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Linking International Investment Agreements and Corporate Social Responsibility: Challenges and Opportunities in the Grounds of Corporate Governance

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LINKING INTERNATIONAL INVESTMENT AGREEMENTS AND CORPORATE SOCIAL RESPONSIBILITY: CHALLENGES AND OPPORTUNITIES IN THE GROUNDS OF CORPORATE GOVERNANCE

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I. Introduction

In 1970, professor Detlev Vagts depicted multinational corporations (MCs) as primary entities in a changing international scene, and pointed out the need to accordingly develop new and creative modes of both national and international regulation in order to deal with the conflicts arisen from the relation between the former and the State.[2] One of such conflicts is the fact that despite of their undeniable contribution to national economies, MCs activity can produce adverse social and environmental impacts under their sphere of influence. Considering the State's nature and *raison d'être* –the protection and promotion of people's wellbeing and dignity–, the latter is definitely a relevant subject of concern which, consequently, should be relevant to Law.

In that regard, it is nowadays quite visible that MCs have increased their power and operational range through rules and institutions designed by States to provide extraordinary and far-reaching protection. Due to the intention of joining the global economic market as a strategy for development, the latter have implemented a complex weave of policy decisions and legal instruments so as to create an attractive environment to foreign direct investment (FDI). In that order, what is commonly known as *Investment Law* has been promoted by the World Bank and other international financial institutions, codified by both domestic legislation and international investment agreements –bilateral investment treaties and free trade accords– (IIAs), and enforced through international arbitration tribunals.[3]

On the other hand, it is of great contrast that MCs whose activity is conducted out of the jurisdiction of the country where they have been legally incorporated are not subject of substantial obligations in regards of their conduct. Law is hence presenting an unbalanced equation, because while it grants extensive entitlements to foreign investors, apparently there are no concrete means to make them *accountable* for their actions or omissions.[4] In response, one of the alternatives proposed to deal with this asymmetry is the inclusion of elements tantamount to Corporate Social Responsibility (CSR) within IIAs.

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[2] VAGTS, Detlev. "The Multinational Enterprise: A New Challenge for Transnational Law" *83 Harvard Law Review* (1970), 739-792.

[3] ANDERSON, Sarah & GRUSKY, Sara. "Challenging Corporate Investor Rule: How the World Bank's Investment Court, Free Trade Agreements, and Bilateral Investment Treaties have Unleashed a New Era of Corporate Power and What to Do About It" Washington: Institute for Policy Studies and Food and Water Watch, 2007, p.2.

[4] See CERNIC, Jernej Letnar. "Corporate Human Rights Obligations at the International Level" *16 Willamette Journal of International Law & Dispute Resolution* (2008), p. 134.

In a broad sense, CSR has traditionally been seen as a normative structure integrated to the activity and/or structure of MCs, with the purpose of framing the enterprise's activity on the respect of certain values and objectives in view of the responsibility they owe to people and the environment in which they operate. Unlike the highly controversial idea of attributing civil and/or criminal liability to MCs[5], CSR intends to project the issue from a dissuasive perspective. In that order, its main purpose is to control the behavior of MCs through the voluntary adoption of commonly self-provided standards in order to prevent and mitigate any direct or collateral impact.

Considering the intention of introducing a dialogue on the possible interconnections between Foreign Investment Law and Corporate Governance (CG)[6], the purpose of this paper is to present some ideas on the IIAs' likelihood to make CSR compromises more robust by including specific provisions on the matter. More specifically, it is intended to understand the ways on which Investment Law –and more specifically IIAs– influences the structure and dynamics of CG, so as to assess whether the inclusion of CSR on the abovementioned legal instruments might influence the conduct of MCs[7].

In that order, Section II presents the *rationale* behind the possibility to *internationalize CSR* by including specific measures within IIAs, which at first glance are legal instruments that prominently regulate inter-state economic interests. Subsequently, Section III formulates some examples of the diverse ways in which CSR has been inserted in the context of IIAs by using the case of Colombia as an illustrative example, and finally Section IV considers the possible implications of the implementation of a model of that kind.

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[5] See ADEYEYE, Adefolake. "Corporate Responsibility in International Law: which way to go?" *11 Singapore Year Book of International Law and Contributors* (2007), 141-161; ÁLVAREZ, José E. "Are Corporations "Subjects" of International Law?" *9 Santa Clara Journal of International Law* (2011), 1-36; RATNER, Steven R. "Corporations and Human Rights: a Theory of Legal Responsibility" *3 Yale Law Journal Vo. 111* (2001), 443-545; VÁZQUEZ, Carlos M. "Direct vs. Indirect Obligations of Corporations under International Law" *43 Columbia Journal of Transnational Law* (2004-2005), 927-959.

[6] Corporate Governance understood in terms of structures and processes, direction and control, substantive elements like performance and compliance, or managing the multiplicity of internal and external corporate relationships. See HORRIGAN, Bryan. "Fault Lines in the Intersection between Corporate Governance and Social Responsibility". *UNSW Law Journal Vol. 25* (2002), p. 521.

[7] The need to identify and understand the linkages between international investment agreements and the debate on business and human rights was recognized by the Special Representative of the Secretary General for Business and Human Rights (SRSG) at the consultations on the "Duty to Protect" held in Copenhagen in November 2007. See MANN, Howard. "International Investment Agreements, Business and Human Rights: Key Issues and Opportunities". Winnipeg: International Institute for Sustainable Development IISD, 2008, p.7.

II. The rationale behind the inclusion of CSR into IIAs

A. What CSR is and how has it been regulated so far?

Nowadays, MCs should be considered no less than a political subject. These enterprises are powerful entities whose wealth, flexibility, and technological advantages overwhelmed the governments attempting to regulate the new creatures.[8] In that order, MCs presents challenges for the world economy and the world polity, particularly for Host States, due to both the ***power*** the former own to permeate/influence hosting societies and the consequent ***impact*** they may cause while developing their business object, especially at the social and environmental levels.

In that order, it is not coincidence that MCs have been subject of permanent interest to Law. In terms of their legal position, they have traditionally been framed as private entities *obliged to respect both the law of the country in which they are considered as incorporated as well as the domestic legislation at the host country*[9], especially on economic issues such as corporate structure, commercial performance, exchange policy and taxation.[10] Hence, the space for private regulation is defined by the area on which State's regulatory power is silent.

Nevertheless, this position hasn't been absent of contention, and the intent to extend the domain of State-referenced public law towards MCs' conduct has been a permanent argument raised by the ones considering that due to their structure and specific dynamics of maneuver, they have an evident capacity to intervene the *public sphere*. Thus, one of the areas under dispute is Corporate Social Responsibility, considering the impact that transnational enterprises may cause within their operational scope, and the normative idea that MCs should integrate society's goal in their business policies and thereby achieve competitive advantage. Thus, CSR focuses on the ways that corporations can help to address various social issues that are not necessarily issues of immediate impact to the corporations' business. [11]

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[8] See VAGTS, Detlev. "The Governance of the Multinational". *Wisconsin International Law Journal Vol. 23* (2005), p. 526.

[9] See MUCHLINSKI, Peter. "Human Rights and Multinationals: Is There a Problem?" *1 International Affairs - Royal Institute of International Affairs Vol. 77* (2001), p.35.

[10] See BACKER, Larry Catá. "Multinational Corporations as Objects and Sources of Transnational Regulation" *2 ILSA Journal of International & Comparative Law Vo. 14* (2008), p. 3-4.

[11] Larry Catá Backer points out that the usual start of the modern discourse of corporate social responsibility revolves around the debate between two influential academics in the period 1930-1950, Adolph Berle and E. Merrick Dodd. The former took the position that a corporation owes only a duty to maximize shareholder benefit.

Having said that, it is not surprising to notice that CSR has correspondingly been developed under a voluntary basis –characteristic of a private law regime– and through the issuance of self-produced *codes of conduct*[12]. Usually dealing with the different relations that the enterprise has with individuals –shareholders within the establishment and stakeholders at the society level–, such type of regulatory framework has progressively gained influence on MCs structure and dynamics, this is to say, on its CG scheme. Nowadays, one could say that most of MCs have adopted internal norms on the issue and created dependencies within their organization.

Nevertheless, the public nature of CSR is an idea impossible to be left out of the debate around CG, so pressures around the need to implement any kind of regulation at the international level have come from everywhere, especially from States and international organizations. In that order, one of the strategies to make that happen has been the issuance of *transnational codes of conduct* under the framework of public-private initiatives discussed at international scenarios[13].

Even if each one of these initiatives have a different structure and approaches, all of them share some common features: a) developed under the framework of international institutions; b) reference to International binding legal instruments in several grounds (human rights, environment, labor, anti-corruption); c) non-regulatory character but can be voluntarily incorporated as binding self-regulation; and d) normative character, because of the presence of a series of conducts that are expected to be assumed by the addressees.

In that order, CSR has been moving from an exclusive private perspective to its *internationalization* via the implementation of transnational scenarios. Although they still are *codes of conduct* that can be voluntary incorporated to a MCs governance scheme, they have

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On the other hand, the latter suggested that the corporation is an economic institution that serves a social purpose as well. See BACKER, Larry Catá. "Multinational Corporations, Transnational Law: the United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law" *Columbia Human Rights Law Review Vol. 37* (2005-2006), p. 298-299.

[12] See extensively RUGGIE, John. "Current Developments, Business and Human Rights: The Evolving International Agenda". *American Journal of International Law Vol. 101* (2007), 819-840.

[13] With the purpose to be non-exhaustive, the following are the most important initiatives undertaken so far: UNCTAD Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (December 5, 1980); OECD Guidelines for Multinational Enterprises (June 27, 2000); United Nations Global Compact Initiative (July 26 2000); United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (August 26, 2003); UN Secretary General´s Special Representative on Business and Human Rights "Protect, Respect and Remedy" Framework for Business and Human Rights – Guiding Principles of Business and Human Rights (2011). See BACKER, Larry Catá. "On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context" *9 Santa Clara Journal of International Law Vol. 9* (2011), 37-80.

been produced by a new set of actors and institutional scenarios with the intent to incorporate of a public-interest character to certain aspects of CG. Accordingly, the framework of the debate about CSR is altered since it is now visible that there is an international public interest on the issue[14], reason that can be considered as the starting point for the idea to consider CRS within the scope of International Investment Law, and more specifically, within the content and scope of IIAs.

B. IIAs' rationale and the consequent issues arising from the possibility of regulating CSR

As it was presented in the previous section, although it has a voluntary nature and has been mainly developed through self-regulation, CSR is nowadays going through a process of *internationalization* by means of the adoption of transnational initiatives –codes of conduct and governance schemes– which can be seen as means to enforce and legitimize the intend to consider the social impact of MCs' economic performance. Bearing that in mind, it is consequently necessary to inquire about the potential *added value* that the inclusion of CSR within international investment law –and more specifically into IIAs– would bring to the purpose of control MCs' behaviour, in order to make them more responsible to the adverse impacts that can be caused through their operation.

From a purely formal point of view IIAs are nothing but *inter-State treaty law*, structurally governed by the rules contained on the 1969 Vienna Convention on the Law of Treaties and a source of rights and obligations to States, which have legal capacity to be subject of them. Consequently, it is considered that on the one hand, their main aim is the establishment of predictability in the parties' conduct so as to guarantee stability in contractual relations, and on the other, that apparently they are not suited for extending legal effects towards private parties such as MCs[15]. According to this perspective, IIAs wouldn't be able to regulate the behavior of MCs, including references to CSR.

[14] See BACKER, Larry Catá. "Multinational Corporations, Transnational Law: the United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law" *Columbia Human Rights Law Review Vol. 37* (2005-2006), p. 388.

[15] This is, unfortunately, the point on which a great amount of literature from the "Business and Human Rights" branch has fallen into. The sterile discussion on whether MCs are subjects of International Law has produced many pages, but few conductive answers. For advanced positions on the matter, see ÁLVAREZ, José E. "Are Corporations "Subjects" of International Law?" *9 Santa Clara Journal of International Law* (2011), 1-36;

Nevertheless, one has to bring out both the current nature of international relations and the influence of globalization in our understanding of the legal phenomenon so as to contextualize and modulate such verdict. In the first place –from a paradigmatic point of view–, International Law has moved from a dynamic of *coexistence* between political units towards a scheme of *cooperation*, whose main aim is the coordinated regulation of an issue of common interest[16], including *economic relations*. Likewise, globalization has permeated social reality in order to evidence that everything is *more interconnected* by means of the dissociation of political and economic borders and the consequent complex relations between several actors that traditionally were isolated by the nation-State model.[17] Therefore, an analysis of IIAs' suitability to be a vehicle for CSR has to be conducted taking into account this perspective.

The regulation of the promotion and protection of FDI implies the need to capture an economic reality –MCs' mobilization and operation overseas– within the norm[18]. In that order, IIAs have gone beyond the main legal link –inter-State– to allocate well-defined entitlements on investors; on the one hand, indirectly by imposing obligations to Host States[19], and on the other, through the creation of a dispute-settlement mechanism that entitles them to claim fair and prompt compensation in case the former fails to comply with the compromises assumed in terms of non-discrimination and the guarantee of property rights or economic interests whatsoever[20].

The problem arises when it is reminded that by virtue of the investment regulation and as very powerful and influencing actors, MCs arriving to host countries have the potential to generate adverse impacts when inserted in vulnerable societies, which in the case of developing countries

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RATNER, Steven R. "Corporations and Human Rights: a Theory of Legal Responsibility" *3 Yale Law Journal Vol. 111* (2001), 443-545.

[16] See FRIEDMANN, Wolfgang. *The Changing Structure of International Law*. London: Stevens & Sons, 1984, p.89.

[17] See TWINING, William. "Globalisation and Legal Scholarship – Montesquieu Seminar". Tilburg: Wolf Legal Publishers and Tilburg Law School, 2011, p. 24-25.

[18] See APONTE M., Lillian. "The Hybrid State-corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability under International Law" *11 Lewis & Clark Law Review.* (2007), p. 173

[19] Including legal stability causes and the devoir to perform in a way to grant equitable treatment before other economic agents operating within its jurisdiction. In consequence, it is expected that the implementation of IIAs will produce the increase of private foreign investment, since the placement of favorable conditions of ownership, location and internalization of advantages is generally viewed as the preeminent framework to foreign investment decisions.

[20] For an account of the nature of investment arbitration see VAN HARTEN, Gus & LOUGHLIN, Martin. "Investment Treaty Arbitration as a Species of Global Administrative Law" *1 The European Journal of International Law Vol. 17* (2006), p. 121-150.

are usually areas under conditions of poverty, violence and corruption. Hence, the natural reaction is to consider the need to ***balance*** investor's ample *charte de droits et libertés* with performance obligations, even more since it is not national law which grants rights to corporations but investment agreements.[21] In other words, there is a necessity of more reciprocity by increasing the weight of corporate obligations in the agreement where their rights enjoy full protection.[22] Therefore, it is relevant to review the scope of CSR so as to make it fit under the context of International Investment Law[23].

The first point in question is the one related with the *purpose of IIAs*. Radically considered, IIAs' *raison d'etre* is the regulation of economic relations between States, and more specifically, the protection of foreign investors. In that order, the inclusion of CSR elements could be considered as a radical depart from such logic.[24] Nevertheless, day by day it is clearer that the investment phenomenon has additional dimensions –politic, social, and cultural– that should be accounted when considering the task of investment law. Additionally, it is worth to consider that from the point of view of their logic, investment protection and human rights –normative element inserted within CSR– share a common heritage, which is protection from asymmetric state power, being the clearest example the protection of property.[25]

Additionally, it has been argued that the inclusion of CSR elements into IIAs might drive business out of the public system of International Law into a less transparent, accountable, and legitimate scheme of regulation.[26] This is sometimes referred to as a *race to the bottom*, meaning

[21] See CERNIC, Jernej. "Corporate Human Rights Obligations at the International Level" *16 Willamette Journal of International Law & Dispute Resolution* (2008), p. 181.
[22] See GUGLER, Philippe & SHI, Jacylyn. "Corporate Social Responsibility for Developing Country Multinational Corporations: Lost War in Pertaining Global Competitiveness?" *Journal of Business Ethics, Vol. 87, Supplement 1: Globalization and the Good Corporation* (2009), p.17.
[23] Mann comments that whereas the initial generations of IIAs were focused solely and exclusively on investor rights, from the decade of 1990 they started to contain references to social issues, such as labour and the environment. See MANN, Howard. "International Investment Agreements, Business and Human Rights: Key Issues and Opportunities". Winnipeg: International Institute for Sustainable Development IISD, 2008, p.10.
[24] See WELLS, Megan. "Bilateral Investment Treaties: a Friend or Foe to Human Rights?" *Denver Journal of International Law and Policy Vol. 39* (2011), p. 507.
[25] See JACOB, Marc. "International Investment Agreements and Human Rights" Duisburg: Institute for Development and Peace, Research Paper Series Human Rights, Corporate Responsibility and Sustainable Development 03/2010, 2010.
[26] *Ibid*.

that States might want to retain an investor-friendly environment with little public interference and lax regulation and enforcement in order to attract foreign investors[27].

In that regard, it must be said that in the contrary, CSR entails an alternative and more realistic approach to the unpopular idea of imposing direct obligations to enterprises so as to considering direct liability in case of adverse impacts affecting, for example, human rights or en environmental regulation[28]. Moreover, CSR's flexibility might guarantee that, in spite of the evident rejection to the inclusion of the abovementioned references to direct obligations, MCs would consider to commit with social objectives by controlling their conduct.

Moreover, the idea of including CSR elements within IIAs is not novel. In the 1970s, authors like Meesen predicted that the impact of codes of conduct for MCs would depend on their integration in IIAs, noting that the relevance and influence of such legal instruments should not be underestimated and that they would gain importance particularly as an integrated part of international investment agreements.[29] In the same way, the High Commissioner for Human Rights referred to the need of promoting investors' rights alongside investors' obligations.[30]

III. The Colombian case: some examples of the inclusion of CSR into IIAs

A. Why Colombia is a good example of the tension between IIAs and CSR?

Colombia is an auspicious example of how FDI has become a decisive pillar to global economy, and how the proliferation of international agreements on trade and investment is considered by developing countries as the preferred vehicle to consolidate a strong position as *host country* with a favorable climate for investors. Never than ever has it taken stronger steps towards the

[27] See FAUCHALD, Ole K. & STIGENT, Jo. "Corporate Responsibility before International Institutions" *40 George Washington International Law Review* (2008-2009), p. 1028

[28] Whereas this idea has been raised by several authors, it has obtained low support from practitioners. In that order see WEILER, Todd. "Balancing Human Rights and Investor Protection: a New Approach for a Different Legal Order" *27 British Columbia International & Comparative Law Review* (2004) 429-452.

[29] See DAVERJENAD, Leyla. "Strengthening the Social Dimension of International Investment Agreements by Integrating Codes of Conduct for Multinational Enterprises". Paris: OECD Global Forum on International Investment, 2008, p. 11.

[30] See Report of the High Commissioner for Human Rights, U.N. Economic and Social Council, Human rights, trade and investment (E/CN.4/Sub.2/2003/9), at para. 59

implementation of such developmental model, which was initially chosen after the promulgation of the 1991 Political Constitution but decisively adopted in the last 10 years.

The country has enacted domestic legislation likely to create a stable environment for investment; has developed consistent public policies around integration for the circulation of labor, capital and goods; *has signed several international agreements –both free trade agreements and bilateral investment accords– with industrialized countries to lift traditional barriers on the issue*; and has directly signed legal stability contracts with investors. Jointly considered, these regulatory actions are part of a general commitment with the injection of foreign resources into the economy as the magic formula for progress and development.

Despite of the overall sentiments of *prosperity*[31], the country has been immersed into a long-range armed conflict for the last 50 years which is firmly rooted on social inequalities and discriminatory schemes. Paradoxically, the areas where the conflict has produced the greatest impact are the regions where most of natural resources that MCs consider as determinants for investment are located. In that context, their arrival is by no means exempt from controversy, to the extent of been considered as an *additional risk*, because of their feasibility to cause adverse impacts on population[32]. In that order, since most of Colombia's recent IIAs negotiation processes have been imbued by the debate around CSR, it is worth to present the way in which the latter has been included as a way to include social elements into the economic discourse.

[31] *Prosperity* is, as an anecdote, the slogan of Juan Manuel Santos' political campaign that led him to the Presidency of the Republic in 2010.

[32] Once multinational corporations arrive to the zones of operation/conflict, they become a paramount actor of society, so interaction between them and the violent actors in play –guerrilla groups, paramilitary forces, criminal bands, and official army– is unavoidable. In that regard, a symbiotic interaction is built around the type of capital/power each part administers; on the one hand, a huge amount of resources, and on the other, monopoly over violence. See extensively APONTE-MIRANDA, Lillian. "Law, the U'wa and Occidental Petroleum: Searching for Corporate accountability in Violations of Indigenous Land Rights" *2 American Indian Law Review Vol. 31 Symposium: Lands, Liberties, and Legacies: Indigenous Peoples and International Law* (2006-2007), 651-673; ELHAWARY, Samir. "Violent Paths to Peace? Rethinking the Conflict-Development Nexus in Colombia" *67 Colombia Internacional* (2008), 84-100; GIBSON, Alicia. "The Real Price of Oil: Cultural Survival and the U'wa of Colombia" *12 Colorado Journal of International Environmental Law and Policy* (2001), 139-147; MUGGAH, Robert. "Through the Developmentalist's Looking Glass: Conflict-Induced Displacement and Involuntary Resettlement in Colombia" *2 Journal of Refugee Studies Vol. 13* (2000), 133-164; RICHANI, Nazih. "Multinational Corporations, Rentier Capitalism, and the War System in Colombia" *3 Latin American Politics & Society Vol. 47* (2005), 113-144; RODRÍGUEZ-GARAVITO, César. "Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields" *1 Indiana Journal of Global Legal Studies Vol. 18* (2011), 263-305.

B. Normative examples

The following chart illustrates three of the most prominent IIAs' negotiations in which Colombia had been embedded during the first decade of 2000, by means of the decision of implementing a generalized policy of trade and investment liberalization as one of the principal foundations of the country´s development model.[33]

INTERNATIONAL LEGAL INSTRUMENT	PREAMBLE	INSTITUTIONAL PERFORMANCE DUTIES	CSR CLAUSE	ADDITIONAL REFERENCES
Colombia-European Union Free Trade Agreement (2012)	Sustainable development perspective	**Art. 286**: Cooperation activities for implementing sustainable development, including CSR	**Art. 271(3) (4)**: States should promote CSR through flexible mechanisms	-Chapter on Sustainable Development as integrator of social elements within the FTA -Social (environmental and labor) clauses
Colombia – Canada Free Trade agreement (2011)	Encourage enterprises to respect CSR	**Art. 817**: Committee on Investment has to promote CSR issues.	**Art 816**: -States should encourage enterprises -Voluntary adoption of internationally recognized standards -On internal policies and practices -Specific topics	-Side Agreements on labor and environmental issues -Human Rights Impact Assessment Mechanism
Colombia – USA Free Trade Agreement (2012)	Reference to labor and environmental issues	**Art. 17.6**: Cooperation activities for promoting CSR	NO	Complementary agreements to be negotiated

Source: Direct consultation to legal instruments.

These specific processes were chosen so as to show the inclusion of CSR elements into IIAs; the European Union-Colombia Free Trade Agreement - CEUFTA (signed in 2012 and in course of approbation)[34]; The Canada-Colombia Free Trade Agreement - CCOFTA (signed in 2008 and entered into force in August 2011)[35]; and the United States-Colombia Trade Promotion

[33] This is without prejudice of the extensive amount of literature produced in the regard, whose main purpose is the suggestion of possible ways to implement CSR clauses into IIAS and that due to space restrictions won't be directly accounted in this paper. See REPÚBLICA DE COLOMBIA. "Plan Nacional de Desarrollo 2002-2006: Hacia un Estado Comunitario". Bogotá: Departamento Nacional de Planeación, 2002, p.145.

[34] After a process of in-block negotiations, in 2012 Colombia and Peru, on the one part, agreed a Free Trade Agreement with the European Union, notwithstanding that considering EU's community nature, this legal instrument is complementary to existing or future international agreements relating to investment to which a Member State of the European Union and a Colombia are parties. CEUFTA's Title IV contains specific provisions on the liberalization of investment (termed as establishment), aim that is traduced in the implementation of an environment attractive for reciprocal investment within their respective spheres of competence.

[35] As a consequence of a process of re-engagement in the Americas while one of its highest foreign policy priorities –specially from an economic point of view– , in 2003 Canada decided to take on efforts on the building of a larger network of free trade agreements in the region. In that order, it developed the "Foreign Investment Promotional

Agreement - CTPA (signed in 2007 and went into force in May 2012).[36] While all of them contain references to CSR, they vary depending on two factors; on the one hand, their location within the legal instrument, and on the other, their scope. Such variations have indisputable effects in the way on which CR will interact with regulation provided by IIAs, as it will be set forth.

The first possibility to consider is the inclusion of CSR elements within the preamble. While a preambular paragraph can have an impact on the interpretation of an agreement, it does not create rights or place obligations on any state party or an investor. CEUFTA makes an integrative movement by appealing to *sustainable development* as an umbrella for the integration of social element into the dynamics of trade and investment. In turn, CCOFTA makes a specific reference by stating the encouragement of CSR as one of the purposes of the agreement. Finally, CTPA includes allusions to labor and environment, but far from being conclusive in terms of MCs behavior. As Mann points out, whereas this first scheme might be useful in setting a tone for interpreting the obligations in the agreement and can have an impact on its application, it does not require in itself any acts (or omissions) by states or investors, so there are no concrete effects.[37]

The second option is the inclusion of CSR as subject of discussion or consideration by the institutional bodies created under the IIAs' framework. In this point, the three legal instruments are coincident in establishing the need to undertake cooperation activities in the grounds of CSR, especially the exchange of information and experiences related to the promotion and implementation of good practices. Additionally, such activities appear incorporated both in institutional bodies –the Committee on Investment in the case of CCOFTA– and mechanisms –the Labor Cooperation and Capacity Building Mechanism in the context of CTPA–, which suggests the intention of make CSR operative at the inter-state sphere, considering again the nature of IIAs.

Protection Agreement" model (FIPA) so as to create a framework pursuing the enforcement of Canadian corporation's competitiveness in the global economy.

[36] Even if negotiations concluded in 2007, this agreement only came into force in 2012, after a long process of discussions and consultation within the US Congress, due to the implications of the agreement on several social and environmental issues.

[37] See MANN, Howard. "International Investment Agreements, Business and Human Rights: Key Issues and Opportunities". Winnipeg: International Institute for Sustainable Development IISD, 2008, p.10.

But the more straight way to include CSR elements within IIAs is through *clauses*. While CTPA doesn't have one, the IIAs signed with the European Union and Canada possesses specific articles making reference to the convenience of implementing CSR provisions into MCs conduct. Nevertheless, it is important to establish the specificities of such orientation in each case. On the one hand, CEUFTA's article 271(3) points out that the Parties agree to generally *promote* best business practices related to corporate social responsibility, reference that is modulated by an appointment to have flexible, voluntary and incentive-based mechanisms[38]. On the other, CCOFTA's article 816 asks parties to encourage enterprises operating within their territory or subject to their jurisdiction, to voluntary incorporate CSR's internationally recognized standards in their internal policies and practices, framing them into issues such as labour, the environment, human rights, community relations and anti-corruption[39].

While the clause contained by CEUFTA makes neither mention of the type of actions to be implemented, nor addressees or thematic areas, CCOFTA is a way more comprehensive legal construction. The encouragement addressed to enterprises operating under the parties' jurisdiction, yet voluntary, implies the specific action of adopting CSR recognized standards in their governance structure and frames it to specific issues considered, as relevant to corporate conduct.

The latter considerations deserve a series of punctual commentaries that will be useful to start answering the paper's main inquiry:

- Following the inter-state nature of IIAs, CSR provisions are mainly directed to States by imposing them a "conduct obligation", which implies a specific performance – encourage– without any expected result.

[38] ***Article 271: Trade Favouring Sustainable Development.*** *3. The Parties agree to promote best business practices related to corporate social responsibility. 4. The Parties recognise that flexible, voluntary, and incentive-based mechanisms can contribute to coherence between trade practices and the objectives of sustainable development. In this regard, and in accordance with its respective laws and policies, each Party will encourage the development and use of such mechanisms.*

[39] ***Article 816: 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.*

- Indirectly, CSR provisions might produce effects on MCs' internal policies and consequently, their governance scheme. Whereas this is contingent to their voluntary acceptance, the presence of a normative structure generates undeniable effects of political and even legal character.
- The reference made to *internationally recognized standards* is a direct appeal to the immense relevance of the CSR's internationalization process explained in the previous section. Apparently, such transnational codes of conduct and initiatives are starting to find space so as to become operative within IIAs.

Finally, it is worth to mention that CCOFTA additionally includes a set on side agreements on both labor and environmental issues, which along with a *Human Rights Impact Assessment Mechanism* that was incorporated to the agreement's orbit through another auxiliary legal instrument, are envisaged as useful complements to the CSR clause whatsoever.

IV. Conclusions: the implications of the inclusion of CSR into IIAs

So far and using the case of Colombia as an illustration, this paper presented the possibility of including CSR elements into IIAs as a feasible situation from the point of view of both legal technique –legality– and an ethics–legitimacy–. This is so, considering that FDI should be seen as a global phenomenon which entails more than a pure economic reality. Product of such perspective, the main contention of this text is a call for the recognition and further study of the *progressive penetration of social elements into IIAs' economic discourse*, and in general, into economic law. Hence, corporate regulation should no longer be considered merely as a matter limited to the traditional fields of "corporate" or "economic" law and policy; it is now also a creature of *transnational social policy*[40].

In that regard, CSR might be an alternative for social aims to become part of IIAs equation towards a holistic approach by virtue of which both should be equally embraced as relevant[41]. The idea of of MCs as powerful structures having *performance responsibilities* with societies where they develop an economic activity doesn't seem to be incompatible with the primary aim

[40] See BACKER, Larry Catá. "Multinational Corporations, Transnational Law: the United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law" *Columbia Human Rights Law Review Vol. 37* (2005-2006), p. 321.
[41] See ORTINO, Federico. "The Social Dimension of International Investment Agreements: Drafting a New BIT/MIT Model?" *International Law Forum du Droit International Vol. 7* (2005), p.243.

of Investment Law, which is the protection of investors through the establishment of a set of entitlements coming from the imposition of obligations to State parties. [42]

Whereas the main challenge to this approach is still the fact that CSR is mainly voluntary and product of conduct-oriented self-regulation (private law), IIAs could be seen as an initial installment for a more balanced CG scheme, since they would be able to provide *legitimacy*. In concrete, States[43] deliver a steering baseline through IIAs that frames CSR law-making from both substantial and procedural points of view. This is a possible alternative to redeem State's role in global governance, and can be also seen as a substitute path to the unpopular idea of imposing specific obligations to MCs.

Moreover, social objectives will never be met as part of MCs core business objectives unless CSR is effectively integrated within CG. If that ever happens, there will be real incentives for enterprises to modify their conduct. Thus, IIAs can consolidate such incorporation by means of its symbolic power and undisputable capacity to influence a legal environment. Consequently, this process must not pass unnoticed or be considered as a simple ornament to Foreign Direct Investment Law.

International Investment Law and CSR have to be considered as different but complementary governance systems. In that order, such dynamic illustrates rearrangements in the relative power of domestic, international, public, and private systems of governance, and that in a world of multiple competing systems of governance, no one –political, social, or economic- can claim a monopoly of power over an object of regulation.[44]

Finally, it is important to raise some issues that, as interesting side-effects of this phenomenon, should be considered in further research:

- From the perspective of International Law, would a generalized inclusion of CSR elements into IIAs be considered as a custom-crystallization process? If so, what would be the implications of that law-making scheme?

[42] See complementarily, HORRIGAN, Bryan. "Fault Lines in the Intersection between Corporate Governance and Social Responsibility". *UNSW Law Journal Vol. 25* (2002), p. 517-518.
[43] Entities representing public demands and performing as social redistributors.
[44] See BACKER, Larry Catá. "Multinational Corporations, Transnational Law: the United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law" *Columbia Human Rights Law Review Vol. 37* (2005-2006), P.293-294.

- From a Human Rights perspective, would the incorporation of CSR elements into IIAs impose direct obligations to States? If so, what kind of duties and how would they be managed?
- Is the adoption of this perspective a way to *consolidate* CSRs' self-regulation and voluntary approach, so the pretention to impose direct enforceable obligations to MCs would be decisively defeated?
- What are the specific implications of such governance scheme to MCs *internal* CG structure?
- Would the adoption of CSR elements within IIAs affect the investment climate and consequently, alter future investment decisions/flows?