *UNCAC* also includes efforts that were deployed after its entry into force to establish a mechanism for the review of its implementation.[292] The Conference of the State Parties to the *UNCAC* thus decided to institute an open-ended intergovernmental expert working group tasked with making recommendations on this matter in 2006.[293] From the outset, the Conference of the State Parties underlined that such a review mechanism should "[b]e transparent, efficient, non-intrusive, inclusive and impartial" and "provide opportunities to share good practices and challenges", among others.[294] In a subsequent resolution, the Conference of the State Parties also decided that the mechanism should be non-adversarial and non-punitive, and that it should be geared toward the promotion of universal adherence to the *UNCAC*.[295] The *Terms of Reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption* were adopted in 2009 and established an Implementation Review Group.[296] *Guidelines for the Governmental Experts and the Secretariat in the Conduct of Country Reviews* were also adopted in 2011.[297]

Beyond the resolutions that can be used to trace the emergence of this international norm, the discourses of the members of the *community of practice* involved in its

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[290] *Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on the Work of its First to Seventh Sessions*, 2003, UN Doc A/58/422 at para 90.

[291] *United Nations Convention Against Corruption*, GA Res 58/4, UNGAOR, 58th Sess, Supp No 49, UN Doc A/RES/58/4, (2003).

[292] See Wouters et al, *supra* note 270 at 18; Rose, *supra* note 278 at 105-106.

[293] *Review of Implementation*, CAC Res 1/1, 2006, UN Doc CAC/COSP/2006/12 at para 2.

[294] *Ibid* at para 3.

[295] *Review of Implementation*, CAC Res 2/1, 2008, UN Doc CAC/COSP/2008/15 at para 3.

[296] *Review Mechanism*, CAC Res 3/1, 2009, UN Doc CAC/COSP/2009/15 at para 2 [*Resolution 3/1*]. For the establishment of the Implementation Review Group, see paras 42-44 of the *Terms of Reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption* [*Terms of Reference – Review Mechanism*]. The *Terms of Reference – Review Mechanism* are included in the annex of the *Resolution 3/1*.

[297] *Mechanism for the Review of Implementation of the United Nations Convention against Corruption*, CAC Res 4/1, 2011, UN Doc CAC/COSP/2011/14 at para 6.

elaboration provide crucial information with respect to the shared understandings that underlie the *UNCAC*. In fact, representatives of states, intergovernmental organizations, public interest NGOs and private interest NGOs constitute a community of actors that contributed to the elaboration of the *UNCAC* and its review mechanism.[298] In this regard, the reports emanating from the sessions of the *ad hoc* committee on the negotiations of the *UNCAC*, the reports of the open-ended intergovernmental working group on the review of the implementation and the transcripts of semi-structured interviews are all relevant sources of discourses that shed light on the shared understandings in which this norm is embedded.

It is plain from the analysis of these discourses that the states involved in the negotiation of the *UNCAC* supported the elaboration of a formal instrument from the very beginning. For example, the importance of a "*binding international legal instrument* against corruption that embodied a comprehensive approach" was mentioned by the Group of 77 and China at the first meeting of the *ad hoc* committee.[299] However, several representatives also aimed at maintaining a high level of flexibility in the provisions of this instrument. As summarized by the *ad hoc* committee, "[m]any representatives expressed the view that the future convention against corruption should be *binding*, effective, efficient and universal and that it should be a *flexible and balanced instrument* that would take into account the legal, social, cultural, economic and political differences of countries, as well as their different levels of development".[300] Some state representatives even implicitly referred to various "degree[s] to which the measures should be obligatory".[301] Along the same lines, one interviewee emphasized that the negotiation process led to the adoption of

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[298] See e.g. *Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its Seventh Session, Held in Vienna from 29 September to 1 October 2003*, 2003, UN Doc A/AC.261/25 at para 24.

[299] *Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its First Session, Held in Vienna from 21 January to 1 February 2002*, 2002, UN Doc A/AC.261/4 at para 26 [emphasis added] [*Ad Hoc Committee – First Session Report*].

[300] *Ibid* at para 33 [emphasis added].

[301] See the information related to the Group of Latin American and Caribbean States in *Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its Fifth Session, Held in Vienna from 10 to 21 March 2003*, 2003, UN Doc A/AC.261/16 at para 15; *Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its Sixth Session, Held in Vienna from 21 July to 8 August 2003*, 2003, UN Doc A/AC.261/22 at para 12 [*Ad hoc Committee – Sixth Session Report*]. See also the information related to the member states of the European Union in *Ad hoc Committee – Sixth Session Report*, *ibid* at para 13.

some provisions that are "not mandatory".[302] In other words, beyond the avowed intent to elaborate a formal instrument under international law, several states agreed to limit the impact of the requirements included in the *UNCAC*.

As far as the elaboration of the mechanism for the review of implementation of the *UNCAC* is concerned, some non-state actors pushed for an initiative that would allow an effective assessment of states' compliance with the requirements found in the agreement.[303] Representatives of the business sector thus "expressed strong support for the Convention and called for the establishment of an effective and robust review mechanism by the Conference".[304] However, several capital-importing states advocated for a review mechanism that would primarily serve as a way to support states in the implementation of this instrument rather than assessing their compliance. For example, the Group of Latin American and Caribbean States "were of the view that the assumption of obligations by [s]tates through the ratification of the new convention would require sustained technical assistance".[305] Other states emphasized that the review mechanism should not be intrusive and should respect the sovereignty of states.[306] Overall, it was assumed that "the mechanism would have a progressive and gradual approach[,] was to be based on consensus and negotiation", and that "the review mechanism should serve to identify and disseminate best practices".[307]

Interestingly, the discourses emanating from the *ad hoc* committee and the open-ended intergovernmental working group reproduce *relations of power* in a far subtler way

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[302] Interview 20.

[303] See *Report on the Meeting of the Open-Ended Intergovernmental Working Group on Review of the Implementation of the United Nations Convention against Corruption Held in Vienna from 25 August to 2 September 2009*, 2009, UN Doc CAC/COSP/WG.1/2009/5 at para 8.

[304] See *Report on the Meeting of the Open-Ended Intergovernmental Working Group on Review of the Implementation of the United Nations Convention against Corruption Held in Vienna from 11 to 13 May 2009*, 2009, UN Doc CAC/COSP/WG.1/2009/3 at para 8.

[305] See *Report of the Informal Preparatory Meeting of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption, Held in Buenos Aires from 4 to 7 December 2001*, 2001, UN Doc A/AC.261/2 at para 24.

[306] See the information related to the Group of 77 and China in *Ad hoc Committee – Sixth Session Report*, *supra* note 301 at para 10.

[307] See *Report on the Meeting of the Open-Ended Intergovernmental Working Group on Review of the Implementation of the United Nations Convention against Corruption Held in Vienna from 15 to 17 December 2008*, 2008, UN Doc CAC/COSP/WG.1/2008/8 at para 20.

than for other instruments. Even if the disappointment expressed by the African Group concerning the lack of funds at the Secretariat to ensure the participation of all the least developed countries in the work of the *ad hoc* committee suggests a weaker position of these countries throughout the elaboration of this international norm,[308] the discourses do not explicitly reproduce relations of power. Yet, taking into account the large number of capital-importing states at the UN General Assembly, it can nevertheless be suggested that these actors generally benefited from a form of institutional power during the negotiations of the *UNCAC*.[309] In this regard, the intent of several capital-importing states to include more flexibility with respect to its provisions and the review mechanism played an important role in shaping the shared understandings that underlie this agreement.

Overall, it is plain that the elaboration of the *UNCAC* has relied on an initial will from norm entrepreneurs to elaborate a formal instrument under international law to address various offences related to corruption and contribute to the establishment of the liability of legal persons. However, a closer look at the resolutions adopted by the Conference of the State Parties and the discourses from actors involved in the elaboration process demonstrates a will from several states to limit the normative character of this instrument. Ultimately, in line with the position adopted by a large number of capital-importing states, the community of practice has agreed on the elaboration of an international initiative with a flexible mandatory character for several provisions and a review mechanism that is primarily oriented toward a learning process. Although some core issues of this international norm probably rely on a stronger consensus, the shared understandings emerging from the elaboration of the *UNCAC* considerably affect the sense of obligation that can be generated from this international norm as a whole.

5.2 Criteria of Legality: Inherent Contradictions and Weak Congruence

Beyond its adoption as a formal international agreement, the *UNCAC*'s normative character also depends upon the extent to which this international initiative meets specific

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[308] See *Ad Hoc Committee – First Session Report*, *supra* note 299 at para 28.

[309] For a discussion on institutional power, see section 1 of Chapter 5.

criteria of legality. While the majority of these criteria does not pose any particular issues, two aspects negatively affect the ability of the *UNCAC* to generate legitimacy and a sense of obligation. The attempt at elaborating a flexible instrument has ultimately led to the adoption of weak provisions that contradict the aim of fighting corruption at the international level. Moreover, the mechanism for the review of implementation of the *UNCAC* does not provide an appropriate procedural device to determine the lack of compliance of states.

From the outset, the *UNCAC* sharply contrasts with the other initiatives elaborated and implemented under the auspices of the UN to the extent that it is a formal international agreement. While the criterion of *promulgation* can also be fulfilled by informal international instruments, the adoption of this initiative as an international treaty ensures that it easily meets this criterion of legality. Moreover, relying on the ratification from 177 states as of the sixth Conference of the State Parties in 2015,[310] this international agreement is unambiguously approaching a universal character and is made available to various international actors.

The *UNCAC* does not discriminate with respect to the states that must implement its requirements nor the legal persons that are concerned by the offences that it establishes. For example, regarding the bribery of foreign public officials and officials of pubic international organizations, Article 16(1) provides the following:

> *Each State Party* shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.[311]

Without including any distinction among the legal persons concerned, Article 26(1) also provides that "*[e]ach state* shall adopt such measures as may be necessary … to establish the liability of legal persons for participation in the offences established in accordance with

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[310] *Report of the Conference of the State Parties to the United Nations Convention against Corruption on its Sixth Session Held in St. Petersburg, Russian Federation, from 2 to 6 November 2015*, 2015, UN Doc CAC/COSP/2015/10 at para 6 [*Conference of the State Parties – Sixth Session Report*].

[311] *UNCAC*, *supra* note 8, art 16(1) [emphasis added].

this Convention".[312] Therefore, the *UNCAC* lives up to the requirement of *generality* that characterizes international legal norms.

Several aspects of this agreement also ensure that it meets the criterion of *clarity*. Despite the absence of a specific definition of corruption among the terms expressly defined in the *UNCAC*,[313] the chapter focusing on criminalization and law enforcement provides sufficient details regarding the offences that must be criminalized by states.[314] As exemplified by the citation of Article 16 above,[315] the information included in the articles of the *UNCAC* extensively contributes to the clarity of this international instrument. Furthermore, even if this instrument is not accompanied by any set of official commentaries that could provide additional information on the meaning of its provisions, the publication of the *travaux préparatoires* resulting from the negotiation process of the *UNCAC*[316] and a legislative guide[317] are particularly useful to interpret each article of this instrument.

Not only has the *UNCAC* not been amended so far, some features of this international agreement suggest particular attention from the negotiators with respect to its *constancy*. Article 69(1) provides a detailed procedure requiring any proposed amendments to be submitted to the UN Secretary-General prior to its transmission to the member states and the Conference of the State Parties for its adoption by consensus or a two-thirds majority vote.[318] In a way that also contributes to a constant application of the *UNCAC*, Article 70(1) includes a procedure stipulating that a "denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General".[319]

Moreover, none of the instruments elaborated and implemented under the auspices of intergovernmental organizations to codify the responsibilities of private actors operating

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[312] *Ibid*, art 26(1) [emphasis added].

[313] *Ibid*, art 2. See also Wouters et al, *supra* note 270 at 39.

[314] *UNCAC*, *ibid*, Chapter III.

[315] *Ibid*, art 16(1).

[316] *Travaux Préparatoires*, *supra* note 278.

[317] United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention Against Corruption* (New York: United Nations, 2006). See also Marco Arnone & Leonardo S Borlini, *Corruption: Economic Analysis and International Law* (Northampton: Edward Elgar, 2014) at 256.

[318] *UNCAC*, *supra* note 8, art 69(1).

[319] *Ibid*, art 70(1).

abroad that are considered in this dissertation supposes a *retroactive application*. Likewise, given that the *UNCAC* does not expressly address any temporal issues, this international instrument unambiguously meets the requirement of this criterion of legality.

Even if the Chairman of the *ad hoc* committee responsible for the *UNCAC* negotiations expressed his concerns with respect to the repeated references to the conformity of its provisions with domestic legislation,[320] such references are particularly relevant to ensure that the *UNCAC* does *not ask impossible requirements* to its member states. For example, regarding the liability of legal persons, Article 26(2) provides that "[s]ubject to the legal principles of the [s]tate [p]arty, the liability of legal persons may be criminal, civil or administrative".[321] Without allowing states to circumvent the requirement to establish such liability, this provision takes into account the limits that can be imposed by different legal systems and contributes to the legitimacy of the *UNCAC*.

With respect to *contradiction*, it is worth mentioning that the absence of an exception for facilitation payments allows the *UNCAC* to avoid a contradiction that was initially found in the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.[322] However, while many provisions echo the intent of elaborating a flexible legal instrument,[323] the weakness of several requirements can ultimately be perceived as being in tension with the overarching aim of the *UNCAC*. According to its Preamble, states are "[c]oncerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing

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[320] See *Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its Third Session, Held in Vienna from 30 September to 11 October 2002*, 2002, UN Doc A/AC.261/9 at para 33. This element is also criticized in the literature: Arnone & Borlini, *supra* note 317 at 254; Rose, *supra* note 278 at 114.

[321] *UNCAC*, *supra* note 8, art 26(2). See also Arnone & Borlini, *ibid* at 372.

[322] Such a contradiction is discussed in section 3.2 of Chapter 6. While Article 1(1) of the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* defines the offence of bribery as "*any* undue pecuniary … advantage … to a foreign public official … in order that the official act … in relation to the performance of official duties", the authorization of facilitation payments at para 9 of the commentaries on the convention appears highly problematic. See *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, 37 ILM 1 (entered into force 15 February 1999), art 1(1) [emphasis added]; *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 21 November 1997 (Paris: OECD, 2011) at para 9. See also Wouters et al, *supra* note 270 at 37.

[323] See Arnone & Borlini, *supra* note 317 at 258.

sustainable development and the rule of law".[324] By contrast, the means that are considered to tackle these problems and threats are sometimes notably limited. Several articles thus merely require that states "shall consider" or "may consider" adopting specific measures.[325] For example, such a requirement is included in the provision addressing the demand of bribes by foreign pubic officials:

> Each State Party *shall consider* adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.[326]

Although these provisions do not amount to asking contradictory requirements to member states, the adoption of such weak provisions does not ensure a sufficient contribution to tackle a problem that is depicted as being of the utmost seriousness.

Finally, in line with the attempt of states to focus on building their capacity to implement the requirements of the *UNCAC*, the mechanism to review implementation of this agreement is not entirely appropriate to address significant instances of non-compliance and fulfill the criterion of *congruence*.[327] Although Article 30(1) underscores that "[e]ach State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence",[328] the existence of a procedural mechanism to tackle reluctance of states to implement the agreement is less straightforward. In fact, Article 66(2) establishes a state-to-state dispute settlement mechanism regarding the interpretation and the implementation of the *UNCAC*.[329] This provision also mentions that any disputes that cannot be settled through negotiation can be submitted to arbitration and, ultimately, to the International

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[324] *UNCAC*, *supra* note 8, Preamble.

[325] *Ibid*, arts 7(2)-(3), 8(6) 14(1)-(3), 18-22, 24, 30(6), 31(8), 32(3), 33-34, 37(2)-(3), 37(5), 39(2), 43, 44(5), 44(13), 45, 46(9), 46(30), 47, 48(2), 49, 52(4)-(6), 54(1), 55(6), 58, 59, 60(4), 60(6)-(8) and 61. See also Arnone & Borlini, *supra* note 317 at 259; Rose, *supra* note 278 at 106-113.

[326] *UNCAC*, *ibid*, art 16(2) [emphasis added].

[327] For the information provided in this paragraph, see Arnone & Borlini, *supra* note 317 at 269.

[328] *UNCAC*, *supra* note 8, art 30(1). See also Arnone & Borlini, *ibid* at 351 and 355.

[329] *UNCAC*, *ibid*, art 66(2).

Court of Justice.[330] However, pursuant to Article 66(3), several member states made a reservation concerning this dispute settlement mechanism.[331]

The lack of congruence is also reflected in the review process that was established further to the adoption of the *UNCAC*. In fact, the terms of reference summarize the goals of this process in the following terms:

> (a) Promote the purposes of the Convention as set out in its article 1; (b) Provide the Conference with information on the measures taken by States parties in implementing the Convention and the difficulties encountered by them in doing so; (c) Help States parties to identify and substantiate specific needs for technical assistance and to promote and facilitate the provision of technical assistance; (d) Promote and facilitate international cooperation in the prevention of and the fight against corruption, including in the area of asset recovery; (e) Provide the Conference with information on successes, good practices and challenges of States parties in implementing and using the Convention; (f) Promote and facilitate the exchange of information, practices and experiences gained in the implementation of the Convention.[332]

Above all, the review process culminates with the elaboration of a report that "shall be finalized upon agreement between the reviewing States parties and the State party under review".[333] While such a review can be useful to foster the implementation of the *UNCAC*, it is not adapted to provide an independent assessment of a state's compliance with the requirements included in this agreement.

Assessing the provisions of the *UNCAC* and the instruments related to the mechanism to review its implementation against criteria of legality sheds light on some issues that can affect the sense of obligation generated by this international norm. Even if this international instrument meets most of these criteria of legality, several provisions

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[330] *Ibid*, art 66(2). See also Joost Pauwelyn, "Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy" in Susan Rose-Ackerman & Paul Carrington, eds, *Anti-Corruption Policy: Can International Actors Play a Constructive Role* (Durahm: Carolina Academic Press, 2013) 247 at 251.

[331] For the list of reservations, see United Nations Treaty Collection: online United Nations <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&clang=_en> (accessed 14 September 2016). See also Rose, *supra* note 278 at 101.

[332] *Terms of Reference – Review Mechanism*, *supra* note 296 at para 11. See also Rose, *ibid* at 127.

[333] *Terms of Reference – Review Mechanism*, *ibid* at para 34. See also the *Guidelines for Governmental Experts and the Secretariat in the Conduct of Country Reviews* at para 34 [*Guidelines for Governmental Experts*]. The *Guidelines for Governmental Experts* are annexed to the *Report of the Implementation Review Group on its First Session, Held in Vienna from 28 June to 2 July 2010*, 2010, UN Doc CAC/COSP/IRG/2010/7 [*Implementation Review Group – First Session Report*].

remain weak and suggest a tension with the avowed intent to tackle the threat of corruption. Furthermore, the review mechanism adopted after the entry into force of the *UNCAC* is a way to foster dialogue around good implementation practices rather than a procedural device to fully address the lack of compliance by states.

5.3 Practice of Legality: Watering Down the Normative Character of the *UNCAC*

Interactions between the members of the community of practice to implement the *UNCAC* is another key element to consider when assessing the normative character of this instrument. In order to shed light on the nature of the practice surrounding the *UNCAC*, the present section combines an examination of the provisions of other instruments codifying foreign investors' responsibilities with discourses from members of the community of practice that devote efforts to implement the agreement. Reports and other documents from the Conference of the State Parties, reports on the sessions of the Implementation Review Group, NGOs' statements submitted to the Implementation Review Group and transcripts of semi-structured interviews thus all constitute relevant discourses that ultimately suggest the absence of a proper legal character to the practice surrounding the *UNCAC*.

Several aspects point toward a vast practice characterizing the implementation of the *UNCAC* since its entry into force. Express references to this agreement in other international instruments adopted under the auspices of intergovernmental organizations suggest a key role of this initiative in the evolving codification of foreign investors' responsibilities.[334] It is also plain that states are extensively engaged in the implementation of the *UNCAC*. As mentioned by the Conference of the State Parties, more than 120 executive summaries, 160 self-assessment checklists and almost 150 country visits and

[334] See *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 26 November 2009, Doc No C(2009)159/REV1/FINAL (amended on 18 February 2010, Doc No C(2010)19), Preamble; *Recommendation of the Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 17 July 2012, Doc No C(2012)93 (2012), Preamble; *OECD Guidelines 2011 – Commentaries*, *supra* note 223 at para 79; *Principles for Responsible Investment in Agricultur*e, *supra* note 64 at para 19(B)(iii). It is also worth mentioning that the principles of the UN Global Compact are partly "derived" from the *UNCAC*. See UN Global Compact, *supra* note 4.

joint meetings have been completed as of November 2015.[335] Such a vast participation has also been highlighted by an interviewee in the following terms:

> [I]t is amazing how seriously countries are taking this and how much they engage. And it is even more rewarding to see how much developing countries are engaging with this. And how important they consider, how seriously they take the entire affair. And how much they invest limited resources – both human and financial – in engaging both as countries under review but also as countries reviewing others.[336]

Interestingly, some excerpts of the reports related to the implementation of the *UNCAC* include express references to obligations resulting from this instrument. For example, the Vice-President of a Conference of the State Parties called upon states "to adapt their legislation and regulations in order to *comply with the obligation* to establish as criminal offences the acts described in the Convention as *mandatory offences*, without prejudice to other criminalization provisions".[337] Similarly, "[s]peakers reported on national efforts and initiatives to implement the provisions of the Convention and described domestic legislative, administrative and judicial measures to incorporate into their legal systems the requirements set forth in the Convention" during a previous conference.[338] Yet, some of these discourses were provided with a view to identifying best practices regarding the implementation of the *UNCAC* rather than establishing a sense of having to comply with the requirements found in this international instrument.[339]

Most significantly, other statements from members of the community of practice suggest that this international norm is not perceived as generating a general sense of obligation. One key element in this regard relates to discourses that expressly acknowledge the existence of non-mandatory provisions in the *UNCAC*. Addressing the preparation of

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[335] *Conference of the State Parties – Sixth Session Report*, *supra* note 310 at para 6.

[336] Interview 20.

[337] See *Report of the Conference of the State Parties to the United Nations Convention against Corruption on its Second Session, Held in Nusa Dua, Indonesia, from 28 January to 1 February 2008*, 2008, UN Doc CAC/COSP/2008/15 at para 63.

[338] See *Report of the Conference of the State Parties to the United Nations Convention against Corruption on its Fourth Session, Held in Marrakech, Morocco, from 24 to 28 October 2011*, 2011, UN Doc CAC/COSP/2011/14 at para 40 [*Conference of the State Parties – Fourth Session Report*]. See also *Report of the Conference of the State Parties to the United Nations Convention against Corruption on its Fifth Session, Held in Panama City from 25 to 29 November 2013*, 2014, UN Doc CAC/COSP/2013/18 at para 49 [*Conference of the State Parties – Fifth Session Report*].

[339] See *Conference of the State Parties – Fifth Session Report*, *ibid* at para 49.

thematic reports by the Implementation Review Group, some speakers suggested that "future reports could more clearly differentiate between mandatory and non-mandatory provisions".[340] Similarly, the consideration of "non-mandatory provisions and evolving good practices" in the country reviews was raised by several states.[341] By shedding light on the consideration of some provisions of the *UNCAC* as being non-mandatory, such discourses suggest that the practice surrounding this international instrument cannot be considered as a general practice of legality.

Even if some discourses related to the implementation of this international norm demonstrate the ability of the country reviews to influence the behavior of states when it comes to adopting measures to tackle corruption,[342] it remains unclear whether the amendments to their legislation are made pursuant to a will to comply with the conclusions of the country review reports. According to the Implementation Review Group, "some speakers referred to the observations made in the country review reports or during the dialogue phase and reported that *some of those observations* had since been addressed within the domestic systems of their countries".[343] Similarly, other states mentioned that such reports "had been *beneficial* for their domestic reforms",[344] while others merely "noted the importance, usefulness and positive impact of the country reviews".[345] The same Implementation Review Group reported that "in designing national reform measures, a

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[340] See *Report of the Implementation Review Group on its Resumed Third Session, Held in Vienna from 14 to 16 November 2012*, 2012, UN Doc CAC/COSP/IRG/2012/6/Add.1 at para 30 [*Implementation Review Group – Third Resumed Session Report*]. See also *Report of the Implementation Review Group on its Fourth Session, Held in Vienna from 27 to 31 May 2013*, 2013, UN Doc CAC/COSP/IRG/2013/12 at para 29.

[341] See *Report of the Implementation Review Group on its Second Session, Held in Vienna from 30 May to 2 June 2011*, 2011, UN Doc CAC/COSP/IRG/2011/4 at para 39 [*Implementation Review Group – Second Session Report*].

[342] In addition to the other discourses mentioned in this paragraph, see *Conference of the State Parties – Fourth Session Report*, *supra* note 338 at paras 35 and 46; *Conference of the State Parties – Sixth Session Report*, *supra* note 310 at paras 35 and 46.

[343] *Implementation Review Group – Second Session Report*, *supra* note 341 at para 39 [emphasis added].

[344] See *Implementation Review Group – Third Resumed Session Report*, *supra* note 340 at para 26 [emphasis added]. See also *Conference of the State Parties – Sixth Session Report*, *supra* note 310 at para 54.

[345] See *Report of the Implementation Review Group on its Fifth Session, Held in Vienna from 13 to 15 October 2014*, 2014, UN Doc CAC/COSP/IRG/2014/11/Add.1 at para 34 [*Implementation Review Group – Fifth Session Report*].

number of [s]tates parties had been oriented by the *good practices and lessons learned* in other countries as identified through the reviews".[346]

Several statements also emphasize the perception of country reviews as a means to identify areas where technical assistance is needed rather than a thorough assessment of compliance. At the first session of the Implementation Review Group, the Group of Latin American and Caribbean States reportedly "encouraged States parties to submit their technical assistance needs through the self-assessment checklist and was of the view that the Secretariat should submit periodic reports on technical assistance to the Implementation Review Group in order to systematically identify regional and thematic tendencies".[347] The identification of technical assistance needs was also depicted by the same group of states as "one of the crucial aspects of the work of the Review Mechanism".[348] The prevalence of technical assistance over the evaluation of compliance was even reported by the Conference of the State Parties, which mentioned that some states "expressed the view that compliance with the Convention should not be a prerequisite for technical assistance and that no conditions should be attached to the provision of assistance".[349]

Another element that extensively prevents the emergence of a practice of legality can be found in the refusal from several states to elaborate a concrete follow-up procedure to the country reviews. In this regard, reports of the Implementation Review Group highlight a clear divide among the member states on this matter.[350] For example, the representative of the European Union and other states regretted the absence of "an appropriate follow-up to the problems identified through the Mechanism and to implement lessons learned throughout the process".[351] As an alternative, the Implementation Review

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[346] *Report of the Implementation Review Group on its Resumed Sixth Session, Held in St. Petersburg, Russian Federation, on 3 and 4 November 2015*, 2015, UN Doc CAC/COSP/IRG/2015/5/Add.1 at para 12 [emphasis added].

[347] *Implementation Review Group – First Session Report*, *supra* note 333 at para 13.

[348] See *ibid* at para 22. See also *Report of the Implementation Review Group on its Third Session, Held in Vienna from 18 to 22 June 2012*, 2012, UN Doc CAC/COSP/IRG/2012/6 at para 8 [*Implementation Review Group – Third Session Report*]; *Report of the Implementation Review Group on its Resumed Fourth Session, Held in Panama City on 26 and 27 November 2013*, 2013, UN Doc CAC/COSP/IRG/2013/10/Add.1 at para 14.

[349] *Report of the Conference of the State Parties to the United Nations Convention against Corruption on its First Session, Held in Amman from 10 to 14 December 2006*, 2006, UN Doc CAC/COSP/2006/12 at para 90.

[350] See e.g. *Implementation Review Group – Third Resumed Session Report*, *supra* note 340 at para 27.

[351] See *Implementation Review Group – Fifth Session Report*, *supra* note 345 at para 5.

Group reported that states had developed national action plans based on the outcome of the review process "on a *voluntary* basis",[352] while others suggested "the compilation of *non-binding recommendations* for the implementation of the Convention and of common best practices into a document to serve as a reference".[353] Without suggesting that reliance on these national action plans is useless to encourage compliance, the fact that the member states currently rely on these non-binding alternatives demonstrates that the practice surrounding the country reviews does not bear a solid legal character.

These discourses sharply contrast with attempts from public interest NGOs to strengthen the legal character of the *UNCAC*. A declaration of the Coalition of the Civil Society Friends against Corruption depicted the agreement as encompassing "legal, political and moral obligations" and called upon governments to "show the ambition required to ensure that *UNCAC* has a real and lasting impact on global corruption".[354] Along the same lines, representatives of the business sector and public interest NGOs called upon the deployment of efforts to monitor the implementation by states of the recommendations provided in country reviews.[355] For example, Transparency International supported the establishment of a follow-up process to address these recommendations, recalling that it would "help ensure that the findings of the reviews are given priority and that momentum for Convention against Corruption implementation is maintained".[356]

Relations of power are also at play in the implementation process of this international norm. However, instead of the traditional cleavage between international

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[352] *Implementation Review Group – Third Session Report*, *supra* note 348 at para 56 [emphasis added]. See also *Report of the Implementation Review Group on its Resumed Fifth Session, Held in Vienna from 13 to 15 October 2014*, 2014, UN Doc CAC/COSP/IRG/2014/11/Add.1 at para 42 [*Implementation Review Group – Resumed Fifth Session Report*].

[353] *Implementation Review Group – Resumed Fifth Session Report*, *ibid* at para 43 [emphasis added].

[354] See *Civil Society and Private Sector Forum, Forum for Anti-Corruption Activities and Forum for Parliamentarians: Side Events Held on the Occasion of the First Session of the Conference of the State Parties to the United Nations Convention against Corruption*, 2006, UN Doc CAC/COSP/2006/CRP.6 at 4.

[355] See *ibid* at 6; *Conference of the State Parties – Sixth Session Report*, *supra* note 310 at paras 57 and 74; *Statement Submitted by the UNCAC Coalition, a Non-Governmental Organization Not in Consultative Status with the Economic and Social Council*, 2014, UN Doc CAC/COSP/IRG/2014/NGO/1 at 4; *Letter Submitted by the UNCAC Coalition, a Non-Governmental Organization Not in Consultative Status with the Economic and Social Council*, 2015, UN Doc CAC/COSP/IRP/2015/NGO/2 at paras 3-4; *Statement Submitted by the UNCAC Coalition, a Non-Governmental Organization Not in Consultative Status with the Economic and Social Council*, 2015, UN Doc CAC/COSP/IRG/2015/NGO/4 at 2.

[356] *Statement Submitted by Transparency International, a Non-Governmental Organization in Consultative Status with the Economic and Social Council*, 2013, UN Doc CAC/COSP/IRG/2013/NGO/3 at 5.

actors observed in the implementation of other instruments, the tensions that are reproduced in the discourses of the members of the community of practice primarily concern capital-importing states and non-state actors. In fact, Resolution 4/6 adopted by the Conference of the State Parties limits the participation of NGOs in the mechanism for the review of implementation to briefings held in the margins of the review process.[357] In this regard, a representative of the group of African states stressed the intergovernmental nature of the implementation mechanism.[358] While the representative of the European Union advocated for a more transparent mechanism,[359] another speaker reportedly "regretted that the potential of the Review Mechanism could not be exploited to the fullest by providing NGOs with an opportunity to contribute specific knowledge in the fight against corruption while leaving decision-making power to States parties".[360] Similarly, Transparency International and the Transparency and Accountability Network stated that

> [t]he restrictions placed on NGO written and oral statements to the [Intergovernmental Review Group] briefing limit [its] ability to report on [its] anti-corruption activities and assessments, [thus restricting] meaningful dialogue and exchange of information between governments and other stakeholders about the UNCAC review process and UNCAC implementation.[361]

Recalling the institutional power of capital-importing states at the UN, the weaker position of public interest NGOs and representatives of the private sector in contrast to these states in the activities of the Implementation Review Group suggests a limited impact of their calls for a practice of legality.

For some international law experts, the results of the present analysis will inevitably appear as surprising given the formal character of the *UNCAC* under international law. However, an examination of this instrument that includes a consideration of its content and interactions between international actors unambiguously suggests that the *UNCAC* is a

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[357] *Non-Governmental Organizations and the Mechanism for the Review of Implementation of the United Nations Convention against Corruption*, CAC Res 4/6, 2011, UN Doc CAC/COSP/2011/14 at paras 1-2.

[358] See *Report of the Implementation Review Group on its Sixth Session, Held in Vienna from 1 to 5 June 2015*, 2015, UN Doc CAC/COSP/IRG/2015/5 at para 6.

[359] See *ibid* at para 5.

[360] See *Conference of the State Parties – Fourth Session Report*, *supra* note 338 at para 93.

[361] *Statement Submitted by Transparency International, a Non-Governmental Organization in Consultative Status with the Economic and Social Council, and by the Transparency and Accountability Network, a Non-Governmental Organization not in Consultative Status with the Economic and Social Council*, 2013, UN Doc CAC/COSP/IRG/2013/NGO/1 at 3.

strong social norm that nevertheless fails to generate a general sense of obligation. Although the UN General Assembly initially supported the adoption of a formal instrument under international law to establish the liability of legal persons for various corruption offences, the shared understandings characterizing the elaboration of the *UNCAC* rely on an avowed intent by a majority of institutionally empowered capital-importing states to adopt an instrument including several flexible provisions with an implementation mechanism generally geared toward a learning process. These negotiations led to several weak provisions that fail to meet the criteria of non-contradiction and congruence that usually characterize international legal norms. Finally, even if one could be tempted to suggest that some provisions of the *UNCAC* remain mandatory, the interactions between the members of the community of practice highlight a practice that primarily seeks to build the capacity of states. Such a practice fails to establish any form of follow-up with respect to the country reviews, thus preventing the emergence of a practice bearing an overarching legal character. Without denying the ability of this instrument to influence the behavior of states with respect to the measures that they adopt to address corruption, the analysis above stresses that such influence relies on the social character of the *UNCAC* rather than on a general sense of obligation to act accordingly.

Conclusion

The UN has hosted a rich normative process that relates to the codification of foreign investors' responsibilities and that is rooted in a historical will to change the international economic order. While the initiatives elaborated and implemented by various organs of this intergovernmental organization include both formal and informal international instruments, they all constitute international norms whose normative character is better assessed through a consideration of their provisions and the interactions that they generate between international actors. Only through such an account can one position the UN Global Compact, the *UN Norms*, the *UN Guiding Principles* and the *UNCAC* on a continuum that varies from social norms to legal norms.

Initially intended as platform for dialogue and a learning process for the adoption of sustainable conduct by business enterprises, it is plain that the UN Global Compact has never been considered as a legal norm. The UN Secretary-General benefited from the support of powerful actors when launching an initiative that relies on a voluntary commitment of private actors to take into account their impacts on human rights, labour rights, environmental protection and corruption. This absence of shared understandings for a legal initiative is combined to a failure to meet several criteria of legality – namely clarity, constancy, not asking the impossible, absence of contradiction and congruence – that usually characterize international legal norms. Ultimately, despite a high number of participants and a broad dissemination of this initiative, the practice surrounding the UN Global Compact faces important problems and an express avoidance of assessing compliance with the principles that it includes. As a result, the UN Global Compact is a fairly weak social norm.

While the epistemic community that initiated the elaboration of the *UN Norms* avowedly intended to adopt a binding instrument, this instrument has never reached the threshold of legality and can hardly be considered as an international norm nowadays. More specifically, the working group tasked with their elaboration became the target of numerous critics from several states and representatives of the private sector, preventing the emergence of shared understandings with respect to the legal nature of this instrument. The confusion that still persists with respect to their promulgation, the inclusion of requirements reaching beyond the direct control of business enterprises, the presence of inherent contradictions and the absence of a fully developed procedure to address congruence all constitute tensions and failures of the *UN Norms* to meet criteria of legality. What is more, even if some actors have perceived it as a starting point to impose obligations on foreign investors, the ephemeral practice of this initiative has been characterized by a manifest opposition from powerful actors to implement the *UN Norms* according to a practice of legality.

The weak practice regarding the UN Global Compact and the brief existence of the *UN Norms* sharply contrast with the impressive uptake of the fairly recent *UN Guiding Principles*. Although it remains unquestionable that the *UN Guiding Principles* are currently a social norm that do not produce a genuine sense of obligation, this informal

international instrument has a stronger potential than other informal instruments to reach the realm of legality. Of course, while the Special Representative was never tasked with the elaboration of a legal instrument, the support provided by powerful actors was conditioned to the absence of any new obligations in this initiative. Similarly, the current practice surrounding the *UN Guiding Principles* is characterized by discourses emphasizing the absence of any legal character. Yet, given that this instrument is anchored in shared understandings that the corporate responsibility to respect human rights is not strictly voluntary, that its provisions meet almost all the criteria of legality and that some aspects of the practice contribute to make it unavoidable, it would not be a total surprise to see the *UN Guiding Principles* eventually generating a sense of obligation despite its informal character.

The adoption of a formal international agreement does not guarantee the elaboration and the implementation of a legal norm as understood by the interactional theory of international law. In fact, despite its formal character, the *UNCAC* is a strong social norm that remains below the threshold of legality on various points. Even if the UN General Assembly initially opted for the adoption of a formal international instrument, the shared understandings in which this agreement is embedded are characterized by a will to adopt flexible requirements and a review mechanism that does not concretely assess the compliance of states. The elaboration of the *UNCAC* has thus resulted in the adoption of some provisions that are in tension with the aim to fully tackle the scourge of corruption, as well as a mechanism to review implementation that is insufficient to ensure congruence between the rules and official action. The absence of a sense of obligation emanating from the *UNCAC* also results from a practice focusing on providing opportunities for dialogue on best practices, rather than appropriately following-up on significant instances of non-compliance.

Chapter 9 – World Bank Group

Introduction

The last multilateral intergovernmental organization involved in the codification of foreign investors' responsibilities that is considered for the purposes of this micro-level analysis is the World Bank Group. Acting as both a development agency and an investment promoter,[1] the institutions that constitute this organization have developed several instruments that articulate standards of behavior related to the activities of private investors operating abroad. A key instrument that specifically concerns the responsibilities of clients operating projects financed by one of these institutions is the *Performance Standards on Social & Environmental Sustainability* ("*Performance Standards*"), which were elaborated by the International Finance Corporation ("IFC") in 2006 and revised in 2011.[2] Similar standards have subsequently been adopted by the Multilateral Investment Guarantee Agency ("MIGA") in 2007,[3] as well as the International Bank for Reconstruction and Development ("IBRD") and the International Development Association ("IDA") in 2013.[4]

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[1] See Genoveva Hernández Uriz, "The Application of the World Bank Standards to the Oil Industry: Can the World Bank Group Promote Corporate Responsibility?" (2002) 28 Brook J Int'l L 77 at 117.

[2] *International Finance Corporation's Performance Standards on Social & Environmental Sustainability*, 30 April 2006, online: IFC <http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Our+Approach/Risk+Management/Performance+Standards/> (accessed 14 September 2016) [*IFC Performance Standards 2006*]; *International Finance Corporation's Performance Standards on Environmental and Social Sustainability*, 1 January 2012, online: IFC <http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Our+Approach/Risk+Management/Performance+Standards/> (accessed 14 September 2016) [*IFC Performance Standards 2012*].

[3] *Multilateral Investment Guarantee Agency's Performance Standards on Social & Environmental Sustainability*, 1 October 2007, online: MIGA <https://www.miga.org/documents/performance_standards_social_and_env_sustainability.pdf> (accessed 14 September 2016). These standards were also revised in 2013. See *Multilateral Investment Guarantee Agency Performance Standards on Environmental and Social Sustainability*, 1 October 2013, online: MIGA <https://www.miga.org/documents/performance_standards_env_and_social_sustainability.pdf> (accessed 14 September 2016).

[4] *Operational Policy 4.03 – Performance Standards for Private Sector Activities*, May 2013, online: World Bank <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,cont

Given the similarity of these performance standards, a detailed analysis of each instrument would only be redundant. Accordingly, this chapter focuses on the *IFC Performance Standards* and contextualizes the assessment of their normative character by considering the broader activities of the World Bank Group. After a brief overview of its institutional features and the identity shift toward sustainability that has occurred in this intergovernmental organization (1), an application of the interactional theory of international law[5] suggests that the *IFC Performance Standards* unambiguously generates a sense of obligation for the IFC and its clients (2). Despite its informal character under international law, this instrument thus constitutes a legal norm.

1. The World Bank Group: Several Activities and a Major Identity Shift

A consideration of the normative site from which the *IFC Performance Standards* emanate is relevant to contextualize the analysis of their normative character. According to the World Bank Group, its role is to use financial resources to support various projects with a view to diminishing poverty, increasing economic growth and improving the quality of life.[6] In 2015, the World Bank Group committed around $60 billion in loans, grants, equity investments and guarantees to their members and private businesses.[7] More specifically, this intergovernmental organization consists of five institutions that undertake different aspects related to this use of financial resources.[8] While the IBRD lends resources to governments of middle-income and low-income countries, the activities of the IDA focuses on interest-free loans and grants to the poorest countries. As far as relations with the private sector are concerned, the IFC seeks to stimulate investments from private actors

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entMDK:23408394~menuPK:64701763~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> (accessed 14 September 2016) [*World Bank Performance Standards*].

[5] See section 2 of Chapter 2.

[6] World Bank, *A Guide to the World Bank*, 3d ed (Washington, DC: The World Bank, 2011) at 3 [World Bank, *A Guide*].

[7] See World Bank, *World Bank Group Summary Results 2015*, online: World Bank <http://www.worldbank.org/en/about/annual-report/wbg-summary-results> (accessed 14 September 2016).

[8] For a brief overview of these five institutions, see World Bank, *A Guide*, *supra* note 6 at 2 and 10-29. See also Adam Masser, "The Nexus of Public and Private in Foreign Direct Investment: An Analysis of IFC, MIGA, and OPIC" (2008) 32 Fordham Int'l LJ 1698 at 1707–1711.

in developing countries and the MIGA provides guarantees against losses caused by non-commercial risks in these countries. Finally, although this institution does not strictly relate to the use of financial resources to partner with developing countries, the International Centre for Settlement of Investment Disputes provides international facilities regarding the conciliation and arbitration of international investment disputes.

In contrast to other intergovernmental organizations considered in the dissertation, the institutions that constitute the World Bank Group do not have explicit power to elaborate international norms. For example, instead of enunciating specific normative acts that can be adopted by the IFC, the *Articles of Agreement* of this organization focus primarily on its functioning.[9] Section 2(a) of Article IV thus mentions that "all the powers of the Corporation shall be vested in the Board of Governors",[10] which can delegate the authority to exercise some of its powers to the Board of Directors.[11] In this regard, the latter is "responsible for the conduct of the general operations of the Corporation, and for this purpose shall exercise all the powers given to it by this Agreement or delegated to it by the Board of Governors".[12] Among other powers, the Board of Directors considers and approves projects submitted for funding by the IFC.[13] As far as votes are concerned, they are determined by the equal distribution of the aggregate sum of the voting power of all members as well as the allocation of the share of stock held by each member.[14] As of March 2016, the Director appointed by the United States thus held 20.99%, followed by the Directors of Japan (6.01%) and Germany (4.77%).[15]

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[9] *International Finance Corporation Articles of Agreement*, 27 June 2012, online: IFC <http://www.ifc.org/wps/wcm/connect/1c95b500484cb68d9f3dbf5f4fc3f18b/IFC_Articles_of_Agreement.pdf?MOD=AJPERES> (accessed 14 September 2016) [*IFC Articles of Agreement*]. Each institution of the World Bank Group has *Articles of Agreement* or an equivalent instrument. See World Bank, *A Guide*, *ibid* at 7.

[10] *IFC Articles of Agreement*, *ibid*, Article IV, Section 2(a).

[11] *Ibid*, Article IV, Section 2(c).

[12] See *ibid*, Article IV, Section 4(a).

[13] See World Bank, *A Guide*, *supra* note 6 at 9 and 97-98.

[14] See *IFC Articles of Agreement*, *supra* note 9, Article IV, Section 3.

[15] See IFC, *Voting Power of Directors* (31 March 2016), online: The World Bank <http://siteresources.worldbank.org/BODINT/Resources/278027-1215524804501/IFCEDsVotingTable.pdf> (accessed 14 September 2016).

Of particular relevance for an analysis that partly draws on a constructivist analytical framework is the consideration of an identity shift that occurred within the World Bank Group. Despite an undeniable focus on the protection of foreign investment,[16] this intergovernmental organization responded to criticisms pertaining to the negative impacts of its activities on local communities and the environment by adopting various policies that seek to foster sustainable development.[17] Some authors stress a change in the identity of the World Bank Group through reforms of its policies that were triggered by pubic interest nongovernmental organizations ("NGOs") and the United States.[18] Several scholars have also identify an increasing consideration of environmental and social sustainability throughout the operations of the IFC since the late 1990s.[19] Of course, the IFC's purpose primarily relates to the advancement of "economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas".[20] Yet, Park argues that transnational advocacy networks socialized the IFC, a process that led to a change in the mandate and bureaucratic culture of this organization.[21] In other words, although the focus on financial viability and protection of private investors fits the context of neoliberal globalization, this identity shift has opened the door to the

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[16] See e.g. Hernández Uriz, *supra* note 1 at 82 and 117; David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44 Va J Int'l L 931 at 1002.

[17] See e.g. David B Hunter, "Civil Society Networks and the Development of Environmental Standards at International Financial Institutions" (2008) 8 Chi J Int'l L 437 at 438–442.

[18] See generally Susan Park, "Norm Diffusion within International Organizations: A Case Study of the World Bank" (2005) 8 J Int'l Rel & Dev 111. See also Hunter, *ibid* at 457. In a subsequent article, Park nevertheless mentions that the World Bank Group experienced some difficulties in implementing sustainable development through its everyday operations. See Susan Park, "The World Bank Group: Championing Sustainable Development Norms?" (2007) 13 Global Governance 535 at 539–545 [Park, "World Bank Group"].

[19] See e.g. Hernández Uriz, *supra* note 1 at 102; Susan Park, "How Transnational Environmental Advocacy Networks Socialize International Financial Institutions: A Case Study of the International Finance Corporation" (2005) 5 Global Envtl Politics 95 at 109 [Park, "How Transnational Advocacy"]; Terra Eve Lawson-Remer, "A Role for the International Finance Corporation in Integrating Environmental and Human Rights Standards into Core Project Covenants: Case Study of the Baku-Tbilisi-Ceyhan Oil Pipeline Project" in Olivier De Schutter, ed, *Transnational Corporations and Human Rights* (Portland: Hart Publishing, 2006) 393 at 401–404; Elisa Morgera, "Significant Trends in Corporate Environmental Accountability: The New Performance Standards of the International Finance Corporation" (2007) 18 Colo J Int'l Envtl L & Pol'y 151 at 154–156 [Morgera, "Significant Trends"]; Hunter, *ibid* at 443-445; Adebola Adeyemi, "Changing the Face of Sustainable Development in Developing Countries: The Role of the International Finance Corporation" (2014) 16 Envtl L Rev 91 at 95–97.

[20] See *IFC Articles of Agreement*, *supra* note 9, Article I.

[21] See generally Park, "How Transnational Advocacy", *supra* note 19. See also Park, "World Bank Group", *supra* note 18 at 545-552.

consideration of foreign investors' responsibilities and the development of international norms in this regard.

Although the various institutions of the World Bank Group are ultimately managed by their member states,[22] it is also worth noting that their operations extensively rely on the work of experts and professionals. While the elaboration of environmental and social standards in international finance institutions "has been accompanied by the emergence of an epistemic community that committed to the creation and implementation of these standards",[23] Hunter emphasizes that these sustainable standards differ considerably from the outcome of the typical state-to-state negotiation process.[24] The level of expertise related to the elaboration and the implementation of international norms to limit the negative impacts of projects financed by the World Bank Group thus requires the participation of non-state actors to a great extent.

This brief analysis of the World Bank Group demonstrates that this intergovernmental organization can play an important role with respect to the codification of foreign investors' responsibilities. Through its institutions, the World Bank Group is involved in various activities that seek to both increase economic development and promote foreign investment. While the entities within the institutions constituting this intergovernmental organization are vested with powers that broadly relate to this role, the identity shift toward a more sustainable development has prepared the ground for the development of international norms whose elaboration and implementation extensively rely on the participation of non-state actors.

2. The *IFC Performance Standards*

It is in this particular institutional context that the *IFC Performance Standards* must be analyzed. Combined with the *IFC Policy on Environmental and Social Sustainability*

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[22] See World Bank, *A Guide*, *supra* note 6 at 3. See also Hunter, *supra* note 17 at 464.

[23] See Hunter, *ibid* at 462-464.

[24] *Ibid* at 464-465.

("*IFC Sustainability Policy*")[25] and the *IFC Access to Information Policy* ("*IFC Information Policy*"),[26] the *IFC Performance Standards* are part of a broader framework on sustainability.[27] While the two policies primarily concern responsibilities of the IFC, the *IFC Performance Standards* "are directed towards clients, providing guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way, including stakeholder engagement and disclosure obligations of the client in relation to project-level activities".[28] Further to requiring the assessment and management of environmental and social impacts,[29] these standards cover the following issues: labour and working conditions; resource efficiency and pollution prevention; community health, safety and security; land acquisition and involuntary resettlement; biodiversity conservation and sustainable management of living natural resources; Indigenous peoples; and cultural heritage.[30]

Most significantly, the analysis below suggests that the *IFC Performance Standards* generate a genuine sense of obligation for the IFC and its clients, thus constituting an international legal norm. The epistemic community that initiated the elaboration of this international instrument has benefited from the support of powerful actors and succeeded in reaching shared understandings regarding the adoption of an instrument whose observance is mandatory to obtain funding from the IFC (2.1). Moreover, the consistency of the *IFC Performance Standards* with the criteria of legality articulated in the interactional theory of international law fosters the legitimacy of this instrument

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[25] *International Finance Corporation's Policy on Environmental and Social Sustainability*, 1 January 2012, online: IFC <http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES> (accessed 14 September 2016) [*IFC Sustainability Policy 2012*].

[26] *International Finance Corporation Access to Information Policy*, 1 January 2012, online: IFC <http://www.ifc.org/wps/wcm/connect/98d8ae004997936f9b7bffb2b4b33c15/IFCPolicyDisclosureInformation.pdf?MOD=AJPERES> (accessed 14 September 2016).

[27] IFC, *IFC Sustainability Framework* (Washington, IFC: 2012) [IFC, *Sustainability Framework*].

[28] *IFC Performance Standards 2012*, *supra* note 2, Overview at para 1. See also Morgera, "Significant Trends", *supra* note 19 at 156-157; Hunter, *supra* note 17 at 444; Benjamin M Saper, "The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective" (2012) 44 NYU J Int'l L & Pol 1279 at 1286–1288; Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014) at 131.

[29] *IFC Performance Standards 2012*, *ibid*, Performance Standard 1.

[30] *Ibid*, Performances Standards 2-8.

(2.2). The extent to which the members of the community of practice seek to disseminate the *IFC Performance Standards* and ensure compliance with their content also constitutes a strong practice of legality (2.3).

2.1 Shared Understandings: Developing Mandatory Standards for Private Actors

In line with the general influence of specialists in the work of the World Bank Group discussed above, the intent to develop a set of standards for the assessment of projects' environmental and social risks was advanced by an *epistemic community* related to the IFC.[31] Prior to the elaboration of the *IFC Performance Standards*, this organization relied on a set of *Safeguard Policies* that were inspired by the *Operational Policies* applied within the World Bank Group for loans to public entities.[32] Further to an assessment of these policies that was published by the Office of the Compliance Advisor Ombudsman ("CAO") in 2003, several experts acknowledged the need for the elaboration of a clear set of standards that specifically apply to private actors' activities.[33] As a result, the IFC staff prepared the first version of the *IFC Performance Standards*, which was approved by the Board of Directors in February 2006.[34] The central role of experts is also evidenced through

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[31] In addition to the aspects mentioned in this paragraph, Interview 7 highlights the central role of IFC's specialists in the elaboration of the *IFC Performance Standards*: "The basis for it is our own internal expertise. IFC has probably 60 or 70 full-time environmental and social scientists working virtually full time on projects, helping to appraise, assess, make recommendations, supervise and monitor projects, and advising companies on how to use and apply these principles. So we have a very large number of specialists with a combined… a huge amount of experience – probably more than just about any other development financial institutions, certainly those working with private sector initiatives. So the initial input came from our own specialists' views and experience as about what would constitute good practice, what was feasible from an operational perspective".

[32] See IFC, *Safeguard Policies*, online: IFC <http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Our+Approach/Risk+Management/Performance+Standards/#pre2006> (accessed 14 September 2016). See also Hernández Uriz, *supra* note 1 at 101-105; Morgera, "Significant Trends", *supra* note 19 at 154.

[33] CAO, *A Review of IFC's Safeguard Policies – Core Business: Achieving Consistent and Excellent Environmental and Social Outcomes* (Washington: World Bank, 2003) at 46; CAO, *Safeguard Policy Review Revisited: Has IFC Addressed the Recommendations of the CAO Safeguard Policy Review?*, online: CAO <http://www.cao-ombudsman.org/howwework/advisor/documents/FINALCAOSafeguardPolicyReviewRevisited-Aug19.pdf> (accessed 14 September 2016) at para 1 [CAO, *Safeguard Policy Review Revisited*]. See also Morgera, "Significant Trends", *ibid* at 156; Park, "World Bank Group", *supra* note 18 at 546-547; Hunter, *supra* note 17 at 444.

[34] *IFC Performance Standards 2006*, *supra* note 2. See also Simons & Macklin, *supra* note 28 at 131.

several assessments that led to the revision of this international instrument.[35] In a progress report on the revision process that was held from 2009 to 2011, the IFC stressed that "[o]ngoing engagement with IFC staff has been a central part of the update process since its beginning and has helped to ensure that the proposed changes reflect the realities of IFC's business activities and incorporate lessons learned from the four years of experience".[36] Ultimately, the current version of the *IFC Performance Standards* was submitted to the Board of Directors in April 2011[37] and became effective on January 1st, 2012.[38]

In addition to in-house experts and the necessary approval from the IFC Board of Directors, a broader *community of practice* participated in the elaboration of this instrument. In a document prepared prior to launching the review of the *IFC Performance Standards*, the IFC referred to the participation of clients, business organizations, trade unions, public interest NGOs, United Nations ("UN") agencies and other institutions of the World Bank Group in the consultation process.[39] A critical analysis of the discourses from the epistemic community and the members of this community of practice is a key step to assess the existence of shared understandings that underlie the *IFC Performance*

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[35] See IFC, *IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information: Report on the First Three Years of Application* (29 July 2009), online: IFC <http://www.ifc.org/wps/wcm/connect/90f2d88046b63bdaa9f7abb254bfb7d4/IFC_Third_Year_Report_PS_DP_.pdf?MOD=AJPERES> (accessed 14 September 2016) [IFC, *Report on the First Three Years*]; CAO, *Advisory Note: Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information* (Washington: CAO, 2010) [CAO, *Advisory Note 2010*]. A report provided by the Independent Evaluation Group is also mentioned in IFC, *Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information* (14 April 2010), online: IFC <http://www.ifc.org/wps/wcm/connect/d29bff0049800841a2a0f2336b93d75f/Compounded%2BCODE_Progress%2BReport%2Bon%2BIFC%2527s%2BSustainability%2BFramework_Review%2Band%2BUpdate.pdf?MOD=AJPERES> (accessed 14 September 2016) at paras 21-24 [IFC, *Progress Report – April 2010*].

[36] IFC, *Progress Report – April 2010*, *ibid* at para 8.

[37] IFC, *Update of IFC's Policy and Performance Standards on Environmental and Social Sustainability, and Access to Information Policy* (14 April 2011), online: IFC <http://www.ifc.org/wps/wcm/connect/fca42a0049800aaaaba2fb336b93d75f/Board-Paper-IFC_SustainabilityFramework-2012.pdf?MOD=AJPERES> (accessed 14 September 2016) at vi [IFC, *Update*].

[38] *IFC Performance Standards 2012*, *supra* note 2.

[39] IFC, *IFC Policy and Performance Standards on Social and Environmental Sustainability: Review and Update – Overview of Consultation and Engagement Process* (26 August 2009), online: IFC <http://www.ifc.org/wps/wcm/connect/d9f9008049800946a606f6336b93d75f/PPS%2BOverview%2Bof%2BConsultation%2Band%2BEngagement_English.pdf?MOD=AJPERES> (accessed 14 September 2016) at 6.

Standards. Reports provided by the CAO and the IFC, various statements from international actors involved in the consultations that preceded the two versions of the standards and transcripts of semi-structured interviews conducted for the present research constitute a pool of discourses that are particularly relevant in this regard.

From the outset, the intent of experts involved in the elaboration of the *IFC Performance Standards* was to develop a flexible and "outcome-focused approach" to assess clients' impacts on the environment and society.[40] Nevertheless, several discourses point toward a will to elaborate a mandatory instrument for private actors. In this regard, the CAO expressly supported the position of the IFC, which "publicly stated that provisions of the [IFC Sustainability Policy] and the Performance Standards will be *mandatory*".[41] Similarly, in a response that specifically concerns the application of the *IFC Performance Standards* to financial intermediaries, the IFC stressed its intent to ensure that such clients would have to "*comply* with relevant requirements of [Performance Standard 1]".[42] When providing a response to NGOs that attended a consultation held in Turkey, the IFC also mentioned that "[w]hile developing the [*IFC Performance Standards*], the aim was to create a system that *holds clients accountable* for the impacts on the ground".[43]

Other members of the community of practice also emphasized the mandatory character of the *IFC Performance Standards* by underscoring the need to condition the IFC's funding to compliance with these standards and to elaborate an effective accountability mechanism in this regard. For example, with respect to the elaboration of

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[40] See CAO, *IFC's Review of Safeguard Policies & Policy on Disclosure of Information: CAO Comments on the January 25, 2006 Drafts of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information*, online: CAO <http://www.cao-ombudsman.org/howwework/advisor/documents/CAOcommentsonthefinalPPSdraftsFINAL-February22006.pdf> (accessed 14 September 2016) at para 1.3; CAO, *Advisory Note 2010*, *supra* note 35 at v and 15; IFC, *Update*, *supra* note 37 at 14.

[41] CAO, *Safeguard Policy Review Revisited*, *supra* note 33 at para 54 [emphasis added].

[42] IFC, *Review and Update of the Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information: Financial Intermediaries Thematic Consultation Report* (26 July 2010), online: IFC <http://www.ifc.org/wps/wcm/connect/49472f8049800ac2ac12fe336b93d75f/FIThematicConsultationReport.pdf?MOD=AJPERES> (accessed 14 September 2016) [emphasis added].

[43] IFC, *Review and Update of the Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information: Consultations' Report – Istanbul, Turkey* (22 June 2010), online: IFC <http://www.ifc.org/wps/wcm/connect/8138608049800964a676f6336b93d75f/PS_Consultations_Istanbul.pdf?MOD=AJPERES> (accessed 14 September 2016) at 2 [emphasis added].

the first version of this instrument, Friends of the Earth Japan and other public interest NGOs stressed that the IFC should clearly state that it "will not finance projects which do not meet the requirements of all Performance Standards".[44] A summary of regional multi-stakeholder consultations also emphasized "the need for the Performance Standards or the Guidance Notes to clearly identify a system of monitoring and grievance mechanisms".[45] An explicit support for the elaboration of a mandatory requirement beyond national frameworks was also mentioned during a consultation held in Russia to revise the *IFC Performance Standards*.[46] Similarly, in a statement from the International Council on Mining and Metals, this representative of the private sector mentioned its appreciation "that the primary focus of the Performance Standards to date has been on 'do-no-harm' and that the requirements set out in the standards represents a *baseline expectation that client companies must comply with*".[47] Even the United States emphasized "the need for assurance of compliance at the time of Board consideration and strong client commitment to continued compliance, coupled with continued IFC oversight and the *availability of*

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[44] Friends of the Earth Japan et al, *Comments on the IFC's Draft Policy on and Performance Standards on Social & Environmental Sustainability and the Draft Policy on Disclosure of Information* (25 November 2005), online: JACSES.org <http://www.jacses.org/sdap/mof/gijiroku/CommentsonIFCSafeguard&Disclosure.pdf> (accessed 14 September 2016). Similar statements were made by NGOs during the revision process that occurred between 2009 and 2011. See Accountability Counsel et al, *Comments on IFC's Consultation Drafts of the IFC Sustainability Policy and Performance Standards and Disclosure Policy* (27 August 2010), online: Center for International Environmental Law <http://www.ciel.org/reports/comments-on-ifcs-consultation-drafts-of-the-ifc-sustainability-policy-and-performance-standards-and-disclosure-policy-august-2010-2/> (accessed 14 September 2016) at 18; International Rivers, *Comments on the IFC's April 2010 Draft Policy and Performance Standards on Social and Environmental Sustainability* (July 2010), online: International Rivers <https://www.internationalrivers.org/resources/%EF%BB%BFcomments-on-the-ifc's-april-2010-draft-policy-and-performance-standards-on-social-and> (accessed 14 September 2016).

[45] See Consensus Building Institute, *International Finance Corporation Safeguard Policy Update and Disclosure Policy Review: Regional Multi-Stakeholder Consultation* (23 February 2005), online: Center for Human Rights and Environment <http://wp.cedha.net/wp-content/uploads/2011/05/Final-Report-Regional-Multistakeholder-Consultation-CBI.pdf> (accessed 14 September 2016) at 14.

[46] See IFC, *Review and Update of the Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information* (9 July 2010), online: IFC <http://www.ifc.org/wps/wcm/connect/15cd8200498007f0a1cff3336b93d75f/Moscow%2BOpen%2BHouse%2BSummary.pdf?MOD=AJPERES> (accessed 14 September 2016) at 3.

[47] International Council on Mining & Metals, *Review of IFC's Performance Standards and Related Policies: ICMM Phase 2 Submission* (July 2010), online: ICMM <http://www.icmm.com/document/1024> (accessed 14 September 2016) at 2 [emphasis added].

appropriate and timely remedies in the event of non-compliance, including possible IFC disengagement".[48]

However, an important tension between capital-importing states and other members of the community of practice has been discussed at great length by a participant in the research project:

> It is in the interests of the donor countries to have a strict requirement on what we now consider international good practice – whether it is on financial management, procurement, environmental and social standards, anti-corruption, etc. – as possible. So, those who represent that constituency would like to have very strict conditionality on the lending. The borrowing countries often feel that … this imposes huge transaction costs and implementation challenges and delays, and requires things of them where they don't yet have the policy environment or the institutional capacity to implement them properly. … And, one of the political divisions, more generally, in our board was precisely along those lines. So there was a general group of member countries and their executive directors that have pushed for stronger requirements. And this was met with resistance by many from developing countries who said: 'You're just overcomplicating things and making the finance almost impossible'".

Such concerns ultimately point toward the existence of *relations of power* between the members of the community of practice. For example, a submission from a group of public interest NGOs mentioned that "IFC's approach to measuring effectiveness demonstrates a bias towards responding to the needs of IFC's private sector clients rather than, and perhaps to the detriment of, the concerns of local communities and the environment".[49] When discussing the inclusion of Free, Prior and Informed Consent in the *IFC Performance Standards*, the Chairperson of the Permanent Forum on Indigenous Peoples Issues stressed that "the relationship between corporations and [I]ndigenous peoples hasn't changed" and that "[u]nder the current capitalistic system, the degradation of [I]ndigenous territories continues".[50] Similarly, one interviewee implicitly referred to

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[48] United States of America, *US Comments on IFC Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information* (January 2010), online: US Department of the Treasury <https://www.treasury.gov/resource-center/international/development-banks/Documents/jan2010_policy.pdf> (accessed 14 September 2016) at 14 [emphasis added].

[49] Center for International Environmental Law, *Submission by Civil Society Organizations to the International Finance Corporation: Commenting on the Social and Environmental Sustainability Policy, Performance Standards and Disclosure* (11 March 2010), online: Halifax Initiative <http://www.halifaxinitiative.org/sites/halifaxinitiative.org/files/Civil%20Society%20Submission%20to%20IFC%2011Mar10.pdf> (accessed 14 September 2016) at 2.

[50] See IFC, *Review and Update of the Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information: Indigenous Thematic Consultation Summary* (29 July

such relations of power by underscoring that "[i]f only the wealthiest or the best functioning countries or companies can afford or be able to implement this type of standards, then you are effectively discriminating against lower capacity clients".[51] Considered in addition to the advantage granted to some capital-exporting states through the voting system of this organization, these statements expressly recognize the power held by private actors and some members of the IFC. Support from these powerful actors is an element that must thus be factored in when explaining the emergence of shared understandings regarding the mandatory character of the *IFC Performance Standards*.

The consideration of the process through which this instrument has been elaborated, as well as the critical discourse analysis of various statements and reports that have emanated from this elaboration process, demonstrate that the *IFC Performance Standards* rely on shared understandings with respect to their mandatory character. Despite a certain degree of reluctance from some capital-importing states, the epistemic community that initiated the elaboration process was supported by powerful actors involved in a community of practice to develop environmental and social standards that must be followed by foreign investors operating projects funded by the IFC.

2.2 Criteria of Legality: Provisions Fostering the Instrument's Legitimacy

In addition to observing the interactions between international actors that participated in the elaboration of the *IFC Performance Standards*, a consideration of the extent to which their content meets a set of criteria of legality is an integral part of a nuanced analysis of their normative character. This section demonstrates that the *IFC Performance Standards*, when considered with the *IFC Sustainability Policy* and other documents elaborated under the auspices of the IFC, meet all the criteria of legality included in the interactional theory of international law. This international norm thus

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2010), online: IFC <http://www.ifc.org/wps/wcm/connect/6268c58049800a5baa5bfa336b93d75f/IFCConsultationIndigenousPeoples.pdf?MOD=AJPERES> (accessed 14 September 2016) at 4.

[51] Interview 7.

induces a high level of legitimacy that undoubtedly contributes to the sense of obligation that it generates.

Like several instruments included in this dissertation, the *IFC Performance Standards* can be considered as meeting the criterion of *promulgation* without being adopted as a formal international agreement. As mentioned above, these standards have been approved by the IFC's Board of Directors before becoming applicable to investments and advisory clients of the IFC.[52] Moreover, in addition to being included in a publication that details the sustainability framework applied by this organization,[53] a summary of the IFC's environmental and social due diligence process mentions that a copy of the *IFC Performance Standards* is provided to each client of this organization.[54] Despite their informal character under international law, the *IFC Performance Standards* are thus available to the public and the private actors that they concern.

Even if the *IFC Sustainability Policy* stipulates that the application of the *IFC Performance Standards* relies on a categorization based on the magnitude of risks and impacts of each project,[55] nothing in the content of this international instrument amounts to a failure to meet the criterion of *generality*. In fact, when describing its overall approach, the *IFC Sustainability Policy* provides that "environmental and social due diligence applies to *all IFC investment activities*".[56] Moreover, the *IFC Performance Standards* stress that the requirement to assess and manage environmental and social risks included in Performance Standard 1 "applies to *all projects* that have environmental and social risks and impacts" and that "[t]he requirements section of each Performance Standard applies to *all activities financed under the project*, unless otherwise noted in the specific limitations described in each paragraph".[57] In other words, despite the categorization that is used to differentiate the application of the *IFC Performance Standards*, there is a presumption that

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[52] See section 2.1.

[53] See IFC, *Sustainability Framework*, *supra* note 27.

[54] IFC, *Understanding the IFC's Environmental and Social Due Diligence Process*, online: IFC <http://www.ifc.org/wps/wcm/connect/b58ead804942ee5da7a5ff4f5ddda76e/IFC+Process.pdf?MOD=AJPERES> (accessed 14 September 2016).

[55] *IFC Sustainability Policy 2012*, *supra* note 25 at paras 40-44. See also Lawson-Remer, *supra* note 19 at 405-406; Morgera, "Significant Trends", *supra* note 19 at 161-163.

[56] *IFC Sustainability Policy 2012*, *ibid* at para 20 [emphasis added].

[57] *IFC Performance Standards 2012*, *supra* note 2, Overview at para 4 [emphasis added].

no client can avoid the requirement to address the environmental and social impacts of its project.

Several provisions of the *IFC Performance Standards*, combined with the elaboration of other documents by this intergovernmental organization, also contribute to the *clarity* of this international instrument. While the application of these standards relies on broad concepts such as "area of influence" and "Free, Prior, and Informed Consent", these terms are extensively described in the standards themselves.[58] Another aspect of the *IFC Performance Standards* that contributes to the clarity of this instrument is the express reference to international agreements.[59] Furthermore, the IFC has developed a set of Guidance Notes with a view to offering "helpful guidance on the requirements contained in the Performance Standards, including reference materials, and on good sustainability practices to improve project performance".[60] The *Environmental, Health and Safety Guidelines* have also been elaborated by the IFC as technical reference documents with general and industry-specific examples of good international industry practice.[61] Taken as a whole, these elements undeniably enhance the clarity of the *IFC Performance Standards*.

While unanticipated changes in the provisions of an international instrument can affect its legitimacy, the application of a revised version of the *IFC Performance Standards* since January 2012 does not pose any serious issues as far as the criterion of *constancy* is concerned. Of course, the revision process has led to the inclusion of important elements within the provisions of the *IFC Performance Standards* such as climate change, human

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[58] For "area of influence", see *ibid*, Performance Standard 1 at para 8. See also Morgera, "Significant Trends", *supra* note 19 at 160-161. For "Free, Prior, and Informed Consent", see *IFC Performance Standards 2012*, *ibid*, Performance Standard 7 at paras 13-17.

[59] See *IFC Performance Standards 2012*, *ibid*, Performance Standard 2 at para 2; Performance Standard 6 at para 1; Performance Standard 8 at para 1. As suggested by Morera, this inclusion is intended to acknowledge the existence of an international consensus on a specific matter rather than requiring IFC's clients to comply with these agreements. See Morgera, "Significant Trends", *ibid* at 159.

[60] *International Finance Corporation's Guidance Note: Performance Standards on Environmental and Social Sustainability*, 1 January 2012, online: IFC <http://www.ifc.org/wps/wcm/connect/e280ef804a0256609709ffd1a5d13d27/GN_English_2012_Full-Document.pdf?MOD=AJPERES> (accessed 14 September 2016). These guidance notes are mentioned in *IFC Performance Standards 2012*, *ibid*, Overview at para 8. See also Simons and Macklin, *supra* note 28 at 131.

[61] *Environmental, Health, and Safety General Guidelines*, 30 April 2007, online: IFC <http://www.ifc.org/wps/wcm/connect/554e8d80488658e4b76af76a6515bb18/Final%2B-%2BGeneral%2BEHS%2BGuidelines.pdf?MOD=AJPERES> (accessed 14 September 2016). See also *IFC Performance Standards 2012*, *ibid*, Overview at para 6.

rights, supply chain management, stakeholder engagement, as well as Free, Prior, and Informed Consent for Indigenous peoples.[62] However, according to the IFC, "most of the revised language represents either clarifications or more explicit reference to approaches that have become recognized as standard practice in recent years".[63] The adoption of the revised version of the *IFC Performance Standards* must thus be seen as reflecting the evolution of the practice surrounding this instrument rather than a threat to the criterion of constancy.

None of the instruments that are analyzed in this part of the dissertation encounters any specific issue with respect to the *avoidance of a retroactive application*. The absence of provisions that relate to the temporal application of the *IFC Performance Standards* thus echoes a feature that is found in other international instruments and ensures that these standards live up to the requirements of this criterion. Moreover, the IFC explicitly provides that the application of the 2012 version of the *IFC Performance Standards* is limited to investments and advisory clients whose projects went through the initial credit review process after January 1st, 2012.[64] Along the same lines, the first version of this international instrument only concerns investments and advisory clients that were considered through the same process between April 30th, 2006 and December 31st, 2011.[65]

Although the identification of "all relevant environmental and social risks and impacts of the project"[66] can appear as a daunting task, at least four elements of the *IFC Performance Standards* ensure that this international norm does *not ask the impossible*. First, the use of a fairly detailed concept of "area of influence" at Performance Standard 1 contributes to limit the scope of the requirements to aspects that are related to clients'

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[62] For a summary of these changes, see IFC, *Update*, *supra* note 37 at 6-13 and Annex A. See also Elisa Morgera, "From Corporate Social Responsibility to Accountability Mechanisms" in Pierre-Marie Dupuy & Jorge E Viñuales, eds, *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge: Cambridge University Press, 2013) 321 at 327–331 [Morgera, "From Corporate Social Responsibility"].

[63] IFC, *Update*, *ibid* at 4.

[64] IFC, *Environmental and Social Performance Standards and Guidance Notes*, online: IFC <http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes> (accessed 14 September 2016).

[65] See *ibid*.

[66] See *IFC Performance Standards 2012*, *supra* note 2, Performance Standard 1 at para 7.

activities.[67] Second, the requirement to elaborate an environmental and social management system is balanced with an explicit recognition that clients cannot control the actions of governments and third parties.[68] In this regard, clients are required to "identify the different entities involved and the roles they play, the corresponding risks they present to the client, and opportunities to collaborate with these third parties in order to help achieve environmental and social outcomes that are consistent with the Performance Standards".[69] Third, several provisions of this instrument seek to ensure that its requirements are commensurate with the nature and the scale of the project. For example, such a concern is included in provisions pertaining to the establishment of an environmental and social management system,[70] the elaboration of management programs,[71] monitoring requirements[72] and stakeholder engagement.[73] Fourth, the *IFC Performance Standards* expressly acknowledge potential conflicts between these standards and national legislation, without requiring clients to simultaneously comply with two conflicting norms. For example, with respect to labour standards, Performance Standard 2 encourages clients to carry out their operations in a way that remains consistent with the standard's intent, "without contravening applicable law".[74] Taken as a whole, these elements prevent the imposition of requirements that cannot realistically be met by the IFC's clients.

The legitimacy of the *IFC Performance Standards* is also strengthened by the *avoidance of an inherent contradiction* that characterizes several informal international instruments previously analyzed. In addition to the absence of any direct contradictions between its provisions, the application of the *IFC Performance Standards* appears as a coherent means to achieve the IFC's goal of enhancing sustainable development. According to the *IFC Sustainability Policy*, the "IFC believes that an important component of achieving positive development outcomes is the environmental and social sustainability

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[67] *Ibid*, Performance Standard 1 at para 8.

[68] *Ibid*, Performance Standard 1 at para 2.

[69] *Ibid*, Performance Standard 1 at para 2.

[70] *Ibid*, Performance Standard 1 at para 5.

[71] *Ibid*, Performance Standard 1 at paras 14-15.

[72] *Ibid*, Performance Standard 1 at para 22.

[73] *Ibid*, Performance Standard 1 at para 25.

[74] *Ibid*, Performance Standard 2 at para 16.

of these activities".[75] In this regard, paragraph 24 of this policy ensures that the *IFC Performance Standards* are used in a way that contributes to this overarching belief:

> IFC's agreements pertaining to the financing of clients' activities include specific provisions with which clients undertake to comply. *These include complying with the applicable requirements of the Performance Standards* and specific conditions included in action plans, as well as relevant provisions for environmental and social reporting, and supervision visits by IFC staff or representatives, as appropriate. If the client fails to comply with its environmental and social commitments as expressed in the legal agreements and associated documents, IFC will work with the client to bring it back into compliance, and if the client fails to reestablish compliance, IFC will exercise its rights and remedies, as appropriate.[76]

To put it differently, the absence of an express voluntary character to the observance of the *IFC Performance Standards* ensures a higher level of consistency with the ambit of the IFC than what is found in several informal international instruments codifying foreign investors' responsibilities.

Finally, the existence of various procedural devices to ensure the consideration of significant instances of non-compliance with the *IFC Performance Standards* is in line with the criterion of *congruence*. Beyond the requirement for each client to establish a grievance mechanism "to receive and facilitate resolution of affected Communities' concerns and grievances about the client's environmental and social performance",[77] the IFC is closely involved in determining compliance of its clients' operations with the *IFC Performance Standards*.[78] Among other tools, the IFC relies on the *Environmental and Social Review Procedures Manual*, which "provides a structured approach for [IFC's

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[75] *IFC Sustainability Policy 2012*, *supra* note 25 at para 1.

[76] *Ibid* at para 24 [emphasis added]. See also Morgera, "Significant Trends", *supra* note 19 at 159 and 182-183; Hunter, *supra* note 17 at 470 and 472; Adeyemi, *supra* note 19 at 104-105; Arnaud Poitevin, "Des « prérequis » pour la levée de fonds sur les marchés internationaux : Les normes environnementales et sociales des institutions financières internationales et leurs sanctions" (2015) JDI 527.

[77] See *IFC Performance Standards 2012*, *supra* note 2, Performance Standard 1 at para 35. Grievance mechanisms established by clients are also mentioned at Performance Standard 2 (at para 20), Performance Standard 4 (at para 12) and Performance Standard 5 (at para 11). See also Morgera, "Significant Trends", *ibid* at 165-166; Natalie L Bridgeman & David B Hunter, "Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism" (2008) 20 Geo Int'l Envtl L Rev 187 at 222; Simons and Macklin, *supra* note 28 at 134.

[78] See *IFC Sustainability Policy 2012*, *supra* note 25 at para 45. See also Simons and Macklin, *ibid* at 138-139

Environment, Social and Governance Department] to monitoring and recording client performance".[79]

The work of the CAO is also a key element that contributes to congruence with respect to the *IFC Performance Standards*. Constituted as an independent recourse and accountability mechanism of the IFC and the MIGA for environmental and social concerns, the CAO assumes three interdependent roles (*i.e.* dispute resolution, compliance and advisor).[80] Of course, it must be noted that this entity "is not an appeals court or a legal enforcement mechanism, nor is CAO a substitute for international court systems or court systems in host countries".[81] Moreover, the *CAO Operational Guidelines* recall that engaging in the dispute resolution process that it provides to communities and individuals affected by IFC's projects is "a voluntary decision [requiring] agreement between the complainant and client".[82] While such restraints fail to adequately determine compliance with the *IFC Performance Standards* in a way that would meet this criterion of legality, the compliance role of the CAO nevertheless contributes to congruence between the provisions of this instrument and official action. More specifically, without focusing primarily on clients' operations, the CAO compliance mechanism assesses how the IFC assures itself "of the performance of its business activity or advice, as well as whether the outcomes of the business activity or advice are consistent with the intent of the relevant policy provisions".[83] According to the *CAO Operational Guidelines*, the compliance investigation criteria include "policies, *Performance Standards*, guidelines, procedures, and requirements whose violation might lead to adverse environmental and/or social

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[79] *Environmental and Social Review Procedures Manual*, online: IFC <http://www.ifc.org/wps/wcm/connect/190d25804886582fb47ef66a6515bb18/ESRP+Manual.pdf?MOD=AJPERES> (accessed 14 September 2016), 1 at 1.1.

[80] See *CAO Operational Guidelines*, March 2013, online: CAO <http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines_2013.pdf> (accessed 14 September 2016) at para 1.2 [*CAO Operational Guidelines 2013*]. For a discussion of the various roles of the CAO, see Hernández Uriz, *supra* note 1 at 105-108; Kinley & Tadaki, *supra* note 16 at 1004-1005; Morgera, "Significant Trends", *supra* note 19 at 154; Bridgeman & Hunter, *supra* note 77 at 210-213; Saper, *supra* note 28 at 1296-1307; Morgera, "From Corporate Social Responsibility", *supra* note 62 at 342-345; Simons and Macklin, *supra* note 28 at 140-141; Poitevin, *supra* note 76.

[81] See *CAO Operational Guidelines 2013*, *ibid* at para 1.1.

[82] *Ibid* at para 3.1.

[83] See *ibid* at para 4.1.

outcomes".[84] In other words, in addition to the monitoring of each project that is conducted by the IFC, the CAO ensures that the IFC effectively applies the *IFC Performance Standards* to tackle significant instances of non-compliance.

By meeting all the criteria of legality that are included in the interactional theory of international law, the *IFC Performance Standards* appear as a highly legitimate international norm. Even if they are not enshrined in a formal international agreement, these standards can generate a considerable level of adherence from international actors. While such legitimacy is a necessary condition for any international norm to become a legal norm, the *IFC Performance Standards* are in a good standing to be considered as such.

2.3 Practice of Legality: Interactions Geared Toward Compliance

An international instrument relying on shared understandings with respect to its mandatory character and meeting a whole set of criteria of legality is in a good position to be applied according to a practice of legality. Interestingly, the IFC depicts itself as being at the "centre of a global *community of practice* in an effort to promote consistent implementation of the Performance Standards by all users".[85] With a view to assessing the nature of the practice that has emerged from the *IFC Performance Standards*, this section examines the extent to which this instrument has been included in other initiatives that seek to codify foreign investors' responsibilities. Furthermore, a critical discourse analysis of various reports from the IFC and the CAO, as well as transcripts from semi-structured interviews, allows concluding that the community of practice surrounding the *IFC Performance Standards* implements this international instrument in a way that is binding for the IFC and its clients.

This initiative adopted by the IFC is not extensively referred to in other international instruments adopted by intergovernmental organizations that are considered in the present analysis. In fact, beyond a vague reference to "performance standards

[84] *Ibid* at para 4.3 [emphasis added].

[85] IFC, *Update*, *supra* note 37 at vi [emphasis added].

required by institutions that support overseas investments" in a commentary of the *Guiding Principles on Business and Human Rights*,[86] these intergovernmental organizations are not expressly taking into account the contribution of the *IFC Performance Standards* with respect to the broader codification of foreign investors' responsibilities. However, an important part of the practice that characterizes the implementation of the *IFC Performance Standards* is the uptake of these standards within the World Bank Group and international financial institutions. In fact, the *Operational Policy 4.03 – Performance Standards for Private Sector Activities* ("*Operational Policy 4.03*") that was adopted in May 2013 provides that "[t]he eight IFC Performance Standards have been adopted by the Bank … for application to Bank support for projects (or components thereof) that are designed, owned, constructed and/or operated by a Private Entity … in lieu of the World Bank's safeguard policies".[87] The inclusion of the *IFC Performance Standards* as Exhibit III of the *Equator Principles* also suggests a wide practice amidst the financial industry.[88]

Beyond these references, the discourses of the community of practice related to the *IFC Performance Standards* strongly support the idea that this international norm is implemented according to a practice of legality. In fact, several reports from the IFC focus on the need for its clients to comply with these standards. For example, the IFC considered the Environmental and Social Review Procedure as describing "steps to be taken in case of *noncompliance with the Performance Standards* during the implementation phase".[89] Another aspect discussed in IFC reports that implicitly highlights a practice of legality relates to the consideration of costs associated with meeting the requirements of the *IFC Performance Standards*. In fact, relying on a client survey conducted three years after the adoption of these standards, the IFC mentioned that "[h]alf of IFC's clients indicated that

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[86] Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 2011, UN Doc A/HRC/17/31, Guiding Principle 2, Commentary.

[87] *World Bank Performance Standards*, *supra* note 4 at para 2. See also Poitevin, *supra* note 76.

[88] *Equator Principles*, 4 June 2013, online: Equator Principles <http://www.equator-principles.com/resources/equator_principles_III.pdf> (accessed 14 September 2016), Exhibit III. See also Kinley & Tadaki, *supra* note 16 at 1003; Morgera, "Significant Trends", *supra* note 19 at 187; Bridgeman & Hunter, *supra* note 77 at 227; Hunter, *supra* note 17 at 450-451; Alice De Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Northampton: Edward Elgar, 2011) at 25–26.

[89] IFC, *Report on the First Three Years*, *supra* note 35 at 6 [emphasis added].

the cost factor related to [Performance Standards] implementation would not impact their decision to consider pursuing IFC financing in the future, whereas 21 percent said the cost of [Performance Standards] implementation might negatively influence future decisions to work with IFC".[90] While compliance with other instruments is sometimes considered as part of a mere cost-benefit analysis,[91] the IFC's conclusion demonstrates that its clients comply with this norm and pay the corresponding costs once they decide to work with this organization.

As far as the reports of the CAO are concerned, some excerpts tend to depict a practice that does not bear any legal character. For example, in line with the *CAO Operational Guidelines* mentioned above, this entity has often recalled that its dispute resolution process "does not make a judgement about the merit of a complaint, nor does it find fault or impose solutions as conciliator, arbiter or judge".[92] However, other discourses from the CAO unambiguously underscore its role to ensure that the IFC applies the *IFC Performance Standards* as a binding international norm. In its annual report published in 2007, the CAO mentioned that "[t]he compliance role has responsibility to make *judgments* about whether IFC and MIGA are in *compliance with relevant standards* and guidelines on projects that have prompted complaints or have raised concerns with the World Bank President, IFC/MIGA management, or the CAO".[93] In another annual report, the CAO addressed the IFC's assessment of a project in Kazakhstan by stressing "IFC's *obligations* to assure itself of project performance".[94] Moreover, with respect to a mining project in Peru, the CAO emphasized that "although efforts were made by IFC to supervise Quellaveco's *compliance with evolving environmental and social standards*, the lack of clarity around the company's *obligations* made it difficult to deal with issues that emerged during IFC's supervision of the project".[95]

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[90] *Ibid* at 22.

[91] See section 2.3 of Chapter 6.

[92] CAO, *2013 Annual Report* (Washington: CAO, 2013) at 12; CAO, *2014 Annual Report* (Washington: CAO, 2014) at 12. Previous annual reports include similar terms with respect to the "ombudsman" role of the CAO. See e.g. CAO, *2006-07 Annual Report* (Washington: CAO, 2007) at 10 [CAO, *Annual Report 2007*].

[93] CAO, *Annual Report 2007*, *ibid* at 3 [emphasis added].

[94] CAO, *2008-09 Annual Report* (Washington: CAO, 2009) at 19 [emphasis added].

[95] CAO. *Advisory Note: IFC's Policy and Performance Standards on Social and Environmental Sustainability and Disclosure Policy – Commentary on IFC's Progress Report on the First 18 Months of Application* (17

The legal character of the practice surrounding the *IFC Performance Standards* has also been mentioned in the discourses of individuals working for intergovernmental organizations involved in the codification of foreign investors' responsibilities. Interestingly, one interviewee warned against the lack of flexibility that the inclusion of the *IFC Performance Standards* in a formal source of international law would entail:

> I would gather that this is one of the challenges in translating it into formalized law. Because, internally, when we engage with our clients, we build an enormous amount on case practice, and consistency of professional judgments across regions and across sectors. And we have internal peer review meetings and discussions. I get called in … to essentially advise on interpretation issues, quite frequently. And this would be difficult to replicate, I think, in a legal framework.[96]

While depicting the IFC's approach as avoiding a "legalistic approach",[97] the same interviewee nevertheless claimed that the practice surrounding the *IFC Performance Standards* remains "legally binding":

> When we invest in a company or lend to a company, [the *IFC Performance Standards*] become *legally binding contractual obligations*. So we have our lawyers who write legal contracts with the companies we invest in. They commit to following these standards. And if they don't, well there's obviously different ways in which we try to bring them back into *compliance*. Sometimes, that's a gradual process, sometimes it's more absolute. … If it's absolutely not working, we can withdraw and require a repayment of the loan.[98]

Along the same lines, another interviewee mentioned that "all institutional lenders are *obliged* to comply with [the *IFC Performance Standards*]", despite their "soft law" character.[99]

In line with the other international instruments considered in this dissertation, the discourses pertaining to the implementation of the *IFC Performance Standards* also reproduce inherent *relations of power*. For example, regarding its role as an ombudsman that addresses complaints from communities and individuals affected by a project, the CAO recognized that "[l]ack of trust, respect, and *imbalances of power* often lay at the heart of

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December 2007), online: CAO <http://www.cao-ombudsman.org/howwework/advisor/documents/CAOpublicstatementIFCperformancestandards121707.pdf> (accessed 14 September 2016) at 4 [emphasis added].

[96] Interview 7.

[97] *Ibid*.

[98] *Ibid* [emphasis added].

[99] Interview 8 [emphasis added].

the problem, rather than evidence presented by one side or the other".[100] An audit of IFC's environmental and social due diligence in a specific project conducted by the CAO also emphasized that "commercial pressures were allowed to prevail and overly influence the categorization of the project".[101] Beyond this implicit recognition that private actors often hold more power than other members of the community of practice, the IFC expressly acknowledged that providing a comprehensive view of performance requirements early in the engagement process "is of critical importance for private sector clients that need a high level of certainty on roles, responsibilities, and performance expectations before entering into a financial transaction".[102] In other words, the practice of legality that emerged around the *IFC Performance Standards* is ultimately perceived as being in line with the interests of powerful private actors that enter into contractual relations with the IFC.

It must be emphasized that the reference to the *IFC Performance Standards* in the contracts that are signed between the IFC and its clients is a key element of the practice of legality surrounding this instrument. Such an inclusion sharply contrasts with the practice of other initiatives analyzed in this dissertation. Of course, given that the terms of these contractual agreements do not imply any requirements for other international actors, an instance of non-compliance with the standards by an actor that is not a client of the IFC cannot be addressed by this agency. Nevertheless, this should not be considered as a reason to diminish the legal character of the practice surrounding the *IFC Performance Standards*. Regardless of the scope of actors to whom these standards are applicable, it is the fact that members of the community of practice perceive observance of these standards as being mandatory in order to operate a project funded by the IFC that shows the legal character of this practice. Moreover, recalling the references to the *IFC Performance Standards* in the *Operational Policy 4.03* and the *Equator Principles*, it is here submitted that the practice regarding the *IFC Performance Standards* somehow reaches beyond these contractual agreements and that this instrument exists as an international legal norm.

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[100] CAO, *The CAO at 10: Annual Report FY2010 and Review FY2000-10* (Washington: CAO, 2010) at 28 [emphasis added]. See also CAO, *Annual Report 2012* (Washington: CAO, 2012) at 4: "The CAO's direct access to affected communities is therefore essential so we can help build on existing methods for addressing disputes, create greater capacity to engage with external parties, and help level power imbalances".

[101] See CAO, *Annual Report 2011* (Washington: CAO, 2011) at 34-35.

[102] IFC, *Report on the First Three Years*, *supra* note 35 at 21.

In sum, in addition to a considerable uptake by the World Bank Group and international financial institutions, the discourses pertaining to the implementation of the *IFC Performance Standards* suggest that members of the community of practice perceive this instrument as bearing a binding character. Observance of these standards is constantly considered as mandatory for IFC's clients and several discourses acknowledge an obligation for the IFC to ensure that private actors comply with them. While this implementation process inevitably encompasses relations of power between actors involved, the recognition that predictable performance expectations remain in the interests of powerful clients of the IFC contributes to perpetuate the practice of legality that characterizes the *IFC Performance Standards*.

Conclusion

Even if their application is limited to the private actors that operate projects funded by the IFC, the *IFC Performance Standards* remain an integral part of the evolving codification of foreign investors' responsibilities by intergovernmental organizations. Within a broader context of neoliberal globalization, this normative development emerges from an important shift of identity that paved the way to the consideration of environmental and social sustainability in the World Bank Group's operations. Moreover, without being considered as a formal source of international law, an interactional account of the *IFC Performance Standards* demonstrates that this instrument has been elaborated and implemented as an international legal norm that generates a sense of obligation for the IFC and its clients. The initial intent of an epistemic community to elaborate standards applicable to private actors and whose observance is mandatory to obtain funding from the IFC has benefited from the support of powerful members of the community of practice. In addition to these shared understandings, the *IFC Performance Standards* meet all the criteria of legality that contribute to enhance the legitimacy of international norms. Finally, while a predictable application of such standards can be perceived as being in line with the interests of IFC's powerful clients, several discourses related to the implementation of the *IFC Performance Standards* evidence a practice of legality.

Conclusion

A contextualized assessment of foreign investors' responsibilities that reaches beyond the formal character of instruments under international law and that expressly takes into account the interactions of actors involved in the international lawmaking process provides a mixed response to the question that was asked in the introduction of the dissertation. In a context of neoliberal globalization, the extent to which the processes of elaboration and implementation of foreign investors' responsibilities by intergovernmental organizations have reached the realm of legality is uneven and extensively driven by the interests of the most powerful actors.

More specifically, the analytical foundations underlying this dissertation stress the necessity of an interdisciplinary approach and elaborate a framework to conduct a nuanced examination of the evolving codification of foreign investors' responsibilities. Be relying on the theoretical and methodological tools of a single discipline, the overwhelming majority of previous studies addressing this codification process are grounded in a legal positivist approach, a legal pluralist approach or critical perspectives. By contrast, this dissertation relies on the assumption that an analysis of the international phenomenon at hand requires a consideration of normative developments and relations of power between international actors. The previous chapters thus rely on an analytical framework that explicitly combines legal pluralism from international law and critical constructivism from international relations theory. Such a framework ensures a consideration of the normative character of initiatives adopted beyond the strict control of states, as well as relations of power underlying the mutual constitution of international actors and international norms. An interdisciplinary character is also present in the methodology, which expressly draws on a traditional method in international law and a critical discourse analysis. In addition to scrutinizing the content of various international instruments and decisions from international investment arbitration tribunals, such methodology provides concrete evidence of relations of power inherent to normative developments that relate to the codification of foreign investors' responsibilities.

A macro-level analysis advances some elements of the mixed response to the research question. With a view to situating this evolving codification process within the broader context of neoliberal globalization, such an analysis focuses on the normative integration of foreign investors' responsibilities in international investment law. Functionally differentiated normative orders covering different areas of foreign investors' responsibilities – *i.e.* human rights, environmental protection, labour rights and anti-corruption – have emerged in parallel to efforts to protect foreign investment. However, the extent to which these responsibilities are included in international investment agreements and considered in decisions from international investment arbitration tribunals is generally weak and uneven. With respect to human rights, environmental protection and labour rights, such responsibilities are often included in international investment agreements only through hortatory provisions. Moreover, the consideration of the negative impact of foreign investors' activities in these areas by international investment arbitration tribunals has been marked by an inconstant approach, thus suggesting a rather weak normative integration. By contrast, the stronger provisions pertaining to anti-corruption in some international investment agreements and the constant recognition that foreign investors resorting to corruption lose their ability to seek redress under international investment arbitration point toward a stronger normative integration of foreign investors' responsibilities for this area.

Enter relations of power and diverging interests that are inherent to the international investment lawmaking process. The macro-level analysis presented in this dissertation emphasizes that foreign investors and capital-exporting states hold structural power over other actors involved in the elaboration of rules governing international investment. Moreover, a critical analysis of statements submitted through consultation processes piloted by intergovernmental organizations that broadly relate to foreign investors' responsibilities suggests that discourses of international actors reproduce such relations of power. In this regard, discourses pertaining to the elaboration of foreign investors' responsibilities in the areas of human rights, environmental protection and labour rights are characterized by hardly reconcilable positions. While public interest nongovernmental organizations ("NGOs") and some states hosting a considerable level of foreign direct investment stocks generally support the elaboration of international instruments whose

observance is not merely voluntary, such demands meet a strong opposition from the majority of private interest NGOs, foreign investors, capital-exporting states and some intergovernmental organizations. By contrast, foreign investors, private interest NGOs and capital-exporting states unambiguously support the elaboration of effective legal norms to prohibit corruption in order to level the playing field and prevent undue commercial advantages to actors that resort to corruption. Although the support for anti-corruption initiatives from public interest NGOs, capital-importing states and intergovernmental organizations is also notable, such support is primarily marked by concerns that reach beyond competitive issues.

In other words, this macro-level analysis suggests that foreign investors' responsibilities are not totally absent from international investment law. Even if the integration of such responsibilities remain weak and uneven, provisions found in some international investment agreements and the consideration of the negative impact of foreign investors' activities by some tribunals when assessing the legality of a measure adopted by a respondent state must be acknowledged. It is thus more accurate to address the normative integration of foreign investors' responsibilities in international investment law as being fragmented rather than non-existent. In this regard, supplementing a legal pluralist approach and a traditional method in international law with a critical constructivist approach and a critical discourse analysis also suggests that these responsibilities are normatively integrated to international investment law in a way that remains consistent with the interests of the most powerful actors involved in the international investment lawmaking process.

The analysis of whether international norms setting foreign investors' responsibilities have reached the realm of legality has also been conducted through a micro-level analysis of instruments elaborated and implemented under the auspices of intergovernmental organizations. By drawing on the interactional theory of international law – which also combines legal pluralism and constructivism – and an interdisciplinary methodology, this dissertation allows positioning each instrument on a continuum that varies from social norms to legal norms. With a view to determining which instruments currently produce a sense of obligation and have reached the threshold of legality, it is

worth presenting these findings from the instrument that carries the weakest normative character to the initiative that generates the strongest sense of obligation.

Among all the international norms considered for present purposes, the instrument that bears the lowest normative character is the *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights* ("*UN Norms*")[1] that were adopted by the Sub-Commission on the Promotion and the Protection of Human Rights ("Sub-Commission") of the United Nations ("UN"). Even if the experts from the Sub-Commission initially intended to develop a binding instrument to address the issue of business and human rights, the strong opposition from powerful foreign investors and capital-exporting states prevented the emergence of shared understandings with respect to the legal character of this instrument. Aspects related to their promulgation and their content also fail to meet several criteria of legality, thus negatively impacting the ability of the *UN Norms* to be considered as a legitimate instrument. The brief practice that occurred shortly after the refusal of the UN Commission on Human Rights to acknowledge any legal standing to this initiative was also marked by efforts from powerful actors to prevent the use of the *UN Norms* as the basis for a binding instrument, thus keeping this initiative far below the threshold of legality. Now, given the absence of a current practice regarding the *UN Norms*, one wonders if this instrument is still considered as enunciating standards of appropriate behavior and constitutes an international norm at all.

The contribution of the International Labour Organization ("ILO") to the evolving codification of foreign investors' responsibilities has also led to the elaboration and the implementation of an instrument that appears as a relatively weak social norm. From the outset, the norm entrepreneurs that pushed for the elaboration of the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* ("*ILO Tripartite Declaration*")[2] sought to adopt an instrument whose observance would remain non-mandatory. Even if capital-importing states and workers' associations generally supported the negotiation of a formal international agreement on this matter, the opposition from

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[1] *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, 2003, UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

[2] For the current version, see *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, March 2006, online: ILO <http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm> (accessed 14 September 2016).

several capital-exporting states and representatives of employers appeared as a major obstacle to reach shared understandings with respect to the *ILO Tripartite Declaration*'s legal nature. Lack of clarity related to some provisions, requirements that can be perceived as asking the impossible of foreign investors, an inherent contradiction between the aim of the instrument and its express voluntary character, as well as the absence of a procedural mechanism to properly determine lack of compliance with the provisions of the declaration all constitute inconsistencies with the criteria of legality. At the end of the day, even if the *ILO Tripartite Declaration* provides standards of appropriate behavior, the weakness of this social norm is evidenced through a practice characterized by the rejection of its legal character by many powerful actors and a general lack of awareness.

The analysis provided in the previous chapters also allows identifying some widely disseminated international norms that nevertheless fail to generate a sense of obligation. In this regard, the UN Global Compact[3] has always been considered as a voluntary initiative primarily geared toward dialogue. Shared understandings in which this initiative is anchored have been shaped by private interest NGOs and some states that joined the UN Secretary-General and supported the elaboration of a voluntary initiative. The provisions of the UN Global Compact also imply considerable issues with most of the criteria of legality (*i.e.* clarity, constancy, not asking the impossible, absence of contradiction and congruence). While the broad awareness of the UN Global Compact ensures a stronger normative character than the *ILO Tripartite Declaration*, the worrisome disengagement of participants beyond their initial commitment and the repeated voluntary character of the initiative prevent the emergence of a practice of legality and lead to a fairly weak social norm.

A more recent initiative endorsed by the Human Rights Council of the UN bears a stronger normative character than the UN Global Compact. Even if the *Guiding Principles on Business and Human Rights* ("*UN Guiding Principles*")[4] undeniably constitute an

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[3] United Nations Global Compact, online: United Nations Global Compact <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (accessed 14 September 2016).

[4] Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 2011, UN Doc A/HRC/17/31.

international social norm, some aspects of their provisions and the interactions that they generate suggest a strong potential to evolve closer to the threshold of legality. In fact, while some public interest NGOs and capital-importing states advocated for the elaboration of a formal international agreement, the support provided by foreign investors and capital-exporting states extensively depended upon the initial intent of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises not to adopt any new legal obligations. The overwhelming majority of interactions within the community of practice implementing this international instrument also demonstrates an unambiguous will to avoid establishing a practice of legality for the moment. However, the highly legitimate character of the *UN Guiding Principles* that results from its consistency with almost all the criteria of legality, the absence of a voluntary character to the corporate responsibility to respect human rights that it establishes and some aspects of their surrounding practice that make the consideration of this instrument unavoidable can be considered as the foundation of a potential sense of obligation.

An interactional account of the *Guidelines for Multinational Enterprises* ("*Guidelines*")[5] adopted by the Organisation for Economic Co-operation and Development ("OECD") also suggests that this instrument embodies a widely disseminated international social norm whose normative character is even stronger than the *UN Guiding Principles*. The constant disagreement between the various international actors involved in the elaboration and revision of these guidelines with respect to their legal nature demonstrates the absence of shared understandings to establish a legal norm. What is more, despite an express voluntary character that remains in tension with the ambit of this instrument and the absence of a procedure that requires the determination of a lack of compliance with the *OECD Guidelines*, this instrument meets most of the criteria that characterize legitimate international norms. Even if the practice surrounding the *OECD Guidelines* is characterized by a persistent emphasis on the voluntary observance of the recommendations included in this instrument and generally fails to generate a practice of legality, the extensive reliance on the National Contact Points to address specific instances

[5] For the most recent version, see *Declaration on International Investment and Multinational Enterprises*, 25 May 2011, Doc No C/MIN(2011)11/FINAL (2011), Annex 1.

pertaining to the application of these guidelines contribute to make this instrument a stronger social norm than the *UN Guiding Principles*.

The last international instrument considered as a social norm in the previous chapters is the *United Nations Convention Against Corruption* ("*UNCAC*").[6] Despite its formal character under international law, the *UNCAC* fails to generate a general sense of obligation and thus cannot be considered as a proper international legal norm according to the interactional theory of international law. Although the norm entrepreneurs and the international actors that contributed to the elaboration of this instrument have agreed to negotiate a formal international agreement to hold legal persons liable for various offences related to corruption, the shared understandings underlying the *UNCAC* are marked by a will from several states to establish flexible standards. The legitimacy of this international agreement is also negatively impacted by several weak provisions that do not sit well with the ambit of tackling the scourge of corruption and a mechanism for the review of implementation that fails to adequately address significant instances of non-compliance. The emergence of a practice that is primarily oriented toward learning and sharing of best practices also points toward the absence of a sense of obligation emanating from this international norm. Even if the *UNCAC* is promulgated as a formal international agreement and relies on a vast practice, this instrument can only be perceived as a strong, yet social international norm.

By contrast, three initiatives considered in the dissertation appear as proper international legal norms in the sense of the interactional theory of international law. The first initiative lies in an informal instrument adopted under the auspices of the International Finance Corporation ("IFC"), namely the *International Finance Corporation's Performance Standards on Environmental and Social Sustainability* ("*IFC Performance Standards*").[7] These standards result from the work of an epistemic community that intended to elaborate an instrument whose observance is mandatory for clients operating

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[6] *United Nations Convention Against Corruption*, 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005).

[7] *International Finance Corporation's Performance Standards on Environmental and Social Sustainability*, 1 January 2012, online: IFC <http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Our+Approach/Risk+Management/Performance+Standards/> (accessed 14 September 2016).

projects funded by this institution of the World Bank Group. Despite some opposition from capital-importing states, such mandatory standards were supported by more powerful actors and thus rely on strong shared understandings with respect to their mandatory character. When considered in light of accompanying documents, the *IFC Performance Standards* also meet all the criteria of legality advanced in the interactional theory of international law. Furthermore, the various discourses related to the implementation of these standards render a practice of legality that focuses on the need to ensure that IFC's clients comply with these standards. Despite their informal character under international law, the *IFC Performance Standards* thus appear as an international legal norm that produces a genuine sense of obligation for the IFC and its clients.

Finally, the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ("*OECD Anti-Bribery Convention*")[8] and the *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* ("*OECD 2009 Recommendation*")[9] adopted by the OECD are two international legal norms that relate to the codification of foreign investors' responsibilities. Since an initial push from the United States and powerful private actors to elaborate an international agreement establishing the liability of legal persons for the bribery of foreign public officials, it is plain that these two instruments are embedded in solid shared understandings with respect to their legal character. Despite some contradictions related to the *OECD Anti-Bribery Convention* with respect to small facilitation payments that are mitigated by the *OECD 2009 Recommendation*, these two instruments meet all the criteria of legality included in the interactional theory of international law. The implementation of these instruments revolving around a system of peer review also ensures a practice according to which compliance with the *OECD Anti-Bribery Convention* and the *OECD 2009 Recommendation* is considered as compulsory by member states.

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[8] *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, 37 ILM 1 (entered into force 15 February 1999).

[9] *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 26 November 2009, Doc No C(2009)159/REV1/FINAL (amended on 18 February 2010, Doc No C(2010)19).

Most importantly, it is plain that the application of the interactional theory of international law allows a fuller account of the sense of obligation (or lack thereof) emanating from international instruments that reaches beyond their informal or formal character under international law. When considering interactions between international actors that they generate and some of their provisions, informal international instruments like the *IFC Performance Standards* and the *OECD 2009 Recommendation* produce a stronger sense of obligation than the *UNCAC*. Positioning the instruments on a continuum that varies from social norms to legal norms allows a refined understanding of the evolving codification of foreign investors' responsibilities by intergovernmental organizations that cannot be fully captured by a strict legal positivist approach.

While these instruments codifying foreign investors' responsibilities evidence a double movement where "society protect[s] itself against the perils inherent in a self-regulating market system",[10] it is plain that such a movement remains largely unfinished under international law. Of course, the analysis provided in the previous chapters suggests that a deeper normative integration of foreign investors' responsibilities in international investment law and that the adoption of instruments whose observance is perceived as being mandatory have been achieved in some instances. However, in a context of neoliberal globalization, the strongest impediment to fostering the imposition of obligations to foreign investors through legal norms remains the interests of the most powerful actors. This dissertation demonstrates that advancing this double movement can only be possible if the most powerful actors of the international investment lawmaking process are convinced that such obligations can level the playing field and avoid undue advantages to actors that negatively impact the environment and the communities in which they operate. Identifying promising normative avenues and acknowledging the necessity of overcoming the opposition from powerful actors are the first steps toward increasing the accountability of foreign investors under international law.

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[10] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 2d ed (Boston: Beacon Press, 2001 [1944]) at 80.

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