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INTERSECTING SPHERES OF ANALYSIS IN BUSINESS AND HUMAN RIGHTS: DEVELOPING A NEW SOCIO-LEGAL RESEARCH AGENDA AND METHODOLOGY FOR UN GUIDING PRINCIPLE NO. 9

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> *Disciplinary boundaries should be viewed pragmatically; indeed, with healthy suspicion. They should not be prisons of understanding.*
>
> (Roger Cotterrell, 1998)[1]

Abstract

Existing methodological approaches to business and human rights frequently fail to address the broad spectrum of relevant issues in the field. Persistent disciplinary silos and normative limitations of key legal and governance instruments result in reductive normative approaches and ultimately in ineffective policies. Focusing on the normative environment covered by UN Guiding Principle No. 9, specifically on the intersection between business and human rights in international investment, this paper argues for the need to put forward interdisciplinary socio-legal methodologies. It contends that any comprehensive methodology addressing the field ought to account for the specificity of existing governance models, the intrinsic dominant role of corporate actors and the socio-legal complexity displayed at the intersection of human rights with business and market mechanisms. The analysis developed is advanced not as a 'model' methodology but as an instance of mapping out how a relatively narrow governance approach can be enhanced methodologically in order to better inform research and policy design.

Keywords: business and human rights; international investment law; bilateral investment treaties; socio-legal research methods; network governance; UN Guiding Principles

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[1] Roger Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25(2) Journal of Law and Society 171, 177.

1. Introduction

The intersection of business and human rights (BHR) discourse with the area of international investment law (IIL) displays certain contradictions. While both normative environments appear to seek human development as the ultimate goal, compatibility between the two cannot and should not be presumed.[2] Highlighting essential points of tension between these competing normative discourses, this paper argues for the need to put forward complex interdisciplinary methodologies that build consistently on a socio-legal platform.[3] Such methodologies would acknowledge the extent to which existing political practices determine the conceptualisation of governance structures, and would thus lend such structures to a more systematic use of theoretical and empirical evidence, as opposed to submitting them to a predominantly doctrinal analysis.[4]

Over the past decades, international investment agreements, and in particular bilateral investment treaties (BITs) have increased sufficiently in number and have acquired sufficient institutional coherence in terms of available 'legal mechanics' to allow one to speak about the distillation of a model BIT, whose features (albeit still disputed) are now advanced as features of customary international law.[5] Equally significant have been the initiatives towards the

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[2] Sarah Joseph, 'Human Rights and International Economic Law', *European Yearbook of International Economic Law 2016* (Springer, Cham 2016).

[3] The term 'socio-legal' is used here in its wide-ranging meaning as offered by the Socio-Legal Studies Association. It covers both theoretical and empirical work, as well as more policy-oriented studies. The socio-legal methodological approach to the study of legal phenomena references a large spectrum of disciplines. While traditionally socio-legal research has bridged the divide between law and sociology, social policy, and economics, there is also an increasing interest in bringing together law and organisational studies, international relations, governance studies and disciplines in the field of humanities. SLSA, 'What Is Socio-Legal Research?' (*Socio-Legal Research Centre - DCU*, 12 March 2010) <https://sociolegaldcu.wordpress.com/what-is-socio-legal-research/> accessed 25 August 2018.

[4] Sol Picciotto, 'Critical Theory and Practice in International Economic Law and the New Global Governance', *European Yearbook of International Economic Law 2016* (Springer, Cham 2016).

[5] Horatia Muir Watt, 'The Contested Legitimacy of Investment Arbitration and the Human Rights Ordeal' in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press 2014) 2. For an

formal development of model BITs and of regional investment policymaking.[6] However, after an initial boom period, the field is now displaying a slow-down in processes of negotiation and signing of BITs, with a certain cautiousness being manifest in both developed and in developing countries.[7] This phenomenon is accompanied by the adoption of a host of domestic regulatory measures that attempt to tame emerging transnational trends.[8] Part of this cautiousness is linked to the perceived implications and consequences that BITs and other investment agreements have for democratic governance and human rights.[9]

Signalling the importance of these implications, the UN Guiding Principles on Business and Human Rights (UNGPs) address trade and investment issues in several instances, with international investment and human rights being the focus of the UNGP No.9:

> *States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.*[10]

Furthermore, the Principles' associated commentary largely reiterates the same idea, namely that States remain the fundamental actors in resolving the IIL–BHR tensions.

The domestic State-centred element is still, undoubtedly, an important aspect in mitigating some of the most egregious human rights violations that may take place at the IIL–BHR intersection. However, the perspective offered by UNGP no. 9 fails to capture the socio-legal complexity of this normative intersection. Certainly, the genesis of the current system of international investment is undeniably linked to the State actors' initiative within the international arena. At the same time, important IIL developments (with both their normative

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institutional perspective on the evolution of customary patterns, see Richard R Nelson and Bhaven N Sampat, 'Making Sense of Institutions as a Factor Shaping Economic Performance' (2001) 44(1) Journal of Economic Behavior & Organization 31, 38.

[6] UNCTAD, 'World Investment Report 2012: Towards a New Generation of Investment Policies. Chapter III - Recent Policy Developments' (United Nations 2012) 84–86.
[7] UNCTAD, 'World Investment Report 2012 - Chapter III' (n 6).
[8] Ibid 79; UNCTAD, 'World Investment Report 2009: Transnational Corporations, Agriculatural Production and Development' (2009) 30f.
[9] Anne Van Aaken, 'Fragmentation of International Law: The Case of International Investment Protection' (2008) 17(1) Finnish Yearbook of International Law 91.
[10] United Nations, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) A/HRC/17/31.

crystallisation and with their contestations) have transnational corporations (TNCs) at their heart, as major players that are actively engaged in generating and shaping a transnational regulatory environment for international investment.[11] While the active role played by corporate actors within the investment sphere deserves to be scrutinised in its own right, the scrutiny becomes imperative when, in the process of exercising their power within the investment agreements sphere, these private actors also impact other key social spheres, such as the realisation of human rights, the protection of the environment, or the domestic powers to design policy. Against the backdrop of UNGP No. 9, which puts the State at the forefront of the protection of human rights against international investment-related challenges, thus focusing research attention predominantly on the State's capacity for action, this paper argues for a more comprehensive methodological approach, highlighting substantial methodological lacunae manifest in BHR research at the intersection with the international investment field.

A comprehensive methodological perspective is also presented throughout this paper as an essential prerequisite for policy aimed at supporting change in the way that the human rights and business intersection is addressed within the international investment domain.[12] Suggesting from the outset the limited normative suitability of UNGP No. 9 – with its exclusive focus on State responsibility – for answering the complex BHR challenges stemming from the intersection of IIL and human rights, the paper highlights international economic law (IEL) as a fragmented platform upon which IIL and HR 'link' with difficulty (Section 2). It then focuses on BITs as a particularly challenging IEL field for those governments that wish to address the human rights harms associated with international investment agreements and for the agencies that aim to operationalise UNGP no. 9 (Section 3). The section highlights BITs as a domain that would specifically benefit from a socio-legal research agenda that brings doctrinal and non-doctrinal methods to bear on policy design. Identifying points of tension in the doctrine and practice of IIL and human rights is, however, not sufficient. In this sense, Section 4 brings a much-needed focus on the theoretical underpinnings of the existing normative and regulatory set-ups in IIL. Drawing, in particular, on the networked governance concept and the

[11] UNCTAD, 'World Investment Report 2003. FDI Policies for Development: National and International Perspectives' (2003).

[12] For the inter-relatedness of the various international spheres and the role of human rights, see Alfred-Maurice de Zayas, 'OHCHR Statement by Alfred-Maurice de Zayas, Independent Expert on the Promotion of a Democratic and Equitable International Order at the 72nd Session of the General Assembly' (OHCHR 2017).

implications this can have for addressing the points of tension between BITs and human rights, the paper highlights the complex and powerful role played by corporate actors in the current polycentric governance set up. Finally, Section 5 suggests possible lines of both theoretical and empirical critique of the proposed normative environment, highlighting the idea that the way governance and regulation are conceptualised remains essentially value-laden and ideologically driven and, as such, should be open to socio-legal lines of inquiry. The critique offered in this section proposes an engagement with the theoretical tenets of the networked governance perspective on international investment and suggests avenues of empirical investigation. In so doing, the paper sketches out the socio-legal methodological complexity that should underscore the linkage between BITs and BHR, suggesting that the responsibilities identified in UNGP No. 9 can only partially inform a coherent policy approach that aims to embed BHR in the international investment framework.

2. International Economic Law and Human Rights Between Linkage and Fragmentation

Over the past decades, the issue of BHR has progressed from a radical but largely ignored agenda towards a discourse now taken up by business organisations[13] and, according to some, increasingly shaped by them.[14] On the other hand, human rights are routinely used as the *lingua franca* of a constantly renewed attempt to taming corporate power, whether in order to address 'classic' human rights issues, labour standards or environment-related issues, in order to shape domestic corporate governance, or to address bribery and corruption in the host countries. However, despite the raised awareness of the multitude of dangers that human rights are exposed to through corporate activities, the additional issue of the corporate role in the impact of BITs and IEL on human rights has largely been ignored.

[13] Tom Campbell, 'The Normative Grounding of Corporate Social Responsibility: A Human Rights Approach' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 22.

[14] Jens Martens and Judith Richter, 'Corporate Influence on the Business and Human Rights Agenda of the United Nations' (Bischöfliches Hilfswerk MISEREOR eV; Brot für die Welt; Global Policy Forum 2014) Working Paper.

Presented often as a catalogue of stray topics in search of consistency,[15] IEL is a relatively new field of practice and inquiry, covering a more or less coherent set of domains. It includes public and private elements, such as economic relations between States as well as, to a certain extent, economic relations between States, business organisations and individuals.[16] It also relates to, and is dependent upon, different professional spheres in contexts that go beyond mere regulatory implementation.[17] While this state of affairs calls for an interdisciplinary approach to any policy-oriented research, such as the one that ought to inform the evaluation and realisation of UNGP No. 9, the various IEL spheres appear well insulated by a technical legal carapace. A methodological piercing of this carapace is therefore required to translate the intrinsic goal of UNGP No. 9 – embedding BHR good practice within the international investment environment – into adequate policies.

The contact between IEL and other normative regulatory domains, such as international human rights law, has generated normative interfaces or 'nodes' at the encounter of two social discourses that address or affect the same social values.[18] Such areas of contact are characterised by normative tension points, described by scholars as 'linkage' areas.[19] Given the regulatory dimensions of the discourses in question, a doctrinal and jurisprudential investigation of the points of tension is, of course, always necessary.[20] At the same time, given

[15] Aurora Voiculescu, 'Human Rights, Corporate Social Responsibility and International Economic Law: Strong Answers to Strong Questions?' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2013) 222.

[16] Steve Charnovitz, 'What Is International Economic Law?' (2011) 14(1) Journal of International Economic Law 3; Isabella D Bunn and Colin B Picker, 'The State and Future of International Economic Law' in Colin B Picker, Isabella D Bunn and Douglas W Arner (eds), *International Economic Law: The State and Future of the Discipline* (Hart Publishing 2008) 1.

[17] Emmanuel Gaillard, 'Sociology of International Arbitration' (2015) 31 Arbitration International 1.

[18] Isabella D Bunn, 'Linkages Between Ethics and International Economic Law' (2000) 19(2) University of Pennsylvania Journal of International Economic Law 319, 319.

[19] Joseph (n 2); Frank J Garcia and Lindita V Ciko, 'Theories of Justice and International Economic Law' in John Linarelli (ed), *Research Handbook on Global Justice and International Economic Law* (Edward Elgar Publishing 2013) 54; David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (Cambridge University Press 2009) 47; Elizabeth M Iglesias, 'Human Rights in International Economic Law: Locating Latinas/Os in the Linkage Debates' (1996) 28 University of Miami Inter-American Law Review 361.

[20] Robert Howse and Ruti G Teitel, *Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization* (Friedrich-Ebert-Stiftung 2007) 4.

the complexity of the regulated social spheres, a socio-legal approach that looks not only at the legal texts, but also at 'the context in which they are created, destroyed, used, abused, avoided' is also imperative.[21] Other spheres of analysis, such as institutional theory, governance studies, the sociology of organisations and development studies are therefore invited to contribute to the research agenda and, ultimately, to inform the linkage policies. Environmental studies, labour standards, socio-economic rights, (sustainable) development and more generally (global) social justice are only some of the potential disciplinary linkage points for IEL and BHR. The interface of IEL with these domains produce a variety of new substantive areas of policy regulation and research, such as public health, environmental science, public services and competition and consumer law, to name the most prominent. All these domains make a claim for the re-negotiation of the public sphere in ways that are significant for the normative core of IEL.[22]

The research agenda focusing on the implementation of UNGP No. 9 ought to address the tensions present in the domestic and transnational public sphere. This would support the operationalising of new normative parameters and the development of best practice at the point of linkage between international investment and human rights.[23] A normative linkage amplifies various normative risks that were already manifest both within the IEL jurisprudence and the BHR discourse, and also creates new ones.[24] The strong, rule-based system of international trade, for instance, is unsettled by the idea of incorporating substantive external normative parameters, such as human rights and sustainable development, beyond the level of declarative statements.[25] On the other hand, various social discourses, such as environmental protection, sustainability, labour standards and human development, have a lot to lose by outsourcing

[21] Amanda Perry-Kessaris, 'What Does It Mean to Take a Socio-Legal Approach to International Economic Law?' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law* (Routledge 2014) 6.
[22] Kinley (n 19) 3.
[23] Voiculescu (n 15).
[24] Richard H Steinberg, 'Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development' (1997) 91 American Journal of International Law 231.
[25] Markus Krajewski, 'Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model Clauses for a UN Treaty on Transnational Corporations, Other Businesses and Human Rights' (CIDSE 2017) CIDSE, Private Sector Group 16; Caroline Dommen, 'The WTO, International Trade, and Human Rights' in Michael Windfuhr (ed), *Mainstreaming Human Rights in Multilateral Institutions*; World Trade Organisation (WTO), 'Human Rights and the WTO: Dispute Settlement and Trade Policy Review Mechanisms' (WTO 2011).

decision-making and dispute resolution processes to strong international trade and international investment systems.[26] Given the latter's strength and normative roots, it may easily prove biased in favour of its traditional market rationale. The linkage process, therefore, must be scrutinised and pursued cautiously, allowing for an appropriate recognition of the normative distinctiveness of the linked areas.[27]

In the meantime, two approaches are available for dealing with IEL and BHR linkage points.[28] One approach seeks a certain level of *normative universalism,* based on common roots between the linked social domains, building conceptual bridges by making use of terms such as 'development' and 'sustainability'.[29] The second approach proposes a common normative basis that grows from *consensus building* processes, which reflect a shared understanding of the importance of key building blocks of our social life, such as democracy, human rights and markets.[30] In reality, however, the approach is often a hybrid one, with the same linkage drawing both on universalist and consensus dimensions.[31] In this process of normative balancing and negotiations, the normative paradigm of social responsibility at both corporate level and international level appears to be in search of a 'soul' for its *homo economicus*: corporate law tries to show its responsiveness to public interest by tuning into the social responsibility discourse and by buying into the 'business case for human rights',[32] while IEL learns to speak the language of 'linkage' to human rights by coming to terms with new perceptions of its social role and by allowing new, *amicus curiae* voices to be occasionally heard in its dispute resolution forums.[33]

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[26] Valentina Vadi, 'Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?' (2015) 48(5) Vanderbilt Journal of Transnational Law 1285.
[27] Voiculescu (n 15) 227; Frank J Garcia, 'The Trade Linkage Phenomenon: Pointing the Way to the Trade Law and Global Social Policy of the 21st Century' (1998) 19(2) University of Pennsylvania Journal of International Economic Law 201, 204.
[28] Voiculescu (n 15) 229.
[29] Kathrine Gordon, Joachim Pohl and Marie Bouchard, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' (OECD 2014) OECD Working Papers on International Investment.
[30] Frank J Garcia, 'Globalization and the Theory of International Law' (2005) 11(Fall) International Legal Theory 9; Drusilla K Brown, 'Labor Standards: Where Do They Belong on the International Trade Agenda?' (2001) 15(3) Journal of Economic Perspectives 89.
[31] Brown (n 30) 92f.
[32] Angus Corbett and Peta Spender, 'Review Essay: Corporate Constitutionalism' (2009) 31(1) Sydney Law Review 147, 148f.
[33] Mary E Footer, 'Bits and Peaces – Social and Environmental Protection in the Regulation of Foreign Investment' (2009) 18(1) Michigan State Journal of International Law 33.

At the same time, the human rights' claim to universality is itself a source of tension when intersecting IEL.[34] As a now institutionalised discourse, it is generally accepted that human rights take precedence and that – in principle – markets should not be allowed to hinder the individual pursuit of welfare and happiness, either intentionally or through unintended consequences. Yet the choice between competing courses of action is considerably complicated by the fact that the neoliberal market underpinnings of IEL themselves build on a claim to universality that has recently been interpreted as being rooted in human rights. Put simply, this claim builds on the idea that the neoliberal model of market economy is uncontestably the best economic model for pursuing welfare and happiness. While the market itself does not 'care' directly about each individual, its individualism becomes its main virtue and the vehicle for pursuing human development.[35]

Approaching UNGP No. 9 through a 'linkage' strategy – that is through a strategy that tends to blur edges rather than establish normative hierarchies between markets and human rights – highlights other aspects that need consideration. Conceptually, the market-centred position on the link between trade and human rights has brought about the idea of fundamental economic freedoms, which propose unfettered free trade as a quasi-human right in itself.[36] Moreover, human rights law has recently been used directly by business actors in order to protect their *economic* interests,[37] in particular curbing a public authority's regulatory or enforcement powers. Human rights have been, therefore, converted, and some would say diverted – often through courts – for the protection of the corporate entity.[38] The corporate duty to respect,

[34] Voiculescu (n 15) 230.
[35] Paul O'Connell, 'On Reconciling Irreconcilables: Neo-Liberal Globalisation and Human Rights' (2007) 7(3) Human Rights Law Review 483.
[36] Nicolas Klein, 'Human Rights and International Investment Law: Investment Protection as Human Right?' (2012) 4(1) Goettingen Journal of International Law 199, 206; Timothy G Nelson, 'Human Rights Law and BIT Protection: Areas of Convergence' (2011) 12(1) Journal of World Investment & Trade 27.
[37] Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (OUP Oxford 2006); Stefanie Khoury and David Whyte, *Corporate Human Rights Violations: Global Prospects for Legal Action* (Routledge 2018) 136; Winfried HAM van den Muijsenbergh and Sam Rezai, 'Corporations and the European Convention on Human Rights' (2011) 25(1) Global Business & Development Law Journal 43.
[38] Emberland (n 37); Anna Grear, 'Challenging Corporate Humanity: Legal Disembodiment, Embodiment and Human Rights' (2007) 7(3) Human Rights Law Review 511; Khoury and Whyte (n 37).

protect and fulfil human rights thus becomes coupled with the corporate entitlement to the human rights themselves.[39] As will be outlined later in this paper, the move towards a domestically enforceable corporate 'right to trade', coupled with (transnational) institutional managerialism and with the 'judicial' norm generation flowing from international investment dispute resolution bodies, appear as the three key elements that are at work in the process of the 'constitutionalisation' of international investment governance structures.[40]

On closer inspection, therefore, putting together a research agenda that supports policy development aimed at embedding BHR within the international investment environment, and thus operationalising UNGP No. 9, requires the consideration of a multitude of parameters.[41] The methodological parameters should, of course, include jurisprudential lines of analysis and doctrinal scrutiny of the various distinct yet 'linked' legal discourses.[42] These will offer a legal insight into the normative and regulatory 'linkage', addressing the competing perspectives on the IIL–HR linkage areas, identifying points of legal tension and proposing eventual solutions from within the legal discourse. At the same time, opening the research agenda to interdisciplinary insights from numerous pertinent disciplines may shed light on understanding

[39] Luke Eric Peterson, 'Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration' (International Centre for Human Rights and Democratic Development Report 2009) 23.

[40] A number of studies address such processes of 'constitutionalisation', suggesting that those processes that promote and connect trade and investment institutions, management techniques, and quasi-judicial powers of discrete bodies are seen as constructing a 'constitution' for those institutions (such as WTO and ICSID). This suggests that there are certain mutations that are taking place in the traditional notion of constitutionalisation. Such processes enable those institutions to consider and evaluate non-economic and non-free-trade goals outside the usual domestic democratic processes, which raises obvious issues of legitimacy and democracy. Deborah Z Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, 2005) 22; Sol Picciotto, 'Constitutionalizing Multilevel Governance?' (2008) 6(3-4) International Journal of Constitutional Law 457, 471ff; Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization' (2006) 8(1) Theoretical Inquiries in Law 9, 21.

[41] Sabine Frerichs, 'Law, Economy and Society in the Global Age: A Study Guide' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2013) 37–43.

[42] Howse and Teitel (n 20) 7.

the linkage in a socio-legal perspective and thus may support governance and policy solutions to the existing fragmentation.[43]

3. Assembling a Research Agenda for BHR on the Bilateral Investment Treaty Platform

Within the IEL landscape, the international investment regime is probably one of the most successful 'new-style' regulatory and governance systems. A vast and complex area that has evolved in a pluri-centred way, IIL is submitted with difficulty to government-led long-term policy strategies. Built on mechanisms that often place governments and corporate actors on a somewhat reversed power position, one can see with difficulty how the 'spirit' of UNGP No. 9 can be operationalised by relying predominantly on government action. Based on a multitude of distinct investment treaties and economic agreements negotiated largely independently of each other, the international investment law system has created a vast transnational platform of investment and economic activity, which is based on special protections put at the disposal of the corporate actors. The foreign direct investment (FDI) pursued by business organisations on this treaty-infused platform is subject to a complex of legal norms stemming, on the one hand, from direct investment contracts and domestic, host-State law and, on the other hand, from international investment treaty and customary law.

Ironically, investment treaty law, with BITs as a prominent area, and the BHR sphere, now a key area of international human rights law, have both solidified their roles over the past decades. Featuring 'development' as one of the privileged operational parameters – sustainable development, economic development, human development – both domains should have a lot in common and should work in synergy.[44] However, due to the absence of appropriate linkage

[43] For an interesting structuring of such research dimensions along the legal text, context and subtext, see Perry-Kessaris (n 21) 6–10; United Nations, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission - Finalized by Martti Koskenniemi' (International Law Commission 2006) A/CN.4/L.682.

[44] John Linarelli, 'Law, Rights and Development' in John Linarelli (ed), *Research Handbook on Global Justice and International Economic Law* (Edward Elgar Publishing 2013); Philip Alston and Mary Robinson, 'Some Reflections on Human Rights and Development' in Philip

structures, in particular transnational governance ones, the two systems have grown in parallel and are conflicting in ways that undermine both discourses.

As pointed out in the previous section, the normative and regulatory fragmentation of international economic law has generally proved to have severe consequences at the point of contact (linkage) between domains such as investment treaty law and human rights. This explains the decision to address the issue through the UN Guiding Principles, in particular through UNGP No. 9. However, focusing exclusively on the responsibility of the State to maintain domestic policy space sufficient to protect human rights, UNGP No. 9 embraces a rather narrow approach that does not account for the transnational socio-economic complexity of the field and does not account for corporate actors as increasingly active and powerful players in the field.[45] While the safeguarding of regulatory space by governments remains vital, designing policies for resolving BIT–BHR conflicts requires more than the preservation of domestic policy space. The fragmentation of international law has allowed an investment system potentially inimical to human rights to become embedded in market practices through global governance structures. Within such structures, domestic governments appear as just one category of actors (and not necessarily a *primus inter pares*). This process of weakening of State actors on the international investment platform has been largely facilitated by the institutionalisation of a 'triangular' relationship set up through investment treaties. Such a relationship allows transnational corporate investors to act under a public international law umbrella while protecting exclusively corporate interests and profit margins. This has eroded a place largely reserved for the State, entrusted with the preservation of State and public interests.[46] Through an interplay of institutional set-ups, investment treaty provisions and arbitration activism, the relationship between private investors and their host States changed

Alston and Mary Robinson (eds), *Human Rights and Development : Towards Mutual Reinforcement: Towards Mutual Reinforcement* (Oxford University Press 2005).

[45] United Nations, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (n 10).

[46] Rodney Bruce Hall and Thomas J Biersteker, 'The Emergence of Private Authority in the International System' in Rodney Bruce Hall and Thomas J Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge University Press 2010) 4; Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553.

radically in less than two decades,[47] re-modelled into what can now be called a 'global public sphere', the impact of which extends well beyond investment.[48]

As an international law instrument, an investment treaty creates legal obligations between member States. It is governed by the international law of treaties, with governments holding each other responsible for the realisation of the obligations assumed reciprocally under the agreement. In practice, these treaties also create complex legal rights for other entities as well, in particular for directly investing corporations, affording them a rather special position.[49] Based on the rights created through the BITs' triangular set-up, TNC investors acquire the power to enforce the investment treaty, exercising direct agency in international law in ways that go beyond the realm of the private international sphere.[50] This privileged position has been largely downplayed in IEL discourse, the treaty component in the FDI being presented as a mere complement to the contractual investment agreements and the domestic regulatory platform.[51]

Yet, such 'complements' severely affect precisely that capacity of governments to preserve policy space and to act promptly when investment appears inimical to human rights and human development. Therefore, a BHR research agenda requires the unpacking of this 'complement' that leads to the BIT system and the corporate actors sometimes failing to deliver the desired sustainable development,[52] and which can contribute to the undermining of human rights in

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[47] Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20(1) European Journal of International Law 7, 9.

[48] Sol Picciotto, 'Liberalization and Democratization: The Forum and the Hearth in the Era of Cosmopolitan Post-Industrial Capitalism' (2000) 63(4) Law and Contemporary Problems 157, 160; Frank Biermann, Philipp Patberg, Harro van Asselt and Fariborz Zelli, 'The Fragmentation of Global Governance Architectures: A Framework for Analysis' (2009) 9(4) Global Environmental Politics 14.

[49] Koskenniemi (n 47) 9; OECD, *International Investment Law:Understanding Concepts and Tracking Innovations* (2008).

[50] Louis W Pauly, 'Global Finance, Political Authority, and the Problem of Legitimation' in Rodney Bruce Hall and Thomas J Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge University Press 2010).

[51] UNCTAD, 'World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge' (United Nations 2008) 162f; OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (n 49).

[52] UNCTAD, 'World Investment Report 2010: Investing in a Low-Carbon Economy' (United Nations 2010) 78; Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract FDI? Only a Bit … and They Could Bite' in Karl P Sauvant and Lisa E Sachs (eds), *Effect of Treaties*

host countries. The analysis of key arbitration decisions has shown, for instance, that when an investor's treaty rights conflict with the rights of the host country's population or with the host government's use of its regulatory powers, the investor's rights – more often than not – will prevail.[53] Moreover, the link between foreign investment, corporate activities and human rights has often been seen too crudely, through the lens of a simple and direct cause and effect link. On a closer look, the system is plagued by considerable deficits. The democratic deficit, related to the international investment institutional set-up, requires the input of political studies, international relations and critical democracy and governance studies in order to help understand the long-term social, political and economic implications of the negotiated investment treaties. Equally, the system appears afflicted by a deficit in integrated economic theory studies. The claim that the BITs establish a 'virtuous circle' for development has been long debunked,[54] yet this fails to impact conventional wisdom about FDI and BITs. For a long time, the prevailing perspective has been that a welcoming environment for FDI would necessarily bring with it regulatory stability and economic growth, good governance and the rule of law, thus providing a fertile ground for overall human development.[55] This has been used as a major argument in selling the drawbacks of BITs, such as the loss of regulatory flexibility. The premise of the virtuous circle has, however, been largely disproved, in particular in the case of developing countries,[56] where it has been shown that BITs can equally breed exploitation, environmental damage, human rights violations, corruption and *bad* governance.[57] Therefore, a research agenda questioning the balance of power established through BITs between the host countries and the investors requires a perspective that goes beyond a mere case-law approach. This would allow the debate as well as the policy

on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows - Oxford Scholarship (Oxford Scholarship Online 2009) 368.

[53] Aaken (n 9); Peterson (n 39).

[54] Susan Rose-Ackerman and Jennifer Tobin, 'Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties' (2005) *Yale Law & Economics Research Paper No. 293*; Andrew T Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38(4) Virginia Journal of International Law 639; Ndiva Kofele-Kale, 'The Political Economy of Foreign Direct Investment: A Framework for Analyzing Investment Laws and Regulations in Developing Countries' (1992) 23(2-3) Law and Policy in International Business 619.

[55] For competing meanings of this term see J Anthony VanDuzer, Penelope Simons and Graham Mayeda, 'Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries' (Commonwealth Secretariat 2012) 24f.

[56] Hallward-Driemeier (n 52) 379; Guzman (n 54).

[57] Hallward-Driemeier (n 52) 368, 374.

developments to be informed by other disciplinary perspectives, highlighting in a more systematic way, the economic, political and social implications of the BITs' trade-offs.[58]

The narrow perspective on the issue of the corporate impact on human rights on the investment treaties platform is still perpetuated by key international players. For instance, in a 2012 report, UNCTAD raised the issue of the social responsibility of corporate foreign investors predominantly in relation to the proliferation of corporate social responsibility (CSR) instruments, seen as impediments to international investment. In more recent documents, however, UNCTAD appears to acknowledge the need for reform of the international investment environment in order to incorporate social concerns.[59] Yet, it has been suggested that there is a need for a more radical change of the investment treaty paradigm, which would balance the interests of investors and host countries through acknowledging directly the human rights responsibilities of corporations.[60]

While not going as far as suggesting directly the inclusion of the human rights responsibilities of corporate investors in a model BIT, UNGP No. 9 raised, implicitly, some key issues. The integrated commentary to UNGP No. 9 links the weakening of the host country's policy space to 'the terms of international investment agreements [that] may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so'.[61] In other words, the UNGPs refer implicitly to those elements most deeply associated with the 'success'[62] of the BITs, elements such as umbrella clauses, the

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[58] Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017) 233; Jan Peter Sasse, *An Economic Analysis of Bilateral Investment Treaties* (Gabler 2011) 12, 67; Mavluda Sattorova, 'The Impact of Investment Treaty Law on Host State Behavior: Some Doctrinal, Empirical, and Interdisciplinary Insights' in Shaheeza Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration*, vol 3 (Martinus Nijhoff 2014).

[59] UNCTAD, 'Reform of the International Investment Agreement Regime: Phase 2. TD/B/C.II/MEM.4/14.' (2017).

[60] Patrick Dumberry and Gabrielle Dumas-Aubin, 'A Few Pragmatic Observations on How BITs Should Be Modified to Incorporate Human Rights Obligations' (2014) 11(1) Transnational Dispute Management. Special Issue: Reform of Investor-State Dispute Settlement: In Search of A Roadmap 1.

[61] United Nations, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (n 10).

[62] Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60(3) The International and Comparative Law Quarterly 573, 574; Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010) 1-35.

notion of fair and equitable treatment, the definition of 'investment', and last but not least, to the BITs' dispute resolution mechanisms themselves.[63] Similar concerns over the unfriendly terrain that the international investment system may represent for the protection of human rights have been raised in other fora. For instance, the final recommendations to the European Commission issued from the COST Action IS 0702, the Human Rights Partnerships section,[64] refer to the need for the European Union to review the existing BITs when those conflict with the Lisbon Treaty provisions on human rights and human development. Equally, the recommendations encouraged the development of a template for future BITs, a template that should respect 'the capacity for public regulation with regard to human rights'.[65]

4. Challenging Networks of Governance through BHR Methodology

The spontaneous development of customary-like transnational regulatory spheres, such as the BITs and investment agreements generally, tends to perpetuate the myth of a practical, process-oriented approach to rules generation, free from over-theorising and, most importantly, free from ideology. The underpinning theoretical perspectives, however, play a very important role in understanding, explaining and addressing the points of tension between the international investment regime and BHR. The research agenda aimed at investigating the UNGP No. 9 normative environment should therefore go beyond a focus on the fragmentation of international law and the normative and doctrinal intricacies of BITs and BHR as competing and conflicting discourses. It is equally important that we scrutinise the governance model that is put forth. Such a model will contain embedded conflict management (prevention, resolution, avoidance) pathways that should address both intra (IIL) and inter-systemic (IIL and HR or IIL and environment, for instance) conflicts. In this sense, international investment has often been presented as following a transnational networked governance model, for which the parameters

[63] Patrick Dumberry and Gabrielle Dumas-Aubin, 'How to Impose Human Rights Obligations on Corporations under Investment Treaties? Pragmatic Guidelines for the Amendment of BITs' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2011-2012*, vol 14 (Oxford University Press 2013).
[64] 'COST Action IS 0702: 'The Role of the EU in UN Human Rights Reform (2009-2012)'.
[65] ibid.

of governmentality are anchored in areas that reach beyond the State.[66] Within this model, the network concept is promoted as a tool for understanding and critically evaluating emergent transnational legal orders, such as the one of international investment.[67] The governance that emerges in complex set-ups, such as international investment agreements, is a hybrid one,[68] in which the public and private actors appear as 'integrated stakeholders',[69] following a polycentric structure, rather than a hierarchical structure, such as in a court system or a government bureaucracy. Such polycentric structure occupies an 'ambiguous space' between traditional and market-centred regulatory assemblages.[70] Against this backdrop of 'networked governance' beyond the State, and of processes of systemic spontaneous generation and 'customisation' of regulatory and conflict resolution pathways, the *de facto* corporate power and sphere of influence require careful scrutiny.

In the context of investment treaty law, it is largely recognised that maintaining an adequate domestic policy space by host States, as recommended by UNGP No. 9, has been put under considerable pressure. This pressure was applied largely through informal but forceful corporate influence,[71] to the extent to which corporate actors appear as 'steering subjects' in international economic law.[72] One of the key features that can be identified as enabling the steering role of corporate organisations is their capacity to take part in law-making processes and regulatory design. While involving various stakeholders in generating regulatory

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[66] Larry Cata Backer, 'Private Actors and Public Governance beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order' (2011) 18(2) Indiana Journal of Global Legal Studies 751.

[67] Mark Fewick, Steven Van Uytsel and Stefan Wrbka (eds), *Networked Governance, Transnational Business and the Law* (Springer 2014) 3.

[68] Randall Germain, *Global Politics and Financial Governance* (Palgrave Macmillan 2010) 131.

[69] Backer (n 66).

[70] Fewick, Uytsel and Wrbka (n 67) 3. John Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights' (2014) 20 *Global Governance: A Review of Multilateralism and International Organizations* 5, 9.

[71] Peter Muchlinski, 'Policy Issues' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment* (Oxford University Press 2008) 7;
Andrew Walter, 'Unravelling the Faustian Bargain: Non-State Actors and the Multilateral Agreement on Investment', *Non-state Actors in World Politics* (Palgrave Macmillan 2001) 150.

[72] Karsten Nowrot, 'Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future?' (2011) 18(2) Indiana Journal of Global Legal Studies 803, 805.

instruments is not unusual, over the past decades, corporations have been engaging with States largely on an equal footing, influencing investment agreements that cater for their needs but that incorporate few, if any, of the key parameters of sustainable human development, such as human rights and the environment.[73] The TNCs' increased steering influence is also illustrated through their participation in IEL hybrid instruments, such as international investment 'State contracts'. While the applicable legal instruments (domestic, international, mixed) have been extensively debated, the key element to be noted here is that TNCs regularly engage in such agreements at eye level with the States.[74] Such processes have been increasingly promoting TNCs as key players in an emerging 'transnational law-making community',[75] enhancing the fragmentation of international law and, more importantly, the fragmentation of the capacity for addressing economic and human development in an integrated way. Interrogating, therefore, the notion of governance and, in particular, that of networked governance,[76] foregrounds the mechanisms through which human rights are affected and ultimately helps identify and address the governance deficit.

Another equally relevant aspect of the impact of networked governance on BHR operationalisation is the steering role of corporate actors in international investment through their dominant position in the dispute settlement mechanisms and more generally, within the transnational governance network. More specifically, this aspect refers to the 'mixed' dispute settlement mechanism – between host States and corporate foreign investors – used as the most common way of resolving international investment disputes.[77] In the context of a polycentric networked governance system, characterised by the absence of a hierarchical court structure or

[73] OHCHR, 'Trade Agreements Should Mainstream Human Rights - UN Expert Urges' (2016); Alfred-Maurice de Zayas, 'Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order' (2016) Thematic Report, pursuant to Council resolution 30/29 A/HRC/33/40.
[74] Nowrot (n 72) 823.
[75] Peter Muchlinski, '"Global Bukowina" Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community' in Gunther Teubner (ed), *Global Law without a State* (Dartmouth Publishing 1997) 79.
[76] David Levi-Faur, 'Regulation & Regulatory Governance' (2010) Working Paper No. 1 *Jerusalem Papers in Regulation and Governance* 1, 25–27; Ruggie (n 70) 5.
[77] Sachet Singh and Sooraj Sharma, 'Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap' (2013) 29(76) Merkourios: Utrecht Journal of International and European Law 88.

even of a formalised precedent-based international investment jurisprudence,[78] the ad-hoc arbitral tribunals are shaping the normative standards in a customary law fashion, with corporate actors playing a dominant role. While this is not an entirely novel process, the past years have seen a 'strengthening of the position of TNCs in this regard',[79] and even a forceful promotion of such litigations.[80] Corporate investors have also been empowered by the migration of the arbitration provisions clauses, from the respective State contract between the host State and the investor, as it more commonly used to be the case, to what are now investment treaty clauses.[81] From a private, contractual entitlement to making use of arbitration options, the corporate investors got their legal status upgraded to direct subjective rights to investor–State arbitration *conferred under international law*.[82] This institutionalisation of dispute resolution under international law must be acknowledged through the research agenda, not only as a means of application and enforcement of the law, but as a very powerful means of international law making,[83] achieving an important step in the corporate actors' transition from objects to subjects of international law.[84]

These complex elements of the corporate regulatory positioning on the international arena take place against the backdrop of complex globalisation processes that are further conducive to the fragmentation of social and, thus, of regulatory spheres, displacing the State-centred political and rule-making processes towards multi-layered processes through which a host of actors interact and, more importantly still, through which corporate actors are perceived as

[78] Giorgio Sacerdoti, 'From Law Professor to International Adjudicator: The WTO Appellate Body and ICSID Arbitration Compared, a Personal Account' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 206.
[79] Nowrot (n 72) 823.
[80] Corporate Europe Observatory (CEO), 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom' (Corporate Europe Observatory (CEO) and the Transnational Institute (TNI) 2012) 7.
[81] OECD, 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' (2012) OECD, Investment Division, Directorate for Financial and Enterprise Affairs; OECD, 'Environmental Concerns in International Investment Agreements: A Survey' (2011) OECD Working Papers on International Investment 2011/01.
[82] Alex Mills, 'The Balancing (and Unbalancing?) Of Interests in International Investment Law and Arbitration' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (Oxford University Press 2014) 462.
[83] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 263ff.
[84] *Plama Consortium Limited v Republic of Bulgaria* [2008] ICSID Case No. ARB/03/24.

influencing unduly the agenda.[85] In this context, the State appears to surrender 'the production of public goods' to corporate actors and other entities, such as non-governmental organisations. This renders the State leaner and yet capable to delegate implementing public tasks both at home and abroad.[86] In the context of the fragmented competing and conflicting international law spheres, such as investment treaty law and international human rights law, the resolution of such conflicts is seen to be delegated (or surrendered) to networked governance structures beyond the State.[87] Such structures, however, acknowledge with difficulty a clear responsibility for embedding human rights in their mode of functioning. There are no easily identifiable institutionalised points of access and established procedural obligations that can make the governance network respond promptly to social harm and tensions.[88] As to the victims, the networked governance structure gives no address to send petitions and no customer relations number to ring and complain. Human rights prevention measures and compensatory remedies remain therefore to be provided by governments with weakened policy space and corporate actors that may or may not subscribe to CSR and the 'business case for human rights' doctrines.

In this context, the production of governance and regulation,[89] understood as public goods that are ultimately meant to address the fragmentation of the social spheres[90] and to establish an authoritative hierarchy of values that prioritises sustainable human development over immediate market values, becomes in fact 'denationalised' and displaced from its social contract foundation. Yet, in the context of networked governance, this is not necessarily seen as a public governance problem. The idea is that, for as long as the processes of producing the required public goods continue (through networked governance processes rather than

[85] James N Rosenau, 'Governance in a New Global Order' in David Held and Anthony McGrew (eds), *Governing Globalization: Power, Authority and Global Governance* (Polity Press 2002) 70.
[86] Jost Delbruck, 'Transnational Federalism: Problems and Prospects of Allocating Public Authority beyond the State Lecture: The Earl A. Snyder Lecture in International Law' (2004) 11(1) Indiana Journal of Global Legal Studies 31, 43.
[87] Backer (n 66) 751.
[88] Levi-Faur (n 76) 24.
[89] Levi-Faur (n 76).
[90] Aurora Voiculescu, 'Investment in Human Rights: Defragment or Reboot? (Panel: International Economic Law: Governing Markets in Context. Convenors: C. Tan, G. Castellano and S. Connelly' (Socio-Legal Studies Association Annual Conference 2015) <https://papers.ssrn.com/abstract=242045#> accessed 17 October 2018.

stemming from State policies), the resulting normative selection and regulatory outcome will reflect some kind of integrated stakeholder perspective.

Such regulatory systems are shaped in ways that express agreements and synergies that are generated from within the governance network itself. The governance system that emerges from such conceptualisation is understood to consist of 'frameworks of institutional communication'[91] that assemble a certain number of governance subsystems, such as private systems, global frameworks and autonomous corporate regulatory instruments.[92] For instance, the promotion and realisation of human rights is largely dependent upon the dynamics of a network of governance forces that comprises State systems, corporate actors (as private governance systems that exert both internal authority – over their own internal structures – and external authority – over their supply chains, for instance),[93] global governance frameworks (including, for instance, the UN 'Protect, Respect and Remedy' Framework) as well as autonomous corporate 'constitutional' instruments stemming from institutions such as the OECD.

In this (meta-)governance set-up, the barriers between public and private, and between hard and soft legal norms, are constantly blurred.[94] In the context of such governance networks, the corporate actors emerge as 'autonomous, functionally differentiated organisations' which, within the scope of their network-generated mandate, exercise (internal and external) 'regulatory authority'.[95] The rules that emerge out of the communications taking place within

[91] Backer (n 66) 758.
[92] Joana Mendes, 'Rule of Law and Participation: A Normative Analysis of Internationalized Rulemaking as Composite Procedures' (2014) 12(2) International Journal of Constitutional Law 370, 374.
[93] Doreen McBarnet and Marina Kurkchiyan, 'Corporate Social Responsibility Through Contractual Control: Global Supply Chains and "Other-Regulation"' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 59.
[94] Doreen J McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 9.
[95] Backer (n 66) 761; Gunther Teubner, 'The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination' in Rainer Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification* (Intersentia Publishers 2010) 206.

the governance networks become binding[96] and impact across both private and public spheres. Such regimes draw strength not from the traditional State authority, but through the acquiescence of corporate agents to those normative hierarchies and regulatory instruments that they have helped produce and that reflect the internal values of the corporate discourse.[97] This type of governance by contract and internal/networked production of norms[98] is presented as a recipe for governance success and cost-effective compliance.[99]

However, the extent to which such frameworks of polycentric governance, with corporate private actors as key players, can be instrumental in internalising human rights norms, and thus in defragmenting the various competing discourses within international law, remains to be further interrogated. Mapping out the actors and the nodes of the network, capturing the relevant institutional communications and grasping the nature of the communications taking place between actors will facilitate a pluridisciplinary understanding of a normative or regulatory point of tension.[100] It is recognised, for instance, that corporate engagement in the dialogue on social values, such as human rights, is conditioned in particular ways. For instance, 'voluntary' compliance is said to intervene 'when massive learning pressures' are exerted on the corporation 'from the outside', and the internalisation of societal values comes about, according to Teubner, 'neither due to intrinsic motives of voluntariness, nor due to the sanctioning mechanisms of State law, but to a circuitous translation process in which different learning pressures come to bear'.[101] Understanding what those pressures are, whether a governance network can generate those pressures, and if so, how, is crucial for embedding BHR in the international investment platform.

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[96] Teubners, for instance, speaks about processes of 'constitutionalisation of private governance regimes'. Teubner (n 95) 205.
[97] Laura Albareda, 'Corporate Responsibility, Governance and Accountability: From Self-Regulation to Co-Regulation' (2008) 8(4) Corporate Governance 430.
[98] Teubner (n 95) 208.
[99] See Koskenniemi's transformations of the vocabularies of power in this respect. (n 40).
[100] Gabriel A Huppé, Heather Creech and Doris Knoblauch, 'The Frontiers of Networked Governance' (The International Institute for Sustainable Development Report 2012); Ruggie (n 70) 5.
[101] Teubner refers to this process as a process of 'autoconstitutionalisation of corporations'. Gunther Teubner, 'Self-Constitutionalizing TNCs – On the Linkage of Private and Public Corporate Codes of Conduct' (2011) 18(2) Indiana Journal of Global Legal Studies 617, 638.

The networked governance perspective on the BIT system and the *de facto* power that corporate investors are understood to hold in the system[102] ought to inform and shape the approach to understanding the context of UNGP No. 9. The relevance of this context should be extended beyond the immediate formulation of Principle No. 9 and of the 'Protect, Respect and Remedy Framework',[103] both of which place an important amount of the BHR agenda with the State rather than with the corporate platform.[104] The issue of the governing of complex international spheres, such as international trade and investment, has long been recognised as overpassing the remit and capacity of a traditional system of international structures, which presupposed the State at its epicentre. It is thus time that the research approach on BHR 'constitutionalises', in its turn, a more comprehensive interdisciplinary research agenda, that covers essential complementary dimensions of doctrinal and socio-legal methodologies.

5. Theoretical and Empirical Aspects of a Socio-Legal Research Agenda for BHR

The important 'technical' success of international investment law as an expanding normative sphere, with its affirmation of TNCs as steering actors in ever more complex networked governance processes, seems to have reached a moment of intense questioning. Critical aspects stemming from both theoretical and empirical investigations question the capacity of transnational networked governance structures to achieve autonomously a satisfactory defragmentation of international law and to get corporate constitutional processes to internalise human rights. This invites the development of further research strands that are informed by governance studies and politics. Some scholars, for instance, offer a critique of the networked governance model by attempting to rehabilitate the political, that is the public register of debate and normative negotiation and reflection that is traditionally associated with processes of formalising normative hierarchies. According to this line of critique, the investor rights/human

[102] Martens and Richter (n 14).
[103] United Nations, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' A/HRC/8/5.
[104] Radu Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers / Brill Academic 2012).

rights normative hierarchy should be debated and resolved in such a public space, rather than through the opaque communications of a transnational network of governance.

From this perspective, one can identify a number of dangers associated with the transnational networked governance model and with the co-option of non-State production of governance and regulation.[105] First, there is the danger that the 'constitutional' process of production of governance and regulation that now takes place within the networked governance structures undercuts what we would typically associate with the 'constitutional', namely its deliberative framing function, i.e. the 'constitutional' as a place of social debate and contestation, that balances the public–private hierarchy.[106] Within the network governance framework, such distinctions become largely obscured. Secondly, there is the danger that this loss of the constitutional framing function is further enhanced in the transnational sphere, due to the complexity of governance networks and to the absence of external supervisory structures that would bear direct responsibility for the public interest.[107] Finally, there is the danger that the frameworks of institutional communication established within the networked governance structures are prone to market capture, in which case, again, the network remains only nominally political.[108] Overall, this perspective highlights the risk of the collapse of democratic categories into market thinking, as well as the risk of politics that cannot escape the logic of price any longer.[109] Therefore, far from being a sterile enterprise, an engagement with the theoretical frameworks that inform conceptions of politics and democracy becomes the cornerstone of the process of putting together a viable research methodology. It is through engaging with such theoretical frameworks that we can identify not only where the points of normative tension lie, but also how they arise.

In addressing competing perspectives on governance structures, BHR researchers should combine the theoretical socio-legal perspective informed by political theory and governance

[105] Or, as Teubner defines it, the production of societal 'constitutionalism'. Teubner (n 101).
[106] Alain Supiot, 'The Public–Private Relation in the Context of Today's Refeudalization' (2013) 11(1) International Journal of Constitutional Law 129.
[107] Sol Picciotto, *Regulating Global Corporate Capitalism* (Cambridge University Press 2011) 483ff.
[108] LM Moncrieff, 'The Molotov Milkshake: Corporate Social Responsibility and the Market' (2011) 22(3) Law and Critique 273.
[109] Emilios Christodoulidis, 'On the Politics of Societal Constitutionalism' (2013) 20(2) Indiana Journal of Global Legal Studies 629, 663.

studies, while being mindful of internalising the specific (theoretical) issues of varied empirical contexts. Adopting such an approach would provide for a comprehensive methodology, complementing other discipline-bound and theoretical approaches. However, it should be pointed out that, while investigating BHR norms with the contribution of multiple disciplinary perspectives has its own difficulties, undertaking empirical research brings with it additional challenges. How does one investigate empirically complex networks that generate governance from multiple intricate nodes of opaque institutional communications? Which node of the network and which part of the network communications do we select for such an approach? The research agenda for such a topic resembles an investigative puzzle and can benefit from complex interdisciplinary and empirical accounts. From socio-legal approaches to investigating investment arbitration tribunals and international investment dispute resolution processes, to the scrutiny of international investment experts as an influential professional category, as well as the historical analysis of how investment treaties come to life or how investor-State disputes emerge or are discouraged, there is a mosaic of issues and approaches that could and largely should inform the BHR research agenda.

As mentioned at the beginning of this paper, the aim here is not to propose a fit-all 'model methodology' that addresses the intersection of BHR with the international investment regime, but rather to map out lines of investigation that should enhance and expand the focus of instruments such as UNGP No. 9. For instance, whereas UNGP No. 9 focuses exclusively on the responsibility of States to oversee international investment and human rights, one other relevant line of inquiry would relate to corporate processes. In particular, such a line of inquiry would focus on the extent to which international investment can be seen as part of the corporate 'sphere of influence'.[110] Such a perspective should invite – through the evaluation of context, impact and contribution – a jurisprudentially as well as empirically-informed corporate due diligence element of the BHR research and policy agenda.[111]

Engaging with the theory through empirical avenues can equally contribute to the critique and understanding of the role of corporate actors within governance networks. The structures that

[110] John Ruggie, 'Clarifying the Concepts of "Sphere of Influence" and "Complicity"' (United Nations Human Rights Council 2008) Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises A/HRC/8/16.
[111] Ibid, para. 6 & 7.

make up such networks are usually seen as a solution to the defragmentation of investment and human rights discourses, as a mechanism from which appropriately shaped norms, would spontaneously be generated simply through the civilised communications between the network actors. Stemming from the issue of corporate engagement within their sphere of influence, which it is argued, includes the very governance network, a second line of critique and inquiry derives from empirically informed research (in institutional theory and the sociology of organisations, for instance). Such research shows TNCs – key network actors – display three types of engagement with other social spheres and institutions: institutional avoidance, institutional adaptation and institutional coevolution, each with its own drawbacks for the human rights agenda.[112] According to these perspectives, when faced with an institutionally weak environment, characterised by lack of accountability, political instability, poor regulation and deficient enforcement, TNCs will avoid engagement and adopt an 'exit' rather than a 'voice' strategy. Alternatively, when faced with a weak normative environment, TNCs may engage by 'adapting' to that environment, emulating behaviour and commercial culture, or by making use of political influence and bribery, for instance. In other words, the corporate actor will 'go native'. Finally, institutional coevolution takes place when the corporate actors are no longer content just to adapt, but aim to effect change in the local formal and informal institutions. A TNC might, for instance, engage in political activities in order to advance specific kinds of regulation or market structures that give it an advantage.[113] In line with this perspective, the BHR research offers a plethora of empirical evidence, supported by doctrinal and jurisprudential studies of the international investment arbitration case-law, which can illustrate and support the pertinence of the three levels of the corporate engagement perspective.[114]

However, engaging empirically with networked governance structures highlights challenges that go beyond the perspective on the three rules of corporate engagement mentioned above. As pointed out earlier, governance networks, such as the ones regulating the BIT system,

[112] Sarianna M Lundan, 'The Coevolution of Transnational Corporations and Institutions' (2011) 18(2) Indiana Journal of Global Legal Studies 639, 649.
[113] John Cantwell, John H Dunning and Sarianna M Lundan, 'An Evolutionary Approach to Understanding International Business Activity: The Co-Evolution of MNEs and the Institutional Environment' (2010) 41(4) Journal of International Business Studies 567; Martens and Richter (n 14).
[114] Corporate Europe Observatory (CEO) (n 80); Martens and Richter (n 14).

appear as polycentric structures, the geography of which is not always easy to trace with clarity. Such structures are not likely to offer clear pathways to remedy for human rights harm, nor will it be easy to 'listen' to the institutional communications taking place between the nodes of the network, a good number of those being subliminal. Yet, an effort needs to be made to put together methodologies that can capture as many of these communications as possible and could inform human rights-friendly policies aimed at the international investment regime.

While the possible methodological avenues of investigation are multiple, the purpose of this paper has not been to draw an exhaustive list, but to tease the methodological imagination that would foster a systematic socio-legal multidisciplinary approach. Such a comprehensive approach would build on a mixed methods/mixed data methodology that blends quantitative and qualitative, empirical and theoretical socio-legal methodologies. It would identify key network nodes and focus on the alignment of interests of key actors as well as on the specificity of varied political contexts, thus functioning as a framework of analysis for the intersection of BHR with international investment and, equally, with other socio-economic spheres. Such a complex, empirically supported approach, identifying actors and institutional communications, could prove an effective tool of practical reflection and BHR policy design.[115]

Ultimately, in complex normative set-ups such as the networked governance in international investment (many other BHR issues would qualify for same level of complexity), a key avenue of research would seek to map out disciplinary areas of empirical enquiry and to bring these to bear on the construction of the socio-legal puzzle of networked governance. This would entail deploying what one could identify as a methodological pluralism, that is a commitment to designing a research methodology that reflects the complexity described above. While some have argued for an investigative pluralism with respect to the legal points of tension in IEL [116]

[115] When researching labour rights in international supply chains, for instance, Berliner and colleagues drew on a mixed-methodologies approach in order to identify the relevant policy avenues related to the promotion of international labour rights. While the authors do not directly engage with the networked governance debate, their proposed model identifies stakeholders as 'working-clusters of actors' and uses interests 'alignment' as a signal of inter-cluster institutional communications. Daniel Berliner, Anne R. Greenleaf, Milli Lake, Margaret Levi and Jennifer Noveck, *Labor Standards in International Supply Chains: Aligning Rights and Incentives* (Edward Elgar Publishing 2015).

[116] James Harrison, 'The Case for Investigative Legal Pluralism in International Economic Law Linkage Debates: A Strategy for Enhancing the Value of International Legal Discourse' (2014) 2(1) London Review of International Law 115 (emphasis added).

or EU law,[117] what is argued for here is for BHR researchers to design pluralist frameworks of empirical and analytical socio-legal inquiry that would encourage the various disciplinary fields – some of which were highlighted in the previous sections – to carry out multidisciplinary conversations in support of BHR policies. In this sense, rather than focusing on analysing (and producing) 'buffer' zones around the 'linkage' points of tension discussed earlier in this paper, such an approach would undertake to explore the relevant points of tension. The use of multiple methodological tools would offer an account of the challenges that networked rule-generating poses to normative discourses such as human rights, rooted as the latter are in traditional deliberative practices. These challenges can only be apprehended 'if they are seen in their entirety as segments of a broader regulatory cycle'.[118] Rather than applying the same investigative frameworks to each actor or node in the networked governance structure, thus ignoring the huge differences in nature, role and the level of transparency of these actors and nodes, researchers can instead draw on an investigative methodological pluralism – perhaps even with the risk of creating 'unruly assemblages'[119] – in order to account for the complexity that characterises the BHR reality.

6. Conclusions

Business and human rights emerged as a field of political action and as an academic discipline at the intersection of multiple normative discourses, such as human rights, business ethics, commercial law, international economic law and international investment law, development, to mention just a few. It grew in what might be seen as challenging times for the domestic, international and transnational governance structures. Essentially an 'intersection' discourse – of legal, normative and policy fields, of hard and soft law, of domestic and trans-national governance – BHR should be seen as a fundamentally interdisciplinary socio-legal field of research *and* policy. Of course, approaching BHR topics from a mono-disciplinary perspective (be it legal, business and management, governance, or other) remains a valuable contribution to the field. Yet, as our reflection on UNGP No. 9 normative context has shown, from the point

[117] Mendes (n 92).
[118] See Mendes for an insightful normative analysis of internationalised rulemaking. Ibid 370.
[119] John Law, 'Making a Mess with Method' in William Outhwaite and Stephen P Turner (eds), *The Sage Handbook of Social Science Methodology* (Sage 2007) 606.

of view of a research agenda that aims to inform a coherent and effective policy approach, a complex interdisciplinary, socio-legal inquiry becomes imperative.

The sketching of the contours of an interdisciplinary approach to UNGP No. 9 should, of course, be seen only as an illustration of such an approach, not as an exemplar or ultimate 'model' of a prescribed methodology. Different BHR issues will bring different challenges, and thus will inform different selections of methods and intersections of disciplines. The issue of governance models does appear, however, as a defining issue. In the case of UNGP No. 9, it draws attention to competing normative and legal discourses, institutional set-ups and institutional communications. It equally brings into focus a requirement to map out the actors of the transnational network of governance, who shape investment treaty law to various extents, and to identify their characteristics, roles and power of steering.

In particular, a salient approach to investigating linkage areas such as the one within the purview of UNGP No. 9 would be mindful not only of parameters of regulatory behaviour (i.e. direct regulation of instances of normative intersection between BITs/IIL and human rights), but also of the potential of research and policy to develop in ways that set out to integrate a risk analysis of economic, financial and BHR parameters. Informed by normative universalism and consensus building processes, the engagement with fields such as governance studies, the sociology of organisations, development studies, environmental studies, labour standards, socio-economic rights, (sustainable) development and more generally, (global) social justice would also highlight key points on the BHR agenda. From the interface of IEL and IIL with these domains emerges a variety of new substantive areas of BHR research and policy, such as public health, environmental regulation, public services, competition and consumer law, to name just the most prominent. All these domains make a claim for the re-negotiation of the public sphere in ways that are significant for the normative core of BHR as well as IEL and IIL. In refining our interdisciplinary repository of methodologies, we can, therefore, aim to improve our access to the web of transnational socio-economic practices, while at the same time bringing the various levels of empirical inquiry to bear. We can thus help shape a more coherent and transparent policy approach to the current BHR challenges and, ultimately, produce genuinely sustainable human development.