The *Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and Colombia* and home state responsibility to prevent transnational human rights and environmental harm caused or enabled by international investment agreements

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To my Father,
Without whom
Many of my ways
Would have been lost.

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Stanko Krstik
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List of frequently used acronyms

BIT- Bilateral Investment Treaty

CCOFTA- Canada-Colombia Free Trade Agreement

EIA- Environmental Impact Assessment

FPIC- Free, Prior and Informed Consent

HRIA- Human Rights Impact Assessment

IIA- International Investment Agreement

MNC- Multinational Corporation

PSNR- Permanent sovereignty over natural resources

SIA- Social Impact Assessment

SRSG- Special Representative of the United Nations Secretary-General on transnational corporations and other business enterprises

TIA-Trade and Investment Agreement

Abstract

The *Canada-Colombia Free Trade Agreement* (CCOFTA) came into force in August 2011 amidst concerns that the provisions protecting Canadian investment in Colombia could exacerbate the precarious human rights situation. The *Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and Colombia* was negotiated to address such concerns by enshrining the first ever human rights impact assessment (HRIA) of a free trade and investment agreement (TIA) in an internationally binding instrument. This thesis builds on a growing body of international legal scholarship that has considered the duty of home states of private investors to regulate their activity in the host state so as to prevent them from causing or contributing to human rights and environmental harm. It examines state obligations found in human rights, environmental and general principles of international law to propose that while an obligation might exist for the home state to exercise unilateral regulation of its investors, in the presence of a TIA that could cause or enable private human rights or environmental harm, investor regulation *through the TIA* can be seen as duty for both the home and host states. In view of the absence of such regulation in the CCOFTA, this thesis will consider if the annual HRIA mechanism is an alternative for preventing human rights and environmental harm caused or enabled by the TIA. It is submitted that while HRIAs of TIAs are a novel concept for which little international practice exists, this mechanism has the capacity to provide concrete evidence of human rights or environmental harm caused or enabled by the TIA, but only if based on a methodological model that uses existing state international human rights law obligations as indicators to measure a change in the human rights situation, draws unequivocal causal links between the investment protection provisions and human rights indicators, and allows for broad public participation, especially from the most marginalized and underrepresented groups in the host state to validate its methodology and findings. While under international law all investment-exporting states might have a duty to conduct HRIA on the effects of a proposed TIA as part of the due diligence to prevent transnational harm, the enshrinement of such assessments in an internationally binding instrument triggers a duty for the home state to, on one hand use the HRIA mechanism to prevent transnational human rights or environmental harm and, on the other hand, structure its annual assessments according to the described model in order to give effect to the duty to prevent. Broad and inclusive participation of the local affected communities from the host state in the HRIA becomes an integral component of the home state duty to prevent that can be expected to reveal any negative effects on the human rights situation from the TIA provisions, as well as the type of action required from both states parties to address them.

Keywords: *Canada-Colombia Free Trade Agreement*, *Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and Colombia*, International Investment Agreements, Human Rights Impact Assessments, transnational human rights and environmental harm, home state duty to prevent.

Introduction

> "I fancied that those nations which, starting from a semi-barbarous state and advancing to civilization by slow degrees, have had their laws successively determined, and, as it were, forced upon them simply by experience of the hurtfulness of particular crimes and disputes, would by this process come to be possessed of less perfect institutions than those which, from the commencement of their association as communities, have followed the appointments of some wise legislator."
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> René Descartes, *A Discourse on Method, 1637*[1]

> "Five hundred years after the Spanish conquest that dispossessed indigenous peoples for economic interests, two modern states are doing the same. One would think that five hundred years later a different model for companies to invest would be developed. A model that is compatible with the survival of indigenous peoples."
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> Patricia Tobón Yagarí, National Indigenous Organization of Colombia[2]

In June 2007 the Government of Canada entered into negotiations with the Government of the Republic of Colombia for a comprehensive bilateral free trade agreement, the "Canada-Colombia Free Trade Agreement" (CCOFTA) covering trade in goods, services, as well as a chapter for the protection of private investment.[3] The agreement was signed in November 2008 and received Royal Assent on June 29, 2010 after implementing legislation was passed in the Canadian Parliament earlier that month.[4] The CCOFTA came into force for Canada on August 15, 2011.[5]

The CCOFTA negotiations were concluded and the treaty came into force amidst strong opposition from Canadian opposition parties, as well as civil society, academia and social

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[1] René Descartes, *A Discourse on Method*, translated by Donald A. Cress (Indianapolis: Hackett Pub, 1998).
[2] Lecture delivered at Amnesty International-Canada, "Contested land, threatened Indigenous peoples and the role of Canada in Colombia", May 22, 2013.
[3] *Free Trade Agreement between Canada and the Republic of Colombia*, Signed 21 November 2008, entry into force 15 August 2011, available at http://www.treaty-accord.gc.ca/details.aspx?id=105165, accessed August 21, 2013 [hereinafter "CCOFTA"].
[4] Canada, Department of Foreign Affairs and International Trade, News Release, "Legislation to Implement the Canada-Colombia Free Trade Agreement Receives Royal Assent" (30 June 2010), found online at http://www.international.gc.ca/media_commerce/comm/news-communiques/2010/208.aspx?view=d. See Bill C-2, *An Act to implement the Free Trade Agreement between Canada and the Republic of Colombia, the Agreement on the Environment between Canada and the Republic of Colombia and the Agreement on Labour Cooperation between Canada and the Republic of Colombia (short title: Canada–Colombia Free Trade Agreement Implementation Act)*, 3d Sess., 40th Parl., 2010.
[5] See Canada, Department of Foreign Affairs and International Trade, News Release, "Canada-Colombia Free Trade Agreement Comes into Force" (August 15, 2011) found online at http://www.international.gc.ca/media_commerce/comm/news-communiques/2011/230.aspx?lang=eng&view=d

activists from both countries who spoke against Canada's signing of this free trade agreement given the ongoing human rights situation in Colombia.[6] Specific concerns were expressed that the "serious and persistent human rights crisis in Colombia" may be exacerbated by the implementation of the CCOFTA.[7] Opposition voices questioned the economic gain for Canada from the trade in goods with Colombia that was presented as standing to see an increase from this deal, while emphasizing that the real reason behind the CCOFTA negotiations lies in its investment protection chapter whose true beneficiaries would be Canadian-based corporations operating in Colombia.[8] Canada's support for the CCOFTA was seen as political support for the Colombian Government despite of its bad track record for respecting human rights. In particular, the economic ties of the Colombian government with foreign corporations raised fears of the latter becoming complicit in human rights abuses which in turn led to the terms of the investment chapter of the treaty being described as "exposing indigenous people, Afro-Colombians and rural dwellers to land grabs by Canadian mining companies equipped with powerful new investor rights, but no binding responsibilities".[9] Additional concerns were expressed about the lack of consultation from either government with local communities whose livelihoods the CCOTFA is likely to directly affect, and especially about "due process" prior to the implementation vote that, in the view of trade justice activists, represented a failure of Canada to undertake extensive

[6] See for example, Amnesty International (Canada), Canadian Council for International Cooperation, Canadian Labour Congress and The Council of Canadians, Joint Statement, "Canada-Colombia Human Rights Deal "Empty": Civil Society Leaders", June 14, 2010 (found online at http://www.ccic.ca/_files/en/media/news_2010-06-15_canada-colombia_human_rights.pdf accessed August 21, 2013).
[7] *Ibid*.
[8] See e.g. Canadian Council for International Co-operation, Canadian Association of Labour Lawyers, Canadian Labour Congress, Canadian Centre for Policy Alternatives, *Making A Bad Situation Worse: An Analysis Of The Text Of The Canada-Colombia Free Trade Agreement* (Ottawa: CCIC, 2009), 2.
[9] *Ibid*.

consultation of community witnesses from Colombia on the implementation of the CCOFTA.[10]

After hearing expert and civil society witnesses from Canada, the House of Commons Standing Committee on International Trade produced a report in June 2008 in which it noted these and other concerns about the possible negative effects of the CCOFTA on the human rights situation in Colombia. It recommended that the Canadian Government not ratify the free trade agreement without addressing these issues.[11] The Committee paid special attention to human rights abuses by private corporations the CCOFTA could enable or contribute to, and recommended that the Canadian Government adopt "legislated provisions on corporate social responsibility and reporting mechanisms to monitor the implementation of universal human rights standards by Canadian entities investing in Colombia".[12] The Committee also recommended that before signing the CCOFTA, the Canadian Government commission an "independent, impartial, and comprehensive human rights impact assessment", as well as address the findings of that study before proceeding with ratification.[13] None of the Committee's recommendations were implemented by the Canadian government before the CCOFTA came into effect.[14]

Due to the specific configuration in the Canadian Parliament at the time, the concerns about the harmful impact of CCOFTA on human rights in Colombia prevented, for more than a year, a minority Government from obtaining the support of opposition parties for passing the

[10] Council of Canadians *supra* note 6. The implementation vote was stalled in the Canadian Parliament for over a year until the House of Commons fast-tracked the debate on the proposed Bill C-2 after a side agreement on annual human rights reports was negotiated in early 2010.
[11] House of Commons, Standing Committee on International Trade, *Human Rights, the Environment and Free Trade with Colombia*, 2nd Session, 39th Parliament, June 2008 Recommendation 1 at p. 43.
[12] *Ibid*, Recommendation 6 at p. 44.
[13] *Ibid*, Recommendation 4.
[14] The Committee's other recommendations were that the Canadian government conduct comprehensive assessments on the impact on human rights and the environment of the economic agreements it negotiates with other countries at risk (Recommendation 3);

implementing legislation on the CCOFTA in the House of Commons.[15] In order to move forward from this standstill, the Government accepted an opposition-brokered compromise and in May 2010 the two countries signed a Side Agreement on annual human rights reports.[16] Under this arrangement, both governments would have to produce and submit to their respective parliaments comprehensive annual reports on the effects of the CCOFTA on the human rights situation in both countries.[17] For the proponents of the CCOFTA in the Canadian parliament this kind of mechanism was to enable both parties to address any negative consequences from Canadian trade and investment for human rights in Colombia.[18] Nevertheless, critics have called this side agreement "empty" in terms of its ability to ensure that Canadian investors in Colombia respect human rights, and as setting a "limiting and dangerous precedent" in terms of granting the two governments a liberty to self-assess their actions and omissions and thus avoid any responsibility for failing to prevent negative effects.[19] Concerns about whether the annual report on human rights will present a credible account of the effects of Canadian trade flows and private investment operations in Colombia

[15] Canada, Library of Parliament, Bill C-2: Canada–Colombia Free Trade Agreement Implementation Act: Legislative Summary, 30 March 2010.

[16] *Ibid*. See *Agreement Concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia*, signed on 27 May 2010, entry into force 15 August 2011, available at http://www.treaty-accord.gc.ca/details.aspx?id=105278, accessed August 21, 2013 [hereinafter "Side Agreement"]. See also Canada, House of Commons Debates (*Hansard*), 40th Parl., 3d Sess., No 016 (24 March 2010); Canada, Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade, 4oth Parl., 3d Sess., 17 June 2010, testimony of Hon. Scott Brison at 9:41; Joint Statement *supra* note 6.

[17] Side Agreement at *ibid*. The Canadian Government tabled its first such annual human rights report in May 2012. See Canada, Department of Foreign Affairs and International Trade, *Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia*, submitted in the House of Commons May 15, 2012 (available at http://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/rep-hrft-co_2012-dple-rapp.aspx, accessed August 21, 2013) The Colombian Government has not produced one despite of having such an obligation under the Side Agreement. See House of Commons, Standing Committee on International Trade, *Evidence*, 41st. Parl., 1st Sess., June 12, 2012, testimony of Mr. Juan Diego Gonzalez Rúa (Researcher, Escuela Nacional Sindical).

[18] Testimony of Hon. Scott Brison *supra* note 16 at 9:40.

[19] Joint Statement *supra* note 6. Amnesty International Canada, "Canada-Colombia trade deal: Empty human rights impact report yet another failure by government", Press Release, May 16, 2012. See also statements from opposition parties in CIIT debates *supra* note 17.

have been raised in connection with the failure of the Canadian Government to implement the recommendations of the Standing Committee regarding the regulation of Canadian investors to respect human rights in Colombia, as well as to assess the potential negative impacts on human rights of such investments as part of Canada's due diligence obligation under international law.[20] Equally, concerns were raised that the effects on human rights of the activity of Canadian-based corporations in Colombia will elude scope of the annual report and that the methodology and indicators used to measure the change in the human rights situation in Colombia caused by Canadian trade and investment flows will not follow internationally recognized human rights standards.[21] Indeed, in its second annual report, the Canadian government excluded foreign direct investment from the scope of the report claiming that "no actions were taken by Canada" in that area.[22]

The primary objective of this thesis is to demonstrate that Canada had, under positive international law, a duty to regulate its investors operations abroad so as to prevent human rights and environmental abuses, and in the absence of such regulation under the CCOFTA, it continues to have a duty to structure and conduct the annual HRIA to the same effect. The risks of harmful effects of foreign direct investment (FDI) and the activity of multinational corporations (MNCs) for human rights and the environment are not endemic to Canadian investment in Colombia, but are frequently experienced by host countries.[23] On the other

[20] See for example, House of Commons, Standing Committee on International Trade, *Evidence*, 41st Parl., 1st. Sess., June 7, 2012, Testimony of Alex Neve, Secretary General, Amnesty International Canada, at 1215-20.
[21] *Ibid* at 1220-5. Also questions by Hon. Don Davies, MP at 1140-5.
[22] See, Foreign Affairs, International Trade and Development, Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia For the period August 15, 2011 to December 31, 2012 (available online at http://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/rep-hrft-co_2013-dple-rapp.aspx?lang=eng accessed August 21, 2013)
[23] In international investment law a 'host state' is the state where an investor, a physical or juridical entity established under the laws of the other state party to the IIA, or the 'home state', carries out its investment project. While historically IIAs were concluded exclusively between a 'developed' and a 'developing' state, treaties for investment protection between developing and between developed nations are now commonplace.

hand, in light of the ongoing internal armed conflict, prevalent human rights abuses, existing presence of Canadian MNCs in conflict regions in Colombia, the active support by the Canadian government of the CCOFTA in spite of its knowledge of the human rights circumstances in Colombia and the risks that investment protection provisions in the CCOFTA might exacerbate them, and ultimately, the conclusion of the Side Agreement on annual human rights reports, the case of Canadian investment in Colombia provides a particularly apposite context for the discussion on home state obligations to regulate investor conduct in host states.

The relationship between foreign direct investment (FDI) and human rights has become a prominent theme in the era of economic globalization and development.[24] There is nowadays a common understanding that FDI is a central component of economic development for industrialized and developing countries alike, and as such carries a great potential for contributing to human rights enjoyment globally while at the same time having social, environmental, political and legal implications that need to be carefully balanced in order to respect fundamental human rights affected by economic development.[25] In international law,

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See UNCTAD, *International Investment Agreements: Key Issues*, Vol. I (New York: United Nations, 2004), at 19; UNCTAD, *World Investment Report: 2013* (New York: UNCTAD, 2013), 39-84. In addition the restrictions on host state policy space and harmful environmental and human rights consequences are equally felt by economically more developed and developing states. See for example *Dow Agrosciences LLC v Government of Canada* involving a ban on a herbicide with potentially harmful health effects. See *Dow AgroSciences LLC and Government of Canada settle NAFTA claim*, May 25, 2011 (found at http://www.dowagro.com/ca/pdfs/Dow_AgroSciences_LLC_and_Government_of_Canada_settle_NAFTA_claim_May_2011.pdf, accessed August 21, 2013). The term 'home state' will be used in this thesis interchangeably with the term 'industrialized' and 'capital-exporting'.

[24] While deregulation and economic liberalization were the focus of global political economy during the 1980s, the secondary effects of economic globalization, including social, environmental and human rights issues came to the fore in the 1990s. See e.g. United Nations Research Institute for Social Development (UNRISD), *States of Disarray: The Social Effects of Globalization* (Geneva: UNRISD, 1995). Economic globalization, primarily in the form of international trade and investment, is said to dominate international relations and national development policies of both developed and developing countries. R. Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton: Princeton University Press, 2001), cited in D. Aguirre, *The Human Right to Development in a Globalised World* (Aldershot: Ashgate, 2008), 1.

[25] See e.g. the resolutions adopted by the United Nations General Assembly entitled "Globalization and its impact on the full enjoyment of all human rights", UN Doc. A/RES/67/165, 13 March 2013; A/RES/60/152, 16

state interest in pursuing economic development through FDI has resulted in a fascinating expansion of a network of bilateral or regional international investment agreements (IIAs)[26], public international law instruments whose sole purpose is the protection of foreign-owned economic assets in host states.[27] However, most FDI occurs through private enterprises in host countries that are fully or partially owned by multinational corporations (MNCs) headquartered in an industrialized country who are the primary beneficiaries of the investment protection provisions found in IIAs.[28]

While the economic benefits of FDI and their dependence on IIAs continue to be the subject of extensive academic debate[29], the frequent detrimental side effects on human rights and the environment associated with MNC activity in the developing world[30] have placed under

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December 2005; UNCTAD, *Foreign Direct Investment and Development* (New York: United Nations, 1999); in particular UN, Economic and Social Council, *Human Rights, trade and investment*, Report of the High Commissioner for Human Rights, UN Doc., E/CN.4/Sub.2/2003/9 (2 July 2003) [hereinafter OHCHR "*Human rights, trade and investment*"], at paras 5-11.

[26] In 2013 the number of Bilateral Investment Treaties (BITs) and IIAs contained in regional Free Trade Agreements (FTAs) reached 3196. See UNCTAD, *World Investment Report supra* note 23, at 101. The term 'IIA' is used here to designate both types of international instruments.

[27] See generally A. Newcombe and L. Pradell, *Law and Practice of Investment Treaties* (Austin: Kluwer, 2009).

[28] For the purposes of this discussion it understood that MNCs are private entities with a complex structure that transcend national borders by incorporating subsidiaries in developing states that operate either privately or enter into joint ventures with host state governments to carry out investment projects. Accordingly, 'home state' denotes the state of incorporation of the parent corporation and 'host state' means the state where an entity linked through "ownership, decision-making or significant managerial influence" from the parent is located. Adapted from United Nations Commission On Transnational Corporations, "Draft U.N. Code Of Conduct On Transnational Corporations" (1983) 22 ILM 1 at 192. See generally, P. Muchlinski, *Multinational Enterprises and the Law*, 2nd ed., (Oxford: Oxford University Press, 2007) at 5-8.

[29] The traditional "conventional wisdom" adopted by neoliberal economic theory is that FDI is undoubtedly beneficial as long as the investors do not pollute the environment or blatantly abuse workers' rights. T. Moran, E. Graham & M. Blomström, eds, *Does Foreign Direct Investment Promote Development* (Washington D.C.: Institute for International Economics, 2005) at 2. For a discussion on the traditionally assumed financial, capital and technological benefits from FDI for the developing host state see e.g. R. Dolzer, M. Herdegen & B. Vogel, eds, *Foreign Investment: Its Significance in Relation to the Fight against Poverty, Economic Growth and Legal Culture* (Singapore: Konrad Adenauer Stiftung, 2006). See K. Vandelvede. "The Political Economy of a Bilateral Investment Treaty" (1998) 92 AJIL 4:621 on how neoliberal economic theories translated into the modern legal regime for investment protection and concrete BIT provisions. On the questionable role of BITs to attract FDI for developing states see E. Neumayer and L. Spess, "Do bilateral investment treaties increase foreign direct investment to developing countries?" (2005) 33 World Development 10, 1567.

[30] MNC activity leading to the Bhopal environmental disaster in India, killings, torture, destruction of property and forced child labour alleged in the case of the Myanmar-Thailand pipeline, the accusations against Royal Dutch Shell in Nigeria and Texaco Oil in Ecuador are among the most often-cited examples of such side-effects. S. Puvimanasinghe, *Foreign Investment, Human Rights and the Environment: A Perspective from South*

scrutiny the intersection of state obligations under international investment law and under human rights and environmental law. As private entities, MNCs have no direct obligations under international human rights law and states remain the primary duty-bearers responsible for the protection of human rights of individuals, while at the same time bearing responsibility for protecting the economic interests of MNCs when they conclude IIAs.[31] However, when FDI takes place in 'weak governance zones', regions where armed conflict is ongoing, or in countries where the state apparatus is weak, corrupt or otherwise unable or unwilling to ensure human rights protection, the absence of direct human rights obligations on MNCs creates a "regulatory void, or 'governance gap'" in which corporate involvement in rights abuses can remain unsanctioned.[32] The presence of an IIA, whose primary purpose is to shield foreign investors from host state regulatory action[33] can present a further impediment or disincentive for the host state to regulate to protect human rights. The case of the legal protections offered by the investment protection chapter of the Canada-Colombia Free Trade Agreement (CCOFTA) to Canadian-based corporations operating in Colombia is illustrative of this problem.

Asia on The Role of Public International Law for Development (Leiden: Martinus Nijhoff, 2007), 2-4; see also L. Zarsky, ed., *Human Rights and the Environment: Conflicts and Norms in a Globalizing World* (London: Earthscan, 2002) for various perspectives from South America, Africa and Asia. See below for a discussion on human rights and environmental implications of MNC activity in Colombia.

[31] States are after all the creators of the global legal regime of investment protection. O. De Schutter, "The Accountability Of Multinationals For Human Rights Violations In European Law", in P. Alston, ed., *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), 314.

[32] G. Gagnon, A. Macklin and P. Simons, *Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones – Implications for Human Rights and Canadian Public Policy* (Toronto: Relationships in Transition, 2003) at 11-12 discussing the human rights allegations against the operations of Canadian oil MNC Talisman in Sudan. This governance gap can equally be linked to the absence of regulation from the corporations' home state due to the uncertain status of home state international human rights law obligations in that regard. This proposition is challenged in this chapter. The 'human rights' and other types of regulation of MNCs in international and domestic law has been a subject of academic debate and attempts at international solutions for many decades. See e.g. P. Muchlinski, "Framing the Relationship: Human rights and multinationals: is there a problem?" in D. Kinley, ed., *Human Rights and Corporations* (Sydney: Ashgate, 2009). For a discussion on the plurality of conceptual, doctrinal and practical problems raised by the human rights impacts of corporate activity and the plurality of existing and potential solutions in international law, including human rights law see S. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 Yale LJ 443.

[33] OHCHR, *Human rights, trade and investment, supra* note 25 at paras 24-27. See further section 1.1.2 below.

Several closely related lines of scholarship have developed in response to this state of affairs in international law. One view is to reject the statist approach to international law viewing states as the only subjects of international obligations and focuses on interpreting existing international law to infer direct or indirect human rights obligations for MNCs.[34] Another approach has been to focus on different forms of home state regulation ranging from hard laws to policy incentives.[35] The realization that IIAs and investor-state arbitral jurisprudence can restrict the policy space of the host state that may be necessary to ensure human rights protection has encouraged proposals for IIA remodeling, including proposals to insert human rights obligations for investors in these treaties.[36] Other authors have argued that human rights can or should be considered under the existing architecture of IIAs in particular as defences against host state responsibility towards the foreign investor when regulating for the purposes of protecting human rights or the environment.[37] Yet another approach has been to focus on the responsibility of the states involved, in particular that of the home state of

[34] E.g. J. Paust, "Human Rights Responsibilities of Private Corporations" (2002) 35 Vand. J. Transnat'l L. 801, rejecting a formalistic reading of international law obligations to conclude that international human rights law imposes obligations on corporations either directly or by implication. For an overview of major claims in this direction see E. Duruigbo, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges" (2008) 6 Nw. J. Int'l Hum. Rts. 222. See generally, M. K. Addo, "Human Rights and Transnational Corporations - an Introduction" and N. Jägers, "Legal Status of the Multinational Corporation Under International Law" in M. Addo, ed., *Human rights standards and the responsibility of transnational corporations* (Hague: Kluwer Law, 1999); O. de Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in O. de Schutter, ed., *Transnational corporations and human rights* (Oxford: Hart, 2006).

[35] N. Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Antwerpen: Intersentia, 2003) and J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (New York: Cambridge University Press, 2006);

[36] See most notably the proposal by the International Institute for Sustainable Development (IISD), *IISD Model International Agreement on Investment for Sustainable Development* (Winnipeg: IISD, 2005); also A. VanDuzer, P. Simons and G. Mayeda, "Modeling International Investment Agreements for Economic Development", in V. Qalo, ed., *Bilateralism and Development: Emerging Trade Patterns* (London : Cameron May, 2008) [hereinafter "*Modeling IIAs"*], at 407-9 discussing inclusion of human rights obligations for investors and home states in IIAs. More recently P. Dumberry and G. Dumas-Aubin, "How to Impose Human Rights Obligations on Corporations under Investment Treaties?" (2011-2012) 4 YB on Int'l Inv L & Pol'y 569. See further Chapter 1 on the elements of treaty-based regulation.

[37] See generally P-M Dupuy, E-U Petersman and F. Francioni, eds., *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) in particular chapters in part II. L-E Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration* (Montreal: Rights and Democracy, 2009).

corporations, in an attempt to establish a duty on the home state to regulate investor operations in the host state by revisiting and providing clarification to traditional international law principles such as jurisdiction in human rights law and the rules on state responsibility.[38]

All three approaches have recently attracted significant academic (and also political) attention in the work of the Special Representative of the United Nations Secretary- General on business and human rights (SRSG).[39] While this ambitious effort to clarify the current state of international law pertaining to business and human rights left many questions

[38] M. Gibney, K. Tomaševski and J. Vedsted-Hansen, "Transnational State Responsibility for Violations of Human Rights" (1999) 12 Harv Hum Rts J 267; M. Sornarajah, "Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States" in C. Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart, 2001) 491; in particular on deriving human rights duties for home states from the customary international law of state responsibility see S. Seck, "Conceptualizing the Home State Duty to Protect Human Rights" in K. Buhmann, L. Roseberry and M. Morsing, eds., *Corporate Social and Human Rights Responsibilities Global Legal and Management Perspectives* (New York: Palgrave Macmillan, 2011) [hereinafter "Seck, *Conceptualizing the Home State Duty to Protect"*]; F. Francioni, "Alternative perspectives on international responsibility for human rights violations by multinational corporations", in W. Benedek, K. de Feyter and F. Marrella, eds., *Economic Globalization and Human Rights* (Cambridge: Cambridge University Press, 2007); on the permissibility of home state unilateral regulation in the context of the human rights harm caused in host states by Canadian mining corporations see S. L. Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Human Rts & Dev LJ 177 [hereinafter "Seck, *Home State Responsibility*"]; for a discussion on the duty of due diligence found in human rights law and requiring home states to prevent investor rights abuses abroad see V. Tzevelekos, "In Search of Alternative Solutions: Can the State of Origin be held internationally responsible for Investors' Human Rights Abuses that are not attributable to it?" (2010) 35 Brook J Int'l L 155.

[39] The UN Secretary General first appointed the SRSG in 2005 upon recommendation by the then Human Rights Commission. In 2008 the Human Rights Council that replaced the UN Human Rights Commission extended the mandate of the SRSG for an additional 3 years to "provide views and concrete and practical recommendations on ways to strengthen the fulfilment of the duty of the State to protect all human rights from abuses; elaborate further on the scope and content of the corporate responsibility to respect all human rights; and explore options and make recommendations, at the national, regional and international level, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities". See HRC, *Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, 8th Sess., UN Doc., A/HRC/RES/8/7, 18 June 2008. In April 2008, the SRSG submitted his first report to the HRC entitled "Protect, Respect and Remedy: a Framework for Business and Human Rights" in which he proposed a tripartite approach to overcoming the "governance gaps created by economic globalization": the state duty to protect against human rights abuses by third parties, including businesses, the corporate responsibility to respect human rights, and the need for more effective access to remedies. HRC, 8th Sess., UN Doc. A/HRC/8/5, April 7 2008 [hereinafter "SRSG, *Protect, Respect and Remedy*"], at para 9. The SRSG concluded his mandate in March 2011 with the submission of his last report entitled "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework", HRC, 17th Sess., UN Doc. A/HRC/17/31, 21 March 2011 [hereinafter "SRSG, *Guiding Principles on business and human rights*"].

unresolved, in particular that of the direct imposition of international human rights obligations on corporations[40], the SRSG reports seem to reflect a general consensus on the existence of the governance gaps in terms of human rights protection created by IIAs, and the need for state action to address these.[41]

However, the question if and to what extent home states should or are required by international law to regulate the conduct of companies incorporated on their territory and under their laws remains the subject of academic debate and controversy.[42] The idea is resisted by home and host state governments on the grounds that such regulatory measures would amount to an unwarranted intrusion on the sovereignty of the host state as well as, not surprisingly, lobbied heavily against by large MNCs claiming that such measures would thwart private entrepreneurship and investment incentives.[43] Legally, the problem can be construed as one of sources of such obligations: as most international human rights and environmental law instruments do not impose explicit obligations on states to regulate

[40] See for e.g. position of the Government of the United Kingdom on the conclusions drawn by the SRSG on the interpretation of the state duty to protect human rights from corporate abuses found at http://www.reports-and-materials.org/UK-Foreign-Office-letter-to-Ruggie-9-Jul-2009.pdf; see also reports from the expert workshops organized by the SRSG, in particular *Workshop on Attributing Corporate Responsibility for Human Rights under International Law*, available on the SRSG website http://www.business-humanrights.org/

[41] SRSG, *Protect, Respect and Remedy supra* note 39 at paras 3, 11-16. Regrettably, although touching on the issue of home state obligations in his early work, the SRSG limited the discussion on state obligations to protect human rights against corporate abuses to host states obligations when negotiating IIAs. SRSG, Guiding Principles on business and human rights at 10 principle 9 and commentary. His reports have been criticized for failing to elaborate sufficiently on the issue of home state obligations and for the over-emphasis on the issue of extraterritorial jurisdiction. See R. McCorquodale, "Corporate Social Responsibility and International Human Rights Law" (2009) 87 J of Buss Eth 385 at 387 et seq.; S. Deva, "'Protect, Respect and Remedy': A Critique of the SRSG's Framework for Business and Human Rights" in Buhmann et al. *supra* note 38; R. Grabosch, *SRSG John Ruggie's Draft Guiding Principles for the implementation of the United Nation's 'protect, respect, and remedy framework'*, Position Paper, European Center for Constitutional and Human Rights, 27 January 2011.

[42] As stated by the SRSG "Experts disagree on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory." SRSG, *Protect, Respect and Remedt supra* note 39 at para 8.

[43] *Ibid* at para 14. The Canadian Government has taken the position that such regulation would raise problems with the sovereignty of other states. See Government Response To The Fourteenth Report Of The Standing Committee On Foreign Affairs And International Trade, *Mining In Developing Countries - Corporate Social Responsibility* (available at http://www.parl.gc.ca/HousePublications/Publication.aspx?Mode=1&Language=E&DocId=2030362&File=0 accessed August 22, 2013).

private conduct beyond their national borders, the SRSG has for example taken the view that unilateral home state regulation, although not required, can be permissible under the rules of jurisdiction in public international law provided that it is reasonably exercised.[44] A body of scholarship has also focused on finding permissible bases in public international law to encourage home state regulation.[45] Although this view is not uncontested by scholars who contend that some extraterritorial obligations do exist in current international law, including the obligation on home states to protect from extraterritorial MNC harm[46], even if the existence of such obligations is admitted, when they would be triggered, as well as their scope of application in regard to the activity of private corporations are far from certain.

However, it is argued in this thesis that part of the problem lies in how the issue is framed. Home state regulation is usually conceptualized as unilateral legislation, backed with sanctions, aimed at controlling directly the extraterritorial activities of companies (or their subsidiaries) domiciled in the home state.[47] Similarly, the harm resulting from investor activity is usually seen as entirely private and not associated with the IIA in spite of the apparent consensus that these treaties can enable such harm. Moreover, IIAs are regarded as actions or activity occurring at the international level between two sovereign states and any

[44] SRSG, Respect, Protect and Remedy *supra* note 39 at para 19.

[45] See for e.g. Zerk *supra* note 35; O. De Schutter, *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*, Report prepared for the SRSG, December 2006, available at http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf (accessed August 21, 2013); Seck, *Home State Responsibility supra* note 38.

[46] See e.g. S. Skogly, *Beyond National Borders: States' Human Rights Obligations in their International Cooperation* (Antwerp: Intersentia, 2006); S. I. Skogly and M. Gibney, "Transnational Human Rights Obligations" (2002) 24 Human Rights Quarterly 781; S. I. Skogly and M. Gibney, "Economic Rights and Extraterritorial Obligations" in S. Hertel and L. Minkler eds., *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge: Cambridge University Press, 2007) 267; and most recently and authoritatively O. de Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon and I. Seiderman, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" (2012) 34 Human Rights Quarterly 1084.

[47] Zerk *supra* note 35 at 36-40 discussing the definition of "command and control" regulation of corporate activity as contrasted to other softer policy forms of regulation. Also, for the use of command and control regulation in environmental policy see N. Gunningham, P. Grabosky, and D. Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press, 1998).

harmful human rights or environmental effects they might cause or contribute to are expected to be borne by the host state who gave its consent to the treaty. In consequence, most of the debate on home state obligations has been preoccupied with the problem of the extraterritoriality of human rights instruments[48], or with the direct attribution of MNC conduct to the home state for the purposes finding home state responsibility for private investor abuses.[49]

This thesis argues that the preoccupation with extraterritoriality and attribution obscure the active role the home state plays in enabling and facilitating MNC activity by negotiating IIAs and that these treaties can instead be conceptualized as domestic or intra-territorial acts of the home state with extraterritorial effects for human rights and environmental protection.[50] Under this approach the home state would be responsible for ensuring that its own actions and omissions in negotiating IIAs and setting investment protection standards do not result in extraterritorial human rights or environmental harm, whether committed by the host state or by private actors—a premise that has solid bases both in law and in the jurisprudence of international human rights bodies.[51] In addition, if in some cases the IIA can be seen as the

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[48] An excellent expose of the challenges and limitations of this approach under current international human rights law (notably the International Covenant on Civil and Political and the International Covenant on Economic, Social and Cultural Rights) see F. Coomans and M. Kamminga, eds., *Extraterritorial Application of Human Rights Treaties* (Oxford: Intersentia 2004), in particular M. Scheinin, "Extraterritorial Effect of the International Covenant on Civil and Political Rights" at 73 and R. Kunneman, "Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights" at 201.

[49] E.g. Gibney et al. and De Schutter *supra* note 38.

[50] The SRSG has proposed a differential conceptualization of unilateral home state regulation as consisting of either direct assertions of extraterritorial control of the conduct of the corporation abroad, or as domestic regulatory measures with extraterritorial implications that, in his view, are less invasive for host state sovereignty. HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework*, 14th Sess., UN Doc. A/HRC/14/27 (9 April 2010). at para 49. See further s. 1.2.

[51] The approach draws on three bases: the universal state duty to respect human rights through its own actions that, as persuasively argued by many scholars is extraterritorial by its very nature (see e.g. Skogly and Gibney *supra* note 46 at 273); the consideration that this duty extends to the fullest legal authority of the home state, including treaty negotiations by the executive and gives to an obligation of due diligence to prevent and remedy harm (see Seck, *Conceptualizing the Home State Duty supra* note 38 at 37 citing Jägers *supra* note 35 at 166-

cause of private human rights or environmental harm in the host state, the home state would be responsible for its failure to prevent such harm *through its own activity*- the IIA.

A related question examined here is the role of HRIAs in home state regulation and if, in the case of the CCOFTA, the Side Agreement on annual human rights reports could serve as an alternative to traditional 'command and control' investor regulation. It is argued here that the conceptualization of IIAs as unilateral home state acts is also valid for the HRIA reports under the Side Agreement between Canada and Colombia and as such home state obligations to ensure its own actions are not the cause of extraterritorial harm are equally applicable. Yet, while the home state duties of prevention and protection could be translated into treaty-based investor regulation when conceptualizing IIAs as home state activity, when it comes to the annual reports on human rights they would translate into a duty for the home state to structure and conduct its unilateral HRIA in a way that both ensures the effects of the underlying home state activity—the IIA—are captured by the assessment and that the assessment process respects human rights in the host state. It is submitted that HRIAs serve a dual purpose: they are both key procedural mechanisms to answer what kind and to what extent home state regulatory action is required, while at the same time being indispensable for the home state to satisfy the duty of due diligence for its own actions. Finally, as human rights and environmental standards are defined as broad categories in international instruments, the precise content of each right and corresponding state obligations, as well as the question if a violation of such standards has occurred and who caused it, can only be ascertained through the active participation of potential victims and local communities in the

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7); and thirdly on the premise that IIAs can be seen as home state acts of support or facilitation of corporate abuses thereby engaging its international responsibility (see R. McCorquodale and P. Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law" (2007) 70 Mod L Rev 598).

HRIA process. This thesis concludes that the HRIA mechanism under the CCOFTA is an indispensable first step and a legal duty for the home state to unlock the puzzle of investor regulation, while at the same time having the potential to allow for an unprecedented inclusion of local communities in such regulation and the process of international lawmaking.

The thesis is structured as follows: chapter one presents the key risks for human rights and environmental harm from the activity of Canadian corporations in Colombia and the legal protection granted to them by the CCOFTA. It then proposes the concept of treaty-based investor regulation as more legally and practically feasible than the approaches focusing on extraterritorial unilateral home state regulation, and examines state obligations in existing international law that support this concept. The second chapter examines the purpose and practice of HRIAs in order to demonstrate conceptually their potential to provide an alternative approach to investor regulation. The third chapter analyzes the home state duties to structure and conduct its unilateral HRIAs so as to prevent and remedy transnational human rights and environmental harm. The fourth chapter examines the sources of home state obligations to provide for the active participation of local communities in the HRIA and discusses the effects of such participation on the home state obligation to regulate.

Chapter 1
Treaty-based investor regulation as a home state obligation to prevent transnational human rights and environmental harm caused or enabled by the CCOFTA

This chapter is concerned with the duty of home states to avoid creating and/or contributing to the creation of governance gaps when negotiating IIAs with developing states. As such it seeks to demonstrate that Canada had a duty to regulate *through the provisions of the CCOFTA* the activity of its corporations in Colombia so as to prevent human rights violations or environmental harm occurring as a result of the legal protection offered to Canadian MNCs. Although this concept is not new[1], most commentary has focused on problems with the extraterritorial extension of home state human rights obligations[2] in order to demonstrate the permissibility of the unilateral home state duty to regulate. In contrast, this chapter proposes that in cases where IIAs enable or facilitate corporate human rights or environmental harm in the host state, there is a duty on the home state to prevent *its own actions*, being the negotiations of IIA and the setting of standards in investment protection

[1] See in that perspective M. Sornarajah, "Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States" in C. Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart, 2001) 491. The idea can also be explained on the premise that legal regime responsible for granting investor rights vis-à-vis the host state should also be responsible for imposing obligations on investors to respect and abide by internationally recognized human rights standards in their activity in the host state. As capital-exporting home states were and continue to be strong promoters and architects of IIAs, they are often seen as responsible for ensuring that IIAs do not negatively affect human rights in the host state. See e.g. UN, OHCHR, *Human Rigths and Poverty Reduction: A Conceptual Framework*, UN Doc., HR/PUB/04/1, 2004 at 29. See in the same vein M. E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007).

[2] E.g. O. De Schutter, *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*, Report prepared for the SRSG, December 2006, available at http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf. The SRSG has taken the position that "[e]xperts disagree on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory" and that in the default of the home state contributing in a positive way to the extraterritorial violation of the MNC (for example through financing), states are not prohibited from exercising extraterritorial regulation but also not obliged to do so. SRSG, HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights,* 8th Sess., UN Doc. A/HRC/8/5 (7 April 2008) [hereinafter "Protect, Respect and Remedy"] at para 19.

clauses, from causing or contributing to rights abuses in particular when the home state is aware of such risks and has the power prevent them.

The first section presents the human rights situation in Colombia in the context of the activity of Canadian corporations and risks of their complicity in human rights abuses, as well as the specific investment protection provisions of the CCOFTA that could cause or enable Canadian corporations to commit or become complicit in human rights abuses or environmental harm. The second section examines the problem of the qualification, in terms of sources of state obligations, of transnational environmental and human rights harm and proposes that a better approach for human rights regulation for investors and home state obligations to ensure such regulation is to conceptualize IIAs as domestic acts of the home state. The third section examines the sources of international law obligations that support the concept of home state obligations for treaty-based regulation. The fourth section examines the doctrine of state responsibility to present various approaches under which the home state could be found partially or entirely responsible for IIA-enabled human rights and environmental harm.

1.1 The risks of human rights and environmental harm from Canadian investment in Colombia before and after the CCOFTA: the need for investor regulation

1.1.1 The human rights situation in Colombia against the backdrop of foreign direct investment

For over four decades Colombia has suffered from internal armed conflict, often described as a state of war.[3] Despite significant improvements in recent years, the human rights situation in Colombia remains precarious. The ongoing internal conflict between state forces and paramilitary and guerilla groups is regarded as the main source of human rights violations that are attributed to both state forces and paramilitaries.[4] The key actors of the armed conflict in Colombia include the official state army and police forces, leftist guerilla groups established and controlling various regions of the country, and right-wing private and counterinsurgency paramilitary groups that alternate their allegiance between the state and guerilla forces.[5] Civilians and local communities are often caught in the line of fire, or even

[3] J. E. Sweig, "What Kind of War for Colombia?" (2002) 81 Foreign Aff. 122. For a brief summary of the origins and key actors involved in the internal armed conflict see Justice for Colombia, Human Rights in Colombia, found online at http://www.justiceforcolombia.org/about-colombia/#fd3. ["Justice for Colombia"].

[4] See e.g. UN Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights, Addendum*: Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia*, UN Doc., A/HRC/19/21/Add.3 (31 January 2012) at para. 5 noting the efforts of the Colombian Government to improve the human rights situation in spite of the ongoing paramilitary conflict. Identical conclusions have been presented in successive UNHCHR Reports on Colombia; see for example A/HRC/13/72, 4 March 2010. For similar conclusions and a detailed analysis on human rights violations in Colombia see US Department of State, Colombia 2012 Human Rights Report, April 19, 2013 (available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dlid=204438, last accessed July 10, 2013). For similar conclusions see also Human Rights Watch, World Report 2013: Colombia (available at http://www.hrw.org/world-report/2013/country-chapters/colombia, last accessed July 10, 2013); Amnesty International, World Report 2013: The State of World's Human Rights (London: Amnesty International, 2013) at 65.

[5] The main leftist insurgent formation is commonly known as the FARC (Revolutionary Armed Forces of Colombia) that grew out of the peasant movement and liberal political parties involved in the civil war during the 1950s and 1960s. Another smaller originally left-oriented group, known as the ELN, is also reported to be active in some areas. Justice For Colombia, *ibid,* "The Armed Conflict". The structure and interrelationship between various armed groups is complex and differentiating between, for example, guerrilla groups and paramilitaries is often difficult. Of interest, private security forces, owned and controlled by landowners, drug cartels and mafia organizations, as well as private counter-insurgency structures funded by the Colombian state to fight against the FARC, are commonly labelled as 'paramilitaries'. Justice for Colombia, *ibid*, "The Paramilitaries". For a more comprehensive discussion on the origins, typology and internal structure of the

direct victims or targets of the belligerents. Rights violations such as kidnappings and enforced disappearances, torture and arbitrary detention, extrajudicial killings, child recruitment, and conflict related-sexual violence are among the most prominent violations reported.[6] While illegal armed groups are seen as directly responsible for most cases of attacks on the physical integrity of civilians, close ties between the state military and police forces and illegal armed groups and the inefficiency of the Colombian state to properly investigate and punish such offences due to corruption or collaboration with paramilitary groups continues.[7]

The origins of the internal armed conflict in Colombia are complex, but a general consensus has developed that socioeconomic inequality, wide-spread political corruption that continues to plague the state apparatus, and a culture of physical, political and economic violence remain the root causes of the conflict in Colombia.[8] Control by the various actors involved in the armed conflict over natural resources, especially oil and minerals, and control of the lands where they abound remains both a root cause of the conflict in Colombia while also fuelling its perpetuation.[9] The economic aspect of armed conflict in Colombia is considered

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various armed groups engaged in the ongoing conflict in Colombia see F. G. Sanin, "Telling the Difference: Guerrillas and Paramilitaries in the Colombian War" (2008) 36 Politics & Society 3, at 9-10.

[6] See OHCHR Report *supra* note 4 at 5-14 and 22-30 and the US Department of State Report for a well-documented overview of the main civil rights violated by guerilla, paramilitary and state forces in Colombia.

[7] US Department of State Report *supra* note 4 at 1; OHCHR Report *supra* note 4, in particular on extrajudicial executions committed by the state military paras 30-32, and paras 36, 62, 69 noting the problem of impunity of human rights violators in cases of extrajudicial executions, enforced disappearances and conflict-related sexual violence.

[8] G. Lopez, "The Colombian Civil War: Potential for Justice in a Culture of Violence" (2011) 2 Jackson School J of Int'l Stud. 1,6. For a historic and comparative perspective on the paramilitarization of Colombia in the context of the conflict between state and leftist forces see W. Avilles, *Global capitalism, democracy, and civil-military relations in Colombia* (Albany: SUNY Press, 2006), in particular his conclusions about the impact of the continuing paramilitarization on the political culture, state behaviour and government policy priorities. The US Department of State Report concludes that "impunity, an inefficient judiciary, corruption and societal discrimination" are the most serious cause for human rights problems. *Supra* note 4 at 1.

[9] S. Lavaux, "Natural Resources and Conflict in Colombia" (2006) 62 Int'l J 19, at 21-22. Lavaux presents three scenarios in which natural resources become central to conflict in Colombia: direct resource exploitation by the state and other armed groups that has led to displacement and uprooting of local communities, especially indigenous peoples, from resource-rich areas and massive environmental damage; the use of threats and

as a direct cause of massive internal displacement[10], in particular of indigenous and Afro-American communities, the destruction of lands and resources upon which local communities rely for food production and subsistence[11], environmental degradation and increase in country-wide levels of extreme poverty[12]. Attacks on the physical integrity of civilians, in particular trade unionists and human rights activists often occur in the context of the struggle or control over natural resources and their exploitation.[13]

The impact of armed conflict on specific internationally recognized human rights is beyond the scope of this discussion. At the risk of oversimplification, it is assumed here that the ongoing internal armed conflict leads to violations of both civil and political, and economic, social and cultural rights in Colombia.[14] Colombia has ratified all of the core international

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terrorist attacks against natural resources or exploitation facilities that leads to environmental degradation and fuels political conflict; and thirdly the economic dimension of violence and insecurity that leads local peasants, farmers and landowners to become directly involved in the armed conflict. According to Lopez, "[a] combination of availability of natural resources—including land, agricultural resources and oil—and high levels of inequality [have] transformed rural areas into a battleground between guerilla and paramilitary groups as they compete for resources".Lopez, *supra 8* at 8-9 citing Caroline O.N. Moser and Cathy McIlwaine, *Encounters with Violence in Latin America: Urban Poor Perceptions from Colombia and Guatemala* (NewYork: Routledge, 2004), at 71.

[10] According to the Internal Displacement Monitoring Centre between 4.9 and 5.5 million people are currently internally displaced in Colombia as a result of the ongoing conflict. See IDMC, Country pages: Colombia, Current IDP Figures as of September 5, 2011 (found at http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/A7E1B7BD7528B329C12575E500525165?OpenDocument#expand)

[11] See UN, Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. James Anaya, Addendum: *The situation of indigenous peoples in Colombia: follow-up to the recommendations made by the previous Special Rapporteur*, UN Doc. A/HRC/15/37/Add.3 (25 May 2010), at paras 13-35. The Colombian Constitutional Court found in 2009 that indigenous peoples are suffering from forced displacement on an alarming scale and that 34 indigenous peoples were under a threat of "cultural or physical extermination". Decision 004 of 2009 at p. 2 cited in *ibid* at para 13.

[12] According to the UNDP, one third of the Colombian population living in rural areas lives in extreme poverty conditions. Of the 1.4 million indigenous peoples, comprising 3.36% of the total Colombian population, some 78.4% live in rural areas and 63% are living below the poverty line. See UNDP Colombia, *Colombia rural: Razones para la esperanza: Informe Nactional de Desarrollo Humano 2011* (Bogotá: Programa de las Naciones Unidas para el Desarrollo, 2011) at 149.

[13] OHCHR Report *supra* note 4 at para 14 and at pp 21-22 detailing cases of attacks on trade unionists and human rights activists related to for example illegal mining and other extraction activities. See also Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders, UNHRC, 13 Sess, UN Doc., A/HRC/13/22/Add.3 (March 4 2010) at 9-15

[14] See e.g. UN HRC, *Concluding observations of the Human Rights Committee: Colombia*, 99th Sess., UN Doc., CCPR/C/COL/CO/6, 4 August 2010; UN ESC, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia*, 44th Sess., UN Doc. E/C.12/COL/CO/5, 21 May 2010. The UNHCHR

human rights treaties[15] and these obligations prevail in its internal legal order over other types of international law obligations and legislation.[16] In addition, the Colombian Constitution recognizes the individual and collective rights of indigenous peoples[17] that have been confirmed in numerous decisions by the Colombian Constitutional Court relating to development projects and the forced displacement of indigenous peoples.[18] The persisting inability of the Colombian government to ensure the protection of individual rights and investigate and punish rights violations is therefore at the heart of the human rights crisis in that country.

At the same time, successive Colombian governments have pursued a neo-liberal policy course of opening the country to free trade and foreign direct investment.[19] In the first line,

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and US Department of State Reports present a comprehensive and factually documented account of the violations of civil and political rights resulting from instances where the physical integrity of civilians is attacked. The UNHCHR reports also briefly touch on the effects of conflict on economic, social and cultural rights. See e.g. *supra* note 4 at paras 102-4. For a comprehensive research document on violations of economic, social and cultural rights in Colombia, caused by armed conflict and the government's failure to protect these rights see Colombian Platform for Human Rights, Democracy and Development, *Parallel Report To The Fifth Report Of The Colombian State To Committee On Economic, Social And Cultural Rights (E./C.12/Col/5)* (Bogotá D.C.: Colombian Platform for Human Rights, Democracy and Development, March 2010).

[15] According to the OHCHR (http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx) the ten core international human rights treaties, which include the *International Covenant on Civil and Political Rights* (ICCPR); the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), *Convention on the Rights of the Child* (CRC), *International Convention for the Protection of All Persons from Enforced Disappearance* (CPED), the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICRMW), and the *Convention on the Rights of Persons with Disabilities* (CRPD). Colombia is a state party to all of these treaties (see UN Treaty Collection, Status of Treaties, Chapter IV: Human Rights, available at http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en).

[16] See Article 93 of the 1991 Constitution of Colombia, unofficial English translation at http://confinder.richmond.edu/admin/docs/colombia_const2.pdf

[17] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people supra* note 11 at 7 noting that Colombia has also ratified the International Labour Organization (ILO) Convention No. 169 and the *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, as well as expressed its support for the principles of the *Declaration on the Rights of Indigenous Peoples*.

[18] The Special Rapporteur notes that the Colombian Constitutional Court delivered 18 rulings between 1993 and 2006 in favor of indigenous peoples in the context of displacement without prior consultation to pursue economic development and 'megaprojects'. *Ibid* at para 41.

[19] See R. Grosse, 'Investment Promotion Policies in Latin America', in E. Huber, ed., *Models of Capitalism: Lessons for Latin America* (Pennsylvania: Pennsylvania State University Press, 2002), at 103 et seq. on the political and legal structural reforms undertaken by Latin American countries during the 'debt crisis' of the

this involved constitutional and legal reforms to enable the transition from "state-controlled capitalism" to a fully liberal private market signaling the country's openness to FDI.[20] Notions such as the constitutional recognition of "private ownership with a social function" and "private property rights in function of community needs"[21] were abandoned in favor of the "internationalization of economic relations"[22], "a democratization of property" and constitutional amendments that abolished state expropriation of private assets without compensation.[23] Constitutional provisions were also enacted for the privatization of state-owned assets and public services such as health and environmental protection.[24] Rules of admission of foreign investors, including prior screening and licensing were also abolished, as were the rules limiting the repatriation profits.[25] In the same vein, the governments' efforts to attract foreign investors in resource-rich Colombia[26] resulted in modifications of the

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1980s. To a large extent, these reforms were prescribed, or even imposed by conditioning loans and credit lines, by foreign donors chief among which were the World Bank and the International Monetary Fund (IMF).

[20] D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008) at 158-160. Schneiderman analyzes the constitutional reform leading to the adoption of the 1991 Colombian Constitution from the perspective of paving the way for FDI and IIAs. Latin American countries had adopted constitutions premised on the absolute power of the state to regulate the establishment and operations of foreign investors. Furthermore, the state could expropriate in the public interest without having to compensate the foreign company for its economic losses—a doctrine (also known as the "Calvo Doctrine) that was at odds with the principle of prompt, equitable and adequate compensation in accordance with the rules of international law (also known as the "Hull rule") promoted by Western states. With the onset of the recession and debt crisis during the 1980s Latin American states migrated to the neo-liberal ('Western') model, which was also the basis for the rules contained in IIAs. See generally, W. Shan, "Calvo Doctrine, State Sovereignty and The Changing Landscape of International Investment Law", in W. Shan, P. Simons and D. Singh, eds, *Redefining Sovereignty in International Economic Law* (Oxford: Hart Publishing, 2008). See further discussion in 1.2 below. Of interest, some authors argue that structural reform in Colombia was self-imposed, as the country did not experience a debt crisis during the 1980s. M. Giugale, O. Lafourcade, and C. Luff, eds., *Colombia: The Economic Foundation of Peace* (Washington: World Bank, 2003).

[21] Schneiderman, *ibid* at 165-7.

[22] Article 227 of the 1991 Constitution *supra* note 16.

[23] The Colombian government responded by amending the constitutional provisions allowing expropriation without compensation in 1999 to a 1996 ruling of the Constitutional Court of Colombia (C-358/96) declaring the provisions for prompt, adequate and effective compensation in cases of expropriation under the UK-Colombia IIA incompatible with the Constitution of 1991. Schnederman *supra* note 20 at 177-9.

[24] Articles 48, 49 and 150.9 of the Colombian Constitution discussed in *ibid* at 169.

[25] Schneiderman, *ibid*.

[26] More than 50% of total FDI in Colombia goes to mining, quarrying, oil, gas and other mineral extraction. Colombian Central Bank, *Balance of Payments,* cited in Proexport Colombia, *Reporte Trimestral de Inversión*

mining legislation to ease access and establishment of foreign investors in this sector.[27] Of interest, performance qualification reviews of prospective investors were removed; the central government acquired the discretion to classify investment zones such as indigenous lands as excluded and the requirements for environmental screening and impact assessments between the three stages of an investment project (exploration, exploitation and abandonment) were eliminated.[28]

It is uncertain to what extent such legal and structural readjustments contributed to increased FDI flows in Colombia.[29] On the other hand, the presence of large mining and other extractive sector industry corporation in conflict-affected regions in Colombia has resulted in reports of human rights violations associated with large-scale development projects.[30] Such findings have spurred a debate focusing on the coincidence of the government systemic inability to eradicate armed conflict and rights violations that, according to some authors, suggests that foreign capital and corporate interests in Colombia's resources are the root

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Extranjera Directa en Colombia Información a Enero – Septiembre (III Trim) de 2012 Enero 2013, September 2012, available at http://www.proexport.com.co/sites/default/files/reporte_de_inversion_a_iii_trimestre_2012.pdf

[27] L. Rodriguez. "Are the characteristics of the new Colombian mining code sufficiently competitive in attracting investment to the mineral sector?" (2004) 19 Minerals & Energy 32. Rodriguez compares the legislative modifications against the benchmark criteria for attracting FDI in the mining sector set by the World Bank. See e.g. UNCTAD, *Investment Policy Review: Colombia* (Geneva: UN, 2006). In essence, the change of the mining code followed the constitutional amendments in that the definition of property was modified from its version in the 1988 Mining Code to vest sovereignty over natural resources in the state rather than the nation. Rodriguez notes that this was done in order to allow the central government to issue permits for natural resource extraction on indigenous lands. Rodriguez at 35.

[28] Rodriguez, *ibid*.

[29] According to some studies, the ongoing armed conflict, corruption and the institutional shortcomings of the justice system remain major concerns for prospective investors despite the comprehensive readjustment measures. UNCTAD *supra* note 27 at 43. For one author the presence of armed conflict, coupled with the culture of corruption, impunity and inefficiency of the judiciary and different levels of government in Latin American states makes the promise of FDI delivering significant benefits unrealistic. C. G. Garcia, "All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the necessary evil of investor-state arbitration" (2004) 16 Fla J Int'l L 301.

[30] E.g. CESCR, *Concluding Observations-Colombia supra* note 14 at paras 9-10 in regards to mining and other development projects carried out on indigenous lands without prior consultation. Also CCPR, *Concluding Observations- Colombia*, *supra* note 14 at para 25 finding discriminatory effects of the armed conflict on indigenous populations and their land restitution claims.

cause of the human rights situation in Colombia and in many cases of the conflict itself.[31] For instance, one scholar has proposed that while armed conflict would normally deter foreign investors, corporate activity in Colombia in the extractive and private protection services sector has flourished over the decade-long conflict.[32] Corporate interest in resource-rich areas of Colombia has been used as a weapon by paramilitary groups that forcefully displace civilian populations from these areas, and in other cases attacks on corporate facilities have served as a bargaining chip for the paramilitaries for extortion, bribery and collection of 'illegal royalties' from the companies themselves.[33] In turn this often leads to resistance from the local communities to the presence of large multinational corporation, often manifested through open protesting that has led to documented cases of human rights violations.[34] Other scholars have also been critical of Colombia's rapid transition to a neoliberal market, arguing that any foreign capital accumulated in this way only furthers the perpetuation of the existing political, social and economic order in Colombia that is based on complex mechanisms of control over paramilitaries and other illegal armed groups by a small capitalist elite.[35] The need for transnational capital on both sides of the conflict is therefore viewed as a major catalyst and in some cases, root cause of armed conflict, and by implication, human rights violations in Colombia.

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[31] N. Richani, "Multinational Corporations, Rentier Capitalism, and the War System in Colombia" (2005) 47 Latin American Politics and Society 3:113; J. Hristov, Blood and Capital: The Paramilitarization of Colombia (Toronto: Between the Lines, 2009) (hereinafter "Hristov, Blood and Capital"); J. Rochlin, *Social Forces and the Revolution in Military Affairs: The Cases of Colombia and Mexico* (New York: Palgrave Macmillan, 2007); J. C. Dougas "Paramilitaries and the Economic Origins of Armed Conflict in Colombia" (2012) 47 Latin American Research Review 1:205 for a critical perspective on Hristov and Rochlin's conclusions.

[32] Richani *ibid* at 115-6.

[33] Richani *ibid* at 123-5.

[34] See e.g. US Department of State Report *supra* note 4 at 28.

[35] See Hristov *supra* note 31 for a class-based discussion on the origins and causes of conflict and its effects on the rural population, in particular indigenous peoples and the poor. Rochlin, *ibid*, presents similar conclusions as regards the numerous cases of "collusion between state and paramilitary forces" that in his opinion demonstrate a need for the perpetuation of the armed conflict. At 50.

Given this brief overview of the human rights situation in Colombia, it is pertinent to examine the concrete risks for human rights and environmental harm stemming from the conclusion of the CCOFTA.

1.1.2 Risks for human rights and environmental harm caused by the investment protection provisions of the CCOFTA and by the activity of Canadian-based MNCs

It is recognized that the "permissible environment" in which human rights and environmental harm occurs arises in situations where the host state is either unable or unwilling to regulate the corporation and no home state regulation exists.[36] This situation is probably most evident in the context of Canadian FDI in Colombia, where credible evidence suggests that the host state is not only unable *and* unwilling to regulate (most evidently in view of the government's relentless pursuit of FDI despite of its inability to ensure human rights protection), but also the perpetrator of all sorts of human rights abuses itself. This puts into question *any* international arrangement between that host state and a foreign state such as an IIA, that may further contribute to Colombia's inability to regulate and thus become the cause for human rights violations on its own.[37]

The SRSG has identified that worst human rights violations occur "amidst conflict over the control of territory, resources or government itself", where the "human rights regime cannot function" due to the failure of the state apparatus or its control over territory or persons.[38]

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[36] SRSG, *Respect, Protect and Remedy supra* note 2 at para 3.

[37] The Canadian Standing Committee on International Trade (SCIT) considered the implications of the investment protections provisions of the CCOFTA and explicitly recommended that human rights obligations for Canadian investors be inserted in the CCOFTA in its report: House of Commons, Standing Committee on International Trade, *Report: Human Rights, The Environment And Free Trade With Colombia*, 2nd Sess, 39th Parl (June 2008). [Hereinafter "SCIT Report"].

[38] HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Business and Human Rights: Further*

Specific consideration has been given by the SRSG to the question if home state regulation of MNCs is particularly apposite in "weak governance zones, where the host state is unable or unwilling to exercise its authority".[39] Notwithstanding that the determination of conflict or weak governance zones may be an inherently political process[40], there is enough reputable evidence to consider the ongoing situation in Colombia as one of civil war, struggle over territory and occupation of parts of the state by paramilitary groups, and flagrant human rights violations attributed to both the paramilitaries and the state forces.[41] Of particular relevance is the observation that poverty, armed conflict, high degrees of inefficiency and systemic corruption in the state apparatus, including the pace of pushing the country towards neoliberal market readjustment without the capacity to mitigate its side effects due to the conflict conditions, all continue to restrict the respect for all human rights in Colombia and *preclude democratic processes, including free, prior and informed public consent* to governmental policies.[42] This evidence comes in spite of continuous reassurances given by the Colombian government to its potential trading partners that the country is fully prepared to welcome FDI.[43] In a very similar tone, the Canadian Standing Committee on International Trade (SCIT) questioned if "Canada [can] in good faith, enter into a free trade agreement

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steps toward the operationalization of the "protect, respect and remedy" framework, 14th Sess., UN Doc. A/HRC/14/27 (9 April 2010). at para 44.

[39] *Ibid*.

[40] *Ibid*.

[41] See UN and other reports cited in section 1.1.1 above.

[42] See e.g. Report of the UN High Commissioner for Human Rights *supra* 4 at para 96 regarding indigenous peoples consultation over "mega development projects" pursued by the government that may result in forced displacement. Paramilitary presence, conflict and internal displacement have also been linked to restrictions to the right to food, water and highest standard of living in many regions in Colombia. Other indicators of lack of public consent to policies and regulation by the central government, such as process of trials of ex paramilitaries and leniency of criminal sentences for egregious human rights violations, were noted in the Fifth Periodic Report.

[43] See Canada, Prime Minister's Office, News Release, *PM meets with Colombian President Álvaro Uribe*, 10 June 2009 <http://pm.gc.ca/eng/media.asp?id=2629>. Also, discussion with the deputy foreign minister of Colombia Mejia at the Canadian Foundation of the Americas, Ottawa 17 March 2010, notes on file with author.

with a country where labor and human rights abuses are so prevalent".[44] The SCIT further recommended that the government undertake an independent human rights impact assessment prior to ratifying the CCOFTA, adopt unilateral corporate social responsibility standards for Canadian based MNCs operating in Colombia, as well as include specific provisions to that effect in the CCOFTA.[45] In spite of these recommendations, the Canadian government concluded the CCOFTA without human rights obligations for investors and rejects an obligation to regulate the conduct of its MNCs abroad.[46] At the same time, the government continues to support Canadian FDI in Colombia and the work of Canadian-based MNCs, while allegations have been made as to existing and potential human rights and environmental risks from such activity. This section will briefly discuss the key implications for human rights protection and enjoyment in Colombia from the investment protection provisions in the CCOFTA. For clarity, the potential risks for human rights enjoyment from the investment protection chapter in the CCOFTA is discussed first and the risks of human rights and environmental harm stemming directly from the activity of Canadian-based MNCs is discussed second although it is implied that the CCOFTA is considered here as a proxy for such harm to occur.[47]

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[44] See SCIT Report *supra* note 37. The questionable legitimacy and legality of Canada concluding the CCOFTA while Colombia does not exercise control over large portions of its territory were raised in parliamentary debate on the ratification of the deal. See House of Commons, Debates (*Hansard*), 40th Parl., 3d Sess., No 016 (24 March 2010).

[45] SCIT Report, *supra* note 37 recommendations at 43-44.

[46] The Government did not issue an official response to the SCIT report on the CCOFTA. However, the refusal to include explicit human rights obligations for investors is evident from the CCOFTA text, while the rationale for this could be implied from the government's response to Government Response To The Fourteenth Report Of The Standing Committee On Foreign Affairs And International Trade, *Mining In Developing Countries - Corporate Social Responsibility* (available at http://www.parl.gc.ca/HousePublications/Publication.aspx?Mode=1&Language=E&DocId=2030362&File=0 accessed August 22, 2013).

[47] The distinction is relevant for the discussion on the sources of home state obligations see below section 2.

1.1.2.1 Human rights implications of the investment protection clauses in the CCOFTA

IIAs do not explicitly reference human rights or contain provisions that in any way contradict state obligations found in human rights or any other international law sources. Rather, they create a set of obligations between two sovereigns granting private investors certain rights.[48] When discussing the effects of investment treaties on human rights or environmental protection this is done by implication of the limitations (or restrictions) that obligations found in IIAs can have on the host state right/power, or duty, to regulate in these areas, which can at the same time be its obligation under human rights (or environmental) instruments.[49] A comprehensive analysis of how specific investment protection clauses in the CCOFTA might violate particular human rights is not attempted here[50], the focus being rather on the probability of the risk of such an interference to occur (in particular in light of the human rights crisis in Colombia), the knowledge of the Canadian state of this probability, and its power to prevent a restriction on Colombia's host state regulatory space from enabling private corporate human rights or environmental harm.

[48] International investment law (treaties and arbitration case-law) is often said to have a hybrid nature whereby a public international law instrument grants private rights that are in turn enforced directly against the host state on the international plane through investor-state arbitration. See Z. Douglas, "The Hybrid Foundations of Investment Treaty Arbitration" (2003) 74 British YB of Int'l L 1, 151.

[49] UN, Economic and Social Council, *Human Rights, trade and investment*, Report of the High Commissioner for Human Rights, UN Doc., E/CN.4/Sub.2/2003/9 (2 July 2003) [hereinafter OHCHR "*Human rights, trade and investment*"] at paras 28-35. State regulatory powers are often equated with "police powers" or "public interest regulation". See Mann *infra* note 59 at 18. However, in human rights law it is proper to speak of the state duty to regulate (see OHCHR *ibid*) and not a discretion to do so as the concept of police powers would seem to suggest. The types of state obligations under human rights treaties are discussed in section 2.

[50] For a short, albeit informative analysis see Canadian Council for International Cooperation, *Making A Bad Situation Worse: An Analysis Of The Text Of The Canada-Colombia Free Trade Agreement* (Ottawa: CCIC, 2009); É. Roy, "Le traité de libre-échange Canada-Colombie et les droits de la personne : Les défis de la cohérence dans la politique étrangère canadienne" (Montréal: Centre d'études sur l'intégration et la mondialisation, 2009).

The investment chapter of the CCOFTA is based on a model investment treaty that the Canadian government has used in bilateral negotiations for almost a decade.[51] This template traces its origins to the investment protection chapter of the *North American Free Trade Agreement* (NAFTA)[52] whose provisions and the jurisprudence of investor-state arbitral tribunals constituted under the NAFTA have been the subject of extensive academic commentary, especially in terms of their effects on host state regulation to protect human rights and the environment[53]. While the investment protection chapter of the CCOFTA includes an article encouraging the state parties to adopt corporate social responsibility standards[54], and a provision encouraging states to not lower health, safety and environmental standards in order to attract investment[55], clauses that are not found in previous Canadian

[51] When used as standalone instruments these agreements are called *Foreign Investment Promotion and Protection Agreements* (FIPAs) and are identical in their purpose, scope and objectives to the global regime of BITs and IIAs. The current Canadian model FIPA has been used since 2004 as a standalone agreement or replicated in investment protection chapters of Canadian FTAs. Foreign Affairs, Trade and Development Canada, *Canada's FIPA Program: Its Purpose, Objective and Content* available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-purpose.aspx?lang=en

[52] *North American Free Trade Agreement* (1993) 32 ILM 289, 605 entry into force January 1st 1994, Chapter 11. The NAFTA investment chapter is closely based on earlier versions of US BITs negotiated in the 1980s. For the origins of the modern US model BIT see K. J. Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (New York: Oxford University Press, 2010), at 19-75.

[53] See for e.g. L. E. Peterson and K. R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration* (Winnipeg: IISD, 2005); P. I. Hansen, "The Interplay Between Trade and Environment Within the NAFTA Framework" in F. Francioni, ed., *Environment, Human Rights and International Trade* (Oxford: Hart, 2001) at 313; L. E. Peterson, *Evaluating Canada's 2004 Model Foreign Investment Protection Agreement in Light of Civil Society Concerns*, Briefing Note prepared for the Canadian Council for International Co-operation, June 2006, available at http://www.ccic.ca/_files/en/what_we_do/trade_2006-06_foreign_investment_memo_e.pdf

[54] Article 816 of the CCOFTA reads:

> "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."

[55] Article 815 of the CCOFTA. References to the protection of labour and environmental standards, as well as an obligation to implement the CCOFTA consistently with the parties' right and responsibilities in these areas found in other international instruments, are found in Chapters 16 "Labour" and 17 "Environment" of the CCOFTA. The two side agreements on labour and the environment concluded concurrently with the CCOFTA, which reaffirm state obligations in these areas and commit them to further cooperation, are also referenced as being integral with the trade and investment provisions of the CCOFTA. See *Canada-Colombia Labour*

IIAs[56] the standard investment protection clauses replicate those of the NAFTA and the Canadian model IIA[57]. These include: definitions of investment and investors, standards for investment and investor treatment (national treatment, most-favoured-nation treatment, minimum standard of treatment in accordance with international law), prohibition of performance requirements, rules on expropriation and rules on settling disputes between investors and the host state through international arbitration.[58] Each of these provisions has been identified in academic commentary as carrying a risk of impairing human rights protection and enjoyment in the host state, a detailed analysis of which is beyond the scope of this chapter.[59]

Several different scenarios can be identified in which IIAs intersect with human rights, both in the state duty to protect human rights enjoyment from being impaired by a private party and the state obligation to strive towards the progressive realization of human rights.[60] First, an investor could use the IIA to challenge human rights or environmental regulation under

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Cooperation Agreement, signed November, 21 2008, entry into force August 15, 2011 (available at http://www.labour.gc.ca/eng/relations/international/agreements/lca_colombia.shtml#ccalc) and *The Agreement on the Environment between Canada and the Republic of Colombia* signed and entered into force on the same dates (available at http://www.ec.gc.ca/caraib-carib/default.asp?lang=En&n=FFEF249E-1) . However, as noted by several commentators, these references are to the obligations of states to regulate and not of obligations of private investors to respect rights standards in these areas—references that might appear mooted if the host state regulatory powers are curtailed to begin with by the core substantive investment protection provisions of the IIA. See Mann *infra* note 59 at 10-11; Jacob *ibid* at 11.

[56] A definition of indirect expropriation that excludes "non-discriminatory measures designed to protect legitimate public welfare objectives such as health, safety and the protection of the environment" was also introduced in the CCOFTA. See Annex 811(b). This is a departure from the previous model IIA that however remains to be tested in investor-state jurisprudence. See Peterson, *Evaluating Canada's 2004 Model FIPA supra* note 53 at 4. See further below on expropriation.

[57] Only the provisions that are relevant to the discussion on host state regulatory space to protect human rigths and the environment are considered here.

[58] Articles 803-807; 811; 818-837; and 839 of the CCOFTA.

[59] See e.g. OHCHR, *Human Rights, Trade and Investment supra* note 49 at paras 24-27; R. Suda, "The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization" in O. de Schutter, ed., *Transnational corporations and human rights* (Oxford: Hart, 2006), at 73-160; H. Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities* (Winnipeg: IISD, 2008); M. Jacob, "International Investment Agreements and Human Rights" (2010) INEF Research Paper Series 03/2010.

[60] State obligations under human rights law have three aspects: the duty to respect, the obligation to protect (against state and private interference with the enjoyment of a right) and the obligation to fulfill (often called the obligation to progressively realize) all human rights. See OHCHR *ibid* at para 29. See further below s.2.

the pretext that it violates one of the substantive investment protection clauses. In this case, the rules on expropriation and the standards of treatment (protection) of foreign investment by the host state are the most problematic.[61] For example, although the notion of 'indirect expropriation'[62] seems to have been clarified in the CCOFTA, investor-state arbitrators have often adopted the approach of only assessing the economic losses suffered by the investor and ignoring the purpose of the regulatory measure when awarding compensation, which opens the door for almost any regulatory measure that would negatively impact the assets or economic interests of the investor to be challenged.[63] Similarly, the open-ended scope and application of the minimum standard of treatment clause[64] carries the risk of claims for investor-state arbitration on a panoply of regulatory measures including labour rights, indigenous rights, environmental protection etc.[65] These clauses can make human rights or

[61] Mann *supra* note 59 at 20 notes that non-discrimination and national treatment provisions are less likely to give rise to interference in this regard given the recognition in several arbitration cases that discriminatory regulation for a public purpose between nationals and non-nationals does not violate these IIA provisions. Citing *Methanex Corp. v United States of America* (2005).

[62] Under IIAs, host states are allowed to expropriate the property of foreign investors provided that the 'taking' is done for a public purpose, is not discriminatory and the investor is compensated commensurately to the suffered loss. R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008) at 91. Expropriation is usually distinguished as direct regulatory taking (nationalization, confiscation etc.) and indirect takings which encompass a panoply of regulatory measures (taxation, administrative authorisations etc.) that have received diverging interpretations by differente investor-state arbitration tribunals. *Ibid* at 92-118.

[63] This is also known as the "sole effects doctrine" by which only the effect of the regulatory measure on the property (or assets) of the investor is relevant for evaluating compensation. See e.g. R. Dolzer and F. Bloch, "Indirect Expropriation: Conceptual Realignments?" (2003) 5 Int'l L Forum 155, at 158. This approach was used for example by the arbitration panel in *Metalclad Corp v United Mexican States* (2000) 119 ILR 615 and *Técnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No ARB(AF)/00/2 (2003)—both cases of environmentally-inspired regulation.

[64] Article 805 of the CCOFTA provides that "[e]ach Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security". This provision is found universally in IIAs and has been used by investors (and applied by investor-state arbitrators) to seek compensation for a wide spectrum of government measures and/or behavior, ranging from denial of due process, discrimination and harassment, bad faith, transparency, to the protection of the investor's legitimate expectations for a "stable and predictable regulatory climate". See e.g. *Tecmed ibid* at para 154. For applications see I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford: Oxford University Press, 2008), at 154-181.

[65] Investor-state arbitration cases involving these and other regulatory measures adopted by host states that conflict with the minimum standard of treatment are enumerated in Ioana Knoll-Tudor, "The Fair and Equitable

environmental protection regulation either too costly, undesirable or even feared in the host state because of the risk of arbitration claims. Other provisions such as the definition of covered investments[66], protection offered to pre-established investments[67] and stabilization clauses[68] that are found in CCOFTA have all been linked to the restriction on host state regulatory space and the resulting 'regulatory chill' or the unwillingness of the host to regulate MNCs out of fear or threat of arbitration claims[69].

A second scenario involves the interference of the IIA with the host state capacity to progressively realize human rights, especially economic and social rights (e.g. the right to health, water, housing) through legislative and regulatory measures targeting investors[70]. Provisions prohibiting the host state from imposing performance requirements or other

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Treatment Standard and Human Rights Norms" in P-M Dupuy, E-U Petersman and F. Francioni, eds., *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) at 339. See also Mann *supra* note 59 at 23-4 and Jacob *supra ibid* at 17-18; Suda *supra ibid* at 101-4.

[66] CCOFTA Article 838 "Definitions", paragraph 14(i): investment means "any other tangible or intangible property, moveable or immovable property, and related property rights acquired in the expectation or used for the purpose of economic benefit or other business purposes".

[67] Often referred to as 'pre-establishment rights', or 'right to admission' offering investors of a party who have not yet established themselves physically on the territory of the host state the substantive protection of the IIA. Dolzer and Schreuer *supra* note 62 at 80-81. In practice this translates into a prohibition to the host state to refuse (or screen) the entry and establishment to an investor regardless of the motivation (e.g. environmental impact assessment) that such a refusal might have. This type of protection is offered in US and Canadian IIAs, including the CCOFTA (Articles 803, 804 and 812(1)).

[68] Stabilization clauses are contractual arrangements between investors and host states in which the host state undertakes to provide regulatory stability for the duration of the contract. L. Cotula, "Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a rethink of stabilization clauses" (2008) 1 J of World Energy L & Business 2, 158. In the CCOFTA article 839 provides the procedure (UNCITRAL) and rules (international law standards) to be used in Colombian law for the arbitration of claims made by Canadian investors who have entered into "juridical stability contracts" with the Colombian government prior to the entry into force of the CCOFTA.

[69] Suda *supra* note 59 at 99-101 discussing the notion of 'regulatory chill', the impact on human rights regulation of MNCs of stabilization clauses, at 98, and the impact of the definition and scope of covered investments and rules on admission, at 110-112.

[70] See Article 2(1) of the International Covenant on Economic and Social Rights (ICESCR): 'to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the [ICESCR] by all appropriate means, including particularly the adoption of legislative measures'.

restrictions on investors[71] are usually discussed in this context, but the case law of investor-state arbitration tribunals suggests that the standard substantive protection provisions offered to investors such as national treatment or compensation for indirect expropriation can also be used to challenge host state measures aimed at the progressive realization of human rights[72]. A pertinent example would be a situation where host state regulation aimed at redressing past violations of property rights of indigenous peoples, or discrimination of racial minorities or socially disadvantaged groups can be challenged by an investor under the terms of the IIA.[73] A related concern is the transfer to private investors of state services essential for essential citizen and community needs such as water, sanitation, health, education etc., where such private commercial operations can for example reduce the quality of the service below the standards required by international human rights law, or directly or indirectly preclude access

[71] Performance requirements are regulatory measures intended to place conditions on foreign investors with the view of achieving a specific benefit (economic or otherwise) for the host state or local economy where the investment is taking place. These can relate to intellectual property, market access, generation of employment, linkages with local communities (labour, CSR etc.) etc. See N. Kumar, "Use and effectiveness of performance requirements: What can be learnt from the experiences of developed and developing countries?" in *The Development Dimension of FDI: Policy and Rule-making perspectives* (New York: UNCTAD, 2003) at 59-60. US and Canadian post-NAFTA IIAs prohibit the host state from using such requirements. Dolzer and Schreuer *supra* note 62 at 82-3. See Article 807 of the CCOFTA listing types of prohibited performance requirements. The rules on market access (Articles 801 and 904 of the CCOFTA) have also been linked to the Colombian government's inability to impose restrictions or conditions on Canadian investor access in sensitive sectors (health services, environmentally sensitive regions etc.). See *Making a Bad Situation Worse supra* note 50 at 20-1.

[72] Suda *supra* note 59 at 119-125 discussing the effect on human rights realization of performance requirements, standards of treatment and indirect expropriation. Even where a regulatory measure is not explicitly prohibited as a performance requirement under the IIA, it can nevertheless be challenged by an investor under the standards of treatment or expropriation clauses. See Article 807(2) of the CCOFTA "A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with subparagraph [1]. For greater certainty, Articles 803 [National Treatment] and 804 [Most-Favoured-Nation Treatment] apply to the measure." Measures directed only to foreign investors that do not apply to domestic firms could trigger such claims.

[73] Such a scenario played out under the 2002 *Minerals and Petroleum Resources Act* in South Africa, which sought to transfer all privately owned mineral rights to the state that would distribute licenses to businesses as part of an affirmative action policy to redress past discrimination of ethnic minorities by requiring private companies to comply with employment equity and contribute to local community development. The government was threatened with investor arbitration claims under IIAs with the UK, Luxembourg and Belgium. Suda *ibid* at 121-3. Similar situations have arisen in relation to government attempts at 'indigenization' (transfer of foreign property to nationals of the host state) in Zimbabwe and Congo. *Ibid*.

to it.[74] In such scenarios the host state action to protect human rights could directly be challenged in investor-state arbitration, while the state capacity to fulfill human rights would also be indirectly burdened or even impaired through the cost of the investor-state litigation and award.

A third type of scenario concerns host state inaction due to complicity in human rights abuses with private investors.[75] In such cases the IIA could both enable the violation, for example in cases where the host state government issues land exploration or resource exploitation licences in violation of property right of internally displaced indigenous populations, and interfere with the right to remedy of the affected individuals who would bring civil or criminal claims before the courts of the host state against the private investor.[76] This is further discussed below.

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[74] Most often cited are the cases of water privatization in Bolivia and Argentina where water and sanitation services run by foreign MNCs both lowered the quality of the service and resulted in discrimination against the poor and marginalized groups from the increase in costs. This led to violent protests from the local communities and when the state sought to redress the situation by nationalizing the service, the corporations initiated investor-state arbitration claims. See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3); *Aguas del Tunari S.A. v. Republic of Bolivia* (case No. ARB/02/3). The effects of privatization on economic, social and cultural rights are discussed at length in OHCHR, Human RIhgts, trade and investment at paras 44-55 and Suda *ibid* at 123-5. For a discussion on how the arbitration tribunals interpretation of the IIA rules on expropriation, fair and equitable treatment and equitable defences of necessity restricted human rights protection in Argentina see G. Mayeda, "International Investment Agreements between Developed and Developing Countries: Dancing with the Devil - Case Comment on the Vivendi Sempra and Enron Awards" (2008) 4 McGill Int'l J. Sust. Dev. L. & Pol'y 189.

[75] Such cases have been documented. See G. Gagnon, A. Macklin and P. Simons, *Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones – Implications for Human Rights and Canadian Public Policy* (Toronto: Relationships in Transition, 2003) and below s. 1.2.2 in relation to MNC complicity in human rights abuses in Colombia.

[76] Peterson and Gray *supra* note 53 at 16-22; Suda *supra* note 59 at 89. While foreign investors can benefit from the investor-state dispute mechanism of IIAs to bring claims against the host state, affected groups and individuals can only rely on the courts of the host state or, in limited conditions, on international complaints mechanisms of some human rights treaties. The collusion of host state and investor interest and possible complicity in the rights violation can be a significant obstacle to civil and criminal proceedings before domestic courts (i.e. investigation, evidence etc.). Domestic courts might be constrained by the provisions of an IIA to rule in favour of individual complainants. See Suda *ibid* at 122 discussing the decision of the High Court of Zimbabwe ordering the government to refrain from the compulsory acquisition of the property of foreign assets in accordance with the Germany-Zimbabwe IIA. See also F. Francioni, "Access to Justice, Denial of Justice, and International Investment Law" in Dupuy at al. *supra* note 65 at 71-7.

Generally speaking, it is the possibility of bringing a claim, or the threat of a claim of investor-state arbitration against the host state that is the enabling link in all these scenarios. The investor-state dispute resolution process has itself been subject to significant human rights criticism in relation to, for example, its lack of transparency[77], lack of sensitivity to human rights issues and bias in favor of private investor claimants from developed states[78]. While the issue of the transparency of investor-state arbitration claims seems to have been resolved in favor of public access[79], the risk remains that investor-state arbitration tribunals would be in a position to adjudicate on issues of public interest regulation encroaching on the economic rights and interests of the investor protected by the IIA—something that should arguably be left to the domestic courts.[80] In addition, the lack of precedent in arbitral awards[81] increases the uncertainty of the process and can also contribute to deterring host state regulation aimed at safeguarding human rights or the environment.[82]

[77] Mann *supra* note 59 at 29-32; Peterson and Gray *supra* note 53 at 9-12; Jacob *supra* note 59 at 23-6;

[78] See e.g. G. Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration" (2012) 50 Osgoode Hall LJ 211, concluding based on an statistical empirical analysis of investor-state arbitration cases that there is a significant amount of bias in favour of private investors among investment arbitrators, in particular towards investors from major Western capital-exporting states. A related concern is the independence of private arbitrators and their questionable independence in situations where government and private investor interests in maintaining the system collide. See G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007) at chapter 7; G. Van Harten, "Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law" in S. W. Schill, ed., *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) at 643.

[79] While Article 830 of the CCOFTA requires that all awards be made public, the parties to the dispute (i.e. the private investor and the host state) are given the option to forego public disclosure of documents submitted to the tribunal and while hearings are in principle public, tribunals are permitted to establish procedures for holding sessions in camera.

[80] See e.g. B. Kingsbury, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality", in Schill ed., *supra* note 78 at 75.

[81] Article 835(1) CCOFTA.

[82] For a discussion on the consideration of host state regulatory action to protect the environment, including the weight given to extensive public participation in the context of an environmental impact assessment procedure (that also led to the denial of certain permits to the foreign investor) by different investor-state tribunals (most notably *Tecmed*, *Methanex* and *Metaclad* cited *supra*) see R. Pavoni, "Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal" in P-M Dupuy et al., eds., *supra* note 65 at 551-556.

To summarize, it would seem that IIAs affect human rights enjoyment only indirectly, that is insofar as they could be said to curtail host state regulatory capacity. Under normal circumstances, the balancing of human rights protection and the protection of foreign investment is a standard exercise of executing two sets of international law obligations. However the ongoing armed conflict in Colombia significantly amplifies the risk of negative consequences from the investment protection provisions of the CCOFTA on human rights and environmental protection in Colombia and raises complex questions of how the legal rights created for Canadian investors who choose to operate in conflict regions in Colombia will affect the rights of local communities. For example, while pre-establishment rights would not necessarily pose a concern where the state apparatus is functional, in Colombia this could mean instantaneous exploration or even exploitation access to immense areas of land where indigenous and local landowners have been internally displaced.[83] Apart from complicating future land restitution claims or reducing Colombia's regulatory space to introduce environmental or development project screening, a primary issue is that such broad-based investor rights would have been granted in the CCOFTA amidst a staggering participatory deficit.[84] As further examined in the sections below, it is possible to ask from the point of view of recent developments in human rights law if governmental consent to such rights is even valid. Ultimately, if land is restituted to the victims, compensation would

[83] This is also plausible in light of the modification brought to the national mining legislation discussed above.
[84] Land restitution claims are one of the most pressing human rights concerns for victims of internal and forced displacement due to the armed conflict. On the issue of participatory deficit when negotiating IIAs see Jacob *supra* note 59 at 22; Mann *supra* note 59 at 35-9 discussing the effects of pre-establishment clauses on the host state capacity to promote human rights where government regulation is weak or non-existent at the time of ratification of the IIA.

still be owed to the foreign investor and the prospect of investor-state arbitration in such a scenario could be a substantial deterrent from finalizing the land restitution process.[85]

At the same time, it is important to consider how the investment protection provisions could influence the behavior of Canadian investors operating in conflict areas in Colombia. Compensation of investors' losses "owing to armed conflict or civil strife" has already found its way into the CCOFTA.[86] The risk is therefore credible that Canadian investors would not remain neutral actors in the ongoing conflict in Colombia all the while benefiting from the protections of the CCOFTA.

1.1.2.2 Human rights implications from the activity of Canadian-based MNCs

While the previous section sketched the ways in which IIAs can enable or contribute to human rights and environmental harm by means of restricting host state regulatory space, the harm itself arises almost exclusively through the activity (or mere presence) of private corporations. It is therefore useful to see what type of MNC activity is most likely to result in harm, what human rights are most likely to be affected and in what way. The SRSG has identified that although virtually all internationally recognized human rights could be affected by corporate activity, not every type of FDI carries such a broad risk.[87] Corporate

[85] Such concerns have already been raised by the HRC in its concluding comments on Colombia. See e.g. CESCR, Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant Concluding Observations of the Committee on Economic, Social and Cultural Rights Colombia, 44th Sess., UN Doc. E/C.12/COL/CO/5 (21 May 2010) at paras 23-5.

[86] Albeit in the form of non-discriminatory treatment for measures that the host state adopts to compensate such losses, without requiring the state to adopt such measures in the first place. See Article 806 CCOFTA. However, armed conflict in Colombia is not localized and is by no means equally intense in different regions. It is easy to imagine how this clause can enable a flood of claims for losses suffered due to armed conflict or protests against large-scale FDI projects from local communities as the full protection and security of the investment is already expressly guaranteed for in Article 805.

[87] HRC, *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, John G. Ruggie submitted as addendum to the 2008 SRSG Report HRC, 8 Sess., UN

activity in the extractive, heavy manufacturing and infrastructure sectors is therefore not surprisingly more likely to affect rights enjoyment.[88] A single activity often generates impact on multiple human rights and similarly an initial violation often leads to further abuses.[89] Abuses can affect individuals or communities, and in the latter case frequently involve environmental harm that negatively affects the health, subsistence and livelihood of local populations.[90] In cases involving FDI on indigenous lands, the corporate failure to obtain the consent of the local communities prior to commencing activity or to properly carry out environmental or social impact assessments is frequently cited.[91] Finally, corruption, bribery and other forms of MNC influence on various levels of government are also linked to rights violations.[92]

There is no space here to engage in a detailed discussion about how Canadian based MNCs may potentially violate human rights in Colombia, as there is enough factual evidence on the work of Canadian-based MNCs in Colombia to support the claim that the Canadian government knew about the potential of human rights and environment harm. Canadian MNCs were active in Colombia prior to the conclusion of the CCOFTA and continue to

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Doc. A/HRC/8/5/Add.2, 23 May 2008 ["*Survey of Corporate Abuse*"] at 2. This report examined rights found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and ILO Core Conventions. Given that corporations are also major employers, the report discusses labour and non-labour rights impacted.

[88] *Ibid* at 10.

[89] For example, non-adequate health and safety standards in hazardous work environments can lead to injury or death or worker protests that can trigger violent suppression by corporate security personnel. *Ibid* at 2.

[90] *Ibid* at 4, 14 and 24-25 citing cases of water contamination, release of toxins affecting the right to health and life, and the destruction of wildlife necessary for the survival of indigenous populations. The critical link between environmental degradation and violations of human rights in the context of FDI has been recognized for a long time. The usual rights involved are the right to life, health and water in terms of individual rights and the right to property, economic subsistence and prior consultation or consent in terms of local communities. See e.g. OHCHR, *Human Rights, Trade and Investment supra* note 49 at para 35; concluding observations on Colombia *supra* note 85. This critical connection is explored in s2 in relation to the sources of home state obligations.

[91] SRSG, *ibid* at 24-5.

[92] *Ibid* at 3. Interestingly corruption or bribery from the foreign investor has been examined as a host state defence against an investor-state arbitration claim. See P. Muchlinski, "'Caveat Investor'? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard" (2006) 55 Int'l & Comp L Q 3, 527.

operate actively especially in exploration and production in the mining sector, oil and gas extraction, pipelines and drilling.[93] There have been a number of studies directly or indirectly linking Canadian based MNCs to human rights violations, or describing them as the *cause* for some violations.[94] Generally, rights violations may manifest as direct abuses by MNCs or direct complicity in abuses committed by the host state (e.g. joint investment projects with the host state); indirect complicity (such as financing or supplying tools for the actual violations); and incidental complicity (where the MNC or the FDI projects are the proximate cause for violations or benefit from them).[95] Each of these categories can be further subdivided according to the level of control exercised by the corporation over the host state government, or according to the type of support provided for the abuse (e.g. financial support or tools).[96] Therefore the determination of the extent of corporate involvement in specific rights violations is often very complex, in particular when discussing indirect impact on economic or social rights of local communities. In such cases a human rights impact

[93] See e.g. Government of Alberta, Colombia-Alberta Relations, September 2012 available at http://www.international.alberta.ca/documents/Colombia-AB.pdf

[94] See generally L. North; T. Clark & V. Patroni, eds, *Community rights and corporate responsibility: Canadian mining and oil companies in Latin America* (Toronto: Between the Lines, 2006); Inter Pares, *Land and Conflict: Resource Extraction, Human Rights and Corporate Social Responsibility: Canadian Companies in Colombia* (Ottawa: Inter Pares, 2009) [Hereinafter "*Land and Conflict*"] specifically on the human rights impacts of four Canadian based MNCs currently operating in Colombia.

[95] Adapted from I. Tofalo, "Overt and Hidden Accomplices: Transnational Corporations' Range of Complicity for Human Rights Violations", in De Schutter ed., *supra* note 59 at 336-7; International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations for companies* (Versoix: International Council on Human Rights Policy, 2002) at 125-135 on assessing complicity in the same broad categories. Tofalo's analysis is rooted in the concept of complicity between the host state and the corporation and ignores the links between corporations and home states. Corporations also act as autonomous agents wielding immense economic power. The classification used by the SRSG of direct and indirect impacts on human rights is therefore added here.

[96] Tofalo *ibid* at 343, 345-6. Thus "[M]NC participation in the shaping of an abusive regime" by means of influencing legislation or government policies could fall into the category of direct violation (because of the control of the MNC over the government) or could be categorized as indirect financial support of a repressive regime. Further, MNCs could also be accused of benefiting silently (i.e. not objecting) from rights abuses (e.g. accepting land titles obtained without the consent of local communities). On the concepts of corporate influence, including influence over government policy and legislation, and complicity and their legal significance in domestic and international law see UN, HRC, *Clarifying the Concepts of "Sphere of influence" and "Complicity" Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie*, UN Doc. 1/HRC/8/16, 15 May 2008.

assessment (both by the private corporation and the state) could be the most appropriate tool for establishing causation links.[97]

In the first scenario, no allegations have to date been made against Canadian based MNCs directly perpetrating egregious human rights abuses, although such abuses have been documented on both sides of the armed conflict. However, considering that most of the FDI projects are found in conflict areas, where government control is weak or inexistent, MNCs risk becoming a "party to one of the sides of the conflict" and thus directly committing or becoming directly involved in human rights abuses perpetrated by state or paramilitary forces.[98] Most noteworthy is the hiring of private security personnel to protect the physical infrastructure of the project, which may either enter into direct confrontation with local communities or partake in armed operations affecting civilians and thus commit or become complicit in rights abuses.[99] A related and more apparent scenario is when MNCs may directly or indirectly, knowingly or inadvertently support (for example when being required

[97] The SRSG Guiding Principles include an encouragement for corporations to undertake human rights and other forms of impact assessments as part of the corporate duty of due diligence to respect human rights. "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework", HRC, 17th Sess., UN Doc. A/HRC/17/31 (21 March 2011), Commentary to principle 18. The potential for the state HRIA process under the CCOFTA to result in elucidating causation between investment protection provisions and corporate rights violations is discussed in chapter 2.

[98] See Deconstructing engagement *supra* note 75. See also testimonies of Gauri Sreenivasan, Canadian Council for International Co-operation and Professor Penelope Simons, University of Ottawa, in SCIT Report *supra* note 37 at 32, describing that companies (especially extractive-sector oil, coal and general mining companies, whose business is premised on land and subsoil exploitation) operating in conflict zones, directly become parties to the conflict and risk to inadvertently or knowingly support human rights abuses.

[99] What has been described as the "struggle from below", namely when security forces of private investors operate in conflict areas where the presence of the central government is weak they often find on resistance from local communities either politically inspired or fuelled by one of the parties to the conflict for strategic purposes, such as seeking extortion from the wealthy multinational. T. Gordon and J. Webber, "Imperialism and Resistance: Canadian mining companies in Latin America" (2008) 29 Third World Quarterly 63 at 72, 79 discuss that the security forces of one extractive sector multinational has allegedly murdered a local community leader. *Land and Conflict* notes that in all of their case studies, private security hired by the Canadian multinationals was linked through various channels with either paramilitary groups, or was ex Colombian army personnel, both of which have a documented poor human rights record. For older documented cases see C. Forcese, "Deterring "Militarized Commerce": The Prospect of Liability for "Privatized" Human Rights Abuses", (2000) 31 Ottawa L Rev, discussing (at 175-8) cases of private corporate security forces violation of human rights in Colombia and prospects for civil and criminal claims before Canadian courts.

to make extortion payments by paramilitaries in order to keep their investment project safe) human rights abuses committed by one of the parties to the conflict.[100] MNCs can thus directly provide the financial or other (e.g. facilities, personnel etc.) means for abuses committed by the state or the paramilitaries that violate individual (e.g. torture, kidnapping, extrajudicial executions) and community (e.g. forced evictions and displacement, extortion) rights.[101] Closely related is the risk for MNCs to knowingly or inadvertently benefit from rights abuses, notably through acquisition of illegally obtained land titles because of forceful dispossession or obtained without prior and informed consent from local populations.[102] In some cases, the government has been reported to have relied on MNCs to carry out consultations with local populations, including project impact assessments and the reports indicate that populations have often been unaware of the exact impact and magnitude of the

[100] Gordon and Webber *ibid*. Forcese, *ibid* at 176, and Lavaux, *supra* note 9 at 25, describe extortion payments (the so called "war tax" or "circulation tax" paid to ensure capital or personnel passage) made by MNCs to the paramilitaries, state forces or both interchangeably in order to secure protection of their projects. Indeed as Richani discusses, large multinational presence has been the source of income of paramilitaries for decades (the conflict in Colombia has been ongoing for almost fifty years) and in many cases, monies extorted or secured through threats, intimidation or even voluntary donations has "fuelled the ongoing conflict". *Supra* note 31 at 124-5. Specifically there appear to be three models of indirect funding to the paramilitaries: "direct tax", for securing personnel or capital safety, "community tax" which forces MNCs to invest in community projects, and thus surrogate for state functions (of special significance for the agency principle of state responsibility, see below section 3); and joint ventures with companies owed by the guerrillas. *Ibid* at 125.

[101] Similarly, large-scale land dispossession and displacement, either forced (by the state armed forces or paramilitaries) or economic (because of poverty and detrimental living conditions due to the armed conflict), have created conditions for environmental degradation and transformation of farmland into cocaine plantations by the paramilitaries. Colombia continues to be the world's larges source of cocaine and other illicit drugs. See SCIT *supra* note 37 report at 7. By funding the paramilitaries Canadian MNCs may in fact be indirectly supporting these abuses.

[102] *Land and Conflict supra* note 94 at 17, 20-21 notes that whereas the Colombian constitution (and the ratification of Colombia of the UN *Declaration on the Rights of Indigenous Peoples*) provides for indigenous and Afro-Colombian to be consulted and give consent to development projects, state agencies and government regulation avoided these consultations by defining land ownership over project areas in such a way so as to exclude indigenous territories or by requiring populations to meet impossible criteria for their rights to be recognized. Further, the constitution does not offer similar protection to local farmers or small-scale miners that are often the most common targets of paramilitary offensive to dispossess in order to clear up the land for investment projects. With respect to areas protected for their environmental significance, the Colombian Constitutional Court has recently invalidated mining regulations allowing projects in highland ecosystems. See D. Molinski, "Colombian court kills recently passed mining laws", *Mines and Communities*, 12 May 2011 (available at http://www.minesandcommunities.org/article.php?a=10923, last accessed June 6, 2011).

investment project or misinformed by the corporation.[103] In a related scenario, investment in privatized governmental services (sanitation and water for example) or in services ran by local companies controlled by paramilitary forces, often contributes to the ongoing conflict or directly affects price levels, job security and violating various human rights.[104]

This brings into consideration the more complex yet significant proposition of incidental complicity, namely that mere presence of Canadian MNCs and FDI at large may be the cause for human rights violations and that granting investors more protection through the CCOFTA will exacerbate this situation.[105] Notwithstanding the risk of these circumstances in Colombia leading to impunity for corporate violations of internationally recognized human rights because of the failure of the host state to protect[106], "striking correlations have been observed between investment... and rights abuses" in conflict areas where lucrative prospects of Canadian FDI may be at the center of land dispossession and violations by all actors,

[103] For example, project abandonment and local revitalization have often been downplayed or absent from these assessments thus arguably violating directly internationally protected human rights (such as the right of peoples to dispose of their own natural wealth and resources). *Land and Conflict supra* note 94 at 23. These findings coincide with the report of the UNOHCHR *supra* note 20. As noted in the Inter Pares study, this situation is worsened by the open hostility of both the government and the paramilitaries to any civil organizations that may advocate for different terms of the investment projects or seek to inform more closely the local populations as to the real impacts of the project in question. See also UN, HRC, *Report of the Special Rapporteur on the situation of human rights defenders*, UNHRC, 13 Sess, UN Doc A/HRC/13/22/Add.3 (March 4 2010) documenting the threats, kidnappings and torture and extrajudicial executions of human rights defenders.

[104] MNCs have been documented for employing local workforce under conditions violating internationally protected labour rights. Further, in situations where they run services normally befalling the purview of the state in territories occupied by paramilitary forces, no guarantees exist to protect *any* rights of the local population. *Land and Conflict supra* note 94 at 5, 18.

[105] While *Land and Conflict* directly makes this proposition with respect to the CCOFTA (*Land and Conflict ibid* at 24) the other authors cited have demonstrated how FDI in general in Colombia has fuelled the decade-old conflict, not only by providing funding to the paramilitaries but also from governmental action dispossessing countless persons to clear up land for development projects. See in particular Hristov, Ramirez and Richani.

[106] Despite the evident absence of the host state regulatory presence and overall control in areas occupied by paramilitaries, wide-spread "endemic" corruption in the Colombian judiciary, complex interrelations between government officials, the army and paramilitaries and organized narco-crime create a culture of legal impunity in which the safeguarding of human rights is not assured. See generally Hristov *supra* note 31. The specific ways in which this legal impunity culture can give rise to investor impunity and arbitration claims against Colombia has been explored in Garcia *supra* note 29.

including MNCs.[107] Legitimate concerns therefore exist that strengthening investor rights may frustrate the rights of already disadvantaged individuals and groups and, in the absence of available remedies against investor violations, further contribute to the ongoing conflict and rights abuses.[108] However, establishing the investment protection provisions (or the existence of the CCOFTA) as the proximate cause for private corporate violations can be even more complex than establishing corporate complicity in violations of some rights.[109] Nevertheless, it is submitted here that the qualification of an investment protection clause as the direct or indirect cause for MNC violations is not necessary to warrant home state regulation, in particular regulation within the IIA, in light of the risk already present in the context of Canadian FDI in Colombia.[110] This coincides with the recommendations to the Canadian government by the SCIT that "any trade agreement with Colombia include a compliance and enforcement mechanism for both the environment and human rights", and that it must be accompanied by home state legislation monitoring the respect for human rights by Canadian based MNCs in Colombia[111]- neither of which did the government implement. The balance of this chapter will explore if Canada had an obligation to do so.

To summarize, current and prospective Canadian FDI in Colombia raises credible concerns for human rights violations or environmental harm. The ongoing conflict between state and

[107] *Land and Conflict supra* note 94 at 2, 24 calling for the Canadian government to ensure its MNCs respect human rights and provide remedies for victims of abuses either unilaterally or through the CCOFTA.
[108] The Inter Pares study compares the situation to the one in Peru where massacres and military repression over indigenous peoples ensued after their protesting against the US-Peru FTA in 2009. *Land and Conflict ibid* at 7.
[109] Pertinent questions might include: would the violation have been committed without the existence of the IIA?; is the IIA the sole cause or only a contributing factor to the violation?; is the IIA an enabling factor or has the corporation's incidental benefit from it caused/contributed to the violation?; to what extent did host state inaction contribute or cause the violation etc. Tofalo *supra* note 95 at 355-7 discussing the importance of using proximate causation criteria in finding corporate complicity. The issue of causation is further discussed below in s 4 from the perspective of home state responsibility to regulate.
[110] Arguably, home state regulation is also necessary regardless of the existence of an IIA where the home state has knowledge of the risk of environmental or human rights harm occurring from MNC activity in the host state. See further below.
[111] SCIT Report *supra* note 37, recommendations 6 and 7 at 44-5.

paramilitary forces amplifies this risk. Corporations can affect the full range of international human rights in relation to both individuals and communities. Corporate activity in conflict-affected areas and on indigenous lands where activity in high-risk sectors such as mineral, oil and gas extraction that poses a significant risk to the legal protection offered to Canadian-based corporations in the CCOFTA risk to enable such harm directly or indirectly through restricting Colombia's regulatory space.

1.2. Treaty-based investor regulation as a response to practical and theoretical obstacles associated with unilateral home state regulation

In the absence or the deficiency of host state regulation to prevent or remedy human rights and environmental harm, regulation from the home state can be described as a 'surrogate' approach for ensuring corporate accountability for harm perpetrated in the host state. If understood in a traditional 'command and control' sense, home state regulation of private corporate activity has been defined as the "imposition of a minimum legislative standard, which is then backed by legal sanctions".[112] This therefore implies an exercise of *jurisdiction* (legislation, enforcement or adjudication)[113] over the corporate subject by the home state. Since the harm under consideration here occurs in the territory of the host state, home state

[112] J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (New York: Cambridge University Press, 2006) at 36 and at 41: "For legal purposes, regulation is generally taken to refer to the control over private activities exercised by public authorities". (footnote omitted)

[113] The concept of jurisdiction can be defined as a state's power or right to regulate conduct of private individuals. In terms of international law, jurisdiction is often approached from the idea of the state's entitlement to regulate conduct within the limitations imposed to it by public international law. See F. A. Mann, "The Doctrine of Jurisdiction in International Law" (1964) 111 RDCADI 9. In its broadest sense jurisdiction can be understood as "jurisdiction to prescribe, ie, to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination by a court". C. Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008) at 9 citing §401(a) of the Restatement (Third) of US Foreign Relations Law.

regulation can be termed as a unilateral exercise of *extraterritorial jurisdiction*[114]. As the home state would be acting unilaterally the issue is usually analyzed in terms of the 'permissibility' under public international law of such regulation, as it can be seen as encroaching on the sovereignty of the host state.[115] While as a general rule states are allowed to regulate the conduct of their nationals abroad provided that such action respects the sovereign space of other states[116], an entirely different question addressed in this chapter is if the home state is required to do so in order to prevent human rights and environmental harm. The prevailing view is that "states are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, but nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis and that an overall reasonableness test is met"[117]. While this conclusion may be accurate when analyzing home state obligations to regulate corporate conduct in the absence of an IIA, the aim here is to propose that international law does require home states to ensure that their own activities, which include

[114] From a public international law point of view, the whole concept of jurisdiction is often referred to as *unilateral* 'extraterritorial' jurisdiction, that is the power/entitlement of a state to "apply its laws to cases involving a foreign element (legislative jurisdiction), the power to perform acts in the territory of another state (executive) and the power of a state's courts to try cases involving a foreign element (adjudicative jurisdiction). M. Akehurst, "Jurisdiction in International Law" (1972) 46 Brit YB Int'l L 145. However, as pointed out by Ryngaert, the term "extraterritorial" is confusing because it denotes an absence of a link between the regulating state and the regulated subject/issue, which is in practice almost universally untrue. *Ibid* at 7. As discussed further below, this is indeed the case of home state regulation through IIAs.

[115] The question of whether or not unilateral home state regulation to protect universally recognized human rights can even be regarded as 'impermissible' under the public international rules of jurisdiction can also be seen as moot since the sources of substantive human rights obligations should override the principles of the public international law doctrine of jurisdiction. See A. Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors", in P. Alston, ed., *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), 37 at 58.

[116] In principle, the nationals of a state remain under its control even when entering another state's territorial space thereby also falling under the jurisdiction of the territorial state. See e.g. *Skirotes v. Florida*, 313 U.S. 69 (1941) cited in O. De Shutter, "The Accountability Of Multinationals For Human Rights Violations In European Law" (2004) Center For Human Rights And Global Justice Working Paper 1, at 7. However, while states are allowed to prescribe rules for the extraterritorial conduct of their nationals, they must not enforce such rules so as to violate the sovereign space of other states. See PCIJ, *SS Lotus (France v Turkey)* [1927] PCIJ Reports, Series A, No 10, p 19. It is therefore taken that extraterritorial jurisdiction is permitted as long as it satisfies several conditions among which are: a genuine link between the state and the regulated conduct; a legitimate interest in regulating such conduct; reasonableness not to interfere with the domestic affairs of the host state etc. Discussed in Ryngaert *supra* note 113 at 32-6.

[117] SRSG, 38 at para 15.

the negotiations of IIAs, do not directly cause or indirectly lead to extraterritorial harm. For a number of legal, practical and legitimacy issues this section aims to suggest that home state duty to regulate investors' activity abroad should be addressed within IIAs themselves.

1.2.1 The uncertain status of home state obligations to prevent and remedy transnational environmental and human rights harm resulting from MNC activity

1.2.1.1 The qualification of private transnational environmental and human rights harm and the problem of sources of home state obligations

Several challenges surround unilateral home state regulation. A first problem to the proposal that home states are required to regulate MNC conduct in the host state is the problem of sources of such obligations. As argued in the previous section, MNC activity can result directly or indirectly in both human rights and environmental harm, most commonly the latter giving rise to the former, but this qualification is not easily translated in terms of state international law obligations and responsibility. Neither human rights nor environmental law explicitly require state regulation of private actors, less even the regulation of private activity in other states. In human rights law, it is generally accepted that states have the duty to protect from corporate violations and provide remedies when violations occur.[118] However, international human rights law obligations are primarily vertical, that is imposed on the territorial state where the victims reside or under whose jurisdiction they are. The rules and principles of international environmental law are on the other hand horizontal, concerning

[118] See e.g. Human Rights Committee, General Comment No. 31: *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess., UN Doc. CCPR/C/21/Rev.1/Add/13 (26 May 2004) at para 8.

obligations owed by states to other states and not state duties owed to individuals.[119] Obligations to regulate private actors therefore arise implicitly from the broad duty of states to ensure rights enjoyment or prevent environmental harm on its territory or to persons under its jurisdiction.[120] Much depends therefore on how harm is defined.

Second, the category of 'transnational private human rights and environmental harm' is not readily apparent within the existing parameters of international human rights or environmental law.[121] In theory defined as "arising where the activity and physical damage all occur within one country when capital (including technological know-how has been exported from another country in order to make possible the activity which has caused environmental damage and, presumably, any profits realized from such exported capital will be returned to its country of origin"[122], state obligations in international environmental law are limited to physical transboundary harm.[123] Similarly, human rights harm caused by transnational private activities is seen as internally assimilated into the responsibility of the territorial state to prevent and provide remedies for.

Third, corporate activity is private and unless there is some form of control by the state over the corporation, the resulting harm is not attributed to the state for the purposes of state responsibility.[124] This is further complicated by the complex structure of MNCs where a parent company incorporated in the home state is usually not directly active on the territory

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[119] J. Knox, "Diagonal Environmental Rights" in M. Gibney and S. Skogly, eds., *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press, 2010) at 83.
[120] HRC, General Comment No. 31 *supra* note 118.
[121] S. L. Seck, "Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations" (2011) 3 Trade L & Dev 164 at 176-7.
[122] Xue Hanquin, *Transnboundary Damage in International Law* (Cambridge: Cambridge University Press, 2003) at 9-10 cited in Seck *ibid*.
[123] See e.g *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, UNGAOR 56ts Sess., Supp. No. 10, UN Doc., A/56/10, 2001, article1.
[124] See Draft Articles on State Responsibility discussed in detail below in s.4

of the host state, but operates through ownership of a subsidiary.[125] Control of the parent over the subsidiary and the home state over the parent would be necessary in most cases if attempting to trace obligations/responsibility back to the state of origin of the corporation—a legal test that could in most cases be impossible to meet.[126]

Fourth, the minimum standards of protection associated with certain human rights—especially in the area of economic, social and cultural rights— are not readily discernable from international instruments and therefore often considered as 'policy goals' or 'best efforts' obligations by many states.[127] Similarly, environmental standards vary from state to state and what level of environmental damage is 'permissible' and triggers the state duty to prevent is subject to much controversy.[128] This further complicates how human rights or environmental harm caused by FDI is or can be measured, as well as any discussion on what home state measures are needed to prevent it—rendering unilateral home state regulation difficult to define.

One approach to consolidate the discussion on the sources of home state obligations, which will be further explored in this thesis, is to look for state obligations relating to the prevention of environmental harm within human rights law.[129] Factually, environmental harm most often leads to violations of specific human rights and as such allows for a

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[125] De Shutter for SRSG *supra* note 2 for approaches to home state regulation of parent companies. For approaches to home state regulation of environmental harm caused by subsidiaries of corporations in home states see S. L Seck, "Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law" (1999) 37 Can YB Int'l L 139.

[126] M. Gibney, K. Tomaševski and J. Vedsted-Hansen, "Transnational State Responsibility for Violations of Human Rights" (1999) 12 Harv Hum Rts J 267 citing *Military and Paramilitary Activities (Nicaragua v United States of America),* Merits [1986] ICJ Rep 14; B. Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights" (2002) 20 Berkeley J of Int'l L 45, at 47-8. See further s. 4 below.

[127] See e.g. M. Gondek, The Reach of Human in a Globalising World: Extraterritorial Application of Human Rights Treaties (Antwerp: Intersentia, 2009) at

[128] See J. Knox, "The Myth and Reality of Transboundary Environmental Impact Assessment" (2002) 96 AJIL 291.

[129] Knox *supra* 119; J. Knox, "Climate Change and Human Rights Law" (2009) 50 Virginia J of Int'l L 1:164.

discussion on home state obligations within human rights law[130]. Nonetheless, the key challenge to this approach lies in demonstrating that the home state duty to regulate private actors extends extraterritorially under human rights law.

1.2.1.2 The extraterritorial reach of the home state duty to protect under human rights law

Extraterritorial home state jurisdiction over private activity is exercised by many states in various regulatory areas such as bribery, securities and anti-trust law and international criminal law.[131] Some states have adopted domestic legislation requiring corporations domiciled in their jurisdiction to report on their human rights record, or have conditioned financial and other support to corporations on their human rights performance.[132] There have also been attempts in many states, including Canada, to adopt legislation requiring corporations to respect human rights abroad[133] that have failed mainly due to the perception that home state regulation to this effect would constitute undue interference in the domestic affairs of host states, as well as that such regulation might place investors in a disadvantage

[130] See Knox "Climate Change and Human Rights" *ibid* discussing jurisprudence of human rights tribunals dealing with "environmental human rights". See further below.

[131] J. A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*, A report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG's Special Representative on Business and Human Rights, Working Paper No. 59, June 2010. On the limited use in state practice of extraterritorial home state regulation see M. Gibney and D. Emerick, "The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations Accountable to Domestic and International Standards" (1996) 10 Temple Int'l and Comp L J 123.

[132] See B. Cragg, "Home is Where the Halt Is: Mandating Corporate Social Responsibility Through Home State Regulatory and Social Disclosure" (2010) 24 Emory Int'l L Rev 735 at 754, discussing legislation adopted by Sweden, Denmark and Norway requiring both state organs that assist corporations financially and corporations themselves to respect human rights in host states.

[133] Canada has recently voted down a private member's Bill proposing governmental authority to investigate complaints against Canadian MNCs operating abroad and withhold subsidies (such as the discussed insurance through the EDC) to offenders. See "Canadian lawmakers vote down controversial Bill C-300", Mining Weekly, October 28 2010. A similar attempt occurred in Australia, see Commonwealth of Australia, *Corporate Code of Conduct Bill*, discussed in Zerk *supra* note 112 at 165-7.

vis-à-vis companies from home states that have not adopted such regulation.[134] As the work of the SRSG shows, developing states may themselves oppose extraterritorial regulation from home states, not because of real fears of intervention, but fearing loss of FDI inflows or divestment.[135] While these arguments relate to the permissibility and economic effects of extraterritorial regulation, the primary challenge to the argument that the home state has a duty to regulate in order to prevent and to remedy private MNC harm occurring in the host state lies the fact that key international legal instruments—most notably the ICCPR— limit state obligations to their territory and to the persons under their jurisdiction.[136] Since the victims of potential abuses are found on the territory and within the jurisdiction of the host state, the responsibility to protect would rest with it and not with the home state. This does not mean that human rights law does not recognize that state actions or omissions, whether carried out on domestic or foreign soil, can produce human rights violations abroad[137] however, this is again limited to the actions or omissions of state organs and not private entities operating autonomously without any degree of control by the home state over the

[134] The Canadian House of Commons Standing Committee on Foreign Affairs and International Trade had examined the role of the Canadian state in promoting FDI and recommended legislation to hold Canadian corporations accountable for their human rights impacts abroad. The Canadian government responded that such regulation would violate host state sovereignty as well as cause corporations to relocate to more favourable jurisdictions. See Government Response To The Fourteenth Report Of The Standing Committee On Foreign Affairs And International Trade, *Mining In Developing Countries - Corporate Social Responsibility* (available at http://www.parl.gc.ca/HousePublications/Publication.aspx?Mode=1&Language=E&DocId=2030362&File=0 accessed August 22, 2013). Zerk *ibid*.

[135] In fact most of developing states have called for the inclusion of investor obligations to respect human rights in the host state in IIAs and other investment instruments (such as the failed Multilateral Agreement on Investment) and such provisions exist in IIAs between developing states for example in South Asia. M. Sornarajah, *The International Law on Foreign Investment*, 3d ed (Cambridge: Cambridge University Press, 2010) ["Sornarajah, ILFI"] at 225.

[136] See e.g. Article 2(1) ICCPR; Article 2(1) CAT; Article 3 CERD infra note 164.

[137] HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, *State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries*, 4th Sess., UN Doc. A/HRC/4/35/Add.1 (13 February 2007). Notable examples include cases of extradition etc.

victim or the perpetrator in cases of abuses by an affiliate of the parent company.[138] In response to this state of international human rights law commentators often imply an obligation to regulate from to the duty of due diligence that would require the home state to prevent its actions or omissions from causing harm in the territory or to persons in another state.[139]

The situation is somewhat different for the ICESCR where territory or jurisdiction are not mentioned as a determinant of state obligations, but state have undertaken to take steps towards achieving the rights in the Covenant "individually and through international assistance and co-operation"[140]. On the basis of this the Committee on Economic, Social and Cultural Rights has inferred a duty for states to protect economic, social and cultural rights against third party abuses extraterritorially whenever they are in a position to influence third party behavior.[141] Diverging views are found in literature on the existence and precise scope of the extraterritorial duty to protect under the ICESCR, with many commentators finding a basis for an implicit duty to regulate due to the absence of a territorial/jurisdictional

[138] The jurisprudence of international human rights treaty-bodies has developed in the direction to find a jurisdictional link for the purposes of applying the state obligation to protect whenever the victim is "within the power, effective control, or authority of the state". R. McCorquodale and P. Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law" (2007) 70 Mod L Rev 598 at 605. In addition, some commentators find that jurisdiction and in consequence the state duty to respect and protect human rights arises in cases where the state, through its organs or agents, has effective control over the 'situation' giving rise to the violation. See H. King, "The Extraterritorial Human Rights Obligations of States" (2009) 9 Human Rights Law Review 4.

[139] McCorquodale and Simons *ibid* at 618-9; S. Seck, "Conceptualizing the Home State Duty to Protect Human Rights" in K. Buhmann, L. Roseberry and M. Morsing, eds., *Corporate Social and Human Rights Responsibilities Global Legal and Management Perspectives* (New York: Palgrave Macmillan, 2011) ["Seck, *Home State Duty to Protect*"], at 42. See further s.3

[140] Article 2(1) ICESCR.

[141] See CESCR, General Comment 14, *The right to the highest attainable standard of health*, UN Doc E/C.12/2000/4 (11 August 2000) at para 39; and in less binding terms, "steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals in other countries", CESCR, General Comment 15, *The right to water*, UN Doc E/C.12/2002/11 (20 January 2003) at para 33. Discussed in F. Coomans, "The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights" (2011) 11 HRLR 1, at 29.

limitation in the ICESCR.[142] In addition, some find that the extraterritorial obligation to protect civil and political or economic, social and cultural rights could be easier to derive (under the rules on state responsibility) when the home state actively supports the activities of a corporation abroad.[143]

Nevertheless, discussing unilateral home state regulation solely within the extraterritorial extension of the duty to protect human rights remains imprecise in its scope (e.g. what minimum rights standards to protect) and unclear as to what extent it is expected to 'control' the extraterritorial behavior of the private actor (e.g. withhold financial support or prosecute before domestic courts). Legislation backed by sanction is the primary method by which states implement their human rights obligations, but in the context of protecting rights from violations of third parties the duty to investigate, punish and provide remedies as equally relevant.[144] In some cases the exercise of such regulatory functions by the home state might prove impracticable due to the need for cooperation by the host state (i.e. in cases where the host state is complicit in corporate human rights violations) or impermissible under the rules of jurisdiction (e.g. enforcement).

The SRSG has attempted to shed some light on this issue by describing home state regulation as a "matrix" or a range of options in which home states can regulate corporate behavior

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[142] Coomans *ibid* at 30-1 citing S. Skogly, *Beyond National Borders: States' Human Rights Obligations in their International Cooperation* (Antwerp: Intersentia, 2006) ["Skogly, *Beyond National Borders*"]; De Shutter *supra* 2; S. I. Skogly and M. Gibney, "Economic Rights and Extraterritorial Obligations" in S. Hertel and L. Minkler eds., *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge: Cambridge University Press, 2007) at 273 argue persuasively that such an obligation is implicit in the duty to promote human rights through international cooperation. Failing to regulate corporate activity abroad would directly violate the positive obligation to protect through cooperation. See further next section.

[143] McCorquodale and Simons *supra* note 138 at 606; S. Joseph, "Scope of Application" in Moeckli et al., *International Human Rights Law* (Oxford: Oxford University Press, 2010) 150 at 166. See further s.4.

[144] See e.g. HRC General Comment 31 *supra* note 118 at paras 7-8; CESCR, General Comment No. 3, *The nature of States parties obligations (Art. 2, par.1)*, 5th Sess., UN Doc. E/1991/23 (14 December 1990) at para 3, 5, 7; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2006] ICJ Rep 91 finding a separate obligation to investigate and punish private perpetrators of rights abuses.

extraterritorially including public policies for companies (e.g. export credit support), regulation through laws and enforcement actions (adjudicating alleged breaches as well as enforcing judicial or executive decisions).[145] Thus the SRSG makes a crucial distinction between direct "extraterritorial jurisdiction over actors or activities abroad" and "domestic measures with extraterritorial implications", concluding that any form of regulation in the latter category is most likely to be the least objectionable from the point of view of host state sovereignty.[146] While this clarifies to a certain extent the permissibility under public international law of some extraterritorial home state regulatory measures, it is curious that given the recognition in the work of the SRSG of the wide-spread proliferation of IIAs and their effects on creating governance gaps in human rights protection, an attempt was never made to look at these treaties themselves as intra-territorial home state actions with an extraterritorial human rights and environmental impact.[147] The analogy between IIAs and home state unilateral measures such as export credit guarantees, risk insurance or consular support—all recognized by the SRSG as potential candidates for human rights regulation—seems very apparent. Such recognition could have shifted the debate from the permissibility of unilateral home state regulation to the potential of IIAs as regulatory tools for corporate compliance with universal human rights. Indeed, as one scholar has noted "preoccupation with the extraterritorial reach of home states laws serves as a distraction from the central issue, only to disguise the existence of real territorial links that provide a solid if preliminary justification for the reasonable exercise of home state jurisdiction. A better way to think... is to focus on territorial points of control linking the home state with the conduct being

[145] SRSG *supra* note 38 at para 50.
[146] *Ibid*.
[147] It is possible that the aversion to the concept of extraterritorial regulation from both home and host states influenced the SRSG's conclusions to the extent of his efforts to present a less-controversial framework that would be accepted both by governments and the business community.

regulated", in which cases all states, including home states have to exercise due diligence to prevent and remedy human rights abuses by MNCs.[148] IIAs can thus be seen as a paradigmatic 'point of regulatory control' for MNC conduct. This conceptualization constitutes the backbone of the analysis of home state obligations and responsibility to prevent IIA-caused or enabled MNC harm via treaty-based regulation that are examined in the remainder of this chapter.

1.3 Home state obligations for treaty-based investor regulation

1.3.1 State duty to respect human rights under the UN Charter and core international human rights treaties

Several approaches can be taken to establish the existence of such an obligation for home states through the general negative duty (the duty to respect) and in some situations a positive duty (the obligation to protect)[149] human rights in a third state.[150] To begin with, state sovereignty and with it the principles of territoriality and jurisdiction have been strongly

[148] Seck, *Home State Duty supra* note 139 at 50 ; S. L. Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Human Rts & Dev LJ 177 ["Seck, *Home State Responsibility*"] at 186-7, 188-9.

[149] State obligations under international human rights law are generally accepted by legal scholarship to operate on three levels: the duty to respect (negative duty, not to violate rights), the obligation to protect (positive duty, to prevent violations by third parties, such as MNCs- see below) and the obligation to fulfill (a positive obligation to facilitate enjoyment either by directly fulfilling human rights or by creating conditions for their incremental improvement). This typology was originally proposed by Eide. See A. Eide, "Economic, social and cultural rights as human rights", in A. Eide, C. Krause and A. Rosas, eds., *Economic, Social and Cultural Rights: A Textbook*, 2nd ed (Dordrecht: Martinus Nijhoff, 2001) at 9-28. It was subsequently adopted by the treaty monitoring bodies in their general comments and concluding observations. The SRSG also operates under this typology, albeit also analyzing the direct duty of corporations to respect. In the context of extraterritoriality, a useful typology is given by Kunnemann in Coomans and Kamminga eds., *infra* note 170 at 216: internal obligations (those of the territorial state and undisputed), external obligations towards the victims outside the territorial state through agents or acts/omissions of the state, and international obligations towards all victims potentially affected by an international agreement or organization where states exercise governing authority.

[150] Thus, despite the SRSG assertion that no clear obligation exists to this end under current international law, there may be enough evidence that this can and is changing, in other words that international human rights law outside the context of transnational crimes can be interpreted in such a way so as to require home states to prevent extraterritorial violations by their nationals. De Shutter recognizes this in his *supra* note 2 at 18-19.

challenged by the development of human rights law to the extent that states have a *universal* obligation to respect and protect human rights.[151] The legal status of international human rights protection instruments cannot be construed, even on a purely formalistic reading of human rights instruments as treaties between states from which the protection of the individual is merely an incidental by-product[152], so as to mean that states can exercise (or fail to exercise) their jurisdictional competence while ignoring the effects of their actions that may violate international human rights law. Extraterritoriality, in the context of human rights, has to be understood from the point of view of the effect that the actions or omissions on the part of one state have on the respect for human rights of individuals in other states[153]. For some authors the legality of such effects has primarily to be assessed against the principal obligations of the United Nations Charter, namely the obligation to universally respect and act jointly to protect human rights, an often under-utilized approach for establishing the extraterritorial obligation of home states.[154] Thus to shield behind the

[151] See M. E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007) at 26: "[s]overeignty does not exist separately from international law, but as an element of it: it has no independent value. Its relevance is measured against its compatibility with precepts of a juridically-based international community, and the demands of international cooperation in securing, inter alia, human rights".

[152] See M. Craven, "Legal Differentiation and the Concept of the Human Rights Treaty in International Law" (2000) 11 EJIL 3, 489 at 513-517 discussing the three conceptualizations of human rights treaties in their status vis a vis general treaty law between states. According to Craven's reading of the formalistic school, even if human rights treaties are seen as mere treaties differing from standard treaties insofar as they do not involve any material exchanges or benefits for states, noncompliance with the obligations is not legally justified in spite of the absence of such a reciprocal relationship. The particular status of human rights treaties also challenges the doctrine of state responsibility. See below section three.

[153] Skogly and Gibney *supra* note 142 at 267-8. Also, S. I. Skogly and M. Gibney, "Transnational Human Rights Obligations" (2002) 24 Hum Rts Q 781.

[154] Skogly and Gibney *supra* note 142 at 269-271. They posit that Articles 1 (establishing the purposes of the UN as inter alia "to achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all"), 55 ("universal respect for, and observance of, human rights and fundamental freedoms for all") and 56 ("through joint and separate action" of member states) establish clear substantive (as opposed to the procedural obligation of cooperating with the UN) obligation for all states to respect the fundamental human rights universally and an obligation to promote this respect individually and jointly. From this it is straightforward that any state action, either unilateral or with another state, that results in human rights violations constitutes a breach of the Charter obligations. The authors lament the fact that this is overlooked in most literature dealing with extraterritoriality.

territoriality principle and argue that home states owe an obligation to respect human rights only to their citizens, while legally relegating to the obligation to protect of the territorial host state the fact that their transnational activity (such as IIAs) results in violations, both defies the purpose the human rights protection regime and is clearly in breach of the Charter.[155] A related argument has been made in connection with the Charter provisions on international cooperation and assistance between states to universally respect and promote the protection of human rights in their international activity (such as treaties).[156] Thus, according to commentators subscribing to this view, any international action or omission, such as in a bilateral or multilateral instrument, that has negative consequences for rights protection, is contrary to the obligations to cooperate internationally to respect, protect and fulfill human rights.[157] While state practice, notably in the transnational economic field, is routinely divorced from such considerations (presumably because it would allegedly be

[155] For Skogly and Gibney territoriality in human rights law and protection is a paradox, which brings into question the whole idea of universal human rights protection. Conceptually, human rights are acquired not by virtue of one's nationality but by the very fact of being human. For them, conditioning human rights respect upon legal technicalities such as which state has ratified what convention is a perverse situation, which enables massive violations of human rights to evade transnational state responsibility. *Ibid* at 274. For the same argument see Salomon *supra* note 151. On the role of non-reciprocity and the irrelevance of nationality in human rights treaties see Craven *supra* 152 and B. Simma, "International Human Rights and General International Law: A Comparative Analysis", in Academy of European Law, ed., *Collected Courses of the Academy of European Law*, Vol. IV, Book 2 (The Hague: Kluwer Law International, 1995).

[156] Skogly and Gibney have proposed that an obligation to cooperate (implying activity of more than one state) in furtherance of the UN Charter purposes including respect and protection of human rights is found in Article 56. Further, a clear obligation of cooperation is found in Article 2(1) of the ICESCR. For them state unilateral action or any activity between two states which does not respect or promote the protection of human rights is illegal under the Charter. Skogly and Gibney *supra* note 142 at 271. By contrast, state practice under the ICESCR suggests that states have traditionally viewed obligations of cooperation and assistance as financial transactions in the form of assistance from developed to less developed states. The Canadian government has recently stated before the UN Working Group on the Optional Protocol intended to introduce an inter-state complaints mechanism under the ICESCR that it considered its obligations of cooperation under the Covenant to be merely of moral and not legal nature! See *Report of an Open-Ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session*, UN Doc E/CN.4/2006/47, 14 March 2006, at para 82.

[157] Salomon *supra* note 151, at 132-143, defends that the UN Charter and the ICESCR impose obligations of conduct for all states, that is obligations to develop policies individually or in international cooperation (including bilateral and multilateral treaties and participation in international organizations) that are conductive of the realization of human rights globally. The obligation being one of conduct, states are required to exercise due diligence in framing their policies and at all times align their international activities with their obligations under human rights law. See further section 3.

impracticable to consider all kinds of possible harmful effects on human rights in all kinds of unilateral and international activity), the illegality of this omission could be made out under the Charter and Covenant obligations, jurisprudence and authoritative doctrine, provided a causal link can be established between state action or inaction and a violation caused by international state transactions.[158] It is clear from this that the obligations under the Charter relate to states individually, and in international cooperation, and thus any protection (or lack thereof) by the territorial state is not an excuse for the individual obligation of the home state to respect and protect human rights whenever it has the opportunity and especially if it has "effective control over the enjoyment of those rights extraterritorially"[159].

It is often said that international law operates under a bias of territoriality.[160] In international law states are primarily territorially defined under the principle of sovereignty and their jurisdiction[161] is, for practical and legal purposes (i.e. the prohibition of intervention in the

[158] Salomon *ibid* at 67-88 takes Skogly and Gibney's position even further in arguing that the Charter prohibits states from adopting policies that are obstructive of the purposes and obligations contained therein (at 68). In the human rights context, Article 2(7) of the Charter dictating the prohibition of intervention in the domestic affairs has been devoid of substance because international human rights law regulates both the universal and domestic protection of individuals and thus overrides non-interventionist justifications for inaction to protect (at 69). The Charter, together with the UDHR, therefore impose direct legal obligations upon member states. Quoting H. Lauterpacht, *International Law and Human Rights* (London: Stevens, 1950); and ICJ dicta in inter alia *Barcelona Traction, Light and Power (Belgium v Spain)*, Second Phase, [1970] ICJ Rep. 3 affirming that the UN Charter gives rise to universal human rights obligations for states.

[159] Skogly and Gibney *supra* note 142 at 278.

[160] P. Szigeti, "Territorial Bias in International Law: Attribution in State and Corporate Responsibility" (2010) 19 J Transnat'l L & Pol'y 311 at 313-315, describing how nation-state borders, in the Westphalian sense, are not "found" per se general international law, but are read into by concepts and images of territory that "steer the legal handling of power relations", especially in the context when territoriality is selectively read or not when it comes to state and corporate responsibility and due diligence for human rights.

[161] The term jurisdiction is often said to lead to much confusion in legal thinking, especially when used in the context of the permissibility or duty for a state to exercise its legislative, adjudicative and enforcement powers extraterritorially. See generally, I. Brownlie, *Principles of Public International Law* (New York : Oxford University Press, 2003) at 297 in particular sources cited in note 1; Jennings and Watts *supra* note 52 at *ibid*. Zerk has observed that the problem of using the term jurisdiction in the case of the home state duty to control the extraterritorial activities of their corporations is misleading when jurisdiction is taken to mean "command and control". Instead she proposes a meaning of jurisdiction which captures the power to grant benefits (such as IIA rights) and the obligation to impose duties. See Zerk *supra* note 112 at 140-2. Seck has persuasively argued that *any* mention of jurisdiction in this context is unnecessary as the obligation to control applies on the territory of the home state and not abroad and is clearly permissible under the nationality principle. Seck, *Home State Responsibility supra* note 148 at 186-188.

domestic affairs of another state) limited to their factual territory.[162] The principle of territoriality should not however be confused with the definition or lawful bases for the exercise of state jurisdiction (such as nationality or citizenship), as states routinely do control events and persons outside of their borders when a sufficient link exists with the home forum.[163] International legal instruments, including human rights treaties, and obligations created therein often distinguish between territoriality and jurisdiction.[164] This arises in

[162] *S.S. Lotus (France v Turkey)* [1927] PCIJ, Ser. A No 10, at para 45: "[t]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention." (The court inquired whether under international law Turkey could exercise criminal jurisdiction to prosecute a French national for a crime under Turkish legislation, committed outside of Turkish territory- in international waters.) The prohibition of intervention, or the prohibition to exercise jurisdiction in another state without its consent, stems from the sovereign equality of all states and is found inter alia in Articles 2(1) and 2(7) of the UN Charter. However, once the principle of jurisdiction is deconstructed to the elements of prescriptive and adjudicative powers, it does not prohibit states to regulate events occurring beyond their borders. The point here is that beyond permissibility, human rights law imposes an obligation to do so in the context of IIAs. See below.

[163] In effect, the principle of territoriality serves primarily to define the state and not the reach of its jurisdictional competencies. It is international law that defines the later. See Brownlie *supra* note 161 at 297-305. Jurisdiction, according to Brownlie, refers to an aspect of state sovereignty contained in the judicial, legislative and administrative competence (the power to prescribe laws, adjudicate and enforce decisions). Several classical bases for extraterritorial jurisdiction exist in international law: active nationality (the citizenship or nationality link of the person or legal entity to its home state), passive nationality (link of a national with the harmful effect of an alien committing an act abroad), protective or security principle (jurisdiction over acts abroad that may have a negative effect on the state, such as immigration, currency and anti-trust for example), universality (jurisdiction over an alien for a crime committed abroad) and customary international law crimes (war crimes, crimes against humanity, genocide etc.)

[164] International human rights law has expanded exponentially in the past few decades. There is now a great number of conventions dealing with a variety of human rights issues. However, for the purposes of the present discussion the key difference in the territoriality aspects of human rights obligations for states can be exemplified by comparing the provisions of the *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UNGAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316, (1966), 999 UNTS 171, entered into force March 23 1976 ["ICCPR"], with the *International Covenant on Economic Social and Cultural Rights*, GA Res 2200A (XXI), UNGAOR, 21st Sess., Supp. No. 169, UN Doc. A/6316 (1966), 993 UNTS 3, entered into force January 3 1976 ["ICESCR"] which are among the most widely adopted instruments by states, but also the most controversial with regard to the reach of state obligations. Thus Article 2(1) of the ICCPR provides "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant..." and its homologue in the ICESCR "[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant...". This difference in wording has given rise to a considerable amount of scholarly debate- see below. Other human rights treaties, such as the *International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res 2106 (XX), UNGAOR, Annex 20, Supp. No 14 at 47, UN Doc A/6014 (1966) 660 UNTS 195, entered into force January 4 1969, are not territorially confined, or require universal

practical situations, and especially in the context of human rights protection, where states do not have control over a certain territory but can nevertheless exercise powers over it or create effects on individuals of another state.[165]

Indeed the "whole idea of universal respect for human rights rests on universal human rights obligations" and "international human rights treaty law is, by definition, [and thus with no need for it to explicitly refer to extraterritoriality] premised on the notion of extraterritorial obligations".[166] In some areas like international crimes, international law has evolved so that some egregious human rights violations such as torture, genocide, slavery, extrajudicial executions etc., are considered as requiring states to assume universal jurisdiction, that is to prevent and punish them regardless of the nationality of the perpetrator, their status as a private or public entity and location of the victim.[167] In a related area of "transnational"

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jurisdiction, such as in the case of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNGA Res 39/46, annex, 39 UN GAOR Supp. No 51 at 197, UN Doc A/39/51 (1984), 1465 UNTS 85, entry into force June 26 1987 (at Article 5: [e]ach State Party shall take such measures as may be necessary to establish its jurisdiction..."). Regional human rights instruments either make no mention of territoriality, extending states' obligations only to their jurisdiction (see Article 1 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 5, 213 UNTS 22, entered into force 03 September 1953), or make no mention of territoriality or jurisdiction (see *African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev 5, 1520 UNTS 217, 21 ILM 58 (1982), entered into force 21 October 1986).

[165] The jurisprudence on this matter is too voluminous to be cited in full. The International Court of Justice (ICJ) has only recently confirmed that, absent any specific limitation to such an effect, states are bound by their international obligations, including human rights obligations on all territories they effectively control and all individuals they have power over. See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order, Request for the Indication of Provisional Measures, ICJ, General List No 140, 15 October 2008 at para 109; see with the same reasoning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, 9 July 2004. See further below jurisprudence of the human rights adjudicative bodies.

[166] Skogly and Gibney *supra* note 142 at 273.

[167] See *Convention against Torture supra* note 164; *Slavery Convention*, 60 LNTS 253, entered into force 09 March 1927; *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNTS 277, entered into force 12 January 1951; *International Convention for the Protection of All Persons from Enforced Disappearance*, A/RES/61/177, 14 IHRR 582 (2007), not yet in force. Regional instruments contain identical provisions with regards to jurisdictional obligations- see for example *Inter-American Convention to Prevent and Punish Torture*, OAS TS 67, entered into force 28 February 1987. Of interest, the *International Convention for the Suppression of the Financing of Terrorism*, UN Doc A/RES/54/109, 39 ILM 270 (2000), TIAS No. 13075, entered into force 10 April 2002, arguably has the most extensive set of states' obligations related to establishing universal (ergo extraterritorial) jurisdiction over private persons and legal entities such as corporations for crimes or complicity in crimes of terrorism as defined under the articles and annex. In addition

crimes, such as child prostitution states including Canada have regulated their nationals against potential harmful conduct abroad.[168] However, the problem scholars recognize in the context of FDI and home state regulation of MNCs is that "many matters of concern to local communities, impacted by [FDI] are not violations of international criminal law or matters of universal jurisdiction, but rather involve the realization of indigenous or local community rights to have a say in whether or how [FDI] is to be carried out, and to seek remediation in the event that [FDI] activities cause harm".[169]

Apart from legal obligations flowing directly from the UN Charter, scholarly analysis of the extraterritorial reach of the two Covenants is usually pursued separately in view of the difference in their wording regarding the territorial scope of obligations therein, notably the absence of such limitations in the ICESCR.[170] Nevertheless, the absence or presence of a

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to requiring states to establish jurisdiction by legislating (prescriptive jurisdiction) and prosecuting (adjudicative), they are also required to cooperate internationally to punish the perpetrators (enforcement jurisdiction).

[168] These violations have assumed the name "transnational crimes" alluding to the public (criminal) nature of the offence and its permeability across state borders, regardless of the status of the perpetrator as a private entity although some of the legal instruments where they are found do not distinguish clearly between private persons and private legal entities such as corporations. De Shutter *supra* note 2, at 2-3,11-17; Sornarajah, ILFI *supra* note 135 at 162.

[169] Seck, *Home State Responsibility supra note* 148 at 194. In cases where the violations are egregious, or amount to a breach of a human right of customary international law (the exact status outside of the few categories enumerated above is disputed- De Shutter for example, takes the Universal Declaration of Human Rights as having attained a customary status in order to claim the permissibility of extraterritorial jurisdiction which may explicitly be prohibited in other areas such as intellectual property rights; "Report" at 11) the home state may have an undisputed obligation to establish jurisdiction. The Restatement (Third) of United States Foreign Relations Law, 2 ALI (1987) recognizes the *erga omnes* (that is binding on all states regardless of their consent- see *infra*) status and responsibility of all states for genocide, slavery or slave trade, murder or disappearances, torture or inhumane and degrading treatment, prolonged arbitrary detention, systemic racial discrimination or consistent pattern of gross violations of internationally recognized rights. (at 165). Some authors, notably Salomon, Skogly and Gibney, consider this list to be much broader and include social and economic rights as well. See below.

[170] Both Skogly and Gibney and Salomon deal with the provisions under the ICESCR only in view of the absence of territorial limitations in that Covenant but with the proviso that the Charter obligations apply universally and without distinction as to the duty to respect. Other authors, and indeed jurisprudence from UN and regional human rights adjudicative bodies, have either dealt with extraterritoriality in the ICCPR and ICESCR separately, or implied the inseparability of the two meaning that violations of one order of rights triggers violations of the other. See C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 Osgoode Hall LJ 769; M. Gibney and S. Skogly, eds., *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University

territoriality clause in human rights treaties does not diminish the force of the universal obligation for states to respect and cooperate with other states to protect human rights, and this is indeed the interpretation of state obligations under the two Covenants given by their monitoring bodies.[171] What this means in the context of IIAs is that states have an absolute obligation to refrain from actions or omissions that will cause human rights harm in other states, including restricting the ability of other states to protect human rights on their territory[172]. While the implication observed here is for international activity between states,

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of Pennsylvania Press, 2010), discussing in particular the effects of domestic policies on peoples in other states; F. Coomans and M. Kamminga, eds*., Extraterritorial Application of Human Rights Treaties* (Oxford: Intersentia, 2004), separating the issue of extraterritoriality under the ICCPR and the ICESCR; Gondek *supra* note 127, fusing the issue of extraterritoriality under the two Covenants but labelling the reach of the ICESCR as more problematic in view of the range of state policies susceptible of triggering violations; A. Nolan, "Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the 'Obligation to Protect' (2009) 9 HRLR 2, for a comparative discussion on the dicta of regional human rights adjudicative bodies on the state duty to regulate corporate actors to prevent human rights violations of both civil and political and economic, social nature.

[171] The Human Rights Committee arrived at such an interpretation starting from the universal obligation to respect under the UN Charter and by a disjunctive reading of Article 2(1) of the ICCPR. See HRC, General Comment 31 *supra* note 118 at paras 3, 10 "a general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party". This obligation extends to persons who are not nationals of states but may suffer harm as a result of state actions such as extradition. (at para 12). The same interpretation has been given by the Committee on Economic, Social and Cultural Rights (CESCR) for example in General Comment 12, *The Right to Adequate Food*, 20th Sess., UN Doc E/C.12/1999/5 (12 May 1999) at para 36 "... States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention..."; and General Comment 14, *The right to the highest attainable standard of health*, UN Doc E/C.12/2000/4 (11 August 2000) at para 39: "States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law." The general comments of the monitoring bodies are not usually regarded as creating binding international obligations upon states (as opposed to concluding observations when the committees find an actual violation of the state party and hold it to account for that), as states did not originally consent to them such a power. However, they are considered as highly authoritative sources of interpretation of the obligations under the Covenants and other human rights instruments. See for a detailed discussion Gondek *supra* note 77 at 41-45.

[172] A classic example, given by Skogly and Gibney in *supra* note 142 at 275, is that of a developed state assisting a non-industrialized state to strengthen its health policies and fulfill its obligations under the right to health, but rejects the developing state's priorities for example to create hospitals in rural areas and instead dictates the terms of its aid to go to the building of high tech hospitals in large metropolises. When the rates of mortality increase in the rural areas, it goes without saying that the assisting state has breached its obligation to respect human rights by such conditionality. Similar arguments have been made in the context of developed state influence over the conditionalites prescribed by the international financial institutions (IFIs) and their

such as IIAs, the same universal duty to respect human rights relates to the duty to prevent private actors from causing human rights on the territory of another state (see below s. 3). At the same time most commentators readily acknowledge the difference between establishing a causal link between state or private activity on the territory of the home state that result in extraterritorial violations of civil and political rights, which usually have immediate consequences (such as torture perpetrated over a non-national by state agents abroad), and activity in the economic, social and environmental field (such as FDI), which may depend on an assessment of the proportionality of the harm caused and the overall societal interests in the host state, such as economic development.[173] Nonetheless, it goes without saying that the protection of civil and political rights in the host state requires financial resources, which may be negatively affected by home state actions or inactions, and this link is often overlooked in the discussion of extraterritorial home state obligations and indeed home state responsibility.[174] Thus, to come back to the typology of right violations presented above, it would be imprudent to dissect between different rights when a causal link exists between the investment provisions in the CCOFTA and rights violations either perpetrated by Canadian based MNCs and unpunished by the host state because of fears of investor arbitration claims, or rights violations by the state army for example facilitated by misappropriated FDI

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negative impact on human rights in the developing world. See S. McInerney-Lankford, "International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations", in D. Bradlow and D. Hunter, eds., *International Financial Institutions and International Law* (Austin: Kluwer, 2010), 239.

[173] As Gondek notes in *supra* note 127 at 292, in the field of economic, social and cultural rights this may depend on which view one privileges: that of the potential benefit of FDI for the overall economy of the host state or that of the directly affected communities. Nonetheless, states have an active obligation to consider these implications and implement safeguards to the most reasonable extent possible. In addition, as Coomans has observed, extraterritorial violations of the ICESCR where a direct link can be established between the act or the omission of the state to control and a harmful private activity the state was in a position to control, the state becomes responsible for the omission to exercise due diligence. F. Coomans, "Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights" in Coomans and Kamminga eds., *supra* note 170, 183 at 193.

[174] See Skogly and Gibney "Transnational Human Rights Obligations" *supra* note 153 at 784-5 "[t]he most frequent, and most direct, influence on the enjoyment of human rights by foreign states' activities is most likely to be seen the area of economic and social rights".

profit.[175] At the same time, while it may not appear too imprudent to imply, as some commentators have done regarding Colombia[176], that foreign states have an obligation to prevent any FDI outflows to conflict zones under the universal duty to respect- not to aggravate or contribute to further violations- the argument here is that the CCOFTA presented with an opportunity to protect human rights by inserting such obligations for investors and mechanisms for individual claims for potential victims. Accordingly, Canada was in a position to *protect* human rights in Colombia.

The second aspect of the tripartite typology of states human rights obligations presented above- the state duty to protect human rights- reflects the reality that individuals other than the citizens of a given state or persons living on a territory where that state exercises factual control (such as military occupation)[177] may nevertheless suffer harm or otherwise be negatively affected by the actions or omissions of that state or private entities (such as MNCs) the state has the power to control. Classic examples of this can be found in the jurisprudence of the Human Rights Committee and regional courts, most notably in the area of extradition where the extradited person faces death penalty upon delivery, and also where a legal relationship, such as citizenship or nationality, exists between a state and an individual outside of its territory.[178] This has led commentators to seek to clarify state

[175] As Gondek has pointed out: "[f]oreign investment in a country whose government violates human rights may, on the one hand, produce jobs and contribute to realization of the right to work and ultimately other social and economic rights. On the other hand, however, such policies may enable oppressive governments to stay in power and commit further human rights violations". *Supra* note 127 at 292.

[176] See *supra* note 94 in particular Inter Pares study and Ramirez.

[177] There is no doubt that where a state exercises factual territorial control outside of its borders it has the full range of negative and positive obligations towards those individuals, as per the ICJ dictum in the *Wall Opinion supra* note 165 at para 109, regarding the obligations owed by Israel, an occupying state, to the individuals in the Palestinian occupied territories. See also jurisprudence of the European Court of Human Rights in *Loizidou v Turkey (Preliminary Objections)*, A 310 (1995); 20 EHRR 99; and *(Merits)* VI (1996); 23 EHRR 513. The question here is rather what effects of intra-territorial state actions or omissions may give rise to obligations towards citizens outside of state boundaries and thus to lead to state responsibility.

[178] Other examples may be given of state actions that violate human rights extraterritorially. Note however that because the ICESCR does not allow individual complaints, the extraterritoriality of state obligations under that

obligations under human rights law by distinguishing the concept and operability of the principle of jurisdiction in general international law from human rights law.[179] This argument posits that state jurisdiction needs to be contextualized and state obligations considered from the point of view of the actual power of a state to secure human rights protection to individuals whether from potential violations by its own agents or by third parties regardless of the locus or nationality of the victim.[180] It could thus be argued that the state obligation to protect human rights, including protection from third parties, arises in situations where the state has effective control *over the situation* in question (and not solely over a territory or a

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Covenant has largely remained untested. Nonetheless it would be safe to assume that since human rights adjudicating bodies have implied economic, social and cultural rights violations from civil and political rights violations, most notably via the right to enjoyment of property albeit only at the domestic level, the extraterritoriality of home state economic and social obligations would operate the same as under civil and political rights. See for example Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, IACtHR Series C79 (2001); 10 IHRR 758 (2003), concerning state granting of concessions to corporations that negatively affected the indigenous community right to property; and more recently *Massacres of Ituango v Colombia*, IACtHR Series C148 (2006), where the Court found violations to the right to property from livestock theft and destruction of homes by the paramilitary groups. See further Nolan *supra* note 77. By contrast, extraterritorial violations resulting from state actions have been widely tested under states civil and political rights obligations. Most commonly cited cases include *Lopez Burgos v. Uruguay*, Communication No 52/1979, 29 July 1981, UN Doc CCPR/C/OP/1 (1984) concerning the kidnapping and torture perpetrated over Lopes by Uruguayan forces in Argentina; *Lichtensztejn v Uruguay*, (77/1980), UN Doc CCPR/C/18/D/77/1980 (1983), where a legal relationship (one of citizenship) existed between the plaintiff and the home jurisdiction that by refusing to issue him a passport violated his right to leave another country; and *Drozd and Janousek v France and Spain*, Application No 12747/8, 14 (1992); EHRR 745; *Soering v UK*, Application No 14038/88, ECtHR [GC], 7 July 1989, Ser. A Vol. 161, on violations caused to individuals in other states through the effects of domestic acts or omissions (extradition).

[179] M. Scheinin, "Extraterritorial Effects of the International Covenant on Civil and Political Rights", in Coomans and Kamminga *supra* note 170 at 73; M. Milanovic, "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties" (2008) 8 HRLR 3:411; H. King, "The Extraterritorial Human Rights Obligations of States" (2009) 9 HRLR 4:521. In essence, the universal obligation to respect human rights overrides any limitations on states jurisdiction found in international law, as long it does not result in an intervention either through enforcement activities or other forms of coercion exercised upon another state. This means that "permissibility" to regulate MNCs becomes an "obligation" to regulate MNCs in order to fulfill the universal respect obligation, at the same time giving a positive aspect to this traditionally negatively understood duty. Confining jurisdiction to territoriality in human rights protection leads to manifestly absurd results. See for the same reasoning Gondek *supra* note 127 at 56-7.

[180] Scheinin *ibid* at 75: "Even if someone's human rights are violated in country A, country B cannot be said to be responsible for that violation unless it had some factually possible and meaningful way to prevent the violation"; Milanovic *ibid* at 417: "[t]he word jurisdiction is meant to denote solely a sort of factual power that a state exercises over persons or territory"; King *ibid* at 522: "[w]here a state has a lawful competence to act in relation to a person under international law principles of jurisdiction, that person is within its 'jurisdiction' for human rights purposes, and the state has a commensurate obligation to respect and ensure his or hers rights. But by acting beyond their lawful competence... states also bring persons who are directly affected by their unlawful acts abroad within their 'jurisdiction' for human rights purposes". Also Skogly and Gibney *supra* note 142 at 278.

national) and thereby its *power* to prevent human rights abuses from occurring gives rise to the positive obligation to protect the potential victim.[181] As the European Commission of Human Rights has put it "insofar as, by their acts or omissions, [states] *affect such persons or property* they bring [them] "within [their] jurisdiction" and the responsibility of the State is engaged".[182] Scholars have thus proposed a multi-level understanding of state obligations under human rights instruments, arising at times from lawful territorial jurisdiction, lawful extraterritorial jurisdiction (such as prescriptive regulation based on nationality), and a factual cause-effect relationship arising where the state negatively affects the human rights of individuals whether within or outside its territorial boundaries.[183] A priori this relates to the absolute negative obligation not to interfere with human rights protection in another state, but once a state by its acts or omissions has created a situation it had the power to prevent, and which results in violations in another state, the positive obligation to protect and provide remedies to the affected individuals is triggered by virtue of the harm caused by the act or omission of the intervening state.[184] As Sheinin adds, this conceptualization of state obligations is "particularly important when other states exercise *de facto effective control over the circumstances* that result in human rights violations and the territorial state at the

[181] As Scheinin further observes, state responsibility for a failure to respect its obligations is limited under the doctrine of *force majeure* to the situations (and not persons or territories) the state has the capacity to control, be these acts of its officials or acts of private persons. *Ibid* at 76. King makes a similar observation that state positive action is required only where it has the power to provide human rights protection. *Ibid* at 538.
[182] *Cyprus v Turkey* Application Nos. 6780/74, 6950/75, ECommHR (1975) 2 DR 125 at 136 (added emphasis).
[183] King *supra* note 179 at 551.
[184] *Ibid* at 552. This position is furthermore reinforced by the principle that reparations for human rights violations by states and non-state actors are owed by states to individuals and not to their (in many cases multiple) state of nationality. See D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2006) at 97-8. See also, in the context of the ICESCR (note however that due to the absence of territorial limitations under the Covenant, this argument is more easily made than in the context of extraterritorial violations of the ICCPR) Künneman, in Coomans and Kamminga *supra* note 170 at 217 specifically discussing the external duty to provide remedies and compensation, for example through the courts, to victims in situations of "active support by a foreign state agency for the destruction of livelihoods of vulnerable groups, such as the Canadian [International Development Agency-CIDA] in the case of the Barabaig in Tanzania". The CIDA had collaborated with the Tanzanian government over more than two decades on a wheat project carried out against the consent of the Barabaig peoples and had led to the destruction of their access to food, production resources and livelihoods. See further below section 3.

level of facticity has no means to prevent the violation".[185] In essence, jurisdiction understood as a facticity or cause-effect relation directly rebuts any objections to the obligation of home states to regulate MNC extraterritorial conduct so as to prevent violations.[186]

This relates in two ways to human rights violations perpetrated or caused by MNCs in the context of the interference with human rights protection in the host state created by IIAs. On one hand the home state is clearly in a position to prevent such harm by either regulating unilaterally the conduct of its MNCs abroad, or by inserting provisions to that effect in the IIA itself. On the other hand, the effect of the IIA to preclude human rights protection by the host state, results in an additional violation of the right to a remedy towards the local population affected by the MNC activity that is directly caused by the home state's failure to regulate unilaterally- in itself a breach of the positive obligation to protect human rights whenever the state has the power to do so. As to the idea that the home state controls the circumstances giving rise to human rights violations in the host state, this proposition is straightforward from the point of view of the home state's absolute authority to regulate MNCs domestically, and perhaps also tenable in light of the asymmetry in negotiating and economic power over the host state in the IIA negotiations process. However, as a counterargument can be made that conceptually any extraterritorial activity the home state has failed to regulate (including activity of MNC subsidiaries incorporated in the host state

[185] Scheinin *supra* note 86 at 80, footnote omitted, emphasis in original.
[186] King's lawful/unlawful dichotomy enables this conceptualization. While home states have legal competence under the nationality principle to regulate MNCs extraterritorially (i.e. the permissibility paradigm), this power/competence becomes an obligation once violations occur as a result of the omission to exercise it regardless of the territorial locus of the victim. See on this *Ilaşcu v Moldova and Russia* (Merits), Application No 4878/99, ECtHR [GC], 8 July 2004 at para 266 "even in the absence of effective control... Moldova still has a positive obligation... to secure the applicants the rights guaranteed by the Convention".

and thus escaping the nationality principle)[187] cannot imply that any potentially affected individuals are thereby 'brought into' the jurisdiction of that state, it is submitted that the positive obligations of home states to regulate MNCs extraterritorially are not substantively absolute, but need to be considered through the obligation to exercise due diligence, that is an obligation of conduct for home states to prevent human rights violations in other states.

1.3.2 Treaty-based regulation and the home state duty of due diligence in human rights law

It could be stated that the main confusion about the role of the due diligence principle in human rights law is exactly its nature as a principle, prescribing a minimum degree of observance or vigilance that states must undertake, the precise elements of which depend on the content of a primary human right.[188] In light of the multivalent nature of different rights, the scope of the due diligence obligation triggers questions about the minimum level of state action required to respect (negative aspect-abstain) or protect/fulfill (positive action) that as a rule always depends on the right in question and the factual circumstances of its

[187] See M. D. Ramsey, "International Law Limits on Investor Liability in Human Rights Litigation" (2009) 50 Harv Int'l LJ 2, 271, discussing that customary international law which has enabled foreign plaintiffs to bring claims against US corporations under the *Alien Tort Statute* does not allow regulation of the subsidiaries of corporations, which are for all intents and purposes entities outside of the regulatory perimeter of the home state of the parent corporation. Note however that while this may apply to unilateral home state regulation of MNCs and their subsidiaries, it does not affect the separate obligation for both home and host states to include human rights duties for all potential investors in IIAs.

[188] As explained by Tzevelekos, the principle of due diligence is merely a vehicle to give effect to specific rules and norms of international law via deductible reasoning, that lacks concrete content and effect until its applied with regard to specific international norm or rule, such as human rights. V. Tzevelekos, "In Search of Alternative Solutions: Can the State of Origin be held internationally responsible for Investors' Human Rights Abuses that are not attributable to it?" (2010) 35 Brook J Int'l L 155, at 179-180. Another characterization of due diligence is as a standard or model (although as a strictly semantical point human rights obligations impose a standard of observance for states obligations per se, thus the due diligence principle becomes a part of the minimum standard of observance imposed by human rights law) of behaviour by which states have to abide in order to respect their international obligations, in the default of which they would be responsible for a breach of omission.

respect/protect dimension that are very difficult to ascertain in the abstract.[189] Without engaging in that discussion, it can be posited here that the due diligence principle draws from both negative and positive aspects of human rights protection and there exist concrete indicia in present international law that as such it sets a standard of home state conduct to prevent extraterritorial human rights violations by MNCs, including an obligation to insert human rights obligations for investors in IIAs. Thus, while "[i]n general a state is not under a duty to control the activities of private individuals (being its nationals) beyond the bounds of state territory"[190], "[it is] every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states"[191] and "where a state knows that it's nationals activities will cause, or are causing, harm to other states or peoples, it is consistent with this duty that it should prevent such harm"[192]. While states' obligations are absolute in terms of preventing private actors from violating human rights in their own territory[193], externally -

[189] Tzevelekos goes to a great length to describe the various implications for the due diligence principle when applied to either civil and political or social rights drawing from jurisprudence of the regional adjudicative bodies. He concludes that due diligence is not to be equated with the pure positive state obligation to protect and fulfill human rights as this one extends ad infinitum, but also requires more than pure abstention in order to give effect (effet utile) to the protected rights by safeguarding them from third party violations be they private entities or other states. *Ibid* at 180-197. See also Skogly and Gibney *supra* note 142 at 278-9 discussing that human rights obligations of conduct in international cooperation are both positive and negative in nature.

[190] Brownlie *supra* note 161 at 165.

[191] *Corfu Channel (UK v Albania)* [1949] ICJ Rep 4 at 22. The customary nature of the due diligence obligation to prevent and punish private actors under state jurisdiction that are causing or may cause harm to another state, can be ascertained from pre-ICJ jurisprudence, such as the 1872 *Alabama* case (the responsibility of the British State was engaged under the primary norm of neutrality in maritime war by failing to prevent and punish actions of private persons), the 1928 *Island of Palmas*(1928) Perm Ct Arb 2 UNRIAA 829 case (at para 4: "[t]he territorial sovereignty has as corollary a duty: the obligation to protect within the territory the rights of other states"), as well as its application by the ICJ, for example in *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226.

[192] Sornarajah *supra* note 1 at 507.

[193] As the celebrated passage from the *Velásquez-Rodriguez v Honduras* case (Merits, Int.-Am. Ct. H.R., Ser. C No 4 (1989)) stated at para 172: "in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the state. However, this does not define all the circumstances in which a state is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the state might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention." And at

that is regarding extraterritorial harm caused by intra-territorial private conduct - states would be bound to a due diligence standard of conduct conditioned upon active knowledge of the foreseeable consequences, including the availability of remedies in the host state.[194] The due diligence obligation therefore does not require control over the violation itself, but merely knowledge and effective control over the means (control over perpetrator/situation) for preempting the violation, which triggers a duty to demonstrate diligent protection proportional to the degree of control (availability of means).[195] In the context of FDI, commentators have suggested that "it cannot reasonably be argued today that states do not know that their nationals (or the latter's foreign subsidiaries) may engage in human rights violating activity in their extraterritorial operations".[196] As demonstrated above, this is certainly the case of the situation of Canadian based MNCs operating in Colombia, a matter that was subject to specific recommendations from the SCIT. From this, the implication for

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para. 166-7: "[t]he... obligation of the States Parties is to 'ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction.... The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation- it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights". Effectively, as Szigeti has noted in *supra* note 160 at 337, this creates an absolute standard of prevention imposing, as further observed by Pisillo-Mazzeschi (regarding the *Alabama* case) an absolute obligation to possess an administrative apparatus capable of guaranteeing rights protection and proof of subjective conduct of using that apparatus to such an effect (relative due diligence obligation). *Infra* note 259 at 35-6.

[194] Classic examples are extradition cases involving death penalty. See *Soering* case *supra* note 178 at 34; also *H.L.R. v France*, 1997-III ECtHR 745 (regarding violation by private actors and the availability of remedies in the host state). As Brownlie has put it: "where the loss complained of results from acts of individuals not employed by the state, or from activities of licensees or trespasses on the territory of the state, the responsibility of the state will depend on a failure to control. In this type of case questions of knowledge may be relevant in establishing the omission, or, more properly, responsibility for failure to act". *Infra* note 265 at 45. See also *Kindler v Canada*, Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991, 11 November 1993 at para 6.2: "[i]f a State party takes a decision relating to a person within its jurisdiction and the necessary and foreseeable consequence is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant... The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on".

[195] Tzevelekos *supra* note 188 at 226 discussing the ECtHR position in *Ilaşcu supra* note 186 where Moldova was found to have failed to demonstrate an exercise of due diligence to protect the rights of the plaintiffs even without exercising effective control over the territory in question.

[196] McCorquodale and Simons *supra* note 138 at 619; Sornarajah, ILFI *supra* note 135 at 166-167, discussing that it may be difficult for a home state to know beforehand what its nationals intentions are abroad, but in cases where allegations exist they are currently violating human rights there is a duty to prevent this violation.

the obligation to regulate MNCs linked via their nationality to the home state is clear: the home state is expected to exercise jurisdiction on the basis of active personality to prevent the private actor from causing harm to another state or its subjects, and this ceases to be discretionary and becomes an international obligation.[197] It should be noted that the analyzed case law from regional human rights adjudicative bodies does not require the putative violation to be of customary status, which effectively widens the circle of rights home states need to be diligent about.[198] More importantly, while regional human rights jurisprudence is helpful for discerning the elements of the home state obligation of due diligence, the universal state duty to respect and protect human rights at the global level would flow primarily from the UN Charter and thus inevitably extend to vigilance over extraterritorial acts of state nationals.[199] Furthermore, as the ICESCR (unlike the ICCPR) does not contain a territorial clause, the obligation to regulate to prevent harm in host states under the due diligence principle would seem to be straightforward.[200] What remains to be established is if regulation *through IIAs* falls under the due diligence obligation for the home state to prevent

[197] Tzevelekos *supra* note 188 at 227.
[198] *Ibid* at 225 citing *Dougoz v Greece*, Application No 40907/98, ECtHR, 8 February 2000, and *Kindler v Canada*, Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991, 11 November 1993 where the risk of inhumane treatment was one of near-certainty. Tzevelekos notes that once the *jus cogens* criterion is eliminated, states need to be diligent about their nationals not violating the whole spectrum of rights abroad.
[199] Tzevelekos makes an important point, similarly to that of the commentators cited in *supra* note 86, namely that the interpretation of states' extraterritorial obligations by regional courts is inherently limited by the jurisdictional competence of those bodies, as well as the specific provisions of the regional instruments. Reflecting on the much criticized decision of the ECtHR in *Banković v. Belgium*, 2001-XII, Eur. Ct. H.R. 356-59, where the Court held the attribution of the violations in question to the states defendants insufficient to assume jurisdiction in the absence of effective control of the states over the violative conduct, Tzevelekos notes that at the universal (UN) level, the extraterritoriality of states obligations is not limited by the effectiveness of control over the violation or over the victims and states are simply prohibited from acting in other jurisdictions, through their acts or agents, in a way they cannot behave on their own. *Ibid* at 222. As further noted by Milanovic, the jurisdiction of the court is not to be equated to the reach of the jurisdictional obligation of states parties to human rights instruments. *Supra* note 179 at 416.
[200] Tzevelekos, *ibid* at 228. The due diligence principle here would seem to extend an absolute obligation for all states to ensure private entities respect social rights in third states. Coomans, *supra* note 173 at 193. Indeed the scope of the due diligence obligation may be much wider in the field of social rights, imposing a cumulative obligation of due diligence under the UN Charter and ICESCR on the whole international community. See Salomon *supra* note 151.

from MNC violations. Arguably, this will depend on how one perceives the IIA: either as an international act between two states, or as an internal act of the home state to secure its investors more rights abroad. As argued above, the universal obligation to respect and cooperate in protection of human rights would oblige both states to ensure their international activity does not infringe on human rights, but the latter proposition seems more appealing in view of the power imbalance in IIA negotiations. Thus, "if the primary rules that specify the content of home State obligations include due diligence obligations of prevention and reparation of harm by non-State actor [M]NCs, then the home State obligations must extend to the fullest possible exercise of legal authority by the State".[201] It follows that the duty to protect against MNC abuses captures all branches of the government involved in "creating and supporting the global economic order and consequently MNC conduct" and that "the conduct of the executive branch of a home State is implicated when it engages in the negotiations of investment protection agreements and bilateral investment treaties with host States without regard to home State obligations to protect human rights".[202] In these situations, regulation through IIAs ceases to be extraterritorial since, by imposing an obligation on the executive branch to insert clauses in the IIA that would ensure it does not interfere with human rights protection in the host state, the home state is complying with its own international law obligations.

[201] Seck, *Home State Duty supra* note at 37 in reference to N. Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Antwerpen: Intersentia, 2003) at 172. As Seck has argued this duty would not only extend to the executive branch, but also to the legislature and all state or non-state entities created by statute, such as the CIDA and the Export Development Agency providing investment risk insurance, stock exchanges etc., and finally Canadian courts that would need to provide remedy to victims affected by Canada's omission to regulate. *Ibid* at 45-6 and Seck, *Home State Responsibility supra* note 148 at 190-1.

[202] Seck, *Home State Duty ibid* at 44; McCorquodale and Simons *supra* note 138 at 624-625. Both write in the context of IIAs, as acts of the home state, giving rise to state responsibility for extraterritorial MNC violations in the host state, discussed in section 4.

States that have ratified the ICCPR and the ICESCR, such as the parties to the CCOFTA, are already bound by their provisions to undertake *legislative and all other measures* to give effect to the rights therein.[203] The monitoring bodies under these treaties have also been consistent in clarifying, as generally as possible, that states must use all available means, legislative or otherwise to comply with their obligations, including the obligation to prevent from third party abuses, both individually and through cooperation.[204] Specific guidance that MNCs and FDI in general need to be regulated by home states and through international agreements so as to respect human rights in host states can be found in the general comments of the CESCR.[205] Moreover, Canada has itself been subject to individual observations by the human rights treaty monitoring bodies regarding the need to ensure the protection of human

[203] See Articles 2(2) and 2(1) of the ICCPR and ICESCR respectively.

[204] See HRC General Comment No 31 *supra* note 118 at para. 7: "[a]rticle 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations."; and at para 4: "[t]he obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local – are in a position to engage the responsibility of the State Party." More specifically, and because of the explicit mention of international obligation in the ICESCR, the CESCR has interpreted international obligation for the realization of social, economic and cultural rights, taken in its broadest form- all international activities of states, inevitably including IIAs, as an obligation for all states, in accordance with the UN Charter and Article 2(1) of the Covenant. See CESCR, General Comment No 3, *The Nature of States Parties Obligations (Art. 2, Par. 1)* 5th Sess., 14 December 1990, contained in UN Doc. E/1991/23, at paras 7 and 14. While the interpretations of the Covenants given by the monitoring bodies are not generally considered as creating binding obligations for states parties, they are nevertheless authoritative when determining actual violations or summarizing the state of the law. Thus ICJ relied extensively on general comments and state party conclusions from the CESCR in the *Wall Opinion supra* note 60.

[205] See for example CESCR, General Comment No 15: *The right to water (arts. 11 and 12 of the Covenant)*, 29th Sess., UN Doc, E/C.12/2002/11 (20 January 2003), at para 31: "To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction" and at para 33: "Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law."; also Human Rights Committee, General Comment 12: *The Right to Self-Determination of Peoples*, UN. Doc. CCPR/C/21/Rev.1 (13 March 1984).

rights in its IIAs.[206] It could therefore be concluded, especially in cases where no unilateral home state regulation exists to prevent extraterritorial abuses by its corporations, and considering the universal aspect of states obligations to cooperate to respect and protect human rights on the international level, that MNC regulation through IIAs is an integral part of the due diligence obligation for the home state, and that the absence of such provisions may engage state responsibility in cases where the IIA itself is seen as a direct cause for MNC violations.[207]

1.3.3 The state duty to obtain free, prior and informed consent (FPIC) for investment projects on indigenous lands and involving indigenous natural resources

Of central importance here is the doctrine of permanent sovereignty over natural resources (PSNR) and the related concepts of peoples' rights to economic self-determination, self-governance and the state duty to obtain the consent of indigenous peoples and local land owners for investment projects that are located on or involve the use of their lands and property.[208] Regarding the first point, it can be said that the doctrine of state permanent

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[206] See CESCR, Concluding observations of the Committee on Economic, Social and Cultural Rights- Canada, 36th Sess., UN Doc E/C.12/CAN/CO/4; E/C.12/CAN/CO/5 (22 May 2006) at para 68: "[t]he Committee reminds the State party that, although trade liberalization has a wealth-generating potential, such liberalization does not necessarily create and lead to a favourable environment for the realization of economic, social and cultural rights. In this regard, the Committee recommends that the State party consider ways in which the primacy of Covenant rights may be ensured in trade and investment agreements, and in particular in the adjudication of investor-State disputes...". See also Committee on the Elimination of Racial Discrimination (CERD), Concluding observations of the Committee on the Elimination of Racial Discrimination- Canada, 17th Sess., UN Doc CERD/C/CAN/CO/18 (25 May 2007) at para 68: "...the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable."

[207] See further section 1.4.

[208] It should be noted that these are contentious and complex questions of international law, much addressed in academic literature that cannot and need not be addressed in full for the purposes of the present discussion. The arguments here will therefore draw on existing positive law and recent developments in international and regional human rights jurisprudence. For a classical discussion on the doctrine of permanent sovereignty over natural resources and the rights and duties to state vis-à-vis individuals and other non-state actors such as

sovereignty over natural resources, as an emanation of the principle of territorial or geographical sovereignty, is essential for the very existence of the notion of foreign direct investment and the power of states to create investor rights.[209] Originating from the decolonization period, the principle of PSNR is found in several UN General Assembly Resolutions[210] and was used by the then newly independent states to assert their legal ownership over domestic natural resources in order to 'liberate' themselves from onerous contracts imposed during the colonial period and establish their right to control the entry of foreign capital and regulate foreign investors.[211] In light of the axiomatic link between state territorial sovereignty and natural resources found thereon, Western states were historically not opposed to the idea of the state's right to control, that is to exercise its full sovereignty over natural resources, as long as any takings of private foreign property or assets were

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investors, see N. Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997). On the concept of peoples' rights and implications for the states' sovereignty over natural resources see generally J. Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988) specifically Chapter 4, J. Crawford, "The Rights of Peoples: 'Peoples' or 'Governments'?" and P. Alston, *Peoples' Rights* (Oxford: Oxford University Press, 2001) in particular Chapters 2, 5 and 7.

[209] I. Brownlie, "Legal Status of Natural Resources in International Law (some aspects)" (1979) RCADI vol. 162 no. I, 245-318. Territoriality, as famously proclaimed in the *Island of Palmas* case, "signifies independence...in regard to a portion of globe...to exercise therein... the exclusive competence of a State". *Island of Palmas Case (Netherlands v. USA)* Award of 4 April 1928, (1928) RIAA, vol. II, p. 838. In the context of FDI it has been stated "it is hard to imagine the notion of "foreign direct investment" existing at all, *without* the geographical presupposition of national sovereignty." J. Emel, M. T. Huber and M. H. Makene, "Extracting Sovereignty: Capital, territory, and gold mining in Tanzania" (2011) 30 Political Geography 70 at 77, discussing the serious implications of this concept for communities and Tanzania, whose well-being is sacrificed under the pretext of the pursuit of economic development.

[210] Traditionally General Assembly Resolution 1803 (XVII) *Permanent Sovereignty over Natural Resources* of 14 December 1962 is taken as the starting point for the discussion over the principle of PSNR. However, the 'genesis' of the principle can be linked to GA Res 626 (VII) of 21 December 1952 entitled *Right to Exploit Freely Natural Wealth and Resources* (Brownlie, *ibid*) and has thereafter been reaffirmed in a series of resulutions by the General Assembly and other United Nations bodies. See generally Schrijver *supra* note 208 providing a list of UN references of the principle at appendix 1.

[211] Schrijver *ibid* at 3, 20-25. The goals and objectives of the doctrine of PSNR and its evolution as a function of the struggle for economic independence of newly decolonized states have been summarized by Hossain who wrote: "[f]or developing countries the principle of permanent sovereignty was important because it provided a basis on which they could claim to alter 'inequitable' legal arrangements under which foreign investors enjoyed rights to exploit natural resources found within their territories. Such alteration could be affected through an exercise of (a) the right to nationalize, that is to acquire the rights enjoyed by the foreign investor or (b) the right to alter certain terms of the arrangements (or to repudiate an agreement entered into with the foreign investor)." K. Hossain, "Introduction", in K. Hossain and B. Chowdhury, eds., *Permanent Sovereignty over Natural Resources in International Law: Principle and Practice* (London: Frances Printer, 1980) at ix, cited in Schrijver *ibid* at 22.

accompanied by the so called 'international' standard of compensation.[212] The legal status of the principle of PSNR is thus not disputed, in the sense that it represents a legal right of a territorial state to dispose with its natural resources, which is opposable *erga omnes*, that is against all other states and foreign multinationals.[213] What continues to be more controversial, however, is the idea that the natural resources of a state belong to its *peoples*, which can be found in the wording of GA Resolution 1803 (XVII) that provides, in its first operative paragraph:

> "*[t]he right of peoples* and nations to permanent sovereignty *over their natural wealth and resources must be exercised in the interest* of their national development *and of the well-being of the people of the State* concerned."[214]

In effect this would mean, as this section argues, that states are constrained in the exercise of their sovereign powers concerning natural resources, as they need the consent of their peoples to give permission to exploit natural resources to foreign investors. Moreover, if the principle of PSNR is read conversely, that is as belonging exclusively to states and that governments, as the sole representatives of states in the international legal system, have the

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[212] Schrijver *ibid* at 23 citing J. N. Hyde, "Permanent Sovereignty over Natural Wealth and Resources" (1956) 50 AJIL 854 at 865. Indeed, as discussed in chapter 1, it is the disagreement over the standard of compensation, i.e. national vs. international, and not the classical doctrine of state territorial sovereignty that defined the ideological clash between Western and Third World states that was prompted by the series of nationalizations in the 1950s and 1960s. This should come to no surprise as the very process of decolonization was a territorial severance from metropolitan empires, thereby putting an end their former natural resource exploitation in the colonies.

[213] See *East Timor* case infra note 218 at 204 (dissenting opinion of Judge Weeramantry) and at 264 (dissenting opinion of Judge Skubiszewski) concurring that the principle of PSNR is a part of international law. In a recent decision the ICJ observed that "the principle of permanent sovereignty over natural resources is expressed in General Assembly Resolution 1803 (XVII) of 14 December 1962 and further elaborated in the Declaration on the Establishment of a New International Economic Order (General Assembly Resolution 3201 (S.VI) of 1 Many 1974) and the Charter of Economic Rights and Duties of States (General Assembly Resolution 3281 (XXIX) of 12 December 1974)... which is a principle of customary international law..." *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment [2005] ICJ Rep. at para. 244. Commentators also support the principle's undisputed legal status. See Schrijver *supra* note 208 at 33; Hossain *supra* note 211.

[214] GA Res 1803 *supra* note 210 at para. 1 (emphases added). It should be noted that other resolutions dealing with the principle of PSNR have declared it as solely a right of states, a right of states *and* peoples, or a right of nations. This ambiguity has led to much debate whether or not it is the people or the state that is the right owner of natural resources and has the prerogative to alienate them to foreign investors. Schrijver *ibid* at 8-11.

unique right to exercise it, would render a state's peoples hostage to international commitments made by non-representative governments which runs against fundamental human rights norms.[215] However, the issue of what constitutes a people within the concept of a state in international law is highly controversial as it was traditionally maintained, particularly by Western states, that the right to self-determination only applied to those peoples under colonial rule and carried on only a procedural aspect of the freedom to decide on the internal political or economic system once those peoples were constituted in a state.[216] Without engaging in that discussion, it suffices to say here that there is enough consensus that the concept of peoples and their right to self-determination applies outside of the discourse and era of decolonization, as exemplified by the "tone of universality" attached to them by virtue of their inclusion in human rights treaties and the "precedent of treating natural resources as rights of peoples and not states is [thus] an established one."[217] To a great extent, this has recently been clarified with respect to the rights to property and natural

[215] Professor James Crawford has categorically stated that governments cannot in any way be regarded as the rights-owners of natural resources: "[a]ny insistence that peoples' rights are vested in governments disqualifies the right in question from being regarded as peoples' right". See J. Crawford, "Some Conclusions", in Crawford *supra* note 208 at 167. Indeed, drafting history of the two Covenants to the end of including the permanent sovereignty over natural resources as a peoples right, illustrates that the primary concern in the period during and immediately after decolonization was that governments might impair on the well-being of their populations by deliberately or inadvertently signing off natural wealth and entering into unbalanced concession agreements with foreign investors. See Schrijver *supra* note 208 at 308; Hyde *supra* note 212, at 857-8; R. Dolzer, "Permanent Sovereignty over Natural Resources and Economic Decolonization" (1986) 7 Hum Rts LJ 217 at 221. For a more recent discussion on the principle of peoples' rights over natural resources and the responsibility of states from the perspective of the 'abuse' of the doctrine of PSNR by non-representative governments in developing states see E. Duruigbo, "Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law" (2006) 38 Geo Wash Int'l L Rev 33.

[216] Schrijver *ibid* at 9. See also A. Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986) at 135; I. Brownlie, "The Rights of Peoples in Modern International Law", in Crawford *supra* note 208 at 5.

[217] Crawford *supra* note 215 at 58 and 63 discussing the universal application of principle of self-determination and the doctrine of PSNR respectively. See also opinion of Judge Weeramatry in the *East Timor* case infra. The International Law Commission has stated that the peoples' right to self-determination is of "universal application". See *Report of the International Law Commission on the Work of its Fortieth Session,* GA Res. 42/156, UN Doc. A/43/10 (1988) at 64.

resources of indigenous peoples by international and regional human rights jurisprudence discussed below.

Indeed, the coupling of the principle of PSNR with the right to self-determination of *peoples*, itself a norm of *jus cogens*[218], in the two UN human rights Covenants, as well as in other regional human rights instruments, would suggest that ownership, control and decision-making over natural resources do not belong to states but to their peoples.[219] Thus common Article 1 of the ICCPR and the ICESCR provides:

> "[1.] All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. [2.] All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."[220]

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[218] The principle of self-determination is found in Article 1(2) of the UN Charter, which provides that one of the purposes of the United Nations is the development of friendly relations based on "the principle of equal rights and self-determination of peoples." The ICJ has confirmed the peremptory status of the principle of the right of peoples to self-determination in a number of decisions. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion,* [1971] I.C.J. Rep., pp. 31-32, paras. 52-53; *East Timor (Portugal* v. *Australia), Judgment,* [1995] I.C.J. Reports, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* [2004] I.C.J. Reports (I), pp. 171-172, para. 88, all cited in the most recent *Accordance With International Law Of The Unilateral Declaration Of Independence In Respect Of Kosovo, Advisory Opinion* [2010] ICJ Rep, p. 30, para. 79 (in the context of the right of peoples or groups within a state to secede). Western states originally opposed the idea that the principle of PSNR inherently linked to territorial sovereignty, itself an international legal concept related to statehood, can be intertwined with human rights (that is the rights of individuals vis a vis the state). See deliberations in the UN human rights sub-commission cited in Schrijver *supra* note 208 at 51.

[219] As Vinuales writes, this qualification conforms to the 'external' vis-à-vis the 'internal' aspect of state sovereignty and independence "to exercise, to the exclusion of any other group or State, the functions of a State". J. E. Vinuales, "The 'Resource Curse': A Legal Perspective" (2011) 17 Global Governance: A Review of Multilateralism and International Organizations 2, 197-212. The principle point here is however that peoples rights over natural resources are opposable externally, towards foreign states and their investors, as well as internally towards their own state.

[220] See Article 1 of the ICCPR and ICESCR *supra* note 164. Provisions with similar or identical wording can be found in Article 21 of the African Charter of Human Rights, which reads: "1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it." The subsequent four paragraphs go on to specify in detail the relationship between the *peoples*' right to natural resources and the corresponding duties and obligations of states to exercise that right *for them*: "2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. 4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. 5. States parties to the

Further, common articles 25 of the ICESCR and 47 of the ICCPR provide:

> "[n]othing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."

This coupling of the doctrine of PSNR with the peremptory right of peoples to self-determination illuminates the so-called "economic aspect" of self-determination that has been interpreted by the Human Rights Committee (HRC) as "entailing corresponding rights and duties for all States and the international community".[221] The International Court has defined the principle of self-determination "as the need to pay regard to the freely expressed will of peoples".[222] Primarily, the consequences of this interpretation are to create a valid international legal claim of peoples against their governments, or "subject abusive decisions over natural resources to international scrutiny"[223]; but second and more importantly, whenever "the government acts without the consent of the people, or turns out not to have acted in the interest of the people" it violates international law and state responsibility is engaged.[224] As Nico Schrijver writes, the peoples' right to natural resources could be interpreted to entitle them "to withdraw from unequal investment treaties and to renounce contractual relations when one party unjustly enriches itself, and to revise the terms of an

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present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources." The Inter-American *Declaration of the Rights and Duties of Man* and the *American Convention on Human Rights* do not have provisions relating to self-determination, but the Inter-American Commission and Court have interpreted the right to property (Article 21 of the Convention, Article XIII of the Declaration) in a way that states need the consent of indigenous peoples and local communities before creating investors' rights. See below.

[221] Human Rights Committee, General Comment 12: *The Right to Self-Determination of Peoples*, UN. Doc. CCPR/C/21/Rev.1 (13 March 1984), at para. 5.

[222] ICJ, *Western Sahara*, Advisory Opinion [1975] ICJ Rep. 12 at 33.

[223] Crawford *supra* note 215 at 56.

[224] A. Carty, "The Third World Claim to Economic Self-Determination: Economic Rights of Peoples: Theoretical Aspects", in S. R. Chowdhury et al., eds., *The Right to Development In International Law* (Dordrecht: Martinus Nijhoff, 1992) at 43-4.

arrangement in the exercise of [their] legislative competence."[225] Critically, this means that it is the *consent of peoples* and not that of states' governments that might be indispensable to obtain prior to the creation of rights for investors in IIAs, a proposition that can have strong implications when discussing home state responsibility. Specifically, if the requirement to obtain the consent of peoples as rights holders to natural resources can be linked to the economic aspect of the *jus cogens* principle of self-determination, this could result in the illegality of certain provisions in the IIA by virtue of precluding the peoples' rights to freely dispose with their natural resources.[226] However, outside the context of peoples subject to colonial occupation, the state duty to obtain the peoples' consent prior to giving rights to investors, or conversely the peoples' claim to the invalidity of the government's consent, can be said to be emerging only with respect to indigenous populations and their property rights—in all other cases international law operates under the classical presumption of representativeness by the government. Nonetheless, given the strong interest in large-scale

[225] N. J. Schrijver, "Permanent Sovereignty over Natural Resources Versus the Common Heritage of Mankind", in P. De Waart, P. Peters and E. Denters, eds., *International Law and Development* (Dordrecht: Martinus Nijhoff, 1988) at 90; Duruigbo *supra* note 215 at 57-64 discussing the implications of a peoples approach to the doctrine of PSNR for investors' rights and the doctrine of juridical stability of contracts and *pacta sunt servanda*, concluding that any counterclaim to this approach based on these doctrines would only reinforce the injustice forced upon peoples by a étatist/formalist approach to the doctrine of PSNR.

[226] On the issue of invalidity of treaty provisions violating *jus cogens* norms and treaty implementation of non-violating norms that nevertheless results in conflicts with *jus cogens* norms see A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2008) at 153-164. Of interest, Orakhelashvili discusses the invalidity of the 1989 *Timor Gap Treaty between Australia and Indonesia* that violated the right to self-determination and use and disposal with natural resources of the peoples of East Timor not by its provisions but by virtue of the factual illegal occupation of East Timor by Indonesia. He notes "[o]n its face, the purposes of the Treaty are innocent as it expresses no intention to contradict *jus cogens*. But there is a systemic and consequential contradiction—the whole Treaty regime conflicts with the right of the East Timorese people to self-determination and the norms incident to it and it hampers the exercise of inalienable rights of the people of East Timor through disposing of East Timor's natural resources without its consent. Indonesia's title in East Timor was null and void for breaches of peremptory norms and it had no right to enter into treaty relations that extended to East Timor. The very conclusion of this Treaty contradicted the principle of self-determination in relation to the people of East Timor as it was aimed at exploiting East Timorese natural resources for Indonesia's own purposes." At 163-4. Similarly, the *jus cogens* prohibition of torture can be breached with respect to individuals in the fulfillment of state obligations under international extradition treaties that do not expressly violate the prohibition of torture by their provisions, but can do so if extradited persons face cruel punishment. At 169-171.

investment projects on indigenous lands in Colombia, the analysis of Canada's responsibility as a home state cannot overlook the relevance of this argument.

In this regard, recent international and regional human rights jurisprudence has clarified to a significant extent the state duty to obtain the free prior and informed consent (FPIC) of indigenous peoples before entering into concession agreements or granting mining exploration or property rights to foreign investors[227], what has been termed the new "natural resource allocation by human rights tribunals".[228] Firstly, whereas there existed—in the period since the adoption in 1986 of Convention 169 of the International Labor Organization—some uncertainty as to whether indigenous peoples have the right to ownership or merely the right to use and enjoy natural resources[229], both the Inter-American Commission and the Inter-American Court of Human Rights have consistently confirmed the undeniable right of indigenous peoples to property over natural resources found on and

[227] On the nature and elements of FPIC, including the state duty to obtain the consent of indigenous peoples before allowing investment on their lands or lands they traditionally hold claims to see S. J. Anaya, *International Human Rights and Indigenous Peoples* (New York: Aspen Publishers, 2009); J. Gilbert and C. Doyle, "A new dawn over the land: shedding light on collective ownership and consent", and S. Errico, "The controversial issue of natural resources: balancing states' sovereignty with indigenous peoples' rights", in S. Allen and A. Xanthaki, eds., *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart, 2011); S. J. Anaya, ""Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources" (2005) 22:1 Ariz J Int'l & Comp L 7; C. K. Chan, L. J. Laplante and S. A. Spears, "Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector" (2008) 11 Yale Human Rts & Dev LJ 117; and regarding FPIC of indigenous peoples in Canada and recent human rights jurisprudence P. Simons and L. Collins, "Participatory Rights In the Ontario Mining Sector: An International Human Rights Perspective" (2010) 6 McGill Int'l J of Sust Dev L & Pol'y 2; and N. Bankes, "International Human Rights Law and Natural Resources Projects Within the Traditional Territories of Indigenous Peoples" (2010) 47 Alta L Rev 457.

[228] L. Barrera-Hernandez, "Sovereignty over Natural Resources under Examination: The Inter-American System for Human Rights and Natural Resource Allocation" (2006) 12 Annual Survey of Int'l & Comp L 1, at 43. See also G. Pentassuglia, "Towards a Jurisprudential Articulation of Indigenous Land Rights" (2011) 22 EJIL 1, 165-202.

[229] *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (C169), 27 June 1989, 72 ILO Official Bulletin 59, online: ILO <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>, provides at article 15: "[t]he rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources." Article 6 of Convention requires the consent of indigenous peoples in cases of relocation, but only informed consultation is required with regard to natural resource management by the state.

within their lands.[230] In its most recent decision of *Saramaka* the Court, continuing a long line of jurisprudence, held that "[t]he right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land... [I]t follows that the natural resources found on and within indigenous and tribal people's territories that are protected under Article 21 [of the Inter-American Convention, Article XIII of the *Declaration of Rights and Duties of Man*] are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life."[231] By way of systemic interpretative expansion, the Court further referred to common Article 1 of the ICCPR and ICESCR, and reports from their treaty-monitoring bodies, to find that the state had merely allowed a privilege to the Saramaka people to use their land and thus violated their right to *control their territory and resources without outside*

[230] The Commission was created under the Charter of the Organization of American States and can receive individual petitions as well as conduct fact-finding missions and issue reports and recommendations on human rights protected under the American Declaration of Rights and Duties of Man. The Inter-American Court of Human Rights was created under the 1969 *American Convention on Human Rights* and can issue binding judgements of precedent for those states that have accepted the Court's jurisdiction. Belize, Canada and the United States are not a party to the *American Convention* and thus escape the jurisdiction of the Inter-American Court, but are nevertheless subject to the jurisdiction of the Commission. Discussed in Barrera-Hernandez *supra* note 228 at 47-9. It should be noted that when interpreting the Inter-American Declaration, the Commission has in a number of reports relied extensively on provisions of the Inter-American Convention, the rulings and advisory opinions of the Court, as well as provisions of the two UN Covenants and interpretation and decisions of UN bodies. In its reports the Commission has confirmed the right to ownership over natural resources by indigenous peoples, as well as the state duty to obtain their FPIC. See e.g. *Mary and Carrie Dann v U.S.*, (2003) Case no 11.140, Report No 75/02, Inter-Am CHR, OEA/Ser.L/V/II.117, doc.1 rev.1; *Maya Indigenous Communities of the Toledo District (Belize),* (2004) Inter-Am CHR No 40/04. Discussed in Pentassuglia *supra* note 228 at 181-2.

[231] *Case of Saramaka People v. Suriname* [2007], Series C No 172, IACHR 5, 28 November 2007 ["*Saramaka"*], at para. 122. This case follows the Court's landmark decision in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* [2001] Series C, No 79, IACHR 9, 31 August 2001, where the Court held (at para. 144) that the term "property" protected under Article 21 of the Convention includes "those material things which can be possessed, as well as any right which may be part of a person's patrimony; including all movables and immovable, corporeal and incorporeal elements and any other intangible object capable of having value". Similarly, in *Yakye Axa Indigenous Community v. Paraguay (Merits, Reparations and Costs)* [2005] Series C, No 125, IACHR Judgement of 17 June 2005, the Court considered "the close ties of indigenous peoples with their culture, as well as the componenets derived from them, must be safeguarded by Article 21 of the American Convention".

interference.[232] Since in that case the outside interference was found to be the granting of logging and mining concessions to foreign investors, the Court went on to distinguish between the state duty to consult and the state duty to obtain FPIC from indigenous peoples and stated: "[r]egarding large-scale development or investment projects that would have a major impact within Saramaka territory, the state has a duty, not only to consult with the Saramaka, but also to obtain their free, prior and informed consent, according to their customs and traditions."[233] The Court observed that the requirement to obtain the indigenous peoples' FPIC is additional to the duty of consultation "that is always required when planning development or investment projects within traditional [indigenous] territory."[234] Previously both the Commission and the Court had declared FPIC to be an obligation separate from the duty to consult.[235]

Indeed, the Inter-American Court referred to the decisions and reports of other international bodies and organizations that have specified that the consent of indigenous peoples is indispensable for the state to allow investment projects on indigenous territory.[236] In that regard, the HRC, the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of All Forms of Racial Discrimination (CERD) have all stressed the state duty to seek and obtain FPIC from indigenous peoples, as part of their right

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[232] *Saramaka ibid* at paras 93-5. Emphases added. The Court referred to the UN human rights system in order to overcome an interpretative hurdle because Suriname had not ratified ILO Convention 169. It thus held the right of indigenous peoples to self-determination, including economic self-governance that is the right to choose their own ways of development, as a general principle of international law.
[233] *Ibid* at para. 134.
[234] *Ibid* at para. 137.
[235] See Mayagna (Sumo) Awas Tingni *supra* note 231 and *Mary and Carrie Dann supra* note 230
[236] *Sarmaka* at para. 136, citing CERD, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador (Sixty second session, 2003), U.N. Doc. CERD/C/62/CO/2 (June 2, 2003), para. 16: "[a]s to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought".

to self-determination, in the context of activities impacting their rights or interests.[237] In its recent ruling in *Poma-Poma v. Peru*, the HRC held that mere consultation with indigenous peoples was inadequate and that FPIC was required.[238] It should be added that in a landmark decision from 2009, *Endrois v. Kenya*, the African Commission on Human Rights reaffirmed the duty to obtain FPIC, as well as the right of indigenous peoples to ownership of natural resources, including subsoil resources and found the state responsible for violating *inter alia* the Endrois peoples' right to self-determination.[239] The state duty to obtain the FPIC of indigenous peoples and other communities negatively affected by FDI is also being spelled out by courts at the national level in many states, including Colombia, mostly by way of judicial incorporation of internationally recognized rights of indigenous peoples.[240] In that light, the current UN Special Rapporteur on indigenous peoples has observed an emerging international norm requiring the consent of indigenous peoples when their property rights are concerned by development projects, a requirement that could in "in certain contexts harden into a prohibition of the measure or project in the absence of indigenous consent".[241] Most commentators therefore agree that in view of the precedents laid down in international and regional human rights jurisprudence, investment projects with a significant impact (such as

[237] See e.g. HRC, Concluding Observations on Canada CCPR/C/79/Add.105 (1999) paras 7-8; CESCR, Concluding Observations on Sweden E/C.12/SWE/CO/5 (2008) para 15; CERD, Concluding Observations on Ecuador, CERD/C/ECU/CO/19 (2008) at 15. For an extensive list see Gilbert and Doyle *supra* note 227.
[238] HRC, *Poma-Poma v. Peru*, UN Doc. CCPR/C/95/D/1457/2006, views of 27 March 2009, at para. 7.6.
[239] African Commission on Human and Peoples Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endrois Welfare Council v. Kenya*, Comm. No. 276/2003 (2009). The Commission built on its previous jurisprudence in The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria, Comm. No. 155-96 (2001) case where it held Nigeria responsible for granting oil concessions to foreign investors on lands belonging to the Ogoni people and without their consent and participation including benefits sharing. Regarding the duty of the state to ensure equal benefit redistribution from investment project undertaken on indigenous lands see *Saramaka* decision *supra*.
[240] See e.g. *Álvaro Bailarín y otros, contra los Ministerios del Interior y de Justicia; de Ambiente, Vivienda y Desarrollo Territorial; de Defensa; de Protección Social; y de Minas y Energía*, Constitutional Court of Colombia, Sentencia T-769/09 [2009] invalidating a concession for mining exploration given without obtaining FPIC. See further Simons & Collins *supra* note 227 and Gilbert & Doyle *ibid* at 310-311.
[241] Anaya *supra* note 227 at 17 and HRC, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, UN Doc. A/HRC/12/34 (15 July 2009) para. 47.

relocation, mining or extraction of mineral, water or other resources) on indigenous peoples' lands and livelihoods cannot proceed without their consent.[242] Moreover, as some commentators have underscored, given that jurisprudential interpretation in the above cases was done under provisions protecting property (e.g. Article 21 of the American Convention) or minority rights (Article 27 of the ICCPR), an argument could be made that the consent of other non-indigenous minority, or non-majoritarian groups in the state might be needed before the state can rightfully create rights for foreign investors.[243] But what are the implications of the state duty to obtain FPIC for the legality of IIAs, or more importantly, for the international responsibility of the home state for its refusal to regulate investors?

1.3.4 The state duty to avoid inconsistency between IIA and human rights obligations under general principles of international law

An additional point that merits brief consideration here is the idea, raised in the SCIT Report, that Canada had an active duty, under the good faith principle, to consider the implications of the CCOFTA on the human rights situation in Colombia, including any risks of aggravation of this by Canadian MNCs, and insert human rights obligations for its investors in the

[242] *Ibid*; Simons & Collins *supra* note 227 at 20; Gilbert and Doyle *supra* note 227 BOOK at 316-320; Pentassuglia *supra* note 228 at 183-4. As Gilbert & Doyle explain, a broader claim exists that all investment projects, regardless of the magnitude of their impact, require the FPIC of indigenous peoples. This argument in based on the right to self-determination, especially the right to economic self-governance, which appears at present to be at odds with the post-*Saramaka* state of the law. This should come to no surprise, as Bankes has observed, since the protection of indigenous consent was operated under property protection, which per definitionem, can be constrained for public use, under certain conditions as outlined in *Saramaka* at paras 127-9. Those include 'traditional' restrictions on private property in international law, as well as consultation and in some cases consent, effective participation in the project management, distribution of benefits from the project, prior environmental and social impact assessments.

[243] See Pentassuglia *ibid* at 189 comparing the non-specific approach taken in both the African and Inter-American human rights bodies' jurisprudence, conceptually allowing for other under-represented minorities to claim protection against abusive state decisions. See also Bankes *supra* note 227 at 473 making a similar claim regarding the jurisprudence of the HRC under Article 27 of the ICCPR.

CCOFTA.[244] The principle of good faith operates to limit the sovereign authority and acts of states so as to refrain from causing injuries to the interests of another state or its subjects.[245] It specifically pertains to all international obligations assumed by states under the UN Charter (Article 2(2))[246], such as the two Covenants, and "means that a State's rights must be exercised in a manner compatible with its various obligations arising either from treaties or from general law".[247] The ICJ has referred to it as "[o]ne of the basic principles governing the creation and performance of legal obligations, *whatever their source*"[248]. The idea is simple: international human rights obligations, being *erga omnes* obligations [249] and

[244] See SCIT Report *supra* note 37. It is arguable if the SCIT considered the good faith duty from an ethical or legal viewpoint.

[245] See *Trail Smelter Arbitration (US v Canada)* (1941) 3 RIAA ["*Trail Smelter*"]; also *Lake Lanoux Arbitration (France v Spain)* (1957) 24 IRL101 at 139: "[a]ccording to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own".

[246] "The Organization and its Members, *in pursuit of the Purposes stated in Article 1*, shall act in accordance with the following Principles... (2) All Members... shall fulfill in good faith the obligations assumed by them in accordance with the Charter." (emphasis added with reference to human rights in Article 1)

[247] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1953) at 131. The doctrine of good faith is closely related to the doctrine of abuse of rights- or bad faith- that is when states exercise their discretion in complying with a certain international law obligation in a manner that effectively violates it. Accordingly, "[a] State which, though not with the actual object of breaking an international obligation as such, uses its right to apply certain laws, or to apply them in a certain way, in such a manner that the obligation is not in fact carried out, may be said to have committed an abuse of rights". G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of International Law" (1959) Brit YB Int'l L 183, at 209. See also T. Hassan, "Good Faith in Treaty Formation" (1980) 21 Va J Int'l L 443 discussing the substantive and procedural implications of the good faith principle with reference to the doctrine of unequal treaties and general principles of equity using good faith to correct bargaining power imbalances between parties.

[248] *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253 at 268. See also *Cameroon v Nigeria,* Preliminary Objections, Judgment [1998] ICJ Rep at para 38 citing a long line of international jurisprudence reaffirming the good faith principle.

[249] As per the dictum in the *Barcelona Traction* case *supra* note 158. However, a conceptual clarification is in point here. Legal scholarship distinguishes between the notion of *erga omnes* obligations- obligations opposable to all states irrespective of their consent to be bound by them, and *erga omnes partes* obligations- obligations opposable to all parties to a given international instrument or custom. These two concepts are further to be distinguished from the notion of *jus cogens* norms that the Vienna Convention on the Law of Treaties (Article 53) recognizes as valid ground for the invalidity of treaties without defining their content. It remains unclear whether, if at all, human rights, and which human rights beyond those mentioned in the dictum of the ICJ fall under these categories, with seeming consensus being achieved that a limited number of rights related to the human person, such as the prohibition of torture, slavery, genocide etc., have reached customary *erga omnes* status (meaning they bind all states irrespective of consent). M. Ragazzi, *The concept of international obligations erga omnes* (New York: Oxford University Press, 2002) at 200-206; also C. Tams, *Enforcing obligations erga omnes in international law* (Cambridge: Cambridge University Press, 2005)

pertaining to immutable fundamental human protection, must be observed, invariably, by states in all their acts (legislation, regulation etc.) irrespective of their territorial application.[250] The principle of good faith thus strongly resembles the standard of conduct imposed on states under the due diligence rule. Professor Goodwin-Gill has discussed the implications of the good faith principle in a scenario particularly apposite for the discussion here, where state legislation had created conditions for potential extraterritorial rights violations without any such explicit intent and without actual injuries being suffered.[251] According to his extensive analysis, the good faith principle "requires [state] conduct which is objectively [consistent] and compatible with [state] international obligations at large", and conditions "the legality of actions of a State, taken in pursuit of a lawful aim [such as FDI], upon the availability of reasonable alternatives, proportionate to the purported objective, and least likely to violate its international obligations".[252] It is important to note that the good

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discussing other meanings and applications of the concept *erga omnes*. For the purposes of this discussion, both parties to the CCOFTA have ratified the two Covenants among many other human rights instruments and this distinction will therefore seem to be moot. It is only with respect to the *fundamental* content of human rights obligations, in that they are inviolable and impossible to 'contract-out of' or set aside, that this differentiation will be revisited, see below section 1.4.3.

[250] One may support this argument by reverting to the dictum in the *Corfu Channel* and *Lotus* cases, namely in that international law (and thus human rights law) delimits at all times the sovereign rights of states both vertically (with respect to their own individuals) and horizontally (with respect to rights of other states and individuals). Even a formalistic reading of human rights instruments as creating inter-state contractual obligations would give the same result given their permanent character and the customary obligation under the *Vienna Convention on the Law of Treaties* to apply treaties in good faith and not to frustrate their object and purpose by subsequent activities.

[251] See G. S. Goodwin-Gill, "State Responsibility and the 'Good Faith' Obligation in International Law", in M. Fitzmaurice and D. Sarooshi, eds., *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart, 2004), 75-104. The issue involved the incompatibility of immigration legislation passed by the United Kingdom, introducing a system of pre-entry clearance for asylum seekers in the Czech Republic that effectively discriminated on racial grounds, with several international human rights instruments including the International Convention for the Elimination of All Forms of Racial Discrimination, the ICCPR and the ECHR. At 76-77.

[252] *Ibid* at 92, 96, 98. His observations regarding the unlawful effects of 'passive' regimes, such as visas, are particularly relevant in this context, as such state actions do not actively or intentionally violate human rights of non-citizens (such as asylum seekers), but do so by the silent omission of regulating states to observe their compatibility with human rights law. In these cases, similarly to the omission to regulate MNCs, the violation would result from an omission by the state while the actual injury is suffered extraterritorially. It is also important to note that state responsibility towards the affected individuals (and not another state- Goodwin-Gill's example deals with stateless refugees) that arises in such cases may be looked for individually, with the

faith principle operates objectively, meaning that it looks to the effects of a given state conduct[253], rather than to the intent or motivation (i.e. bad faith) behind the actions of a state, which "will be equivalent to a breach of [a human rights] treaty" if "the [lawful] making of regulations by one [state] frustrated the right of the other [state/individual]"[254]. In this sense, the obligation of conduct in good faith entails: an assessment of the circumstances and identification of potentially affected interests by the state activity in question, compatibility of the action with the rights of those potentially affected, including an assessment of proportionality and *availability of other reasonable means to preclude a potential violation* of- in this case- individuals' rights.[255] Therefore an incompatibility of home state actions (concluding an IIA that frustrates host state regulation of MNCs) or omissions (failure to regulate MNCs unilaterally or through the IIA) with international human rights law, specifically the due diligence standard, may amount to a violation of its international obligations- thus triggering state responsibility- and furthermore give rise to reparations towards the affected individuals ('bring them into' the jurisdiction of the home state).

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regulating state, or jointly between the regulating and the enabling state (in this case the Czech Republic). At 99. See further chapter 3.

[253] The ICJ has affirmed that the good faith obligation is one of conduct, to be evaluated objectively against the circumstances of a particular case and its effects on the rights of another state (*Gabcikovo-Nagymaros (Hungary v Slovakia)*, Judgment [1997] ICJ Rep p. 7 at paras 141-142), and individuals (*East Timor (Portugal v Australia),* Judgment [1995] ICJ Rep 90, dissenting opinion of Judge Weeramantry p 202-210 on the *erga omnes* nature of the right to self-determination). Discussed in Ragazzi *supra* note 249 at 137-8.

[254] Goodwin-Gill *supra* note 251 at 93 quoting A. McNair, *The Law of Treaties* (Oxford: Oxford University Press, 1960) at 540, 550.

[255] Goodwin-Gill *ibid* at 100-101. It is pertinent to observe that the obligation to undertake a 'human rights impact assessment' of proposed state actions, depending on the knowledge of the circumstances potentially affecting human rights including the availability of remedies in the home or host state, is integral to the good faith principle. It is plausible that the SCIT Report is based on the legal obligation and not merely ethical obligation of good faith for Canada. Indeed state responsibility for failure to exercise due diligence will arise upon proof that the state had not availed itself to use the means at its disposal in a sufficient manner so as to prevent the violation. Tzevelekos *supra* note 188 at 199.

To sum up, it is possible to maintain that Canada had an active duty, both under the due diligence and good faith principles, to ensure that by its actions or omissions it would not cause human rights violations or environmental harm affecting individuals in Colombia. Such a positive obligation could also be understood to entail a duty to insert human rights and environmental protection obligations for investors in the CCOFTA; this obligation being shared with Colombia if one looks at the CCOFTA as an act of international cooperation, or individual for Canada if one looks at it as a domestic act of the Canadian executive and legislature. In any event, the fact that Canada does not currently exercise legislative or other regulatory control so as to prevent or sanction its MNCs when causing or becoming complicit to human rights violations abroad, only reinforces the idea that there might have been a duty for Canada to use the CCOFTA as a point for such regulatory control.

1.4 Treaty-based regulation as a home state duty to prevent transnational harm under the doctrine of state responsibility

Home state responsibility has been described as a critical[256] but often under-appreciated approach to combat MNC impunity, which may result from the inability or unwillingness of the host state to regulate corporations to safeguard fundamental human rights and the environment.[257] It is possible that this stems primarily from the ambiguous status of the obligation for home states to regulate their corporate nationals extraterritorially, but it is more plausible to maintain that the problem lies in the strict public/private divide, that is the separation between the conduct and responsibility of non-state actors from that of states,

[256] B. Cragg, "Home is Where the Halt Is: Mandating Corporate Social Responsibility Through Home State Regulatory and Social Disclosure" (2010) 24 Emory Int'l L Rev 735 at 754.
[257] D. M. Chirwa, "The Doctrine of State Responsibility as A Potential Means of Holding Private Actors Accountable for Human Rights" (2004) 5 Melb J Int'l L 1.; also Jägers *supra* note 201.

which continues to inform the fundamental principles of international state responsibility.[258] In the context of international treaty law, and IIAs as its subspecies, the difficulty may appear even greater in terms of imposing responsibility on one state in a seemingly reciprocal and freely consented exchange of international obligations between equal partners. At the same time, this may also appear as a legitimate solution to the acute problem of MNC impunity reinforced by their protection with IIAs, in view of the inequality of power that underlies IIA treaty making between developed and developing states as well as the position of developing states vis-à-vis MNCs.[259] This section will therefore present the options for using the rules on the customary international law doctrine of state responsibility to establish a duty on home states to pair investor protection in IIAs with investor obligations to respect human rights and the environment in the host state.[260]

Therefore the discussion here will focus on the failure of Canada as a home state to prevent *through the provisions of the CCOFTA* human rights or environmental harm caused or perpetrated by its investors in Colombia, while Canada's responsibility, especially if seen

[258] For a discussion of the shifts and fluctuations in the responsibility of states for private conduct and the gradual imposition of the separate delict theory of state responsibility in the 20th century, especially during the Cold War, see J-A. Hessbruegge, "The Historical Development of the Doctrines of Attribution and Due Diligence in International Law" (2004) 36 NYU J Int'l L & Pol 265. Hessbruegge argues that recent developments in the area of the international, or transnational fight against terrorism, most notably the acceptance of the international community of the legality of holding the Taliban regime in Afghanistan responsible for the terrorist attacks of the Al-Qaeda, attest to the fact that the doctrine of state responsibility may be undergoing a change of paradigm at least in the field of terrorism. At 305-6. See R. Pisillo-Mazzechi, "The Marginal Role of the Individual in the ILC's Articles on State Responsibility" (2004) 14 It YB Int'l L 39, suggesting the ILC Articles should have dealt with the separate issue of state responsibility for and towards individuals. See further below.

[259] See for example V. Lowe, "Corporations as International Actors and International Lawmakers" (2004) 14 It YB Int'l L 23 at 32-4, discussing the marginal attention to state responsibility for private corporate acts in the ILC Articles. See discussion below on causation based theory of state responsibility.

[260] The intention is not here to criticize the rules on state responsibility or their application, but to present that it is possible to use existing international legal doctrines to remedy the serious issue of MNC impunity. This approach is therefore consistent with the position of TWAIL scholars who seek to demonstrate that the existing rules of international law may be used as a counter-hegemonic tool for protecting the interest of peoples in developing countries, simply by reading them in a non-formalistic non-static manner. See generally J. Gathii, "Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy" (2000) 98 Mich L Rev 1996, B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

through the eyes of local communities, may indeed extend to a more general interference in the internal paramilitary struggle or political processes in view of the ongoing conflict and unstable government in Colombia. The home state injury or wrong in question is therefore its failure to prevent actual violations by MNCs consistent with the obligation to protect human rights whenever a state has the knowledge and power to do so, without the need to establish material, moral or other legal damages to the individuals in the host state or to the host state itself.[261] This approach has recently found support with scholars given the difficulties of attributing responsibility for the private wrongs of MNCs to the home state.[262]

State responsibility can be described as "the name public international law gives to the normative state of affairs which occurs following a breach by a state of one of its international legal obligations".[263] Thus the international law of state responsibility has a double function: to ascertain (establish, identify) the existence of a breach by a state of its

[261] This is a very important point as state responsibility is often difficult to discuss in the absence of an injury or damage. The rules of state responsibility as discussed below, are objective in nature and operate to establish the existence of a breach of a state's international obligations without resorting to an inquiry into any damages. It could thus be said that the injury/wrongdoing of Canada as the home state under analysis here is a legal one, in the sense of a breach of legal obligation independently of any negative material consequences this may produce. See discussion on the concept of "legal injury" to the international legal order in relation to material and moral damages caused by states and satisfaction (reparations, remedies, etc.) arising therefrom in J. Barboza, "Legal Injury: the Tip of the Iceberg in the Law of State Responsibility" and B. Stern, "A Plea for 'Reconstruction' of International Responsibility based on the Notion of Legal Injury", both in M. Ragazzi, ed., *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden/Boston: Martinus Nijhoff, 2005), at 7-22 and 93-106 respectively. While the underlying rationale is of course the MNC impunity that this breach of Canada's international obligations may cause, this does not need to materialize for the state to be held responsible for failing to abide by its obligations of diligent conduct.

[262] See R. McCorquodale, "Corporate Social Responsibility and International Human Rights Law" (2009) 87 J of Buss Eth 385; Seck, Home State Duty *supra* note 139 and Seck, Home State Responsibility *supra* note 148; F. Francioni, "Alternative perspectives on international responsibility for human rights violations by multinational corporations", in W. Benedek, K. de Feyter and F. Marrella, eds., *Economic Globalization and Human Rights* (Cambridge: Cambridge University Press, 2007); Tzevelekos *supra* note 188; R. McCorquodale, "Spreading Weeds Beyond Their Garden: Extraterritorial Responsibility of States for Violations of Human Rights by Corporate Nationals" (2006) 100 ASIL Proc 95; McCorquodale and Simons *supra* note 138. The difficulties of attributing the actions of private MNCs to their home state are discussed briefly below.

[263] C. Scott, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms", in C. Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart, 2001), 45 at 47.

international obligations, and to provide the rules for the consequences that arise from such a breach.[264]

It is a general principle of international law that the conduct of private entities is not attributable to states and this approach underlies the rules of state responsibility as codified by the International Law Commission (ILC) *Draft Articles on the Responsibility of States for internationally wrongful acts* (*Draft Articles*).[265] According to this view, the state, a moral entity, can only act through its officials or agents under its control who engage its international responsibility *directly*[266] when internationally wrongful acts are attributable to

[264] Brownlie *supra* note 161 at 420. This characterization of the double role of the rules on the law of state responsibility corresponds to the format adopted by the International Law Commission (ILC) in its *Draft Articles* (cited below), that deal with (1) the rules determining the existence of a breach of an international obligation by the state and (2) the consequences (or the content) following such a breach. See *Draft Articles* cited *infra* at 61-9.

[265] See Commentary under Article 8 of the Draft Articles at 110. The articles were adopted by the UN General Assembly, see International Law Commission, *Draft Articles on Responsibility of States for internationally wrongful acts*, UNGAOR, 56th Sess., Supp. No. 10, UNDoc. A/56/10 (2001) 29-365. Hereinafter the references and pagination will be drawn from J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) where the original articles [Hereinafter "ILC, *Draft Articles*"] and commentary [Hereinafter "ILC, *Draft Articles* Commentary"] by the ILC were reprinted. Although the original idea of the ILC was to submit the articles for adoption by states, it was abandoned as the Draft Articles are said to embody the general 'secondary' rules or principles of state responsibility arising from a breach of an international obligation and thus represent a statement of the existing law without a need for any specific state acceptance of the Articles to this effect. Being 'secondary' and 'general' the rules do not prejudice any frameworks of state responsibility that might be found under the primary rules that spell out state obligations. See I. Brownlie, *System of the Law of Nations, Part I : State Responsibility* (New York: Oxford University Press, 1983) at 18-21. See also Crawford at 14-16 and Commentary at 74. In view of the particular nature of international human rights instruments where the obligations to ensure continuous protection to the individual void the idea of reciprocal *state* benefits, the applicability of the *Draft Articles* as a 'surrogate' for state responsibility which is not specified under most human rights treaties, has been contested by some scholars. See A. Clapham *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) at 317-8; Pisillo-Mazzechi *supra* note 259. Nonetheless the ICL Articles are considered an authoritative systematization of the customary international law on state responsibility and applied both by the International Court of Justice (ICJ) and international human rights adjudicative bodies. See Crawford *ibid* at 16 citing ICJ cases using the 1996 draft version of the Articles at footnote 48; McCorquodale and Simons *supra* note 138 at 600-601. See also, J. Crawford and S. Olleson, "The Continuing Debate on a UN Convention on State Responsibility" (2005) 54 ICLQ 959.

[266] The distinction between direct and indirect state responsibility might appear somewhat artificial, since as Brownlie noted "[i]n each case responsibility can only be based upon some ultimate default by the organs of the state, the activities of private persons merely constituting the objective conditions which give rise to a breach of a principle, or standard, of general international law, or relevant treaty provisions, on the part of the state." *Brownlie ibid* at 159 (footnote omitted). It is nevertheless helpful to distinguish between responsibility for direct violations by MNCs, which are, in that sense, directly attributable to the state in cases where it exercises control or empowers the corporation to exercise governmental authority in the instance when the wrongful

them, i.e. the state.[267] From this perspective, extraterritorial MNC violations of human rights will not *a priori* engage the direct responsibility of the home state. The responsibility will axiomatically fall onto the host state to protect human rights from private violations.[268] The *Draft Articles* recognize exceptions to this rule, notably if the state controls or directs *the conduct* of the private entity (Article 8)[269], empowers a private entity to exercise governmental powers (Article 5)[270], or acknowledges its conduct for its own (Article 11)[271]. With regard to the actual wrongful conduct of MNCs (i.e. human rights or environmental harm) falling under the control, instructions or directions of the home state, this test would be highly improbable, if not impossible to attain.[272] Likewise, MNCs would seldom be empowered by home state law to exercise governmental authority in the host state, and home

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conduct occurs. The reference to *indirect* state responsibility denotes its omission to regulate to prevent the wrongful conduct, which is nevertheless again directly attributable to the home or host state. See below.

[267] ILC, *Draft Articles supra* note 265 Commentary at 91: "[t]he general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others, who have acted under the direction, instigation or control of those organs, i.e., as agents of the State".

[268] See *Velásquez-Rodriguez v Honduras* (1998) Int.-Am. Ct. H.R., Ser. C No. 4.

[269] "Article 8: "Conduct directed or controlled by a State: The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

[270] "Article 5: "Conduct of persons or entities exercising elements of governmental authority: The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

[271] "Article 11: "Conduct acknowledged and adopted by a State as its own conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own."

[272] The test of state control over a private entity is based on the ICJ dictum in *Military and Paramilitary Activities (Nicaragua v United States of America),* Merits [1986] I.C.J. Rep. 14 where the Court explicitly held the United States was not responsible for the human rights and humanitarian law violations of the contras (a paramilitary insurgent group) in the course of their paramilitary operations in Nicaragua, although it remained internationally responsible under the non-intervention rule for financing, assisting and supporting them. The degree of necessary control was posited at effective control over the operations of the private actors in which the violations occurred. (at para. 86) Despite some signs that the *Nicaragua* test might be relaxed to a degree of *overall* control of the state over the private conduct in question (in the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, Case IT-94-1, *Prosecutor v Tadic* (1999) ILM, vol 38, p 1546) the ICJ subsequently reaffirmed the *Nicaragua* test in its decision *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2006] ICJ Rep 91. The Commentaries under Article 8 specifically refer to the *Nicaragua* test as authoritative and provide that the incorporation in the home state does not suffice for wrongful conduct of a private entity to be attributed to the state where it was incorporated, unless the corporation exercised governmental authority or the state used its control (such as shares) in the corporation to achieve a particular goal which gave rise to the internationally wrongful act. ILC, *Draft Articles*, Commentary at 112-113.

state adoption of private human rights violations seems highly unlikely.[273] However, while these instances concern the direct attribution of the wrongful conduct of the corporation to its home state, the interest of this chapter is the responsibility incurred for the absence of investor regulation in the CCOFTA, which could be seen as enabling MNCs violations. Thus there are at least two ways in which the home state can incur *direct* responsibility when such a violation occurs: the home state can be seen to be aiding and assisting an internationally wrongful act (i.e. the human rights violation) by the (1) host state, if one should look at the IIA as an act of international cooperation, and (2) by the corporation itself in cases where it substitutes for the governmental authority of the host state, such as in cases of FDI in conflict zones.

1.4.1 The CCOFTA as an international act: home state complicity and joint home/host state responsibility for investor regulation

The first scenario involves the consideration of the absence of investor regulation in the CCOFTA itself as a wrongful act under international law in which both the host and home state partake. For the purposes of the discussion here, it is assumed that negotiating an international treaty is *ispo facto* an act attributable to both of the states involved.[274] As it was discussed in the previous chapter, it is possible to read the UN Charter and the two

[273] Scholars have recognized that this approach to holding the home state responsible for extraterritorial violations of human rights by its MNCs is ineffective, and somewhat unnecessary in view of the existing obligation of due diligence to prevent the said conduct that the home state can be said to have under international human rights law. See Seck, *Home State Duty supra* note 139 at 39-41; McCorquodale and Simons *supra* note 138 at 609-610; Tzevelekos *supra* note 188 at 170-171. It is possible, as McCorquodale and Simons observe, that a lower threshold of control of the home state be applied by human rights adjudicating bodies as the European Court of Human Rights held in *Ilaşcu supra* note 186. However, as this hypothesis remains largely untested the presumption is that international jurisprudence will tend to apply the *Nicaragua* test of state control in most cases.

[274] As per Article 4 of the ILC Draft Articles, conduct of the legislative, executive and judicial branch of a state is attributable to it. As treaty making involves both the executive and the legislature (depending on the constitutional system) it is a joint act attributable by virtue of its nature to the states involved.

Covenants as imposing a universal duty on states to respect and protect human rights in their international cooperation.[275] In this situation, where both states have the same obligations under international law, it is possible to maintain that concluding a treaty, which restricts the host state regulatory capacity and thus allows for human rights violations by private actors triggers the responsibility of both states involved. Under the *Draft Articles* each state is individually responsible for its own conduct, acts or omissions, referred to as the principle of independent responsibility.[276] In some cases the wrongful conduct of one state is entirely dependent upon the actions or inactions of another state, and such may be the case of the absence of regulation of MNCs by the host state to protect human rights.[277] When states share a common set of international obligations, such as in the instant case, they might be jointly responsible when wrongful conduct is attributable to them and results in a violation of their common obligations, although the 'share' of responsibility of each state is determined individually according to its own conduct that contributed to the violation.[278] This does not however mean that the responsibility of one of the states is reduced by virtue of the other state being concurrently responsible for the same violation.[279] As the Commentaries note, a

[275] See UN Charter Articles 55 and 56; ICCPR and ICESCR discussed above. See Salomon *supra* note 151 and Skogly *supra* note 142.
[276] ILC, *Draft Articles*, Commentary under Chapter 4 *supra* note 265 at 145. See also Article 47 "*Plurality of responsible States"* and Commentary at 272-3.
[277] ILC, *Draft Articles,* Commentary under Chapter 4 *ibid* at 145-6, the ILC gives an example of extradition when the defendant is facing death penalty upon delivery, in which case the extraditing state becomes responsible for a violation of the right to life when it has knowledge of the circumstances and power (physical custody in this case) to prevent it. See *Soering supra* note 178. See further below section 1.4.2 for a discussion on the role of the independent actions or omissions of the home state in the assessment of the illegality of the conduct of the host state.
[278] ILC, *Draft* Articles, Commentary under Article 47 *ibid* at 274. See further sections 1.4.2 and 1.4.3 below discussing 'degrees' of state responsibility.
[279] *Ibid* at 275, citing *Corfu Channel (UK v Albania)* [1949] ICJ 4, in which case the responsibility of Albania was not reduced because it had not itself laid down the mines in the Corfu Strait (Yugoslavia did) that caused damage to the naval vessels of the UK. The obligation to warn the ships (due diligence) pertained to Albania nonetheless and it is the breach of that obligation (failure to warn) that caused the damage.

state may be required under its own international obligations to prevent the conduct of another state, or harm caused by such conduct.[280]

In that sense Canada could be seen as responsible to ensure that the failure to regulate MNCs by the host state does not cause harm because of their joint act (CCOFTA). In this case, it is important to note that the wrongful act of the two states in question is the omission of investor regulation through the CCOFTA, an act of international cooperation. It flows from an interpretation of the Charter and two Covenants, discussed in the previous chapter, that states have a negative duty to ensure not to violate human rights in their international cooperation.[281] A closely related issue is the shared responsibility of both states for failing to prevent a wrongful act arising out of their joint cooperation that they could have reasonably foreseen and consequently adopted a different conduct to advert the harm.[282] In this case, the element of foreseeable risk and capacity to avert it become critical, as the internationally wrongful act becomes the failure of both states to comply with their obligation of conduct, that is to structure their international cooperation in a way so as to preclude any foreseeable risks for human rights violations by third parties.[283] If an obligation to prevent harmful

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[280] Commentary under Chapter 4 *ibid* at 146.

[281] *Ibid* Commentary under Article 2 at 84. The two conditions necessary for an internationally wrongful act are conduct attributable to the State under international law and a breach by that conduct of an international obligation of the State. The ILC specifically notes that the question if damage is necessary depends on the content of the primary obligation and it cannot be analyzed in the abstract. The Commentary gives an example of an international treaty obligation to enact domestic uniform law, in which case the injury is simply the failure to enact the law, without any further damage. See also Commentary under Article 12 at 130, in some circumstances the mere existence of the conditions for a breach (such as legislation) does not amount to a breach, whereas in others (such as obligations of conduct) it does. If the obligation is understood in the present context as to respect and protect human rights universally, states would have breached this obligation not by virtue of allowing investors to pursue claims against the host state, but when this mechanism results in the host state denying human rights protection to individuals who may be affected by the actions of that same investor.

[282] See *Velásquez-Rodriguez v Honduras supra* note 268 at paras. 172 and 174.

[283] ILC, *Draft* Articles, Commentary under Article 12 ("*Existence of a breach of an international obligation*: There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character") *supra* note 265 at 124: "The essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation". The Commentary further recognizes that state responsibility can arise for a failure to comply with the United

conduct can be inferred from the Charter and the two Covenants, then it will extend to all acts of international cooperation requiring states to take all "reasonable and necessary measures to prevent a given event from occurring, but without warranting that the event will not occur".[284]

A second and related but distinct scenario is that covered under Article 16 of the *Draft Articles*, when one state aids or assists another in violating its international obligations and thus becomes complicit in the wrongful act of the assisted state.[285] In this case it is important to underscore that the wrongful act of the host state can relate to its failure to regulate investors (due diligence to protect human rights) or its failure to provide remedies for affected victims (right to remedy), but the actual private harm is not assimilated to the conduct of the host state, neither is the wrongful act of the host state assimilated to the conduct of the home state. Article 16 provides for situations where one state knowingly provides aid or assistance in the form of an essential facility or finance for the activity that results in a breach of the assisted state's international obligations.[286] In such occurrences the responsibility of the host state for its wrongful conduct remains unchanged (primary), but the assisting state bears separate (secondary) responsibility to the extent that its aid or assistance

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Nations Charter obligations, which are, as discussed, obligations of cooperation to universally promote and protect human rights, at 128.

[284] Commentary under Article 14 (obligations extending in time) *ibid* at 140. See further Salomon *supra* note 151 at 132-143 discussing the responsibility for a breach of the standard of conduct on the part of states in formulating international policies that violate human rights, for example in international financial institutions (IFIs) or the World Trade Organization (WTO)- both examples of international cooperation (i.e. joint international acts of states) where state parties have obligations to prevent human rights harm.

[285] Article 16: "Aid or assistance in the commission of an internationally wrongful act: A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and (*b*) the act would be internationally wrongful if committed by that State." The Commentary specifically distinguishes this situation from situations where the committal of the wrongful act was carried out jointly, or by co-participation. At 148.

[286] *Ibid*. the Commentary gives examples of a state providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting the destruction of property belonging to nationals of a third country.

causes or contributes to the wrongful act.[287] The Commentary further specifies that the assisting state ought to have knowledge of the circumstances of the wrongful act of the assisted state; the aid must be given to facilitate the occurrence of the wrongful conduct and the assisting state must be bound by the same international obligation as the assisted state.[288] As discussed in the previous chapter, Canada as a home state was and continues to be clearly aware of the risks associated with its FDI in Colombia, including the restrictive potential of the CCOFTA on the regulatory capacity of Colombia. The criterion of intent to facilitate the committal of the wrongful act on the part of the assisting state, despite appearing somewhat ambiguously in the Commentary and not Article 16 itself, has been criticized as failing to reflect the reality in which home state support for MNCs occurs.[289] However, if complicity on the part of the home state is to be understood as creating the conditions in which the wrongful conduct can occur, then the unquestionable intent of IIAs to restrict the regulatory capacity of the host state qualifies for the purposes of Article 16. Therefore the home state's act of concluding an IIA that restricts the capacity of the host state to comply with its human rights obligations can be seen as an act of assisting a breach of the host state's international obligations and thus directly trigger home state responsibility.[290] Lastly, as the Commentary

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[287] *Id*.
[288] *Id* at 149.
[289] Article 16 speaks of knowledge only and not intent. Furthermore, the Commentary reads "aid or assistance must be given with a view... to facilitate the occurrence of the wrongful conduct", which can be interpreted as intent for creating the conditions in which the wrongful conduct can take place (the definition of complicity) and thus still be satisfied in the case of IIAs. For criticism see M. Gibney, K. Tomaševski and J. Vedsted-Hansen, "Transnational State Responsibility for Violations of Human Rights" (1999) 12 Harv Hum Rts J 267, commenting on the earlier draft of the ILC Articles nevertheless substantively unchanged in the final adopted version.
[290] See *Responsibility Beyond Borders supra* note 138 at 611-613. McCorquodale and Simons give the example of the Baku-Tbilisi-Ceyhan and Chad-Cameroon Pipeline projects, where private oil companies had contracts with the host states that included (akin to IIAs) stabilization clauses and investor-state arbitration mechanisms. The projects were carried out in multiple states where serious human rights concerns had been raised in relation to various human rights. They conclude that where developed states provided financial support to the companies operating on the project, through their export credit agencies (ECAs), these acts could be seen as supporting an internationally wrongful act of the host states. The analogy would seem straightforward as IIAs,

notes, where the assistance is the necessary element in the wrongful act in the absence of which it could not have occurred, the breach can be concurrently attributed to the assisting and the acting state, making the distinction between complicity and joint responsibility irrelevant.[291]

A final note is due here to the exculpating circumstance of consent given by the host state.[292] The principle of consent operates so as to manifest an intention by two states to set aside their international obligations either generally or in the particular occurrence.[293] Since IIAs inherently bring about limitations to the regulatory capacity of the host state, the question is whether the host state can validly consent to such limitations and thus preclude the wrongfulness of the joint act (i.e. non-exercise of due diligence) and thus the responsibility of the home state. Article 20 provides that "valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former

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as acts of the home state, are meant to provide support for its MNCs operating in the host state and can thus be seen as 'tools' of assistance making the home state complicit in the breach of the international obligations of the host state.

[291] ILC, *Draft* Articles, Commentary under Article 16 *supra* note 265 at 151.

[292] Chapter 5 of the *Draft Articles* entitled "Circumstances Precluding Wrongfulness" covers six principles that operate to preclude the wrongfulness of state conduct that would otherwise be a breach of its international obligations: consent (Article 20), self-defence (Article 21), countermeasures (Article 22), *force majeure* (Article 23), distress (Article 24) and necessity (Article 25). Article 26 further deals with compliance (or non-compliance) with peremptory norms (*jus cogens*) of international law in the sense of Article 53 of the *Vienna Convention on the Law of Treaties*, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969), which are enumerated in the Commentary: prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination. The Commentary discusses the effect of peremptory norms on treaties concluded before the entry into force of the Vienna Convention in the sense of being used by states to justify non-compliance with their obligations under international law. Thus none of the listed circumstances that would normally operate to preclude the wrongfulness of a state regarding a breach of its international obligations can justify a breach of a *jus cogens* norm. By extension then states cannot create international obligations conflicting with peremptory norms. Human rights obligations as such are not listed by the Commentary due to their uncertain status as peremptory norms (which if any of the rights found in the various international instruments qualify as *jus cogens*). *Ibid* At 187-8.

[293] As the Commentary notes, states can in principle (subject to *jus cogens* limitations notably, but also possibly other primary rules that are not subject to discussion in the *Draft Articles*) decide to displace a specific obligation in general or on a particular occasion, in which case the obligation continues to apply to them with the exception of that occasion. *Ibid* at 163. In essence, consent operates as a "waiver of claim" by the injured state with regard to a particular act of the injuring state.

State, to the extent that the act remains within the limits of that consent".[294] It is possible to argue in several ways that the consent given by the host state is invalid in the case of violations of human rights enabled by an IIA. In the first place, it can be contested that no state can consent to a treaty having an effect to displace its obligations of international cooperation to respect and protect human rights arising under the UN Charter.[295] Second, the Commentary specifies that the operability of the defence of consent concerns the rights and duties of two states in a given situation (i.e. international act), without prejudice to the human rights that are held by individuals vis-à-vis those states and cannot be waived without their free consent.[296] In that sense, the obligation of human rights protection that the host state owes to its population is immutable and cannot be 'contracted out' or set aside by the particular legal relationship created with the IIA.[297] Moreover, the injured party in this case

[294] The question if the consent of a state can be deemed to be valid is not addressed by the Commentary as it falls under the primary norms of international law. The Commentary does however point to the fact that in some circumstances it is questionable if a state can validly consent at all, and that in other cases the legitimacy of the government which has given the consent can be questioned. At 163-4. For a technical analysis of the place and role of state consent in the ILC Articles see A. Abass, "Consent Precluding State Responsibility: A Critical Analysis" (2004) 53 ICLQ 1, 211-225, discussing that international law takes a formalistic approach to ascertain the validity of state consent in terms of looking for attribution to the state, empowerment of the representing agent by that state to consent to the act in question etc. The 'validity' of state consent that is in question here is however more concerned with the power relationships between MNCs, host and home state and the 'monopoly' of the IIA negotiations process by developed home states. See further below discussion under causation theory.

[295] Commentary under Article 12 (*"Existence of a breach of an international obligation"*) at 128 specifically addressing Article 103 of the UN Charter, which provides that in the case of a conflict between the obligations under the Charter and any other international agreement, the obligations of the Charter prevail. (at 128) If a binding international obligation to protect human rights in cases of inter-state cooperation is read into the Charter, than any treaty that would have the effect of endangering human rights would be in breach of it. By comparison, the ICJ held in *East Timor (Portugal v Australia)* [1995] ICJ Rep 90 that "the right to self-determination..., as it evolved from the [UN] Charter and from United Nations practice, has an *erga omnes* character". (at p 102) The analogy would seem to hold for the *erga omnes* character of the obligation for states to respect and protect human rights in international acts of cooperation, also found in the Charter.

[296] Commentary at 165.

[297] It could be maintained that the fact of the IIA frustrating the protection of human rights over a prolonged period of time constitutes an ongoing breach of the host state's international obligation in the sense of Article 14, to which the home state may be found to be complicit. In particular, paragraph 3 of Article 14 provides that "[t]he breach of an international obligation by an act of a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation". (at 135) If the primary obligation is understood as one of due diligence, what the Commentary under Article 14 clearly does (at 140, citing the obligation to prevent transboundary damage per the *Trail*

would not be the host state, but both states would be internationally responsible (and possibly owe reparations) towards the affected individuals.[298] The *Draft Articles* explicitly recognize that in human rights protection, it is the consent of individuals as ultimate beneficiaries and

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Smelter case, which continues to apply to states at all times), then both states in this case could be under ongoing responsibility until the non-conformity with their international obligations is rectified, regardless of the materialization of any actual harm. Alternatively it could be argued that the *aggregate* of acts and omissions constitutes a breach on the part of both the home and the host state of the international obligations to respect and protect human rights under Article 15 (*"Breach consisting of a composite act"*). In other words this would equate to the sum of the failure of regulation by the home and the host state, and the failure to exercise due diligence on the part of both states when signing a treaty which could interfere with human rights protection, notably because of the absence of human rights obligations for investors and mechanisms for claims by potential victims. This means that the absence of investor regulation through the CCOFTA would become wrongful when aggregated with the lack of unilateral home state and absence of host state regulation. The Commentary under Article 15 specifically provides for situations where each of the actions or omissions are wrongful on their own, in what case the individual responsibility of the state actors would be assessed for each of the breaches, including the aggregate wrongful act. (at 143) Nonetheless, the argument of this thesis is principally focused on the wrongfulness of the failure to exercise due diligence in the form of regulating investors through the CCOFTA, which can be directly attributed to both states individually.

[298] The ILC framework recognizes that international obligations may be owed to another state, multiple states, the international community as a whole or non-state entities such as individuals under human rights law. While the ILC framework primarily deals with the designation of an injured and a responsible state(s) for the purpose of identifying the injured state's claim to reparations, the *Draft Articles* provide that the legal relationship covered therein deals exclusively with invocations of responsibility by one state against another state "without prejudice to any right, arising from the international responsibility of a [s]tate, which may accrue directly to any person or entity other than a [s]tate". See Article 33 "*Scope of international obligations set out in [Part II]*" and Commentary at 209-210. Thus where individuals are the ultimate beneficiaries and rights holders against state obligations, the existence and consequences of a breach of, for example, the duty to protect, would be independent from the duty to protect of another state which could not consent to the wrongdoing state's action as its consent would be a breach of its own obligations owed towards individuals. See note 49 below on incompatibility of a consent to set aside human rights protection with the purpose and objective of human rights instruments. The ILC framework is explicit on this in the discussion on the consequences of an internationally wrongful act in terms of the obligation to provide reparations/remedies. See Draft Articles and Commentary at 193, 209-210. Some scholars maintain the purpose of the international law on state responsibility, including state responsibility for human rights wrongs, to be primarily to determine the consequences (reparations/remedies) once a breach of a primary rule can be linked to an act or omission of the state. See Shelton *supra* note 184 at 50. According to this view, primary obligations under human rights treaties differ from the general rules applicable in the context of state responsibility, in the sense that they do not represent purely contractual obligations between states but have, in the words of the Inter-American Court of Human Rights (IACHR), "the purpose of guaranteeing the enjoyment of individual human beings of those rights and freedoms rather than to establish reciprocal relations between States". See *Other Treaties Subject to the Advisory Jurisdiction of the Court (Article 64 ACHR) (1982)* 1 Inter-Am. Ct.H.R. (ser. A), (1982) 3 H.R.L.J. 140. The Court has further emphasized that "modern human rights treaties in general ... are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States." *The Effect of Reservations on the Entry into Force of the ACHR (Articles 74 and 75)* (1982) 2 Inter-Am. Ct.H.R. (ser. A), (1982) 3 H.R.L.J. 153. Shelton at 97-8.

rights holders vis-à-vis state obligations that matters and not that of states/governments.[299] In addition, the fact that core international human rights are *erga omnes* obligations, in the sense of being opposable against all states parties to the same instruments, renders problematic the consent to a bilateral 'displacement' of human rights protection between two states in a particular occurrence, as the individual or joint state responsibility would remain towards the international community.[300] Finally, it can be held that any consent given by the

[299] ILC, *Draft Articles*, Commentary under Article 20 *supra* note 265 at 165: "[t]he rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual's free consent may be relevant to their application. In theses cases the particular rule of international law itself allows for the consent in question and deals with its effects. By contrast article 20 states a general principle so far as enjoyment of rights and performance of obligations of [s]tates are concerned." (citing Articles 7, 8(3), 14 (1)(g), 23(3) of the ICCPR at footnote 349) See further below.

[300] It could also be queried if state consent to set aside human rights protection is possible at all under the principle of giving effect to the purpose and objective of treaties. This issue is too complex to be analyzed in detail here. The question is if the consent given by the host state to set aside human rights protection for the duration of the legal relationship created by an IIA, constitutes a fundamental modification of its primary obligations under human rights instruments, incompatible with their purpose and objectives. This issue arguably resembles the question of incompatible reservations to human rights treaties that are considered void, which is outside the scope of state responsibility and therefore of this thesis. See R. Goodman, "Human Rights Treaties, Invalid Reservations, And State Consent" (2002) 96 AJIL 531. See also jurisprudence of the Inter-American Court cited *supra*. The *Draft Articles* note that when international obligations are owed to more than one state, consent to a breach between two states does not modify the obligations owed to the other parties. (Commentary under Article 20 at 165) Although it is not clear if the consent of the other parties would be necessary to preclude the wrongfulness of breaching primary obligations that are owed to the international community as a whole (which in the context of human rights would seem to be an absurdity), the *Draft Articles* recognize both that state obligations can be of *erga omnes* character and that all states have a legal interest in the compliance with such norms (Commentary at 244, distinguishing between *jus cogens* and *erga omnes* obligations). Primarily this means that states other than the injured state can also bring claims against the injuring state for an *erga omnes* breach, independent of the consensual relationship bilaterally with one state. (Article 48 and Commentary at 276-280) But it could also be interpreted that the "legal interest" in universal compliance with the obligations owed to the international community as a whole, signifies a legal interest in compliance consistent with the purpose and objectives of those obligations, in which case a consent to a bilateral arrangement defeating the purpose and objectives of human rights treaties would trigger responsibility toward the international community as a whole. (The Commentary specifically refers to human rights treaties at 277) Some confusion is apparent here in that the non-operability of bilateral consent, defeating the purpose of an *erga omnes* obligation (invocation of state responsibility), strongly resembles the non-derogability of *jus cogens* norms (restricting treaty-making power), to which the *Draft Articles* devote separate attention. As Tomuschat has observed, there should be no confusion between the law of treaties and the law of state responsibility when it comes to *erga omnes* obligations. The responsibility toward the international community of the states partaking in an internationally wrongful act remains unchanged with the fact that wrongfulness may be precluded bilaterally. See C. Tomuschat, "Reconceptualizing the Debate on *Jus Cogens* and Obligations *Erga Omnes*", in C. Tomuschat and J-M. Thouvenin, eds., *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden/Boston: Martinus Nijhoff, 2006), 425 at 429-430. See also M. Kamminga, *Inter-State Accountability for Violations of Human Rights* (Philadelphia: University of Pennsylvania Press, 1992), specifically at 163-7 discussing the legal standing of all states to bring claims against human rights violations by any state under the secondary rules of state responsibility, because of the

host state would be materially incomplete and in consequence partially invalid: that is to suffer from a mismatch between the investor protection obligations gauged by the host state government prior to signing, and the unforeseen impacts on human rights protection it could subsequently sustain by virtue of expansionary arbitral interpretation.[301] In other words, the host state may be consenting to more restrictions to its human rights protection than it would have knowingly accepted, in what the home state may have played a facilitating or indeed central role, thus assuming entirely or in part the responsibility of the consenting state.[302]

To recapitulate, the absence of investor regulation in the CCOFTA can trigger the responsibility of the home state under the rules of complicity and joint participation in an internationally wrongful act: a violation of the universal duty to respect and protect human rights in international cooperation. In this case, the consent of the host state to the omission to regulate would not affect the responsibility of both states involved vis-à-vis the individual

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erga omnes nature of human rights and the non-traditional treaty nature (i.e. non-reciprocity, non-material interests etc.) of human rights protection instruments. For a discussion that all states have a legal duty to ensure compliance by all other states of *erga omnes* obligations see G. Gaja, "Do States have a Duty to ensure Compliance with Obligations *Erga Omnes* by other States", in M. Ragazzi, ed., *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden/Boston: Martinus Nijhoff, 2005), 31-36.

[301] Section 1.1.2 presented an extensive overview of expansionary tendencies in investor-state arbitration that almost infallibly favour the private investor. This practice could be said to sometimes create obligations that states did not consent to or would not have consented to given the prior knowledge and opportunity of assessment and review. According to some scholars this greatly undermines the legitimacy of IIA treaty-making as to insist upon the formalistic criterion of government consent creates paradoxes that ultimately fall as a burden upon the individual citizen. See M. Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis" (2004) 15 EJIL 5, 907; S. Montt, *State liability in investment treaty arbitration: global constitutional and administrative law in the BIT generation* (Oxford: Hart, 2009) at 141-144. In terms of the law of state responsibility, the ILC framework is categorical in stressing that the validity of a state's consent is to be assessed under the primary obligations (Commentary *supra* note 265 at 188), thus arguably allowing for the perception that when it comes to the interference of IIAs with human rights protection in the host state, any 'umbrella' 'catch-all' consent of the host state given to a broad spectrum of investor rights could be seen as normatively, formally and materially inoperable.

[302] As IIAs are routinely based on models that exclude human rights obligations for investors, and signed and negotiated without public consultation, input or opportunity for review of their provisions (particularly important in developing states, where internal legitimation by the affected populations may be crucial for their human rights protection), it is possible to argue that the home state, having the power to determine the course of IIA negotiations, bears separate direct responsibility for causing the material default in the host state's consent, in the same way that home state failure to regulate investors can be seen to directly cause human rights violations. See below section 1.4.3.

right holders of the breached primary obligations, and vis-à-vis the international community that has a legal interest in the universal protection and respect of human rights.

1.4.2 Independent home state responsibility for the absence of treaty-based regulation

Under the *Draft Articles* "the only conduct that is attributed to the State at the international level, is that of its organs of government, or of those who have acted under the direction, instigation or control of those organs, i.e. as agents of the State"[303]. Thus state responsibility arises when the conduct, consisting of both actions and omissions, is attributable to the state via one of its organs or agents and is in breach of an international obligation of that state.[304] It was already discussed that MNCs are not as a general rule considered either organs or agents of the state without a specific authorization to that effect by home state internal law, or direct control over the private entity and its operations. Scholars recognizing this difficulty have therefore focused on the separate obligation of due diligence on the part of home state organs to prevent human rights or environmental harm in the host state.[305] On this view, the home state would not be directly responsible for the harm perpetrated by its MNCs or the host state, but for its separate wrongful conduct in failing to prevent such harm. This has come to be known as the non-attribution, or separate delict theory in relation to home state

[303] Commentary under Part 1 Chapter 2, "Attribution of Conduct to a State" *supra* note 265at 91, footnote omitted.
[304] As per Article 2 of the *Draft Articles*, *ibid* at 61.
[305] Seck, *Home State Duty supra* note 139 at 42; Seck, *Home State Responsibility* 203; McCorquodale and Simons *supra* note 138 at 617-623; Tzevelekos *supra* note 188 at 170-175, all discussing that in the context of FDI, and IIAs in general, home state responsibility for due diligence is a much more promising approach than to focus on the control or agency ties with the MNC or its wrongful conduct. On the role and content of the due diligence obligation see section 1.3.2.

responsibility for private conduct.[306] The focus of the separate delict theory is the independent breach of a state's international obligations by its organs of government, which is pertinent in the context of MNC extraterritorial human rights or environmental harm because it dispenses with the agency test and provides a strong source of legal control over the actions of the home state.

Under the *Draft Articles* there is no distinction between direct and separate delict responsibility, presumably because of the consideration noted above that ultimately the responsibility of states reverts to some default in the decisions of government officials or its agents.[307] Rather, the *Draft Articles* take the position that the state "is held [directly] responsible for all the consequences, not being too remote, of its wrongful conduct"[308]. The operational provision for the purposes of attribution of wrongful conduct to the home state

[306] See Seck, *Home State Duty ibid*, explaining the difference in terminology between indirect state responsibility, or responsibility by condonation or complicity, and separate delictual responsibility for the failure to regulate. This differentiation was proposed by Tal Becker in Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford: Hart Publishing, 2006), who examined the evolution of the doctrine of state responsibility in relation to acts of private entities. Becker's discussion in the context of transnational terrorist acts and responsibility of home states (states harbouring terrorist bases of operation) was adapted by Seck for the purposes of home state responsibility in the context of MNCs and FDI. Although Seck's work focuses mainly on the duty of the home state to regulate MNCs unilaterally, she acknowledges that her analysis is pertinent for the duty to regulate through IIAs or FTAs in general. See *Home State Duty* at 44. According to Becker, there have been three historical categories of state responsibility for private conduct: direct responsibility (the private conduct is subsumed by the collective idea of the state); indirect responsibility (the private conduct is attributable in cases when the state fails to prosecute and punish, and thus becomes an accomplice or associate to it; otherwise known as condonation theory and separate delict theory for the duty to exercise due diligence to prevent and punish the harmful conduct of the private entity. Becker at 24. Although the condonation theory was widely used until the early 20th century (and still appealing to some scholars, see Sornarajah *supra* note 1), Becker provides an extensive survey of jurisprudential sources (including human rights and environmental cases, at 43-66) confirming that it fell into disuse after the *Janes* case *(United States v. Mexico)* [1925] RIAA 82 where the responsibility of the state for the private crime itself was distinguished from the responsibility to provide reparations and remedies (punish). Becker at 17-9. Becker states that "the prevailing perception" is "that the State is directly responsible only for the acts of those persons with whom it is in a relationship of agency. [What Becker calls the "agency paradigm"] For this reason, the State will be responsible for the conduct of its own organs or officials, but not for the conduct of non-State actors that is wholly private in nature. The State can, however, be held responsible for its own violations of a separate duty to regulate the private conduct". At 66. See also Hessbruegge *supra* note 259 for a similar discussion.

[307] See quotation from Brownlie *supra* note 266.

[308] ILC, *Draft Articles,* Commentary under Article 31 *supra* note 265 at 204-6, in the context of reparations owed by a state after a proximate cause can be established between the wrongful act and injuries or damages suffered. The Commentary acknowledges that this assessment varies between different international obligations and different rules of proximity, causality, foreseeability etc. may be applicable depending on the context. See further below on human rights damages.

under the separate delict theory is Article 4 of the *Draft Articles* which states "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".[309] 'Conduct' is specifically designated as either acts or omissions by the state organs and it is further irrelevant if the conduct was of commercial nature.[310] This is generally consistent with the objective nature of the ILC framework that does not require any specific intention, material damage or injury for an internationally wrongful act of a state to arise.[311] Thus once the negotiation of an IIA is conceptualized as an internal act of the various organs of the home state, the question becomes in what way can the ultimate absence of investor regulation in the IIA trigger the international responsibility at every level of regulatory control by the home state and what would be the exculpating circumstances?[312]

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[309] Article 4 and Commentary *ibid* at 94-99. According to the ILC Article 4 is the point of departure for attribution of conduct to the state.

[310] *Ibid* at 95: "[t]he principle of unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility". And at 96: "[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as "*acta iure gestionis*"". In addition, the federal sub-division of the governmental apparatus is also irrelevant for the purposes of complying with international law obligations. *Ibid* at 97. Thus in Canada, provincial incorporation of MNCs would necessarily trigger the obligation of provincial governments, legislatures and courts, in addition to all other governmental agencies, to fulfill their due diligence obligation to prevent MNCs from engaging in harmful conduct overseas.

[311] See Crawford Introduction to ILC Draft Articles *ibid* at 13, discussing the "neutral" position of the ILC framework with respect to any fault, intent or subjective element on the part of the state, as well as with respect to the irrelevance of any damage or injury; and Commentary under Article 2 at 84, specifically relegating to the primary obligations to determine the requirement of damage in order for international responsibility to arise. For example a mere existence or absence of legislation/regulation not in conformity with that state's international obligations may trigger state responsibility regardless of any harm done to a third state or invocation by a third state of the responsibility for the wrongful conduct. See also Brownlie, *supra* note 265 at 40-7, discussing the objective nature of the secondary rules of state responsibility that do not generally require any intent, fault, motive or damage.

[312] Again, it is critical to understand that the wrongful conduct by these organs would be the failure to preclude human rights or environmental harm by MNCs in the host state when the home state is clearly in a position to do so. Moreover, this duty could be extended to the obligation to preclude the wrongful conduct of the host state itself—the impossibility to comply with its own human rights obligations in terms of protecting individuals and local communities affected by deleterious MNC activity—which the home state was also in a

The obvious point of departure for the analysis under the separate delict theory, would be the executive branch of the home state, which negotiates and signs investment treaties with the host state and would be under an obligation to ensure the IIA provisions do not facilitate human rights or environmental harm in the host state. In addition, the executive would be under an obligation to insist on the inclusion of binding obligations for investors to respect human rights and the environment in the host state, possibly even to desist from signing an IIA without such clauses, especially with host states experiencing internal conflict such as Colombia.[313] It is possible at this stage to ask if the inclusion of non-binding 'encouragement' provisions for investors to voluntarily abide by corporate social responsibility standards is a sufficient discharge of the home state duty of due diligence.[314]

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position to prevent by insisting on the inclusion of human rights obligations for investors and mechanisms for remedies in the IIA. Although the legal basis for attributing home state responsibility is the same for both instances (Article 4), the nature of the primary obligation varies, as in the first case the home state is exercising its due diligence to prevent private harm, whereas in the latter it is exercising its due diligence to prevent harm that may have originated or ultimately be caused by another state (c.f. *Corfu Channel* case). It is difficult to argue that developing host states bear the equivalent burden of insisting on the insertion of such clauses as the resistance for this comes from the developed home state. Furthermore, any justifications as to the unlawful exercise of extraterritorial jurisdiction by the home state based on the non-intervention doctrine would be mooted by international (joint, bilateral) investor control mechanisms in the IIA and dispute settlement mechanisms akin to the well-established investor-state arbitration system. See chapter 2. However, it is also important to emphasize that the duty to prevent on the part of the home state does not extend to preventing any wrongful private conduct within the host state, but simply to prevent a violation of international law by the host state and private harm by the investor it could reasonably have foreseen and was in a position to influence. See ILC, *Draft Articles*, Commentary under Article 31 at 204. See further below on the causal relationship between home state conduct and private harm/host state omission.

[313] These considerations correspond verbatim to the recommendations issued by the Standing Committee on International Trade with respect to the actions of the Canadian government in negotiating the CCOFTA. See SCIT Report *supra* note 37. It is further possible to argue that the executive would be under an obligation to make the government/negotiating team of the host state aware of all the possible implications for human rights and environmental protection resulting from the investment protection provisions, as well as insist on the insertion of mechanisms mitigating any such risks regardless of host state capacity or incapacity to prevent/remedy them on its own. For this argument see McCorquodale and Simons *supra* note 138 at 623-5.

[314] See Article 816 of the CCOFTA, entitled "Corporate Social Responsibility: 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." It is difficult to ascertain what exactly constitute "internationally recognized standards of corporate social responsibility". The SRSG has recently elaborated on the link between corporate social responsibility (CSR) and the state duty to protect human rights in his report *supra* note 38. According to the SRSG, little consensus

The same question may be asked about the environmental and labour protection side-agreements and the subsequently negotiated human rights impact assessment agreement.[315]

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exists in doctrine and in state practice as to what constitute universally acceptable CSR practices. What is further notable is the absence of explicit incorporation of universally recognized human rights obligations in CSR regulation of companies, with most states encouraging companies to abide by principles or guidelines, and not legal rules drawn from international human rights law. *Ibid* at para 33-5. Nowhere in his reports does the SRSG address the issue of CSR provisions in IIAs and their impact on human rights protection, instead focusing on the due diligence of corporations themselves to respect universally recognized human rights (the SRSG mentions a starting point for the list of rights to be considered to be the UDHR, the OECD Guidelines, the Global Compact and the ILO Conventions- with additional consideration due to humanitarian law in conflict affected zones, at paras 57-61). The fact that the reports of the SRSG enlist CSR regulation and corporate reporting as part of the state duty to protect human rights might be a useful step in the right direction, but it has been criticized by scholars for not offering a sound legal basis for states to make corporate compliance with human rights both intra and extraterritorially mandatory. See R. Grabosch, *SRSG John Ruggie's Draft Guiding Principles for the implementation of the United Nation's 'protect, respect, and remedy framework'*, Position Paper, European Center for Constitutional and Human Rights, 27 January 2011, discussing that CSR and voluntary initiative are not to be confused with or a surrogate for legal protection of human rights by the state, including the duty to prevent corporate violations extraterritorially; and R. McCorquodale, "Corporate Social Responsibility and International Human Rights Law" (2009) 87 J of Buss Eth 385, specifically criticizing the confusion on the level of state legal duties vs. corporate social expectations that the terminology employed by the SRSG might create when discussing CSR, due diligence obligations for states and companies, and the duty to provide remedies. It can therefore be concluded that voluntary encouragement provisions in IIAs do not represent 'regulation' of MNCs, in the sense of precluding violations and providing remedies. For a discussion on the shortcomings of CSR, or corporate responsibility (or accountability- a more lax, social and non-legal form of normative framework) and state duty to respect human rights (as used by the SRSG), as opposed to a legal duty on both actors to respect human rights, see S. Deva, "'Protect, Respect and Remedy': A Critique of the SRSG's Framework for Business and Human Rights", in K. Buhmann, L. Roseberry and M. Morsing, eds., *Corporate Social and Human Rights Responsibilities Global Legal and Management Perspectives* (New York: Palgrave Macmillan, 2011).

[315] See *Canada-Colombia Agreement on Labour Cooperation*, signed November 21, 2008 (available at http://www.hrsdc.gc.ca/eng/labour/labour_agreements/ccalc/index.shtml, last accessed June 26, 2011) ; *Agreement on the Environment between Canada and The Republic of Colombia*, signed November 21, 2008 (available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/EN%20Colombia%20Environment%20Agreement%20_formatted_.pdf, last accessed June 26, 2011); *Agreement Concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia*, signed on 27 May 2010, entry into force 15 August 2011, available at http://www.treaty-accord.gc.ca/details.aspx?id=105278, accessed August 21, 2013. It must be noted that neither of these international instruments provide direct obligations for investors to respect labour, environmental or human rights. What the first two side-agreements generally do is provide obligations for both parties to observe standards of labour and environmental protection and enforce these through internal domestic regulation. They are not subject to the dispute resolution procedures of the CCOFTA itself, but provide their own dispute resolution mechanisms that allow private communications to be 'espoused' by the government of the national at whose discretion they may subsequently be pursued to a review panel. However, the communications can only relate to a failure of one of the states to comply with its obligations under the side-agreements, that is enforce its domestic standards of labour and environmental protection (see Article 13 of the LSA and Articles 4 and 12 of the ECA). As commentators have observed, while there may be opportunities for submitting communications against Colombia failing to enforce its labour or environmental regulation on Canadian based MNCs, there is no direct recourse before an international review panel for individuals or communities potentially affected by MNC harm, neither is there an obligation for the state parties to pursue such communications to a resolution that would give primacy to human rights protection. The pursuit of claims before a joint review panel is purely discretionary for the governments. In fact, section 6 of Article 12 of the ECA specifically prohibits state parties to provide in their domestic law with rights of action against the other state for a failure to observe its

The answer to this may depend on what definition is assigned to the term 'regulate', against what backdrop the home state compliance with its due diligence obligation must be assessed.[316] If regulation is to be understood as conduct on the part of the home state, as provided by the *Draft Articles*[317], and the due diligence obligation of prevention as a "best efforts obligation, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur"[318], then the issue becomes if non-binding measures undertaken by the home state unilaterally[319], or through the IIA, qualify at all as preventive regulation.

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commitments under the side-agreement. In short, these instruments do not regulate investors any more than the host state would be expected to do so in their absence. For a discussion on how the LSA and ECA may actually preclude human rights protection by providing a disincentive for Colombia to regulate MNCs, see *Making A Bad Situation Worse supra* note 50. On the opportunities for using the subsequently added human rights impact assessment reporting mechanism as a tool for protecting the interests of affected local communities see chapter 2 of this thesis.

[316] See V. Lowe, "Jurisdiction" in M. Evans, ed., *International Law* 2d ed. (Oxford: Oxford University Press, 2006), 335 at 335-6: "[s]tates regulate conduct... in various ways, which may involve any of the branches of government. Thus the Legislature may lay down rules by statute, or the Executive may do so by order. ... States may also regulate conduct by means of decisions of their courts, which may order litigating parties to do or to abstain from doing certain things... So too may the State's administrative bodies, which may apply rules concerning the issuance of licences to export goods, etc. ...". Cited in Seck, *Home State Duty supra* note 139 at 44. Seck further observes that this definition of regulation, embracing all branches of the home state's government, must comply with the due diligence obligation in the sense of protecting human rights to the extent of its power. It does not suffice for regulation to be merely hortatory, but also needs to be enforceable and, to the extent the due diligence obligation encompasses the duty to provide remedies, enable enforceable sanctions against investors that fail to respect human rights. Likewise, as this obligation extends to the legislature as well as the executive, non-binding CSR or impact assessment policies implemented by the executive will not suffice to fully comply with the state duty to protect (at 44-5).

[317] See ILC, *Draft Articles,* Article 12 and Commentary *supra* note 265 at 125-130. The *Draft Articles* emphasize on the "conformity" of state actions with its international obligations, which can only be ascertained with reference to the primary obligation. However, the Commentary states that a breach can exist if the conduct of a state is only partly contrary to an international obligation, and that in some cases the primary obligation may precisely define what conduct is expected on the part of the state, whereas in other cases it may only set the minimum standard of conduct above which the state has discretion to act. *Ibid* at 125. Admittedly, while considerable amount of confusion as to what exact conduct is required comes from the overly general expectations imposed upon states by international human rights law, the specification of a "minimum threshold" should not create insurmountable practical obstacles to maintain that home states are required to ensure their actions do not violate their own, or the international human rights obligations of host states.

[318] Commentary under Article 14 *ibid* at 140.

[319] The Canadian government emphasized on its role in promoting CSR initiatives for Canadian based corporations operating abroad in its response to the recommendations issued by the Standing Committee on Foreign Affairs and International Trade, *Mining in Developing Countries and Corporate Social Responsibility* (Ottawa: SCFAIT, 2005). In fact, the government relied extensively on domestic CSR encouragement measures, marginalizing the recommendations to condition its support for FDI with compliance by MNCs with international CSR standards and human rights protection and adopting legislation to such effect. See Canada,

To the extent the investment provisions in the CCOFTA do not specifically address investor human rights obligations, and continue to interfere with the capacity of Colombia to protect human rights, it cannot be maintained that Canada has complied with its due diligence obligation to prevent human rights or environmental harm.[320] Beyond controlling the respect of its investors of human rights in Colombia, diligent conduct expected from the Canadian government can also be understood to entail preventing Colombia from violating its own international obligation to protect human rights from Canadian based MNCs, by insisting on the insertion of an individual complaints mechanism, independent from state supervision to espouse such claims, for human rights or environmental harm perpetrated by Canadian investors. In view of the serious ongoing internal conflict in Colombia, this kind of regulation would seem of primary if not central importance.

The conduct of the Canadian executive is not the only element that could give rise to state responsibility for the failure to prevent. As the obligation to exercise due diligence would also attach to the legislature, an issue becomes the failure of the Canadian parliament to legislate to an effect that IIAs signed by the Canadian government comply with Canada's obligations of due diligence under international human rights law. In essence, all actions or omissions of the government and other executive agencies, could be seen as an omission on the part of the legislature to structure the domestic laws so that all other bodies comply with

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Department Of Foreign Affairs and International Trade, *Mining In Developing Countries - Corporate Social Responsibility: The Governments Response To The Report Of The Standing Committee On Foreign Affairs And International Trade* (Ottawa: DFAIT, 2005). This was implicitly criticized as insufficient in the 2008 SCIT Report issued with recommendations for binding provisions in the CCOFTA and the side-agreements to hold investors accountable for human rights violations and allow for victims complaints mechanisms. See SCIT Report *supra* note 37 at 43-4.

[320] As per the ILC framework this breach is of an ongoing character and continues to apply as long as the circumstances of Canada's actions are not in conformity with its international obligations. See ILC, *Draft Articles* Article 14 and Commentary *supra* note 265 at 135-140. To rectify this Canada should either adopt unilateral legislation to control the respect of human rights by its investors, or amend the CCOFTA with such provisions, both of which have thus far been resisted by the government.

the due diligence obligation.[321] It is therefore possible to hold that the non-binding recommendations issued by the Standing Committee on International Trade requiring the executive to negotiate human rights obligations for investors in the CCOFTA, did not suffice for Canada to comply with its due diligence obligation—what was needed was legislation mandating such conduct by the executive.[322] However, the Canadian parliament may yet have a significant role to play in rectifying this omission through its review of the annual human rights impact assessment of the CCOFTA.[323] More broadly, if Canada's wrongful omission results in violations of human rights by Canadian based MNCs in Colombia, then both the Canadian legislature and courts could be under an obligation to provide remedies for such victims.[324] One way of complying with this obligation could arguably have been the constitution of an individual complaints mechanism against Canadian based investors causing human rights or environmental damage in Colombia.[325] Therefore, in the absence of

[321] Seck has discussed this from the point of view of the obligation for Canada as a home state to regulate unilaterally and thus mandate the executive and all other public or quasi-public agencies such as the EDC and CIDA, as points of regulatory control over the extraterritorial actions of Canadian based investors, to prevent these from committing abuses. Seck, *Home State Duty supra* note 139 at 44-5. On this view, even domestic statutes granting corporations personality (i.e. corporate laws), export and trade laws, as well as all other elements that provide key assistance for FDI (such as stock exchanges, banks and other private insurance institutions) would also fall under the duty of due diligence of the legislature. *Ibid* at 45. However, the interest here is limited to the obligation to regulate through the provisions of IIAs.

[322] See *supra* note 133 on the recent defeat in the House of Commons of a bill adopting unilateral regulation of extraterritorial conduct of Canadian based MNCs. It is possible to see this attempt to pass the legislation as an implicit recognition of the situation of non-conformity of Canada's conclusion of the CCOFTA with its international obligations.

[323] See Agreement on annual reports *supra* note 315. See further chapter 2.

[324] If the actions or inactions of a state result in a human rights harm, the state brings those individuals 'into' its protective jurisdiction and a separate legal relationship is created requiring it to provide remedies. This is not to be confused with the obligation to provide reparations to the host state, which would only be injured if its own rights were violated, which is not the case with human rights harm enabled or facilitated by the actions or omissions of the home state. See Shelton *supra* note 298; ILC, *Draft Articles*, Commentary under Article 28 *supra* note 265 at 193 specifically excludes the subject of reparations, which are owed exclusively by states to other states, from state responsibility in the human rights field.

[325] It is also possible to argue that a denial of standing by the Canadian courts, based on previous experience where the doctrine of *forum non conveniens* was used to dismiss claims in Canada brought against Canadian based MNCs by foreign plaintiffs that had suffered an injury abroad, would constitute an additional wrongful conduct on the part of Canada, triggered again by its courts or its legislature. See Seck, *Home State Duty supra* note 139 at 45-6. In the context of the obligation to regulate unilaterally, including the obligation to allow claims in Canadian laws see S. L. Seck, "Environmental Harm in Developing Countries Caused by Subsidiaries

tangible obligations for investors to respect human rights in the host state, including mechanisms for sanctions for their failure to do so, and remedies for the victims of the host state's inability or unwillingness to protect, it can be concluded that Canada has breached its obligation of due diligence with respect to its conduct in negotiating the CCOFTA.

Although this way of establishing Canada's international responsibility appears straightforward, a potential difficulty arises if one were to consider the negligence, or omission, of Colombia as the host state to protect human rights potentially affected by Canadian based MNCs and provide remedies for such victims within or outside the CCOFTA.[326] The question is if Canada's responsibility can be in some way attenuated or altogether erased in the face of the responsibility to protect that attaches primarily to Colombia as the territorial host state. As explained above, the Draft Articles provide that

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of Canadian Mining Corporations: The Interface of Public and Private International Law" (1999) 37 Can YB Int'l L 139.

[326] The ILC *Draft Articles* recognize in several places that when an internationally wrongful act is the result of the actions or omissions of two or more states, the contributory negligence of the injured state has to be taken into account when determining reparations. See Article 39 "*Contribution to the injury*: In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured state or any person or entity in relation to whom reparation is sought." And Commentary *supra* note 265 at 240-1. The negligent omission can consist of a manifest lack of due care by the victim (which may be a state or a non-state entity) that has contributed to the damage caused by the internationally wrongful act of another state, and in some cases the injury in question can be entirely attributable to the conduct of the victim and not at all to that of the responsible state. Commentary under Article 39 *ibid* at 141 and footnote 660. However, under the ILC framework, the contributory negligence of the victim state plays a role for the assessment of damages, i.e. reparations owed to the injured state, but not necessarily for ascertaining the existence of a breach of an international obligation by the wrongdoing state. This is to say that when a state breaches its international obligations towards another state the contributory action or omission of the injured state may absolve the injuring state from paying compensation or making reparations to the victim state. See references to "material damage" and "material contribution to damage" in Commentary under Article 39. It is questionable if this approach can be applied to state responsibility for human rights protection, as the injury and subsequently the right to a remedy would belong to the affected individuals and not their state. It could therefore be argued that in the default of protection by the host state, any act or omission of the home state negatively affecting human rights of individuals in the host state can give rise to claims by the affected individuals against the home state independently from any claims for protection from the host state. This can be inferred from the Commentary under Article 28 ("*Legal consequences of an internationally wrongful act*") stating that Part II of the ILC Draft Articles ("Content of the International Responsibility of a State"), which deals with the consequences of an internationally wrongful act of a state in terms of reparations, "does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than the state". *Ibid* At 193, using the example of individuals as human rights beneficiaries. Thus a state's breach of the obligation to protect or prevent human rights violations is unaffected by the fact that another state has the same obligation, but the latter's contribution to the injury may determine the scope of reparations/remedies owed by the former. See also Commentary under Article 31 "*Reparation*" at 205-6.

when an internationally wrongful act occurs as a result of the conduct of two or more states, for example in cases of aiding and assisting or joint collaboration, the responsibility of the participating states is differentiated to recognize that participating states are held responsible only for the extent of their contributory share in the execution of the wrongful act.[327] This can be further problematized by the fact that the host state may be under a duty to mitigate the negative consequences resulting from the joint or individual home state conduct.[328] However, the ILC emphasizes that where the injury in question can be a result of the conduct of more than one state, the contributory negligence (or fault) of one state does not justify the wrongful conduct of the other state (although it might be relevant for the assessment of damages owed), which is "held responsible for all the consequences, not being too remote, of its wrongful conduct".[329] Thus MNC regulation to prevent human rights abuses remains an

[327] ILC, *Draft Articles,* Commentary under Article 16 *ibid* at 151. As discussed above, this type of assessment involves a qualification of the given aid or assistance as 'necessary' or merely as 'contributory', depending on what the degree of responsibility of each of the states involved can be established. If the provisions in the IIA can be taken as a collaborative undertaking of the home and host states, both having a primary duty to prevent human rights violations resulting from this activity, then the responsibility of the home state for a failure to do so might be seen as only auxiliary, the essential element being the absence of human rights protection in the host state. It is submitted here that this gradation of state responsibility inevitably involves an inquiry into what acts or omissions by both states were a proximate cause, and which were merely conditions enabling the occurrence of the internationally wrongful act. See further below 1.4.3.

[328] See Commentary under Article 31 *ibid* at 205, citing *Gabcikovo-Nagymaros (Hungary v Slovakia)*, Judgment [1997] ICJ Rep, p. 7. It is interesting, if one were to pursue this line of thought, if precedence should be given to the home state duty or the host state duty to protect against investors abuses in the context of IIA treaty-making. See below.

[329] *Ibid* at 206. Furthermore, as per the *Zafiro* (1925) RIAA, vol. VI, p. 160 case the onus is on the responsible state to show that the proportion of the damage was not attributable to its conduct. The Commentary explains that where two or more concurrently operating causes can contribute to the realization of wrongful act, all actors are held equally responsible, but damages may vary according to their actual degree of involvement. This is consistent with the Commentary under Article 16 where the aiding or assisting state may only need to indemnify the victim for the extent of its contribution to the injury, and especially applicable in cases where one of the concurrent causes can be traced to private entities and not state agents, that the state is under a duty to control. See *Diplomatic and Consular Staff (United States v. Islamic Republic of Iran)* [1980] ICJ Rep 3. Thus, depending on how the primary obligation is constructed, the home state may be under a general active obligation to control the activity of its MNCs, in what case the absence of protection, or negligence, in the host state would be irrelevant. Furthermore any reparations for injuries to affected individuals would be directly owed to them and to the host state and the fact that remedies under international human rights instruments disallow claims brought against states by non-residents should not affect, in theoretical terms, the link between the home state omission to regulate and the injury suffered as a result. The Draft Articles however do not deal with individual claims against other states to which the victim has no nationality links, leaving this issue to the

active obligation for the home state, unaffected by the lack of protection in the host state, and possibly amplified in the case of ongoing conflict in Colombia. Yet in the present context, where no specific injury or damage are necessary to establish the existence of an internationally wrongful conduct, that is the interference with human rights protection through the IIA, the separate delict theory allows the home state to be held responsible for its conduct, but inevitably leads to conclude that the host state should also bear an equivalent or even greater share of responsibility for its own conduct.[330] While the principle of sovereign equality of states seems to support such an approach to state responsibility for the human rights effects of IIAs, it is submitted here that this ignores the power relationships between the MNC, the host and the home states that lie at the heart of the problem—the absence of investor regulation through IIAs. While scholars, especially those subscribing to TWAIL, have persuasively argued that developed home states should bear a greater degree of responsibility for their reluctance to regulate their own corporations in the first place[331], the question is if the present rules of state responsibility can be interpreted in such a way so as to allow for a differential, stricter, degree of responsibility for developed home states when their IIAs with developing states result in private investor harm. Some scholars have recently

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primary rules (Commentary at 210), what has been criticized. See E. Brown-Weiss, "Invoking State Responsibility in the Twenty-First Century" (2002) 96 AJIL 798.

[330] It may be trite to say that the ILC framework operates under the principle of sovereign equality of states, which although justifiable on its face, falls short of accounting for the power imbalances in inter-state relations such as IIA negotiations. If the scenario would present itself as human rights or environmental damage caused by Canadian based MNCs operating in the absence of an IIA between Canada and Colombia, then the attribution of a differential degree of responsibility might be more straightforward. However the presumed sovereign equality of the IIA negotiating partners complicates the analysis somewhat, as both states could have an obligation of prevention.

[331] See generally B. S. Chimni, "An Outline of a Marxist Course on Public International Law" (2004) 17 Leiden JIL 1; B. S. Chimni, 'Third World Approaches to International Law: A Manifesto" (2006) 8 Int Comm L Rev 3; T. Pogge, "Severe Poverty as a Human Rights Violation" in T. Pogge, ed., *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford: Oxford University Press, 2007) Skogly and Gibney *supra* note 142; Salomon *supra* note 151; Seck, Home State Duty *supra* note 139; Sornarajah *supra* note 1. See further below section 1.4.4 for a TWAIL perspective on state responsibility.

proposed that a causation-based reading of the rules of state responsibility captures more adequately this power imbalance, to which the following subsection turns.

1.4.3 MNCs as *de facto* agents: the particular relevance of the rules of attribution and complicity for the case of conflict in Colombia

Another option for attributing responsibility to the home state is when human rights violations are perpetrated by private corporations "exercising elements of governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority"[332](Article 9). The Commentary explains that private conduct substituting for governmental functions (e.g. public services) in the default of state authority is attributed to the state.[333] In technical terms, the private entity does not become a general *de facto* government, but performs governmental functions while a central government is in existence but is in the given circumstances displaced or, for example, "out of control over part of the territory of a State"[334]. As discussed in the previous chapter, factual evidence exists of Canadian based MNCs, especially those from the extractive industry sector, operating in areas of severe paramilitary conflict in Colombia, that may exercise governmental functions such as police powers (to protect investment projects), public services (schools, sanitation systems etc.) or substitute for the central government to undertake environmental impact assessments and consultations with local communities for their projects.[335] If human rights violations occur in the course of such activities, the conduct of the MNC would primarily be attributable to the host state under Article 9. However, if the

[332] ILC, *Draft Articles*, Article 9 *supra* note 265 at 114.
[333] *Ibid*.
[334] Commentary under Article 9 *ibid* at 115. The Commentary further specifies that the phrase "in the absence or default of" covers situations both where the state apparatus has totally collapsed and where the official authorities are not exercising control over a certain locality.
[335] See in particular Inter Pares study *supra* note 94.

host state fails to provide remedies to the affected individuals because of the impossibility to regulate private companies imposed upon it by the IIA, both the home and the host state could be found responsible for aiding and assisting an internationally wrongful act.[336] Alternatively, direct home state support, such as investment risk insurance, technical expertise or other key support for the project in question, could also qualify as aid or assistance to the wrongful act of the MNC as a *de facto* agent for the host state.[337] Since the conduct of Canadian public agencies, such as the EDC, would be attributable to Canada under Article 5[338] to the extent they engage in an exercise of governmental authority when

[336] As per ILC, Draft Article 16 discussed above, the absence of regulation in the IIA itself would amount to an aid or assistance for committing the internationally wrongful act for which direct responsibility is attributed. In this scenario it would not seem difficult to see the IIA, an instrument principally destined to give private investors more rights, as an act "contributing significantly" for the committal of the human rights violation. Commentary *supra* note 265 at 149. One may envisage a likely scenario of this kind occurring under Article 816 of the proposed CCOFTA, which deals with non-discriminatory treatment accorded to investors recovering losses from host state regulation related to conflict or civil strife: a successful MNC investor-state arbitration claim may prevent or require the revoking of host state regulation meant to remedy or provide reparations for victims of human rights harm sustained in a conflict zone in Colombia.

[337] For an analysis of the implications for state responsibility for the support of FDI given by the various public and public-private or quasi-public export credit agencies, such as Export Development Canada (EDC), see Ö. Can and S. L. Seck, *The Legal Obligations with Respect to Human Rights and Export Credit Agencies,* (ECAWatch, Halifax-Initiative Coalition & ESCR-Net, June 2006). See also McCorquodale and Simons *supra* note 138 at 607-608, 612-613; and S. Narula, "The Right to Food: Holding Global Actors Accountable Under International Law" (2006) 44 Colomb J Transnat'l L 691, at 764: "[h]ome states can play a considerable role in financing and fashioning an advantageous and deregulated framework for [M]NCs' operations abroad. Without insurance, their risks may not be covered; without capital, they may not be able to finance their ventures abroad; without trade agreements, they may not be able to do business abroad; and without the home states' political muscle, they may not enjoy such a high degree of deregulation or profit from contracts that are highly tilted in their favour. It is therefore not unreasonable to conclude that in many cases (though not all) home state support is vital to TNCs' survival in host states. If so, then home states must exercise due diligence in regulating the activities of [M]NCs abroad."

[338] See ILC Draft Article 5 entitled "*Conduct of persons or entities exercising elements of governmental authority*: The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance." ILC Draft Articles *supra* note 265 at 100. The EDC is created by Canadian federal statute, with the purpose of promoting Canadian investment internationally. See *Export Development Act* (R.S.C., 1985, c. E-20). Beyond financial support, the EDC and other governmental agencies (such as the CIDA) and Canadian embassies and diplomatic staff also work in providing Canadian based investors with various forms of aid or assistance that may be a significant component of the investment project. See Advisory Group Report, *National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries,* Ottawa, March 29, 2007 (available at http://www.mining.ca/www/media_lib/MAC_Documents/Publications/CSRENG.pdf accessed August 23, 2013), discussing the various ways in which home state aid for FDI materializes and recommending that all

financing or providing key support for investment project of Canadian based MNCs[339], this activity can trigger direct home state responsibility for aiding and assisting an internationally wrongful act of the host state or its *de facto* agent (i.e. Canadian based MNC). In these cases knowledge on the part of the home state of the existing or potential involvement of one of its MNCs as a *de facto* agent for the host state becomes critical as "[t]he more that the home State is aware that the host State is unable to exercise its regulatory powers, the more onerous the responsibility might be for the home State"[340]. From this it can be inferred that when the home state has constructive knowledge of its corporate nationals investing in conflict zones, and they receive support either directly from the home state, or in the form of an IIA, the home state could be found to be complicit in or jointly responsible when the host state allows for human rights violations by MNCs to go unpunished, or when these operate

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forms of government or public agency support for Canadian investors' projects be conditioned upon their compliance with corporate social responsibility standards.

[339] See Commentary under Article 5 *ibid* at 100-102. The key link to attributing the conduct of such public agencies to the state is the legislation that empowers them to exercise governmental authority for that state, and not the actual control of the executive or legislature over their conduct. However, the conduct in question (which would give rise to state responsibility) must be one of governmental and not of private nature (the Commentary gives the example of a railway company exercising police powers as opposed to making commercial purchases, at 101). The fact that the conduct may have been in excess of the empowerment granted by internal state legislation is irrelevant, as per Article 7, for the purposes of attribution. It is however important that the activity of the public, or quasi-public entity (such as the EDC and CIDA) be specifically conferred governmental or public powers for the purposes in question. Commentary *ibid*. In the case of FDI, financing and support provided by such entities is given under state regulation "in accordance with a mandate to provide export and investment support which furthers the trade and investment interests of the home state". Can and Seck *supra* note 337 at 5. According to Can and Seck, there is implicit acknowledgment of the obligation of due diligence on the part of export credit agencies (in this case the EDC) as they routinely condition their loans on environmental and social impact assessments of proposed FDI projects. At 9. See also Responsibility Beyond Borders at 615. A related issue is the financing of the 2001 Colombian mining code by the CIDA with the effect of reducing or eliminating certain regulatory controls over investors (such as the environmental impact assessments and consultation with the local communities), and could trigger Canada's international responsibility for complicity in an internationally wrongful act by the host state, or its de facto agents. On the alleged financing of the mining legislation by the CIDA see Inter Pares study *supra* note 94; F. Ramirez-Cuellar, The Profits of Extermination: How U.S. Corporate Power is Destroying Colombia (Monroe, Maine: Common Courage Press, 2005); and L. North; T. Clark & V. Patroni, eds, *Community rights and corporate responsibility: Canadian mining and oil companies in Latin America* (Toronto: Between the Lines, 2006).

[340] Seck, Home State Duty *supra* note 139 at 41.

as *de facto* agents in areas where the host state government is absent.[341] For that reason, the duty to control through the IIA becomes an even greater obligation for the home state, for which it bears separate responsibility under the due diligence rule.

1.4.4 Causation-based theory of home state responsibility: accounting for the power imbalance in IIA treaty making and interference with human rights protection in the host state

As discussed, the law of state responsibility can be most promisingly used to establish the responsibility of the home state for creating a permissible environment for MNC violations of human rights and environmental harm in the host state by focusing on its omission or failure to regulate in fulfillment of its positive obligation to protect human rights. This omission is most evident in the making of IIAs that contribute, if not create on their own, an environment of MNC impunity. Therefore this subsection seeks to advance the idea that the wrongful omission of the home state in failing to regulate MNCs through IIAs may in fact absorb, or cause, the failure of the host state to protect, and thus attribute greater responsibility to it than to the host state for its own failure to protect. Such a conclusion is only attainable if the proper role of all actors—especially MNCs and their influence of

[341] McCorquodale and Simons also note that the home state can be directly responsible for providing political risk insurance or other form of assistance to corporations that engage in violations of human rights that are considered international crimes. Even in cases where the corporation would be complicit (for instance involved in planning or supporting) and not the direct perpetrator of egregious human rights violations (torture, extrajudicial killings, genocide, terrorism, crimes against humanity etc.), some of which have been reported on both sides of the paramilitary conflict in Colombia (e.g. extrajudicial killings, torture), the home state would incur international responsibility when it has knowledge of such an occurrence and provides some sort of support necessary for the investment project. Thus home state financial insurance for an MNC directly or indirectly financing such violations would trigger the responsibility of the state for aiding and assisting under Article 16 (as McCorquodale and Simons observe, the *Draft Articles* do not exclude the possibility of private actors incurring international responsibility, an area that has developed under international criminal law). *Supra* note 138 at 613-614. For the same argument see also O. De Shutter *supra* note 2 See also analysis presented in the reports of the SRSG on the issue of corporate responsibility for international crimes. Ruggie Report *supra* note 38 at paras 31 and 90.

states— in the IIA making process is taken into account, which is possible via a cause-effect analysis of the acts and omissions of the home state.

Approaching the problem of state responsibility from a cause-effect angle is not new[342], and has recently gained prominence with legal scholars, especially in the field of transnational and extraterritorial harm perpetrated by private non-state actors such as terrorists and MNCs.[343] The rationale for adopting a causation based theory of state responsibility is rather uncomplicated: according to Becker, neither the agency-based nor the separate delict theory of state responsibility adequately capture the subtle power relationships between private actors and private wrongs and state acts/omissions that facilitate them.[344] The focus of the

[342] See for example B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1953), Chapter 10 "The Principle of Proximate Causality" at 241-253, discussing the causation-based approach taken by international mixed claims commissions to award reparations for private harms. As Shelton has noted, when material damages are in question, both civil and common law jurisdictions proceed to ascertain causal connections, the former looking for equivalent or adequate and the latter for proximate or natural consequences of state acts, as well as intervening acts that can negate or reduce damages. See Shelton *supra* note 184 at 51 and various jurisprudence by mixed claims and arbitral tribunals cited regarding approaches to assess the issue of reparations in cases of state responsibility for the injuries to aliens. International human rights adjudicating bodies also use causal determinations between the internationally wrongful act of a state and the suffered injury to award monetary compensation or reparations and restitution where applicable. See for example, *Velásquez-Rodriguez supra* 268; *Aloeboetoe et al. v. Suriname, Reparations and Costs,* Inter-Am Ct HR, Series C, No 15 (1998).

[343] See for example F. Rigaux, "International Responsibility and the Principle of Causality" in Ragazzi *supra* note 261 at 81-91; and more recently S. Skogly, "Causality and Extra-territorial Human Rights Obligations" in M. Langford et al., eds., *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, forthcoming 2011). The discussion here will draw mainly from the work of Becker, *supra* note 306, in the context of state responsibility for harm done by private terrorist groups that has been adapted by Seck for the case of home state responsibility for human rights and environmental harm done by MNCs. See Seck, *Home State Duty*; S. Seck, *Home State Obligations For The Prevention And Remediation Of Transnational Harm: Canada, Global Mining And Local Communities* (PhD Dissertation, Osgoode Hall Law School, York University, 2007) ["Seck, PhD"]. While Seck's work primarily targets the home state duty to regulate unilaterally, Becker's analysis can be used to explain home state responsibility from the point of view of the power imbalance that underlines the IIA negotiation process and treaty making, which is in the focus of this thesis. While no comparison is needed here between private terrorist groups and MNCs (see Seck PhD 259-266 for a discussion about main differences and similarities), in Becker's words, " a causal approach underlies the customary law of State responsibility for all private acts which the State is obliged to control". Becker at 359-360. However, because of space constraints it will be impossible to present here a detailed discussion of the various ideas underpinning Becker's approach, but merely his and Seck's conclusions.

[344] Becker *ibid* at 156-157, 258-260. On his reading then current law of state responsibility presents itself as a binary choice: either the state is held directly responsible for private acts when a relationship of control or agency can be established, and thus spared any responsibility in the default of such proof which, as discussed above, can be almost impossible to demonstrate; or state responsibility is "marginal" under the prevent and

causation theory can be said to target the full consequences of state conduct that enables private harm to occur without making the state directly responsible for or complicit in the private wrong.[345] Becker's analysis centers on the "crime of omission" by the state, which he seeks to qualify by proposing a theory of state responsibility that is relational and strives to make the state account for the full consequences of its failure to take all necessary steps to prevent private harm from happening.[346] Indeed much of Becker's criticism of the ILC rules on state responsibility is inspired from the more general critique of the public/private divide which delimits the responsibility of states for private wrongs and "falls short of reflecting the reality of the interaction between States and private actors that makes the infliction of private harm possible, by ignoring more subtle yet more prevalent forms of State involvement in private activity".[347] He posits that the law of state responsibility is more than technical rules and it is firmly rooted in the conception of the proper role of government in regulating the private sphere and controlling private conduct.[348]

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abstain principles and the duty to protect, whereby the state is spared of "full" responsibility for the harm its omissions/inactions helped to bring about.

[345] Conceptually, the causation-based theory of state responsibility can be said to be an extended or enhanced version of the separate delict theory, where "looking for specific evidence of a lack of proper care of state organs is often a fruitless task, [and] the issue becomes one of causation". Brownlie, *supra* note 265 at 45.

[346] Rigaux identifies the "crime of omission" as a purely hypothetical factor that stands outside of the chain of events within which a fact is connected with its consequences: "should that event have interposed, the evil would (possibly) have been spared". Rigaux *supra* note 343 at 82. Becker aptly qualifies the role of state omissions in facilitating private (terrorist) harm as this: "the power relationship between the State and the non-State terrorist varies widely and rarely places the State in the position of principal or the non-State actor in the position of subordinate agent. State involvement in terrorism is not a case of marionette and puppeteer. It is more about acquiescence than direction and control, more about facilitation by quiet encouragement than specific instructions, more about omission than commission... Through complex acts and omissions the State may be a key facilitator of the terrorist activity and even harness that activity to its political advantage... [i]t is difficult to understand why a State should be spared direct responsibility for the consequences of wrongful private conduct that it has knowingly helped bring about, simply because its conduct does not fit tidily into an agency construct. Limiting the State's responsibility to a failure to prevent or abstain in cases where its breaches have been essential to the terrorists' success seems to unfairly absolve the State of its full measure of responsibility". Becker *ibid* at 258.

[347] Becker *ibid* at 71-2; Seck PhD *supra* note 343 at 258.

[348] Becker *ibid* at 271. Thus the greater degree of responsibility, the greater the incentive for governments to interfere in the public domain and regulate private conduct. This tension has become most evident with the advent of the global terrorist threat, whereby ever more demand is placed on governments to enhance security control of the movement and activity of private individuals and entities often at the expense of fundamental

According to Becker, the current law of state responsibility reflects a 20th century concept of government non-interference in the private domain, based on Western ideals of the neoliberal state, the applicability of which is highly questionable for an international society where non-state actors wield state-like power and are able to influence weak and powerful states' conduct alike.[349] At the same time, the state remains the only legal source of protection for the human rights of individuals that are affected by global movements, which effectively raises the threshold of the normative expectations for regulation of private conduct by the state.[350] Critical legal scholars, especially feminist scholars, have questioned the attribution rules of state responsibility from the point of view of the manifest and often systemic and persistent ignorance by the state of violence in the private sphere, that is conceptually based on the idea of "autonomous individuals interacting freely and equally".[351] Equally important

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rights and freedoms—seen by some as a threat of approaching a totalitarian state. Becker discusses this in the context of the inadequacy of placing either a regime of absolute or strict responsibility of states for private terrorist harm in the international context, which reveals a tension between the expectations of powerful and weak states. Thus more powerful states are inclined to seek stronger rules of responsibility for weaker states, approaching a degree of absolute responsibility for terrorist harm that would create a permanent threat of intervention by the powerful states and thus greatly, if not totally, eradicate fundamental liberties in weaker states, fearing countermeasures akin to the post 9/11 pre-emptive war on terrorism. Ultimately the question is what kind of public/private relationship the international system is seeking to advance. It is further interesting to query the fact that whereas the origins of the law of state responsibility point to its inspiration from some, arguably Euro-American, municipal legal systems, the present international legal system strives to promote a public/private order whose deficiencies have induced a transformation, sometimes radical, in its original municipal blueprints in Europe and the US. The recent economic crisis and the return to state economic control are a good example of this.

[349] Becker *ibid* at 19, 361. Hesbruegge in *supra* note 259 offers a detailed account on the evolution of the doctrine of state responsibility that was further developed by Becker at 11-42. Seck questions if the current rules of state responsibility are adequate for the 21st century in light of the reality that is the rise of corporate governance and dominance over the non-industrialized world. Seck PhD *supra* note 343 at 268; *Home State Duty supra* note 139 at 47.

[350] Becker *ibid* at 297; Seck PhD *ibid* at 273.

[351] See generally C. Chinkin, "A Critique of the Public/Private Dimension" (1999) 10 EJIL 387-395, discussing the artificial public/private distinction that pervades the law of state responsibility but also human rights law to the effect of excluding state responsibility for private abuses, often as a device to avoid dealing with political issues and thus obscuring the ways in which government policy regulates the private sphere. Particularly interesting is Chinkin's argument about the state/private divide in the market and economic activities, where she emphasizes that "non-regulation of the market is itself an expression of political preference" and has every reason to fall under the attribution rules of state responsibility, which is not the case in present international law. Equally pertinent is her discussion on persistent state ignorance, by way of non-regulation, of private violence against women, that can be seen as a political choice and therefore have every ground to engage state

is the understanding that the role of government and thus state intrusion in or regulation of the private sphere is culturally specific and "varies widely among States reflecting different political preferences and configurations of power".[352] Indeed, as Becker writes, "the State's influence in the private sphere can be manifested not only in acts of commission, where the State directs private conduct or interferes in private activity, but also in acts of omission. Persistent State failure to prevent wrongs within the private domain can be as much a form of State policy as direct governmental action...Repeated acts and omissions of a functioning State that violate its duty to prevent and abstain are thus more than breaches of a distinct obligation. They are acts that have the potential to transform the State into a silent partner in the private wrongdoing."[353]

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responsibility. For Chinkin, if the state claims the totality of functions within its territorial control, it should bear the totality of responsibility for any of the wrongful acts emanating from it, be they public or private, as both are a matter of political choice. See for a similar argument H. Charlesworth, "Worlds Apart: Public/Private Dimensions in International Law" in M. Thornton, ed., *Public and Private Feminist Debates* (New York: Oxford University Press, 1995) 243; Becker *ibid* at 273-4 and other feminist legal scholars cited therein.

[352] Chinkin *ibid* at 390; Becker *ibid* at 274. Third world scholars similarly posit that the public/private divide in international law results from the colonial encounter, which continues to shape contemporary international law and underlie its doctrines such as state responsibility. On Anghie's account, the proper role of government in the private sphere was imposed, if not invented, for the newly decolonized world thus creating a system of state (dis)involvement in the private economic sphere that, instead of bringing the third world closer to modernity through development, served to mask the subtle ways of external (first world) economic control. See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005). See also B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003), specifically chapters 3-6.

[353] Becker *ibid* ad 274-5. For Becker the acts and omissions of the state create the reality, or the environment, in which private harm occurs, because their potential is shaped by choices made in the public domain for which the state should share responsibility for these consequences it was "charged to forestall". The so-called crime by omission, can be qualified as "commission by omission", a notion "well known in domestic law" yet somewhat obscured in the approach taken under the ILC Draft Articles. See F. Latty, "Actions and Omissions" in J. Crawford, A. Pellet and S. Olleson, eds., *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) at 359-360. Latty discusses that state conduct cannot be so categorically differentiated into acts and omissions as breaches of state international obligations often result from a combination of positive and negative conduct, and sometimes positive acts can give suite to wrongful omissions. For instance, obligations of due diligence can prompt a state to act positively albeit *insufficiently* or *inadequately* and thus ultimately lead to a wrongful omission to prevent a certain event from occurring. While the end result might be same, the difference is not a material but a legal one. Hence the role of knowledge, capacity to prevent and foreseeability of the consequences of a given state conduct, positive or negative, become highly relevant for the purposes of determining the cause of a wrongful act in obligations of due diligence. See Latty's discussion of the *Corfu Channel, Rainbow Warrior* (*Difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, 20 RIAA 215, 20 April 1990) and *Armed*

Thus, as Seck has observed, "the claim that [M]NCs are private actors whose conduct cannot be attributed to the state is in essence a claim that states, as creators both of [M]NCs and of international law, have determined that they do not wish to be responsible for [M]NC conduct. But this must be seen as a deliberate policy choice, not as a natural state of affairs." [354] Similarly, it can be argued that the non-inclusion of human rights and environmental respect obligations for investors in IIAs is as much state practice to the extent of what powerful states want, for which the rules of agency and attribution only provide a shield and a general disincentive to regulate.[355] Therefore a broader, more "honest account of the nature of the interaction between the State and the non-State actor", that considers the political reality that MNCs exercise tremendous pressure on their home state governments to avoid regulation, and that "host state elites may also benefit from a lack of [investor] regulation"[356], can be depicted by a causal approach to the responsibility of the home state for its *contribution* to the wrongful act.[357]

According to Becker, in general legal theory, the responsibility for the acts of another can be triggered, under the principles of causation, "because the harm is viewed, at least in part, as the consequences of the act or omission of the original actor".[358] The use of causality to

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Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) [2005] ICJ Rep p. 168, cases where state responsibility was engaged by a combination of acts and omissions the state had a capacity and knowledge—and hence an obligation—to use differently so as to prevent an internationally wrongful act.

[354] Seck PhD *supra* note 343 at 270-1.

[355] Becker *supra* note 306 at 259.

[356] Becker *ibid* at 280; Seck PhD *supra* 343 at 263, 273.

[357] For Becker, this kind of gradual approach to state responsibility pays due attention to the concerns of weaker states, "by correlating responsibility with capacity". Thus a state that has no capacity of forestalling a terrorist activity should not be regarded, in legal terms, as responsible, while a state that has such capacity should not be allowed to avoid responsibility because of the artificial agency rules of attribution. Becker *ibid* at 280.

[358] Becker *ibid* at 285. This is different from the principle of agency, where a "principal" is held directly responsible for the acts actually perpetrated by its "agent". Becker bases his discussion on the causation doctrine principally on the work of H.L.A. Hart and T. Honoré, *Causation in the Law*, 2nd ed., (Oxford: Clarendon Press, 1985), as well as other scholars from criminal law. The primary appeal of the causation based theory of responsibility can be said to be its potential to involve "independent actors without any apparent relationship", whereas agency "usually requires express or implied agreement between principal and agent...

establish the appropriate level of responsibility of the actors involved in conduct that results in harm has been compared to "a chain", "a net" or a "stream" of events where one or more actors (states) are involved but not all are equally responsible.[359] It can be said that causation, or "causal principles, are intrinsic to the very idea of law... a universal mechanism by which the law, as a philosophy and science, determines accountability... the law's quintessential solution to responsibility problems".[360] It is also worth mentioning that "traditionally" international responsibility was ascertained on "three pillars: an internationally wrongful act; damage; and a causal link between the two"—an approach that has been overturned in the ILC Draft Articles that now retain only a "ghost of causation" in terms of the discussed

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[that] is seen as the representative of the principal, or as an extension of his or her will. In causation-based responsibility, however, responsibility is engaged not because of some metaphysical identity between the actors, but rather because the original actor's *own* conduct is seen as a cause of the ensuing harm." Becker at 286. (footnotes omitted, emphasis in original). Agency can however be treated as a subspecies of causation, if the actions of the agent are viewed as the product of the principal's direction or control.

[359] Rigaux *supra* note 343 at 86 quoting dissenting opinion of Andrews J. in *Palsgraf v. Long Island R. Co*, 248 NY 339, 162 NE 99 (1928). As Rigaux explains conjuring images can be helpful to describe the approach taken by judges, lawyers and legal scientists alike, to determine what actor (state) or event is to be blamed for the wrongdoing in question. According to him the chain approach operates in a linear fashion analyzing successive events; the net indicates that diverse chains concur to the result; and the stream gives a purposeful direction to multiple chains. In wrongdoing that is composed of the actions or omissions of more than one state, Rigaux posits that these should be compounded within a net "where each State reacts to some actions of another State or to what is deemed such action".

[360] Becker *supra* note 306 at 288. According to him "causation represents the archetypal 'general principle of law' recognized by the Statute of the International Court of Justice as a potential source of international law". Quoting Article 38(1)(c), Statute of the International Court of Justice, reprinted in S. Rosenne, ed., *Documents on the International Court of Justice* (Dordrecht: Martinus Nijhoff, 1991), 59. Furthermore, causation principles inform the everyday activity and decision making of more than just lawyers, and are integral to scientific thinking across the board. See also Rigaux *supra* note 343 at 81: "[l]egal responsibility relies on two concepts: one borrowed from the natural sciences, the principle of causation, while the other is an ethical one, the duty to refrain from inflicting harm on other beings... Two questions arise: what is the cause of a certain event? Who is responsible for it?" On the applicability and use of causation within and outside the legal science see T. Honoré, "Causation in the Law", *The Stanford Encyclopedia of Philosophy* (Winter 2010 Edition), E. N. Zalta, ed., available at: http://plato.stanford.edu/archives/win2010/entries/causation-law/, accessed August 23, 2013. As this recent reflection on causality in law and in social sciences shows, much depends on what definitions or qualifications are assigned to the different actors/events in a given scenario in order to determine their adequate responsibility. However, where legal rules of prevention/abstention are in place, questions as to the risk/foreseeability of the harm become relevant in what cases causality becomes central to pinpoint the responsible agent. As Rigaux notes in *ibid* at 83, "[s]tate liability is peculiarly relevant concerning crimes of omission, which imply that someone had the power and the duty to interfere".

obligation to repair the damage not too remote from a state's wrongful act after it occurs.[361] As such, the problem with the separate delict theory of holding the home state responsible for its lack of due diligence limits "[s]tate responsibility to 'less than responsibility for the proximate and natural consequences of a [s]tate's acts.'" [362] Absent a control/agency relationship with the MNC or coercion/control relationship with the host state, the approach under the ILC Draft Articles would not allow the home state to be responsible for the default in protection by the host state, or for the MNC harm itself.[363]

As an alternative, Becker proposes an approach to state responsibility for the harm done by the private actor "that perceives of causation as a cluster of principles that enable an examination of the interaction of associated acts and omissions and assess the impact of expected and unexpected conduct on other human beings and their interests"[364]. In essence Becker advances an approach based on common-sense causation, that analyzes the role of

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[361] See B. Stern, "The Elements of an Internationally Wrongful Act" and "The Obligation to make Reparation" in Crawford, Pellet and Olleson *supra* note 105 at 193-194, 569-579. Stern discusses the importance of examining the causal link between the wrongful act and the injury, not only for the determination of reparations, but also in ascertaining which acts or omissions by the injuring and the victim state, as well as other intervening actors (state or private) are relevant. The ILC Draft Articles retain the notion that a state is responsible for all the consequences, not being too remote, of its internationally wrongful act, but as Becker notes, the rules of agency and attribution delimit the scope of state responsibility for harm not directly attributable to it (for example by control over the private actor or coercion of another state). Becker *ibid* at 307.

[362] Becker *ibid* at 306, citing D. D. Caron, "The Basis of Responsibility: Attribution and Other Trans-Substantive Rules" in R. B. Lillich and D. B. Magaw, eds., *The Iran-United States Claims Tribunal: Its Contribution to State Responsibility* (Irvington-on-Hudson, NY: Transnational Publishers, 1998) 109 at 154.

[363] It is noteworthy that in the context of reparations of human rights harm, Becker posits that the difference between causation and attribution/separate delict theory, may be a "distinction without a difference" as the applicable remedies would be the same—a state (home or host) would always ultimately be responsible for its lack of protection and therefore obliged to provide material or other reparations to the victims. Becker at 53, 62. He further explains that because of the possibility of holding the state responsible for lack of due diligence—the easier alternative to examining a causality link between non-attributable damage and state acts—tribunals and human rights adjudicating bodies have applied a less rigorous analysis of the causality elements in question. As Seck further notes, in the sphere of environmental damage, the principle of strict liability serves to obscure any inquiry into the causal relationship between two or more states and private environmental damage. Seck PhD at 266, referencing Becker at 57-8. However, the position here, which was advanced in the discussion above, is that the developing host state should not be, in Anghie's terms, put in a position to mitigate the negative consequences of the home state's refusal to regulate its investors. See A. Anghie, "Time Present and Time Past : Globalization, International Financial Institutions and the Third World" (2000) 32 NY Jour Int'l L & Pol 243.

[364] Becker *ibid* at 292.

different actors in a given scenario by distinguishing between conditions, "which are present as part of the usual state or mode of operation of the thing under inquiry, and causes, which represent interventions in the existing or expected state of affairs".[365] Thus, "conditions may be *necessary* for the harm to have occurred, but they are discounted as causes because they are not *sufficient* to produce the specific result that is the subject of legal investigation"[366] On the other hand, causes can be described as conduct that is both necessary to produce an event *and* which constitutes an abnormal intervention in the existing or expected state of affairs.[367] From this it follows that state responsibility can be assessed according to what qualification is given to certain state conduct (i.e. acts and omissions) in relation to a certain 'expected' or 'normal' state of affairs, in order to ascertain what or the conduct of which state (in the present context, given an IIA) amounts to a cause of the specific harm in question. As discussed above, the qualification given to the notion of harm is also critical in the present context, as harm can be seen as the interference with the human rights protection in the host

[365] *Ibid* at 293 citing Hart and Honore *supra* note 358 at 35 and 29. According to Becker, the common-sense causation principle was advanced by Hart and Honore as a reaction to the alternative principle of "causal minimalism" or the so-called "but for test" (*sine qua non*). This approach looks at a given problem from a reductionist perspective, that is if harm would have resulted had a given conduct took place or not. The problem with this approach is that it "confuses necessary conditions with causes" and is "potentially limitless in scope". Thus while it is theoretically possible to attribute the breakout of a fire to the presence of oxygen in the air, legal thought does not generally support responsibility for non-proximate or causes that are too remote from the harm in question. See ILC Draft Articles Commentary under 31. By analogy, while the harm perpetrated by Canadian-based MNCs in the present context, could be attributed possibly to the international community as a whole, or to international law per se, for failing to prevent it, it is clear that such harm could have more easily be prevented by investor regulation in the CCOFTA, especially given the situation in Colombia. Hart and Honore also note that once the "but for" test is satisfied, the degree of responsibility is determined on the basis of legal policy rather than any additional causal criteria, to which Becker has added that it "introduces a false moral equivalence into causal analysis". This means that under the 'but for' test, the victim's behavior or its presence itself may be seen as the cause for a given harm, which obscures the real responsibility of those in an immediate position to protect the victim or to prevent harmful conduct. See Becker at 291-293.

[366] Becker *ibid* at 293. In short, the principle of common-sense causation looks at the element, or elements that make the difference in a given state of affairs, that is abnormal or unexpected factors that produced a particular harm on a particular occasion.

[367] *Ibid* at 294. Emphases in original. See also Honoré in *supra* note 358 describing causes as the "necessary element in a sufficient set" or the "NESS" test.

state, in the absence of any actual damage done by investors.[368] But, perhaps more importantly, what qualification one gives to the "existing or expected state of affairs" becomes a central issue in the context of home state responsibility for interference with human rights protection in the host state.

Becker's theory is primarily based in the idea that what states and peoples in the developing world perceive as the existing or expected state of affairs can differ dramatically from what developed states may see as such.[369] Thus the causes for any potentially negative impact on human rights or the environment in the host state are most likely to be viewed differently by the victims and affected local communities, the management in MNCs or home and host state officials, with the first group perceiving support or financing of MNC projects by the home state as an unexpected and undue intrusion in their expected state of affairs, and the other two groups operating under the belief that state support—including IIAs—are a natural component of the present neoliberal global economy and that any resulting harm is a necessary collateral by-product of a legitimate state activity.[370] Arguably, the existence of an

[368] See discussion on the qualification of state obligations to abstain and prevent under the due diligence test in section 1.3, according to which the duty of due diligence of the home state may encompass preventing its MNCs to commit human rights violations, but also preventing the host state from breaching its international obligations, for example by removing its capacity to protect human rights, a conduct the home state can be seen as in a position to influence one way or the other through the IIA.

[369] Becker *supra* note 306 at 294, footnotes omitted. According to Becker's reading of Hart and Honoré, "causation in law and in ordinary thought is a relative notion that is deeply connected to the context in which the inquiry takes place. What is a cause, as opposed to a condition, is a function of human habit, custom, convention or normative expectation". Becker gives the example of the availability of running water in households in the developed and the developing world that shows how understandings of 'normalcy' and expectations of people from and against their state, or even international law, may vary between the developed and the developing world. Thus while one would search for the cause of interruption in abundant water supply on a given day in developed states, irregular water supply would be seen as a normal state of affairs in some other parts of the world and one would look for abnormal causes should this change, i.e. increase in abundance.

[370] Seck PhD *supra* note 343 at 278. Seck asks the question whether it is possible to reflect these differing views of causation, and, if not, which view(s) to privilege. However, it is possible to maintain that such a freedom of reasoning may be an option if these two alternative views would be of equal levels of legitimacy and legality under international law, something that the existence of international human rights law would a priori rebut. Thus while there is nothing 'illegal' in states pursuing FDI and giving support, whether financial, political or legal (such as IIAs) to MNCs, their freedom for 'maneuvering' is, at least in legal terms, circumscribed by their obligations under human rights law, especially the duty to protect against private harm. The question of state

IIA creating or contributing to the environment of MNC impunity, which is the result of the joint acts *and omissions* (to regulate) of two states, complicates somewhat the attribution of the appropriate degree of responsibility to each of the actors involved.[371] The central question thus becomes if the IIA itself and home state conduct in its making can be regarded as *the cause* for the internationally wrongful act of the host state.[372] Two considerations allow for an affirmative answer to this question: a qualification of the precise scope of the home state act/omission to abstain from/prevent the causation of the internationally wrongful act of the host state; and its control over the contributing conduct of the host state, which therefore cannot be seen as an intervening factor breaking the chain of causation between the home state conduct and the internationally wrongful act of the host state.[373]

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responsibility for legal (i.e. not prohibited by international law) conduct (acts or omissions), is a complicated one that need not be analyzed here in view of the general approach taken here that any state activity that interferes with human rights protection is prima facie illegal under international human rights law, in other words a breach of states' international law obligations. In that sense it is not the FDI project itself, but the limitations of host state regulatory capacity effectuated without the consent of human rights holders, that are the source of illegality of investor non-regulation through IIAs. Practically speaking, as Becker has observed, when it comes to actual human rights or environmental injuries suffered by individuals, this distinction may be irrelevant as the state would be in any case held responsible and required to compensate for its failure to control the private actor. For the differences between 'liability' (the state obligation to compensate for damage caused by private conduct) and 'responsibility' in international law and the work of the ILC see A. Boyle, "Liability for Injurous Consequences of Acts not prohibited by International Law" in Crawford, Pellet and Olleson *supra* note 105 at 95-104 and literature cited therein at 104.

[371] Seck's work is based on the broader case of the obligation of home states to regulate unilaterally, of which regulation through IIAs can be said to be a part. In such a scenario the home state omission to regulate is clear and straightforward, thus allowing for an easier attribution of responsibility under the causation theory. However, assigning a greater degree of responsibility to the home state in a situation where both states have equal human rights obligations and sign an international instrument that interferes with these is only possible if home state conduct can be described as the cause for wrongful host state conduct—and subsequently MNC harm—which is the key idea of this chapter.

[372] Further to the discussion in the previous note, non-regulation by the home state can certainly be regarded as one of the causes for extraterritorial MNC harm with or without an IIA, whereas a failure to prevent foreseeable harm through the IIA approaches to home state commission by omission or facilitation of exactly the type of private conduct the home state was charged to prevent. It is conceptually possible to treat any of the factors in the present context as either conditions or causes based on Becker's approach. Thus, the lack of host state protection may be seen as a condition, making non-regulation of MNCs by the home state a cause, or inversely the home state refusal to regulate may be seen as merely a condition exploited by MNCs to violate human rights. However, once the home state obligations of due diligence and duty to abstain and protect are taken into account, it is possible to clearly posit the home state omission as the cause of the breach of international obligations based on the IIA.

[373] Becker points out that common-sense causation theory should not, despite its appeal of simplicity, be applied immediately to hold states responsible for terrorist acts (i.e. private conduct), but that the analysis is

Regarding the first point, Becker argues that "just as an act can be treated as a cause when there is an expectation of inaction", "an omission can only be the cause of harm where there is an affirmative duty to act to avert the harm" and "the affirmative act required must be capable of averting the harm" for the omission to be treated as a cause.[374] It is therefore important to grasp the precise scope and purpose of the obligations in question in order to establish what consequences flow from the non-fulfillment of the exact expectation/duty.[375] Thus if home state obligations under international law can be construed as duties to abstain from interfering with human rights protection in another state and, more importantly, prevent another state from violating its own human rights obligations whenever it is in a position of power and capacity to do so, then the combination of acts and omissions on the part of Canada in the present case can be seen as the cause for the ultimate default in Colombia's

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more complicated when the degree of state omissions needs to be assessed in order to find the appropriate degree of state responsibility (in other words the 'gravity' of the state omission needs to be considered—an approach that has been abandoned by the ILC framework). Moreover, the state itself is not the actual perpetrator of terrorist attacks, but these are non-state groups, which may lead to conclude that it is this subsequent and voluntary act which is the cause of the harm in question, and not the state omission to prevent it. In other words, the conduct of the state may be reduced to a circumstance or a condition that is merely exploited by the private wrongdoer. Becker does not specifically envisage the situation where two or more states' omissions contribute to private harm, but the gradation of responsibility of weaker and stronger states underlining his analysis makes this assertion implicit. *Supra* note 306 at 294, 297. In this sense, and as expounded upon by Seck (PhD *supra* note 343 at 279-281), the focus is on private harm caused by the omission of the home state, to which the conduct of the host state is irrelevant, while it may also be held responsible for its own prevention of MNC harm (Seck, Phd at 281). However, in the present discussion the situation is inversed to argue that the conduct of the host state can be attributed to the omission of the home state.

[374] Becker *ibid* at 294-6.

[375] Thus, not all duties to avert harm are of equal strength and thus susceptible of triggering the responsibility of all actors involved. Becker gives the example of legislation providing for a general obligation of the citizens to give aid to those in peril, as contrasted with a strict obligation of parents, policemen, firemen or prison guards where a special duty to prevent a specific conduct/harm is involved. A commission by omission, and therefore responsibility, produces an expectation of actions/abstention with varying degrees for the actors involved in a given situation. Becker at 295-6. Similarly, the expectations of human rights respect and protection in the international context, in particular in cases of international cooperation or assistance cannot be said to be equivalent between two remote states with absolutely no dealings between each other, and two states that engage in intimate economic cooperation with broad implications for rights protection. The responsibility of the international community as a whole could arguably be engaged for the fact that international trade and cooperation is not in conformity with state obligations under the right to food for example, but it is certainly lesser in degree than the responsibility of a state whose financing of a project in another state directly undermines the latter's capacity to feed its people. For an extensive discussion of these arguments see Salomon *supra* note 151

due diligence and thus allow for the attribution of a greater degree of responsibility.[376] This is especially true if the CCOFTA negotiations process can be seen as an international act where Canada, having the dominant position or power leverage in crafting the terms of the CCOFTA, while knowing of the risk of its investors being or becoming the cause of human rights violations in Colombia and having the capacity to prevent this by inserting specific investor obligations to that effect refused to do so, thereby violating its own due diligence obligations and by the same token causing a violation of Colombia's due diligence obligations.[377]

This argumentation is further supported by explaining the second factor that arguably complicates the causation theory: the problem of the intervening conduct. According to Becker, "in general terms, a subsequent voluntary act or abnormal occurrence may be viewed as 'breaking the chain of causation' and prevent tracing responsibility for the harm back to an earlier actor."[378] In the present context, and pursuant to the separate delict theory, the

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[376] See discussion on state obligations of due diligence in section 1.3.2 *supra* and legal authorities cited.

[377] It cannot be convincingly held that equal responsibility should be attributed to Colombia, a developing state whose need for FDI places it at a comparative disadvantage in IIA negotiations vis-à-vis developed states such as Canada. Moreover, the pressure exercised by Canadian based MNCs already operating in Colombia on the Colombian government has to be accounted for, especially in light of the ongoing paramilitary and guerilla internal conflict, and there cannot be a reasonable expectation for Colombia to regulate investors in such circumstances or to insist for their regulation via the CCOFTA. See chapters 1 and 2 for a discussion on these points. Given that states have a clear obligation not to cause or allow for harm to be caused in other states, the responsibility of Canada becomes stricter, whereby its omissions can be seen as a commission of an internationally wrongful act that should encompass a broader responsibility for Colombia's omissions as well. This conforms to the requirement that the affirmative act be capable of averting the harm which, as Becker discusses, is relevant only to the extent that the harm would have occurred regardless of the conduct (action or inaction) of the actor whose duty was to prevent the harm. This does not however necessarily excuse the lack of capacity or will on the part of that actor to take their obligation to prevent seriously. Becker *ibid* at 296-7. See also R. Pisillo-Mazzechi *supra* note 259 on the presumption in international law of the state obligation to acquire a capacity to fulfill their duty of due diligence regardless of their level of development in situations where they dispose of actual or constructive knowledge regarding the possibility of private harm.

[378] Becker at 197 citing A.M. Honoré, *Responsibility and Fault* (Oxford: Hart Publishing, 1999) at 6; and Hart and Honoré *supra* note 358 at 136. It will be noted that Becker's analysis focuses on the 'breaking' effect of private actors and their conduct, such as private terrorist groups, that is not attributable to the state. Seck has also applied Becker's theory with the consideration of private MNC conduct as acts breaking the chain of events between the non-exercise of the due diligence obligation by home states and the private MNC harm. *Mutatis mutandis*, this argumentation will be applied here to analyze the responsibility of the home/host state in the context of due diligence for human rights protection and investor obligations to that effect in IIAs.

'voluntary' lack of protection/due diligence by the host state could be seen as the intervening factor and thus absolve the home state from responsibility for this and any subsequent MNC harm.[379] However, Becker notes that "[t]his is a false problem" as in "numerous situations... [the] cause is traced to the earlier actor who created the occasion for wrong to be done, irrespective of intervening action."[380] This is particularly relevant in situations where a "conduct is designed or likely to elicit a certain response" and thus the chain of causation allows for the original author to be fully responsible where the "subsequent act is foreseeable".[381] While host state protection of human rights, and hence default on its due diligence obligation, are likely to be affected by the absence of investor regulation in the IIA, according to Becker "a more severe version [of causation-based responsibility of the original actor] involves a situation where one actor is under a specific duty to prevent precisely the

[379] This consideration receives a paramount importance when the reasons for home state refusal to regulate MNCs are examined. Home states, most notably Canada, have traditionally refused any form of investor regulation to respect human rights in host states on the basis of the primary obligation of the territorial host state to protect human rights. See Canadian Government's response *supra* note 46. This quasi-orthodox justification would have it that it is not the responsibility of the home state to regulate so as to prevent any 'hypothetical' misuse of the lack of regulation by investors to violate human rights. In other words, the home state is not responsible if investors benefit from the lack of regulation to cause human rights or environmental harm, a circumstance that is not per se a condition (and thus impossibly a cause) for this, but merely a fact of the way international law currently reflects the neoliberal public/private divide, that is the a priori non-regulation of private commercial affairs by the state. Further and principally, this claim is based on the host state's obligation to protect in which the home state is prevented to interfere by the non-intervention principle, and the default of which is the sole cause for any private rights violations regardless of the nationality links of the private perpetrator with the home state and its capacity to prevent the harm. While this is challenged and rebuttable in the context of the unilateral obligation of home states to regulate investors under the due diligence rule (see previous section), this justification is legally untenable and morally illegitimate in the presence of an IIA that is also an act of the home state that further restricts the host state capacity to protect and can effectively become the cause of MNC impunity for violations and furthermore the cause of the internationally wrongful conduct of the host state.

[380] Becker at 298.

[381] *Ibid*. The examples given are those of leaving a highly inflammable substance in a public place or giving a fire weapon to a mentally insane person. In such cases the resulting harm can be seen as the expected consequence of the original act or omission and full responsibility is placed on the original author as their conduct is seen as the cause for the ensuing harm and a consequential link is established between the conduct of another and an earlier conduct. These situations can be described as "occasioning" rather than "causing" harm, as the wrongful conduct is treated as the "means" by which the original actor brings about a given result. In legal terms this does not change holding the original actor(s) responsible, but may influence the degree of attributed responsibility based on other non-causal considerations—see below.

kind of harm the intervening conduct produced."[382] In such a case the wrong may be regarded as the expected consequence of the failure to comply with the duty to prevent "and the fact that the subsequent conduct was voluntary does nothing to sever the causal connection."[383] With this clarification it becomes possible to argue that the internationally wrongful conduct of the host state can be, at least in part, attributed to the original refusal of the home state to include human rights obligations for investors in the provisions of IIAs, as the home state can be said to have a duty to foster universal respect for human rights and prevent human rights violations, possibly on a universal level, but undisputedly whenever it in its power to do so. However, the above analysis does not exculpate the host state (or the MNC) from responsibility since, without manifest coercion from the home state, it was free to refuse accepting IIA terms that interfere with its human rights protection.[384] The challenge therefore seems to be in determining the appropriate degree of responsibility that falls on the two states in the present case.

Becker explains that the causality approach allows for actors to be held responsible for more or less than that which they have caused, which reveals the importance of taking into account of "non-causal factors that might justify diminishing or enhancing the offender's accountability."[385] Thus while the principle of causation can universally inform finding one

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[382] *Ibid*.

[383] *Ibid* at 299. Of importance here is the environment that the legal rule imposing an obligation of prevention seeks to foster—for example state duties to prevent terrorism exist in order to minimize or eradicate the threat to terrorism and in such cases state omissions to comply with this duty that result in terrorist activity become causes, or expected consequences of the state conduct.

[384] Thus reaffirming the principle of joint responsibility found in the ILC approach. See discussion above. Both states would arguably be jointly responsible towards the affected individuals and communities, but idea here was to present that the degree of their responsibility may vary according to their role/power in safeguarding human rights affected by the IIA. See further below section 1.4.4 for discussion on the role of coercion.

[385] Becker at 304. Causation based responsibility can be said to rest on two tests: the first to determine a causal link between a given actor and a given outcome, and the second to examine policy considerations that may influence the assignment of legal responsibility in terms of the range and intensity of remedies. This second assessment essentially involves what was previously labeled as the type of international legal order the rules of state responsibility seek to advance and involves morality and legitimacy considerations.

actor responsible for a given wrong by looking at the causes intervening in the existing or expected state of affairs, the assessment of non-causal considerations allows for the unique circumstances of the subject matter under inquiry to determine the degree of state responsibility attributed in a given case.[386] This brings into light questions about the host state economic and bargaining power vis-à-vis the home state and its investors, as well as a multitude of socio-economic concerns that should be taken into account when establishing the proper degree of responsibility for the home and host states in the context of human rights violations enabled or facilitated by IIAs. It is therefore possible to argue that the host state was not in a position to influence the conduct of the home state to the end of inserting human rights obligations for investors in the IIA and that, in turn, the home state is the one to bear primary responsibility for the negative effect of an IIA on human rights protection in the host state.[387] However, it is important to recognize that the "basic assumption inherent in causation-based responsibility" is that actors are "responsible only for what they do or do not do that produces harm [and] not for things beyond their control"[388]. The conclusion is therefore that while a developed home state can bear a greater degree of responsibility for its

[386] In the context of terrorism, Becker writes that it is not enough to simply conclude that a state has caused a terrorist act, but it is also necessary to consider non-causal factors that may have induced that particular state to act in such a way or that may even absolve the state entirely of its responsibility. For example, foreseeability or intent, or the specific construction of the legal rule that is violated may all influence the ultimate degree of state responsibility. Becker at 304-5.

[387] This argument would seem to appeal to scholars who have seen the rise and central place of IIAs and FDI for the economic development of the third world as a policy choice imposed by the industrialized states and not a natural state of affairs in international trade and investment that might as well be taking place without IIAs or on different terms favourable to developing states. See mainly M. Sornarajah, "A Law for Need or Law for Greed?: Restoring the lost law in the international law of foreign investment" (2006) 6 Int Env Agreements 329. The law of state responsibility however, even if applied from a causality perspective, would not entirely absolve developing states from responsibility for any harmful effect of FDI and IIAs.

[388] Becker argues that this is a trans-substantive general principle of any legal system applicable to the law of state responsibility as well. According to him, alternative approaches risk either to maximize responsibility so that actors that are helpless to alter the situation are held accountable, or to minimize it so that actors whose conduct causes harm will evade responsibility. These kinds of departures from the general principle, as argued by Becker, are evident in the current international legal system and the rules of state responsibility, but "they need to be justified, not merely asserted". Becker at 305. It is the central argument of this chapter that the merits of such a justification that exculpates developed home states for their conduct with respect to IIAs and MNC harm are not universal and are most rebuttable if one were to appeal to the position of developing states.

non-diligent conduct in view of its power leverage in IIA treaty-making, it cannot be maintained that the absence of investor obligations to respect human rights and the environment in the host state can be entirely attributable to the conduct of the home state thus making the host state responsible as well—if only partially. Of course a causality analysis of a given human rights violation by, for instance a Canadian based MNC in Colombia, might shift the degrees of responsibility depending on the circumstance in a given case or the nature of the breached right for which the absence of regulation through the IIA—attributable to both states—may have a different impact. The discussion here is limited to the responsibility of the home and host states for the lack of due diligence when crafting IIAs without human rights obligations for investors.

In summary, the foregoing discussion suggests that the causation-based theory of home state responsibility allows for the home state to be held responsible for acts and omissions, or generally conduct that is not attributable to it but that was caused by its own wrongful or negligent conduct. In the instant case this conceptualization would allow to hold Canada internationally responsible for the lack of investor regulation in the CCOFTA that contributes to a situation of impunity for human rights violations and environmental harm perpetrated by Canadian based MNCs in Colombia. In addition, because of Canada's dominant role in the negotiations of the CCOFTA, it could be found responsible for Colombia's own lack of due diligence to insist on investor regulation through the CCOFTA. It should be added that although the causality approach may seem as a radical departure from the separate delict theory of home state responsibility that is limited to its lack of due diligence *only*, in reality this approach is not precluded by the ILC *Draft Articles* that start from the principle that a state is "responsible for the all the consequences, not being too

remote, of its wrongful conduct"[389]. Moreover when a state aids or assists the committing of an internationally wrongful act of another state, it becomes responsible for the act itself if its aid or assistance (in other words conduct) was necessary or essential for the committal of the internationally wrongful act.[390] Ultimately, when it comes to the assessment of injuries or reparations owed to the affected individuals or local communities in the host state, international jurisprudence has been consistent in taking a cause-effect approach for attributing responsibility based on the appropriate role/conduct of each implicated actor, be it the MNC or the host state.[391]

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[389] ILC *Draft Articles*, Commentary under Article 31 *supra* note 265 at 206. See also Becker at 325-328 discussing the relationship between causation-based theory of state responsibility and the ILC framework. According to him, it is regrettable that clear cause-effect principles for establishing state responsibility have been omitted from the Draft Articles, but it is possible to demonstrate that the framework is reconcilable with the causation theory. Specifically, he asserts that the causation-based approach is not specifically excluded from the ILC Draft Articles and Commentary in particular by way of the Commentary explaining the role of the rules on attribution which "identify there is an act of the State for the purposes of responsibility" (see Commentary under Chapter II "Attribution of Conduct to a State" at 92), but do not delimit the scope of such responsibility which as discussed is the primary purpose of the causation theory that allows for the attribution of responsibility of private harm. The rules of attribution, as per the ILC framework, are only a starting point in Becker's assessment of state responsibility for non-attributable wrongful conduct (in this case private terrorist harm) that consists of four steps: "(1) a factual test as to whether an act or omission can be regarded as State conduct, by operation of attribution principles; (2) a legal test as to whether the attributed act or omission constitutes a violation of an international legal obligation of the State; (3) a causal test to determine the scope of responsibility that potentially arises from the wrongful act or omission of the State; (4) a policy test to determine whether non-causal considerations justify enhancing or diminishing the responsibility of the State." Becker at 325.

[390] See ILC, *Draft Articles,* Commentary under Article 16 and discussion at *ibid*.

[391] See Cheng *supra* note 342 at 244: "it is a rule of general application both in private and public law, equally applicable to the international legal order, that the relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation. In order that a loss may be regarded as the consequence of an act for purposes of reparation, either the loss has to be the proximate consequence of the act complained of, or the act has to be the proximate cause of the loss". His authority is drawn from, for e.g. German-U.S. Mixed Claims Commission, *Administrative Decision No. II* (1923) at p. 5, reprinted in (1924) 18 AJIL 1 at 177-186 and the Portugo-German Arbitral Tribunal *Angola Case*, *Award I* (1928) 2 UNRIAA 1011 both dealing with private harm suffered by conduct of one or more states having effect on the territory of another state. Cheng writes that in principle state responsibility is determined objectively, that is based on the principle of proximate causality or the normal consequences of a state's conduct, but whenever it is possible, subjective criteria such as foreseeability and intent can also be used to delimit those of the consequences for which the wrongdoer (or original actor) is held responsible—the proximate consequences of a wrongful act may be too many. Cheng *ibid* at 248-251. Indeed Becker argues that the consistent strain of international arbitral and ICJ jurisprudence in looking for causal criteria when assessing the appropriate level of compensation or damages is more than establishing the "financial responsibility" of a state for non-attributable (in his discussion private) conduct but that "the State is held responsible *for that very harm* and its duty to compensate for the harm is a corollary of that responsibility". Becker at 323 (emphasis in original). Jurisprudential examples cited are the abovementioned cases; the *Corfu Channel* Case in which Albania was

1.4.5 Causation, coercion and the consent of local communities: a second look at home state responsibility for investor non-regulation

One scholar has queried if investor-state tribunals would entertain investor claims based on the host state annulment of concession permits or property titles given without the FPIC of indigenous peoples.[392] An analogy with the decision of a recent investment tribunal to deny hearing a claim concerning investment obtained through bribery might lead one to presume that arbitrators would tend to give precedence to human rights in those cases.[393] On the side of human rights, the Inter-American Court has steadily affirmed that indigenous land claims and property rights must prevail over the rights of 'third parties' (i.e. foreign investors), which in some cases includes the duty of the state to rescind the investor's title, or expropriate land it may be using, in order to return it to the indigenous communities.[394] Moreover, in *Sawhoyamaxa Community*, when confronted with Paraguay's claim that an IIA with Germany was precluding the restitution to indigenous peoples of lands being exploited by a foreign investor, the Court dismissed this argument stating that "the enforcement of [IIAs] should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States."[395] Accordingly,

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found responsible for the explosions themselves and subsequent losses of human lives and not only for its failure of due diligence; and inter alia the United Nations Compensation Commission, Report and Recommendations made by the Panel of Commissioners Concerning the Second Installment of 'E2' Claims, UN Doc. S/AC.26/1999/6 (1999) at 6, attributing responsibility to Iraq for losses sustained by private individuals/companies in Israel as a result of Israeli measures undertaken in response to Iraq's occupation of Kuwait. These examples are important as they establish that states can be held responsible for wrongful acts of others, including other states that have been caused by their own conduct. See generally Becker at 308-321.

[392] M. Orellana, Comment, *Saramaka People v. Suriname* (2008) 102 AJIL 841.

[393] See *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006).

[394] *Awas Tingni supra* note 178 at 164.

[395] *Sawhoyamaxa Indigenous Community v. Paraguay* [2006] IACHR, Series C No. 146, 29 March 2006 at para. 140, discussed in P. Nikken, "Balancing Human Rights and Investment Law in the Inter-American System of Human Rights", in P-M Dupuy, E-U Petersman and F. Francioni, eds., *Human Rights in*

the Court ordered the investor to be expropriated and compensated by the state, as this satisfied the 'public purpose' taking stipulated in the IIA, and the lands restituted to their former indigenous owners. While this decision would certainly be justifiable given the "high purposes of human rights treaties"[396], a peculiar situation presents itself where, by holding the developing host state responsible, its peoples will ultimately bear the cost to compensate the investor, a situation that could have been avoided had the latter been required to seek and obtain the FPIC of local populations. Having established that recent human rights jurisprudence conditions the validity of government consent to large-scale investment projects, especially in mining and extractive industries, upon the consent of indigenous peoples and (possibly) local communities in the host state, the question becomes if the home state can be responsible, and to what extent, when concluding IIAs which enable MNCs to violate human rights obligations by not seeking the consent of indigenous populations.

The focus here is therefore on the implications of this on the law of state responsibility, specifically the possibility of holding the home state of MNCs responsible for interfering with rights that *do not belong to states* and entering into treaty obligations that *cannot be consented to* by host state governments without the express consent of the rights holders. The ILC Draft Articles, as already discussed above, deal only in a limited way with the [i]llegality of state consent as a defence precluding an internationally wrongful act of another state towards the consenting state (Article 20), while leaving it to the primary norms to determine if state consent to specific international obligation can or cannot be given.[397] With regards to IIAs and investors rights created therein, international law assumes, as Sornarajah

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International Investment Law and Arbitration (Oxford: Oxford University Press, 2009) at 265-270; and Bankes *supra* note 227 at 486.

[396] See Inter-American Court's Advisory Opinion in The Effects of Reservations on the Entry into Force of the American Convention on Human Rights, 24 September 1982, Ser. A. No. 2.

[397] ILC, *Draft Articles supra* note 265.

points out, "an external validity to these treaties. States which conclude them must be presumed to have intended to be bound by them. Unless there is compelling evidence of coercion, one must proceed on the basis that [IIAs] are voluntarily made."[398] Sornarajah's starting point here is the element of inequality in bargaining power between the developed and the developing state and the possibility of pressure from powerful corporations on the governments of weaker states. He further states that "whether the approach of the United States [and Canada], which [have] a pre-announced model bilateral treaty from which [they] do not permit significant variations, makes the situation different [regarding the freedom of the host state's consent] is an issue that must be raised."[399] In addition, Sornarajah posits that evidence of coercion may exist "where the signing of the treaty is made conditional on the granting of aid, loans or trade preferences", such as in the case of investment insurance by developed states' export credit agencies, or international financial institutions' (IFIs) loans or aid conditioned by the developing state entering into an IIA.[400]

While virtually all IIAs and FTAs are in themselves a condition for developing states' obtention of trading preferences from industrialized states, the CCOFTA was not per se a condition for the entry of Canadian FDI or corporations in Colombia, as these were present in the Colombian market before. A stronger argument for the 'coerciveness' of the investment provisions under the CCOFTA would therefore be that it was based on the Canadian model BIT, to which changes to the effect of introducing safeguards for human rights protection and regulation of investors were resisted by Canada, and Colombia therefore had no choice but to accept the model treaty. But this is a difficult and problematic claim to make that would in any case depend on proof of such conduct in the negotiations

[398] Sornarajah ILFI *supra* note 135 at 178-9.
[399] *Ibid* at footnote 35.
[400] *Ibid* at 179.

process, which is almost impossible to obtain as these negotiations take place away from public scrutiny and issues concerning developed states' resistance to changes in model IIAs are usually raised by former governmental officials long after the ratification of IIAs.[401] A stronger argument could perhaps be made that the home state's resistance to MNC regulation in IIAs causes a 'material' invalidity in the consent of host states which is given in the genuine belief that IIAs will bring about economic development, but does not extend to any future restrictive interpretations of the provisions for investment protection/rights over human rights and environmental protection in the host state.[402] In this scenario the home state

[401] Sornarajah refers to "anecdotal" evidence of this resistance. Stiglitz has similarly discussed the ways in which developing states are 'made' to accept IIAs in his capacity of a former World Bank senior official. See J. Stiglitz, "Regulating Multinational Corporations: Towards Principles Of Cross-Border Legal Frameworks In A Globalized World Balancing Rights With Responsibilities" (2008) 23 Am U Int'l L Rev 451. Governments are usually given the benefit of secrecy to negotiate foreign commercial treaties by legislatures and have only officially admitted, for example in U.S. Congress committee hearings, after longer periods of time that IIAs have been used as tools of foreign policy to induce changes in the domestic politics of developing states, i.e. push towards neoliberal governance. See generally Vandevelde *supra* note 52.

[402] This point was raised in detail in section 1. See generally A. VanDuzer, P. Simons and G. Mayeda, "Modeling International Investment Agreements for Economic Development", in V. Qalo, ed, *Bilateralism and Development: Emerging Trade Patterns* (London : Cameron May, 2008), 374. This situation would fall under Article 48 "Error" of *Vienna Convention on the Law of Treaties* which reads: "(1) A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty. (2) Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error." This has prompted third world scholars such as Chimni, "Outline of a Marxist Course" *supra* note 331 at 13-5, to argue that the rules of the *Vienna Convention* could be read to hold invalid treaties not ratified by popular democratic processes which would pay due consultation and obtain the consent of subaltern and marginalized classes in developing countries, or consented to by non-democratic governments or states coerced by economic or any other pressure by powerful states to enter into such agreements. In fact, Chimni has proposed on a number of occasions that the rules of the *Vienna Convention* should be amended to cover all forms of pressure on weaker states to enter into "unequal" or "unjust" treaties, an issue that was addressed only in a non-binding manner at the time of the adoption of the Convention under the form of the *Resolution relating to the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*, reprinted in (1969) ILM vol. 8, p. 733. See B. S. Chimni, "The World Trade Organization, Democracy and Development: A View From the South" (2006) 40 J of World Trade 1, 5 at 16-18 discussing forms of economic coercion over weaker states in the World Trade Organization and proposing a formal amendment of Article 52 of the Vienna Convention "Coercion of a State by the Threat or Use of Force". Similarly, both Chimni and Sornarajah have proposed that the doctrine of *rebus sic stantibus*, or a material change in circumstances (Article 62 of the Vienna Convention) should be used by weaker and dominated states, especially for defences against human rights and social issues resulting from economic treaties such as IIAs. See Chimni *supra* note 331 a 14-5; Sornarajah, Law for Greed *supra* note 387. While affirming the customary status of this doctrine, the ICJ has taken a cautious approach in allowing successful claims for unforeseability and changes in material circumstances to existing treaties, and has rejected claims arising even from very dramatic economic and

could be found responsible for failing to secure "informed", and thus "valid" in the sense of ILC Draft Article 20, consent from the host state by making it aware of any risks for its capacity to protect human rights, based on the assumption that developed states like Canada have more experience with investor-state arbitration repercussions on domestic regulatory regimes.[403] Treaty invalidity however, does not give rise to state responsibility, unless responsibility is sought for treaty commitments obtained through fraud or coercion, and which arises for such state acts that are prohibited under the Vienna Convention and the UN Charter.[404] Moreover, treaty invalidity depends on it being raised by one of the parties as a defence for non-performance, which happens extremely rarely in practice.[405] While the non-obtention of indigenous peoples consent prior to the creation of investor rights in the IIA might give grounds to invalidity, the point here is that this is an internationally wrongful omission which triggers home state responsibility at the stage of treaty implementation, that is when investors start enforcing their rights against local and indigenous populations whose consent is lacking. Since enforcement of investor rights is enabled by the IIA, but executed under the domestic law of the host state where the IIA commitments are transposed, the argument is that the home state is responsible for this chain of events.

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political restructuring of the two states involved in the *Gabcikovo-Nagymaros* case as reasons for non-performance under a treaty. See *supra* note 328 at 101-112.

[403] This issue has been raised by some Latin American developing states, such as Ecuador and Bolivia, that have experienced the negative effects of expansive investor-state arbitration and have declared not having consented to such broad regulatory constraints, albeit from the perspective of economic sovereignty and not human rights. A defence related to the unanticipated change in domestic political and economic circumstances has been raised in investor-state arbitration under the doctrine of necessity (which is related to an internal change of circumstances in the state need not pertain to the object and purpose of the treaty such as in the *rebus sic stantibus* doctrine) and investor-state tribunals have tended to prefer the doctrine of *pacta sunt servanda* (the counterpart of the *rebus sic stantibus* doctrine) to maintain host state obligations towards investors notwithstanding economic emergencies and social crises, as exemplified by the Argentine cases. See *supra* note 74.

[404] Articles 49, 52 and 69 *Vienna Convention supra* note 293.

[405] See Part V, Section 2 of the Vienna Convention entitled "*Invalidity of Treaties" ibid*; J. Merrills, "The Mutability of Treaty Obligations", in M. Craven and M. Fitzmaurice *Interrogating the Treaty: Essays in the Contemporary Law of Treaties* (Nijmegen: Wolf Legal Publishers, 2005), 89. See also ILC, *Draft articles on the Law of Treaties with commentaries*, 18th Sess., reprinted in (1966) Y'book of the ILC, vol II, at 56.

Under the classical rules of state responsibility, a claim of this type would fall either under Article 17, "*Direction and control exercised of the commission of an internationally wrongful act*", or Article 18 "*Coercion of another state*" of the ILC Draft.[406] It is helpful to define here the notion of coercion for the discussion below. Under classical international law, and the ILC Draft Articles, coercion is defined by assessing the control of one state over the freedom of action of another state. The less a state is free to act, or the more its freedom of decision-making is constrained or subordinated by external pressure from another state, its international responsibility for wrongful acts passes on to the coercing or controlling state.[407] It immediately comes to attention that classical law of state responsibility is concerned with coercion *between states* with respect to an internationally wrongful act committed by the coerced state towards a third state, while not addressing the responsibility of the coercing state towards the coerced one for the act of coercion itself, which could constitute an independently wrongful act of the coercing state under the non-intervention principle.[408] Moreover, under the Draft Articles, the conduct in question must be one of domination,

[406] See ILC Draft Article 17, *supra* note 265 at 152, and Article 18, at 156. The Commentary speaks of "derived responsibility" for these cases where one state is held responsible for another state's conduct. The examples given under Article 17 involve issues where states are represented by other states in international transactions or situations of occupation and "suzerainty". By contrast Article 18 deals with situations where a state is pressurized by another state, by military or other means, to breach one of its international obligations with respect to a third state. See Commentary at 152-158.

[407] As Eagleton put it almost a century ago: "[i]f one State controls another in any circumstances which might prevent the latter from discharging its international obligations, the basis of a responsibility of the protecting State for the subordinated State is laid. Responsibility must be located in each separate case by ascertaining the actual amount of freedom from external contro, or conversely, the actual amount of control left, to the respondent State. Therefore if there is no restriction on the dependent State's freedom of decision, the dependent State is solely responsible." C. Eagleton, *The Responsibility of States in International Law* (New York: New York University Press, 1928) at 43. This definition formed the basis of Article 17 of the ILC Draft. See generally, ILC, Eight Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur, UN Doc. A/CN.4/318, reprinted in (1979) 2 YB Int'l L Comm'n 1, citing Eagleton at para 17.

[408] The discussion in the ILC *Draft Articles* Commentary confirms this. Under Article 17, the ILC's approach is that a state cannot essentially do through another state what it could not do itself, "in the context of bilateral obligations, which are not opposable to the directing State." In these cases both the directing and directed states are responsible towards a third state. Commentary at 154-5. By contrast, responsibility for coercion is equated to *force majeure* to mean that "the responsibility of the coerced State will be precluded vis-à-vis the injured third State." ILC *Draft Articles* Commentary, *supra* note 265 at 157.

subordination or forceful restriction on the sovereign will of the coerced state, a standard so high to attain in practice that, as Professor Fry has argued, it creates a paradoxical situation whereby the surrender of free will by the coerced state would have to be absolute (akin to total control, or occupation) or otherwise it too would have to incur international responsibility and the wrongful conduct would fall under joint responsibility.[409] Similarly, according to Fry, state responsibility for coercion as presently defined under the ILC Draft Articles, fails on the grounds of legal causation as it establishes an absolute binary category (the but for test) between all-or-nothing responsibility, thereby ignoring the subtle and more prevailing degrees of coercion or restrictions upon states' freedom of action, which embody the reality that the coerced state retains its sovereignty to carry out the internationally wrongful act and thus contribute to it through voluntary actions of its own.[410] It follows from these considerations that Canada's responsibility as a home state for the reality that the Colombian government might have violated its international human rights obligations by consenting to the CCOFTA is difficult to establish under the classical doctrine of coercion, as the Colombian government could have, during the negotiations, resist the conclusion of the CCOFTA without mechanisms for investor human rights accountability, and ultimately not sign the treaty without such provisions.

[409] J. Fry, "Coercion, Causation, and the Fictional Elements of Indirect State Responsibility" (2007) 40 Vanderbilt J of Trasnat'l L 3, 611 at 628. Fry calls Article 18 of the ILC Draft a catch-22 type of circularity of sovereignty, because for the responsibility to be shifted on to the coercing state the coerced state would have to have surrendered its sovereignty to the point of not being able to carry out the internationally wrongful act, as it would cease to be a sovereign state. He further argues that without an internationally wrongful act being found in the act of coercion itself, Article 18 digresses from the general principle that an internationally wrongful act must exist and be attributable to a state for responsibility to arise (contained in Articles 1 and 2 of the ILC Draft), as the coercing state simply did not commit an internationally wrongful act.

[410] *Ibid* at 634-639. Fry returns to Eagleton's definition to conclude that state responsibility for coercion should be differentiated, or proportionate to the restriction on the freedom of choice of another state, which should appropriately be held responsible for its own voluntary contribution.

The ILC Framework however deals with the general principle of consent as far as rights and obligations of states towards other states are concerned, leaving an open question about the effects on the law of state responsibility of the "relevance" of the "individual's free consent conferred by international human rights treaties".[411] It is precisely the responsibility for this kind of coercion against the consent of the indigenous and local communities and vulnerable and most affected populations in Colombia that this section is interested in. To address this one needs to step out of the state-state or government-government paradigm of classical international law in order to deliver a just appraisal of the forms of coercion that are enabled or even directly caused by IIAs. A useful analogy can be made with the claims of coercion made against the conditionalities prescribed to developing states by the IFIs and the subsequent modification of these institutions' programs to what has been termed the "new face of conditionality".[412] Recently, as Celine Tan explains, in order to restore their legitimacy, the IFIs policies "moved away from coercion and compulsion" of developing states' governments, towards the so called "consensual conditionality" whereby developing states' governments are "active owners, partners and participants" in the "negotiations and decision-making" concerning their loans, credits or aid, thus "resulting in a situation where external intervention is not exercised through coercive financing terms" but with the active involvement of the developing states' governments.[413] An almost identical change in paradigm can be observed in the developing states' attitude towards FDI and IIAs in the sense of their voluntary internal regulatory restructuring and active involvement to attract

[411] ILC *Draft Articles*, Commentary under Article 20 *supra* note 265 at 165.
[412] C. Tan, "The new disciplinary framework: conditionality, new aid architecture and global economic governance", in J. Faundez and C. Tan, eds., *International Economic Law, Globalization and Developing Countries* (Cheltenham: Edward Elgar, 2010) at 122-4. On the reaction of developing states to the policies prescribed to them by the IFIs and conditions attached to the granting of loans and credit programs, as well as their impact on the economic and social security of the developing world see A. Orford, "Locating the International: Military and Monetary Interventions after the Cold War" (1997) 38 Harv Int'l LJ 2.
[413] Tan *ibid* at 123-4.

foreign investors. It is beyond doubt that the government of Colombia lobbied for the conclusion of the CCOFTA as much as Canadian investors. The principal problem then seems to be the tacit acceptance of the "lack of deliberative democracy" and the non-representativeness in developing states' consent given to international commitments that ignore the often devastating effects on the most vulnerable and generally under-represented local communities in the developing world, for the reason that "the ruling classes in the Third World are comfortable" with this formalistic approach to international treaty-making.[414] Present day economic coercion can therefore be seen as being exercised by the governments of developing states themselves, 'in the name of economic development' and against under-represented minorities, local communities and indigenous peoples, a phenomenon labeled "development aggression"[415], and has led to efforts to use international law to counter this trend.[416]

A pertinent analysis in this regard is given by Robert Dufresne, who examines in causal terms the interplay between the doctrine of PSNR, MNC rights created by petroleum agreements between a corporation and the host state, and the complex forms of violence in

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[414] Chimni *supra* note 402 at 16.

[415] C. Doyle and J. Gilbert, "Indigenous Peoples and Globalization: From "Development Aggression" to "Self-Determined Development" (2009) 8 European YB of Minority Issues 219, at 224. As the authors explain, ruling elites in the developing world continue to treat the rights, property and very existence of under-represented minorities and indigenous peoples as "sacrificial lambs" in the pursuit of "national" economic development. Most importantly, this is carried out through explicit regulatory and legislative instruments, including international legal commitments, either IIAs or host state-investor contracts, concessions and joint ventures, serving as justifications for forced evictions from traditional native lands, dispossession and participatory marginalization of these groups. At 225-8. For a consolidated review of literature on the issue of role of the host state in enabling corporate interference with indigenous property rights and land claims see L. A. Miranda, "The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability under International Law" (2007) 11 Lewis & Clark L Rev 135 especially works cited in footnotes 14-16.

[416] As one renown legal scholar noted two decades ago: "the wealth and natural resources of a country can be spoliated as thoroughly and efficiently by a native as by a foreigner". W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law" (1990) 84 Am J Int'l L 866 at 872. On the struggle of indigenous peoples and under-represented minorities to use international law to combat economic oppression, see generally M. Stewart-Harawira, *The New Imperial Order: Indigenous Responses to Globalization* (London: Zed Books, 2005); J. Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (New York: Transnational, 2006);

host states associated with oil extraction in resource rich countries, such as Colombia.[417] Essentially, Dufresne discusses how international legal doctrines, such as PSNR, are instrumental for the creation of investor rights by the host state, that thereafter become opposable *erga omnes*, most notoriously vis a vis the local population of the host state, which is carried out by the state in the form of repression and criminalization of civil resistance, dissatisfaction and protests against investment projects.[418] From this perspective, "corporations do not simply find themselves in various situations of internal violence that are entirely external to their activities and to their impact on domestic polities [but] become a means for the pursuit of local political objectives and a significant, if not central, stake in conflicts."[419] Building on the work of Thomas Pogge who has labeled the principle of PSNR "the international resource privilege" of governments, that is "the power to confer globally valid ownership rights in the country's resources"[420], Dufresne explains that coercion surrounding the "violent schemes of oil exploitation" is rooted in the orthodox application of the doctrine of PSNR which transforms the sovereign rights and prerogatives of peoples and those groups that are excluded from the process of international law, into a privilege of minority ruling elites.[421] Basically then, host state governments, operating in a "representational gap" in terms of consent by local and indigenous peoples to investment on or involving their lands, remain locked in a cycle of systemic violence which can assume many forms and involve many actors including the state military or police apparatus, private corporate security and rebel or insurrectional groups seeking to enforce civil dissatisfaction

[417] R. Dufresne, "The Opacity of Oil : Oil Corporations, Internal Violence and International Law" (2004) 36 NYU J Int'l L & Pol 331. Dufresne uses specifically the example of the US Occidental Petroleum Corporation's pipelines in Colombia which have repeatedly been the target of military attacks by rebel groups, or a financier of the state's army repression against 'rebels'. At 344-5.
[418] *Ibid* at 349-355.
[419] *Ibid* at 346.
[420] See T. Pogge, "Priorities of Global Justice" (2001) 32 Metaphilosophy 6, 21. Cited in *ibid* at 357.
[421] Dufresne *supra* note 417 at 356-7.

with investment projects or seize power over the government's resource privilege.[422] Thus the blind adherence on the "sanctity of the principle of PSNR", used by corporations to seek enforcement (often military or police protection of property or assets) of their property rights against local populations, "consolidates the externalization of coercion from among the immediate contractual parties, to parties external to the so-conceived contractual relationship."[423] Ultimately the MNCs "embedded in the contractual formation and the rights created therein, derive automatically an entitlement to full enforcement of the rights validly created under [international agreements]. However, when the actual enforcement of contractual rights and its modalities are at stake, corporations immediately portray themselves as uninvolved or neutrally caught in a domestic political struggle. This combination allows them to claim that the rights they hold are valid *erga omnes* and enforceable, while remaining separate from and unaccountable for the violence involved as part of the concrete conditions of their enforcement."[424]

This conceptualization of the interplay between the 'invalid' consent given by the host state government and the 'marginalized' consent of the indigenous populations sheds a different light on the dynamic of human rights violations associated with investment projects in the host state and, in causal terms, the international responsibility of the home state. As one scholar argues, what has become a 'classical' discourse when analyzing corporate human rights violations in the host state, can be seen as a "second tier" of rights violations, which is

[422] *Ibid* at 335-345; 356-9. Dufresne discusses several types of violence associated with oil exploitation in resource rich countries, including but not limited to repression or criminalization of civil resistance by the host state government, the use of oil rents to finance authoritative regimes or conflict between the government and rebel or insurrectional groups and targeting of oil investment projects by paramilitary forces for various reasons. As explained in section 1, there are many forms of violence that can be triggered, enabled or perpetuated by the presence of MNCs in resource rich countries, which raise issues in terms of state responsibility.
[423] *Ibid* at 362-3.
[424] *Ibid* at 349.

directly or indirectly caused by a so-called "first tier" of rights violations, stemming from the breach of the state duty to obtain the FPIC of indigenous peoples and local populations.[425] This commonly discussed second tier of violations, in the order of killings, extrajudicial kidnapping or executions, detentions and physical violence perpetrated by private corporate security, state or paramilitary forces, is in fact a direct product of "first-tier property violations", manifested through various forms of interference with the property of local and indigenous populations without their consent by the host state government or MNCs backed by treaty-created property rights.[426] "When human rights violations associated with major [investment] projects—forced displacement, use of physical violence, starvation, environmental degradation, poor labor conditions—and the triggering of violent opposition are integrated in the picture, what is presented as the defense of property rights against such opposition or as the policing of criminals can easily be recast as a state-and corporate-backed attempt to suppress human rights claims." [427] Disrespect for indigenous and local communities consent thus presents itself as the root cause of MNC or FDI associated human rights violations, and its regular occurrence is in the form of investor non-regulation to obtain the FPIC of local populations.

The implications from this analysis for the responsibility of the home state are not difficult to discern. The mere existence of an IIA in place between the home and host states can be seen as pressure on the host state to resort to coercion and violence towards its most vulnerable groups in order to honor its obligations towards foreign investors. This is particularly true, as Dufresne argues, "in situations where [investment projects] are constitutive of the conflict,

[425] S. Khawaja, "Corporate Free Market Responsibility: Addressing Rights Violations with a Fiduciary Duty Approach to Natural Resource Extractions in Weak Governance Zones" (2008) 3 Brook J Corp Fin & Com L 185, 189-193.
[426] *Ibid* at 191. See also UNHCHR report on displaced persons in Colombia *supra* note 4 making the same conclusions about forceful dispossession and relocation of communities in Colombia.
[427] Dufresne *supra* note 417 at 369.

[which] creates a dilemma for state authorities: continue to ensure undisturbed [investment revenue], at the cost of social peace, or pay heed to the resentment of affected people, at the cost of being sanctioned for violating their duty to protect the assets and property interests of [MNCs]."[428] In this equation, the home state and IIA stand as "insurers" minimizing the risk for corporate interests, which are ultimately "assumed by the local population, either in physical terms (violence, forced displacement, etc.) or materially, through the imposition of a financial burden on the central government of the [host] state".[429] This reality in the economic power and bargaining inequality between the home and host state is classically overlooked in IIA negotiations, based on the doctrines of PSNR and sovereign equality of states. More importantly, the reality that these factors are external to and outside the control of the host state would suggest that responsibility for rights violations, resulting from the cycles of violence triggered by the disregard for indigenous and local peoples' consent, cannot be placed on the host state that could not have influenced it. In causal terms, violence and rights violations associated with FDI might appear as 'business as usual' or not an exceptional state of affairs for the host state government, or even the local populations, but remain a political choice of the home state to allow such occurrences by avoiding to regulate its investors. Much like the corporation in Dufresne's analysis, the home state relies on an unduly formalistic and orthodox reading of international legal doctrines in the creation of investor rights in IIAs, only to distance itself as a neutral and external factor to the violence

[428] *Ibid* at 386.
[429] *Ibid* at 388. Dufresne discusses at some length the 'informal' and usually not overt pressure on the host state government when economically powerful institutional actors, such as the IFIs, or home state EDCs appear as guarantors of corporate investment in the host state. At 377-389. This can be paralleled with the threat of investment arbitration claims by Canadian corporations in Colombia, pursuant to the provisions of the CCOFTA that enable damages to be sought by investors in the case of internal conflict or civil disturbance affecting the assets or economic interests of the investor. The pressure on the host state to maintain investment security is even greater if one takes into account the uncertainty and inconsistency in interpretation of IIA provisions by investor-state arbitration tribunals. See section 1.

and rights violations caused by this. Intuitively, common sense causation, to return to Becker's framework, would suggest placing the responsibility entirely on the home state for reproducing, imposing and perpetuating international legal doctrines that result in rights violations in the host state. This proposition is not far from the recent developments in state responsibility in relation to the consent of indigenous peoples. The recent jurisprudence of human rights bodies, albeit clarifying the duty of the host state (not surprising given the limited jurisdiction of these bodies to receive claims against states based on nationality) to obtain the consent of indigenous peoples prior to creating rights for investors, can be read inversely to suggest that the right of indigenous peoples to give or refuse their consent to investment projects that can affect their subsistence and traditional way of life is opposable *erga omnes*, including vis a vis the home state. Thus a duty to obtain it, or to ensure that such consent is sought by and given to its investors, equally falls on the home state when negotiating IIAs. More than affecting the validity of the treaty, failing to ensure the FPIC from indigenous peoples constitutes a violation of the home state's international obligations. The home state's political choice to assume the 'representativeness' of the consent by the host state government can thus trigger its international responsibility and, if causation is applied, see it directly and independently responsible for human rights violations done by its MNCs caused by its formalistic reading of the doctrine of PSNR and state consent.

To sum up, the validity of host state consent to IIAs has recently been subject to great scrutiny by international and regional human rights bodies, that have in a sense limited it substantially with regard to indigenous peoples and other minorities whose subsistence, livelihoods and traditional life stand to be affected by large-scale investment projects. While this limitation is itself restricted to FDI substantively affecting indigenous peoples and natural resources found on or within their lands, it is particularly pertinent for analyzing the

CCOFTA, as a great percentage of investment projects by Canadian based MNCs, especially in resource extraction in Colombia, are found or intended to take place on indigenous lands. More importantly, the right of those populatons to say 'no' to large-scale investment projects now stands as an *erga omnes* right, opposable against investors and the host and home states alike. There was therefore a duty on Canada to ensure this consent is given, and require its investors to seek it under the CCOFTA. Non-obtention of indigenous consent, in itself a human right, constitutes an internationally wrongful omission on the part of both states. However, in causal terms, in the case where investor pre-establishment or property rights conflict with property rights or land titles of indigenous or local populations, Canada, as the more economically powerful negotiating partner, could be responsible for Colombia's own internationally wrongful act (the conflict between Colombia's internal law and its international human rights obligation to obtain the consent of its indigenous peoples), including any secondary human rights violations perpetrated against local communities in the course of protecting property assets or economic interests of Canadian-based MNCs.

Chapter 2
The human rights impact assessment process as an alternative to treaty-based regulation to prevent private investor human rights and environmental harm in the host state

The previous chapter discussed the legal duty of developed states to regulate investors to respect human rights through international investment agreements (IIAs) concluded with developing states. While in 2008, before the signing of the agreement, the Canadian Standing Committee on International Trade made a similar recommendation[1], the Canada-Colombia Free Trade Agreement (CCOFTA) does not contain provisions to that effect. However, due to increasing pressure from civil society in Canada about the potential negative effects of the CCOFTA on human rights in Colombia, and the political support needed in Parliament by the minority government to pass the treaty into law, the government signed an opposition-negotiated side-agreement implementing an annual human rights impact assessment (HRIA) of the CCOFTA.[2] Labeled as unprecedented and "ground-breaking in many ways"[3] this mechanism nevertheless raises a significant number of legally challenging expectations.

The first and most obvious expectation is that this process, coupled with the side-agreements on labour and environment and the institutional mechanisms of the CCOFTA itself, will allow for human rights concerns related to Canadian trade and foreign direct investment (FDI) in Colombia to be addressed.[4] Implicit in this is the expectation that the baseline

[1] See House of Commons, Report of the Standing Committee on International Trade, *Human Rights, The Environment and Free Trade with Colombia*, 39th Parl., 2nd Sess., June 2008 at 44.
[2] *House of Commons Debates (Hansard),* 40th Parl, 3d Sess, No 016 (24 March 2010); See *Agreement Concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia,* signed on 27 May 2010, entry into force 15 August 2011, available at http://www.treaty-accord.gc.ca/details.aspx?id=105278, accessed August 21, 2013 ["Side Agreement"].
[3] See statement of Hon. Scott Brison, MP, in Senate of Canada, Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade, Evidence, Issue 09, 40th Parl., 3d Sess., 17 June 2010.
[4] Statement of Hon. Peter Van Loan, Minister of International Trade, in *ibid*: given that the side-agreement is reciprocal, it certainly allows for the effects of Colombian trade and investment in Canada to be measured as well, however minimal these might be.

human rights situation in Colombia will also be addressed before any potentially negative effects from Canadian trade and FDI materialize. Second, the Canadian government believes this will allow Canada greater involvement in capacity building to foster human rights protection in Colombia by being present on the ground and directly involved in 'trade and human rights' cooperation with the Colombian government.[5] Third, in view of its structure, the expectation is that the human rights impact assessment mechanism will allow civil society and local communities from both countries to take an active role through the parliamentary annual review process and thereby contribute to identify actual effects of Canadian trade and investment in Colombia, as well as to the raise overall legitimacy of the human rights assessment process.[6] Indeed, it has been stated that it would be the responsibility of the Canadian government to ensure such participation.[7]

At the same time, despite the very fact that this is the first time a government of a developed state has committed itself legally to annually assess the effects of trade and investment flows *from its private sector* into a developing state, an even greater number of unknowns persist. In the first place, there is great ambiguity as to the legal connection between the annual reporting mechanism and the rest of the treaty, putting in question its capacity to bring about a corrective response from the governments of the states parties if a negative correlation between trade and investment is found.[8] Similarly, because of the lack of detail in the side-

[5] Statement of Hon. Lisa Raitt, Minister of Labour, in *ibid*.
[6] *Ibid*.
[7] Hon. Scott Brison, MP, statement in *ibid*.
[8] There has been a great deal of debate on these issues ever since the apparition of the HRIA side-agreement. See e.g. Canadian Council for International Co-operation, *The Canada-Colombia Free Trade Agreement Human Rights Impact Report*, Americas Policy Group Briefing Note 14 May 2012 (available at http://www.ccic.ca/_files/en/working_groups/apg_2012-05-14_brief_CCOFTA_Human_Rights_Impact_Report.pdf, accessed August 21, 2013); J. Harrison, *Conducting A Human Rights Impact Assessment of The Canada-Colombia Free Trade Agreement: Key Issues*, Background Paper Prepared for the CCIC Americas Policy Group, February 2009 (available at http://www.ccic.ca/_files/en/working_groups/003_apg_2009-02_hr_assess_of_cfta.pdf accessed August 21, 2013) ["Harrison, HRIA of CCOFTA"]; Berne Declaration, Canadian Council for International Co-operation

agreement about how the HRIA is to be done, questions arise regarding the process and methodology that will be employed, alongside questions and normative claims as to the process and methodology that *should* be employed, which remain unsettled and highly contentious.[9] Moreover, given the extraterritorial reach of Canada's new obligation[10], a central issue is to ensure that the process of the HRIA respects human rights and, equally as important, that it be used to protect human rights if it is apparent that it can be. Lastly, the question remains how and to what extent will local and potentially affected communities in Colombia be able to use this mechanism to enforce their rights, an issue that is intrinsically linked to the previous.

Since the HRIA of the CCOFTA is the first of its kind and at the time of writing the first assessment is yet to be produced, the assumption needs to be made that the process can go both ways in terms of protecting the human rights of local communities. This chapter is interested in the potential for this mechanism to be used to ensure Canadian-based investors respect human rights in Colombia.[11] It will be argued that a limited substitute for a direct investor regulation to respect human rights can indeed be achieved through the HRIA provided that it follows a specific rights-based framework. This chapter proposes how such a framework can be constructed from the point of view of home state obligations.[12] It proceeds in three sections: the first outlines the conceptual and methodological positions about what

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& Misereor, *Human Rights Impact Assessment for Trade and Investment Agreements*, Report of the Expert Seminar, June 2010, Geneva, Switzerland. ["Expert Seminar"]

[9] See e.g. Expert seminar *ibid*.

[10] This interpretation can be gained even with a casual reading of the side agreement and has been affirmed in debate over the HRIA in the Canadian Senate. See Hon Scott Brison *supra* note 3:

[11] As part of the HRIA of the CCOFTA, assessments on the side-agreements on Environment and Labour cooperation could also be relevant for the protection and promotion of human rights of local communities affected by the activity of Canadian MNCs.

[12] An attempt at a full-scale analysis of methodological issues relevant to the HRIA of the CCOFTA is beyond the scope of this thesis and in any case a purely speculative theoretical exercise. The focus is instead on the minimum home state obligations that inform the HRIA process and findings.

can the HRIA be expected to do with regard to Canadian FDI and MNC activity in Colombia; the second proposes a framework for the HRIA based on home state obligations; finally, the third section revisits the question of what investor regulation means for local communities and what options the HRIA offers for this as well as for their emancipation within the process of international law.

The discussion about the potential for the CCOFTA HRIA to influence the way trade and investment affect human rights in developing states joins a more general debate about the status, content, methodology and utility of HRIAs of trade and investment agreements that has emerged very recently.[13] This debate is fuelled by the increasing calls for HRIAs of trade and investment policies and projects made on both states and non-state actors[14], the lack of state practice in conducting HRIAs—especially on their foreign trade and investment

[13] See e.g. J. Harrison and A. Goller, "Trade and Human Rights: What Does 'Impact Assessment' Have to Offer?" (2008) 8 Human Rights Law Review 4:587 ["Harrison and Goller"]; S. Walker, *The Future of Human Rights Impact Assessments of Trade* Agreements (Antwerp: Intersentia, 2009) ["Walker, The Future of HRIAs"]; J. Harrison, *Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments,* Background Paper for the Expert Seminar on Human Rights Impact Assessments of Trade and Investment Agreements, June 23-4 2010 *supra* 8 at 22 ["Harrison, Geneva Discussion Paper"]; S. Walker, "The United-States-Dominican Republic-Central American Free Trade Agreement and Access to Medicines in Costa Rica: A Human Rights Impact Assessment" (2011) 3 J of HRts Practice 2, 188 ["Walker, DR-CAFTA HRIA"]; International Centre for Human Rights and Democratic Development, *Human Rights Impact Assessments for Foreign Investment Projects: Learning from Community Experiences in the Philippines, Tibet, the Democratic Republic of Congo, Argentina, and Peru* (Montreal: International Centre for Human Rights and Democratic Development, 2007) ["Rights and Democracy"].

[14] As noted the House of Commons Standing Committee on International Trade. Treaty monitoring bodies of international human rights instruments have also increasingly called for states to conduct HRIAs of their trade and investment policies. Cited infra. The SRSG Ruggie linked HRIAs to the due diligence obligation of corporations to respect human rights without any further elaboration on that point as a matter of legal duty. See HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 17th Sess., UN Doc. A/HRC/17/31 (21 March 2011) Principles 17-19. The most recent authoritative study on the legal duty to undertake a HRIA in the context of TIA negotiations is found in the Human Rights Council, Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, *Guiding principles on human rights impact assessments of trade and investment agreements*, 19th Sess., UN Doc. A/HRC/19/59/Add.5 (19 December 2011) ["HRIA Guiding Principles"]. The recently compiled *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* make extensive references to the state duty to undertake a HRIA for its intra and extraterritorial activities that risk to negatively affect human rights. O. de Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon and I. Seiderman, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" (2012) 34 Human Rights Quarterly 1084 ["Maastricht Principles"], Principle 14 at 1115.

policies[15] as opposed to decades of experience with environmental and social impact assessments (ESIAs)[16], and the normative, conceptual and methodological challenges encountered when undertaking a HRIA.[17] This section builds on the proposition that there is enough consensus about the characteristics a HRIA of a Trade and Investment Agreement (TIA) should possess *at a minimum* in order to be qualified as such, and then draws conclusions about the key challenges when using this conceptual framework to assess MNC activity in Colombia.

2.1 The regulatory potential of HRIAs: definition, purpose, conceptual and methodological approaches

Impact assessments have been defined as "the process of identifying the future consequences of a current or proposed action"[18] and have as such been used across a wide variety of different fields by governments and in the private sector.[19] HRIAs are the most recent addition to the larger family of impact assessments and are increasingly becoming the center of attention of the international human rights community.[20] The term HRIA "covers studies that assess impacts [of] activities that directly and intentionally aim at changing a human

[15] Apart from the isolated case of the CCOFTA, only the Norwegian government has implemented a policy requiring a HRIA of all proposed regulatory action with possible effects on a foreign country and its population. See Norwegian Agency for Development Cooperation, *Handbook in Human Rights Assessments: State Obligations, Awareness & Empowerment* (Oslo: NORAD, 2001).

[16] In fact until recently there was a debate on the international level, as well as in academia about the separate status of human rights impact assessments, or of their inclusion in ESIAs. See e.g. HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Human rights impact assessments - resolving key methodological questions*, 4th Sess., UN Doc. A/HRC/4/74 (5 February 2007) at paras 10-19; G. MacNaughton and P. Hunt, "A Human Rights-Based Approach to Social Impact Assessment" in F. Vanclay and A-M Esteves, eds., *New Directions In Social Impact Assessment: Conceptual And Methodological Advances* (Edward Elgar Publishing, 2012) arguing for combining both based on same methodology.

[17] For a good summary of these challenges see Geneva Expert Seminar 6-8.

[18] International Association for Impact Assessment, http://www.iaia.org/

[19] Harison and Goller at 588 citing Toner, "Impact Assessment and Fundamental Rights Protection in EU Law" 31 European L Rev 316 at 316; and J. Harisson, "Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment" (2011) 3 J of HRts Practice 2, 162 ["Harrison, Human Rights Measurement"] at 167-170.

[20] Harrison and Goller 588-9; Geneva Expert Seminar.

rights situation or may have unintended human rights consequences."[21] Given the context, the focus here will be on HRIAs undertaken by states for assessing the legal implications on human rights respect, protection and promotion resulting from state commitments made in trade and investment agreements (TIAs). In particular, this section points to the potential of HRIAs to influence the behaviour of both state and non-state actors alike.

A distinction is usually made between assessments of policies or projects undertaken with the purpose of affecting the enjoyment of human rights *directly* and those having an *indirect* effect. A further distinction is made between HRIA conducted before implementation (*ex ante*) of a specific action, or after a concrete effect of the proposed action materializes (*ex post*), although this distinction is somewhat artificial when dealing with government regulation (including treaties).[22] The scope of the latter assessments can potentially be endless and therefore requires a careful delimitation and linkages between what is assessed and the objective of the assessment.[23] What defines all HRIAs however is the "evidence-based nature of the exercise", which means these studies are concerned with documenting existing or speculating about likely impacts of a given action.[24] The extent to which this

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[21] Adapted from Harisson and Goller *ibid* at 588, citing T. Landman , *Studying Human Rights* (Abingdon: Routlege, 2006) at 127-8.

[22] Landman has classified HRIAs into four groups :

> *Ex ante* impact assessments of projects, programmes or activities *directly* related to human rights that intentionally seek to ensure that future activities and programmes provoke positive change to the human rights situation ; *ex ante* impact assessments of projects, programmes or activities *indirectly* related to human rights but nonetheless affecting them, such as assessments of the impact of development projects, structural adjustment projects, investments and the activities of transnational corporations, which do not intend to change the human rights situation but often do unintentionally ; *ex post* impact assessments that examine activities, projects and programmes specifically designed to affect *directly* the enjoyment of human rights with a view of studying how they fared in practice ; *ex post* impact assessment of activities, policies and programmes that have had an *indirect* impact on human rights.

Landman *ibid* at 128, cited in Walker, *The Future of HRIAs* at 6.

[23] Walker discussing Landman at *ibid*. This consideration has a great impact on the normative and methodological framework of HRIA, as discussed further below.

[24] S. Bakker et al., "Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument" (2009) 3 J of HRts Practice 436, at 442 cited in Harrison, *Human Rights Measurement* at 166.

distinction is important depends on the purpose (aim, objective) of a given HRIA that can be manifold and has been subject to debate: they can serve to "ensure compliance with human rights (of draft legislation [or treaties]), integrate human rights into policy-making, improve accountability, and facilitate empowerment"[25] The polyvalent character of HRIAs can further be deconstructed: they have the potential to equip human rights advocates with evidence-based arguments on the basis of which they can intervene in policy-making; they address human rights issues during the process of policy development and reflect on existing policy practices; they have the potential to prevent human rights violations before they happen; they can impact institutional cultures by enabling human rights mainstreaming within policymaking and influencing the attitudes of policymakers themselves; and finally HRIAs can raise awareness about human rights issues in affected communities and more widely in society thus increasing the accountability of decision-makers.[26] It can therefore be said that since their essential purpose is to produce normative statements about compliance with legal obligations of state and non-state actors, it is clear that HRIAs can have a regulatory impact by influencing behaviour in all stages of the regulatory cycle. They can thus indirectly assume a regulatory purpose albeit not being in themselves 'command and control'

[25] G. De Beco, "Human Rights Impact Assessments" (2009) 27 Netherlands Quarterly of Human Rights 2, 139 at 145-148. HRIAs can be a technical or statistical exercise by indicating a change in the human rights situation or a political process used by human rights activists or defenders to induce a change in policy-making (Geneva Export Seminar report at 7). As compliance instruments, they are widely used by national institutions to verify compliance of proposed legislation or policies with states' human rights obligations and are sometimes called 'regulatory impact assessments'. In the United Kingdom for example a parliamentary Joint Committee on Human Rights verifies compliance statements of proposed legislation by the government. De Beco *ibid* at note 18 citing J. Hiebert, "Parliament and the Human Rights Act : Can the JCHR Help Facilitate a Culture of Rights ?" (2006) 4 Int'l J Constit L, 1 at 18. The compliance aspect is discussed from the point of view of home state obligations below at section 2.

[26] Harrison, *Human Rights Measurement* at 166 citing Bakker et al. 2009 at 442; P. Hunt and G. MacNaughton, *Impact Assessments, Poverty and Human Rights: A Case Study Using the Right to the Highest Attainable Standard of Health*, World Health Organization and UNESCO Health and Human Rights Working Paper Series No. 6 at 6; De Beco *ibid* at 146.

regulation of individual behaviour.[27] In practice however, this potential is conditioned by the HRIA following a certain methodological and analytical approach—in particular HRIAs of TIAs.

HRIAs of TIAs are a very recent phenomenon with the CCOFTA being the first one to be undertaken by a government and only a handful of prior assessments of prior trade agreements undertaken in the private sector.[28] Essentially, an HRIA of a TIA "seeks to assess how *the legal obligations of that agreement* will affect (negatively and positively) the human rights of people in the States concerned".[29] If framed in such general terms, this has profound implications for the structure and methodological approaches of such an assessment, as well as for its regulatory potential. First, as a purely legal analysis, a HRIAs of TIAs should examine the compatibility of the TIA provisions with the existing human rights commitments of a state identifying potential normative conflict.[30] HRIAs are concerned with the international human rights instruments ratified by a given state as well as those of customary international status thus covering a vast regulatory area. Second, the HRIA should examine the impact of the new provisions on the state's capacity to promote and fulfill human rights. Since most TIAs affect human rights only indirectly that is by reducing state policy space to implement rights-promoting regulation, the HRIA should look for potential

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[27] See J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (New York: Cambridge University Press, 2006) at 35 on the classical conceptualization of home state regulation of corporate conduct as 'command and control' legislation backed with sanctions.

[28] Harisson and Goller at 604-5; Walker, *The Future of HRIAs* at 6-7; Harrison, *HRIA of CCOFTA* at 3-5. Of interest are the 2006 Thai Human Rights Commission HRIA undertaken prior to signing an FTA with the United States, the 2007 Ecumenical Advocacy Alliance study titled "Trade Policies and Hunger: The Impact of Trade Liberalisation on the Right to Food of Rice Farming Communities in Ghana, Honduras and Indonesia", Ecumenical Advocacy Alliance, 2007 ["EEA Study"] and the International Centre for Human Rights and Democratic Development, *Human Rights Impact Assessments for Foreign Investment Projects* (Montreal: Rights and Democracy, 2007) ["Rights and Democracy Study"], all discussed in Harrison and Goller *ibid* at 603-7. In addition, Walker's assessment of the impact of the Costa Rica-US FTA intellectual property provisions on the right to health also offers useful analogies for the discussion below. Walker, *DR-CAFTA HRIA*.

[29] Harrison, *HRIA of CCOFTA* at 3, emphasis in original.

[30] See HRIA, Guiding Principles *supra* note 14 at 5.

normative incompatibilities resulting out of the implementation of incompatible international obligations.[31] Third, the HRIA should examine any limitation (or augmentation) of the state's capacity to protect and promote human rights for its population from third parties such as private corporations.[32] The 'effectiveness' of HRIAs of TIAs is therefore measurable by the extent to which they induce state compliance with their international human rights obligations and strengthen rights protection and enjoyment for their citizens. In practice however, since both the obligations found in human rights instruments and TIA provisions are cast in general terms and are open to interpretation[33], the utility of HRIAs depends very much on them being a neutral technical exercise culminating in easily identifiable findings that allow for normative judgments to be made about a particular course of action in governmental economic policy whose strength in turn depends on the methodology and analytical approach employed in the HRIA.[34]

Although it is not the purpose of this study to discuss in detail particular methodological approaches for HRIAs, it is useful for the discussion below to identify the key steps in a HRIA. There appears to be a general consensus that HRIAs of TIAs should, at a minimum, consist of the following steps: screening, scoping, evidence gathering, analysis and

[31] *Ibid*; Geneva Expert Seminar at 7. An example would be the state's inability to put in place programs for agricultural subsidies or benefits for a percentage of its population whose livelihood depends on farming or agricultural production.
[32] HRIA Guiding Principles *ibid*; Walker, *DR-CAFTA HRIA* at 193.
[33] See for example the 10 categories of positive and negative impact of trade agreements on human rights dicussed in Walker, *The Future of HRIAs* at 61-86 and Geneva Expert Seminar at 14-5.
[34] Harrison and Goller describe HRIAs of TIAs an important instrument for external social justice critique of choices made in economic policy that underpin the legal clauses of TIAs. *Supra* note13 at 591-2. Most experts agree that HRIAs of TIAs should in themselves be a technical exercise allowing for political conclusions based on the normative content of human rights obligations to be made only after the technical assessment process. See Harisson, *HRIA of CCOFTA* at 6; Geneva Expert Seminar at 7. Predetermined ideological positions may undermine the utility of the whole process and, as discussed in section 2 below, could lead to states violating their human rights obligations.

production of a report with conclusions and policy-oriented recommendations.[35] Screening refers to the selection of trade measures found in the agreement likely to have an impact on the human existing rights situation.[36] The complexity of this step is highlighted by the number of measures found in a TIA with a potential impact on human rights, the generality of their terms as well as "extent of existing human rights stresses in the affected areas".[37] This step therefore involves preparing a 'baseline' study on the existing human rights situation in the area under consideration as well as developing elaborate assumptions about the likelihood of the trade provisions having an impact on the existing situation. The second step or scoping entails an elaboration of the so called "terms of reference" of the assessment, describing in as much detail as possible how the selected trade measures operate in practice, elaborating on possible scenarios of impact on the baseline situation, and developing "significance criteria" for prioritizing the assessment of a certain measure and certain impacts before others.[38] At this point so-called human rights indicators are identified and developed, describing the analytical approach of the assessment— in other words what is being measured and against what standards— and a plan is developed for the consultation and participation of the identified stakeholders.[39]

The next step consists of operationalizing the assessment by collecting evidence, analyzing compiled data and producing an initial report. The collection and interpretation of collected

[35] Harrison, *HRIA of CCOFTA* at 8; Walker, *The Future of HRIAs* at 87-88. A review of literature reveals these as the core elements of every HRIA, while some commentators also include additional steps that can be considered when undertaking a HRIA. Walker for example adds preparation (setting out the objective, focus and parameters of the assessment and identifying the stakeholders as well as the relevant administrative framework), and both Harrison and Walker include monitoring and review of the HRIA as a follow-up step. Different steps are also proposed depending if the HRIA is undertaken before or after the implementation of the TIA. It is submitted here that given these steps can be considered to be implicit in the structure of the HRIA provided for in the CCOFTA and will therefore be discussed in the context of extraterritorial home state obligations in section 2 below.
[36] Harrison *ibid* at 8 ; Walker *ibid* at 92.
[37] Walker *ibid* at 93 citing EC Handbook 2006 at 17 and George and Kirkpatrick, … FN 140.
[38] Walker *ibid* at 93-5. Harrison, *Geneva Discussion Paper supra* note 13 at 9.
[39] *Ibid*. On the importance of indicators see further in this section.

data is the crucial and probably most complex step of the HRIA as it necessitates both quantitative (statistical) data collection and qualitative research in order to deconstruct the composite interplay of economic impacts of a TIA and human rights enjoyment of the local population by collecting a 'narrative' of their lived experience.[40] Initial results are drawn at this stage by applying a cause-effect analysis to verify the collected results against the established indicators and isolate as much as possible the causal impacts.[41] In practice this proves to be a difficult exercise because obligations found in international human rights instruments, especially social and economic rights most typically affected by TIA clauses, are often difficult to translate into measurable standards. This highlights the importance of the HRIA using properly constructed indicators to explain any change in the enjoyment of human rights in reference to the TIA. Human rights indicators have been described as "quantitative or qualitative statements that can be used to describe human rights or aspects of those rights in situations and contexts and to measure changes or trends in the enjoyment of those rights over time".[42] Given the complex nature of some rights, a HRIA must at this stage have recourse to expert opinion and interpretations of international human rights instruments provided by their implementation bodies (General Comments) in order to ensure that all potential impact is disaggregated and captured by the assessment. For example, the Office of the High Commissioner of Human Rights (OHCHR) has developed a conceptual

[40] Harrison *ibid* at 10-11 ; Walker, *The Future of HRIAs* at 98 and at 103-6 discussing various methodologies used in state practice in conducting EIA and SIAs and arguing for a mixed-methodology approach in view of the nature of states' human rights obligations and the primacy HRIAs should give to the lived experiences of local communities. The importance of this approach is further discussed below in section 3 from the point of view of the local communities themselves.

[41] This step can be described as "testing the hypothesis" set out in the preliminary stage of the assessment. Conclusions are arrived at, as Harrison discusses, by exploring all of the possible alternative causes for an identified deterioration/improvement in the human rights situation identified before/after the implementation of the TIA. Harrison *ibid* at 13. An example of this would be explaining a decrease in access to affordable medicines as a result of a TIA, as discussed by Walker in *ibid*.

[42] Adapted from Walker, *The Future of HRIAs* at 106 and B.A. Andreassen and H-O. Sano, *What's the Goal? What's the Purpose? Observations on Human Rights Impact Assessment*, Norwegian Centre for Human Rights Research Notes 02/2004 at 15.

and methodological framework for translating internationally recognized human rights into measurable standards.[43] It identified four attributes for each human right (availability, accessibility, affordability and quality) and placed them into three categories: structural indicators (legal and institutional framework necessary for the realization of rights—ratification of instruments, national laws, institutions for implementation), process indicators (concrete state policies put in place to give effect to structural commitments), and outcome indicators (the concrete results explained in actual level of enjoyment of a certain aspect of a right).[44] Structuring human rights indicators in this way enables state compliance with its international obligations to be assessed "proactively", based on the continuity required for human rights protection and promotion and not by simply verifying past violations.[45] However, the complexity must be recognized when structuring impact indicators to capture the effects on a given aspect of a given right, whether by the TIA provisions or by private actors enabled by these, and therefore primacy in the process should be given to extensive, non-discriminatory participation by potentially affected local communities both when indicators are defined and when impact is measured.[46] In addition, past experiences of local

[43] See UN, IHRI, Report of the Office of the High Commissioner for Human Rights, *Report On Indicators For Promoting And Monitoring The Implementation Of Human Rights*, UN Doc. HRI/MC/2008/3 (6 June 2008).
[44] *Ibid* at paras 17-9, discussed in Walker, *The Future of HRIAs* at 107-8 and Geneva Expert Seminar at 11. As exemplified by the HRIA on the Costa Rica-US FTA, the relevant outcome indicator for measuring the FTA's impact on the rigth to health was universal access to essential medicines (a pre-defined variable) with the structural indicator being the legal protection of the right to health found in the Costa Rican Constitution and legislation (which needed to undergo amendments in order to allow for greater protection of intellectual property brought by the FTA), and the process indicator being the effect of the FTA provisions on limiting governmental policies to effectuate universal access to essential medicines (legally and economically). See Walker, *DR-CAFTA HRIA* at 198-203.
[45] Hunt and MacNaughton *supra* note 16, at 359-360.
[46] One of the major differences between HRIAs and other IAs is in their keen interest in disaggregating impact and focusing on the most disadvantaged, marginalized and poor communities that often stand to be the most affected in a discriminatory fashion from state policies. When the HRIA process is approached with this objective in mind, state human rights obligations, as interpreted in general comments of treaty monitoring bodies and by experts can be further brought down to the lived realities of local communities and marginalized and vulnerable groups. By giving a primary role to community involvement at all stages of the HRIA, governments can ensure the process of the HRIA respects human rights and, more importantly, their structure and methodology is sufficiently disaggregated to capture as many negative effects as possible and provide

communities can reveal patterns of violations or specific vulnerabilities that might lead to rights violations but would not be captured if indicators are structured in an overly rigid fashion, which re-emphasizes the importance of community consultation and participation and makes HRIA structuring a dialectic and iterative process both in respect to *what* is being measured and as to *how* it is being measured.[47]

The value of this step of the HRIA is therefore not so much in finding a violation of a specific right, but in describing in as much possible detail the change in the situation and comparing it to the universal standard as presented in the selected indicator. These findings are then formulated into policy-oriented recommendations—the final step of the HRIA. There are a number of conclusions/recommendations that could be reached and most commentators argue this step to be the real value added of HRIAs.[48] Walker for example argues that "mitigation" measures should not be considered as such by HRIAs, this term being improper given the paramount nature of human rights obligations whereby potential violations are not mitigated but avoided in the first place.[49] However, that discussion is pertinent to assessments done *ex ante* and does not fully capture the structure of the HRIA under the CCOFTA whose real value added, as argued below, will depend on making precise causal connections, as well as the use of those findings by the institutions envisaged under the CCOFTA.[50]

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redress for their impact. See Geneva Expert Seminar at 12; Harrison, *Geneva Discussion Paper* at 6 and 12; Harrison and Goller at 609.

[47] For examples on having a flexible methodology with respect to indicators see Rights and Democracy study *supra* note 13 the example of Argentina at 108.

[48] Harrison, Geneva Discussion Paper at 13 ; Walker, The Future of HRIAs at 99. For example the HRIA can recommend that the TIA be amended, that safeguard or mitigation clauses be inserted, that potential negative effects be mitigated by a side-agreement or by measures at the national level in which case obligations for technical assistance between the parties can be considered and so on.

[49] Walker *ibid*.

[50] On the importance of institutions for implementing the findings of HRIAs see Geneva Expert Seminar at 15.

It is important to note that HRIAs of TIAs undertaken by states/governments inherently carry a greater normative value as they report on state compliance with their legal obligations. In consequence, such HRIAs must be methodologically structured in a way that respects human rights and enables the state to protect the rights of individuals.[51] Indeed most commentators have discussed that without an explicit basis in internationally recognized human rights, HRIAs would have little value added over other IAs such as SIAs.[52] However, that argument can be taken further that when undertaking HRIAs as part of their due diligence, states are under a legal duty to structure the assessment so that through it they are able to protect human rights. At least two legally relevant implications flow from this: states must develop the HRIA methodology, in particular the indicators that measure impacts on the enjoyment of a certain right, so as to be able to capture all the possible impacts of a proposed TIA; and the process of the HRIA must respect human rights, in particular by respecting the principles of universality, inalienability, indivisibility and inter-relatedness of all human rights and ensuring participation, inclusion and non-discrimination of all potentially affected rights-holders.[53] A poorly constructed and executed HRIA could not only violate certain internationally recognized human rights, but if a causal approach is used could also take on the responsibility for failing to address violations originally caused by the TIA. This could also mean that states are under an obligation to choose between sometimes highly complex

[51] Walker has called this a "human rights framework" for HRIAs. *The Future of HRIAs* at 30.
[52] Walker *ibid* ; Harrison and Goller 603 ; Geneva Expert Seminar at 9.
[53] Walker discusses these considerations from the point of view of the effectiveness of HRIAs. See *ibid* at 32-35. The principle of universality, inalienability, indivisibility, independence and inter-relatedness of all human rights reflects the holistic approach to human rights, a general principle that considers all rights to be inter-related and inter-dependent. See World Conference on Human Rights, *Vienna Declaration And Programme Of Action*, UN Doc. A/CONF.157/23 (12 July 1993). The right to participate in policy decision-making is found in Article 25 ICCPR and, as discussed in the previous chapter, can in some cases harden into a state duty to obtain the consent of local communities for decisions that affect their rights. Non-discrimination, a general principle of human rights law and a right on its own, is found in both the ICCPR and ICESCR as well as many other international rights instruments such as CEDAW.

human rights indicators in order to capture the real effects of a TIA. However, since there is no universal set of indicators used to measure the changes in the baseline rights situation[54], and that the due diligence principle translates into a 'best efforts' obligation leaving states a margin of reasonableness to adjust their approaches to human rights protection, it becomes paramount for states to follow a human rights framework when structuring HRIAs to allow at a minimum for broad and non-discriminatory participation from local communities at all stages of the assessment. Given the highly sensitive structure of the HRIA of the CCOFTA, this argument is further explained in the following section from the perspective of home state obligations.

To sum up, HRIAs of TIAs evaluate the compliance of states with their international law obligations when negotiating and implementing economic agreements. From one point of view their 'regulatory' strength can be seen in their potential to be used as tools that bring governmental action in line with universally recognized human rights standards. On the other hand, it is argued here that state obligations to consult and include local communities and affected individuals in the HRIA process itself possess a regulatory potential, particularly in the context of assessments with an extraterritorial scope (such as the one concerning the CCOFTA), which nonetheless pose specific legal challenges to establish such a duty on the home state. This is further explored in chapter 3 below.

[54] Human rights experts debate on the usefulness of having a common set of rights indicators that could then be adopted by governments and adapted and applied to various scenarios. See Geneva Expert Seminar at 11. However, most commentators agree that only a framework is necessary, pointing out to the principles to be followed when choosing and structuring human rights indicators and leaving a margin for states to adapt the HRIA to the specific baseline situation. See Walker, *DR-CAFTA HRIA* at 199; Harrison and Goller at 609.

2.2 Assessing the human rights impact of investment protection clauses and investor activity: options and challenges for the CCOFTA

HRIAs of investment agreements are very different from assessments of agreements that focus on trade in goods, services and intellectual property protection. While in principle IIAs could be said to operate in a similar way to trade agreements in restricting state policy space to protect and promote human rights, their primary concern is the creation and protection of individual rights for foreign investors.[55] Thus an HRIA of an IIA might for example analyze how a stabilization clause conflicts with human rights protection and promotion at the normative level (*de jure*), or in practice (*de facto*) when a host state government is curtailed from implementing a certain legislative or regulatory instrument that it otherwise would.[56] An example more central to this discussion would be the idea of using HRIAs to evaluate the impact of IIA provisions that lead to increased investment (in particular the possibility of using investor-state arbitration) from foreign MNCs that might then commit or become complicit in human rights violations or environmental damage.[57] In both scenarios however, the HRIA would have to try to resolve extremely complex issues on causation while working with (at least two) assumptions: pinpointing a particular stabilization clause as the primary (or most significant) cause of the failure to legislate to protect human rights, and in the other example pinpointing the benefits of investor protection offered by the IIA itself as the cause for increased investment or presence of a particular firm.[58] Moreover, a HRIA of an IIA is

[55] See chapter 1 for a discussion on how IIAs may cause or enable human rigths violations in host states.
[56] Harrison, Geneva Discussion Paper at 19. The final qualification is open-ended because a government might seek to balance out the redistribution of income, revenue, tax etc. through an instrument that would not be prima facie human rights related but might nonetheless have such an underlying purpose or intended effect.
[57] Adapted from Harrison *ibid*. On the various ways in which MNCs can cause, commit or become complicit in human rights violations or environmental damage see the first chapter of this thesis.
[58] Harrison *ibid*. Some of the HRIAs conducted by civil society have been limited to pointing to the *overall* positive or negative impact the presence of a company has had in a particular sector of the economy or the society in the host state. See for example conclusions about the negative human rights impact from company

not an assessment of the investment projects or investors' behaviour per se, but an assessment of the agreement's impact on state performance to protect and promote human rights. Importantly, this means that the HRIA would also be *indirectly* evaluating investors' respect for human rights as well as the state performance in human rights protection even in the absence of the IIA. Several implications arise from this for the HRIA of the CCOFTA.

As it presently stands, the CCOFTA's HRIA is an annual report, prepared by the Canadian and Colombian cabinet minister for international trade and presented to the Canadian Parliament and the Colombian Congress for debate.[59] It therefore qualifies as an ongoing assessment of the effects of the CCOFTA on human rights in Canada and in Colombia as long as the treaty remains in force. Although not strictly falling under the description *ex ante* assessment, if understood as an assessment prior to the start and completion of the CCOFTA negotiations (such as recommended by the Canadian CIIT), the current HRIA could be described as an *ex post* assessment. However, if the term *ex ante* is understood in a wider sense to mean assessment prior to the implementation of the agreement, the HRIA of the CCOFTA can be described as having a mixed approach if 'implementation' is understood as each time a foreign investor makes use of the treaty-created rights.[60] This could be seen as a disadvantage of the HRIA process but it could also be quite useful for providing relevant data about real impacts of actual investors instead of basing the assessment on hypotheses.[61] Moreover, this dynamic of the HRIA of the CCOFTA offers unique opportunities for

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presence in a mining region in the Philippines in Rights and Democracy *supra* note 13 at 53-4 ; also for e.g. Inter Pares, *Land and Conflict Resource Extraction, Human Rights, and Corporate Social Responsibility: Canadian Companies in Colombia Study* (Ottawa: Inter Pares, 2009).

[59] Article 1 of the Side Agreement *supra* note 1.

[60] Adapted from Walker's definition of *ex ante* and *ex post* HRIAs of trade agreements in *The Future of HRIas* at 86-7.

[61] To some extent data is already available as Canadian firms have been investing in Colombia before the ratification of the IIA, and concerns have been noted about them causing or becoming complicit in human rigths violations in some regions. See Inter Pares study *supra* note 58. This also adds a layer of difficulty for the HRIA making clear attribution and causation links. See below.

providing redress for rights violations, a point discussed further below. It is useful to briefly review the main steps of such an assessment.

Writing in the context of an ex ante assessments, Harrison has proposed that a HRIA of the human rights impacts of Canadian-based MNCs in Colombia should be based on at least nine methodological steps.[62] The first step would consist of mapping the baseline situation, including relevant human rights law, and identifying key communities and other groups whose human rights are most likely to be endangered by the provisions in question. For Colombia, this would inevitably require the HRIA to at least superficially evaluate the human rights protection offered by the state, in other words assess the compliance with its international obligations—an exercise that could be seriously impeded in conflict zones.[63] This step would also require, when preparing a baseline report on the state duty to protect, an identification of the type and extent of rights violations committed by investors already operating in the country. The next step involves an interpretation of the provisions of the IIA and comparison with similar provisions in other IIAs. This exercise serves a double purpose: identify the extent of host state policy space that is reduced by the IIA provisions, and identify, by analogizing with past/existing examples from other IIAs.[64] An advantage of the assessment of the CCOFTA is that it allows for these hypotheses to be tested on an annual

[62] Harrison Geneva Discussion Paper at 13-4. These steps are regrouped and adapted to reflect the mixed nature of the HRIA under the CCOFTA.

[63] For some of the methodological challenges for HRIA of investment in conflict or militarized zones see Rights and Democracy Study *supra* note 13 at 69-70 discussing the assessment of the human rights impacts of a railway project in Tibet and obstacles encountered when collecting data on the ground. Whether or not the impact on human rights of the conflict situations themselves should make part if the baseline study, or first step of the HRIA, depends on the assumption that FDI will occur or that MNCs are active in conflict zones and could also require an analysis under international humanitarian law rules.

[64] For example, the provisions of the North American Free Trade Agreement (NAFTA) are usually taken as a standard for comparison of the newer model IIAs, such as the Canadian Foreign Investment Protection Agreement (FIPA) template on the basis of which the CCOFTA investment chapter was negotiated. Experience with investor-state arbitration under the NAFTA, but also under other IIAs based on this model, are also taken into account especially by experts to show the potential of likely impacts of the IIA on human rights in the host state. See House of Commons Standing Committee Report *supra* note 1. See also discussion in chapter 1.

basis—that is it provides fertile ground for the 'usual suspect' clauses of IIAs to be tested for human rights impact, while also compelling the discovery of other provisions that might potentially have an impact. At this stage, human rights indicators should be developed according to the identified baseline conditions in rights enjoyment of the selected groups. The importance of constructing flexible indicators was already discussed in the previous section. This step of the HRIA should therefore adopt an affected community approach and select and adapt rights indicators to any rights violations already taking place on the ground, as well as those rights and aspects of rights standing the highest risk of being affected by increased MNC presence.[65] The next step would then be to document the increase (or decrease) in rights violations after the implementation of the agreement, bearing in mind the conceptual disambiguation made above regarding the meaning of 'implementation' in this context that could be central to identifying the impact of, for example, establishment clauses.[66] The following step is the most difficult one and consists of the HRIA causally linking the investment protection provisions with the increase in investment flows and with the actual presence of a MNCs and documented increase in rights violations. Of course, this would appear as straightforward where MNCs are found to have directly caused or contributed to rights violations that are immediately apparent (e.g. right to property, right to freedom of assembly, right to freedom of expression etc.), but has proven to be an immensely difficult exercise with complex rights such as health, food, community self-determination etc.[67] Finally, the HRIA makes recommendations about how the provisions of

[65] See Rights and Democracy study throughout.
[66] Pre-establishment or establishment rights are usually offered to investors to protect their assets during the exploratory stage of the investment project and before actual physical investment is made in the host state. See chapter 1. Local community protests against the presence of a certain foreign MNC are a paradigmatic example of MNC-caused rights violations often before the investment project itself has started.
[67] See Rights and Democracy study. See also Walker, *DR-CAFTA HRIA* at 202. The Costa Rican HRIA proceeded in 3 steps to verify, in causal terms, the impact of the intellectual property protection clauses of the

the IIA should be changed in order to prevent rights violations (or provide redress[68]). In the instant case however, it is highly improbable that the HRIA will conclude with recommendations, including such for direct investor regulation by the home state or at the international level (in a side-agreement).[69]

A number of conceptual points can be made from this overview about the general framework of the HRIA of the CCOFTA. While an *ex ante* assessment would inevitably have to make assumptions about the predicted increase in FDI, and hence MNC activity, as a result of the investor protection clauses in the IIA, the CCOFTA HRIA has the advantage of being able to capture Canadian FDI that is already present in Colombia (via the baseline study) and that will occur post ratification. The side-agreement on the annual HRIA could also be read more broadly to capture the effects of the CCOFTA *prior* to its negotiations and ratification, that is to asses the implications for the enjoyment of human rights by local communities arising out

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US-CAFTA DR on the right to health of local communities. First, it documented changes in the legislative and regulatory framework that were required in order to extend the length of exclusivity of patents of certain medicines; second it undertook economic modelling to predict the likely impact on prices of medicines determined to fall under the list of universal medicines on the government list ; and third it proceeded to do a legal analysis of the impact on the enjoyment of the right to health as affected by the change in prices of essential medicines with the relevant outcome indicator being the percentage of local population forgoing access to universal medicines. However, although this would be the most straightforward example of a failure in the state duty to protect human rights, violations might occur in other aspects of rights protection such as acceptability or affordability of certain medicines. See OHCHR *supra* note 43 on the complex challenges when structuring rights indicators.

[68] The question if remedies for local communities suffering environmental or human rights damage from foreign investors should be provided within the IIA itself is a complex one. As a basic principle of international human rights law it is always the territorial state that provides remedies/compensation for rights violations. However, if the responsibility for the violation is shared between the home and the host state a case could be made that remedies should be borne equally by both states, or that the home state should at the very least allow or cooperate to provide human rights victims judicial with recourse for violations occurring from TIA-enabled human rights or environmental harm when the home state was aware of the risks of its activity contributing to the materialization of such harm. For this line of reasoning see Principles 14 and 37 of the Maastricht Principles cited in *supra* note 14 pp. 1115-6 and 1160-4.

[69] The second Canadian Annual Report concludes that "[i]t is not possible to establish a direct link between the CCOFTA and the human rights situation in Colombia." See Canada, Department of Foreign Affairs and International Trade, *Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia for the period August 15, 2011 to December 31, 2012*, submitted in the House of Commons on June 14, 2013 (available at http://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/rep-hrft-co_2013-dple-rapp.aspx?lang=eng#cn-cont, accessed August 21, 2013).

of the vast array of deregulatory measures undertaken by the Colombian state to attract foreign investors and convince the Canadian government an TIA is feasible with Colombia.[70] Understood in this wider sense the HRIA should also assess the process of negotiations and ratification of the CCOFTA itself, especially the absence of consultation and in some cases local community consent for granting property and other protection to Canadian investors.[71] The HRIA would thus provide statements about home state involvement in the negotiations process that could have significant implications for *directly* attributing a degree of state responsibility for violations caused or enabled by the investment protection clauses, and *indirectly* influence recommendations about options to prevent or remedy such violations by investor regulation.[72]

This only further highlights the complexity of issues of attribution and causation the HRIA can encounter. Changes in the human rights situation can come from a variety of sources and each of these can have a different degree of impact on a particular aspect of a human right.[73] In addition, certain rights violations can take time to materialize, which might further blur the ready identification of responsible agents. The main challenge of HRIAs of IIAs is therefore to identify as many possible sources responsible for the change in the baseline rights situation and make clear statements about the nature and degree of attribution of

[70] See chapter 1 of this thesis on key deregulatory measures undertaken in Colombia prior to the CCOFTA. The HRIA could also be able to produce normative statements about the state compliance with its international legal obligations at the baseline level, that is, prior to the implementation of the IIA.

[71] This was one of the hypotheses considered under the Costa Rican HRIA. See Walker *DR-CAFTA HRIA* at 193-5, namely that the "process of negotiation, adoption and implementation of the [FTA] failed and continues to fail to respect the right [of local communities] to take part in the conduct of public affairs."

[72] For comparison, Costa Rica had to implement a number of deregulatory measures prior to the negotiations of the DR-CAFTA and the implementation act in the US was conditioned upon the president issuing an official approval of the Costa Rican implementation laws and regulations. Walker, *DR-CAFTA HRIA* at 191. When approached by the Costa Rican delegation about potentially negative effects on human rights of intellectual property protection under the Costa Rican FTA, US negotiators retorted that they were negotiating a FTA and that human rights are a separate issue not part of this process. *Ibid* at 205. On the issue of joint but separate state responsibility and attributing degrees thereof, see chapter 3.

[73] Andearsen and Sano *supra* note 42at 12 ; Harrison *HRIA of CCOFTA* at 7.

responsibility for each source. This is primarily achieved by defining rights indicators sensitive enough to capture the effects from multiple sources and flexible enough to allow for their disaggregation. In practice however, there is no universal approach as defining indicators usually involves striking a balance and making "trade-offs made differently by individuals with different values, and collectively through the political process", which exposes the HRIA process to the risk of assuming a quasi-judicial function and stepping in the place of local communities to make such choices.[74]

Finally, the inclusion and active participation of locally affected communities thus becomes the central and most crucial element of every state-conducted HRIA, at all stages of the process. While the international law obligations to ensure the participation of locally affected communities are examined in the third chapter, it is important to underscore at this point the potential of the annual HRIAs for assessing the work of Canadian-based MNCs. Strictly speaking, the subject-matter of analysis of the annual HRIA are the provisions of the trade and investment agreement whose conclusion and negotiation are an exclusive state activity. The fact this state activity creates private rights for investors in the host state suggests that the activity of such non-state actors should fall under the scrutiny of the assessment indirectly and insofar that it is implicitly enabled by the language of the treaty. However, establishing the connection between the actions of the private actor in reference to the baseline situation, and human rights or environmental harm suffered by local communities in the host state would require a very robust framework for participation of local communities in the HRIA in order to deconstruct the connectors of attribution and causality. An additional layer of complexity emerges from the fact that, even if taken up in the HRIA process, as a

[74] C. Kirkpatrick and C. George, "Methodological issues in the impact assessment of trade policy : experience from the European Commission's Sustainability Impact Assessment (SIA) programme" (2006) 24 Impact Assessment and Project Appraisal 4 :325 at 329.

general principle of human rights law, the assessment would treat the MNC violation from the perspective of the primary responsibility of the host state to protect. In order to extend the chain of causality from the private violation to the conduct of the home state the HRIA, if done unilaterally by the home state, must include a comprehensive participation from local communities from the host state in order to deconstruct and identify host/home state causation and levels of responsibility. Arguably, the fact the annual HRIA is subject to parliamentary scrutiny in Canada does, at least theoretically, offer a possibility for such participation.[75]

[75] As noted above, Canadian House of Commons and Senate Standing Committees have heard from witnesses in Colombia on the annual HRIA.

Chapter 3
Home state obligations regarding the purpose and content of the annual report on human rights impacts of the CCOFTA

At first glance, the side agreement implementing a yearly HRIA of the impacts of the CCOFTA on human rights seems to grant the state parties unlimited discretion with how this mechanism will be structured, what purpose it will serve, how the process of data collection and analysis will be conducted, as well as in what direction will the research be led and what ends will its outcomes serve.[1] Indeed, nothing in the side agreement concerning the annual HRIAs of the measures taken under the CCOFTA, or in the first Annual Report produced by the Canadian Government would lead to suggest an international law obligation to undertake such an assessment or with regard to its structure and methodology. Admittedly, quite the contrary could be concluded given that the Side Agreement on annual reports is open to amendments and termination at the discretion of the state parties and upon simple notification of the other party.[2]

This section proposes that notwithstanding the actual wording of the Side Agreement, a body of positive international law obligations does in fact attach to the HRIA mechanism and determine the expected conduct of Canada as the home state of FDI and thus potential human rights harm in Colombia. This central argument revolves to a significant extent around the transnational nature of the proposed HRIA where a properly conducted assessment satisfying to the international obligations of the home state would require a certain degree of

[1] *Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia*, signed 27 May 2010, entered into force 15 August 2011 ["Side Agreement"] Article 1.
[2] See Articles 4 and 5 of the Side Agreement. As regards the structuring and methodological approach, the first Annual Report makes no mention of existing international human rights or general law obligations. See Canada, Department of Foreign Affairs and International Trade, *Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia*, submitted in the House of Commons May 15, 2012 (available at http://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/rep-hrft-co_2012-dple-rapp.aspx) ["First Annual Report"] at 4-5.

extraterritorial action from Canada, further reinforcing its duty and power to protect human rights from IIA-enabled private violations. Specifically, this section proposes that in the context of transnational HRIAs of IIAs, home state obligations pertaining to the *status* (*ex ante*, *ex post*), *purpose* (transnational harm prevention), *content* (development of methodological indicators), *process* (engagement with local affected communities), and *outcome* (protection against transnational human rights and environmental harm), can be answered by reference to general principles of international law that inform concrete state obligations found in international human rights and environmental law. In line with the overall objective of this chapter, this section attempts to characterize the potential for *legal* regulation against MNC violations of human rights in developing host states by including HRIAs into IIAs.

3.1 Assessing transnational human rights harm in the annual report: jurisdictional issues

As a preliminary matter, it is important to conceptualize, in legal terms, the status of the annual HRIA of the CCOFTA. As mentioned above, the HRIA presents as a treaty obligation, implemented separately and individually by each state party. [3] Although cooperation as to the implementation of this obligation is provided for under Article 2 of the Side Agreement on Annual Reports, the understanding is that each state would undertake its own individual assessment of the impacts of the CCOFTA on human rights in both states and submit it to the scrutiny of its national legislature. It would appear from the first produced Annual Report that no cooperation took place between the state parties to the Side Agreement concerning the mapping of the methodological or normative legal framework that

[3] See Article 1 of the Side Agreement at para 1: "*Each Party* shall provide a report to *its* national legislature.." and at para 2: "*Each Party* shall make *its own* report public." (emphases added).

will be used for future Annual Reports.[4] Admitting provisionally that both states intend to undertake a comprehensive assessment of the effects of the CCOFTA trade and investment measures in good faith, it is unconceivable how a unilateral HRIA following the general framework discussed in the previous section would take place without significant cooperation from the other party without it interfering with the principle of state sovereignty.[5] Since state commitments found in treaties are to be interpreted in good faith, the presumption can be made that the intention of the parties in this case was to grant state consent to such cooperation and potentially an invitation for the other state or its agents to enforce that state's obligation under the Side Agreement on the territory of the other state.[6] Indeed, an intention to consult "stakeholders" about the Annual Report and its methodology is clearly stated in the first Annual Report produced by the Canadian Government.[7] The lack of precision in the Side Agreement therefore invites to consider Canada's obligation as potentially having an extraterritorial reach, at least as regards the fact finding, data collection

[4] See First Annual Report; See also Testimony of Ms. Kerry Buck, Political Director and Assistant Deputy Minister, International Security, Africa, Latin America and the Caribbean Branch, Department of Foreign Affairs and International Trade, in House of Commons, Standing Committee on International Trade, *Evidence*, No. 042, 41st Parl., 1st Sess., 7 June 2012 at 1140-1145.

[5] The implication is that in order to properly implement their obligation under the Side Agreement, each state would need to engage in extensive data collection, fact finding and consultation with local communities directly, via agents of the implementing authorities designated in the Side Agreement itself (the Department of Foreign Affairs and International Trade on the Canadian side, and the Ministry of Foreign Affairs of Colombia). Alternatively, the state parties may decide to rely on information provided by the other state (or even investors themselves) for its Annual Report. Indeed as this is standard practice regarding domestic environmental impact assessments, this may put into question the state compliance with its due diligence obligations arising under the duty to prevent transnational harm. See further discussion in this subsection.

[6] 'Enforcement' in this context is taken to denote "the power to take executive action in pursuance of or consequent on the making of decisions or rules" and including investigative jurisdiction to give effects to a state's laws. I. Brownlie *Principles of Public International Law,* 6th ed. (Oxford: Oxford University Press, 2003), at 297. For the presumption of execution of state commitments in treaties in good faith see *Vienna Convention on the Law of Treaties,* 1155 UNTS 331, signed 23 May 1969, entered into force 27 January 1980 at Article 31.1. This reasoning is further reinforced by the principle that no state may rely on its internal law to justify a failure to fulfill an international obligation, an extension of the principle of *pacta sunt servanda*. See *ibid* at Article 26 and 27. See also *Nuclear Tests Cases (Australia v France; New Zealand v France)* [1974] ICJ Rep 253 at 268 on the presumption of compliance with these principles in the intention of state parties to treaties.

[7] See First Annual Report at 4.

and consultation with the affected local communities. As will be discussed further below, there is nothing novel about this type of unilateral exercise of Canadian jurisdiction that has long existed under domestic legislation regulating environmental impact assessments of projects with effects outside of Canada.[8]

It is important however to distinguish from a jurisdictional point of view, the investigative aspect of the HRIA from the decision-making or 'regulatory' aspect of the process which takes place entirely within the territorial jurisdiction of the home state.[9] Thus, the defining of the scope of the HRIA, choosing its methodological approach, selecting the applicable legal rules and principles and comparing them to the results obtained through the HRIA analysis, as well as deciding on the future steps or consequences of those results are all internal actions of the home state albeit some if not all of these steps of the HRIA might have an

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[8] See *Canadian Environmental Assessment Act*, *2012* S.C. 2012, c. 19, s. 52 ["CEAA"] at Section 5(1)(b)(iii): "For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are... a change that may be caused to the environment that would occur... outside Canada". The CEAA is vague as to the modalities of cooperation with a foreign jurisdiction potentially affected by environmental harm caused by a Canadian governmental project or sponsored private activity, only specifying that the Minister "must offer to consult and cooperate" (s18 CEAA), and Canadian state practice in this regard has been labeled "ad hoc" with "fragmentary and fragile results". See H. Benevides et al., "Law and Policy Options for Strategic Environmental Assessment in Canada", Report submitted to the Canadian Environmental Assessment Agency, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1660403 (last accessed July 29, 2012) at 8-9. The Federal Government's "unwillingness to exercise its jurisdiction over transboundary environmental assessments in circumstances that might appear to warrant it" has also been criticized. See N. Craik, "Transboundary Environmental Assessment in Canada: International and Constitutional Dimensions" (2011) 23 JELP 1, 107-138, at 108.

[9] On the differentiation between prescriptive, enforcing and adjudicating jurisdiction, as well as recognized bases for state exercise of the three types of jurisdiction (territory, nationality, effects doctrine, universal jurisdiction) see generally V. Lowe, "Jurisdiction" in Malcolm D. Evans, ed., *International Law* 2d ed. (Oxford: Oxford University Press, 2006), 335. For a discussion on acceptable bases for the exercise of home state prescriptive and adjudicative jurisdiction against human rights violations of investors in host states see Chapter 1 and sources cited, especially O. De Schutter, *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*, Report prepared for the SRSG, December 2006, available at http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf (accessed August 21, 2013) and J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (New York: Cambridge University Press, 2006), at 104-165. For a discussion on the obligation to exercise regulatory intra-territorial jurisdiction for corporate human rights abuses committed in the host state see S. Seck, "Conceptualizing the Home State Duty to Protect Human Rights" in K. Buhmann, L. Roseberry and M. Morsing, eds., *Corporate Social and Human Rights Responsibilities Global Legal and Management Perspectives* (New York: Palgrave Macmillan, 2011) [hereinafter "Seck, *Conceptualizing the Home State Duty to Protect"*] at 28-31.

extraterritorial effect on the enjoyment of human rights of local communities in the host state.[10] Under this conceptualization, the HRIA on the impact of the CCOFTA trade and investment provisions can be seen as a classic example of home state exercise of territorial jurisdiction with extraterritorial effects and is, similarly to the home state decision not to regulate its investors' conduct abroad while having the power to do so, a key point when discussing home state obligations pertaining to this mechanism.[11] This section argues that while it is more complex to prove a positive duty from human rights law for the home state duty to regulate its investors to respect human rights in the host state, it is easier to prove a home state duty to assess if and what kind of regulation is necessary.[12]

The jurisdictional status of home state actions when implementing the HRIA raises the question of the relationship of HRIAs of TIAs with existing home state obligations in international law, especially human rights law. The question is two-pronged and relates in part to the possible duty to undertake a HRIA before negotiating a TIA (*status* of the HRIA in international law) and in its other part to the way the HRIA is used to satisfy existing international law home state obligations (*purpose, content* and *structure*). On a jurisdictional level, it is also important to consider if Canada's actions to implement the HRIA will in fact amount to an exercise of human rights jurisdiction over local communities in Colombia affected by Canadian FDI and MNC activity.

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[10] Adapted from S. Seck, *Home State Obligations For The Prevention And Remediation Of Transnational Harm: Canada, Global Mining And Local Communities* (PhD Dissertation, Osgoode Hall Law School, York University, 2007) at 97-99 and Seck, *Conceptualizing the Home State Duty to Protect* at *ibid*.

[11] See Seck, Conceptualizing the Home State Duty at *ibid* for the refusal of home states to exercise intra-territorial jurisdiction with an extraterritorial reach over corporate abuses committed abroad. Also, Zerk *supra* note 9 at 166 discussing the defeat of a proposed corporate conduct Bill in Australia.

[12] For a similar argument about state obligations under human rights treaties regarding possible extraterritorial harm caused by domestic activity contributing to climate change, see J. Knox, "Climate Change and Human Rights Law" (2009) 50 Virginia J of Int'l L 1:164

3.2 International human rights law a source of home state obligations for the Canadian annual report

It is certain that as a general rule the Side Agreement implementing the annual HRIA is to be interpreted with regard to the corpus of international law obligations in force between the state parties—especially in light of the general and open-ended wording in the Side Agreement.[13] Given the purpose of the HRIA in the instant case is to measure the impact of trade and investment clauses found in the CCOFTA on human rights enjoyment, one would instinctively be drawn to look for the normative framework pertaining to such assessments in international human rights law. However, none of core international human rights treaties, or regional human rights instruments make any mention whatsoever to the concept of HRIA per se, and indeed there is a general lack of consensus regarding the precise steps that international human rights law imposes on states when it comes to implementing their commitments domestically as well as extraterritorially.[14] Human rights treaty monitoring

[13] See Article 31(2)(c) of the Vienna Convention on the Law of Treaties *supra* note 5.

[14] The definition of what are considered "core international human rights treaties" draws on the reports produced by the UN Secretary-General Special Representative on business and human rights (SRSG) as well as on an apparently general consensus amongst human rights scholars to include: the *International Covenant on Civil and Political Rights* (ICCPR); the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), *Convention on the Rights of the Child* (CRC), *International Convention for the Protection of All Persons from Enforced Disappearance* (CPED), the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICRMW), and the *Convention on the Rights of Persons with Disabilities* (CRPD). See Office of the High Commissioner for Human Rights, *The Core International Human Rights Instruments And Their Monitoring Bodies* (http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx). See e.g. HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, *State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries*, 4th Sess., UN Doc. A/HRC/4/35/Add.1 (13 February 2007). On the lack of consensus as to what constitute core minimum standards of protection and inconsistent state practice regarding the implementation of human rights obligations found in the core treaties, domestically as well as in international cooperation, in particular regarding state obligations to protect and fulfill economic, social and cultural rights (generally as well as when balancing the enjoyment of human rights and the need to attract FDI) see M. Gondek, *The Reach of Human in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2009) at 327-331 and 333-5.

bodies have occasionally interpreted various core human rights instruments to recommend that states undertake HRIAs of TIAs, however never casting such recommendations in obligatory language.[15] Moreover, no state practice in conducting domestic or extraterritorial HRIAs of TIAs exists and unsurprisingly with the CCOFTA one being the first of that kind, most of academic commentary has focused on the possible duty to undertake *ex ante* assessments of trade and investment clauses.[16] In the instant case, that consideration appears to be mooted by the fact there is now an obligation to conduct an annual HRIA for the CCOFTA, however the sources of international law used to establish a duty on the home state to conduct *ex ante* HRIAs of TIAs would also apply to *ex post* and ongoing assessments such as the one under consideration here.[17]

[15] See e.g. Committee on Economic, Social and Cultural Rights, *Concluding observations regarding Ecuador* (E/C.12/1/Add.100), para. 56; Committee on the Rights of the Child, *Concluding observations regarding El Salvador* (CRC/C/15/Add.232), para. 48; Committee on the Elimination of Discrimination against Women, *Concluding observations regarding Colombia* (CEDAW/C/COL/CO/6), para. 29, regarding the Philippines (CEDAW/C/PHI/CO/6), para. 26, and regarding Guatemala (CEDAW/C/GUA/CO/6), para. 32; Report of the Special Rapporteur on the right to food on his mission to the World Trade Organization (A/HRC/10/5/Add.2), paras. 37-38, cited in Guiding Principles infra note 18 at 3 fn 1. See also Committee on Economic, Social and Cultural Rights Concluding observations on Switzerland: "the State party undertake an impact assessment to determine the possible consequences of its foreign trade policies and agreements on the enjoyment by the population of the State party's partner countries, of their economic, social and cultural rights" (E/C.12/CHE/CO/2-3), para. 24. Cited in *ibid* at 7 fn 14.

[16] See Guiding Principles infra note 18; O. de Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon and I. Seiderman, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" (2012) 34 Human Rights Quarterly 1084 ["Maastricht Principles"]; Berne Declaration, Canadian Council for International Co-operation & Misereor, *Human Rights Impact Assessment for Trade and Investment Agreements*, Report of the Expert Seminar, June 2010, Geneva, Switzerland at 7

[17] It is important to note that the obligation to produce an annual HRIA can be seen as arising under the bilateral Side Agreement and not under general or customary international law. There is nothing in the Side Agreement itself or in the statements made by the Canadian government in the negotiations leading to the Side Agreement or testimonials given before the House of Commons Standing Committee on International Trade to suggest that Canada implemented the HRIA mechanism from a belief of fulfilling its international law obligations. The adoption of such a mechanism can be seen as a political decision to obtain the necessary votes in order to pass implementing legislation of the CCOFTA in the Canadian Parliament and not as an obligation arising under international law. This section aims to prove that such an obligation might indeed exist independently from the Side Agreement and has its normative sources determined in international law independently from the will or political choices of the state parties.

The recent *Guiding Principles on human rights impact assessments of trade and investment agreements*[18] (Guiding Principles) posit that there is a "duty to prepare human rights impact assessments of trade and investment agreements" prior to the conclusion of such agreements on all states.[19] The commentary explains that this duty is grounded in the prohibition on states "from concluding any agreements that would impose on them inconsistent obligations".[20] Since state obligations found in TIAs often collide with pre-existing human rights obligations, and compliance with these is guaranteed by investor-state arbitration mechanisms, such friction needs to be identified beforehand so that states can ensure, as per the UN Charter and human rights treaties, that human rights obligations will at all times prevail over TIA clauses.[21] The "specific purpose of human rights impact assessments" is according to the Principles to "ensure that States will not be facing inconsistent obligations, imposed respectively under human rights treaties and under trade or investment agreements".[22] According to the commentary, the purpose of HRIAs is to measure the potential impacts of TIAs on human rights on the capacity of states to meet their human rights obligations, as well as on the capacity of individuals to enjoy their rights.[23] This is in line with Principle 9 of the SRSG Guiding Principles on Business and Human Rights recommending that "[s]tates should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States

[18] The principles were presented to the Human Rights Council as an Addendum to the Report of the Special Rapporteur on the right to food, Olivier De Shutter, UN HRC, 19 Sess., UN Doc. A/HRC/19/59/Add.5, 19 December 2011. [hereinafter "Guiding Principles"]
[19] Guiding Principles at 5, Part I, principle 1.
[20] *Ibid* Commentary under Principle 1.
[21] *Ibid* at 5-6. The Commentary makes reference to Article 103 of the UN Charter and to the obligation of all states to cooperate towards the full realization of human rights (found in the preamble and Article 1(3) of the UN Charter) as well as the special status of human rights treaties generating rights for individuals and not depending on reciprocal state commitments (citing Inter-American Court of Human Rights, *The Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C No. 146, para. 140.)
[22] *Ibid* at 6, commentary under Principle 2, part II "The purpose of preparing human rights impact assessments of trade and investment agreements".
[23] *Ibid*.

or business enterprises, for instance through investment treaties or contracts".[24] Finally, the Guiding Principles link the state duty to prepare ex ante HRIA of TIAs with the three-pronged obligation to respect, protect and fulfill human rights that could all be affected by the TIA clauses.[25]

In passim, the Principles assert that "States owe obligations [to respect, protect and fulfill human rights] both to the individuals on their territory, and to individuals on the territory of the State with which they conclude a trade or an investment agreement, to the extent that the conclusion of the agreement may affect such individuals' ability to enjoy human rights".[26] Moreover, according to the Principles, a state's international responsibility would be engaged if it uses its economic leverage or other means of influence to require that another state accept the inclusion in a TIA of a provision that will prohibit it from complying with its human rights obligations towards its own population or that will impede such compliance.[27] Since the international law on state responsibility requires knowledge on the part of the state exercising such leverage of the illegality incurred by the host state from the inclusion of clauses that would preclude its compliance with human rights obligations, the Guiding Principles can be interpreted as establishing a duty on the home state, found in positive

[24] See HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 17th Sess., UN Doc. A/HRC/17/31 (21 March 2011).at 12.

[25] Guiding Principles Commentary at 7 give examples of lowering a tariff or strengthening intellectual property rights as a result of commitments in a TIA related to the state duty to respect human rights. Other examples given in the Commentary are the inability to control a private investor that may violate human rights or the inability to impose performance requirements on private actors or adopt policies aimed at progressively realizing human rights as a result of TIA clauses and thus failing in the state duty to protect and fulfill human rights.

[26] *Ibid* at 7-8 citing the recommendations made by the CESCR in its Concluding Observations on Switzerland, cited in *supra* note 15.

[27] *Ibid* at 8 citing article 18 of the International Law Commission, *Draft Articles on State Responsibility for internationally wrongful acts*: "A State which coerces another State to commit an act is internationally responsible for that act if: (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and (b) The coercing State does so with knowledge of the circumstances of the act."

international law, to conduct its own HRIA on the negotiations process and substantive provisions in a proposed TIA in order to avoid responsibility.[28]

While the Guiding Principles appear to imbue the state duty of conducting *ex ante* HRIAs with strong grounding in positive international law, they leave several questions unanswered. First, approaching the issue from the point of view of inconsistency with pre-existing states' international law obligations appears as putting a stronger presumption on the duty of the host state to undertake such an assessment, simply because it is primarily responsible for securing the enjoyment of human rights on its territory.[29] On this reading, a failure of the host state to conduct such an assessment or a poorly conducted assessment that ignored for example the views of local and affected communities could serve as a justification for the home state's failure to conduct its own HRIA and consequently reduce its separate responsibility for its own conduct in the negotiations and for the substance of the TIA provisions.[30] It is certain that as a principle of general international law, states are under an obligation to not only take into account their existing international law obligations, but also

[28] See Article 18 of the International Law Commission, *Draft Articles on Responsibility of States for internationally wrongful acts*, UN GAOR, 56ts Sess., Supp. No. 10, UN Doc. A/56/10 (2001) ["ILC, *Draft Articles on State Responsibility*"]. See also I. Brownlie, *System of the Law of Nations, Part I : State Responsibility* (New York: Oxford University Press, 1983), see further chapter 1 of this theis on the rules of international responsibility of states in relation to extraterritorial compliance with human rights obligations.

[29] For example the options presented under Part III "The link between human rights impact assessments of trade and investment agreements and the conclusion of such agreements", Principle 3, as to what is expected in the case the HRIA finds inconsistencies between a state's human rights obligations and the TIA clauses, include termination, amendment, inclusion of safeguards in the treaty, provision of compensation by third states and adoption of mitigation measures. Except for the option for third states (and not explicitly the home state) to compensate potential victims, the other measures all target the host state. Moreover, the Commentary under Principle 3 makes it clear that "removing the incompatibility can be achieved either by adopting measures at the domestic level that ensure the agreement will be consistent with the human rights obligations of the State,... or by introducing within the agreement itself clauses [sic]... that will allow the State to comply with its human rights obligations". Guiding Principles at 8. Nowhere is the possibility of home state obligations to the same or similar effect mentioned.

[30] See further discussion in Chapter 3 on possibility of attributing varying degrees of home and host state responsibility depending on the circumstances and context of each case and taking into account objectively the degree of home state conduct that might have caused a human rights violation in the host state.

refrain from frustrating their purpose and content when creating new ones.[31] Importantly, when negotiating TIAs this obligation extends equally to the host and home state as they are both bound by pre-existing human rights law obligations and the home state has both a Charter-based and treaty-based duty to, at a minimum, respect the rights of individuals in the host state.[32] Knowledge of the facts and potential negative effects on human rights enjoyment in the host state therefore becomes an obligation for the home state in order to preclude potential inconsistency between TIA provisions and *its own* international law obligations.[33] Logically, this would require some kind of an assessment of the circumstances leading to a potential inconsistency in terms of non-respecting rights enjoyment in the host state, as well as an assessment of alternative approaches in order to avoid such inconsistency.[34]

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[31] As per the principles of good faith and *pacta sunt servanda* discussed in *supra* note 6.

[32] See Articles 55 and 56 of the UN Charter. See for e.g. Human Rights Committee, General Comment No. 31: *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess., UN Doc. CCPR/C/21/Rev.1/Add/13 (26 May 2004); CESCR, General Comment 14, *The right to the highest attainable standard of health*, UN Doc E/C.12/2000/4 (11 August 2000) at 39; CESCR, General Comment 15, *The right to water*, UN Doc E/C.12/2002/11 (20 January 2003) at 33; CESCR, General Comment 19, *The Right to social security (art.9)*, 39th Sess., UN Doc. E/C.12/GC/19 (4 Febuary 2008) at para 54 (using the wording 'extraterritorial'). This has been reaffirmed by regional human rights courts in several decisions. See e.g. Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgement of 29 March 2006, Series C No. 146, at 140; *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v. Ireland,* Application No. 45036/98 [2005] ECtHR 440, at para 154. See further chapter 1 of the thesis for a discussion on the relationship between home state obligation to respect human rights in other states and the duty to regulate investors' conduct abroad.

[33] See for example G. S. Goodwin-Gill, "State Responsibility and the 'Good Faith' Obligation in International Law", in M. Fitzmaurice and D. Sarooshi, eds., *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart, 2004), 75-104 on domestic legislation with effects on individuals in other states and compatibility with the legislating state's own international human rights obligations under the good faith principle. The Human Rights Committee recently held that "a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time". See e.g. HRC, *Munaf v. Romania*, Communication No. 1539/2006, UN Doc. CCPR/C/96/D/1539/2006 (21 August 2009) at para 14.2.

[34] *Ibid*. See also S. Skogly, *Beyond National Borders: States' Human Rights Obligations in their International Cooperation* (Antwerp: Intersentia, 2006) and Knox *supra* note 12 at 207-209, citing with agreement Skogly's position on the general obligation of states to respect human rights in other states that is not subject to the jurisdictional limitations usually attributed to human rights treaties in terms of the state duty to protect against private actor violations. According to Knox, one way for states to satisfy the duty to respect human rights in other states, at least with respect to those rights susceptible of being violated by virtue of environmental

Second, equating the purpose of HRIAs with the imperative for states to avoid inconsistencies between preexisting and new international obligations reduces the HRIA mechanism to a formal exercise of identifying economic sectors with increased trade and investment flows as a result of the implementation of the TIA and assessing the results against human rights criteria interpreted by the assessor state.[35] This puts an emphasis on the investigative function of HRIAs and fails to ground in positive international law, at least with respect to home state obligations towards local communities in the host state, the participatory, empowering, inclusionary and ultimately the regulatory purpose of HRIAs of TIAs. Thus, while the first two parts of the Guiding Principles and Commentary seem to be interpreting existing international law obligations in order to infer a duty for states to undertake HRIAs of TIAs, the Principles dealing with the methodology, indicators and key steps in preparing such assessments do not make an explicit reference to existing positive international law or consider if there is a positive duty on the part of the home state to employ a certain type of methodology or indicators in its HRIA.[36] The Guiding Principles maintain that it is up to each state to define how to prepare HRIAs of TIAs while linking their "credibility" and "effectiveness" on the criteria with *inter alia* transparency, inclusive participation, status (in terms of avoiding inconsistency) without explicitly recognizing an obligation on states to follow a particular approach.[37] Similarly, explicit references to the

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degradation, is by extending procedural rights to non-residents to participate in environmental impact assessments. See also M. Craven, "The Violence of Dispossession: Extraterritoriality and Economic, Social, and Cultural Rights", in M.A. Baderin and R. McCorquodale eds., *Economic, Social And Cultural Rights In Action* (Oxford: Oxford University Press, 2007), 71 at 77.

[35] Indeed, this seems to be the intention for future Annual HRIAs of the CCOFTA as stated in the first Annual Report at 4 "Pairing of Economic Sectors with Relevant Human Rights and Analysis".

[36] Arguably, this is due to the fact that the Guiding Principles seem to address primarily host states. Most of the discussion under Parts III-VI of the Guiding Principles are cast in softer, encouraging language using "should" when proposing the methodology and steps to be followed in HRIAs of TIAs. See Guiding Principles at 8-15.

[37] Guiding Principles at 9-11, at Part IV "The Methodology of human rights impact assessments of trade and investment agreements", Principle 4 and Commentary. Principle 4 posits that these minimum conditions should be followed by states "in order to avoid too widely inconsistent practices that could put human rights impact

normative content of human rights obligations "as clarified by the judicial and non-judicial bodies that are tasked with monitoring compliance with human rights obligations"; relying on indicators that measure the effect of the TIA on the compliance of the domestic regulatory framework of the host state with its international human rights obligations; and "ensuring that decisions on trade-offs are subject to adequate consultation (through a participatory, inclusive and transparent process) comporting to the principles of equality and non-discrimination [with regard to the most vulnerable groups]" are presented as elements states should factor into their assessments but not as legally binding obligations.[38] This approach therefore does not fully capture the relationship between existing home and host state human rights law obligations and the elements of a HRIA (its content) or its process.

As for extraterritorial HRIAs, while the Guiding Principles go a step further than the reports produced by the SRSG Ruggie in terms of recognizing home state extraterritorial human rights obligations, and implicitly posit the HRIA as a tool for addressing the home state duty to respect these rights, this approach does not take into account the existing obligation on the home state to cooperate in ensuring respect and protection of internationally codified human rights in the host state.[39] On the other hand, even if taken as a mechanism of cooperation

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assessments into disrepute". The reasons given why states have unlimited discretion with regard to conducting HRIAs of TIAs are (a) the difficulties of establishing causality between human rigths outcomes and specific trade/investment reforms or initiatives; (b) the paucity of data; and (c) the limitation of qualitative and quantitative methods in capturing the dynamic effects of trade/investment reforms. At 10.

[38] See Principle 5 and Commentary at 11-12.

[39] The reports produced by the SRSG Ruggie recognize that TIAs often put constraints on host state capacity to effectively protect human rights against foreign corporations, but fail to link this conclusion with a positive duty on home states to provide assistance or actively cooperate with the host state in order to correct the imbalance of power created by the TIA. See Ruggie 2008 at 44-5. As Simons points out, the encouragement for home states to provide technical or financial assistance to host states on the regulation, monitoring of compliance and enforcement of human rights standards, "not only fail[s] to address the imbalance of power between many home and host states, but past practice of technical and financial support to host Third World states has often focused on economic policy and regulatory reform to create an environment more conductive to foreign corporate activity". See P. Simons, "International Law's Invisible Hand and The Future of Corporate Accountability for Violations of Human Rights" (2012) 3 Journal of Human Rights and the Environment 5, at

between the home and host states, not grounding the content and process of the HRIA in existing home state human rights obligations, in particular leaving unfettered state discretion for interpreting existing human rights and setting standards as reference points to measure the impacts of the TIA, risks exposing this mechanism to the economic power and influence of corporate actors in both states. More importantly, positing the HRIA as a tool for identifying inconsistencies between human rights obligations and TIA obligations fails to account for the causal link established between the home state inaction to address rights abuses resulting from IIA-enabled private corporate activity by virtue of controlling the HRIA process and outcomes.

3.3 Grounding the purpose and content of the annual report in the due diligence obligation to prevent harm

A better approach to explain home state obligations when assessing human rights impacts of TIAs is proposed in the recent *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (*Maastricht Principles).[40] Principle 14 entitled "Impact assessment and prevention" provides that

> "States must conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights. The results of the assessment must be made public. The assessment must also be undertaken to inform the measures that States must adopt to prevent violations or ensure their cessation as well as to ensure effective remedies."[41]

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19 citing at fn 85 the involvement of the Canadian International Development Agency (CIDA) in Colombian deregulation of mining legislation that served as a precursor to the CCOFTA.

[40] The Principles were elaborated by the Maastricht Centre for Human Rights of Maastricht University and the International Commission of Jurists as a collaborative project of an expert group of more than 40 experts in international law and human rights law including present and former members of international human rights treaty bodies; present and former special procedures mandate holders of the United Nations Human Rights Council; and leading academic and civil society legal experts. The Principles are meant to clarify existing human rights obligations of states beyond their own borders. The International Commission of Jurists, *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, Adopted September 28, 2011 (available at http://www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20FINAL.pdf last accessed August 3, 2012). The annotated version with Commentaries is found in *supra* note 16.

[41] Maastricht Principles at 21.

As explained in the Commentary under Principle 14, "states are under an obligation to inform themselves about the potential impact of their conduct on the enjoyment of economic, social and cultural rights outside their national territories, prior to adopting such conduct".[42] Normatively, the Principles link the state duty to conduct a HRIA with the obligation to avoid causing harm in terms of creating, by acts or omissions, a real risk of "nullifying or impairing the enjoyment of [human] rights extraterritorially".[43] The state duty to conduct a HRIA is conditioned on the risk being "real" and "foreseeable", without however establishing a "threshold of severity or intensity of the risk" but the obligation is triggered merely by the "probability of the risk materializing".[44] The other element of foreseeability is linked to the active knowledge of the state about potential impacts of its conduct as well as to the presumption, of general international law, about what state authorities "should have foreseen" and therefore presumed to have known about the level of risk arising from activities under their control.[45] This second component of the element of foreseeability requires the state to demonstrate an assessment, "at the time of conduct, [that] steps were taken to obtain the scientific or other knowledge necessary to undertake a determination of risk".[46] As explained by the Commentary under Principle 14, the obligation to obtain

[42] Commentary to Principle 14 *ibid*.
[43] Principle 13, Maastricht Principles at 19. The Commentary cites the ICJ ruling in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* as restating the general obligation of States "to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control." [1996] ICJ Rep 226, para. 29 as well as Article 74 of the UN Charter regarding the "the general principle of good neighbourliness, due account being taken of the interests and wellbeing of the rest of the world, in social, economic, and commercial matters".
[44] Commentary under Principle 13 of the Maastricht Principles at 20. The risk in question needs to be "ascertainable" as opposed to a purely hypothetical or theoretical risk that can be said to always accompany a certain activity, especially if the risk is linked to scientific data that can never be proven with absolute certainty. Citing the WTO Appellate Body ruling in *EC-Hormones* at 187.
[45] Commentary under Principle 13 at 20, citing *Corfu Channel (U.K. v. Alb.)*, Merits, 1949 ICJ Rep 4 (Judgment of 9 April 1949), p. 22: "due diligence obligations are based … on certain general and well-recognized principles, namely: … every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."
[46] ILC, *Draft Articles on State Responsibility supra* note 28 at 76, article 23, commentary at para 2 cited at *ibid*.

information in order to identify and assess the potential impacts of State conduct is found in Article 3 of the ILC *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, and consists of the state "taking all appropriate measures to prevent harm, or to minimize the risk thereof, [that] cannot be confined to activities already properly appreciated as involving such a risk. This obligation extends to taking appropriate measures to identify activities which involve such a risk, and is of a continuing character".[47]

It is clear that Principle 14 treats the state duty to prevent extraterritorial human rights harm as both the trigger for HRIAs, as well as a determinative of their content. This approach is enabled by the conceptualization of transnational FDI and associated MNC activity in the host state that might cause extraterritorial human rights and environmental harm, as the risk the home state is under an obligation to assess and prevent.[48] Although the applicability of the *Draft Articles on Prevention and Reparation of Transboundary Harm* could be questioned on the grounds the ILC intended to exclude from the scope of the Articles "transboundary harm which may be caused by State policies in monetary, socio-economic or similar fields" and limit their application to activities having transboundary physical consequences that result in significant harm[49], the ILC was explicit that state duty of preventing transboundary harm is "part of the corpus of international law".[50] It is therefore

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[47] Commentary to Article 3 of the International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, UN GAOR, 56th Sess., Supp. No.10, U.N. Doc. A/56/10 (2001) ["ILC, *Prevention Articles"*] at 155, para. 14.

[48] An elaborate discussion on the applicability of the ILC *Prevention Articles* is found in Seck, PhD *supra* note 10 at 290-313. See also Seck, *Conceptualizing the Home State Duty to Protect supra* note 9 at 38-39.

[49] Commentary to Article 1 of the ILC, *Prevention Articles* at para 16 at 151.

[50] *Ibid* Commentary at 148 paras 3-5. In support of the claim that the state duty to prevent transboundary harm is part of general international law the Draft Articles cite the ICJ dictum in *Legality of the Threat or Use of Nuclear Weapons* Principle 2 of the Rio Declaration on Environment and Development (*Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.); the *Trail Smelter* award; principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) (*Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and

possible to bring Canadian FDI, at least with regard to some economic sectors involving environmentally risky activities such as mining, within the scope of the home state duty of prevention under the Draft Articles.[51] It is equally plausible to conceptualize the negotiation of the CCOFTA as either home state support for the activity bearing a risk of producing a physical consequence in the host state, or as "planning" in the sense of enabling the risky activity.[52] This idea is supported by Canadian domestic legislation recognizing that environmental and socio-economic effects can be "directly linked or necessarily incidental" to the exercise of federal power or authority "that would permit the carrying out, in whole or in part, of the physical activity, the designated project or the project".[53] It should also be emphasized that the risk of human rights and environmental harm could arise both from the direct deregulatory impact of the IIA on the host state, as well as from subsequent MNC

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corrigendum), part one, chap. I.); General Assembly resolution 2995 (XXVII) of 15 December 1972; as well as a great number of multilateral treaties incorporating the principle of "prevention of transboundary harm to the environment, persons and property". See authorities cited in Commentary at p. 149 para 5, especially A. E. Boyle, *International Law and the Environment*, 2nd ed. (Oxford University Press, 2002).

[51] Seck PhD at 298. While Canadian FDI in mining would seem to satisfy the criterion of involving a risk of causing "significant" transboundary harm (ILC, *Prevention Articles*, Article 2), Seck argues that the applicability of the ILC *Prevention Articles* would also depend on what interpretation is given to the terms "activities", "territory", "jurisdiction" and "control" (as criteria set out under para 7 of Commentary to Article 1 ILC *Prevention Articles* at 150). *Ibid* at 299. Depending on the interpretation a set of different scenarios emerges where the home state could be said to control the "planning" of the risky activity, which can be seen as occurring entirely on the territory (or within the jurisdiction) of the home state and is executed, in terms of physical consequences entirely on the territory of the host state. *Ibid* at 299-303. See further chapter 1 of this thesis for a discussion on the implications of the interpretation given to state jurisdiction and control over state and private activities under human rights treaties.

[52] For the ILC, the primary criterion for establishing the obligation of prevention is a territorial link between the state where the activity is occurring. ILC, *Prevention Articles* at 150 (para 7 of Commentary to Art 1). However, the concept of jurisdiction is said to cover all situations where a state is authorized by international law to exercise "its competence and authority", and the Commentaries give the example of a flag ship passing in the territory of another state in which case the flag state and not the territorial state is under an obligation to prevent the hazardous activity. (*Ibid* at 151 paras 9-10). In cases where more than one state has jurisdictional links to the activities covered under the Draft Articles, "states shall individually, and, when appropriate, jointly comply" with the duty to prevent. (*Ibid* at para 11). As Seck rightly points out, if the MNC is analogized with a flag ship, the onus would be on the home state to comply with the duty of prevention. Seck PhD *supra* note 10 at 302-3. Alternately, if the issue is approached by reference to the "planning" in terms of the state activity of negotiating a TIA, both the home and host states could be said to have jurisdictional links with the physical consequences of that activity and would therefore be under an individual duty to prevent any risks thereof. See further Chapters 2 and 3 on concurrent jurisdiction and home state duties.

[53] See Section 5(2)(a) and (b) of the CEAA *supra* note 8.

activity.[54] More importantly, if the focus is on the home state 'planning' the risky activity in terms of the potential physical environmental and human rights harm consequences of the investment protection provisions in the TIA, a *Trail Smelter* scenario can be argued, as Seck points out, where "only by virtue of the socio-economic regulatory policies of the state of origin the private actor was able to cause significant transboundary harm".[55]

State obligations arising under this scenario have both a substantive and procedural content.[56] As mentioned above, Article 3 obliges the state of origin to "take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof".[57] This obligation involves "taking appropriate measures to identify activities" involving a risk of significant transboundary harm, an obligation of continuing character, although the state of origin "does not bear the risk of unforeseeable consequences".[58] The obligation is defined in the Articles as one of due diligence,

> "manifested in reasonable efforts by a state to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in a timely fashion, to address them. States are under an obligation to take unilateral measures to prevent significant transboundary harm or at any event to minimize the risk thereof."[59]

The "standard of due diligence" against which the conduct of the state of origin is to be assessed, is defined as "that which is generally considered to be appropriate and proportional

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[54] See chapter 1 of this thesis for concrete types of human rights and environmental impact of deregulatory measures undertaken to facilitate FDI as well as for examples of direct and indirect harm caused by Canadian investors in Colombia.

[55] Seck PhD at 300.

[56] The procedural content of extraterritorial impact assessments is discussed in the following subsection.

[57] Article 3 of the ILC, *Prevention Articles* at 153. The Commentary to Article 3 explains this as a general obligation "based on the fundamental principle *sic utere tuo ut alienum non laedas*, which is reflected in principle 21 of the Stockholm Declaration, reading:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." *Ibid*.

[58] Commentary to Article 3 of the ILC *Prevention Articles* at 154 para 5.

[59] *Ibid* at para 7.

to the degree of risk of transboundary harm in the particular instance".[60] The state of origin is under an obligation to "adopt and implement national legislation incorporating accepted international standards" that constitute "a necessary reference point to determine whether measures adopted are suitable".[61] Under the Draft Articles, when the activities involving risk of transboundary harm are conducted by private actors, the duty of prevention imposes upon the state of origin an obligation to adopt a "regulatory framework"[62] including prior authorizations[63] that must be based on "an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment".[64] The state must "take a responsible and active role in regulating" activities with a possible risk of significant transboundary harm.[65] The standard of due diligence is the "degree of care expected of a good Government", which is different, according to the ILC, between a "state with a well-developed economy and human and material resources and with highly evolved systems and structures of governance", than in the case of states "which are not so well placed".[66] The obligation to undertake a prior impact assessment, as well as to ensure continuous monitoring of activities involving a risk of causing significant extraterritorial harm, can be seen as a key to establishing the duty to regulate extraterritorial private conduct. It can also be inferred from the Draft Articles that this obligation is greater for developed states as home states of origin of FDI.[67] Following the conceptualization of FDI as an activity presenting

[60] *Ibid* at para 11.
[61] *Ibid* at 153, para 4.
[62] Commentary to Article 5 at 156 para 3.
[63] Article 6 at *ibid*.
[64] Article 7 at 157. The Commentary to Article 7 links the requirement for a prior assessment of any activity involving a risk of transboundary harm to the *Trail Smelter* decision that recognized the study undertaken on the effects of the transboundary atmospheric pollution by industrial smoke on the health of persons across the border. At 158.
[65] Commentary to Article 6 at 157 para 2 citing the *Trail Smelter* and *Corfu Channel* cases.
[66] Commentary to Article 3 at 155 para 17.
[67] Although the *Prevention Articles* explain that a risk assessment is only required for activities involving a risk of causing significant transboundary harm (Commentary to Article 7 at para 3), this does not in any way

with a risk of transboundary environmental and human rights harm, it is apposite to query if international law would require from the home state an EIA, separately from the HRIA under consideration here, prior to giving its support to investment projects in the form of financing or negotiating investor protection treaties.[68]

3.3.1 The obligations of a state source of transnational environmental harm: Environmental Impact Assessments as principle of general international law

While a detailed discussion on the standing of transboundary EIAs in international law is not within the ambit of this chapter[69], it is important to briefly consider their legal inter-linkages with transnational HRIAs. Environmental impact assessments are the oldest in the line of impact assessments used to explain the effects of regulatory decision-making.[70] Until recently, the fact many states have adopted domestic legislation requiring EIAs before

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preclude the obligation for the state of origin to inform itself of the nature and degree of such risk prior to giving its support or authorization for the private activity in question.

[68] As Seck points out, the duty of prevention would require a separate environmental impact assessment, and the home state would not be able to rely on impact assessments produced by private actors themselves as is usually the case with granting authorizations for mining projects. PhD at 307. The Reports of the SRSG Ruggie have also found that states are under a duty to prepare EIAs for large scale investment projects in mining, albeit not explicitly in the context of extraterritorial EIAs. See e.g. *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties supra* note 14 at para 46, citing inter alia: CERD*, Concluding Observations Suriname,* UN Doc. *CERD/CI64/COI9,* 28 April 2004, at para. 15; CERD *Concluding Observations, Nigeria,* UN Doc. CERD/CINGA/C0I18, I November 2005, para. 19; CERD *Concluding Observations, Guyana,* UN Doc. *CERD/CIGUY/CO/14,* 4 April 2006, at para. 19; and CERD *Concluding Observations, Guatemala,* UN Doc. *CERD/C/GTM/CO/II,* 15 May 2006, at para. 19. See also Craik *supra* note 8 at 137-8 discussing that a decision whether or not to undertake an EIA of projects involving transboundary risk cannot be left to the discretion of the home state/state of origin of the harm (as it is the case in Canada under the CEAA giving discretion to the federal minister of environment whether or not to undertake an EIA, see CEAA *supra* note 8) as it is a requirement under general international law.

[69] For a detailed discussion see N. Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge: Cambridge University Press, 2008); K. Bastmeijer and T. Koivurova, eds., *Theory and Practice of Transboundary Environmental Impact Assessment* (Leiden: Martinus Nijhoff, 2008). For a more recent discussion on the status of EIAs in international law and Canada's compliance with these after the 2010 *Pulp Mills* case see Craik *supra* note 8.

[70] According to Craik "the formation of EIA processes within domestic settings may best be understood as fulfilling the need for policy-makers to understand the environmental consequences of their decisions". *Ibid* at 25. The genesis of the concept of EIA in law is usually traced back to the United States federal law under the National Environmental Policy Act (NEPA) adopted in 1969 (42 USC §§ 4321-4370(f) (2000)), a trend which other countries began to follow resulting in the gradual adoption of domestic EIA legislation in most of the world. Craik *ibid* at 23.

authorizing or financing projects, was used to explain as having vertically from the bottom influenced the emergence of the concept of EIA in international law.[71] While some states have domestic EIA laws extending to projects with environmental effects outside domestic borders, a primary feature of domestic EIAs is that they "virtually never require states to adopt mitigative measures, much less to disapprove projects because of their environmental effects. [Domestic] EIA is designed to provide a decision maker and the public with information about the environmental consequences of a proposal, not to force an environmentally correct decision".[72] In addition, while domestic EIA processes in some countries, such as the US and Canada, recognize the need to proceed with an assessment of impact caused in the territory of other states, there are numerous problems with the practical implementation of such assessments that are usually left to the discretion of the national regulating agency, as well as with regard to procedural steps to notify and provide participation for affected non-residents.[73]

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[71] Craik *ibid* at 23,45; Knox *supra* 12 at 297 stating that "although EIA was endorsed by the Rio Declaration, international law does not generally purport to require it for projects with solely domestic effects". (footnote omitted) See *Rio Declaration on Environment and Development*, Annex I to the UNGA, Report Of The United Nations Conference On Environment And Development, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992 at Principle 17.

[72] J. Knox, "The Myth and Reality of Transboundary Environmental Impact Assessment" (2002) 96 AJIL 291 at 298, citing in footnote 47 C. Wood *Environmental Impact Assessment: A Comparative Review* (1995) at 2-3: "EIA is not a procedure for preventing actions with significant environmental impacts from being implemented. Rather the intention is that actions are authorized with the full knowledge of their environmental consequences. EIA takes place in a political context: its is therefore inevitable that economic, social or political factors will outweigh environmental factors in many instances".

[73] Craik *supra* note 69 at 46-51 discussing the extension of domestic EIA laws to projects with extraterritorial impacts in the US and Canada. According to Craik, many practical problems arise when a state undertakes an EIA of its own or a private project with potential extraterritorial risk, including knowledge of the environment where the effects will be felt, ensuring effective participation of affected populations, as well as broad discretion whether or not to undertake an EIA left to domestic agencies (c.f. CEIAA) and danger from "second guessing" the other jurisdiction's determination in concurrent assessments. On this point see further below the *Trail Smelter* case.

While nominally sharing the same structure with domestic EIAs[74], transboundary EIAs operate within a shift of paradigm whereby the requirement to undertake an EIA, as well as its content and process, are found in international law sources.[75] The basis in international law for the obligation to undertake an EIA is found in the oft-quoted dictum of the *Trail Smelter* arbitration, subsequently codified in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration and confirmed by the ICJ as general principle of international law:

> "No state has the right to use or permit the use of its territory in such a manner as to cause injury in or to the territory of another [state] or the properties or persons

[74] Virtually all domestic EIAs have a generalized structure and comprise of six stages: (1) screening; (2) scoping; (3) impact analysis and report preparation; (4) public and agency participation; (5) final decision; and (6) follow up. This structure is mirrored in transboundary EIAs. Craik *ibid* at 27 citing J. Holder, *Environmental Assessment: The Regulation of Decision-Making* (New York: Oxford University Press, 2004) at 12.

[75] The requirement to undertake a prior EIA for either general activities susceptible of causing transboundary harm, or specific projects of such nature, can be found in numerous binding and non-binding international instruments, as well as domestic legislation. One example are the UN *Draft Articles* cited above, extensively relied to by the parties in the *Pulp Mills* case where the ICJ did not dispute their binding status (see infra). For a review of sources see Craik *supra* note 69 at 90-120. Another important example is the *Convention on Environmental Impact in a Transboundary Context*, 25 February 1991, (1991) 30 ILM 800, commonly known as the "Espoo Convention", to which Canada is a party. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&lang=en (last accessed August 5, 2012). The Espoo convention requires states to assess transboundary environmental impacts of certain activities within their jurisdiction and notify and consult with potentially affected states about such effects. It also gives a number of procedural rights to affected states (such as to challenge a decision of the state of origin not to undertake an EIA) and to affected populations to be notified of the impacts of the proposed project, consulted in the process of the EIA and their views taken into account. Articles 3(8), 4(2) and 6(1). See further section 2.2 below for a discussion on procedural rights in HRIAs. Its scope is however limited to projects listed in Appendix I that are subject to government decision. (Article 1(v) defines "Proposed activity" [as] any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure"). For the purposes of FDI projects in Colombia enabled by the CCOFTA (e.g. projects that could not have occurred without exploration or pre-establishment rights of exploration in large scale mining) or otherwise financed or subject to approval by the Canadian government, it could be argued that the Espoo Convention applies for a limited number of such projects (e.g. Appendix I covers *inter alia* waste disposal systems, chemical installations, large dams and reservoirs, large diameter oil and gas pipelines, groundwater abstraction activities, pulp and paper manufacturing, major mining, on site extraction and processing of metals, offshore hydrocarbon production, major storage facilities for petroleum, petrochemical and chemical products, deforestation of large areas.) The *Espoo Convention* does not however extend to 'any' activity (public or private) with a risk of extraterritorial harm and therefore does not fully capture the general principle of do no harm found in other sources of international law, although it has been cited in support of its validity. Knox *supra* note 72 at 302; Craik note 69 at 103.

> therein, when the case is of serious consequence and the injury is established by clear and convincing evidence"[76]

The obvious implication of the principle is that states cannot engage in activities within their jurisdiction regardless of their extraterritorial impacts, while it also cannot be maintained that a state refrain from all activities that might have any kind of extraterritorial impact. Hence, the qualifier "significant" when discussing transboundary harm appears to be international law's preferred way of linking the general prohibition to objectively measurable *international standards* in order to prevent states from determining for themselves if and when there are international consequences from their activities.[77] Second, the obligation to prevent extraterritorial harm is not triggered only when such harm materializes, but it obliges states to diligent conduct to take reasonable steps to prevent such harm. As such, international law obliges states to take steps to inform themselves and understand the extraterritorial consequences of activities within their jurisdiction and power to regulate.[78] The general duty to prevent harm is thus best understood as an obligation of conduct, and not result, where the reasonableness of the efforts of a state source of potential extraterritorial harm is assessed by reference to international sources of minimum standards of due care,

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[76] See *Trail Smelter Arbitral Decision* (1941) 35 AJIL 684, at 716; see also Principle 2 of the Rio Declaration (*supra* note 71)

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

The status of general international law of this principle, as relating to environmental matters, has been confirmed by the ICJ in *Legality of the Threat or Use of Nuclear Weapons supra* note 43. And most recently in the *Pulp Mills* case see infra. On the genesis of the no harm principle see generally X. Hanqin, *Transboundary Damage in International Law* (Cambridge: Cambridge University Press, 2003) at ch. 5.

[77] See Craik *supra* note 69 at 61-2. See also ILC *Prevention Articles supra* note 47 at Commentary under Article 2. According to Craik, the objective determination of "significance" might depend on the circumstances of the case, of evidence in international sources and practice about acceptable standards of measurement of harm, as well as [in the case of environmental pollution] on scientific understanding at the time about tolerable levels of environmental harm.

[78] See *Corfu Channel Case* at 22; ILC *Prevention Articles* at 3 Commentary at para 10.

including more specific standards set out in treaties or those adopted by international organizations, as well as evidence of consistent domestic practice of individual states. While "the practice or standard is not [of itself binding], it is strong evidence of [the reasonableness of] measures that a state acting [has] employed to prevent harm".[79] As instruments used to measure the impact of proposed projects or activities, EIAs are therefore best understood as a manifestation of compliance with the due diligence obligation, equally drawing from both the duty to prevent harm and the separate duty for the state to inform itself of potential harmful consequences of activities in its jurisdiction and capacity to regulate. It is however understood that the state regulatory apparatus as a whole, and not just the laws, regulations or policies implementing a procedural obligation to assess the risk of potential extraterritorial harm, is evaluated when assessing compliance with the due diligence to avoid such harm.[80]

A more controversial question however is if international law determines the substantive or procedural content of such assessments.[81] So far, state practice and international jurisprudence has settled that the assessment of potential extraterritorial harm in the function of the source state informing itself about such risk would not suffice without the auxiliary

[79] Craik *supra* note 69 at 64. The principle that state conduct is measured against international and domestic standards is an old one. See e.g. *Alabama Claims Arbitration* (1872) 1 Moore's International Arbitration Awards 485. Regarding the content and procedure used by states in EIAs the same argument has been upheld, namely that the reasonableness of measures adopted is subject to international standards and supervision. See Memorial of Hungary in the *Gabcikovo- Nagymaros* case Vol. I, 2 May 1994 at paras 8.01-8.52. Host state treatment of international investors and their property rights has also been assessed against what is considered to be an international standard of due diligence by various investor-state tribunals. See Chapter 1.

[80] See Commentary to Articles 3 and 5 of the ILC *Prevention Articles*. See further chapter 1 of this thesis on the home state obligation to regulate investor conduct in IIAs.

[81] State practice in international disputes suggests general and consistent acceptance of EIAs as a primary vehicle to prove compliance with the due diligence obligation in relation to extraterritorial harm. On the other hand, while states accept an obligation to undertake an EIA, most disputes arise with regard to the trigger (i.e. "significant", "substantive", "measurable" harm) and content of such assessments (standards used, methodological approach etc.) See e.g. *Gabcikovo-Nagymaros Project (HungarylSlovakia)* [1997] ICJ 7; *Mox Plant Case (Ireland v. United Kingdom)* (Annex VII Tribunal); and *Nuclear Tests Case (New Zealand v. France)* [1974] ICJ Rep 457 discussed in Craik *supra* note 69 at 111-120. As Craik observes, the argument that the "source state has broad discretion in implementing EIA obligations [has] clear potential to render EIA obligations in international law meaningless since the essence of any EIA obligation is to fix the common requirements for assessment". At 118.

obligation to notify and consult with the host state in good faith and cooperate with it in order to find a mutually acceptable and least environmentally harmful route of implementing the proposed project since the duty to prevent environmental harm applies equally to the source and affected states.[82] It is however less clear if an affected state can veto a project or activity potentially causing transboundary harm on its territory, since international jurisprudence has consistently insisted on the duty to negotiate, in good faith, a mutually acceptable solution.[83] This is examined in more detail below from the point of view of human rights and consent of potentially affected communities in the host state.

The ICJ has recently clarified the legal status of EIA in international law that is useful for the examination of home state obligations for extraterritorial HRIAs. In the *Pulp Mills* case it held that

> "it may now be considered a requirement under *general international law* to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context... Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its water did not undertake an environmental impact assessment on the potential effects of such works."[84]

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[82] Gabcikovo-Nagymaros *ibid*. See also UN *Convention on Non-Navigational Uses of International Watercourses* (1997) 36 ILM 719 (not in force), at Articles 7(2)-8(1); Principle 24 of Stockholm Declaration and Principle 7 of Rio Declaration *supra* note 71; *United Nations Convention of the Law of the Sea* 1833 UNTS 3 at Article 194.

[83] As per the dictum in *Lac Lanoux (France v. Spain)* (1957) 24 ILR 101 a state proposing a project within its jurisdiction does not need the consent of a potentially affected state, while having the obligation to enter into meaningful consultations with such affected states and pay "due consideration to their rights and interests". At 140. Reaffirmed in *Fisheries Jurisdiction Case (United Kingdom v. Iceland)* [1974] ICJ Rep 3 at 33.

[84] *Pulp Mills (Argentina v. Uruguay)* [2010] ICJ Rep 4 at 83 para 204. Emphasis added. The dispute between Argentina and Uruguay involved the authorization and construction by Uruguay of pulp mills on the river Uruguay, a shared watercourse between the states. Argentina relied on a 1975 bilateral treaty with Uruguay on the joint management of the river, including prevention of environmental damage and procedural mechanisms for joint management, to challenge the construction of the plants on the river. For a summary see C.R. Payne "Pulp Mills on the River Uruguay (Argentina v. Uruguay)" (2011) 105 AJIL 1 *International Decisions*, 94-101. The ICJ relied extensively on general principles of international law to interpret the parties' substantive and procedural obligations under the 1975 treaty on the river Uruguay. See Pulp Mills at para 119-120, 206.

In addition, the court stressed the obligation of "continuous monitoring of its effects on the environment" throughout the life of a project.[85] The Court recalled "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control"[86] and reaffirmed the separate and attending

> "obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party."[87]

In this sense, the ICJ found the obligation of the state of origin of transboundary harm to continuously assess the risks and magnitude of such harm to be a constitutive procedural element of the general international law obligation of due diligence, if not consubstantial with it. However, in a somewhat circular and ambiguous statement, the Court found that the scope and content of such assessments are not specified by general international law and that

> "it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment <u>*as well as to the need to exercise due diligence in conducting such an assessment.*</u>"[88]

The ambiguity arises from the point of view that by finding a separate obligation for states of origin of transboundary harm to conduct both prior and continuous EIAs, and linking it with the general principle prohibiting extraterritorial harm, the separate obligation is ineluctably imbued with substantive content, namely the purpose of preventing extraterritorial harm. Second, by elevating the obligation of EIA to a standalone general principle of international law, the ICJ has given substantive content to the due diligence obligation previously considered as only as a formal obligation to demonstrate diligent conduct without a duty to

[85] *Pulp Mills* at para 205.
[86] *Pulp Mills* para 193 citing *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, pp. 241-242.
[87] *Pulp Mills* at para 197.
[88] *Ibid* at para 207 (emphasis added).

ensure that harm would not result.[89] The Court indeed recognized "a functional link, in regard to prevention", between the individual (separate duty on each party to undertake an EIA) and joint (cooperation in good faith) procedural obligations, and the substantive obligation of preventing harm.[90] However, as Judge Cancado Trindade argues in his separate opinion, "in obligations of an objective character without reciprocal advantages for States", such as that of the protection of the environment, "it is the *objective* character of the obligations that ultimately matters" and against which both the conduct of states and its outcome are to be evaluated.[91] In international obligations "undertaken in the common superior interest of humankind", such as many international environmental instruments that refer to "human health" or development, the distinction between procedural and substantive obligations is artificial and "unsatisfactory" since in the end the net effect of state conduct is assessed against the general principles of *prevention and protection*.[92] In situations "related

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[89] Knox *supra* note 72 at 296 discussing the relationship between the prohibition to cause transboundary harm (found in Principle 21 of the Rio Declaration) and EIAs:

> "[t]ransboundary EIA may enable a state to meet a substantive obligation of result, but failure to perform a transboundary EIA for a particular activity does not in itself indicate that the state has violated a substantive obligation—the activity may not in fact cause any transboundary harm. But if the substantive obligation is to take diligent steps to avoid transboundary harm, transboundary EIA is likely to be one of the steps required. In that case, failure to carry out transboundary EIA could conceivably violate the due diligence requirement itself even if no harm results."

[90] *Pulp Mills* at 78-9. The Court further explains that it is not to be interpreted that:

> "[a] party may fulfil [sic] its substantive obligations by complying solely with its procedural obligations, nor that a breach of procedural obligations automatically entails the breach of substantive ones. Likewise, the fact that the parties have complied with their substantive obligations does not mean that they are deemed to have complied *ipso facto* with their procedural obligations, or are excused from doing so. Moreover, the link between these two categories of obligations can also be broken, in fact, when a party which has not complied with its procedural obligations subsequently abandons the implementation of its planned activity."

[91] *Pulp Mills (Argentina v Uruguay)*, Separate Opinion of Judge Cancado Trindade, [2010] ICJ Rep 135, at paras 172-175. Emphasis in original.

[92] *Ibid* at paras 173-4; citing in reference to the objective nature of state obligations undertaken to protect the environment and humankind "preambles of the 1971 *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof*; the 1972 *Convention on the Prohibition of the Development Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction* ; the 1977 *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques* ; the 1972 *Convention on the Prevention o Marine Pollution by Dumping of Wastes and Other Matter* ; the 1974 *Convention for the Prevention of Marine Pollution from Land-Based Sources* ; the 1972 *Convention for the*

to the use of natural resources and the possibility of transboundary harm" the substantive principles of "permanent sovereignty over natural resources, equitable and rational use of [natural] resources, the duty not to cause significant or appreciable harm etc." exemplify "extreme elasticity and generality" and are frequently "in a state of tension with each other. Clearly in such situations, respect for procedural obligations assumes considerable importance and comes to the forefront as being an essential indicator of whether, in a concrete case, substantive obligations were or were not breached."[93] As one commentator points out, [t]he duty to carry out [EIAs], as well as the duties of notification and exchange of information, only make sense if in the end an objection by a notified state is taken into account. The aim in each case is to ensure that the activity is carried out in a manner least harmful to the environment."[94] Thus, despite the fact *Pulp Mills* leaves unanswered many questions about the relationship of general international law and the content of EIAs[95], it can be concluded that the purpose of EIAs is not to guarantee the non-occurrence of transboundary harm, but to demonstrate diligent conduct on the part of the source state

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Prevention of Marine Pollution by Dumping from Ships and Aircraft ; the 1972 *UNESCO Convention for the Protection of the World Cultural and Natural Heritage*; the *1985 Vienna Convention for the Protection of the Ozone Layer* preamble and Article 2 ; the 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*, preamble.

[93] *Pulp Mills (Argentina v Uruguay)*, Joint dissenting opinion of Judges Simma and Al-Khasawneh [2010] ICJ Rep 108 at para 26.

[94] P. N. Okowa, "Procedural Obligations in International Environmental Agreements" (1996) Brit YB of Int'l L 275, at 302 footnote omitted. As Okowa concludes elsewhere, upon a comprehensive review of international materials, jurisprudence and state practice, "there is no evidence in modern state practice to contradict the proposition that states are under a general obligation to ensure that activities on their territory or within their control do not cause transboundary harm". This is consistent with the parties' submissions and ICJ ruling in the *Gabcikovo-Nagymaros* case, where both parties accepted that international law requires them to adopt measures to prevent environmental damage and the Court subsequently reaffirmed this obligation in conjunction with the obligation of consultation and negotiations in good faith with the view of finding the least environmentally harmful approach to development projects. See *Gabcikovo-Nagymaros supra* note 81. Cited in P. Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford: Oxford University Press, 2000) at 75-6, citing at footnote 60 the Slovak and Hungarian governments memorials in *Gabcikovo-Nagymaros*.

[95] Judge Cancado-Trindade explores in detail the importance of the principles of precaution and prevention that have, according to him, crystalized into general principles of international law beyond the domain proper to international environmental law and can therefore be relevant for the evaluation of state conduct under the general prohibition to cause transfrontier harm. *Supra* note 91 at paras 52-96. See below for their relevance in the context of HRIAs.

towards minimizing the risk of such harm. More importantly, the requirement that the state of origin demonstrate due diligence *in* conducting transboundary EIAs is suggestive that discretion when deciding on the content of such assessments is constrained by objective criteria *found in international law* that are used to evaluate the 'reasonableness' of such assessments, and preclude a situation where a "state is the final arbiter of whether or not its conduct in any situation is compatible with international norms".[96] Such criteria are commonly drawn from international instruments and practice. But they could also be looked for in the principles of prevention and precaution that have of themselves emerged as general principles of international law so fundamental to the international legal system, especially in the context of state economic projects for the exploitation of the environment and natural resources, that they also ought to guide the interpretation of state obligations in many other areas such as human rights law.[97]

[96] Okowa, *State Responsibility supra* note 94 at 82 discussing the objective content of the due diligence standard in international law.

[97] As Judge Cancado-Trindade explains, "there are general principles of law proper to international law in general, and there are principles of Law proper to some domains of International Law, such as International Environmental Law". At para 48. These "general principles emanate, from human conscience, from the universal juridical conscience" which is, according to him, the "ultimate source of all Law". Such conscience about the irreparable harm caused to the environment and the pressing need to secure its protection has led to the gradual acknowledgment of the principles of prevention and precaution as general principles proper to the domain of international environmental law. At para 52. The principle of prevention "was articulated in relation to damage and in face of scientific certainty as to its occurrence", while conceding that prevention could be exercised in distinct ways according to the nature and source of pollution. At para 55 citing A.-Ch. Kiss, *Droit international de l'environnement* (Paris: Pedone, 1989) at 202. In the form of the prohibition of transfrontier harm, the principle of prevention was then incorporated in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. It has subsequently found expression in numerous multilateral treaties as well as resolutions and declarations. At paras 59-60. As of the precautionary principle, it emerged in response to the "awareness of the existence or persistence of risks, and the awareness of scientific uncertainties surrounding the issue at stake". At para 62. It does not replace the principle of prevention but it adds a new dimension to it: "in the principle of prevention one is facing threat or dangers to the environment, whilst in light of the precautionary principle, one is rather before a likely or potential threats and dangers to the environment". At para 62. The precautionary principle has been articulated before the court in several cases including *Gabcikovo-Nagymaros* (*supra* note 81 para 97 the ICJ took note of its invocation by the parties) and *Pulp Mills* (the court observed *in passim* that the precautionary principle "may be relevant for the interpretation of the 1975 *Statute on the River Uruguay*, *Pulp Mills* judgment, at para 164). The importance of these principles for the assessment of risks of transboundary harm is aptly summarized by Judge Trindade:

3.3.2 Applicability to home state HRIAs of TIAs

What is the relevance of the status in international law of EIAs for extraterritorial home state obligations regarding the content of HRIAs of TIAs? In the first place, the nature of extraterritorial harm from some FDI projects and resulting MNC activity makes it clear there is an undeniable inter-linkage and inter-dependence between human rights protection and the protection of the environment in the host state and this should be borne in mind when discussing home state obligations for either EIAs or HRIAs.[98] As one commentator notes

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> "while the principle of prevention assumed that risks could be objectively assessed, so as to avoid damage, the precautionary principle arose, to face with anticipation, probable threats, surrounded by uncertainties; risks were to be <u>*reasonably*</u> assessed." At para 72. Emphasis added.
>
> "[p]recaution [is] to take action so as to foresee probable and even long-term consequences to the environment, amidst scientific uncertainties. Given the recurring prevalence of these latter, the epistemology of the precautionary principle is geared to the duty of care, of due diligence. [I]ts presumption is invariably in support of the conservation of the environment and the protection of public health, identified with common good." At para 83.

Together, the principles of prevention and precaution are found in numerous international instruments of environmental law. See sources cited in paras 93-5 of Separate Opinion of Judge Trindade. On the interplay between the principle of prevention and EIAs see Knox *supra* note 72. For a general discussion see P.W. Birnie, A.E Boyle and C. Redgwell, *International Law and the Environment* (Oxford: Oxford University Press, 2009) at 106-211. The purpose of EIAs has also been linked with the precautionary principle in the sense that mechanism is the only way for a state to ascertain, before engaging or authorizing a certain project or activity, if the effects of its conduct will have a significant impact on the environment or not. See Okowa, State Responsibility *supra* note 94 at 84-7 citing for e.g. the submissions of New Zealand in the *Nuclear Tests Case (New Zealand v. France)* [1995] ICJ Rep Verbatim Record, CR 95/20. The customary international status, or status as general principles of international law, of the prevention and precautionary principles is not uncontested however in both state practice and international and regional jurisprudence. See N. de Sadeleer, "The principles of prevention and precaution in international law: two heads of the same coin?" in M. Fitzmautrice et al., eds., *Research Handbook on International Environmental Law* (Cheltenham: Edward Elgar, 2010) at 182-199.

[98] In many cases environmental degradation from investment projects, or the lack of community consent or consultation for such projects, leads to human rights violation by both state and private actors. This is well-documented and needs no detailed examination here. See e.g. UN, HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum: *Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse*, UN Doc. A/HRC/8/5/Add.2, 23 May 2008, at 3. Specifically regarding the connections between environmental and human rights harm caused by the work of Canadian MNCs in Colombia see Inter Pares, *Land and Conflict: Resource Extraction, Human Rights and Corporate Social Responsibility: Canadian Companies in Colombia* (Ottawa: Inter Pares, 2009). More recently see testimonial of Ms. Jennifer Moore, House of Commons, Standing Committee on International Trade, *Evidence*, 41st. Parl., 1st Sess., June 12, 2012 at 1220-1230. For specific examples of corporate complicity in environmental and human rights harm see Chapter 1. Human rights treaty monitoring bodies have consistently interpreted core human rights instruments as requiring states to assess and monitor the human rights impacts of environmental harm as well as to undertake all efforts to prevent, investigate and punish private perpetrators of environmental human rights harm. See UN, HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Addendum: *State*

"[a]dvocates seeking to address environmental harm to humans at an international level must contend with the inherently multifaceted nature of such harms. Although the various negative impacts implicate several areas of law, they do not fit neatly into any one of those areas."[99] Substantive and procedural human rights have widely been used to address environmental issues and to induce state regulation of private actors where environmental degradation has led to human rights harm.[100] International and regional human rights adjudicative bodies have consistently interpreted various human rights to establish a strict regime of procedural state duties with regard to undertaking prior and ongoing EIAs, as well as informing affected individuals and communities about the risk of potential harm and taking their views into account when authorizing projects.[101] The approach taken by these bodies in the context of EIAs is instructive in the sense that the state duties to respect and protect human rights are taken to require prior identification of *any* risk that might potentially endanger human rights protection and is not in that sense limited to only environmental issues.[102] Thus, in addition

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responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries, 4th Sess., UN Doc. A/HRC/4/35/Add.1, 13 February 2007.

[99] H. M. Osofsky, "Learning from Environmental Justice: A New Model for Environmental Rights" (2005) 24 Stan Envtl LJ 71.

[100] See HRC, Report of the United Nations High Commissioner for Human Rights, *Analytical study on the relationship between human rights and the environment*, HRC, UN Doc. A/HRC/19/34 (16 December 2011). For a theoretical discussion on the intersections of human rights and the environment see generally D. Shelton, "Environmental Rights" in P. Alston, ed., *Peoples' Rights* (Oxford: Oxford University Press, 2001) 185; and for a recent excellent and comprehensive review of inter-linkages see D. K. Anton and D. Shelton, eds., *Environmental protection and human rights* (New York: Cambridge University Press, 2011) at ch 2, 6 and 7.

[101] See e.g. ECtHR, *Tatar v. Romania* (Judgment of 27 January 2009); *Öneryildiz v Turkey* (Judgement of 30 November 2004); *Taskin et al. v Turkey*, App. No. 46117/99, (Judgment of 10 November 2004); Af. Comm. Hrts., *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (Communication No. 276/2003), 4 February 2010; Inter-American Ct. Hrts. *Sawhoyamaxa Indigenous Community v. Paraguay* (29 March 2006). See also Council of Europe, *Manual on human rights and the environment - Principles emerging from the case - law of the European Court of Human Rights* (Council of Europe Publishing: 2006). See further T. Stephens, *International Courts and Environmental Protection* (Cambridge : Cambridge University Press, 2009) at ch 10.

[102] See e.g. *Öneryildiz v Turkey ibid* at para 71: "The Court considers that this obligation must be construed as applying in the context of <u>any</u> activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous...". And further at para 93: "such considerations are indisputably valid in the context of dangerous activities, ... [where public authorities] are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused such incidents". (Emphasis added)

to the argument that international law might be requiring Canada to undertake EIAs prior to providing support for its FDI abroad, it can be inferred from the preceding discussion that the HRIA under consideration here must, at a minimum, consider those effects on the environment in the host state that raise human rights issues.

Second, by providing the elements of the diligent conduct that is expected from all states as part of the general duty to respect the environment and the 'rights' of other states, the *Pulp Mills* decision qualified to a large extent the state duties under the no harm principle. In fact, it can be argued that the decision clarifies the harm principle itself by reaffirming its status as a general principle of international law and defining the due diligence obligation as a guiding threshold for evaluating state performance of their other international obligations.[103] It has been argued that "at the normative level, environmental protection and human rights share a common base"[104] and this is true in both the domestic and the transnational context. The primary feature of the prohibition to cause harm in other states, as a general principle of international law, is its trans-substantive application to all other 'specialized' domains of

[103] For a critique of the court's failure to clearly establish a hierarchy between general principles of international law and state obligations arising from treaty and customary law (and the superiority of the former over the latter) see the excellent discussion in the Separate Opinion of Judge Trindade *supra* 91 at paras 3-51 offering a historic overview of the genesis of the concept of general principles of international law, their superiority over treaty and other sources of international law obligations as demonstrated by the drafters of the statues of both the Permanent Court of International Justice and the ICJ. See generally B. Cheng, *General principles of law as applied by international courts and tribunals* (Cambridge: Cambridge University Press, 1953, 2006). The Court did however implicitly, establish a duty to interpret all state obligations found in treaties in light of the harm principle and associated duty of due diligence (see *Pulp Mills* decision paras 193-7).

[104] O. W. Pedersen, "The Ties that Bind: The Environment, the European Convention on Human Rights and the Rule of Law" (2010) 16 European Public Law 4, 571. Pedersen discusses a long line of jurisprudence of the European Court of Human Rights using substantive and procedural human rights to protect individuals from environmental human rights violations caused by private actors, as being founded in the concept of rule of law. While human rights provisions seek to enable self-determination and self-actualization through a framework of rights aimed at protecting people from arbitrary government interference in order to secure the basic political and economic needs for survival, the rules for environmental protection equally seek to preserve basic natural resources in order to secure human survival. See D. Shelton, "The Environmental Jurisprudence of International Human Rights Tribunals", in Picolotti and Tillant, eds., *Linking Rights and the Environment* (Tucson: University of Arizona Press, 2003).

international law, including human rights law.[105] Indeed, the famous passage from *Trail Smelter* has influenced the steady entrenchment of state duties relating to transboundary environmental damage[106], but its validity, although untested in view of the vertical 'internationalization' of human rights issues, is beyond doubt regarding the state duty to respect human rights of individuals in other states.[107] Thus general international law would

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[105] Cancado-Trindade *supra* note 91 at para 39:

> "Principles of International Law are guiding principles of general content, and, in that, they differ from the norms or rules of positive international law, and transcend them. As basic pillars of the international legal system (as of any legal system), those principles give expression to the *idee de droit*, and furthermore to the *idee de justice*, reflecting the conscience of the international community. Irrespective of the distinct approaches to them, those principles stand ineluctably at a superior level than the norms or rules of positive international law. Such norms or rules are binding, but it is the principles which guide them." Citing Cheng *supra* note 103 at 393 (emphases in original)

Ultimately, according to Judge Trindade, general principles emanate from the universal juridical conscience and are the material source of all law. They are often linked to natural law or natural justice and are resorted to as a source, as Henkin puts it, as a triumph of *good sense* and *practical needs* over the limitations of concepts and other abstractions". L. Henkin, "International Law: Politics, Values and Functions: General Course in Public International Law" (1989) 216 RCADI 61-2. The ICJ has applied them both as a formal source of law, and as an interpretive source of law. See Trindade *ibid* at paras 20-25 for a review of ICJ jurisprudence. See also C. Voigt, "The Role of General Principles in International Law and their Relationship to Treaty Law" (2008) 31 Retfaerd Argang 2/121, 3-25.

[106] See S. C. McCaffrey, "Of Paradoxes, Precedents, and Progeny: The *Trail Smelter* Arbitration 65 Years Later" in R. M. Bratspies and R. A. Miller, eds., *Transboundary harm in international law: lessons from the Trail Smelter arbitration* (Cambridge: Cambridge University Press, 2006) at 41-45 discussing the influence of the *Trail Smelter* case on various domains of international law and the work of the ILC. See also Okowa, *State Responsibility supra* note 94 at 62-3 noting that "customary law does not contain a normative regime specific to the environment as such", instead containing a reservoir of general principles and concepts that, when applied to transboundary environmental harm could be interpreted to give rise to erga omnes claims (i.e. one state's non-compliance would trigger a claim for all other states whether directly affected or not) similar to those in human rights law. Traditionally, however the *Trail Smelter* dictum is seen as being confined exclusively to environmental law with limited use for human rights claims against harm originating extraterritorially. See N. Vennemann, "Application of International Human Rights Conventions to Transboundary Harm" in Bratspies and Miller *ibid* ch 23. This proposition is challenged by many authors, notably the experts behind the Maastricht Principles (*supra* note 16 at 1095); Skogly and Gibney (cited infra); Knox *supra* 12 and most authoritatively Judge Trindade as cited, who all argue that the general duty to avoid causing harm in other states is undeniably established in international law and equally applies to extraterritorial human rights harm. See e.g. A. G. Oude-Elferink, "Environmental Impact Assessments in Areas beyond National Jurisdiction" (2012) 27 Marine and Coastal Law 449 at 453-4, discussing that after the *Pulp Mills* case the validity of the harm principle is undeniable for all activities susceptible of causing harm in areas beyond national jurisdiction.

[107] By contrast to purely domestic environmental harm (originating and occurring within one state), environmental damage that implicates human rights is ipso facto internationalized and triggers the scrutiny of international courts and ultimately the international community. On the other hand, purely environmental transboundary harm triggers only a limited international intervention in the form of an espousal of the claim by an affected state, while transboundary environmental harm with human rights consequences remains untested in international jurisprudence because of the jurisdictional constraints on the admissibility before international human rights tribunals. Osofsky *supra* note 99 at 87. Also Knox *supra* note 12 at 203. Skogly and Gibney argue however that the *Trail Smelter* principle applies equally to human rights harm and imposes upon all states a duty to respect human rights in other states including the positive obligation of diligent conduct to avoid such

seem to impose a positive duty on the home state to undertake both an *ex ante* and an ongoing assessment of all state activities that might harm the environment or the rights of individuals in other states as an integral component of the state duty to respect human rights extraterritorially. At a minimum, HRIAs can be said to be required in fulfillment of the duty on states to demonstrate diligent steps to inform themselves of the extraterritorial effects of proposed state activities.[108] As state acts, TIAs fall straight under this obligation whether they might be causing extraterritorial harm directly or indirectly (i.e. by enabling MNC harm).[109] Consequently, there is an obligation for the home state to use the HRIA mechanism to identify all private rights violations and environmental harm enabled by the CCOFTA, *in addition to identifying inconsistencies* between the TIA clauses and pre-existing state obligations under human rights treaties. Admittedly, the methodology for identifying inconsistencies in the human rights performance of host state proposed in the *Guiding Principles* does include an assessment of how the TIA clauses would affect the host state

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harm. S. Skogly and M. Gibney, "Transnational Human Rights Obligations" (2002) 24 Hum Rts Quarterly 3, 789. See also J. Knox, "Diagonal Environmental Rights" and A. Cahill, "Protecting Rights in the Face of Scarcity: The Right to Water" in M. Gibney and S. Skogly, eds., *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press, 2010), 194. In addition, an *erga omnes* duty to respect human rights on all states is found in the UN Charter and many core human rights treaties, most notably the ICESCR imposing an additional positive duty on all states to cooperate to respect and realize the protected rights. See generally Skogly and Gibney *ibid*. See further chapter 1.

[108] "[The state duty to respect human rights] should be interpreted to include not only an obligation to refrain from actual actions and activities that are detrimental to the enjoyment of [human rights in other states], but also encompass an obligation to refrain from formulating and implementing policies that "can be foreseen as having negative effects" upon [rights in other states]". Cahill *ibid* at 197 citing Report of the Special Rapporteur on the Right to Food, UN Doc. E/CN.4/2005/47 at para 51 discussing extraterritorial state obligations to respect the right to water elaborated in CESCR, General Comment No 15 *supra* note 32. This is not to say an independent obligation to perform HRIAs exists in general international law such as for EIAs. The status of HRIAs can be seen as that of EIAs prior to the *Pulp Mills* case. As Craik puts it in the context of EIAs pre-Pulp Mills "when one considers the kind of procedural mechanism that is required to implement the harm principle, it would be difficult to conceive of something that did not look like modern EIA obligations". *Supra* 69 at 75.

[109] The conclusion of TIAs is clearly an act attributable to the home state and to the extent it might be contrary to the "treaty rights of another state" (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10, at p. 28.) the home state would be responsible for "all the consequences, not being too remote, of its conduct". See ILC *Draft Articles on State Responsibility supra* note 28, Article 31 and Commentary at p 13. See chapter 1 of this thesis for an analysis of how MNC human rights and environmental wrongs enabled by IIAs fall under the responsibility of the home state.

capacity to protect human rights against private violations but it is presented here as an independent obligation for the home state.[110] Importantly, under the harm principle this obligation would apply independently of the existence of the TIA, but its scope is significantly broadened when bound to consider the effects of the TIA whose general purpose is the creation of private investor rights.

3.3.3 Canada's duty to prevent transnational private harm through the annual report

A more complicated issue is the relationship of the HRIA mechanism and the home state duty to protect human rights extraterritorially. If one considers a scenario where the HRIA will produce statements about the negative impact of Canadian-based MNCs in Colombia, the question is whether Canada's duty to regulate its investors' conduct abroad would be triggered by such findings. As argued in the previous chapters, the primary duty to protect human rights against private harm resides with the territorial state, however not all human rights instruments are territorially confined and there is enough jurisprudential precedent to construe a duty for the home state to protect individual rights against private harm extraterritorially whenever it has the power, or is in a position to do so.[111] This is especially true in situations where state activities in its territory or jurisdiction, including its

[110] Guiding Principles on HRIAS *supra* note 18 at Principle 5 Commentary at para 5.3.

[111] See e.g. ECtHR, *Ilascu & Others v Moldova & Russia* (Judgement of 08 July 2004), any state has an obligation to use all powers and means at its disposal to influence the situation to the effect of preventing human rights harm even when the individual victims are not on its territory (para 331.). See also *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, [2008] ICJ Rep 353. See CESCR, General Comment No. 14, *The Right to Health supra* note 32 at para 39: "States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means...". See further authorities cited in Maastricht Principles *supra* note 16 at Principle 8 Commentary at paras 3-5. See chapter 1 of this thesis for a discussion on the relationship between the state duty to protect human rights extraterritorially and investor regulation in IIAs.

(non)regulation of private business activity, causes human rights violations extraterritorially.[112] As discussed above, the ILC *Prevention Articles* require states of origin of transboundary harm resulting from the activity of private actors to possess an internal regulatory framework and apply it to private conduct posing risk.[113] The duty of diligence is satisfied by the home state demonstrating "a responsible and active role in regulating" such private activity, as well as basing a decision to authorize it on a prior impact assessment.[114] Interpreting this in light of the general duty to avoid causing extraterritorial harm would mean that the home state has an obligation to use the HRIA, seen as an act of the home state, to prevent any private violations enabled by the CCOFTA, also an act of the state. In this scenario, it would not be the wrongful conduct of the MNC itself that triggers the protective aspect of home state human rights obligations, but the state activity enabling it. More importantly, if causal criteria are used, the responsibility of the home state could be engaged for the separate wrongful conduct of not construing the HRIA mechanism in a certain way or not using its findings to correct its originally wrongful conduct by negotiating investment protection clauses that harm human rights in the host state.[115] This approach combines the obligation for states to inform themselves about the potential transboundary impact of their activity and prevent any such impact, found in the harm principle, with the protective aspect of the due diligence obligation of human rights law that ultimately makes the duty to regulate against private abuses a logical sequence of the investigative function of HRIAs. It should be emphasized however that the protective aspect of human rights due diligence does not

[112] E.g. ECtHR, *Kovacic & Others v Slovenia* (Admissibility Decision of 1 April 2004), at page 34.
[113] ILC *Prevention Articles* at Articles 5, 6 and 7 and Commentary.
[114] *Ibid* Articles 6 and 7.
[115] This conceptualization would depend on admitting the home state conduct of negotiating investment clauses without due regard for human rights in the host state as internationally wrongful and thus giving rise to state responsibility. See further chapter 3 on this and the role of causality in connecting home state conduct to investor violations enabled by IIAs.

automatically impose investor regulation, whether unilateral or treaty-based, as an obligation *per se,* but the diligent conduct of the state is evaluated objectively on a case to case basis and is influenced by many factors (that can include the nature of the risk, the nature of the proposed activity, the interests of the individual and economic or development interests etc.) commonly known as the test of reasonableness.[116] However, if HRIAs are taken to satisfy the obligation to foresee all the consequences of the home state activity (TIA) then the second prong of the harm principle would shift the consideration to the reasonableness of the steps the informed state has taken to demonstrate best efforts to prevent such harm, effectively placing unilateral or treaty-based investor regulation further from a choice and closer to a legal duty.[117]

In that context, the reasonableness of Canada's past and future activities related to the conclusion of the CCOFTA without undertaking a prior HRIA can be questioned from the point of view of state responsibility. Indeed the exclusion by the Canadian government of FDI and private corporate activity in Colombia from the scope of the annual report can be

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[116] ILC *Prevention Articles*, Commentary to Article 3 at para 11:

> "The standard of due diligence against which the conduct of the State of origin should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which may be considered ultrahazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location, special climate conditions, materials used in the activity, and whether the conclusions drawn from the application of these factors in a specific case are reasonable, are among the factors to be considered in determining the due diligence requirement in each instance. What would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future."

See also ILC *Draft Articles on State Responsibility* at Commentary to Article 14 para 14:

> "Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur. The breach of an obligation of prevention may well be a continuing wrongful act..."

On the test of reasonableness used for assessing state measures to prevent extraterritorial environmental harm see Craik *supra* note 69 at 72-77.

[117] On the obligation of home states to regulate investors conduct abroad as part of the due diligence principle see chapter 1.

construed as violating Canada's international responsibility for implementing the Side Agreement in conformity with its human rights law obligations.[118] It is also questionable if the reasonableness criterion will be satisfied if future HRIAs fail to take into account the human rights effects of Canada's financial and political support for the deregulation that took place in Colombia prior to the conclusion of the CCOFTA that paved its way.[119] More importantly, the reasonableness under the harm principle of Canada's future unilateral HRIAs of the CCOFTA can be questioned if those assessments fail to find investor violations in Colombia in light of the overwhelming evidence adduced to this effect to the Canadian government and before Parliament. Moreover, inaction by the Canadian state to address such violations enabled by the CCOFTA would also fall under the scrutiny of reasonableness under the harm principle, while also putting into question the international human rights legality of the HRIA process itself. Similarly, the methodological approach and choice of indicators for the HRIA can also be questioned in terms of demonstrating diligent conduct, and so can a choice to exclude local affected communities in Colombia from the process of HRIA.

On this last note, a final observation is due about the relevance of international human rights law for home state obligations regarding the methodological content of HRIAs. While it is now certain that EIAs are required as a general principle of international law to satisfy the first limb of the harm principle (demonstrate diligence in foreseeing harm), the second limb—the duty to prevent transboundary environmental harm—is left unspecified due to a

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[118] See Canada, Department of Foreign Affairs and International Trade, *Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia for the period August 15, 2011 to December 31, 2012*, submitted in the House of Commons on June 14, 2013 (available at http://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/rep-hrft-co_2013-dple-rapp.aspx?lang=eng#cn-cont)

[119] See in this sense questions to the Department of Foreign Affairs and International Trade in House of Commons Standing Committee Evidence *supra* note 4.

lack of international minimum standards as to what amounts to 'significant' harm that states are required to prevent.[120] Instead, the source (home) state and the affected (host) state are under an obligation to engage in meaningful negotiations with the view of finding a mutually acceptable 'minimum' without however implying a duty for the source state to desist from pursuing the proposed activity.[121] A separate obligation exists however, as examined above, for the source state to demonstrate diligence and best efforts to prevent such harm independently from the obligation to engage in consultations with the host state to define the acceptable level of transboundary harm. As per the *Pulp Mills* case, this is an obligation to conduct a prior EIA on the proposed activity. However, as this obligation is one of the steps taken to prevent transboundary damage, the home state would also be under an obligation to base its EIA on all applicable international norms in force for that state as well as demonstrate consideration for internationally accepted standards of 'best practices'.[122]

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[120] Craik *supra* note 69 at 75-77; Knox *supra* note 72at 315

[121] See *supra Lac Lanoux* case and ILC *Prevention Articles* at Article 9 "Consultations on preventive measures", Commentary at paras 2-3 citing *inter alia* the *Lac Lanoux* case that the affected state cannot veto proposed harmful projects. The state proponent and the concerned state are under an obligation to negotiate, however that obligation does not imply an obligation to reach an agreement. The proponent state does not have the right to authorize an activity over which it has control before these negotiations are deemed to have ended, after which no right of veto exists for the affected state. See *Pulp Mills supra* note 93 at paras 145-150. This area of international law remains very unclear and raises many questions as to damages in case of transboundary harm occurring after projects are executed following failed negotiations.

[122] As the ICJ stated in *Gabcikovo-Nagymaros*, *supra* note 81 at para 140:

> "Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past."

Although the Court did not specifically spell out this requirement in *Pulp Mills*, it implicitly reviewed the adequacy of Uruguay's EIA against the requirements of the Espoo Convention and the 1987 UNEP Goals and Principles of Environmental Impact Assessment while maintaining that general international law does not specify the content of EIAs but it is for each state to determine such content having regard to the obligation to exercise due diligence while carrying out the assessment. At paras 205. This argument is made by A. Boyle, "Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention" (2011) 20 Rev of Eur Community & Int'l Env L 3, 227 at 229.

The situation is somewhat different with assessments of extraterritorial human rights harm. When deciding cases of domestic human rights harm (caused by environmental degradation or otherwise) human rights tribunals have universally held a "margin of appreciation" for the state to allow risky development projects while holding states strictly responsible for conducting a prior EIA, notifying the potential victims and allowing them full participation in the decision making about carrying out the proposed project.[123] International human rights jurisprudence has emphasized procedural safeguards when examining state due diligence under human rights law to protect individual rights against both state and private harm, while always deferring the decision about tolerable levels of harm to the state provided proper procedure was followed.[124] The adverse effects on human rights do not have to be severe or significant—they can simply interfere with the private life or the home of individuals.[125] Similarly, courts have recognized that civil, political and economic, social and cultural rights might be affected by environmental damage especially in the context of investment projects.[126] While deferring to the internal decision making process of states to set specific

[123] See e.g. *Powell and Rayner v. United Kingdom*, (1990) 20 EHRR 277; *Hatton and others v. United Kingdom*, (2003) 37 EHRR 28; *Öneryıldız v. Turkey supra* note 101; *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria (Ogoniland Case)*, Communication No. 155/96 (Oct. 27, 2001), African Commission on Human and Peoples' Rights. See further Anton and Shelton *supra* note 100 at chapters 6 and 7; Council of Europe Manual *supra* note 101.

[124] See e.g. *Taskin supra* note 101 at 206-7 (footnotes omitted):

> "Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them [sic] to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake. The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question. Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process."

[125] *Hatton* op. cit.; *Fadeyeva v. Russia*, 2005-IV Eur. Ct. H.R. 255; *Lopez Ostra v. Spain*, Judgment of 9 December 1994, Eur. Ct. H.R., Series A no. 303-C.

[126] See e.g. *Ogoniland* case *supra* note 123 where the African Human Rights Commission used the right to health in the context of private oil exploitation projects authorized by the Nigerian government to find violations of economic, social and cultural rights, including the right to food and a state duty to undertake independent scientific monitoring and studies of environmental and social impacts before allowing any major

thresholds for the substantive content of specific rights on a case to case basis, states must at all times observe minimum or "core" standards of substantive protection as well as demonstrate diligence in safeguarding them.[127] States must therefore ensure that procedural safeguards, such as impact assessments, take the core substantive content of human rights into account, thereby ensuring rights holders are informed of the full magnitude of the risk and the decision to carry on with the potentially harmful activity is made with their full participation.[128] In addition, the 'core' content of human rights is extremely elastic and not easily identifiable both at the theoretical level and in adjudication by supranational bodies.[129] The important point however is that the determination of the acceptable levels of human rights harm is made vertically within one state and is subject to international supervision both with regard to the minimum core standard itself as well as regarding the state performance in terms of the diligent conduct to assess the risk of a potentially harmful activity and best efforts to ensure this does not result in violations of individual rights.[130] In

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industrial development, ensure ongoing monitoring, and provide communities with information and opportunities to participate in development decisions affecting these communities. At para 53.

[127] Only in exceptional circumstances will human rights courts engage in second guessing the material conclusions of domestic authorities, provided all individuals' procedural rights are observed and such decisions can be challenged at the domestic level. See e.g. Fadeyeva *supra* note 125 at 285.

[128] Fadeyeva *ibid* at 128: "it is not the Court's task to determine what exactly should have been done in the present situation to reduce pollution in a more efficient way. However, it is certainly within the Court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests." In *Öneryıldız v. Turkey* (*supra* note 101) and *Budayeva and others v. Russia*, decision of 20 March 2008 (Appl. no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02) the ECtHR found the state to have substantively violated the right to life by failing to possess and implement an effective legislative and administrative apparatus, including an early warning system and risk assessments that would have allowed the individuals to become aware in due time and assess the harm so as to avoid it. See also *Tătar v. Romania*, decision of 27 January 2009 **(**Appl. No. 67021/01), at 88, the ECtHR found the activity at hand to have entailed a number of positive obligations upon the state to construct a legislative and administrative framework to regulate the licensing, start-up, operation and control of the hazardous activity and which must include appropriate public surveys and studies allowing the public to assess the risks and effects associated with the relevant activities. Discussed in Pedersen *supra* note 104.

[129] For an excellent discussion on the malleability of human rights core standards and their high dependence on contextual interpretation even in cases with similar or identical circumstances see A. Brems, "Human Rights: Minimum and Maximum Perspectives" (2009) 9 Human Rts L Rev 3, 349-372.

[130] For example the UN bodies charged with interpreting human rights instruments have recently produced a large number of authoritative (although not formally binding on state parties) interpretations of the minimum substantive content of many human rights. See e.g. CESCR, General Comment No 15 *supra* note 32 discussing

addition, some rights such as those involving the subsistence of a people, self-determination and the property and natural resources found on indigenous lands, might require the consent of potentially affected rights holders as integral to the process of impact assessment.[131]

Two immediate problems appear when these considerations are transposed in the context of transboundary HRIAs. First, because of its vertical alignment, human rights law "assumes a single polity that experiences both the benefits and the costs of [potentially harmful policies]" and hence awards a significant discretionary margin for the state to balance economic and development priorities with rights protection.[132] Applied horizontally, for a state source of tranboundary harm to define the tolerable levels of individual rights infringement in the target host state, and then to assess the extraterritorial consequences of its own conduct that caused or contributed to such harm against the criteria it set on its own would amount to the source state supplanting the iterative process that international law reserves between the individual rights holders and the institutions in the host state. The acceptable trade-offs in terms of defining the tension of investment protection clauses and human rights enjoyment in the host state can under no circumstances be left to be defined at the discretion of the assessor home state. The reasonableness of such an assessment would be highly questionable compliance with the due diligence expected from the source state to prevent transboundary harm, but would also arguably violate the good faith principle in

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the minimum "essential levels" of the right to water that include "access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease" and "free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health". At paras 37-40. Also CESCR, General Comment No. 3, *The nature of States parties obligations (Art. 2, par.1)*, 5th Sess., UN Doc. E/1991/23 (14 December 1990). States are also under an absolute prohibition to violate certain rights that are considered as having attained the status of *jus cogens* (such as the prohibition of torture, slavery, genocide etc.) regardless if such a decision would come after a well-informed, inclusive public debate. See Knox *supra* note 12.

[131] See e.g. *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172. See further chapter 1 for a discussion on state responsibility and the free, prior and informed consent of indigenous peoples in the context of FDI and IIA negotiations. The section below will address this aspect of the HRIA process from the point of view of home state obligations.

[132] Knox *supra* note 12at 200.

terms of the home state complying with its human rights international obligations. Thus, for unilateral home state HRIAs dealing with the extraterritorial impact of TIAs that have already produced effects, explicitly basing the methodology of the assessment on internationally recognized human rights standards, including specific rights as fleshed out by international jurisprudence and interpretation given from treaty monitoring bodies, can be seen as an integral component of the due diligence obligation. This would also include the general principles proper to the regime of human rights law—chief amongst which are the principles of non-discrimination, equality, transparency and active participation in decision-making of the marginalized and most vulnerable groups—that can be seen either as an implicit obligation for the home state to demonstrate diligence *in* the assessment, or in the case of the CCOFTA, as being incorporated into the Side Agreement in light of its purpose and the pre-existing human rights law obligations of the home state.[133]

Second, what obligations does the home state have to ensure extensive participation in the HRIA of affected communities from the host state? Arguably the positive duty to assess potential transboundary environmental and human rights harm would not be satisfied even if the home state employed a comprehensive methodology strictly based on relevant international human rights standards without providing those affected with the opportunity to participate in such an assessment and to challenge its results. Simply put, the validity of the findings of the home state HRIA can only be tested with the participation of affected communities in the host state. As a point of international law, a home state "could [only] argue that its decisions regarding transboundary harm should be entitled to as much

[133] See discussion above for the interpretation of treaties in light of their purpose and the incorporation of other relevant obligations currently in force between the parties of a given treaty under Article 31(c) of the *Vienna Convention on the Law of Treaties*. See also *Pulp Mills* for a similar argument regarding the clauses of the 1975 treaty between Argentina and Uruguay establishing a regime for transboundary environmental harm prevention. See below for the presumption of conformity of administrative decisions with Canada's international obligations.

deference as its decisions regarding internal harm [when] giving all those affected, including non-residents, the ability to participate in the decision-making process, because extending the procedural safeguards ensures that the state takes into account the full range of costs and benefits of its actions".[134] Ensuring wide and fully informed participation of the local communities in the host state can therefore be seen as a necessary procedural fulfilment of the substantive positive obligation of diligent conduct under the harm principle requiring states to respect human rights in other states.[135] The next section will examine international obligations requiring the home state to include affected local communities from the host state in its annual HRIAs.

To summarize, the acceptance of Canada to undertake an annual HRIA of the impact on human rights of the CCOFTA represents an unprecedented acceptance of a state to assess the extraterritorial human rights impacts of its activities. As a matter of complying with its own international obligations the HRIA mechanism can be seen as a tool for the home state to identify if and how its internal acts might be frustrating human rights enjoyment extraterritorially. There is a clear duty on all states to undertake positive steps to prevent environmental and human rights harm in other states. Some form of impact assessment can therefore be seen as a general obligation for all activities creating a risk of such harm. Moreover, if considered in light of the positive steps every state is required to undertake to respect human rights in other states, it can be argued that the home state is under an obligation to structure the HRIA in a certain way so as to demonstrate diligent conduct. In the case of the CCOFTA this would translate to a positive obligation on the home state to take into account both the environmental and human rights transboundary risks of FDI; base

[134] Knox *supra* note 12 at 201, citing A. Boyle, "Human Rights or Environmental Rights? A Reassessment" (2007) 18 Fordham Envtl L Rev 471 at 502-3.
[135] Knox i*bid*.

the methodology and indicators used for the HRIA on international human rights texts, jurisprudence and interpretation from treaty monitoring bodies; and finally to validate both the process and results obtained from the HRIA by allowing affected local communities to participate in the process and challenge its results.

Chapter 4
Home state HRIAs and local community participation and consent: towards a bottom up approach to treaty-based investor regulation

Even with the yearly HRIA mechanism in place, a legitimate concern remains of whether this process will be able to produce a realistic account on the effects on human rights of the CCOFTA, especially the effects on the poor and marginalized local communities in Colombia where Canadian FDI would be most likely to negatively affect human rights enjoyment. While the discussion in the preceding chapters suggested that consultation of the affected rights holders is a defining aspect of HRIAs and one that distinguishes this type of impact assessments from others, current international law does not readily recognize the concept of 'transnational' public participation and is unclear what duties home states of FDI might owe locally affected communities in the host state. Indeed, the Canadian government's first annual report does propose "consultations with stakeholders with regards to the report and its methodology", but says nothing about who those stakeholders might be, in what way the consultations are to happen and what recourse might individual or community rights holders have in the case they are not consulted in this process.[1] Beyond these procedural issues, it must be borne in mind that markedly different accounts on the effects of trade and investment on human rights can be obtained from different political and social actors from the host state, including actors that might speak for or on behalf of local communities. The

[1] See Canada, Department of Foreign Affairs and International Trade, *Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia*, submitted in the House of Commons May 15, 2012, (available at http://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/rep-hrft-co_2012-dple-rapp.aspx) [hereinafter "First Annual Report"] at 4. In its second Annual Report, the Canadian government indicated issuing public calls for consultation with relevant stakeholders on the website of the Department of Foreign Affairs and International Trade and through the Canadian embassy in Bogota. See Canada, Department of Foreign Affairs and International Trade, *Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia for the period August 15, 2011 to December 31, 2012*, submitted in the House of Commons on June 14, 2013 (available at http://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/rep-hrft-co_2013-dple-rapp.aspx?lang=eng#cn-cont) [hereinafter "Second Annual Report"]

debate on the Canadian government's first Annual Report in the Canadian Standing Committee on International Trade is a perfect example of the political and legal tensions created by this reality.[2] In such a setting, there is a risk that the approach the Canadian government would take to ensure participation the HRIA of the CCOFTA might forego actual consultations with locally affected individuals and communities and distort the findings and recommendations of the HRIA. Indeed the exclusion of the effects on human rights in Colombia of the activity of Canadian corporations from the scope of the Annual Report suggests that consultation with locally affected communities never took place on this issue.[3] This is even more problematic since the Colombian government might also eschew consulting with affected communities or might not even produce a HRIA altogether as appears to have occurred with the first annual report.[4] Therefore, a final set of questions that will be examined in this section pertain to the participation of locally affected communities in the HRIA and its significance for investor regulation.

Does Canada have an obligation to consult local communities in Colombia as part of the HRIA on the human rights effects of the CCOFTA, in particular about the effects of its investment protection clauses and Canadian-based MNC activity? Further, what kind of public participation would international human rights and environmental law require from Canada as the home state of FDI and proponent of the CCOFTA? Would Canada be in

[2] See Canada, House of Commons, Standing Committee on International Trade, *Evidence*, Contents, 41st Parl., 1st. Sess., No. 043, June 12, 2012 for the testimonial of Mr. Juan Diego Gonzales Rua, Researcher, Escuela Nacional Sindical, Colombia, reporting that the communities that are most affected have not had any role and have been "shunted to the side" with regard to the measuring of the actual impacts of the CCOFTA on human rigths in Colombia undertaken by the governments. At 1220. Compare with the testimony of Mr. Augusto Solano, President, Association of Colombian Flower Exporters, discussing how the CCOFTA has generally created conditions for increased trade flows between the two countries and the overall positive impact of this on creating more jobs in Colombia. At 1230-5. As Mr. Solano candidly summarizes further in the questions period "[he is] not a flower grower; [he is] an administrator" of a private organization. At 1310. Canadian opposition party MPs vocally criticized the lack of consultation of civil society in Canada or in Colombia and the inadequacy of such an approach in terms of fulfilling Canada's international law obligations. At 1255-1300.

[3] Second Annual Report *supra* note 1.

[4] Discussion in the Standing Committee on International Trade *supra* note 2.

compliance with its international law obligations if it consulted and cooperated only with the Colombian government and officials with regard to the human rights effects of the CCOFTA, or does international law require it to consult and engage directly with the local communities in Colombia that are most affected by human rights consequences of the CCOFTA? Finally, what kind of opportunities does the HRIA mechanism, as currently established, provide for local communities to challenge the methodology, process and findings of the HRIA on the CCOFTA directly with Canada as the home state? What implications would such a consultative process have on the negotiations and conclusion of TIAs, especially the regulation in IIAs of investors to respect human rights in host states, and more generally on the process of emancipation of local communities from the 'third world' within the process of creation of international law?

4.1 Operationalizing the harm principle: home state obligations relating to access to information, consultation and access to justice in transnational human rights impact assessments

Public participation has been described as "the soul" of impact assessment processes.[5] It has been observed that extending procedural rights to affected non-residents to actively participate in the process of impact assessment in the source state is the only way to legitimize transboundary human rights and environmental harm, while also minimizing it.[6] Public participation in governmental policy decision-making is seen as the cornerstone of

[5] N. Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge: Cambridge University Press, 2008) at 31, further adding, in the context of environmental impact assessments (EIAs), that the consideration of alternatives is the heart of the process.

[6] J. Knox, "Climate Change and Human Rights Law" (2009) 50 Virginia J of Int'l L 1:164, at 201 and 211 observing that "requiring a state merely to take into account the extraterritorial effects of its decisions on human rights mitigates, but does not completely solve, the single-polity problem with applying the environmental human rights jurisprudence to transboundary harm."

international environmental[7] and human rights law[8]. In the context of FDI, especially large-scale projects, "public participation promises to define and redefine the major economic development projects" in particular mining, energy and resource-development industries.[9] While public participation is most commonly equated to political participation, there is no straightforward definition of public participation and it is in fact almost always defined by implication.[10] As a concept, public participation can be explained as an "all-encompassing label used to describe various mechanisms that individuals or groups may use to communicate their views on a public issue" and can "take many forms, including voting, demonstrating, petitioning, lobbying, debating, appearing and testifying at hearings, requesting access to government-held information, even bringing lawsuits".[11] A fitting example is the definition attached to public participation in the *Convention on Access to*

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[7] See Principle 10 of the *Rio Declaration on Environment and Development* (Annex I to the UNGA, *Report Of The United Nations Conference On Environment And Development*, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992 ["Rio Declaration"])

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Other Principles of the Rio Declaration make specific reference to non-discriminatory participation from women (Principle 20), youths (Principle 21) and indigenous peoples and local communities (Principle 22). The importance of public participation in EIAs by individuals and groups is also emphasized in Agenda 21, adopted at the 1992 Rio Conference. See further D. K. Anton and D. Shelton, eds., *Environmental protection and human rights* (New York: Cambridge University Press, 2011) at ch 6.

[8] See Article 21 of the *Universal Declaration of Human Rights*; Article 20 of the *American Declaration of the Rights and Duties of Man*; Article 13 of the African Charter; Article 25 of the ICCPR. See also jurisprudence of the ECtHR cited in the previous chapter.

[9] See G. Pring and S. Y. Noé, "The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development", in D. N. Zillman, A. R. Lucas and G. Pring, eds., *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press, 2002), 12.

[10] *Ibid* at 16 citing the definition of public participation developed by the Organization of American States (OAS) Council for Integrated Development, *Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development*, CIDI/RES. 98 (V-o/00), OEA/Ser.W/II.5, CIDI/doc.25/00, 20 April 2000: "all interaction between government and civil society…including the process by which government and civil society open dialogue, establish partnerships, share information, and otherwise interact to design, implement and evaluate development policies, projects and programs."

[11] Pring and Noé *supra* note 9 at 15.

Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters [*Aarhus Convention*] where public participation connotes participation in the government decision-making process while providing access to information and justice to affected individuals and communities are implicit and corollary state duties.[12] However, as discussed further below, a broad definition of public participation "is in danger of merging with stakeholder conceptions of participation, as distinct from a rights-based conception of participation that focuses attention on local communities".[13]

Although having a long-standing pedigree in western democracies, the entrenchment of the international notion of public participation has been influenced, *inter alia*, by the "evolution of the human rights regime designating public participation as a political right, and the increasing recognition of the rights of indigenous and tribal peoples and local communities" and has itself influenced a "growing body of legal requirements nationally and internationally" pointing to an emerging new "public right to control private development".[14] The growth of public participation requirements is described as a "component of a larger trend toward the increasing legal regulation of the mining, energy and resource development industries".[15] These legal requirements inject a "human dimension into resource planning, financing, licencing, and operating activities on a global scale" that have "until recently been controlled by the project developer, financier, landowner and the government with

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[12] See Article 3, *Convention On Access To Information, Public Participation in Decision-Making And Access to Justice in Environmental Matters*, Signed June 25, 1998, entry into force 30 October 2001, UNTS Vol. 2161, p. 447 ["*Aarhus Convention"*].

[13] S. Seck, *Home State Obligations For The Prevention And Remediation Of Transnational Harm: Canada, Global Mining And Local Communities* (PhD Dissertation, Osgoode Hall Law School, York University, 2007) ["Seck, PhD"] at 399 discussing the process of consultation during the *National Roundtables on Corporate Social Responsibility* organized by the Canadian government that were structured according to the stakeholder concept, and ultimately privileged industry lobbying and economic interests.

[14] PRing and Noe *supra* note 9 at 13-4, footnotes omitted.

[15] *Ibid*.

jurisdiction over the site".[16] Importantly, this 'public control by local communities' of private development projects, that Pring and Noe label "international law of public participation", draws its normative force from both environmental and human rights law, often compounded together into the so called 'human rights approach to environmental protection' that is largely based on case law from the 'environmental human rights jurisprudence' discussed in the previous section.[17] Another defining aspect of the law of public participation is the extent to which it applies, or should apply, to nationals of countries other than the decision-making country, since so many development issues have transboundary or multi-state impacts.[18] In fact, the concept of public participation and indeed its underlying legal framework have been linked to the expansion and acceptance of environmental impact assessments as the norm for projects or policies with suspected extraterritorial impact.[19]

The 'law' of public participation is said to rest on three pillars: access to information, public participation in decision-making, and access to justice.[20] Each of these is "treated differentially in the law, but no one of the three can succeed without the other two" and together, these three pillars are considered to be a "prerequisite to the effective national and international management and protection in matters relating to environment and

[16] *Ibid* at 12.
[17] *Ibid* at 28, noting that the international rules and principles underpinning public participation were established foremost and furthest in the arena of environment and development and arise in response to and therefore specifically apply to mining, energy, and natural resource industries.
[18] *Ibid* at 28-29.
[19] *Ibid* at 38. Indeed any description of the process, methodology or legal rules on EIAs is impossible without a discussion of relevant individual community rights and corresponding state duties regarding public participation in the EIA and decision-making on the proposed project. See P. W. Birnie and A. E. Boyle, International Law and the Environment, 2d ed., (Oxford: Oxford University Press, 2002); Craik *supra* note 5; V. P. Nanda and G. Pring, *International Environmental Law for the 21st Century* (Transnational Publishers, 2002).
[20] Pring and Noé at 28. For a detailed discussion of the these three crucial procedural rights and their international environmental and human rights sources, especially regional human rights jurisprudence, see Anton and Shelton, eds., *supra* note 7at Chapter 6, pp. 356-385.

development".[21] Thus the right to access to information is interpreted as providing two types of duties on states: a reactive duty, meaning that governments must provide information to the public when requested, but also a proactive duty which obliges governments to "compile, prepare and disseminate" to the public information relating to government policies but also on private development projects.[22] The latter type of state duty is usually interpreted as requiring states to undertake EIAs of private projects. The second pillar, the right to participation in government decision making, is said to have emerged as a right both through the proliferation of international instruments requiring environmental impact assessment processes, and the constant case law of human rights tribunals dealing human rights concerns resulting from environmental degradation.[23] The right to participate in decision making can be defined as the "empowerment of individuals and groups most affected, and for whom the opportunity to participate in decisions is the most useful and direct means of influencing the balance of environmental, social and economic interests".[24] It is premised on "the right of those who may be affected, including foreign citizens and residents, to have a say in the

[21] Pring and Noé *ibid* at 28, citing Philippe Sands & Jacob Werksman, "Procedural Aspects of International Law in the Field of Sustainable Development: Citizens' Rights", in *Sustainable and good governance* (Konard Ginther *et al*. eds., 1995), at 178–79.

[22] Pring and Noé at 29. Anton and Shelton posit that the "right to information can mean, narrowly, freedom to seek information or, more broadly, a right to access to information or a right to receive it. Corresponding duties of the state can be limited to abstention from interfering with individual efforts to obtain information from public or private entities, or it can require the state to obtain and disseminate all relevant information concerning both public and private projects that might affect the environment." *Supra* note 7 at 357. In consequence, state duties resulting from the right to access to information can range from not interfering with the individual freedom to seek information from those public and private subjects that are willing to share such information, a state duty to prepare and disseminate information on government policies and projects, and if read most broadly a duty on the government to prepare and disseminate information to the public on both public and private projects. In practice, government held information on private projects, or public policies enabling private projects, is almost always obtained through EIAs thus making them an indispensable for states to fulfil this duty. *Ibid*. See for example *Claude Reyes et al. v. Chile,* Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 77 (19 Sept. 2006), a case where the Inter-American Court of Human Rights found a violation of the right to access to information in view of a government refusal to provide information to a private citizen related to FDI policies, state contracts with private investors and projects. Discussed in Anton and Shelton *ibid* at 369-377.

[23] Pring and Noé, *ibid* at 38. Knox *supra* note 6 at 189; O. W. Pedersen, "The Ties that Bind: The Environment, the European Convention on Human Rights and the Rule of Law" (2010) 16 European Public Law 4, 571.

[24] Knox *ibid*, citing A. Boyle, "Human Rights or Environmental Rights? A Reassessment" (2007) 18 Fordham Envtl L Rev 471, at 498.

determination" of public policies on public and private development projects, "especially in impact assessments or other permitting procedures".[25] The right to public participation, a fundamental human right of individuals and groups to participate either directly, or through freely elected representatives in the conduct of public policy making and governance[26], applies to government decision making concerning assessments and authorizations of potentially harmful private activity and is as such enshrined in numerous international environmental and human rights soft [27] and hard law instruments [28] . International environmental instruments mandating states sources of transboundary environmental harm to undertake EIAs almost always provide public participation rights for affected individuals and communities, albeit with varying degrees.[29] Finally the right to access to justice is described as arising in three distinct situations: a right to challenge a refusal to provide access to information; a right to prevent or seek damages and remedies in the case of harmful activities; and a right to enforce directly existing international and domestic laws.[30] Impact

[25] Anton and Shelton *supra* note 7 at 381. Participation is also critical to the effectiveness of law. The process by which rules emerge, or how proposed rules become norms and norms become law, is a matter of legitimacy, and legitimacy in turn affects compliance, which depends on participation.
[26] See UDHR Article 21; ICCPR Article 25.
[27] See e.g. Rio Declaration *supra* note 7 Principle 10 et seq.; Agenda 21, the plan of action adopted at the Rio Conference of 1992, states in the Preamble to Chapter 23 :

> "One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups, and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those that potentially affect the communities in which they live and work. Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures."

[28] See e.g. *Convention on Biological Diversity,* signed 5 June 1992, entry into force 29 December 1993, UNTS Vol. 1760, p. 79, at Article 14(1)(a); *Convention on Environmental Impact Assessment in a Transboundary Context*, signed 25 February 1991, entry into force 10 September 1997, UNTS Vol. 1989, p. 309 ["*Espoo Convention*"]; *Aarhus Convention supra* note 12 . For a chronological overview of soft and hard international environmental law sources relating to the three pillars of public participation law see Pring and Noé *supra* note 9 at 27-50. For human rights instruments creating similar participation rights see Anton and Shelton.
[29] See e.g. *Espoo Convention* Article 2(6); *Aarhus Convention*. See further Pring and Noé *ibid* at 38-43 ; P. N. Okowa, "Procedural Obligations in International Environmental Agreements" (1996) Brit YB of Int'l L 275.
[30] Pring and Noé *ibid* at 44.

assessment processes are usually linked with the first two pillars of public participation and do not per se provide for remedies for affected individuals or communities. However, the right to access to justice can also mean the right of affected groups or individuals to challenge on judicial review a governmental decision not to undertake an impact assessment of a proposed, or if an assessment is undertaken to challenge its methodology, results or the way public participation was provided for during its process.[31]

While state duties emerging from the 'law of public participation' are most commonly associated with international environmental law, where commentators most often look for sources when discussing participatory rights, it should be borne in mind that state duties to ensure access to information, consultation and access to justice are ultimately grounded in human rights law that created such rights for individuals and groups.[32] Public participation

[31] See e.g. *Tatar v. Romania,* Application No. 67021/01 (27 January 2009) and *Taşkin and Others v. Turkey*, 46117/99 [2004] ECtHR 621 (10 November 2004), discussed in Anton and Shelton *supra* note 7. See further below for access to justice rights of local communities in the transboundary context.

[32] Pring and Noé provide a summary of most relevant international environmental hard and soft law instruments that create participatory rights for individuals (*ibid* at 29-50), while also acknowledging the importance of human rights law sources (*ibid* at 50). For a more detailed presentation on the combined environmental and human rights international law sources of the law of public participation in governmental policy and decision making on development projects with harmful environmental or human rights consequences see Anton and Shelton *supra* note 7 at 358-9; 382-4. For example the right to information is contained in the *Universal Declaration of Human Rights* (Article 19), the ICCPR (Article 19(2)), the *American Declaration of Rights and Duties of Man* (Article 10), the *American Convention on Human Rights* (Article 13) and the *African Charter of Rights and Duties of Peoples* (Article 9). Curiously, the *European Human Rights Convention* guarantees only freedom of information (Article 10), but constant jurisprudence from the ECtHR has found an implicit right to receive information from the government regarding hazardous activities that might violate other convention rights. See e.g. *Oneryildiz v. Turkey*, Application No. 48939/99 [2004] ECHR 657 (30 November 2004). The right to public participation in decision making is also enshrined in these instruments (e.g. ICCPR article 25 "Every citizen shall have the right and the opportunity, … without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;…") However, international and national case law reviewed in Anton and Shelton suggests that these provisions have been invoked far less than those concerned with information and redress. At 383. Similarly, the right to access to justice and to a remedy for environmental harm is itself a most fundamental human right recognized in the UDHR (Article 8), ICCPR (Article 2(3)), ICESCR (Article 2(1); see CESCR, General Comment No. 3, *The nature of States parties obligations (Art. 2, par.1)***,** 5th Sess., UN Doc. E/1991/23 (14 December 1990). expressly linking the right of individuals and groups to a judicial remedy for certain 'justiciable' social, economic and cultural rights and cross-referencing it to the requirement of non-discrimination and the right to a remedy under the ICCPR at para 5. Under the *European Convention on Human Rights* states parties have been found to have violated Article 6 of the Convention which provides the right for everyone to have access to an impartial tribunal established by

rights and the corresponding state duties are therefore seen as a procedural safeguard bestowed upon individual and group rights holders, against state action or inaction enabling economic development which threatens to violate substantive standards of environmental and human rights protection. This section presents the key bases of international human rights and environmental law that could establish a duty on the home state to consult with locally affected communities from the host state about the human rights and environmental impacts of a proposed IIA and resulting MNC activity.

In the context of state duties pertaining to prevention of transboundary harm, participatory rights of locally affected communities in the host state are almost invariably discussed under the umbrella of international environmental law, specifically the duty to undertake a prior EIA of proposed projects or policies with potential transboundary impact.[33] As already touched on in the foregoing discussion, international law obligations to inform and consult with potentially affected individuals and communities from the host state as part of the process of EIA are found in multiple international law instruments, of which two would seem to be applicable to public and private projects that can cause transboundary environmental harm: the *Espoo* and the *Aarhus Conventions.* The *Espoo Convention* provides a general duty for the state parties that are concerned by a project with potential transboundary impact to "ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of

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law, when issuing licenses, permits, authorizations etc. for private commercial projects causing environmental and human rights harm. See Anton and Shelton at 384.

[33] See generally, Pring and Noé *supra* note 9 at 28-50. As discussed above, this also seems to be the case when analyzing state duties under the harm principle which, originating from the *Trail Smelter* arbitral decision, is almost always read narrowly to apply only to cases of transboundary environmental harm and risk. As this chapter demonstrates however it applies as equally to home state activities which carry a risk of transboundary human rights harm.

the Party of origin, either directly to this authority or, where appropriate, through the Party of origin"[34]. It also requires states of origin of environmentally risky projects to undertake prior EIAs that allow for public participation by concerned individuals from the affected state in the relevant EIA processes on the proposed project as well as on the EIA itself.[35] It also requires the state authorizing the proposed activity to take into account the comments and observations of the affected citizens, including non-residents.[36] Since the sole focus of the *Espoo Convention* are state duties related to EIAs in the context of certain transboundary environmental harms, it does not contain provisions specifically granting non-residents access to justice rights, although the general obligation of state parties to implement the Convention's provisions by "legal, administrative and other means" could be read to require state parties to allow residents of the affected state access to the courts in the source state to challenge, at a minimum, the domestic decision not to undertake an EIA, or if read more broadly, its content and findings.[37]

More extensive transnational participatory rights are found in the *Aarhus Convention*, which applies to many public and private activities that can cause transboundary environmental harm, and covers all three pillars of the international law of public participation.[38] The Convention applies to plans, programs and policies, as well as executive regulations and generally applicable legally binding normative instruments that impact the environment.[39] In addition to the activities listed in the Convention itself, it applies to any activity for which the

[34] Espoo Convention *supra* note 28 at Article 3(8).
[35] *Ibid* at Article 2(3) and 2(6).
[36] *Ibid* at Article 6(1).
[37] Espoo Convention *supra* note 28 at Article 2(2).
[38] Pring and Noé decribe the Aarhus Convention as the "most stuggning breakthrough to date in all three aspects of public participation" *supra* note 9 at 35. Article 6 of the Convention provides for public participation in decision-making concerning a list of activities found in Annex I to the Convention. Annex I covers industry sectors such as mining, petroleum and gas extraction, pipelines, quarries, open pit mining etc. that are most susceptible of causing large-scale environmental and human rights harm.
[39] Articles 7 and 8 of the *Aarhus Convention supra* note 12.

national legislation of a state party requires an EIA.[40] Significantly, participation rights created under the *Aarhus Convention* are without discrimination "as to citizenship, nationality or domicile"[41] and similarly the definitions of "public" and "public concerned" are cast broadly without limitations pertaining to the territorial locus of the environmental harm or its relationship to the jurisdiction of state parties[42]. Environmental information is also defined broadly and obliges state parties to both disseminate information and provide it upon request from interested citizens or groups.[43] The Convention obliges state parties to ensure the involvement of the concerned public in the decision-making process, pay due account to its input and justify publicly its reasons for reaching a decision regarding projects.[44] Finally, access to justice provisions require state parties to ensure judicial remedies with respect to the right to access to information, the right to public participation in decision-making as well as the right to seek enforcement of these obligations by challenging private and public acts and omissions before domestic courts.[45]

The application of these obligations to potential transboundary environmental or human rights harm caused by Canadian FDI in Colombia is not straightforward. For one, Canada is a party to the *Espoo* but not to the *Aarhus* Convention and Colombia is not a party to either of these instruments. Further, even if it could be argued that at least some FDI projects carry a risk of causing environmental and human rights harm, the Espoo Convention explicitly refers to public and private *projects* and does not offer any readily recognizable bases for requiring Canada to undertake EIAs or allow for public participation in such assessments to non-residents in its decision-making related to IIAs. Even if this were the case, the wording

[40] *Ibid* at Annex I para 20.
[41] Article 3(9) of the *Aarhus Convention*.
[42] *Ibid* Article 2 (4) and (5).
[43] *Ibid* Articles 4 and 5.
[44] *Ibid* Article 6.
[45] *Ibid* Article 9. No jurisdictional limitation is provided with regard to these obligations.

of the *Espoo Convention* makes it clear the obligations found therein are confined to the state parties to it. Therefore, in order for such an obligation to exist in the case under consideration, one must consider if state obligations under the *Espoo* and *Aarhus* Conventions reflect customary or general international law requiring public participation in impact assessments related to transboundary harm.

These and other international instruments are commonly referred to as implementing the non-discrimination principle that, as a principle of international environmental law[46], requires "that the rights accorded persons affected by transboundary pollution should be equivalent to the rights of residents of the country where the pollution originates with respect to: *information* concerning projects that may give rise to a risk of transboundary pollution, *participation* in hearings concerning proposed decisions that could lead to such pollution, and *access to remedies* for abatement of or compensation for such pollution"[47] These rights should be distinguished from the rights owed to the affected state which is under general principles of international law entitled to state to state consultation and cooperation with the source state, as opposed to having participatory rights before an administrative body in the source state.[48] When discussed in the context of public participation in the EIA processes, the non-discrimination principle is also referred to as "equal access" or "national treatment" in the sense of including non-citizens of the source state in the assessment procedure and

[46] Non-discrimination is also a fundamental principle of human rights law as well as international economic law, as exemplified by provisions commonly found in FTAs and IIAs.
[47] J. Knox, "Diagonal Environmental Rights" in M. Gibney and S. Skogly, eds., *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press, 2010), 82 ["Knox, Diagonal Rights"] at 99 citing Organisation for Economic Co-operation and Development (OECD), *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977), at 19, emphases in original. The concept of non-discrimination was developed by the OECD in the 1970 and has influenced the development of international law in the context of transboundary rights and duties, as exemplified by the work of the ILC on issues such as the low of non-navigational uses of international watercourses, the *Draft Articles on Prevention of Transboundary Harm*, as well as the work of other UN bodies such as the UNECE that produced the *Espoo Convention*. Knox *ibid*. See also Craik *supra* note 5 at 55-7 and J. Knox,"The Myth and Reality of Transboundary Environmental Impact Assessment" (2002) 96 AJIL 291 ["Knox, Myth and Reality"] at 301-5.
[48] Craik *ibid*.

granting impacted individuals the right to access administrative and judicial procedures in the source state concerning the EIA.[49] When applied to EIAs, the non-discrimination principle would require states of origin of potential transboundary harm to assess transboundary impacts no differently than assessing purely domestic impacts of their decisions and policies. It requires a source state to assess the significance of transboundary harm, in the sense of the harm threshold that would trigger the EIA obligation, as well as to provide impacted individuals in another state the same rights of notice and consultation as it would provide to its own citizens.[50]

While so many international instruments adopting the non-discrimination principle with regard to extraterritorial participatory rights has led some commentators to regard is as a general principle of international environmental law[51], simply grounding the duty of the state source of transboundary harm to extend public participation extraterritorially does not fully depict the state of international law. For one, unless supplemented with detailed obligations such as those of the Espoo Convention, non-discrimination does not provide a standard according to which the source state should allow public participation to the affected individuals in the host state, neither does it oblige it to grant any special deference to such participation when deciding whether to proceed with the risky activity in question.[52] Even if taken as a purely procedural requirement to extend notice and consult impacted individuals from the host state, the non-discrimination principle would only cover those actions that the domestic regulatory framework in the source state provides public participation for. For example, Canada routinely conducts EIAs of its IIAs, with consultation of the public, which

[49] Pring and Noé *ibid* ; Craik *ibid* at 56-7 ; Knox, Myth and Reality at 300 citing OECD *supra* note 47 at 28.
[50] Craik *ibid*.
[51] Pring and Noé *supra* note 9 at 29 citing J. Ebbesson,"The Notion of Public Participation in International Environmental Law" (1998) 1997 YB Int'L Envtl L 51, 81-83.
[52] Knox, Myth and Reality at 314 ; Craik *supra* note 5 at 56-7.

solely focus on the potential environmental impact of such treaties on the Canadian environment.[53] Similarly, reporting on its compliance with the Espoo Convention the Canadian government has stated that all EIA processes whether dealing with domestic or extraterritorial harm, are open for participation to foreigners in the same way they are open to Canadian residents.[54] However it is immediately apparent that extending non-discriminatory rights of participation to non-residents places the government of the state source of transboundary harm in a reactionary rather than proactive role which, as discussed above, does not fit with the harm principle and the duty to prevent in the sense of obligating the source state to actively seek to inform and include locally affected individuals and communities in the IA process.

The ILC *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities* (ILC Draft Articles on Prevention), that purport to codify customary international law, place the duty to ensure public participation in the process of assessment of transboundary impacts of its actions, on a par with other procedural duties "essential to balancing the interests of all States concerned"[55]. Thus, Article 13 provides that "States concerned shall, by such means that are appropriate, provide the public likely to be affected" with relevant information relating to the activity susceptible of causing transboundary harm "and ascertain their views" on the "risk involved and the harm which might result".[56] The Commentaries note that the

[53] See Foreign Affairs, Trade and Development Canada, *Framework for Conducting Environnemental Assessments of Trade Negotiations*, February 2001 (available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/env/framework-cadre.aspx)

[54] See UNECE, *Report of Canada for 2003-2005 on the Implementation of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context*, April 2006 (available at http://www.unece.org/fileadmin/DAM/env/eia/documents/Review%202003-2005/Questionnaire%20-%202003-2005%20-%20Canada.pdf), at paras 24-25.

[55] International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, UN GAOR, 56th Sess., Supp. No.10, U.N. Doc. A/56/10 (2001) ["ILC, Draft Articles on Prevention"], commentary to Article 8 at para 1.

[56] *Ibid* Article 13. The Commentaries cite Principle 10 of the *Rio Declaration*, as well as a number of other international instruments in support of the customary status of this obligation.

states involved are to provide the public affected, "whether their own or of other States" with such information and participatory rights.[57] The Articles make it clear the obligation to inform the affected public falls equally upon the affected state as upon the source state which must, upon receiving notification of the potential harm from the source state, "inform, by such means that are appropriate, those parts of its own public likely to be affected".[58] In addition, the Commentaries specify that where the public likely to be affected is beyond the borders of the source state, "information may be provided, as appropriate, through the good offices of the State concerned, if direct communication is not feasible or practical".[59] As regards the legal standing of this state duty in the context of transboundary harm, the ILC *Draft Articles on Prevention* conclude that

> "[a]part from the desirability of encouraging public participation in national decision-making on vital issues regarding development and the tolerance levels of harm in order to enhance the legitimacy of and compliance with the decisions taken, it is suggested that, given the development of human rights law, public participation could also be viewed as a growing right under national law as well as international law."[60]

Access to information and participation obligations are complemented in the Draft Articles by requiring the concerned states to grant persons "who may be or are exposed to the risk of significant transboundary harm as a result of an activity, in accordance with [their] legal system access to judicial or other procedures to seek protection or other appropriate redress".[61] The requirement is one of non-discrimination with respect to the nationality of the victim or the geographical locus of the harm, and the Commentaries describe this rule as residual, allowing the states concerned to agree on alternate means for providing protection and redress to affected persons such as through a bilateral treaty.[62] However, even in such a

[57] *Ibid* Commentary to Article 13 at para 1.
[58] *Ibid* at para 8.
[59] *Ibid* at para 7.
[60] *Ibid* at para 10.
[61] ILC Draft Articles on Prevention *ibid* Article 15.
[62] Commentary to Article 15 at paras 2-4.

treaty the states cannot decide to "to discriminate in granting access to their judicial or other procedures or a right to compensation" as the purpose of such an agreement "should always be the protection of the interests of the victims of the harm".[63] In the context of FDI, it has been suggested that including access to justice mechanisms in IIAs could satisfy this obligation.[64] Importantly however, it would seem that when it comes to the state duty to ensure the informed participation of individuals likely to be affected by a proposed activity, customary international law places equal obligations on the source and the host states. This is different from the unilateral obligation the source state has to assess a risky activity and, upon ascertaining the existence of transboundary risk, notify and engage in good faith consultations with the affected state with the view of finding a commonly acceptable solution.[65] Significantly, only the notification to or from a potentially affected state can trigger the obligation of consultation and the obligation of the source state to take into account the interests of the affected state when making the final decision to authorize the activity. Since ensuring the informed participation of the affected individuals is an equal duty for all concerned states, once the state source of transboundary harm notifies the affected state it can be concluded that the primary responsibility for informing and consulting with affected individuals would fall on the affected state—an obligation it already has under international human rights law.

The Draft Articles do not address the question if as part of the due diligence obligation, the home state would nevertheless have a separate obligation to consult directly with affected populations in the host state as part of its impact assessment, or even withhold authorization of the activity in the absence of such consultation. This issue was touched upon *in passim* in

[63] *Ibid*.
[64] Seck PhD *supra* note 13 at 312.
[65] ILC Draft Articles at Articles 8-13.

the *Pulp Mills* case where Argentina (relying notably on the ILC Draft Articles) claimed a specific obligation for Uruguay to consult affected populations in Argentina as part of its EIA process.[66] The Court shortly concluded that no binding obligations for such consultation arise for the state parties from the international instruments relied on by Argentina, but found that direct consultations with affected communities did in fact take place.[67] This statement of the Court has been criticized of being unduly formalistic in confining the finding only to those instruments presented before the Court with the view that had Argentina relied on human rights law "there should have been no difficulty persuading the court of the general principle that public consultation is a necessary element of every EIA process"[68]. Indeed, if one follows the Court's finding in *Pulp Mills* that EIAs for activities that carry a risk of transboundary harm are a duty for all states as a general principle of international law, demonstrating due diligence in meeting this obligation cannot be done by bypassing public participation of the affected individuals that is a fundamental element of any impact assessment. If analyzed only through the optic of inter-state obligations, a source state would not normally be under an obligation to provide the affected state or its populace with participation during the early stages of the IA such as screening and scoping in cases where the IA is undertake with the view of ascertaining if the activity is risky at all, since the duty of notification and consultation/cooperation is only triggered when the source state becomes

[66] *Pulp Mills (Argentina v. Uruguay)* [2010] ICJ Rep 4 at para 215.
[67] *Ibid* at para 216-7.
[68] A. Boyle, "Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention" (2011) 20 RECIEL 3, 227 at 231 citing *Taskin v. Turkey supra* note 32. Similarly, Judge Cancado-Trindade notes in his separate opinion in the *Pulp Mills* case that the imperatives of human health and well-being are the common concern of the international community as a whole, and as such transcend the classical inter-state dimension that the Court seemed to have upheld in the *Pulp Mills* case, thereby implying an obligation on all states to consider these at the level of general principle of international law. He sees the obligation to notify and share information with affected population as ensuing from the precautionary principle and criticizes the Court for failing to say so. Separate Opinion of Judge Cancado Trindade, [2010] ICJ Rep 135 at 42-9.

aware of the risk of transboundary harm.[69] However, international practice suggests that effective public participation from the outset of the IA process is indispensable for identifying real concerns, alternatives and sources of information.[70] Thus a shared obligation for the home and host states to consult with affected populations in the host state can be said to exist under general international law, albeit in a scenario where such consultation, however inadequate, is undertaken through the organs of the affected host state, the attribution of responsibility for this inadequacy to the source state would depend on a case to case evaluation of the reasonableness of the steps the source state has undertaken to notify the affected state and its efforts to ensure notification and participation of affected individuals actually occurs.

What would also be of relevance for the HRIA under consideration is the existence of an obligation to allow, as a matter of implementing the access to justice principle, Colombian citizens and communities that might be affected by environmental harm originating in Canada, to challenge the adequacy of an assessment that has failed to identify such a harm and its causal link to the CCOFTA. In that regard, the ILC Articles are in line with the non-discrimination principle that, as discussed, does not oblige a state to offer more participatory rights to non-nationals than it offers its nationals. The problem arises from the absence of any substantive threshold for public participation in the Side Agreement on HRIAs, which can be seen as allowing the Canadian government unrestricted discretion to decide if and how to involve individuals likely to be affected in Colombia. The situation is again comparable to the discretion the Canadian federal government enjoys to undertake EIAs of

[69] Craik *supra* 5 at 142-3.

[70] *Ibid* citing Barry Sadler, *Environmental Assessment in a Changing World: Final Report of the International Study of the Effectiveness of Environmental Assessment* (Ottawa: Canadian Environmental Assessment Agency, 1996). Early participation of indigenous and other communities has for example enabled to draw on their specialized knowledge when conducting EIAs concerning activities that impact the Arctic region.

activities with transboundary impact, as well as the discretion to decide on which groups or individuals are to be considered as "interested parties" and therefore given the right to participate in the EIA process.[71] In the domestic context, such discretion is subject to judicial review to validate if the executive's discretionary decision-making was reasonably exercised[72] and such review is exercised in accordance with the principle of presumption of conformity of the exercise of the discretionary decision-making power so as to maintain compliance with international law.[73] Therefore, "specific findings of compliance with, or a breach of, international law can only be made in relation to a particular exercise of discretion", however "breaches are more likely to occur where the implementing rules poorly reflect international requirements".[74]

In relation to transboundary EIAs, non-compliance can arise when the source state exercises discretion so as to *a priori* exclude activities that do carry a risk of harm or harm ultimately results because discretion was used in a way to forego procedural steps that could have prevented its occurrence. The latter is more salient in the case of the annual HRIA as there is

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[71] See *Canadian Environmental Assessment Act*, *2012* S.C. 2012, c. 19, s. 52 ["CEAA"].The discussion here draws from Creik N. Craik, "Transboundary Environmental Assessment in Canada: International and Constitutional Dimensions" (2011) 23 JELP 1, 107, at 131-7. However, Craik bases his analysis of Canada's compliance with international law in terms of the old CEAA which was repealed and replaced in 2012 by the new *Canadian Environmental Assessment Act*, *2012* S.C. 2012, c. 19, s. 52. Under the new Act, EIAs are required for activities listed in the regulations under the Act, but the Canadian Environmental Assessment Agency or the Minister may also decide that an EIA is required for any other project or activity that, in their opinion, has the risk of producing significant environmental effects, or is warranted by public concerns. Section 14(2) CEAA. However, such designation cannot be done after the activity has produced effects on the environment or the federal authority has exercised a power or function that has enabled such effects (14(5)(a)(b)). Section 7 also prohibits any federal authority from exercising such powers or functions to permit or authorize a project until the Agency or the Minister decides that no EIA is required, thus implying that these provisions are likely to cover future projects and exercises of government functions. Section 2(2) points to the responsible authority (Agency, federal department or review panel) to decide "if, in its opinion, the person is directly affected by the carrying out of the designated project or if, in its opinion, the person has relevant information or expertise".

[72] Craik *ibid* at 131, citing *Pembina Institute for Appropriate Development b. Canada (Attorney General)*, 2008 FC 302 at para. 37, for the reasonableness standard applied by canadian courts in regard to government assessment of evidence and conclusions. See also Gib van Ert, *Using International Law in Canadian Courts*, 2d ed. (Toronto : Irwin Law, 2008), chapter 5.

[73] Craik *ibid* at 132 citing *R. v. Hape* [2007] 2 S.C.R. 292 at para 39.

[74] Craik *ibid*.

a real concern that environmental and human rights harm might occur as the result of the deliberate or inadvertent exclusion of some individuals or groups from the HRIA. In other words, the question is how proactively does the Canadian HRIA have to solicit the participation of affected local communities from Colombia? If international law is understood as requiring the concerned states to provide notice and opportunities for commenting to the public likely affected only after the harm has crossed a threshold of significance, the home state is, prior to such a determination, only bound to directly consult and cooperate in good faith with the affected state and the HRIA Side Agreement can be seen as implementing these obligations for both Canada and Colombia. The fact that, as practical matter, the significance of human rights and environmental harm can only be determined in direct consultations with those that are most affected by it, does not suggest that a non-inclusive HRIA which nevertheless succeeds in preventing such harm is not in compliance with the source state's international law obligations. A stronger argument for the home state duty to ensure the widest possible consultation with the affected communities in the host state is that the inter-state duty to cooperate is itself subject to the principle of transparency that draws from the emerging rights of public participation.[75] On the other hand, where direct consultations with affected communities do not take place and transboundary harm occurs as a result of the actions of the home state, this could be seen as a failure to exercise due diligence and could, on a case by case basis, be actionable in the domestic courts of the home state as part of its international law obligations.[76] The usefulness of the non-discrimination principle would in such a scenario be to oblige the home state to

[75] Craik *ibid* at 135.

[76] Craik concludes that the home state failure to exercise its discretion in accordance with interantional law with regard to EIAs is reviewable by domestic courts. *Ibid* at 134. Boyle makes a similar argument regarding the reviewability of transboundary EIAs, including the way public participation was conducted, by international tribunals in accordance with, inter alia, human rigths law. *Supra* note 68 at 230-1.

allow non-residents standing before its courts to challenge the diligence exercised by the home state in the IA process itself.[77]

To sum up, the general principles of international law relating to transboundary harm do offer affected local communities participatory rights, albeit in most cases indirectly exercised through the affected host state. This does not mean however that as a matter of complying with its due diligence obligation, the home (source) state can choose to exclude communities that are likely to be affected in the host state from its unilateral assessment, but neither should it be taken to place a burden on the home state to ensure that every individual likely to be affected is consulted and given opportunity to comment on the proposed activity. Finally, while the lack of consultation can in some cases lead to international responsibility of the home state for a failure in its due diligence obligations, general international law does not require a source state to desist from pursuing a potentially harmful activity, albeit exposing it to liability if transboundary harm occurs. More concrete obligations to this effect might flow from public participation in the context of international human rights law that is discussed in the following subsection.

4.2 Local community participation in transnational HRIAs as a home state obligation under international human rights law

The key feature of participatory rights in the context of environmental transboundary harm is that they are usually regarded as procedural obligations for the concerned states, without guaranteeing a specific outcome of the decision-making process, in other words the substantive protection of the environment. This is due to the assumption that the increased

[77] In such a case the if the courts of the home state refuse the interested non-resident group or individual standing to hear the case, the responsibility of the home state could be engaged under the non-discrimination principle.

democratization of decision-making, especially the inclusion of the most marginalized groups who suffer the most deleterious effects of environmental degradation, will inevitably lead to more environmentally-friendly policies.[78] This assumption has been criticized, most notably in light of what seemed to be a differentiation between procedural and substantive state obligations in the context of transnational environmental harm in the *Pulp Mills* case.[79] For example, one commentator argues that "the dissemination of information and increased transparency of procedures, rather than being fundamentally tied to improved environmental outcomes, can ultimately conflict with this overarching purpose".[80] For him this is due to the "particular forms of knowledge constructed by [Transboundary] EIA operate in the service of existing socio-political power structures, and as such procedural requirements alone retain a limited potential for catalyzing broader substantive achievements."[81] The above assumption "rests upon core presumptions regarding the rational and impartial decision-making capabilities of State-based institutions" and thus "fails to account for the inescapable influence of power structures within the procedure as well as the overarching 'meta-normative and political economic conflicts' which are both mirrored in and influenced by the EIA process".[82] Importantly, transboundary EIAs fail to provide "impartial and balanced scientific information upon which rational state decisions can be made" and instead examine disclosure initiatives according to their own terms of reference".[83] Examples of state-

[78] Pring and Noé *supra* note at 24 citing M.R.Anderson, 'Human Rights Approaches to Environmental Protection: An Overview, in A. E. Boyle and M. R. Anderson, eds., *Human Rights Approaches to Environmental Protection* (Oxford: Claredon Press, 1996) at 9.
[79] See e.g. *Pulp Mills (Argentina v Uruguay)*, Joint dissenting opinion of Judges Simma and Al-Khasawneh [2010] ICJ Rep 108 and Separate Opinion of Judge Cancado-Trindade *supra* note 68.
[80] A. Langshaw, "Giving Substance to Form: Moving towards an Integrated Governance Model of Transboundary Environmental Impact Assessment" (2012) 81 Nordic J Int'l L, 21 at 22.
[81] *Ibid*.
[82] *Ibid* at 25, citing A. Gupta, "Transparency as Contested Political Terrain: Who Knows What about the Global GMO Trade and Why does it Matter?" (2010) 10 Global Environmental Politics 3, at 49.
[83] Langshaw *ibid*.

controlled EIA processes have proven them to be *de facto* subservient to the economic and geopolitical interests of different lobby groups in their own national constituencies.[84] This problem can be traced back to the structure of international law rules in the area of environmental protection which, as discussed above, subject the mitigation of transnational environmental harm to the state duty to consult and cooperate in good faith with ultimately allowing states the freedom to pursue environmentally harmful projects. However, the problem can also be explained by acknowledging that the reliance on state institutional rationality "fails to account for the underlying power structures which serve to distort both the provision of information and the ability of disempowered actors to effectively use such information". [85] For Langshaw, the concept of public participation is fundamental to answering the question if EIAs can reconfigure power asymmetries and be transformative in the sense achieving better substantive outcomes, however the "*actual* inclusion of civil participation within the process must be much more radical than any procedures currently [existing]" in international environmental law.[86]

The question is whether public participation in HRIAs can provide a stronger protection from transnational environmental and human rights harm to locally affected communities, particularly through the optic of treating environmental degradation caused by economic development projects as a human rights and not merely environmental law issue. The participation of affected individuals and groups, from a human rights perspective has been

[84] Langshaw at 26-7 describes the example of the Suummas Energy 2 power plant, that was to be built on the U.S.- Canadian border in which case two markedly different conclusions were reached with respect to authorizing its construction as result of EIAs carried out by the proponent in the U.S. and by the Canadian National Energy Board which ultimately declined permit for construction on the Canadian side. The other example Langshaw proposes is the EIA of the Baltic Sea Gas Pipeline where nine states parties to the Espoo Convention undertook a complex EIA process which was nonetheless criticized for promoting economic over environmental concerns.
[85] *Ibid* at 29.
[86] *Ibid* at 31.

described as "different from participation in a managerial sense", but as "a right for people to have control over the direction of the development process, rather than simply being consulted about projects or policies that have already been decided upon. Participation in a human rights sense means having the power to direct or to exercise authoritative influence over the development process, rather than simply being consulted about pre-determined results."[87] Participation in human rights law can therefore be seen as an implicit aspect of the right to economic and social self-determination, even as flowing from the right to self-determination itself.[88] In this sense the right to participate in decision-making can be seen as creating duties for the territorial state towards its people, but also on the part of other states and the international community as a whole. Importantly, for Orford participation in decision-making about economic development, exercised as a right, "could be used to inspire an increased scrutiny into how it is that technoscience and economics have become privileged forms of knowledge, institutionalized as expert knowledge, to limit the capacity of communities to participate in decision-making".[89] This section will explore the bases for local community participation in home state HRIAs in international human rights law.

Public participation goes to the heart of a HRIA, both in terms of the international legal rules and principles that underpin it, as well as its content, methodology and ultimately the legitimacy and credibility of the whole process. For example, the Committee on Economic, Social and Cultural Rights has stated that the right of individuals and groups to participate in

[87] A. Orford, "Globalization and the Right to Development", in P. Alston, ed., *People's Rights* (Oxford: Oxford University Press, 2001) at 138-9, citing the Human Rights Council of Australia Inc., *The Right Way to Development: A Human Rights Approach to Development Assistance* (1995) 118-21: "Participation understood as control cannot easily be confused with 'involved', 'consulted', 'empowered', or even 'ownership'. To ask who has control, authority, direction over a particular aspect of the development program is a much tougher question than to ask who is involved or empowered by it. It also leads to significantly more meaningful answers."

[88] Orford *ibid* at 139, citing M. Bedjaoui, 'The Right to Development', in M. Bedjaoui, ed., *International Law: Achievements and Prospects* (1991) 1177, at 1184.

[89] *Ibid* at 181-2.

decision-making processes must be an integral component of any policy, programme or strategy developed to discharge governmental obligations.[90] The *Guiding principles on human rights impact assessments of trade and investment agreements* link HRIAs of TIAs with the right of every citizen to take part in the conduct of public affairs, in the sense that HRIAs serve the basic purpose to enable and inform the public debate on the conclusion of every TIA and ensure that the free expression of the will of the people is respected when a state enters into such international agreements.[91] For their part, the *Maastricht Principles* further point to the right of access to information as the normative background behind the conclusion of TIAs as well as in the process of HRIAs, making public participation an indispensable legal requirement for all human rights impact assessments on proposed state activity with extraterritorial effects.[92] On the methodological level, the *Guiding Principles* make it clear that the credibility and effectiveness of the HRIA of TIAs depend on inclusive participation, especially of individuals who are most affected by the TIA provisions, when establishing relevant human rights criteria for the assessment, compiling qualitative research and producing the results and recommendations.[93] In addition, the principle of transparency

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[90] E.g. CESCR, General Comment No. 14: *The right to the highest attainable standard of health*, 22nd Sess., UN. Doc. E/C.12/2000/4 (11 August 2000) at para 54.

[91] Human Rights Council, Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, *Guiding principles on human rights impact assessments of trade and investment agreements*, 19th Sess., UN Doc. A/HRC/19/59/Add.5, 19 December 2011 ["Guiding Principles"] at 5 para 1.2 citing Article 25 (a) and (b) of the ICCPR.

[92] See O. de Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon and I. Seiderman, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" (2012) 34 Human Rights Quarterly 1084 ["Maastricht Principles"], at 1116 citing UN HRC, *General Comment 34, Article 19 : freedoms of expression and opinion*, UN Doc. CCPR/C/GC/34, 102 Sess., 2011 at paras 18 and 19 and jurisprudence from the Inter-American and European Courts of Human Rights at fn 82 and 83.

[93] Guiding Principles *supra* note 91 at 9-10: Principle 4 states "Each State should define how to prepare human rights impact assessments of trade and investment agreements it intends to conclude or has entered into. The procedure however, should be guided by a human rights-based approach, and its credibility and effectiveness depend on the fulfillment of the following minimum conditions... (c) inclusive participation. The Principles further state that any human rights impact assessment should be guided by a human rights-based approach in the way it is conducted, in the sense that the methodology it uses is not discriminatory, that it promotes inclusive participation and that it is conducted with full transparency. At para 4.2. Principle 5 also provides that

in the assessment, methodology and interaction with the affected individuals and groups (openness to receiving submissions throughout the process) is also considered a key principle when conducting HRIAs of TIAs.[94] It should be recalled that the lack of government transparency and public involvement in the negotiations of TIA and decision-making on their substantive content is one of the major criticisms against investment treaties, particularly from the point of view of local communities in the developing world.[95] Subjecting TIA provisions that can negatively affect human rights in the host state to the broad and *informed* public opinion can have a major impact on the negotiations of such treaties and serve to legitimize trade-offs between trade and investment costs and benefits and even prevent harm from materializing at the implementation stage.[96]

Thus it is beyond doubt that broad and inclusive public participation of those affected by TIA provisions is the key for an objective and credible HRIA. However, beyond the credibility and legitimacy of the HRIA, the question is to what extent does international human rights law require the home state to ensure the public participation of locally affected communities from the host state in its HRIA.

One obvious approach would be to argue that the public participation of locally affected communities from the host state is an indispensible element for fulfilling the purpose of the

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"[w]hile each State may decide on the methodology by which human rights impact assessments of trade and investment agreements will be prepared, a number of elements should be considered" including (c)[e]nsuring that decisions on trade-offs [regarding TIA provisions] are subject to adequate consultation (through a participatory, inclusive and transparent process), comport with the principles of equality and non-discrimination, and do not result in retrogression.

[94] Transparency in HRIAs of TIAs is defined in the Guiding Principles as "basing the assessment on sources of information that are made public, working on a clear methodology, defined in advance of the process and made public; and open to receiving submissions, in order to ensure that its information will be as broad as possible". At para 4.4. Public access to the results of the assessment is seen as a guarantee of transparency in the Maastricht Principles. *Ibid* at 22.

[95] See discussion in Chapter 1 and sources cited. See further below on the different forms of public participation and their significance for the HRIA and investor regulation.

[96] See discussion in chapter 2 about the referendum held in Costa Rica on the negotiations of the US-CAFTA FTA and the right to health and access to medicines.

Side Agreement on annual HRIAs, in terms of the principles of general international law governing the creation and execution of international obligations under the Vienna Convention.[97] Since this agreement only creates an obligation to assess the effects on human rights of the CCOFTA, then this obligation would remain incomplete as long as the rights-holders are not able to participate in the assessment process. It can also be seen as the only way for the states involved to validate the assessment's findings if the CCOFTA is negatively affecting the human rights situation, in what way and to what extent. In that regard, both Canada and Colombia can be seen as equally sharing this obligation as state parties to the Side Agreement. However, as seen in previous chapters, human rights law does not *a priori* impose extraterritorial duties on states to consult with potentially affected individuals in other states and in order to understand the potential for the HRIA to contribute to investor regulation to respect human rights in the host state one must examine the issue of how a potential duty on the home state to ensure the public participation of affected communities from the host state can contribute to unilateral or treaty-based investor regulation to this end. This analysis will produce different answers whether the HRIA is understood as a unilateral act of the home state or a bilateral act of international cooperation with the host state.

As explained above, human rights law requires governments to subject decisions on economic development projects with potentially harmful environmental and human rights impact to inclusive, transparent and informed participation of groups and individuals likely to be affected. It has been suggested, with respect to state actions that can negatively affect human rights extraterritorially, that such decisions can only receive deference under the

[97] See *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, signed 23 May 1969, entered into force 27 January 1980, at article 31 and 26 for the principle *pacta sunt servanda* and the good faith in the execution of international obligations.

principles of international human rights law, if the acting state took into account the whole range of costs and benefits of its actions by conducting an assessment and giving all affected non-residents procedural rights to participate in the decision-making.[98] Public participation in national decision-making related to FDI, especially the control and management of natural resources, can indeed be seen as a fundamental principle of human rights law given the consistent international and regional jurisprudence to this effect. Inevitably for the principle of consultation to operate as a legal obligation in the transboundary context, one must admit that under international human rights law the home state has certain obligations with respect to individuals and groups in the host state, or that the right to participation of local communities in home state decision-making that can affect them is an *erga omnes* one—creating duties for all states. To this effect, two bases that exist in international human rights law that can be suggested as requiring the acting home state to consult and take into account the views of locally affected communities from the host state: the state duty to respect human rights in other states, and the state duty to cooperate with other states to promote human rights enjoyment abroad while at the same tine respecting rights in such cooperation.[99]

The question whether extraterritorial application of core human rights treaties applicable to home states in the context of FDI is discussed in the first chapter of this thesis and do not require detailed repetition here. Essentially a universal duty exists for all states to respect the protection, enjoyment and realization of human rights in other states, which can translate into a duty not to engage in conduct that would impair or nullify the capacity of other states to

[98] Knox makes this argument in the context climate change regarding state decisions concerning economic development activities that are internal but produce harmful effects on people in other states. *Supra* note 6.
[99] Knox *ibid* 209-216.

secure human rights for their citizens.[100] This obligation draws directly from the UN Charter and has been interpreted as not being subject to the limitations, found in some international human rights instruments, requiring that the individual right holder be on the territory or in the jurisdiction of the acting state.[101] Arguably, the state duty to respect human rights enjoyment in other states could be interpreted as requiring an acting state to assess the extraterritorial human rights effects of its actions, when such effects are anticipated (i.e. known to the acting state) and whether they be negative or positive. This would seem logical for if the obligation is taken as one of conduct without guaranteeing the non-occurrence of the impairment to human rights enjoyment in other states, an assessment of the potential extraterritorial impacts would seem to be required to demonstrate diligence. Allowing potentially affected non-nationals to participate in such an assessment can also be seen as an element of the duty of due diligence, as the acting state would not be able to claim it acted diligently if it shielded its decision-making process from all comments attesting to the negative extraterritorial effects of its decisions. Indeed, it would be impossible to conceive how the home state would avoid receiving comments from local communities given the modern means of communication and such intent on the part of the Canadian government

[100] See e.g. *Maastricht Principles supra* note 92 at Principle 13, "Obligation to avoid causing harm: States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct." Citing the general obligation of States "to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control" restated by the ICJ in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* [1996] ICJ Rep, p. 226, para. 29. The ICJ, the Human Rights Committee and most commentators find a state duty to respect civil and political rights abroad by reading disjunctively Article 2(1) of the ICCPR. See e.g. ICJ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep. 136 at para 111. Since the ICESCR does not contain a limitation clause based on jurisdiction or territory, the duty to respect is more readily found. The existence and application the duty to respect is arguably less controversial than the extraterritorial duty to protect human rights of individuals abroad from private violations. See generally, S. Skogly, *Beyond National Borders: States' Human Rights Obligations in their International Cooperation* (Antwerp: Intersentia, 2006) at 70.

[101] See generally Skogly *ibid*; Maastricht Principles *ibid*. See Knox *supra* note 6 at 202-210 for a discussion on the applicability of the state duty to respect human rights in other states under the ICCPR and the ICESCR with regard to climate change harm suffered by small nations.

cannot be inferred from the first Annual Report which envisages consultation with stakeholders. However, the duty to respect human rights in other states has a limited potential of ensuring the participation of the most vulnerable individuals and groups in Colombia as it would only seem to require the home state to remain open to receiving communications from non-residents and not actively seek to include them in the process. In this, the extraterritorial extension of the duty to respect human rights in the context of transboundary HRIAs resembles the non-discrimination principle of international environmental law where the source state of transboundary harm is only required to enable participation of individuals from the affected state in its decision-making in the same way as it would enable its own citizens to participate. Basically, the home state would have a duty to keep the process open to receiving communications from those individuals or groups from the host state that choose to comment on the assessment. The non-discrimination principle, as applied to human rights harm, would however seem to require the acting state to, at a minimum, provide non-residents with sufficient information about the nature and extent of potential impacts of the activity, as it human rights law requires it to do so for its own residents. Thus, by admitting that the state duty to respect can be extended extraterritorially, a duty to ensure the informed participation of affected individuals does not completely absolve the acting state from any proactive role in the sense that it would still have to provide data to the participating individuals as to how its decision might affect their rights, information that can in many cases only be obtained through consultation with those communities in the affected state. Interestingly, the non-discrimination principle, as applied to issues of transnational environmental harm, would also require the acting state to allow access to justice for affected non-residents to challenge, before the domestic courts of the acting state, the process of its assessment and the validity of its findings. However, as

explained above, it would seem difficult to argue, unless a sufficient causal link can be established, that because of the purely passive role the acting state took in the assessment process, a non-resident's rights were violated by the fact the acting state did not specifically consult them during the assessment process.

Another area of human rights law, namely the rights concerning self-determination of peoples and groups, could arguably offer a more tangible duty for the home state to consult, as part of the HRIA, with affected aboriginal or minority communities. The right to self-determination is usually seen as transcending the jurisdictional limits of state international law obligations, since it is found in common article 1 of the two most important human rights instruments, the ICCPR and the ICESCR. The right of all peoples "to freely dispose of their natural wealth and resources" is explained in absolute terms that "[i]n no case may a people be deprived of its own means of subsistence" which could be interpreted as creating duties for all states and the international community as a whole to refrain from undertaking actions that would undermine the economic subsistence and means of survival for peoples regardless of what state they are found in.[102] In the context of natural resource exploitation by the state or state authorizations given to private economic development projects, this right has been interpreted to place a duty of consultation on the state with peoples whose livelihoods depend on natural resources found on their lands, as well as a duty to obtain the free, prior and informed consent in cases where economic development projects are of such magnitude

[102] This interpretation is given by most commentators on a simple reading of the ICCPR and ICESCR. The Human Rights Committee has also taken the same position on the right to self-determination giving rise to duties for all states and the international community. See Human Rights Committee, General Comment 12: *The Right to Self-Determination of Peoples*, UN. Doc. CCPR/C/21/Rev.1, 13 March 1984, at para 5. See also M. Langford, "The Right to Housing" in Skogly and Gibney *supra* note 47 at 167 stating that the duties found in common article 1 of the ICCPR and ICESCR are "exercisable against the world". For a similar discussion see M. E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007).

as to threaten the very existence of those communities.[103] Significantly, if this emerging right is admitted to be exercisable by local communities against third states and the international community as a whole, it implies a duty for third states to respect the right to consultation and consent of indigenous communities in other states affected by their actions. In cases where the territorial state has failed to consult or obtain the consent of indigenous communities about FDI project on their lands, other states might also be responsible under international human rights law if they engage in unilateral or joint actions that enable or further the violation of this right by the host state.[104] Therefore, this duty might be seen as providing an international law base for procedural obligations of consultation with affected aboriginal communities to exist for the home state to avoid violating its own duty of undermining the right to subsistence and free use of natural resources.[105] Concerning the HRIA of the CCOFTA, the implication of this interpretation of human rights law is that a duty might exist for Canada to directly consult with aboriginal communities as part of the HRIA process, in order to verify if consultation occurred or if their consent was obtained by the Colombian government prior to signing the CCOFTA that created investor rights to explore or exploit natural resources found on their lands.[106] This aspect of human rights law could therefore serve as a basis for the HRIA to provide, albeit indirectly, statements about the impact of state and private investor activities on the right of indigenous peoples to

[103] See e.g.. *Case of Saramaka People v. Suriname* [2007], Series C No 172, IACHR 5, 28 November 2007.
[104] See chapter 1 for a discussion on the intersection of home state responsibility, the right to self-determination in the context of natural resource development and the duty of consultation, including the duty to obtain the free, prior and informed consent of indigenous communities.
[105] Knox argues this in the context of greenhouse emissions by developed states that might threaten to destroy the economy or even literally erase small island states by, for example raising sea levels. *Supra* note 6 at 205-6.
[106] It is unlikely however that the Canadian government would accept the existence of this obligation as part of positive international human rights law or as part of customary, international law, given its resistance to the right to free, prior and informed consent of aboriginal peoples as expressed during the UN bid to adopt in 2007 the *Declaration on the Rights of Indigenous Peoples*. See e.g. Aboriginal Affairs and Northern Development Canada, *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*, November 12, 2010 (found at http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142).

dispose freely with the natural resources found on their lands and in that sense trace a link between the (in)actions of the home state in enabling such impact.

More problematic is the general question whether as part of the HRIA, the home state has an obligation to assess the activities of private actors such as MNCs, which can exist as a duty only if the extraterritorial extension of the state obligation to protect human rights is admitted. As discussed in earlier chapters, such an interpretation is resisted by developed states since it could have the effect of accepting positive obligations towards every individual on the planet. It is also controversial given the limitation found in most human rights instruments where states' positive obligations to 'secure' human rights extend only to individuals in the territory or jurisdictional control of the acting state.[107] Nevertheless, commentators have suggested that a duty to protect individual rights from private violations extraterritorially can be interpreted under some human rights instruments, such as the ICESCR, that do not contain wording explicitly limiting their application to the territory or jurisdiction of the acting state.[108] Indeed, such has also been the position of the CESCR in its General Comments and concluding observations on state compliance.[109] The implications for

[107] Such limitations are most notably found in the ICCPR and the ECHR, and commentators generally agree that it would be difficult to argue under those instruments a state duty to protect individuals abroad from the activities of private actors, without an interpretation that by failing to prevent private violations abroad the (non)acting state brought the affected individuals within its jurisdiction in the sense of these two instruments. Knox at 202-5; and more generally M. Schenin, "Extraterritorial Effect of the International Covenant on Civil and Political Rights" in F. Coomans and M. Kamminga, eds., *Extraterritorial Application of Human Rights Treaties* (Oxford: Intersentia 2004), 73.

[108] The ICESCR and many other human rights instruments (CRC, CEDAW, CERD) do not contain any jurisdictional limitations and thus potentially allow the argument about state extraterritorial duties to protect individuals where they are in a position to do so. See Skogly *supra* 100 at 70 and R. Künneman, "Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights" in Koomans and Camminga *ibid* at 201; M. Craven, *Human Rights in the Realm of Order : Sanctions and Extraterritoriality*, in *ibid* at 233 cites the ICJ position in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia)* [1996] ICJ Rep. 595 where extraterritorial state obligations (and responsibility) were upheld for instruments not containing explicit wording limiting their application to either territory or jurisdiction. Cited in Knox *ibid* at 206.

[109] Knox points that in virtually every General Comment, and in many concluding observations on states' compliance with their international obligations, the CESCR has relied on the wording in the Covenant to set out extraterritorial obligations. *Ibid* at 207. For a similar view see F. Coomans, "The Extraterritorial Scope of the

the HRIA of the existence of such an extraterritorial obligation to protect are interesting. Strictly speaking, by undertaking an obligation to assess the human rights impacts of the CCOFTA, Canada did not explicitly accept a duty to protect individuals from Colombia whose social or economic rights for example might be negatively affected by Canadian trade or investment. It also did not strictly undertake to assess the activities of Canadian-based MNCs or protect human rights from potential violations by them. However, if the duties to respect and protect extend extraterritorially, this would require the acting state to assess if and to what extent it is in a position to prevent private actors under its jurisdiction or control from harming human rights in other states, including providing information to everyone whose human rights might be affected by the actions under its jurisdiction, and allowing them to participate in the decision-making process that could have enabled such private activity (in the case of an *ex ante* IA) or conversely in the decision-making that can prevent such harm (*ex post* IA).[110] Practically, this can be seen as adding a separate duty for a home state to catalogue private activity enabled by the CCOFTA and an obligation to enable public participation to validate its findings. The value of this approach for locally affected communities is in that it broadens the scope of the home state HRIA to consider, as a matter of legal duty, the activities of private corporations enabled by the investment treaty, which in turn triggers the discussion about state obligations to prevent or repair such harm. In effect, if the duty to protect under human rights law is read in conjunction with the general obligation to prevent transboundary harm, this takes the role of the HRIA mechanism to another level whereby identifying private harm caused by entities under the jurisdiction of the acting state

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International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights" (2011) 11 Human Rights Review 1.

[110] Knox *ibid* at 209.

triggers a duty to prevent and consequently state responsibility for failing to do so.[111] While this would arguably not require the home state to actively solicit the participation of individuals or groups from the host state, the extraterritorial application of human rights law would require it to enable such rights holders to make submissions and to provide to the participating affected communities information about MNC violations or risk thereof, thereby acknowledging the link between home state decision-making and extraterritorial corporate rights violations.

Finally, some commentators are of the opinion that the "most feasible basis for extending environmental human rights jurisprudence" extraterritorially "is the duty to cooperate".[112] The obligation to cooperate in cases of transnational harm has already been discussed in the previous section and there is no reason why it should not be seen as applying equally, as a general principle of international law and international relations at large, to human rights issues.[113] Knox points out that with respect to many challenges to human rights, the duty to cooperate plays only a subordinate role, a situation that is justified to the extent that "threats to human rights [that] typically arise within a state, can and should be addressed primarily by that state".[114] However, those human rights issues that are "inherently [international] require coordinated action on a[n] international scale to solve", in what cases international cooperation must take the primary, rather than the secondary, role.[115] The sources of the state

[111] See chapter 3.
[112] Knox *supra* note 6 at 212 concurring with Skogly *supra* 100 at 76. See also Salomon *supra* note 102.
[113] See Article 4 ("Prevention") of the ILC *Draft Articles on Prevention supra* note 55. See also Coomans *supra* note 109 at 16: "The notion of 'international cooperation' may be characterized as a general principle of international law... a cornerstone of international relations between states, in the area of [inter alia] human rights".
[114] Knox *ibid*.
[115] *Ibid*. Knox cites the ICJ's Advisory Opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15, to make the analogy that climate change in regards to the threat it poses to human rights is of universal importance and therefore imposes obligations and responsibility on the part of all states to prevent and remedy, much like the universal obligations found in the Genocide Convention.

duty to cooperate for the furtherance of human rights enjoyment are commonly cited in Article 2(1) of the ICESCR, which provides that each state party undertakes to "take steps, individual and through international assistance and co-operation...with the view to achieving progressively the full realization of the [Covenant] rights".[116] This obligation draws on and is ultimately subject to the obligations of universal respect, observance and joint and separate action for the realization of human rights found in Articles 55 and 56 of the UN Charter.[117] The general obligation of international cooperation can thus be seen as an obligation to "provide international assistance to contribute to the fulfilment of [human rights]" on the part of all states who are in a position to do so, as well as a duty to seek assistance and cooperation when states are not in a position to secure human rights enjoyment on their own.[118]A distinction has also to be drawn between international cooperation in terms of development financial and economic assistance from richer to poorer countries, and international cooperation as joint action between two or more states that can take multiple forms from treaty negotiations to information exchange and can influence human rights extraterritorially thereby implicating the state duty to respect and to protect human rights.[119] In the context of TIA enabled violations, the duty to cooperate for home states has for example been linked in the recent *Guiding Principles on Business and Human Rights* developed by SGSR Ruggie, to the obligation for home states of MNCs to cooperate with

[116] ICESCR article 2(1).
[117] Maastricht Principles *supra* note 92 commentary to Principle 3 at paras 3, 6-9. See further Skogly *supra* BLUE BOOK.
[118] Maastricht Principles, Principles 33 and 34.
[119] States from the South have traditionally held human rights law, in particular the ICESCR, imposes a legal obligation for states from the North to provide financial assistance for the realization of human rights in the third world, something that has been resisted by developed states. Coomans, *supra* note 109 at 17 ; Skogly *supra* note 100 at 17. However, as Skogly explains, "[international cooperation] needs to be addressed in terms of the various levels of obligations, and to understand what implications for foreign policy or international assistance *respect, protect* and *fulfil* human rights may have". *Ibid* at 18.

host states in order to remove legal barriers to access to justice to victims of human rights abuse by corporate actors who cannot access the courts in the host state.[120]

The duty to cooperate could thus be said to place equal obligations on the acting states to ensure that their joint activity, such as negotiating international agreements, respect human rights, including protecting rights abuses by private entities. As a matter of general principle of human rights law, this obligation can only be fully discharged when individuals and groups likely to be affected have an opportunity to participate and influence the decision-making process. In other words, human rights law provides the standard that state joint activities should strive to meet at the level of obligation of conduct: comply with the procedural requirements of human rights law to ensure that the decision-making process about the joint activity is informed, inclusive and consensual. For Knox, the duty of cooperation also determines the substantive purpose of state international actions: the prevention of human rights harm that might result from such action.[121] After all, in challenges that negatively affect human rights, almost all states have equal international law obligations and the duty to cooperate simply recognizes the equal level of concern and degree of obligation for protecting human rights that states already have in international law. The value of basing procedural obligations of public participation is that it avoids the extraterritoriality paradigm and requires the acting states to follow the procedural and substantive norms of human rights law by acting together as a single duty-bearer.[122] In addition, the duty to cooperate reconciles the acknowledgment that state activities have

[120] Guiding Principles *supra* note 91 at paras 2,3 through 10.
[121] Knox at 213.
[122] As Knox explains in the context of human rights threats posed by climate change, the practical problem of interfering with human rights in other states arises "with having each state expand its own polity to include those affected by transboundary harm". This is avoided by the duty to cooperate in the sense that "rather than trying to improve the procedural safeguards in multiple polities, the duty to cooperate requires the international community to try to act as a *single polity* as it addresses climate change as a global problem". *Supra* note 6 at 215 (emphasis in original).

extraterritorial effects with the principle of state sovereignty by imposing equal duties on the acting states to ensure their joint action does not violate human rights irrespective of the geographical location of the victim.[123] In that sense, both state parties to the CCOFTA could be said to have an equal obligation to allow for affected communities to participate in an informed fashion in the decision-making process concerning those aspects of the TIA that might be causing or enabling human rights harm, as well as an obligation to allow for judicial remedies to ensure that these requirements are followed by the acting states. The duty to cooperate recognizes, however, the primary responsibility of the host state to secure the protection of human rights for its citizens, while also establishing an equal but secondary obligation for the home state that is an equal partner in the TIA negotiations.

Thus, the duty to cooperate could be seen as applying equally to the Side Agreement on the HRIA, as it would apply to home state actions under the CCOFTA. One obvious implication for the HRIA is that, in light of the transboundary nature of the activity that is the subject-matter of the yearly assessments, the HRIA would have to ensure public participation in order to verify if the CCOFTA itself, seen as an act of international cooperation, caused or enabled rights violations in Colombia. To do so, even if considered as a unilateral act of the home state, the HRIA would nonetheless have to rely on cooperation between the two states in order to ensure the participation of affected communities. In the case that the host state fails to fulfil its obligation to carry out an annual HRIA, the home state could be required to ensure direct participation of affected communities in its own HRIA under the obligation of international assistance— a corollary to the obligation of cooperation— to the developing

[123] Skogly *supra* note 100 at 80.

host state in the fulfilment of its own obligations to respect and protect human rights.[124] Importantly, when providing international assistance, states are under an obligation to act in accordance with fundamental human rights principles such as non-discrimination and equality, transparency and accountability that would be equally as binding on them for domestic activities.[125] The home state HRIA would therefore have to ensure its mechanisms for participation of local communities from the host state are as inclusive as possible and not discriminatory against specific groups. It is therefore readily apparent that this approach that exists in positive international law, imposes on the home state a proactive role with respect to allowing public participation in conducting its HRIA.

To summarize, human rights law provides several bases for arguing a duty for Canada to ensure the inclusive participation of local communities from the host state in its assessment of the human rights impacts of the CCOFTA.

[124] The CESCR has consistently held that it is "particularly incumbent on States parties and other actors in a position to assist, to provide 'international assistance and cooperation, especially economic and technical' which enable developing countries to fulfil their core and other obligations". General Comment No 14 *supra* note 90 at para 45.

[125] See e.g. CESCR, General Comment No. 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),* 29th Sess., UN Doc. E/C.12/2002/11, para. 34; CESCR, General Comment No. 19*, The right to social security (art. 9)*, 39th Sess., UN Doc. E/C.12/GC/19, at para. 55. See further Maastricht Principles *supra* note 92 Commentary to Principle 2 at paras 1-6. This is further linked with the duty to respect human rights in other states in the Commentary to Principle 32 "Principles and priorities in cooperation" at para 4 stating "[t]o act consistently with this right, States acting extraterritorially must refrain from imposing conditions linked to its cooperation that would preclude individuals and groups from being able to have an opportunity to influence decision-making affecting their rights."

Conclusions

This thesis set out to propose several key points. First, by using the example of Canadian investment in Colombia and the legal protections of it created by the CCOFTA, it sought to demonstrate that home states have a responsibility to ensure that investment protection agreements they negotiate with host states where the human rights situation is precarious and the host state is unable to ensure rights protection, do not contribute to human rights violations or environmental degradation when the home state is aware of such risks. The internal conflict in Colombia and the well-documented complicity of the Colombian government in human rights abuses is the perfect illustration of such instances. To this end, it is argued that treaty-based regulation, whether by inserting specific provisions imposing human rights obligations on investors and/or establishing grievance mechanisms for affected victims, can be seen as compliance with the home state duty to respect human rights in the host state *through its own actions* that risk to enable or contribute to harm. It is also clear that such regulation is a more satisfactory approach than unilateral home state regulation that risks to both interfere with the sovereignty of the host state and impose a unilateral vision of what human rights protection and enjoyment mean for the affected rights-holders in the host state. Thus, while a range of options exists for how investor conduct can be regulated through IIAs, the power leverage of the home state over the IIA negotiations process and the determination of the content of substantive investment protection provisions places the home state in a unique position to exercise diligence to prevent the IIA from causing or contributing to human rights and environmental harm. A central point of this thesis is that treaty-based regulation, understood from the point of view of the home state obligation of diligence to prevent environmental or human rights harm associated with IIAs, should not be

understood as the simple insertion in the IIA of clauses obligating investors to respect human rights in the host state, but can take many other forms of home state action or abstention.

Second, in order to demonstrate a legal duty for investor regulation for the home state, this thesis proposes to conceptualize IIAs as intra-territorial acts of the home state with extraterritorial effects (or risks thereof) on human rights and the environment in the host state for the purposes of the discussion on home state obligations and responsibility under current international law. Similarly, IIAs can also be conceptualized as home state domestic acts of international cooperation that can cause or enable private transnational harm. It is then argued that current international law, most notably the UN Charter and core international human rights treaties, as well as the harm and good faith principles, impose a duty on all states to respect human rights when acting unilaterally, and a duty not to frustrate human rights enjoyment in their actions of international cooperation. This crystallizes in a duty of diligence to prevent the IIA from causing human rights violations for which the home state can be held entirely or partially responsible under the existing principles of state responsibility for the absence of investor regulation in the IIA. Significantly, if a causal approach is applied to the rules of state responsibility the power leverage that the home state exercises over the IIA negotiations process can lead to it being indirectly responsible for MNC harm entirely or partially caused by the substantive provisions of the IIA.

The third key point of this thesis is to propose that the duty of diligence arising from the obligation to prevent IIA-caused or enabled harm translates into an obligation of conduct that requires, at a minimum, a human rights impact assessment for the home state actions in IIA negotiations. The recent recognition of the duty to undertake an environmental impact assessment for all state activities carrying a risk of extraterritorial environmental harm as a general principle of international law, supports this idea since the harm principle in

international environmental law operates similarly to the universal duty to respect human rights. This duty would require the home state to both prepare a HRIA and demonstrate diligence in its preparation and process which includes basing the HRIA methodology on standards found in international human rights law and consulting with the potentially affected rights-holders.

In the absence of investor regulation in the CCOFTA, the conclusion of the Side Agreement on annual reports on human rights presents a particular situation in which this thesis seeks to demonstrate that the sources of home state obligations regarding treaty-based investor regulation are equally applicable to unilateral home state HRIAs undertaken to implement the Side Agreement. Thus, while a general duty to undertake a HRIA of IIAs as acts of the home state can be said to exist under the diligence principle, Canada's annual human rights reports produced in implementation of the Side Agreement can also be seen as triggering an obligation to use the HRIA mechanism to prevent and remedy transnational harm. Therefore, it is argued that specific obligations arise for the home state to structure the annual report in such a way so as to identify the harm and its causes, adapt the methodology of the HRIA to international human rights standards, and allow for direct participation of potential victims and locally affected communities. While these steps can be seen as a duty on the home state to demonstrate diligent conduct, it is argued here that the participation of local communities in the HRIA, both as concerns the identification of sources and causes of harm is and in the elaboration of the HRIA methodology and indicators, is an obligation for the home state to validate its compliance with the duty to respect human rights. In that regard, a central point of this thesis is to demonstrate that the annual reports on the human rights effects of the CCOFTA have a strong regulatory potential in terms of identifying to what extent the actions of the home state caused the negative human rights and environmental impacts of the activity

of Canadian corporations in Colombia enabled or facilitated by the CCOFTA, as well as to identify what home state responses are required to remedy them thus triggering the obligation to do so.

Finally, even if the home state choses to ignore the effects of the investment protection clauses of the CCOFTA, as evident from the first two annual reports, the fact that the obligation to undertake an annual report was enshrined in an internationally binding instrument, transposed into Canadian domestic law, and that it subjects the annual reports to the scrutiny of the Canadian parliament, opens for the first time a small door for the participation, in the most powerful public forum of the home state, of locally affected communities in the discussion on transnational human rights and environmental harm caused by international law. The ongoing character of this new international obligation allows for future Canadian governments to comply with their duty to fulfill the purpose of the annual HRIA of the CCOFTA.

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