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

A Dissertation Submitted in Partial Fulfillment of the Requirements for the Degree of

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University of Victoria

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Abstract

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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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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² Ibid at 138-139.

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. 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”. 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.

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 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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5 Ibid at 2.

6 Ibid at 2.


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 state 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 organizations9 (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

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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”. 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. 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. Restated, international lawmaking occurring in a


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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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].
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,\textsuperscript{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.\textsuperscript{19} Ultimately, neoliberalism relates to an “ideal of the ‘self-regulation market’ as the main engine powering the individual’s rational pursuit of wealth”\textsuperscript{20}

Beyond the ideas that characterize neoliberalism, policies adopted in a context of neoliberal globalization are extensively based on privatization, liberalization and deregulation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{18} For useful summaries, see Cerny et al., supra note 16 at 14-19; Turner, \textit{ibid} at 4-5; Steger & Roy, \textit{ibid} at 11-15.


\textsuperscript{20} See e.g. Steger & Roy, \textit{ibid} at 2.


\textsuperscript{22} Cerny et al., \textit{ibid} at 15-16.

reflect the neoliberal ideal of self-regulation and can even be considered as a departure from these policies. 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, 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. Since the aforementioned report from the UN Department of Economic and Social Affairs in 1973,


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”.

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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lawmaking process that occurs in intergovernmental organizations is extensively discussed in the literature from both disciplines.\(^\text{33}\) 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”.\(^\text{34}\) 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.\(^\text{35}\)

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.\(^\text{36}\) While state representatives are often involved in the elaboration of international initiatives that address the lack of accountability of foreign investors,\(^\text{37}\) experts and civil society organizations also play a substantial role in this task.\(^\text{38}\) 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.


\(^{34}\) Alvarez, \textit{International Organizations}, supra note 28 at 17. See also Alvarez, “International Organizations”, \textit{ibid} at 326.

\(^{35}\) See Alvarez, \textit{International Organizations, ibid} at 48-49.

\(^{36}\) Muchlinski, “Human Rights”, supra note 27 at 145; Muchlinski, \textit{Multinational Enterprises, supra} note 12 at 84; Muchlinski, “Policy Issues”, supra note 12 at 8.


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)\(^\text{39}\) 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.\(^\text{40}\) 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,\(^\text{41}\) 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).


\(^{40}\) 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.
The OECD has been particularly active in elaborating international initiatives that concern foreign investors’ responsibilities. After its first adoption in 1976, the OECD Guidelines for Multinational Enterprises (“OECD Guidelines”) went through various revisions. While the most recent version of these guidelines was adopted in 2011, considerable changes were made to this instrument in 2000. 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”)

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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 ‘likemindness’ 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.


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”).

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”) in 1977. Substantial modifications were subsequently made to this declaration in 2000 and in 2006. 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, the UN Secretary-General announced the elaboration of an initiative directly addressed to businesses and entitled the UN Global Compact. 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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50 See UN Draft Code of Conduct, supra note 39.

(“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

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). 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”. 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. 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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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).


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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\(^{63}\) 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).

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

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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{75} These authors present a more nuanced distinction between soft law and hard law as being different points on a spectrum of


\textsuperscript{73} For a summary of these interpretations, see Rose, supra note 60 at 15-19.


commitment instead of a binary choice. Through an application of different variables, other authors even conclude that “most international law is ‘soft’ in distinctive ways”. 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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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”.

Although some authors maintain that such cross-fertilization among different disciplines is rare or even illusionary, 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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in which these instruments are elaborated and implemented. 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’.” 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. 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. While some authors limit socio-legal studies to an interdisciplinary approach that extensively draws from sociology, others refer to the potential contribution that can be brought by other disciplines from social sciences in order to scrutinize this context.

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


84 See generally Banakar & Travers, supra note 78; Hirsch, “The Sociology of International Law”, ibid.

two disciplines has drawn several scholars’ attention for more than twenty years. 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. Nevertheless, it has often been repeated that a complete analysis of one of these two objects cannot be conducted in isolation of the other. Some even argue that international law and international relations are now increasingly perceived as a single or a hybrid discipline. 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, some authors are now urging for analyses that draw from analytical tools of both disciplines. In line with such suggestions,

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


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.

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\(^{93}\) 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.

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, the legal positivist approach is primarily characterized by a focus on states’

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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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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.

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. 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.

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 conduct. It is in this regard that the distinction between direct and indirect responsibilities becomes relevant to address. 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. Although some authors appear to be

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6 See generally Vazquez, supra note 1.

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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established through these initiatives are also examined closely by several authors. 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. 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”) are not formally binding in international law, a


limited number of studies nevertheless intend to show how this instrument could be considered as “legally binding”. 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. 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. 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”.

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. 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

15 Davarnejad, “The Impact”, ibid at 53-54.
16 See generally Robinson, supra note 14.
17 Ibid at 69.
particular role in actually shaping this process. 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”). 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.

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 and studies that address the consistency of international investment law with the concept of sustainable development tangentially discuss the issue of foreign investors’ responsibilities through a legal positivist lens. In this respect, general publications pertaining to the law of investment treaties and studies that address the consistency of international investment law with the concept of sustainable development tangentially discuss the issue of foreign investors’ responsibilities through a legal positivist lens.


responsibilities. For example, despite occasional references to sustainable development principles in international investment agreements (“IIAs”), some authors conclude that these agreements do not generally require states to impose any responsibilities on their national investors when they are operating abroad. 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. Although they remain highly


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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business and human rights under the auspices of the UN. 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. Others advance the idea of including aspects that transcend investment issues, without fully modifying the state-centered structure of these agreements.

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

30 See Kamatali, supra note 3 at 453-563.
beyond the limits of the state. In a way that echoes political scientists who consider the role of state and non-state actors in the regulation of the global economy, 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. Some examples are worth citing.

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


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

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\(^{36}\) 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


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:

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

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”

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.


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. 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”. 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. 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

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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; Ghafeli & Mercer, supra note 45 at 60; Vendzules, supra note 34 at 454; Hervé Ascensio, “Le Pacte mondial et l'apparition d'une responsabilité internationale des entreprises” in Laurent 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; Buhmann, supra note 34 at 112 [emphasis added].


51 Steinhardt, supra note 42 at 221-226.
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, human rights and environmental issues.

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. For example, Dupuy explicitly questions the

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52 Ruggie, Just Business, supra note 34 at xlvi.
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.
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. 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.

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. 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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interest”.\textsuperscript{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.\textsuperscript{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.\textsuperscript{62} In this regard, Ratner derives norms of corporate responsibility that could be ultimately applied to foreign investors through various means of implementation.\textsuperscript{63} Contending that “international law has always evolved and adapted to changing global realities”,\textsuperscript{64} de Jonge advances some principles that are modeled on the \textit{Draft Articles on Responsibility of States for Internationally Wrongful Acts}\textsuperscript{65} and that seek to impose direct duties on foreign investors under international law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{68}

\textsuperscript{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.

\textsuperscript{61} For a summary of the doctrinal debate pertaining to the international legal personality of foreign investors, see Chetail, \textit{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, \textit{ibid} at 120.

\textsuperscript{62} See e.g. Ratner, \textit{supra} note 35 at 465-467; Zerk, \textit{supra} note 2 at 72-76 and 304-306; Buhmann, “Regulating”, \textit{supra} note 34 at 14; Muchlinski, “Implementing”, \textit{supra} note 42 at 154.

\textsuperscript{63} Ratner, \textit{ibid} at 496-524.

\textsuperscript{64} De Jonge, “Transnational Corporations”, \textit{supra} note 48 at 66.


\textsuperscript{66} See generally De Jonge, “Transnational Corporations”, \textit{supra} note 48 at 77-83.

\textsuperscript{67} See Bridgeman & Hunter, \textit{supra} note 38 at 218-235; Pantazopoulos, \textit{supra} note 34 at 139.

\textsuperscript{68} See Weiler, \textit{supra} note 34 at 437-440; Reinisch, \textit{supra} note 34 at 82-83; Stiglitz, \textit{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.

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. However, instead of

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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. 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”. 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”. While the work of Muchlinski is cited in the legal


Charney, supra note 69 at 777.

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

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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. 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”. 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.

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, several critics maintain that these powerful actors’ interests are mirrored in the international law making process pertaining to foreign investors’ responsibilities. 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

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.


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.


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.  

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”. In the same vein, Clapp stresses the role of businesses in the creation and maintenance of private international norms regarding environmental governance.

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. 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. Moreover, the elaboration of the UN Guiding Principles is extensively scrutinized according to critical lenses. Thus, Bilchitz and Deva contend the following:

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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”.

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.

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. 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”. Similarly, Weissbrodt and Kruger consider transnational corporations and other business enterprises as being “some of the most powerful non-state actors in the world”. 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.
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, 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”. 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. The limits of follow-up mechanisms that are provided by the instruments and the lack of implementation by states


are also highlighted in several studies. 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. 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.

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

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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”.\(^9^7\) 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.\(^9^8\)

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.\(^9^9\) 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”.\(^1^0^0\) 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.\(^1^0^1\)

\(^9^7\) *Ibid* at 125-126 and Chapter 3.


\(^9^9\) Bantekas, *supra* note 89 at 314-316.

\(^1^0^0\) 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.

With respect to international investment law, while some critics advocate for the direct imposition of human rights duties on foreign investors through IIAs provisions, 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. It is in this context that several scholars signed the *Osgoode Hall Public Statement on the International Investment Regime* 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”.

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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103 Sornarajah, “Justice-Based Regime”, *supra* note 93 at 464.


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 law1 that already combines legal pluralism and constructivism (2). This chapter concludes by providing a brief discussion on other interdisciplinary theories that

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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. 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. 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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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. 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. In both instances, legal pluralism remains driven by a clear rejection of the “ideology of legal centralism” 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 and highly relevant to analyze law as a social phenomenon.

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”, “global legal pluralism” or “law

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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"].


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


¹³ See Tamanaha, “Understanding”, supra note 8 at 386. Contra Michaels, supra note 10 at 245.


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. 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. 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”.

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. 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”. 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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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”. 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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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]).


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

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.\textsuperscript{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”.\textsuperscript{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 – \textit{e.g.} trade, investment and finance – and others that relate to wider social concerns – \textit{e.g.} human rights, environmental protection and labour rights.\textsuperscript{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 \textit{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.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{31} While some international legal authors take issue with a view that depicts

\textsuperscript{26} See Michaels, \textit{supra} note 10 at 247.

\textsuperscript{27} See \textit{ibid} at 247.

\textsuperscript{28} See Flores Elizondo, \textit{supra} note 25 at 120.

\textsuperscript{29} See Teubner, “Global Bukowina”, \textit{supra} note 12 at 5; Tamanaha, “Understanding”, \textit{supra} note 8 at 387; Berman, “Global Legal Pluralism”, \textit{supra} note 10 at 1192; Michaels, \textit{supra} note 10 at 249; Berman, “New Legal Pluralism”, \textit{supra} note 10 at 238; Flores Elizondo, \textit{ibid} at 120; Klabbers & Piparinen, “Introduction”, \textit{supra} note 23 at 5-6.


international law as being fragmented, 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.

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. For example, Koskenniemi and Leino perceive this fragmentation as being an expression of political pluralism at the international level. De Sousa Santos argues that the evolution of law’s potential is strongly related to the political mobilization of social competing forces. Seeking to identify an explanation that reaches beyond a “political foundation for legal norms collision”, 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”.

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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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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{39} See de Sousa Santos, \textit{Toward a New Legal Common Sense}, supra note 14 at 98; Tamanaha, \textquotedblleft Understanding\textquotedblright, supra note 8 at 402; Oomen, \textit{supra} note 4 at 489-490; Klabbers & Piiparinen, \textquoteleft Normative Pluralism\textquoteframelihet, supra note 23 at 28-29.

\textsuperscript{40} See Robé, \textit{supra} note 14 at 70-71; Muchlinski, \textquoteleft Global Bukowina\textquoteframelihet, \textit{supra} note 15 at 80 and 85-101; Adelle Blackett, \textquoteleft Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct\textquoteframelihet (2001) 8 Ind J Global Legal Stud 401 at 430–431; Klabbers & Piiparinen, \textquoteleft Normative Pluralism\textquoteframelihet, 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.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{44} Such a critical approach primarily aims to identify relations of power reproduced in international norms and institutions.\textsuperscript{45} However, it is here submitted that


\textsuperscript{43} Kurki & Sinclair, \textit{ibid} at 17 [emphasis in the original].


\textsuperscript{45} See Bachand, \textit{ibid} at 127; Jodoin & Lofts, \textit{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. 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, 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, most modern studies conducted according to this approach scrutinize the influence of non-state actors in world politics. Second, instead of focusing on material forces as the fundamental fact about society, constructivists grant an extensive importance to ideas, norms, knowledge and culture. Third, the constructivist ontology

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46 See section 2 of the Introduction.
48 See e.g. Alexander Wendt, Social Theory of International Politics (Cambridge: Cambridge University Press, 1999) at 8–10.
focuses on the *mutual constitution of agents and social structures*. On the one hand, constructivists assume that international actors hold a prominent role in shaping international norms through social interaction and practice. As underscored by Wendt, “structure exists, has effects, and evolves only because of agents and their practices”. 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. Without pretending that the latter directly cause behavior, constructivists consider these norms as acting upon actors’ identities and indirectly informing their actions. 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.


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 48 at 185.


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.\textsuperscript{56} Of course, one must recall that constructivism has its intellectual roots in critical social theory.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{60} In addition to stressing the need to depart from a state-centric view of international relations,\textsuperscript{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.\textsuperscript{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

\textsuperscript{56} See Sinclair, supra note 47 at 25; Webb, supra note 49 at 792-793. See also generally Kurki & Sinclair, supra note 42.


\textsuperscript{60} See Finemore & Sikkink, “Taking Stock”, supra note 50 at 398.


\textsuperscript{62} See Finemore & Sikkink, “Taking Stock”, supra note 50 at 398; Eckersley, \textit{ibid} at 80-82.
regulating relations of power between actors in a given field, remain highly relevant for present purposes. For example, by avowedly encouraging a critical and social examination of international political economy, investigations that analyze the emergence of private authority in global governance are grounded in the “pluralization” of sources and subjects of legal regulation. 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. 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. 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.


66 See Cutler, Private Power, ibid at 103.


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. 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.

This increasing private authority in global governance is also discussed as one of the main themes of the literature on new constitutionalism. 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, some authors seek to “reveal and question the purposes and interests served by new constitutionalism as a political and social project”. Echoing concerns raised in investigations of private

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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.


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.

\(^{74}\) 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.

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

\(^79\) See Brunnée & Toope, *Legitimacy and Legality*, ibid at 5 and 45.


\(^81\) 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*. 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. 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”, 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.

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. 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. Legal norms must also be *general* to the extent that they apply equally to a specific kind of actors of the international community. 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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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.
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-
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

\(^{98}\) Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 113-114 [emphasis added].

\(^{99}\) Tamanaha, "Non-Essentialist", *supra* note 4 at 299.

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. Such a potential to socialize actors refers to the mainstream constructivist’s assumption pertaining to the mutual constitution of agents and structures discussed above. 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, the interactional theory draws from the work of Finnemore and Sikkink pertaining to *norm entrepreneurs* that are involved in a norm life cycle. 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. 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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102 See section 1.2.


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. Drawing on the work of Haas, Brunnée and Toope define such communities as “knowledge-based networks, most often focused on scientific, economic or technical matters”. 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. Such knowledge can in turn play a crucial role in the elaboration of international norms by contributing to the emergence of shared understandings between international actors.

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. According to Adler, the mutual constitution between agents and structures that characterizes the constructivist approach mainly occurs through actions of such communities. 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”. 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. 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.
108 Brunnée & Toope, Legitimacy and Legality, supra note 1 at 59.
109 Ibid at 59-60.
110 Ibid at 60.
111 Ibid at 62.
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.\textsuperscript{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 \textit{practice of legality} that is required for the emergence of a sense of obligation that characterizes legal norms.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{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

\textsuperscript{115} Brunnée & Toope, \textit{Legitimacy and Legality}, \textit{supra} note 1 at 100 and 356.

\textsuperscript{116} Brunnée & Toope, “Interactional International Law”, \textit{supra} note 54 at 313.

\textsuperscript{117} Brunnée & Toope, \textit{Legitimacy and Legality}, \textit{supra} note 1 at 69; Brunnée & Toope, “Interactional International Law”, \textit{ibid} at 313.

\textsuperscript{118} See Mayrand, \textit{supra} note 51 at 170-171.
power”. 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’”. 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. 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. 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 Brunnee & 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.\footnote{Teubner, "Global Bukowina", *supra* note 12 at 4.} Relying primarily on sociology and drawing from Luhman’s idea that legal systems are “normatively closed and cognitively open”,\footnote{Niklas Luhmann, “Operational Closure and Structural Coupling: The Differentiation of the Legal System” (1992) 13 Cardozo L Rev 1419 at 1427.} systems theory suggests that a binary code of legal/non-legal is sufficient to distinguish legal norms from other social norms.\footnote{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. Teubner thus maintains that “any communication that observes action under the legal code constitutes an integral part of the legal discourse”. 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”.

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”. 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”. 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, 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.
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.


133 See Abbott et al, ibid at 404. See also Abbott, ibid at 59; Brütsch & Lehmkuhl, 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,\textsuperscript{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,\textsuperscript{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”.\textsuperscript{137} To put it differently, the concept of legalization favors a hierarchical elaboration of international law,\textsuperscript{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,\textsuperscript{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” – \emph{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.\textsuperscript{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,\textsuperscript{141} authors like Finnemore and Toope advocate for the need to offer

\begin{footnotesize}
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\item \textsuperscript{135} \textit{Ibid} at 34.
\item \textsuperscript{137} Abbott et al., \textit{supra} note 131 at 403 [citation omitted].
\item \textsuperscript{138} See Brunée & Toope, “International Law and Constructivism”, \textit{supra} note 51 at 72; Brütsch & Lehmkuhl, \textit{supra} note 132 at 22-25.
\item \textsuperscript{139} See Abbott & Snidal, \textit{supra} note 131 at 45.
\item \textsuperscript{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, \textit{supra} note 59 at 8; Sinclair, \textit{supra} note 47 at 17.
\item \textsuperscript{141} See Abbott, \textit{supra} note 131 at 58.
\end{itemize}
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a richer perspective of international law that takes into account the process according to which international norms are developed and applied.\textsuperscript{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”.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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”.

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.


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”) and the United Nations Conference on Trade and Development (“UNCTAD”) 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, as well as other references in international investment law, 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


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.

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

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 with the critical theory paradigm in qualitative research, critical discourse analysis aims to illuminate ideologies and relations of power that underpin various forms of statements and practices. What is more, the same method acknowledges that discourses inevitably become instruments of power as well as a starting point for


resistance. 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.

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. 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. Once the discourses are gathered, they can be coded to identify larger chunks in order to detect certain patterns and themes in the data. In fact, assuming that discourses present coherent systems of meanings, their content can be grouped according to the topic that is referred to. These patterns and themes are then usually analyzed to highlight specific functions of the discourse.

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...
discourse analysis remains vulnerable to the perspective of the researcher who is conducting the analysis. The critical stance adopted by a researcher who follows this method is also likely to influence the collection and the analysis of data. 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.

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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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”) 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. 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. 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. 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. 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


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

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. As a result, legal pluralists and critical researchers often turn to interviews as a technique to collect data. 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. 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. Therefore, semi-structured interviews appear as a balanced solution that nonetheless remains open-ended and geared toward the participant’s point of view. Given that such

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32 See Bryman, supra note 11 at 329; Seneviratne, supra note 11 at 169.
35 See Bryman, ibid at 314-315; Schensul, supra note 14 at 89.
interviews are articulated around a set of core topics, this method to collect data also seems particularly appropriate for studies that compare different cases. Overall, semi-structured interviews are deemed to generate rich and detailed answers without losing the focus of the research.

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. The limited time available for interviews is also highlighted as a recurring problem. 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. 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

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, 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. Furthermore, following suggestions found in the literature, 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.

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

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.

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

⁴⁷ See Milliken, supra note 13 at 229; Lange, supra note 11 at 182-183.
provided by Willis and his collaborators of the critical researcher in social science,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{49} Willis, Jost & Nilakanta, supra note 14 at 85.

\textsuperscript{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.

\textsuperscript{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, the asymmetry of obligations in international investment agreements (“IIAs”) is a recurring theme. While

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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.

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

investors and home states are concerned. For these reasons, authors like Ratner maintain that these agreements remain “heavily skewed in favor of international investors”. 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. 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. For example, some authors highlight the extent to which international

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human rights law is used in investment arbitration to define the protection accorded to foreign investors. Other scholars address the compatibility between IIAs and measures adopted by states to comply with obligations from other branches of international law. 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 and a traditional method in international law 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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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. 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. 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


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, 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. 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, the Subcommission on the Promotion and the Protection of Human Rights elaborated the Norms on the Responsibilities of Transnational Corporation and Other Business Enterprises with

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regard to Human Rights ("UN Norms")\(^\text{18}\) in 2003. The Guiding Principles on Business and Human Rights ("UN Guiding Principles")\(^\text{19}\) 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.\(^\text{20}\)

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")\(^\text{21}\) 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".\(^\text{21}\)

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")\(^\text{22}\) 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".\(^\text{22}\) Moreover, in 2011, the OECD opted for the


inclusion of a whole chapter on human rights within the most recent version of this instrument. 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”. 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.

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.

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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.


1.2 Environmental Protection

The activities of foreign investors can also have a considerable impact on the environment in which these actors operate.\textsuperscript{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.\textsuperscript{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 – \textit{i.e.} supporting a precautionary approach to environmental challenges, promoting greater environmental responsibility and encouraging environmental friendly technology.\textsuperscript{29} Although the main focus of the \textit{UN Norms} remains on human rights, this instrument also includes a provision that emphasizes environmental protection responsibilities.\textsuperscript{30}

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

\begin{itemize}
  \item See Paust, \textit{supra} note 15 at 818.
  \item UN Global Compact, \textit{supra} note 16, Principles 7-9.
  \item “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”. \textit{UN Norms, supra} note 18 at para 14.
  \item See Jennifer A Zerk, \textit{Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law} (Cambridge: Cambridge University Press, 2006) at 249; Muchlinski, \textit{Multinational Enterprises, supra} note 5 at 569-570; Muchlinski, “Corporate Social Responsibility”, \textit{supra} note 3 at 666.
\end{itemize}
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. 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.

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*. 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.

### 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. 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.


employment, training of workers, conditions of work and life, as well as industrial relations.\textsuperscript{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.\textsuperscript{39} Most of these principles are also reflected in the \textit{UN Norms}, which include more detailed provisions pertaining to the rights of workers that must be respected by private firms.\textsuperscript{40} Although such aspects are not expressly addressed under a specific part of the \textit{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.\textsuperscript{41}

In a way that mirrors the consideration of the other areas in which foreign investors’ activities can produce negative effects, the \textit{OECD Guidelines} also include a chapter concerning labour rights under the heading “Employment and Industrial Relations”.\textsuperscript{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.\textsuperscript{43} It also emphasizes that the role of the \textit{OECD Guidelines} is to promote observance of these standards among private firms.\textsuperscript{44} After acknowledging the existence of the \textit{ILO Declaration}, the commentaries to this instrument mention that the latter and the \textit{OECD Guidelines} both “refer to the behavior expected from enterprises and are intended to parallel and not conflict with each other”.\textsuperscript{45}

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\textsuperscript{38} \textit{ILO Declaration}, supra note 21 at para 7. See also Muchlinski, \textit{Multinational Enterprises}, supra note 5 at 479-506; Muchlinski, “Corporate Social Responsibility”, supra note 3 at 648.

\textsuperscript{39} \textit{UN Global Compact}, supra note 16, Principles 3-6.

\textsuperscript{40} \textit{UN Norms}, supra note 18, Part D.

\textsuperscript{41} \textit{UN Guiding Principles}, supra note 19, Principle 12.

\textsuperscript{42} \textit{OECD Guidelines} 1976, supra note 31; \textit{OECD Guidelines} 2000, supra note 22, Chapter IV; \textit{OECD Guidelines} 2011, supra note 22, Chapter V.

\textsuperscript{43} \textit{OECD Guidelines} 2011 – Commentaries, supra note 25, Commentary 48.

\textsuperscript{44} \textit{Ibid}, Commentary 48.

\textsuperscript{45} \textit{Ibid}, Commentary 48.
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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.


Compact, the OECD Guidelines and the OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions 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 and the UN 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.

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.
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).
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. 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).

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.

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


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.


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 2107 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

\(^{62}\) 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.
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. Finally, the Southern African Development Community (“SADC”) model BIT encompasses the same type of recognition not to relax domestic and labour legislation.

Not only do such provisions remain an indirect way to address harms caused by foreign investors, but their potential effect is also greatly affected by the words chosen by states. 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. 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. 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”.

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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.


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”.\(^7^3\) 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

also refers to the aim of encouraging investors to respect corporate social responsibility norms and principles that are internationally recognized.\textsuperscript{78} More recently, the preamble of the draft model BIT adopted by Norway in 2015 emphasizes the importance of corporate social responsibility\textsuperscript{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 \textit{Comprehensive Economic and Trade Agreement (“CETA”)} between Canada and the EU.\textsuperscript{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”.\textsuperscript{81} Although the language included in preamble can be used by investment arbitration tribunals to illuminate the object and the purpose of IIAs,\textsuperscript{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 \textit{separate provisions} within IIAs that detail more precisely how various actors should address foreign investors’ responsibilities.\textsuperscript{83} One of the earliest examples of such a provision can be found in the

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\item Norway, \textit{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/e47326b61f424d4e9c3d470896492623/draft-model-agreement-english.pdf> (accessed 14 September 2016) [\textit{Norway Model BIT}].
\item \textit{SADC Model BIT}, \textit{supra} note 67.
\item See e.g. Newcombe & Paradell, \textit{supra} note 1 at 113-116.
\item See Muchlinski, “Policy Issues”, \textit{supra} note 3 at 38; Muchlinski, “Regulating Multinationals”, \textit{supra} note 3 at 47.
\end{enumerate}
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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.

While the possibility of imposing direct obligations on foreign investors to that extent is highly contentious in international investment law, 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.

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. A shorter clause can even be found in the Trans-Pacific Partnership

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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].

between Canada and eleven other states.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{89} “The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily 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.

\textsuperscript{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).

\textsuperscript{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”.  

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. 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. 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”. In 2013, the European Parliament recalled this statement in the context of the negotiations for a BIT between the EU and China. 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).


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.\textsuperscript{97} The list of these issues includes environmental and social impact assessments, labour standards, respect for human rights, conduct in conflict zones and corruption.\textsuperscript{98} To a certain extent, this investment agreement also reflects the approach in the \textit{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”.\textsuperscript{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.\textsuperscript{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.\textsuperscript{101} Furthermore, this model includes obligations for the investors in regard to compliance with domestic law,\textsuperscript{102} provision of information to the host state,\textsuperscript{103} environmental and social impact assessments,\textsuperscript{104} environmental management,\textsuperscript{105} corporate governance standards,\textsuperscript{106} investor liability,\textsuperscript{107} transparency,\textsuperscript{108} as well as human rights, environmental protection and labour rights.\textsuperscript{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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\item[98] Ibid, art 7.2.
\item[99] Ibid, art 13.
\item[100] UNCTAD, \textit{WIR 2012}, supra note 5 at 89; Sornarajah, \textit{Resistance and Change}, supra note 3 at 359-361.
\item[101] SADC Model BIT, supra note 67, art 4(1) and 4(2).
\item[102] Ibid, art 11.
\item[103] Ibid, art 12.
\item[104] Ibid, art 13.
\item[105] Ibid, art 14.
\item[106] Ibid, art 16.
\item[107] Ibid, art 17.
\item[108] Ibid, art 18.
\item[109] Ibid, art 15.
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in an investment dispute. 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.

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. 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. 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”.

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”. 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).
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.
114 Ibid at para 33.
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 preamble118 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,

116 *Norway Model BIT*, supra note 79, art 31 [emphasis added].


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.

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122 See Footer, supra note 61 at 61; Van der Zee, supra note 3 at 51-52.


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, 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”. 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. In contrast to other references to the obligations of the state parties to combat bribery and corruption within IIAs, 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. 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”. 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

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133 Ibid, art 18.8(3).
a potential violation of provisions that are found in IIAs. 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, it becomes paramount to scrutinize how tribunals deal with the negative impact that foreign investors’ activities can have in local communities and the environment. 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. 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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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.

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”). In this dispute, an agreement between the investor and the Egyptian General Organization for Tourism and Hotels provided the

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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. When a project related to this joint venture was considered as posing a threat to undiscovered antiquities, 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. Although the tribunal found that “[t]he obligation to pay fair compensation in the event of expropriation applies equally where antiquities are involved”, 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”.

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. 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. 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”, and that the host state could not be held responsible for decisions taken by the investor regarding this procedure.

\[139\] 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 Agustín 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*. In that case, a municipality rejected a multi-storey car parks project and refused to conclude specific agreements with the foreign investor’s subsidiary. 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. While the claimant argued that both projects were facing similar circumstances, the tribunal stressed that host state’s departments and commissions had already raised environmental concerns pertaining to the project. 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.

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. In the opinion of the respondent state, the measures that were taken were justified by the poor contractual performance of the investor. Several briefs from third parties were also submitted to the tribunal with a view to emphasizing the responsibilities of the private company. While the tribunal acknowledged the arguments provided by these *amicus curiae*, it upheld the investor claim in regard to the breach of several

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149 *Ibid* at para 363.

150 *Ibid* at paras 363 and 374.


152 *Ibid* at para 385.

153 *Ibid* at paras 392, 395 and 396. See also Pavoni, *supra* note 137 at 544.


155 *Biwater*, *ibid* at para 461.


157 *Biwater*, *ibid* at paras 392 and 601.
obligations by the state.\textsuperscript{158} However, the tribunal emphasized that the loss incurred by the investor was not related to the measures adopted by the respondent state.\textsuperscript{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.\textsuperscript{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.

\textit{Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentine Republic} and \textit{AWG Group v Argentine Republic} (“Suez et al.”) also relate to a concession for water distribution and waste water treatment services.\textsuperscript{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.\textsuperscript{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, \textit{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. \textit{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.\textsuperscript{163}

Although other measures adopted by Argentina were found to be in violation of its obligations under international investment law,\textsuperscript{164} it appears that the tribunal considered

\textsuperscript{158} \textit{Ibid} at paras 485, 519 and 814.
\textsuperscript{159} \textit{Ibid} at para 805.
\textsuperscript{160} \textit{Ibid} at para 486.
\textsuperscript{162} Suez et al, \textit{ibid} at paras 36 and 52.
\textsuperscript{163} \textit{Ibid} at para 246.
\textsuperscript{164} \textit{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”.

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. 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. 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. 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.

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. After stressing that its role was not to

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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; Somarajah, Resistance and Change, supra note 3 at 336.
determine whether the use of lindane was dangerous,\textsuperscript{171} the tribunal maintained that these registration measures were in line with legitimate regulatory concerns and the host state’s international commitments.\textsuperscript{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 \textit{Spyridon Roussalis v Romania}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{176} As a result, the claimant failed to prove that the measures at hand were unjustifiable, disproportionate or discriminatory.\textsuperscript{177}

In \textit{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

\textsuperscript{171} \textit{Chemtura}, \textit{ibid} at para 134.
\textsuperscript{172} \textit{ibid} at paras 147, 216 and 266.
\textsuperscript{174} \textit{ibid} at paras 631-632.
\textsuperscript{175} \textit{ibid} at paras 642 and 664.
\textsuperscript{176} \textit{ibid} at para 687.
\textsuperscript{177} \textit{ibid} at para 680.
owned by Apotex Holdings Inc. from receiving these drugs for sale in the United States.\textsuperscript{178}

Even after emphasizing that it did not receive any evidence that these drugs had caused actual harm to any patient,\textsuperscript{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.\textsuperscript{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 \textit{NAFTA}.\textsuperscript{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 \textit{Burlington Resources Inc. v Republic of Ecuador} ("\textit{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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


\textsuperscript{179} \textit{Ibid} at para 3.62.

\textsuperscript{180} \textit{Ibid} at para 8.76.

\textsuperscript{181} \textit{Ibid} at para 9.60.


\textsuperscript{183} \textit{Ibid} at para 537.

\textsuperscript{184} \textit{Ibid} at para 526.
environmental counterclaim in *Perenco Ecuador Limited v Republic of Ecuador* ("Perenco").

Amidst a dispute related to breaches by Ecuador of its obligations under an IIA and participation contracts signed by the claimant, the respondent state alleged the existence of an “environmental catastrophe” in the area operated by the investor. 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.”

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), the tribunal held that it will not dispose of this claim on a simple burden of proof approach.

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. 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*
from complying with its commitments to international investors by searching ways and means to satisfy \textit{in a balanced way} both conditions.\footnote{Ibid at para 595 [emphasis added].}

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.\footnote{Ibid at para 596.} 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.\footnote{Ibid at para 600.}

A similar conclusion can be found in a more recent investment dispute between a Canadian mining company and Venezuela. In \textit{Crystallex International Corporation v Bolivarian Republic of Venezuela} ("\textit{Crystallex}")\footnote{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.}, the foreign investor challenged the denial of an environmental permit to mining exploitation among others.\footnote{Ibid at paras 44 and 324.} According to the respondent state, the reasons justifying such a denial included concerns for the environment and Indigenous communities surrounding the area.\footnote{Ibid at para 623.} 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\footnote{Ibid at para 718.} and expropriation,\footnote{Ibid at para 623.} 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
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.


\(^{201}\) *Ibid* at paras 450-452 and 503-543.


\(^{203}\) *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.\footnote{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.} After emphasizing the highly addictive and lethal impact of cigarettes,\footnote{Ibid at paras 74 and 133.} 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”\footnote{Ibid at para 307.}. 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”\footnote{Ibid at para 418.}. 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”\footnote{Ibid at para 418.}.

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, Crystalex 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
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”), 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

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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. 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. 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.

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. The respondent state alleged that the protection of nesting sites from human activity and beachside development was essential to protect the leatherback turtle. 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”. Despite a brief consideration of the environmentally-sensitive surroundings in determining the fair-market value of the investment, 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].
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.\textsuperscript{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 \textit{Metalclad Corporation v Mexico}, public authorities partly relied on environmental justifications to deny a municipal construction permit to the foreign investor.\textsuperscript{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”.\textsuperscript{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 \textit{NAFTA}.\textsuperscript{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, \textit{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}.\textsuperscript{221}

Furthermore, in \textit{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.\textsuperscript{222} One of the arguments raised by the respondent state to justify its measure was the negative attitude of the community with

\textsuperscript{217} \textit{Ibid} at paras 217-218.

\textsuperscript{218} \textit{Metalclad Corporation v Mexico} (2001), Award, 40 ILM 36 (International Centre for Settlement of Investment Disputes Additional Facility) at para 50 \textit{[Metalclad]}.

\textsuperscript{219} \textit{Ibid} at para 92. See also Bachand et al, \textit{supra} note 13 at 594; Pavoni, \textit{supra} note 137 at 552; Kulick, \textit{supra} note 8 at 238.

\textsuperscript{220} \textit{Metalclad}, \textit{ibid} at paras 101 and 104-107. See also Pavoni, \textit{ibid} at 551.

\textsuperscript{221} \textit{Metalclad}, \textit{ibid} at para 86. See also para 106.

\textsuperscript{222} \textit{Técnicas Medioambientales Tecmed S.A. v Mexico} (2004), Award, 43 ILM 133 (International Centre for Settlement of Investment Disputes Additional Facility) at para 39 \textit{[Tecmed]}. See also Pavoni, \textit{supra} note 137 at 551.
respect to the investor’s operations.\textsuperscript{223} However, echoing the \textit{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:

\textit{[W]e find no principle stating that regulatory administrative actions are \textit{per se} excluded from the scope of the \textit{agreement}, \textit{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.\textsuperscript{224}}

Other environmental issues regarding a foreign investment were at stake in \textit{Empresas Lucchetti, S.A. and Lucchetti Peru S.A. v Republic of Peru}.\textsuperscript{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.\textsuperscript{226} Although the tribunal decided that it lacked jurisdiction because the dispute had crystallized before the entry into force of the applicable IIA,\textsuperscript{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”.\textsuperscript{228}

In contrast to the aforementioned claims that were filed against Argentina with respect to water concessions, the case of \textit{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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\textsuperscript{223} Tecmed, \textit{ibid} at para 49. See also Hirsch, “Interactions”, supra note 8 at 171; Kulick, \textit{supra} note 8 at 245-246.

\textsuperscript{224} Tecmed, \textit{ibid} at para 121 [emphasis added]. See also Miles, \textit{Origins}, \textit{supra} note 3 at 164-165.


\textsuperscript{226} \textit{Ibid} at paras 18-19.

\textsuperscript{227} \textit{Ibid} at para 53 and 58.

\textsuperscript{228} \textit{Ibid} at para 29.
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. 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. 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. 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”. 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”. 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. 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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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. Interestingly, several third parties used *amicus curiae* submissions to address issues pertaining to the responsibilities of the investor in that case. 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 and emphasized the emergence of corporate social responsibility norms at the international level. Environmental organizations also pointed out negative effects related to hard rock mining in another *amicus curiae* submission. Ultimately, the tribunal dismissed the claim. 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, 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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241 *Glamis*, *supra* note 235 at paras 14, 18, 26, 534-536 and 830.

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 nongovernmental 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 [petitioners]”,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

243 Ibid at para 8 [emphasis added]. See also Footer, supra note 61 at 42; Viñuales, “Foreign Investment”, supra note 8 at 271-272.
245 Ibid at para 56.
246 Ibid at para 59.
248 Ibid at para 3.
deep context and history, 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 tribunal 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 arbitral tribunal mandated to adjudicate a dispute or disputes in accordance with the Convention of the International Centre for Settlement of Investment Disputes ... and applicable law.

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. 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. Even when submissions are authorized, tribunals are not obliged to consider, either explicitly or implicitly, arguments that are provided by *amicus curiae*. 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{256}

Although the majority of the tribunal in \textit{Southern Pacific Properties} only tangentially addressed allegations of corruption,\textsuperscript{257} a dissenting arbitrator emphasized that

\begin{footnotesize}
\begin{enumerate}
\item See Reiner & Schreuer, \textit{supra} note 134 at 90; Hirsch, “Investment Tribunals”, \textit{supra} note 137 at 106-107; Somarajah, \textit{supra} note 3 at 472; Taillant & Bonnitcha, \textit{supra} note 5 at 78; Kulick, \textit{supra} note 8 at 258 and 300; Miles, \textit{Origins, supra} note 3 at 210; Leinhardt, \textit{ibid} at 10-11; VanDuzer et al, \textit{supra} note 15 at 256-257.
\item \textit{Southern Pacific Properties, supra} note 138 at para 204.
\end{enumerate}
\end{footnotesize}
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”. 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. 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.

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”), 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.

on a contract between an investor and the host state, without relying on an IIA. 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. 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.

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. 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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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. 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. 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”. After emphasizing that the prohibition of corruption by the host state remained consistent with international law and the laws of several states, 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. Ultimately, these findings entailed a lack of jurisdiction of the tribunal. 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.

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”). Given the complexity of the allegations at hand, the tribunal initially decided

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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].

that parties’ claims regarding allegations of corruption and the solicitation of bribes had to be dealt with at the merits phase of the arbitration. 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. 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. 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. Put simply, the tribunal emphasized that “the doctrine of ‘clean hands’ render[ed] the Claimant’s claim inadmissible”.

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. 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. While the decision was subject to a revision proceeding under Article 51 of the Convention on the Settlement of Investment Disputes between States

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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).

and Nationals of Other States.\textsuperscript{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.\textsuperscript{282} While the tribunal in Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v Republic of Azerbaijan ("Azpetrol") had to determine whether the parties had previously reached an agreement to settle the case,\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{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.\textsuperscript{287} While they are crucial

\textsuperscript{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.


\textsuperscript{283} Ibid at para 1.

\textsuperscript{284} Ibid at para 7.

\textsuperscript{285} Ibid at para 105.

\textsuperscript{286} See Meshel, “The Use”, supra note 262 at 274; Kulick, supra note 8 at 321; Kulkarni, supra note 49 at 43.

\textsuperscript{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.  

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, the impact of this finding on international investment arbitration is unequivocal: an investor resorting to corruption loses the ability to seek redress.  

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.

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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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. 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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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. 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

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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

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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. 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”. 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. 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.

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. It is in this regard that the adoption of

Limitations and Opportunities in International Law (Cambridge: Cambridge University Press, 2006) at 93–102.

2 See Sornarajah, The International Law, ibid at 6.


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.

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. 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.

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


See section 1.2 of Chapter 2.

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, 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, 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, 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”. More specifically, these authors provide four different concepts of power. Compulsory power is thus presented as a situation characterized by interactions in which one previously constituted actor has a

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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.\(^\text{14}\) 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.\(^\text{15}\) 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.\(^\text{16}\) 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.

opportunities in creating links with world markets and improving their balance of payments. 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. 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. Arguments found in the literature regarding the extent to which international investment rules reflect the national constitutional systems


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


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


²⁴ See Faruque, supra note 18 at 540; Dolzer & Schreuer, ibid at 22; Cutler, “Human Rights”, supra note 18 at 25.


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

27 See Salacuse, supra note 16 at 39; Dolzer & Schreuer, supra note 23 at 21.
29 Ibid at 47.
30 Ibid at 65–9.
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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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{41} Furthermore,


\textsuperscript{39} Muchlinski, “Multinational Enterprises as Actors”, supra note 18 at 10 [emphasis added].

\textsuperscript{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.

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.\textsuperscript{42}

Beyond the power held by capital-exporting states and foreign investors, a certain form of \textit{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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,\textsuperscript{46} several public interest NGOs are mostly recognized for their capacity of providing additional expertise and making procedures more transparent.\textsuperscript{47} Beside their notorious

\begin{footnotesize}
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\item[43] This nuance is also mentioned in Muchlinski, “Regulating Multinationals”, supra note 1 at 32.
\item[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.
\item[46] See Muchlinski, \textit{Multinational Enterprises}, ibid at 83 and 85; Muchlinski, “Policy Issues”, supra note 1 at 8; Sornarajah, \textit{The International Law}, supra note 1 at 6 and 67-68; Muchlinski, “Regulating Multinationals”, supra note 1 at 32.
\end{enumerate}
\end{footnotesize}
impact on negotiations around the failed *OECD Multilateral Agreement on Investment*, 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.

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, such organizations bring their expertise in a diffuse way. 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”. 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. 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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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.


international rules in this area”,\textsuperscript{54} as well as the institutional limits regarding their potential actions.\textsuperscript{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.\textsuperscript{56} Even

\textsuperscript{54} Muchlinski, \textit{Multinational Enterprises}, supra note 1 at 84; Muchlinski, “Policy Issues”, \textit{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"].

\textsuperscript{55} Muchlinski, “Human Rights, Social Responsibility”, \textit{ibid} at 145-151.

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. 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


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].”

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

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mandatory international regulation of companies’ activities”.

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, 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”.

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, 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

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.


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.\textsuperscript{63} It is in this regard that Oxfam submitted the following statement:

\begin{quote}
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.\textsuperscript{64}
\end{quote}

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”.\textsuperscript{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”.\textsuperscript{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


\textsuperscript{64} Oxfam, \textit{supra} note 58 [emphasis added].

\textsuperscript{65} International Commission of Jurists, \textit{supra} note 58.

\textsuperscript{66} Mineral Policy Institute et al, \textit{supra} note 58.
minimum standard of acceptable behaviour”, 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.

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. 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”. 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”.

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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).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{74} For example, Norway maintained that there was “a need for norms from which directives for concrete actions and omissions by

\textsuperscript{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, \textit{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 \textltt{http://www2.ohchr.org/english/issues/globalization/business/contributions.htm}\textgtt<http://www2.ohchr.org/english/issues/globalization/business/contributions.htm> (accessed February 2014, on file with the author). See also OECD StatExtract, \textit{supra} note 69.

\textsuperscript{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 (\textit{i.e.} Czech Republic, Hungary and Poland).

\textsuperscript{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, \textit{supra} note 69.
companies can be derived”. 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.

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


Guidelines for Multinational Enterprises (2001), the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2000). Additionally, after citing the OECD Guidelines for Multinational Enterprises and the UN Global Compact, the International Chamber of Commerce stated that “such 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”.

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”, 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


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.


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,


83 Shell, supra note 77.


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”. 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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[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.  

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”, 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”. 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”. 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.

\(^{91}\) 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\(^2\) as well as statements submitted during a consultation process launched by the OECD in 2008\(^3\) – 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).


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

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”. 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”. 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, including more effectively major emerging countries, addressing passive corruption and targeting the private-to-private corruption issue.

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, 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”. 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”.

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.
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. Abbott and Snidal thus view the elaboration of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* as resulting from a combination of interests and values pushed by different actors. These authors present foreign investors as “interests actors” whose actions were prominently motivated by preventing the negative impact of corruption on competition. 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”.

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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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...

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.
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.


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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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.

auspices of the OECD, the analysis of their normative character must thus be conducted by considering their inclusion within this broad and complex process.\textsuperscript{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”).\textsuperscript{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.\textsuperscript{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,\textsuperscript{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”.\textsuperscript{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.\textsuperscript{17} More specifically, OECD members devote considerable efforts to promote principles of free market and neoliberal policies.\textsuperscript{18} With respect to international investment,

\textsuperscript{12} See Ascensio, \textit{supra} note 5 at 22.

\textsuperscript{13} See Salzman, \textit{supra} note 5 at 785-788; Böhmer, \textit{supra} note 11 at 230; Ascensio, \textit{ibid} at 18.

\textsuperscript{14} See e.g. Böhmer, \textit{ibid} at 230; Ascensio, \textit{ibid} at 19.

\textsuperscript{15} See e.g. Salzman, \textit{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.

\textsuperscript{16} See Porter & Webb, \textit{supra} note 11 at 43.

\textsuperscript{17} \textit{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.

\textsuperscript{18} See e.g. Salzman, \textit{supra} note 5 at 775; Böhmer, \textit{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”.  

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. 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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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.\(^\text{21}\) 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.\(^\text{22}\) More specifically, in line with the

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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. Therefore, the OECD Guidelines constitute an integral part of a broader Declaration on International Investment and Multinational Enterprises, 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. 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.

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. For example, these reviews have led to the inclusion of a provision with

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26 See e.g. Schwamm, supra note 23 at 348-349; Vogelaar, ibid at 131; Hamdani & Ruffing, supra note 21 at 112.

respect to the establishment of National Contact Points (“NCPs”) by adhering countries in 1984,28 a chapter on the environment in 199129 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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32 This language is still present in the current version of the *OECD Guidelines*. See *OECD Guidelines 2011*, *ibid* at para I(1).

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. 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. 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].”


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”.\(^{42}\)

\(^{37}\) 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.


\(^{41}\) “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.

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

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

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\(^{48}\) For the most recent version, see *OECD Guidelines 2011*, *supra* note 1.
participating parties”. 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,
the fact that a specific definition of multinational enterprises is excluded from this instrument can be pointed out as a considerable weakness. 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. Furthermore, a total of 106 commentaries have been adopted to provide additional information regarding the provisions of this instrument. 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, the commentaries provide a relatively detailed definition of this term. Where appropriate, several commentaries also refer to other formal and informal international instruments to explain the content of the OECD Guidelines.

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”.

55 See Schuler, ibid at 209.
56 See OECD Guidelines 2011, supra note 1 at para I(4).
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.
addition relies primarily on the work undertaken by the Special Representative. 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.

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.

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, 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”. 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

62 See section 2.1.


65 OECD Guidelines 2011, supra note 1 at paras I(2) and I(8).

nature and context of operations and the severity of the risks of adverse human rights impacts), 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”.

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” 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”. Yet, the ubiquitous voluntary character of this initiative may contradict, to a certain extent, such noble objectives. 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”. 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).
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”.

NCPs are thus expected to issue a statement when they decide that issues raised do not merit any further consideration 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.” A report must also be prepared when the parties involved reach an agreement on the issues raised. Moreover, the *Decision on the OECD Guidelines* provides that the Investment Committee is responsible for clarification of the *OECD Guidelines*. 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*.

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.

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77 *Ibid* at para II(4).


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. 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.*

In other words, despite considerable institutional arrangements and details with respect to their functioning, 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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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.

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

\(^{83}\) 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 &lt;http://mneguidelines.oecd.org/database/&gt; (accessed 14 September 2016). For a recent study regarding the patterns of these specific instances, see generally Ruggie & Nelson, *supra* note 27.


international norm plays a role in shaping the behavior of several international actors when addressing the need to hold private actors operating abroad accountable.


latitude in the way that they operate the Guidelines that NGOs increasingly view the process as an arbitrary, unfair and unpredictable process”. Important variations concerning the performance of existing NCPs have also been underlined by several interviewees.

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, 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”. 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”. Rather, this procedure is perceived as “a problem solving

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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].

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 [Philippines 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

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.
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*.\(^1\) 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”.\(^2\) 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”.\(^3\)

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”.\(^4\) BIAC also strongly reacted to this use of the *OECD Guidelines* by maintaining its position “that

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\(^3\) *Ibid* at 178 [emphasis added].

\(^4\) 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”.

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.

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.

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”.

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].
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

\(^{109}\) Ibid at 12-13.

\(^{110}\) Ibid at 41.

\(^{111}\) *OECD Guidelines Annual Report 2014, supra* note 50 at 137.


other how best to further the objectives of the Guidelines in light of their individual challenges”.

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*, 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.

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. 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.

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.

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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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”. 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 cooperation 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.

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. 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.


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. 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

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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 focusing 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*”), 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.

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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”. While the United States primarily sought to limit the comparative advantage granted to foreign private entities not subjected to legislation equivalent to the FCPA, 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. 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”.

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. After a first recommendation adopted in 1994 and in parallel to a campaign of persuasion led by the public interest NGO Transparency International, the OECD member states elaborated a set of “agreed common elements”

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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.


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. 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”. It is on the basis of these elements that the OECD Anti-Bribery Convention was negotiated and ultimately signed in 1997. 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”.

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 and the Policy Statement on Bribery in International Business Transactions (“Working Group on Bribery”) in June 2009, the OECD 2009 Recommendation was adopted on 26 November 2009. Annex I of this international instrument thus includes additional detail with respect to the responsibility of legal persons

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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].
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

\(^{139}\) See *ibid*, Annex I at para B. See also De Jonge, *supra* note 21 at 137.


\(^{144}\) *Ibid* at 3.
understandings: the United States Proposal on the Issue of Illicit Payment;\textsuperscript{145} the Statement on a Shared Commitment to Fight Against Bribery;\textsuperscript{146} a consultation paper prepared by the Working Group on Bribery;\textsuperscript{147} the collection of responses to the consultation process gathered by the OECD;\textsuperscript{148} and the Policy Statement on Bribery in International Business Transactions.\textsuperscript{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.\textsuperscript{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

\textsuperscript{145} United States Proposal, supra note 129.
\textsuperscript{146} OECD, Shared Commitment, supra note 136.
\textsuperscript{147} OECD, Consultation Paper, supra note 143.
\textsuperscript{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.
\textsuperscript{149} OECD, Policy Statement, supra note 137.
\textsuperscript{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’. 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”.

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”. 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”. 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”. 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”.

Similarly, one interviewee linked the participation of foreign investors in the elaboration of these international instruments with the interests of these private actors:

> [T]hey 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 [emphasis 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 through 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. 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. 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.*

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. 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.


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

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

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”.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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,\textsuperscript{179} extradition,\textsuperscript{180} awareness-raising,\textsuperscript{181} tax legislation,\textsuperscript{182} reporting of foreign bribery,\textsuperscript{183} regulation of financial institutions\textsuperscript{184} and public procurements,\textsuperscript{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 \textit{OECD Anti-Bribery Convention}, addressing the extent to which the OECD anti-bribery instruments meet the criterion of the \textit{absence of contradiction} requires some nuances. When considering solely the \textit{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

\begin{itemize}
  \item \textsuperscript{176} Ibid, art 2.
  \item \textsuperscript{177} See Commentaries on the OECD Anti-Bribery Convention, supra note 172 at para 20.
  \item \textsuperscript{178} See OECD Anti-Bribery Convention, supra note 2, art 3(2).
  \item \textsuperscript{179} See \textit{ibid}, art 9(1).
  \item \textsuperscript{180} See \textit{ibid}, art 10(4).
  \item \textsuperscript{181} See OECD 2009 Recommendation, supra note 3, Section III.
  \item \textsuperscript{182} See \textit{ibid}, Section III.
  \item \textsuperscript{183} See \textit{ibid}, Sections III and IX(i)-IX(ii).
  \item \textsuperscript{184} See \textit{ibid}, Section III.
  \item \textsuperscript{185} See \textit{ibid}, Section III.
\end{itemize}
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

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 Foreign 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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\(^{191}\) *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 additional 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

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,\textsuperscript{197} the \textit{Mid-Term Study of Phase 2 Reports} prepared by the Working Group on Bribery,\textsuperscript{198} publicly available annual reports of the Working Group on Bribery,\textsuperscript{199} the \textit{OECD Foreign Bribery Report} that was published in 2014\textsuperscript{200} and transcripts from semi-structured interviews.

One component that suggests the emergence of a practice of legality surrounding the \textit{OECD Anti-Bribery Convention} and the \textit{OECD 2009 Recommendation} is the extensive reference to these instruments in other formal and informal international initiatives related to foreign investors’ responsibilities. While the \textit{OECD 2009 Recommendation} is expressly mentioned in the most recent version of the commentaries accompanying the \textit{OECD Guidelines},\textsuperscript{201} the \textit{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,\textsuperscript{202} this convention is also mentioned in formal and informal initiatives developed by the UN and the European Union.\textsuperscript{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


\textsuperscript{201} \textit{OECD Guidelines 2011 – Commentaries}, supra note 57 at paras 76, 77 and 80.


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”. 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”. “Notable differences in the way State Parties enforce their national anti-foreign bribery laws” were also pointed out by the International Chamber of Commerce. 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.

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.

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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.


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.”

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. 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.

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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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.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{214} However, in the aforementioned consultation paper, the Working Group on Bribery maintained the following: “These reports include \textit{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 \textit{strength of the peer review process and the commitment of the Parties}”.\textsuperscript{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.\textsuperscript{216}

\begin{footnotesize}
\textsuperscript{212} See Working Group Report, \textit{Annual Report 2010}, \textit{ibid} at 4 [emphasis added].
\textsuperscript{213} See Working Group Report, \textit{Annual Report 2013}, \textit{supra} note 208 at 2 [emphasis added].
\textsuperscript{215} OECD, \textit{Consultation Paper}, \textit{supra} note 143 at 5. See also OECD, \textit{Mid-Term Study}, \textit{ibid} at para 16; OECD, \textit{Consultation Paper}, \textit{ibid} at para 76.
\textsuperscript{216} On the expectation of member states to report on the implementation of the recommendations, see Working Group Report, \textit{Annual Report 2007}, \textit{supra} note 214 at 19 and 23; Working Group Report, \textit{Annual Report 2008}, \textit{supra} note 204 at 19-20.
\end{footnotesize}
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.\(^{219}\)


\(^{218}\) 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

\(^{220}\) 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 public 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”), its relative autonomy from the main organs of the UN entails a different normative process that justifies its consideration as a separate intergovernmental organization. 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”).

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. 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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2. The instruments adopted by the main organs of the UN are addressed in Chapter 8 of the present dissertation.
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).


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).


\(^9\) See ILO Constitution, ibid, art 24.

\(^10\) See ibid, art 26.

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.


\(^ {16}\) 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.\textsuperscript{20} The \textit{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 \textit{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 \textit{Guidelines for Multinational Enterprises} by the Organisation for Economic Co-operation and Development (\textquotedblleft \textit{OECD Guidelines}\textquotedblright),\textsuperscript{21} several actors within the ILO appear as \textit{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 \textit{ILO Tripartite Declaration} mentions that \textquotedblleft 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\textquotedblright,\textsuperscript{22} the active role of capital-importing states and workers’ representatives is specifically put forward by various authors.\textsuperscript{23} In November 1975, the Governing Body decided to hold a Tripartite Advisory

\begin{itemize}
\item \textsuperscript{20} See the main parts of the \textit{ILO Tripartite Declaration 2006, supra} note 3.
\item \textsuperscript{21} The \textit{OECD Guidelines for Multinational Enterprises} are included in Annex 1 of the \textit{Declaration on International Investment and Multinational Enterprises}. See \textit{Declaration on International Investment and Multinational Enterprises}, 21 June 1976, Doc No C(76)99/FINAL (1976).
\item \textsuperscript{22} \textit{ILO Tripartite Declaration 2006, supra} note 3, Preamble.
\item \textsuperscript{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
\end{itemize}
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". 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". After the preparation of a draft declaration, the Governing Body decided to reconvene the Tripartite Advisory Meeting and to adopt the ILO Tripartite Declaration in November 1977.

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", a follow-up procedure was established in order to invite governments to report periodically on the effect given to the Declaration. With respect to disputes arising

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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.


27 ILO Tripartite Declaration 1977, supra note 3.


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 2 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互动理论 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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Tripartite Advisory Meeting in 1976 and 1977,\textsuperscript{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,\textsuperscript{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 \textit{ILO Tripartite Declaration}. Several capital-exporting states and representatives of employers recalled that they would only support a non-mandatory initiative.\textsuperscript{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”.\textsuperscript{37} Similarly, the employer members of the advisory meeting appeared to be convinced that a tripartite declaration would be harmful unless its principles “\textit{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.\textsuperscript{38}


\textsuperscript{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 \textit{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 \textit{Tripartite Advisory Meeting – 1977}, supra note 26 at para 9.

\textsuperscript{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.

\textsuperscript{37} \textit{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.

\textsuperscript{38} \textit{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

\(^{39}\) 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. 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

44 Interview 3.
45 Ibid.
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. 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

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49 See section 2.2 of Chapter 6.
declarations that “contain symbolic and political undertakings by the member States”, the ILO Tripartite Declaration is the only declaration that was adopted by the Governing Body. 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”. 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”, other provisions expressly establish similar requirements for both types of enterprises.

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. The numerous references to ILO

50 See ILO, “ILO Declarations”, supra note 11.
52 ILO Tripartite Declaration 2006, supra note 3 at para 8 [emphasis added].
53 Ibid at para 11.
conventions and recommendations also contribute to improve the overall clarity of this informal international instrument.  

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”. 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”. 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. 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”. 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, 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. 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.

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. 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.


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”. 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”. The voluntary nature of the *ILO Tripartite Declaration* is also recalled in Addendum I and Addendum II of the instrument. 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. It is also worth noting that these periodical reports have been set aside in 2008 and replaced by a different information-gathering process occurring at the regional level that also avoids addressing instances of non-compliance. 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.


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.

71 ILO, Procedure for the Examination of Disputes, supra note 30.
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 Rights77 – do not mention the ILO

The *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 Body.

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\(^{78}\) For the interpretations that were approved by the Governing Body, see ILO, *Report of the Committee on Multinational Enterprises*, 229\(^\text{th}\) Sess, Official Bulletin, Vol LXVIII, Series A, No 3 (1985) at 113-114; ILO, *Report of the Committee on Multinational Enterprises*, 239\(^\text{th}\) Sess, Official Bulletin, Vol LXXI, Series A, No 3 (1988) at 138; ILO, *Report on the Subcommittee on Multinational Enterprises*, 272\(^\text{th}\) 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; Černíč, *supra* note 68 at 31; Padmanabhan, *supra* note 68 at 12; Sims, *supra* note 54 at 21.

\(^{79}\) See Padmanabhan, *ibid* at 13.

Body with respect to requests for interpretation;\textsuperscript{81} a summary of proceedings of a tripartite forum on the implementation of the \textit{ILO Tripartite Declaration} held in 2002;\textsuperscript{82} documents resulting from a symposium held in 2003;\textsuperscript{83} the first report on regional meetings related to the new information-gathering procedure on the implementation of the \textit{ILO Tripartite Declaration};\textsuperscript{84} and semi-structured interviews.

At first sight, some discourses related to the implementation of the \textit{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 \textit{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”.\textsuperscript{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 \textit{entirely consistent with the principles in the Declaration}”.\textsuperscript{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

\textsuperscript{81} These documents are cited in the text below.


\textsuperscript{85} See \textit{ILO, Summary of Fifth Government Reports, supra note 80} at 21 [emphasis added].

\textsuperscript{86} See \textit{ILO, Summary of First Government Reports, supra} note 80 at 10 [emphasis added]. See also other examples in \textit{ILO, Summary of Fifth Government Reports, ibid} at 25; \textit{ILO, Summary of Seventh Government Reports, supra} note 80 at 51. Some workers’ associations also put forward similar conclusions. See \textit{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:

\(^{87}\) 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’ associations95 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*
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

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”.  

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”. 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

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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, "achieving international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights". 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, 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 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,


2 See Chapter 7 and Chapter 9.


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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\(^8\) *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.


\(^{12}\) *UN Charter*, ibid, art 62.

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”.

While the Organisation for Economic Co-operation and Development (“OECD”) shapes the identity of its member states as promoters of liberal and neoliberal policies, the development of international norms to tackle the misconduct of foreign investors by the UN emerges from a drastically different institutional context. In fact, in addition to the elaboration of two reports addressing the impact of transnational corporations, the UN General Assembly adopted several resolutions affirming the right of states to regulate foreign investors’ activities during the 1970s. 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”. 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.


[e]ach State has the right: (a) to 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) to 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.  

The concerns raised through these resolutions ultimately led to the establishment of an intergovernmental information and research Centre on Transnational Corporations, operating under the guidance of the Commission on Transnational Corporations. 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”. 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, 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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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)].
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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others. 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” and a “learning network that provides a framework through which its participants are able to publicly support a set of universally agreed values”, 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”. This approach


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.

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.\footnote{See \textit{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).}

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 \textit{binding set of regulations} nor as a code of conduct for companies”.\footnote{EarthRights International, \textit{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, \textit{Joint Civil Society}] [emphasis added].} 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”.\footnote{Interview 10.}

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 \textit{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”,\footnote{United Nations, “SG Proposes Global Compact”, \textit{supra} note 4.} public interest NGOs maintained that “governments should work together more effectively to reduce corporate influence on government and intergovernmental decision-making processes”.\footnote{EarthRights International, \textit{Joint Civil Society}, \textit{supra} note 37.} 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
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, but the UN General Assembly has also constantly referred to and supported this initiative since 2000. 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

41 UN Global Compact, supra note 4.

asks companies to embrace, support and enact … a set of core values”.

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. 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, the lack of details provided in the UN Global Compact’s principles considerably affects its clarity. 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”. 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. While the use of a relatively vague term in a

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43 UN Global Compact, supra note 4, Preamble [emphasis added].


47 UN Global Compact, supra note 4, Principle 1 and Principle 2.

48 Ibid, Preamble.
provision does not necessarily entail an unclear international norm, 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.” However, the annual review that was published in 2008, as well as other reports published in 2013 and in 2014, all neglect this Preamble. 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. 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.


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

54 UN Global Compact, supra note 4, Preamble.
that this initiative “is not designed, nor does it have the mandate or resources, to monitor or measure participants’ performance”. 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. Furthermore, a dialogue facilitation process has been established to address allegations of systematic and egregious abuses. 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”. 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, 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.


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, 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”), the *UN Norms*, and the *Principles for Responsible Investment in Agriculture and Food Systems* (“UN PRAI”) 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*. Moreover, the various reports summarizing the activities of the UN Global Compact emphasize the

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61 See section 2.2.


63 *UN Norms*, supra note 5, Preamble.


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\textsuperscript{66} – that provides crucial resources and organizes multiple events related to this initiative.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


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”. 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”. 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”.

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, 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”. 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”.

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
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:


79 Interview 16 [emphasis added].
Because 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.\textsuperscript{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 \textit{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.\textsuperscript{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”.\textsuperscript{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”.\textsuperscript{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

\textsuperscript{80} Interview 10.


\textsuperscript{82} United Nations, \textit{Global Compact Summit: China, supra} note 71 at para 3.

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, specifications pertaining to their implementation and definitions. 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).

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*...
“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


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.\(^4\) 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”.\(^5\) 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”.\(^6\) Later in the elaboration process, the main drafter of the UN Norms reportedly stated that this instrument “was

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\(^95\) 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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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”. A similar position from private actors was highlighted by the sessional working group of the Sub-Commission in its last report.

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, 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.

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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”\(^\text{106}\) 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”\(^\text{107}\). 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”\(^\text{108}\), 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”.\(^\text{109}\) 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.

\(^{106}\) Interview 19.


\(^{108}\) *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.\(^\text{110}\) Combined with the ultimate refusal of the Commission to recognize any legal character to the **UN Norms**,\(^\text{111}\) 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.\(^\text{112}\) 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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\(^\text{110}\) See United Nations, *UN Today*, *supra* note 1 at 248.

\(^\text{111}\) *Responsibilities of Transnational Corporations*, *supra* note 91 at para (c).

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”. 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. 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.

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. 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. 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.
identified in the *UN Norms*, such a commentary ensures a certain level of clarity that can satisfy this criterion of legality.\textsuperscript{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*.\textsuperscript{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”\textsuperscript{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]”\textsuperscript{122} ultimately seek to impose an obligation on transnational corporations and business enterprises that depends upon actions of a third party.\textsuperscript{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,\textsuperscript{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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\textsuperscript{119} See Kinley & Chambers, *supra* note 87 at 466-467.

\textsuperscript{120} See Clapham, *Human Rights Obligations*, *supra* note 87 at 230.

\textsuperscript{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.

\textsuperscript{122} *UN Norms, ibid* at para 11.


\textsuperscript{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

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. 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. 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. The numerous submissions to the OHCHR thus demonstrate a fairly ephemeral practice surrounding the UN Norms. 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

that “[t]he Norms provide the basis of a global compliance framework that should over time become legally binding”.\(^\text{136}\) “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”.\(^\text{137}\)

A small group of business enterprises also supported the development of a stronger practice around the *UN Norms*.\(^\text{138}\) 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”.\(^\text{139}\) 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”.\(^\text{140}\)


\(^\text{138}\) See Kinley et al, *supra* note 93 at 38.


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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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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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

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authority advanced for the Norms and the other the principle by which they propose to allocate human rights responsibilities between States and firms.\footnote{Special Representative – Interim Report, ibid at para 59 [emphasis added].}

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”.\footnote{Ibid at para 69.}

Taken as a whole, the discourse of the Special Representative strongly discouraged the use of the \textit{UN Norms}, let alone a practice of legality.

Another source of discourses that demonstrates the absence of a practice of legality related to the \textit{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.\footnote{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”.}

Despite the refusal of the Special Representative to rely on this instrument for his mandate, one participant even suggested that some concepts of the \textit{UN Norms} had had an appreciable impact on the \textit{UN Guiding Principles}.\footnote{Interview 9.} By contrast, the reference to the practice surrounding the \textit{UN Norms} by one participant as “a pretty much disaster”\footnote{See Interview 9.} suggests a weak practice that definitely failed to reflect any legal character.

Several discourses that followed the elaboration of the \textit{UN Norms} also reproduce \textit{relations of power} whose consideration contributes to explain the lack of a practice of legality.\footnote{On the role of relations of power in the failure of the \textit{UN Norms}, see Daniel Augenstein & David Kinley, “When Human Rights ‘Responsibilities’ Become ‘Duties’: The Extra-Territorial Obligations of States that Bind Corporations” in \textit{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.} For example, Christian Aid stressed that representatives of the private sector
“have the power to delay the establishment of binding regulation”.

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”. 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.

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.

155 Christian Aid, supra note 135 at 20.
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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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” that was welcomed by the Human Rights Council in 2008, the mandate of the Special Representative was extended with a view to operationalizing further this framework. As a result, the Special Representative presented the UN Guiding Principles to the Human Rights Council for consideration in March 2011. 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”, 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.

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


Ibid at para 4.

UN Guiding Principles, supra note 7.


Despite diverging views with respect to issues like states’ extraterritorial obligations,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

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.


171 For another study related to the UN Guiding Principles that also relies on discourse analysis, see Buhmann, “Navigating”, supra note 148.


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-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>
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”. 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”. 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. Of course, when

174 Special Representative – 2008 Report – Addendum 1, supra note 170 at para 152.


considering the corporate responsibility to respect human rights as a “baseline expectation” or a “universally applicable human rights responsibility for all companies, in all situations”, 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”.

This absence of new legal obligations has been the primary reason explaining the support of several states and business enterprises for this international instrument. 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”.

The Commission on Multinational Enterprises of the Confederation of Netherlands’

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179 UN Guiding Principles, supra note 7, Introduction at para 14 [emphasis added].


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


186 See Taylor, supra note 77 at 19-20.
mandatory nature of [s]tate and business obligations”. 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”. 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”. The need for stronger grievance mechanisms that depart from non-judicial initiatives to specifically address human rights violations was also mentioned in several submissions.

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:


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.

\(^{191}\) 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

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\(^{198}\) 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”\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{204} More specifically, even if several authors consider the application of the concept of due diligence as confusing or requiring clarification,\textsuperscript{205} the process through

\begin{footnotesize}
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\item See HRC Resolution 17/4, supra note 167 at para 1 [emphasis omitted].
\item See Taylor, supra note 77 at 15.
\item UN Guiding Principles, supra note 7, General Principles [emphasis added].
\item See also ibid, Guiding Principle 14.
\item Ibid, General Principles.
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which business enterprises should carry out due diligence is explained at great length in Guiding Principles 17 to 21 and their related commentaries. 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. 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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where appropriate, by requiring human rights due diligence”. 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”; Guiding Principle 23 stipulates that they should “[s]eek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements”.

210 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. After acknowledging that “[n]othing in these Guiding Principles should be read as creating new international law obligations”, this instrument does not rely on a voluntary observance of its principles. 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).


212 See section 2.2 of Chapter 6 and section 2.2 of Chapter 7.

213 *UN Guiding Principles*, *supra* note 7, General Principles.

human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations. 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*. Guiding Principle 25 thus mentions that “as part of their duty to protect against business-related human rights abuse, [st]ates 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”. 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. 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.

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.
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.\footnote{HRC Resolution 17/4, supra note 167 at para 6.} 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.\footnote{See Simons, supra note 135 at 39; Addo, supra note 172 at 138-141.}

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...
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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\(^{224}\) 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


\(^{226}\) *Principles for Responsible Investment in Agriculture*, *supra* note 64 at paras 19(A)(v) and 33.

respect human rights by the OHCHR, the Working Group prepared some guidance for states regarding the elaboration of National Action Plans to implement the UN Guiding Principles in 2014. 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”. 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. 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.

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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”. Lithuanian 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”. 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”.

However, in a way that recalls discourses of international actors addressing the implementation of the ILO Tripartite Declaration, this sense of obligation is generally owed to formal human rights international agreements rather than to the UN Guiding Principles. 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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236 See section 2.3 of Chapter 7.

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”. 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”. 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, the Working Group referred to the “business uptake of the Guiding Principles” 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”. These organizations also recalled the necessity of relying on “dialogue and consultation” in order to sustain the engagement of business enterprises in the implementation of this instrument.


239 Sweden, supra note 235 at 15 [emphasis added].


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”. 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”. Others, like the Netherlands, expressly referred to the corporate responsibility to respect human rights as a “social responsibility”. 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. 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”.

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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248 Ibid at 49-50.
considered as a means to discuss best practices and lessons learned. 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”. 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.

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. During the first meeting of this intergovernmental working group, the UN Guiding Principles were considered by participants and delegations

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as being “complementary and not in contradiction to a legally binding instrument”.

One panellist also stressed that the use of the term “responsibility” in the *UN Guiding Principles* fails to entail legal responsibility and legal duty. 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 states 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”. 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”. 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*. However, they have been considered as important tools to obtain a response from international actors on alleged violations. 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

254 *Ibid* at para 69.
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. 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.

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”. 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”. 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*,\(^\text{263}\) several participants depicted this instrument as being part of an “evolutionary process”.\(^\text{264}\) 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.\(^\text{265}\)

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”.\(^\text{266}\) 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”.\(^\text{267}\)

Commenting on the development of initiatives to measure the implementation of the *UN Guiding Principles*,

\(^\text{263}\) 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”.

\(^\text{264}\) Interview 4. Similar ideas were formulated in Interview 9; Interview 16; Interview 18; Interview 19.

\(^\text{265}\) 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”.


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”.

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

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. Amidst the various aspects included in the scope of this instrument, the latter establishes several offences – *e.g.* bribery of foreign public officials, trading of influence, bribery in the private sector, laundering of proceeds of crime and concealment – 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 and expressly provides states’ jurisdiction for offences that are committed by a national having its habitual residence in their territory. 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,

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).


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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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

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.
submitted it to the UN General Assembly for consideration.\textsuperscript{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 31\textsuperscript{st}, 2003\textsuperscript{291}.

The norm emergence of the \textit{UNCAC} also includes efforts that were deployed after its entry into force to establish a mechanism for the review of its implementation.\textsuperscript{292} The Conference of the State Parties to the \textit{UNCAC} thus decided to institute an open-ended intergovernmental expert working group tasked with making recommendations on this matter in 2006.\textsuperscript{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.\textsuperscript{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 \textit{UNCAC}.\textsuperscript{295} The \textit{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.\textsuperscript{296} \textit{Guidelines for the Governmental Experts and the Secretariat in the Conduct of Country Reviews} were also adopted in 2011.\textsuperscript{297}

Beyond the resolutions that can be used to trace the emergence of this international norm, the discourses of the members of the \textit{community of practice} involved in its

\begin{footnotesize}
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\item 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.
\item See Wouters et al, \textit{supra} note 270 at 18; Rose, \textit{supra} note 278 at 105-106.
\item Review of Implementation, CAC Res 1/1, 2006, UN Doc CAC/COSP/2006/12 at para 2.
\item \textit{Ibid} at para 3.
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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.\(^\text{298}\) 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.\(^\text{299}\) 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”.\(^\text{300}\) Some state representatives even implicitly referred to various “degree[s] to which the measures should be obligatory”.\(^\text{301}\) Along the same lines, one interviewee emphasized that the negotiation process led to the adoption of


\(^{300}\) Ibid at para 33 [emphasis added].

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.

³⁰² Interview 20.
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.
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, 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. 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, 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 public 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.*

Without including any distinction among the legal persons concerned, Article 26(1) also provides that “*each 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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311 *UNCAC, supra* note 8, art 16(1) [emphasis added].
this Convention”. 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*, the chapter focusing on criminalization and law enforcement provides sufficient details regarding the offences that must be criminalized by states. As exemplified by the citation of Article 16 above, 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* and a legislative guide 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. 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”.

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].
314 *UNCAC*, *ibid*, Chapter III.
315 *Ibid*, art 16(1).
316 *Travaux Préparatoires*, *supra* note 278.
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 conformity of its provisions with domestic legislation, 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”. 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*.

However, while many provisions echo the intent of elaborating a flexible legal instrument, 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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321 *UNCAC*, *supra* note 8, at 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”.\textsuperscript{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.\textsuperscript{325} For example, such a requirement is included in the provision addressing the demand of bribes by foreign public officials:

Each State Party \textit{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.\textsuperscript{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 \textit{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 \textit{congruence}.\textsuperscript{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”,\textsuperscript{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 \textit{UNCAC}.\textsuperscript{329} This provision also mentions that any disputes that cannot be settled through negotiation can be submitted to arbitration and, ultimately, to the International

\textsuperscript{324} \textit{UNCAC}, supra note 8, Preamble.

\textsuperscript{325} \textit{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, \textit{supra} note 317 at 259; Rose, \textit{supra} note 278 at 106-113.

\textsuperscript{326} \textit{UNCAC}, \textit{ibid}, art 16(2) [emphasis added].

\textsuperscript{327} For the information provided in this paragraph, see Arnone & Borlini, \textit{supra} note 317 at 269.

\textsuperscript{328} \textit{UNCAC}, supra note 8, art 30(1). See also Arnone & Borlini, \textit{ibid} at 351 and 355.

\textsuperscript{329} \textit{UNCAC}, \textit{ibid}, art 66(2).
However, pursuant to Article 66(3), several member states made a reservation concerning this dispute settlement mechanism.

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.

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”. 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...
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. 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

joint meetings have been completed as of November 2015. 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.

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”.

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. 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.

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.


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


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].


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


350 See e.g. Implementation Review Group – Third Resumed Session Report, supra note 340 at para 27.

Group reported that states had developed national action plans based on the outcome of the review process “on a voluntary basis”, 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”. 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”. 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. 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”.

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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353 Implementation Review Group – Resumed Fifth Session Report, ibid at para 43 [emphasis added].


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.

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.\textsuperscript{357} In this regard, a representative of the group of African states stressed the intergovernmental nature of the implementation mechanism.\textsuperscript{358} While the representative of the European Union advocated for a more transparent mechanism,\textsuperscript{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”.\textsuperscript{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.\textsuperscript{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 \textit{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 \textit{UNCAC} is a


\textsuperscript{359} See \textit{ibid} at para 5.

\textsuperscript{360} See \textit{Conference of the State Parties – Fourth Session Report, supra} note 338 at para 93.

\textsuperscript{361} \textit{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 interational 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.
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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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...
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. Section 2(a) of Article IV thus mentions that “all the powers of the Corporation shall be vested in the Board of Governors”, which can delegate the authority to exercise some of its powers to the Board of Directors. 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”. Among other powers, the Board of Directors considers and approves projects submitted for funding by the IFC. 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. 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%).

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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.

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, 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. Some authors stress a change in the identity of the World Bank Group through reforms of its policies that were triggered by public interest nongovernmental organizations (“NGOs”) and the United States. Several scholars have also identified an increasing consideration of environmental and social sustainability throughout the operations of the IFC since the late 1990s. 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”. 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. 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 & Juno 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.


20 See IFC Articles of Agreement, supra note 9, Article I.

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, 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”, Hunter emphasizes that these sustainable standards differ considerably from the outcome of the typical state-to-state negotiation process. 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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23 See Hunter, *ibid* at 462-464.
(“IFC Sustainability Policy”) and the IFC Access to Information Policy (“IFC Information Policy”), the IFC Performance Standards are part of a broader framework on sustainability. 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”.

Further to requiring the assessment and management of environmental and social impacts, 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.

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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27 IFC, IFC Sustainability Framework (Washington, IFC: 2012) [IFC, Sustainability Framework].


(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

\(^{31}\) 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”.


\(^{34}\) 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. 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”. Ultimately, the current version of the *IFC Performance Standards* was submitted to the Board of Directors in April 2011 and became effective on January 1st, 2012.

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. 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 Standards*.

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38 *IFC Performance Standards 2012*, supra note 2.

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


\(^{41}\) CAO, *Safeguard Policy Review Revisited*, supra note 33 at para 54 [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”. 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. 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”. 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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appropriate and timely remedies in the event of non-compliance, including possible IFC disengagement”.  

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


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”.

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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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.\textsuperscript{52} Moreover, in addition to being included in a publication that details the sustainability framework applied by this organization,\textsuperscript{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.\textsuperscript{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,\textsuperscript{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”.\textsuperscript{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”.\textsuperscript{57} In other words, despite the categorization that is used to differentiate the application of the IFC Performance Standards, there is a presumption that

\textsuperscript{52} See section 2.1.
\textsuperscript{53} See IFC, Sustainability Framework, supra note 27.
\textsuperscript{54} IFC, Understanding the IFC’s Environmental and Social Due Diligence Process, online: IFC <http://www.ifc.org/wps/wcm/connect/b58ead804942ee5da7a5ff4f5ddd76e/IFC+Process.pdf?MOD=AJP ERES> (accessed 14 September 2016).
\textsuperscript{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.
\textsuperscript{56} IFC Sustainability Policy 2012, ibid at para 20 [emphasis added].
\textsuperscript{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.  

Another aspect of the *IFC Performance Standards* that contributes to the clarity of this instrument is the express reference to international agreements. 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”. 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. 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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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 Moreira, 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.


rights, supply chain management, stakeholder engagement, as well as Free, Prior, and Informed Consent for Indigenous peoples. 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”. 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. 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.

Although the identification of “all relevant environmental and social risks and impacts of the project” 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.


65 See ibid.

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. 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”. 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, the elaboration of management programs, monitoring requirements and stakeholder engagement. 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”. 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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70 Ibid, Performance Standard 1 at para 5.
72 Ibid, Performance Standard 1 at para 22.
of these activities”. 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.

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”, the IFC is closely involved in determining compliance of its clients’ operations with the IFC Performance Standards. 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.
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


81 See CAO Operational Guidelines 2013, *ibid* at para 1.1.


83 See *ibid* at para 4.1.
outcomes”.\textsuperscript{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 \textit{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 \textit{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 \textit{IFC Performance Standards} are in a good standing to be considered as such.

\subsection*{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 \textit{community of practice} in an effort to promote consistent implementation of the Performance Standards by all users”.\textsuperscript{85} With a view to assessing the nature of the practice that has emerged from the \textit{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 \textit{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

\textsuperscript{84} \textit{Ibid} at para 4.3 [emphasis added].

\textsuperscript{85} IFC, \textit{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


87 *World Bank Performance Standards*, supra note 4 at para 2. See also Poitevin, supra note 76.


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

90 Ibid at 22.
91 See section 2.3 of Chapter 6.
2014) at 12. Previous annual reports include similar terms with respect to the “ombudsman” role of the CAO.
93 CAO, Annual Report 2007, ibid at 3 [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 *imbalance of power* often lay at the heart of

\(^{96}\) 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”. 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”. 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”. 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.

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”.


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. By 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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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 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") undeniably constitute an

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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") adopts 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

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
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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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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