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STUDENT'S NAME: Redeat Stiphanos Teka
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DISSERTATION TITLE Analysis on the application of Responsible Investment Schemes and Incentives based approaches to foreign investors: The case of Industrial Parks in Ethiopia

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DISSERTATION

Analysis on the application of Responsible Investment Schemes and Incentives based approaches to foreign investors: The case of Industrial Parks in Ethiopia

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LIST OF ACRONYMS

BIT – Bilateral Investment Treaty

ESG – Environmental, Social and Governance

ECOSOC – Economic and Social Council

FDI – Foreign Direct Investment

FI – Foreign investment

FTA – Free Trade Agreement

GATT – General Agreement on Trade and Tariffs

GATS – General Agreement on Trade in Services

GFC – Global Financial Crisis

HR – Human Rights

ICJ – International Court of Justice

ICSID - International Centre for Settlement of Investment Disputes

IIL – International Investment Law

ITL – International Trade Law

ILO – International Labour Organization

IPDC – Industrial Park Development Corporation

ISDS – Investor-State Dispute Settlement

MDGs – Millennium Development Goals

MITs- Multilateral Investment Treaties

MNC – Multi National Corporation

MNE – Multi National Enterprise

NAFTA – North American Free Trade Area

OECD – Organization for Economic Co-operation and Development

RI - Responsible Investment

SCM - Agreement on Subsidies and Countervailing Measures

SDG – Sustainable Development Goals

SEZ – Specialized Economic Zones

SRI – Socially Responsible Investment

TRIM – Trade-Related in Investment Measures

UNCITRAL – United Nations Commission on International Trade Law

UNCTAD – United Nations Conference on Trade and Development

UNGA – United Nations General Assembly

UN – United Nations

UNGBH - United Nations Guidelines

WTO – World Trade Organization

CHAPTER ONE

INTRODUCTION

BACKGROUND

Globalization presents unprecedented opportunities for business enterprises in obtaining necessary business essentials from around the globe.[1] Businesses can readily tap into cheaper labour markets while also sourcing goods and services from around the world.[2] Trade and foreign investment also thrive globally consequently bringing about economic development.[3] Contrariwise, the development of global trade and investment has been hindered by a number of challenges.[4] One such significant challenge eliciting globalisation's disadvantage is the extent to which it has triggered governance gaps in overcoming businesses' adverse impacts including human rights violations.[5] Thus, this paper is prepared pursuant to alleviating these impacts through the concept of Responsible Investment.

Responsible Investment (RI), leitmotif of this paper, is a concept relating to corporate practice features involving Corporate Social Responsibility (CSR) and Sustainable Development (SD).[6] RI though seemingly appears as self-explanatory, it is conceptually vague and definable in myriad of ways.[7] Thus, RI has no universally accepted definition and construed as a concept by which investors consider the influence of longer-term non-financial factors in their investment decision-making.[8] More so, different terminologies are used to describe the term such as 'Ethical Investment' and 'Socially Responsible Investment (SRI)' as referred in the United Kingdom (UK) and the United States of America (USA), respectively.[9] Still, broadly described, RI refers to: '*an investment where social, environmental and ethical factors are taken into account in the selection, retention and realisation of investments and responsible use of rights associated with such investments.*'[10] RI is often used to depict various investing forms purporting to consider environmental, social and other non-financial criteria on investment decision-makings.[11] Typically held in portfolio investments and associated with the

[1] Alex Newton, *The Business of Human Rights: Best Practice and the UN Guiding Principles* (Routledge 2019) 14.
[2] ibid 14 & 15.
[3] Laurence Boulle, 'Balancing Competing Interests in FDI Policy - A Developing Country Perspective' (2012) 7 Asian Journal of WTO & International Health Law and Policy 315, 317.
[4] Teresa Cheng, 'Special Economic Zones: A Catalyst for International Trade and Investment in Unsettling Times?' (2019) 20 Journal of World Investment & Trade 32, 33 .
[5] Newton (n 1) 16.
[6] Rory Sullivan and Craig Mackenzie, 'Introduction' in Rory Sullivan and Craig Mackenzie (eds), *Responsible Investment* (Green Leaf Publishing Ltd 2006) 12.
[7] Benjamin J Richardson, *Fiduciary Law and Responsible Investing* (Routledge 2013) 1.
[8] Tesfaye Abate Abebe, 'Laws of Investment and Environmental Protection: The Case of Ethiopian Large-Scale Agriculture' (University of South Africa (UNISA) 2018) 39.
[9] Richardson (n 7) 40 & 41.
[10] Sullivan and Mackenzie (n 6) 12. See also Mansley, M, 'Socially Responsible Investment: A Guide for Pension Funds and Institutional investors
[11] Richardson (n 7) 1 & 2.

financial industry[12], RI when used in this paper is distinctively understood as follows: 'RI is *the exercise of investors' to apply responsible corporate conduct practices and standards of behaviour by duly considering non-economic factors particularly environmental and labour standards in their making of foreign direct investments.* Thus, the term RI will not be applied pursuant to its conventional meaning associated with portfolio investments and also be limited to considerations of labour and environmental factors, only.

There has been a traditional categorisation of investments between Portfolio and Foreign Direct.[13] The United Nations Conference on Trade and Development (UNCTAD) defines Portfolio Investment as "*an investment of a purely financial character, where the investor remains passive*".[14] Concentrating on the capital value appreciation and the return generated thereof, the investor stays distant from controlling the investment's management.[15] Conversely, Foreign Direct Investment (FDI), is the movement of both human and financial capital over national borders in a manner providing the investor full control over the asset acquired.[16] Further, the term '*Foreign Investment*' (FI) is used by some to refer solely to FDI while others include Portfolio Investment as part of the broader picture of FI.[17]

In establishing a clear cut distinction, five elements distinguish FDI not only from portfolio investment but also from ordinary transaction of sale and/or short-term financial transaction.[18] These five elements are: (i) the transfer of funds, (ii) longer term project, (iii) purpose of regular income, (iv) participation of person transferring funds in the management of investment project and (v) business risk.[19] In this regards, this paper's subject will be dealing with FDI and all references to FI, unless referred otherwise, will only be used alternatively with FDI.

FDI serves as an important source of financing development particularly in developing and less developed economies such as Africa.[20] FDI contributes to local economic development by providing for local infrastructure development, generation of local employment and wages, improvements in exports, spill-overs and positive externalities.[21] Having negative impacts on local governance, displacing employees and local suppliers and transfer pricing, among others, FDI can also be antithetical to economic development.[22] With a hope of reaping economic

[12] William Ransome and Charles Sampford, *Ethics and Socially Responsible Investment: A Philosophical Approach* (Ashgate Publishing Company 2010) 12.
[13] Organization for Economic Cooperation and Development (OECD), 'Definition of Investor and Investment in International Investment Agreements', *International Investment Law: Understanding Concepts and Tracking Innovations* (Organization for Economic Cooperation and Development (OECD) 2008) 47.
[14] United Nations Conference on Trade and Development (UNCTAD), 'Scope and Definition: A Sequel' (United Nations 2011) UNCTAD/DIAE/IA/2010/2 29 <https://unctad.org/en/Docs/diaeia20102_en.pdf> accessed 20 August 2019.
[15] ibid.
[16] Efiong Akwaowo and Andree Swanson, 'Foreign Direct Investment, Corporate Social Reponsibility and Povery Alleviation: Evidence from African Countries' (2016) 7 Review of Business & Finance Studies 21, 22.
[17] M Sornarajah, *The International Law on Foreign Investment* (1st edn, Cambridge University Press 2010) 8.
[18] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Second, Oxford University Press 2012) 60.
[19] ibid.
[20] Pravakar Sahoo, 'Determinants of FDI in South Asia: Role of Infrastructure, Trade, Openess and Reforms' (2012) 13 Journal of World Investment & Trade 256, 256.
[21] Boulle (n 3) 317.
[22] ibid.

benefits from FDI, states, especially developing economies in Africa have continued to design policies and measures promoting and attracting FDI to their respective jurisdictions.[23]

The promotion of positive social development by international business ventures compared to their economic contribution has been contentious.[24] Legitimate public concerns on some aspects of businesses' conduct and issues on responsible corporate behaviour are raised.[25] Yet, the contribution of trade and investment liberalization to SD has gained more focus and in this regards, it is necessary for appropriate regulatory standardizations addressing environment and social concerns, ascertain the contributions.[26] Further, Multinational Enterprises (MNEs) involvement in the globalized economy has been sparking more attention into their activities including adverse impacts, particularly in developing states.[27] Accordingly, international law shall be keenly observed to consider MNEs developments and their transnational impact.[28] Yet again, responsible corporate behaviour of investors has much to do with the investment hosting state's responsibility to regulate as much as corporate responsibility.[29]

Traditionally, regulation of economic activities was a matter of states' regulatory power by virtue of their sovereignty.[30] Nevertheless, the increase in economic globalisation has eroded and displaced national sovereignty to a certain level.[31] Perhaps, two main frameworks under the stimulus of international law, can be ascribed for this move from the state's regulatory role on economic activities: (i) International Trade Law (ITL) framework which refers to a set of rules governing transboundary trade and is regulated by inter-state relationships through the institutional framework of the World Trade Organization (WTO)[32] and (ii) International Investment Law (IIL) framework regulated mainly by means of agreements entered with other states, referred hereinafter as 'home states' in Bilateral Investment Treaties (BITs) and also International Investment Agreements (IIAs).[33]

Decision to invest in a foreign country initiates a long-term plan between the investor and the investment recipient state, i.e. host state.[34] In view of that, IIL has its origins embedded in the

[23] Dupasquier Chantal and Osakwe Patrick N., 'Foreign Direct Investment in Africa: Performance, Challenges and Responsibilities' (2006) 17 Journal of Asian Economics 241, 253.
[24] Roland Brady, Stephen Drew and Tumenta F. Kennedy, 'Foreign Investment and Ethics: How to Contribute to Social Responsibility by Doing Business in Less -Developed Countries' (2012) 106 Journal of Business Ethics 267, 267.
[25] Mehmet Ogutcu, 'New Horizons for Internationl Investment and Sustainable Development' (2002) 3 Journal of World Investment 455, 464.
[26] Mehmet Ogutcu, 'New Horizons for International Investment and Sustainable Development' (2002) 3 Journal of World Investment 455, 455.
[27] Efiong Akwaowo and Andree Swanson, 'Foreign Direct Investment, Corporate Social Responsibility and Poverty Alleviation: Evidence from African Countries' (2016) 7 Review of Business & Finance Studies 21, 21.
[28] Anel Ferreira-Snyman, 'Sovereignty and the Changing Nature of Public International Law: Towards a World Law?' (2007) 40 The Comparative and International Law Journal of Southern Africa 395, 396.
[29] Ogutcu (n 25) 465.
[30] Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law' (2014) 36 University of Pennsylvania Journal of International Law 1, 4.
[31] Ferreira-Snyman (n 28) 396.
[32] Nadia Bernaz, *Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap* (Routledge 2017) 120.
[33] ibid 122.
[34] Dolzer and Schreuer (n 18) 21.

protection of aliens and the right to property.[35] The protection of aliens by itself is also based on principles of public international law and international human rights law, such as fairness, equity, justice and non-discrimination.[36] Then again, the ITL and IIL frameworks are closely related and governed by more or less similar rules to address investor protection concerns while also subject to the larger scope of international economic law.[37]

Host states adamant need for FI puts them in a dilemma of addressing their domestic public concerns while honouring promise made to foreign investors.[38] However, with respect to the IIL regime, it is especially important to consider essential policy trends of host states in interpreting BITs as they offer a context.[39] Some notable international investment policy trends emphasized by host states include SD, SRI, transparency and CSR.[40] Meanwhile, firms decisions to invest in a certain host state is considered as being reliant on location decisions'.[41] In this regards, investment incentives are considered as playing a substantial role.[42] African host states taking after the Chinese economic growth Model through creation of designated geographic areas otherwise known as Specialized Economic Zones (SEZs), offer investment incentives expansively, to attract foreign investors.[43] Notwithstanding FDI's positive economic outcome and promotion through incentives-based approach, it is vital to ensure that sufficient emphasis is given to encompass RI, especially in developing states.

Ethiopia is one of the developing states actively engaging to promote and attract FDI. Following political changes in 1991, the Federal Democratic Republic of Ethiopia (FDRE) government has established a federal and democratic system composed of nine regional and two city administration governments.[44] The horn of African nation is one of the world's fastest growing economies in 2017 with an impressive economic growth record over the years.[45] The FDRE government has been implementing a pro-FDI regulatory and institutional regime by which broad investment incentives are offered especially within the cost-intensive Industrial Parks developed throughout the country. As the country expends huge capital both in SEZs developments as well as the country's loss through tax-related investment incentives, RI, as argued in this paper is not properly mitigated and displays imbalance between RI and the incentives.

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[35] Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 8.
[36] ibid.
[37] Wagner (n 30) 1.
[38] Surya Deva, *Regulating Corporate Human Rights Violations* (Routledge 2012) 164.
[39] Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Routledge 2016) 79.
[40] ibid 79–85.
[41] Kenneth P Thomas, *Investment Incentives and the Global Competition for Capital* (Palgrave Macmillan 2011) 11.
[42] ibid.
[43] Martyn Davies, 'China's Developmental Model Comes to Africa' (2008) 35 Review of African Political Economy 134, 134.
[44] Tesfaye Hailu, 'Foreign Direct Investment (FDI) Outlook in Ethiopia: An Evidence from Oromia Region Selected Special Zones' (2017) 35 International Journal of African and Asian Studies 31, 31.
[45] https://www.worldbank.org/en/country/ethiopia/publication/ethiopia-economic-update-reform-imperatives-for-ethiopias-services-sector accessed on August 20th, 2019.

1.1. STATEMENT OF THE PROBLEM

In establishing standards for corporations to act in a socially responsible manner, an increasing number of soft law instruments have been developed.[46] Regrettably though, the lack of binding international legal instruments on RI practices together with the rare imposition of investors' obligations under BITs limits host states from adopting some form of responsible business conduct standards.[47] Especially with respect to developing states, the urge in advancing economic development combined with the absence of binding international instruments to set standards on RI practices imaginably drives them to choose on their momentary economic needs. Likewise, developing host states expend enormous amount of their tax payers' money on schemes aimed to promote investment such as the construction of SEZs and investment incentives. However, efforts in excelling economic development through FDI attraction is presumed in this paper, as not being carried out in a similar haste and manner as that of concurrent non-economic concerns. From the standpoint of the preceding presumption, it is therefore important to assess the existing instruments to advance RI via social and environmental protection while advancing economic development.

1.2. HYPOTHESIS, METHODOLOGY AND LIMITATIONS

1.2.1. Hypothesis

This paper has been prepared with the premise that the IIL framework fails to provide sufficient mechanisms to integrate RI. Additionally, the paper hypothesizes that the present Ethiopian investment regulatory framework on SEZs fails to accommodate RI sufficiently in light of existing international soft law regimes and particularly when compared to the incentives-based approach. With the lack of binding standards to ascertain foreign investors' execution of investment activities in RI manner, a host state's regulatory framework should at least exercise its sovereign power to regulate in ensuring such practice. Based on this ground, the paper is accordingly built on the hypothesis that there is an apparent imbalance in the Ethiopian regulatory framework, in favouring investment incentives over addressing adverse social impacts of FI by means of RI.

1.2.2. Methodology

The paper is essentially prepared based on a desk research and references to reports by various international institutions has been utilized to reflect practical and policy related trends. The arguments are basically drawn from the theoretical perspective in books and journals as well as practical circumstances noted from reports and publications of various institutions. Both a descriptive as well as analytical approach has been implemented throughout the paper. More so, the paper in addition to highlighting

[46] Mouyal (n 39) 88.
[47] ibid 89.

the loopholes arising from the imbalance in existing structures also digs to find mechanisms in addressing RI concerns.

1.2.3. Limitations

Discussions on RI in this paper are not addressed in the literatures similarly, at least terminology wise. An approach into bringing the term RI as a corollary to equate responsible business practices or social responsibility in the FDI arena is endeavoured. Also, the term itself here is used differently from the fragmented approach taken by literatures in dealing with specific socio-economic and environmental impacts of investment. This has made it challenging to find precise literature on the issue. Moreover, the absence of sufficient academic literatures on SEZs combined with the undeveloped Ethiopian investment law framework has limited the detailed investigations thereof.

1.3. SCOPE/FOCUS AREA

The main focus area of this dissertation will be to analyse the responsibility of host states in implementing RI when enforcing incentives-based approach to FDI. In this regards, the application of international standards in place will be evaluated. While human rights clearly cross paths with standards on environment and labour as will repeatedly be noticed, discussions and references to human rights are only used for the purpose of enriching the discussion as this paper is otherwise entirely focused on the international trade and investment law aspect. Moreover, the Ethiopian regulatory framework in respect to the application of RI standards into the incentives scheme implemented in the SEZs is assessed with respect to the rules on Industrial Parks only.

1.4. STRUCTURE

This paper is structured between three chapters excluding this very introduction and conclusion. The second chapter entitled ‘Responsibility and Foreign Investment’ deals with issues relating to some of the investment policy trends necessary in the implementation of RI. Accordingly, the chapter identifies issues such as Common Concerns, state’s responsibility to regulate and CSR. Moreover, the chapter aims to look at some of the pertinent soft law regulatory initiatives which reflect RI practices.

The third chapter partly titled ‘Schemes to attract FDI’ focuses on pondering on issues relating to incentivising schemes of host states with a particular remark on investment incentives and SEZs. The Chapter also present some of the principles reflecting the nexus between IIL and ITL. Moreover, the third chapter also introduces the Ethiopian regulatory framework in dealing with the incentives framework for SEZs.

The fourth chapter entitled, ‘Analysis on balancing investment incentives vis-à-vis RI, pertains to providing an analysis on the need as well as integration of standards on environment and

labour under the ITL and IIL frameworks. Moreover, making a remark on integrating environmental and labour standards into CSR, the chapter will continue to analyse the Ethiopian framework in respect to addressing RI compared to incentives offered.

"The economy is badly weakened, a consequence of greed and irresponsibility on the part of some but also our collective failure…"[48]

CHAPTER TWO

RESPONSIBILITY AND FOREIGN INVESTMENT

BACKGROUND

The term 'Responsibility' etymologically refers to 'being responsible or being answerable'.[49] Thereof, it implies accountability and incorporates a sense of duty.[50] An extensive subject matter under the eyes of the law, responsibility as a term is used in the international law context predominantly in reference to States.[51] Fundamentally, the literal meaning of the term 'Responsibility', broadly embraces three aspects.[52] These are: the freedom of an acting subject; the authority to whom the subject answers for its actions and the way the relationship between the two poles are expressed.[53]

In the wake of the 2008 Global Financial Crisis (GFC), one of the major revelations was the need for the world to rethink its fundamental tenets.[54] The statement by the former USA President, as quoted in the beginning of this chapter, thus magnified the importance and consequence of failure to dispense responsibility in the economic and financial domain.[55] Although responsibility in investments as a concept, predated President Obama's statement and traces its roots back to the eighteenth century, the GFC highlighted, the lack of a mechanism to managing systemic risks, as a fundamental dysfunction in the system.[56] In this regards, there has been a growing recognition to the financial significance of considering specific issues relating to social, ethical and environmental aspects.[57]

Corporations and the investment community for many years, had been urged to singly concern themselves with financial value.[58] In this regards, the American economist, Milton Freedman's proposition used to be hailed for his famous line: 'The social responsibility of a business is to

[48] https://obamawhitehouse.archives.gov/blog/2009/01/21/president-barack-obamas-inaugural-address, accessed on 20 August, 2019
[49] Kenneth Amaeshi, Onyeka K Osuji and Paul Nnodim, 'Corporate Social Responsibility in Supply Chains of Global Brands: A Boundaryless Responsibility? Clarifications, Exceptions and Implications' (2008) 81 Journal of Business Ethicss 223, 225.
[50] Deva (n 38) 22.
[51] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 523
[52] Paul H Dembinski and others, 'The Ethical Foundations of Responsible Investment' (2003) 48 Journal of Business Ethics 203, 204.
[53] ibid.
[54] Richardson (n 7) 1.
[55] https://obamawhitehouse.archives.gov/blog/2009/01/21/president-barack-obamas-inaugural-address, accessed on 20 August, 2019
[56] Richardson (n 7) 1 & 27.
[57] Sullivan and Mackenzie (n 6).
[58] Ransome and Sampford (n 12) 31.

maximize its profits.'[59] Freedman's proposition has been overshadowed for the responsibility of businesses is understood to going beyond profits. Yet, corporate activities continue to result in socially adverse impacts and also cause Human Rights (HR) violations, most of which are attributed to lack of ethics.[60] Moreover, allegations of corporate wrongdoings and inappropriate influences of corporations on governments, have prompted deliberations on the proper role, responsibility and level of accountability of corporations in a globalised economy.[61]

The promotion of positive social developments by business ventures including FDI has for long remained theoretically dubious.[62] Researches relating to the effects of international business ventures mainly focus on the economic development aspect with only handful of those researches raising social development or rather non-economic aspect.[63] This chapter therefore navigates the issue of responsibility in FDI from the perspective of non-economic concerns. In this regards, the chapter highlights some notable investment policy trends required in the development of corporations' responsibility and adverse impacts resulting from their FDI activities. The chapter will therefore initially address in the first section, the notions of Common Concern as well as the viewpoints of international law on State's responsibility in respect to addressing the adverse social and environmental impacts of FDI activities. Moreover, the chapter will explicate the social responsibility of corporations from the perspective of CSR within FDI. The second major section of this chapter discusses selected regulatory initiatives reflecting RI both from the perspective of CSR and RI focusing on environment and labour aspects.

2.1. COMMON CONCERNS AND RESPONSIBILITY

Globalization results from the transboundary developments in the economic, political, social and cultural exchanges.[64] It is also the increasing interaction of people and States through increased flow of money, ideas and culture.[65] These interaction and exchange at all levels of state and non-state actors have called for the development of the '*Common Concern of human kind' (Concept of Commons)* in international law.[66] The speculations on commonality, associated initially with the external world later referred as the environment, is a result of the shared interest in ownership, consequential effect and entitlement to benefit from the external environment.[67] The existence of common interest, importance and also the impossibility of

[59] Adefolake O Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries* (Cambridge University Press 2012) 8.
[60] Deva (n 38) 5.
[61] Sullivan and Mackenzie (n 6) 6.
[62] Brady, Drew and F. Kennedy (n 24) 267.
[63] ibid 268.
[64] Laura Horn, 'Globalization, Sustainable Development and the Common Concern of Human Kind' (2007) 7 Macquarie Law Journal 53, 54.
[65] Newton (n 1) 17.
[66] Horn (n 69) 54.
[67] Luigi Crema, 'Investor Rights and Well-Being: Remarks on the Interpretation of Investment Treaties in Light of Other Rights' in Tullio Treves, Francesco Seatzu and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge 2014) 53.

safeguarding the environment with the help of only few states, gave rise to the connotation of Common Concern being solely associated with environment.[68]

The need for integrating environmental issues in international law by going beyond States' self-interest was also indicated by the International Court of Justice (ICJ) Vice-President Weeramantry.[69] In his separate opinion in the *Gabčíkovo-Nagymaros*[70] decision, Vice-President stated as follows: '*International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.* [71]' It can thus be noted that the need for offering common concerns particularly with respect to environment, has been widely accepted.

The expression Common Concerns however, creates vagueness as to the legal nature and content of what it includes.[72] As highlighted above, the inception and development of the Common Concerns concept is closely linked with environment. But international law and legal scholarship have gone to embrace the dominion of Common Concerns, sometimes referred as 'planetary welfare', for global reflection beyond environment and embrace human rights and associated specifications.[73] Further, the growing number of international treaty law on the protection of foreign investments has brought an increasing concern on the consequences of such growth vis-à-vis the states' ability to exercise their public regulatory powers.[74] Some of these concern areas or fields such as human rights' protection, environmental protection or workers' rights protection, are generically termed as Common Concerns.[75] Henceforth, even if stemming from completely different perspectives and paradigms, both environmental protection and workers' rights protection fall into the category of Common Concerns.

Moreover, the development of the Common Concerns concept emerged next to another key concept, Sustainable Development (SD): a concept guiding to enable humanity attaining the goal of life by balancing it with nature.[76] Sustainable Development (SD) was a term originally defined in the Brundtland Report.[77] In describing the concept of SD, the Brundtland Report stated that: '*Sustainable Development seeks to meet the need and aspirations of the present*

[68] ibid 54.
[69] Duncan French, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities' (2000) 49 International & Comparative Law Quarterly 35, 59.
70 Gabčikovo-Nagymaros Project (Hungary v Slovakia), Judgment, [25 September 1997] ICJ Rep 3, ICGJ 65 (ICJ 1997), 5th February 1997, United Nations [UN]; International Court of Justice [ICJ]
71 *Gabčíkovo-Nagymaros Project*, Separate Opinion of Vice-President Weeramantry, at p. 118
[72] Crema (n 72) 55.
[73] ibid 54.
[74] Stefano Brugnatelli, 'International Investment Law and International Protection of Worker's Rights' in Tullio Treves, Francesco Seatzu and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge 2014) 298.
[75] Angelica Bonfanti, 'Applying Corporate Social Responsibility to Foreign Investments: Failures and Prospects' in Tullio Treves, Francesco Seatzu and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge 2014) 298.
[76] Horn (n 69) 60.
[77] Mouyal (n 39) 80.

without compromising the ability to meet those of the future.'[78] The concept of SD is per se founded on three major pillars, namely, economic development, social development and environmental protection.[79] These three dimensions of SD were set out under the United Nations General Assembly (UNGA) resolution of 2015.[80] Seventeen Sustainable Development Goals (SDGs) and 169 targets were identified with the aim of stimulating action over the subsequent fifteen years in areas of critical importance for humanity and the planet.[81] A successor to a forerunner instrument, the Millennium Development Goals (MDGs), the SDGs unlike the MDGs and other UNGA instruments are commended for integrating the three-fold dimensions of development.[82] A product of voluntary, non-binding and unilateral instrument, the SDGs serve as soft law instruments.[83]

Common Concern under this paper be understood hereof as a global reflection for issues that may have a commonality in terms of universal welfare and include but not limited to environment. In this regards, the concept of *Common Concerns* and reflections in this regards throughout this paper will be assessed with respect to responsibilities in relation to two selected areas of concern, namely, environment and labour issues. Furthermore, it is necessary to bear in mind Common Concerns as a concept and when discussed under this paper crosses path with international human rights law, greatly. Below, the first sub-section provides an overview of the notion of state responsibility within the purview of Common Concerns followed by the another sub-section emphasizing on the notion of Corporate Social Responsibility (CSR) with respect to describing the responsibility of businesses.

2.1.1. State Responsibility and the Right to Regulate

State Responsibility is one of the fundamental principles of international law, in general.[84] The notion is perceived under international law as arising from the commission of internationally unlawful act against another state leading to an international responsibility, thereof.[85] In this regards, international law imposes responsibility on states for breaching an international obligation and a reparation requirement for the breach.[86]

Host States as national sovereigns have the authority to act within their territory.[87] The right to regulate in this regards is an affirmation of a host state's authority to act as sovereigns acting on behalf of the people.[88] Yet again, states are not only endowed with a right but also a duty to

[78] Report of the World Commission on Environment and Development, 'Our Common Future' (The Brundtland Report), 1987
[79] Mouyal (n 39) 80.
[80] UNGA Res 70/1(25 September 2015) UN Doc A/RES/51/210
[81] ibid
[82] Ricardo S Borges, 'The United Kingdom and the UN Convention on Contracts for the International Sale of Goods (CISG): To Ratify Not to Ratify?' (2008) 14 Journal of International Maritime Law 331, 25 & 26.
[83] Riccardo Pavoni and Dario Piselli, 'The Sustainable Development Goals and International Environmental Law: Normative Value and Challenges for Implementation' (2016) 13 VEREDAS DO DOREITO 13, 35.
[84] Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 589.
[85] ibid.
[86] Crawford (n 56) 523.
[87] Mouyal (n 39) 31.
[88] ibid 8.

regulate especially in regards to economic and social rights, also known as second generation rights.[89] As such, states assume the obligation to respect, protect and fulfil HR under a framework known as 'respect, protect and fulfil.'[90] Thus, the regulatory powers of states is both a right as well as duty of states. While state responsibility is a widely accepted international law notion, host states are nevertheless compelled into admitting FI into their territories under international law.[91] Entry into foreign investment is as such, entirely recognized as a matter of the state prerogative.[92] Customary international law recognizes that the host state has the choice to determine entry of foreign investment into its jurisdictions.[93]

The right to regulate is increasingly being limited by contractual devices.[94] One such device being stabilization clauses: clauses seeking to protect any future legal changes in the host state, after the making of the investment, in detriment of the foreign investor.[95] Additional to the contractual devices, host states regulatory power is limited by fear of arbitration proceedings resulting what is known as 'Regulatory Chill'.[96] Regulatory Chill depicts restraint of regulators to regulate on various public interest concerns such as environment and labour for fear of future arbitration proceedings.[97]

International law requires for States to take domestic action on Common Concerns.[98] Especially with respect to natural resources, states cannot claim full independence and autonomy under the principle of permanent sovereignty.[99] It is in this regards that reconsiderations on the concept of 'Sovereignty' were applied, especially in light of international obligations related to the environment.[100] The Stockholm Declaration[101] for instance stipulated under Principle 21 that States have the sovereign right to exploit their own resources pursuant to their own environmental policies; however, they are equally responsible to ensure that the activities within their control or jurisdiction do not cause damage to areas beyond the limits of their national jurisdiction.[102] Moreover, in extending similar international obligation on States to regulate on Common Concerns, additional international instruments have also been adopted in the years succeeding the Stockholm Declaration.[103]

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[89] ibid 115.
[90] ibid.
[91] Rudolf Dolzer and Christoph Schuerer, 'Principles of International Investment Law', p. 28.
[92] Sornarajah (n 17) 273.
[93] ibid.
[94] Mouyal (n 39) 206.
[95] Subedi (n 35) 104.
[96] Satwik Shekhar, '"Regulatory Chill": Talking Right to Regulate for a Spin' (Centre for WTO Studies) CWS/WP/200/27 6.
[97] ibid.
[98] Thomas Cottier and others, 'The Principle of Common Concern and Climate Change' (NCCR Trade Regulation 2014) Working Paper Working Paper No. 2014/18 21.
[99] ibid.
[100] Horn (n 69) 56.
[101] Report of the United Nations Conference on the Human Environment, UN Doc E/73/II.A/ 14 (1972), 11 ILM 1416, 1419 (1972) (hereafter Stockholm Declaration) Accessed from https://www.un.org/en/ga/search/view_doc.asp?symbol=A/CONF.48/14/Rev.1 on 26 August, 2019
[102] Principle 21, The Stockholm Declaration 1972
[103] Horn (n 69) 56–59. The Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer, the UN Convention on Biological Diversity and the Principles of the Rio Declaration are few amongst many imposing protection of environment on States.

Meanwhile, the Charter of Economic Rights and Duties of States[104] provides the fundamental principles necessary in exercising economic as well as political rights.[105] Sovereignty, territorial integrity and political independence of States, fulfilment of good faith of international obligations, respecting HR and international obligations as well as promotion of international social justice are amongst the long list of these principles.[106] The Charter also stipulates that States have the right to regulate and exercise authority over foreign investment in their national jurisdictions according to their national objectives and priorities.[107] Host states therefore are allowed to carry out their internationally recognized right to self-regulate on foreign investment including the entry into their jurisdiction pursuant to other international commitments and treaties they have entered into. However, in order for states to fully ensure the protection of Common concerns foreign investors play a key role.

2.1.2. Corporate Social Responsibility and Corporations responsibility

There has been a longstanding debate on role and place of corporations within society.[108] Corporate scholarship is considered to be a field dominated by the law and economics movement.[109] However, corporations are not solely a one-dimensional economic engines as they are imbricated within broader symbolic systems of texts and institutions.[110] Also, social responsibility, as part of the human nature, tends to guide corporate activities and financial considerations.[111] Henceforth, the view towards corporations needs to go beyond the profit maximization and economic goal of these institutions.

Traditionally, under international law, individuals and companies did not possess legal personality and responsibility, thereof.[112] Also, individuals and companies, unlike states, were rather treated as 'beneficiaries' of treaties of commerce or that of treaties on the treatment of foreigners. Later, there were changes including the *Barcelona Traction* case[113], which made reference to the general rules relating to the diplomatic protection of corporations making investments in foreign countries.[114] While rules governing the treatment of corporations, particularly Multinational Enterprises (MNEs) by host states has been subject to much challenge MNEs have presently principal actors in international trade and globalization with an increasing operation in FDI.[115]

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[104] GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50
[105] Chapter 1, ibid.
[106] Ibid.
[107] Ibid Article 2.
[108] Deva (n 38) 120.
[109] Douglas Litowitz, 'The Corporation as God' [2005] The Journal of Corporation Law 501, 501.
[110] ibid 535.
[111] Julia M Puaschunder, 'On the Emergence, Current State and Future Perspectives of Socially Responsible Investment' (2016) 16 The Journal of Sustainable Development 38, 39.
[112] Mouyal (n 39) 30.
[113] *Barcelona Traction* case (Belgium vs Spain) [24 July,1964] ICJ Reports, Preliminary Objections (Judgment).
[114] Sornarajah (n 17) 197.
[115] Karl P Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experiences and Lessons Learned' (2015) 16 The Journal of World Investment & Trade 11, 12.

MNEs are thus one of the key actors in the global economy whose economic strength outweighs almost the capacity of forty states combined.[116] The term MNEs is also used in alternate with other terminologies such as Transnational Corporations (TNCs), Multinational Corporations (MNCs), Transnational Enterprises (TNEs) and Supranational Entities (SNEs).[117] While it is challenging to find a precise definition, *Malcolm Shaw* describes MNEs as private business organizations comprising of several legal entities, all of which are linked through parent corporations whereas each MNE retaining distinguishing feature of size and multinational spread.[118] The central connecting dot in MNEs multifaceted web of structures is the control exercised by a corporation over the operations performed offshore outside the country where the business is established.[119] Due to the nature of their structure and capacity, MNEs influence on the social, market and political arenas has also exceeded their influence previously confined to economic activities.[120]

Private business firms are increasingly embracing actions even deemed as rights and duties of political actors such as the State.[121] However, the motives behind and particularly corporations' active role in going all the way to engaging in rule-finding discourses and rule-setting processes, have not escaped from cynicism.[122] Corporations are claimed to having an active role in the promulgation of internationally binding standards for the protection of their investments and also indirectly via the WTO system.[123] Nonetheless, there are recognisable ethical and social issues often crucial for strategies adopted by MNEs and their long term successes.[124] Some of these issues include corruption, employment conditions, marketing practices, and effects on the natural environment.[125] With respect to the best MNE strategies that lead towards social benefits particularly in emerging host countries, the response leads towards the application of business ethics and Corporate Social Responsibility (CSR).[126]

The concept of CSR has been existent in business and business research for many decades.[127] However, the 1970's, a period trembled with several political and financial crises, was marked as the beginning of discussions on the concept of CSR with a relevance to modern global business.[128] Corporations' are increasingly considering the importance of CSR and manifesting their endorsement.[129] Some of the rationales forwarded for corporations' favouring CSR include: the protective shield CSR offers against government regulations on the subject of

[116] Lorraine Eden, 'Multinationals and Foreign Investment Policies in a Digital World', *The E15 Initiative* (International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 2016) 1 <www.e15initiative.org/>.
[117] Deva (n 38) 21.
[118] Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 197
[119] Deva (n 38) 21.
[120] Akwaowo and Swanson (n 16) 25.
[121] Brady, Drew and F. Kennedy (n 1) 269.
[122] ibid.
[123] Adeyeye (n 64) 17.
[124] Brady, Drew and F. Kennedy (n 24) 268.
[125] ibid.
[126] ibid.
[127] Jeremy Moon and Wendy Chapple, 'Corporate Social Responsibility (CSR) in Asia: A Seven-Country Study of CSR Website Reporting' (2005) 44 Business & Society 415, 416.
[128] Bernaz (n 32) 164.
[129] Adeyeye (n 64) 34.

societal interests; apparent ability of businesses to carry out social responsibilities and the support of the wider public.[130] In this regards, private regulation in the areas of diverse human rights and fields of Common Concerns have been flourishing.[131] The main incentive for the voluntary regulation of companies by means of private regulation is associated with mitigating reputational risks and increasing profits, eventually.[132]

Still, companies in efforts to prove their commitment to social responsibility have been adopting many CSR-related codes, guidelines and initiatives.[133] Private regulations are categorized differently but particularly, in area of business and human rights, two major initiatives are increasingly applied by MNEs: (i) Corporate Self-regulatory initiatives and (ii) Voluntary monitoring initiatives.[134] Corporate self-regulatory typically referred as 'Codes of corporate conduct' are also called 'Sourcing Guidelines'[135] and are used either as company or sector-level Human Rights policies.[136] Driving forces for the adoption of such codes of conduct likely arise from different considerations such as responses driven from market forces and stakeholder; volition to do business rightly; or even as a cover-up for inhuman activities.[137]

Voluntary monitoring initiatives conversely refer to the more coordinated industry-wide attempts of MNEs to work alongside other stakeholder parties such as trade unions and NGOs to establish common standards and monitoring mechanisms such as multi-stakeholder initiatives.[138] Notwithstanding the advantages and importance of voluntary exercises of CSR by corporations, it is equally necessary to put the CSR initiatives in some form of legal responsibility context as it otherwise enables corporations to unnecessarily manoeuvre their social responsibility. It will in this regards be essential to tender an overview of pertinent regulatory initiatives bringing labour and environment issues at the forefront, in the following section.

2.2. PERTINENT INTERNATIONAL REGULATORY INITIATIVES

The United Nations (UN, herein) began developing standards of behaviour for MNEs in the 1970s.[139] The development of the standards was part of UN's effort to regulate MNEs' FDI undertaking as well as host states.[140] To this effect, governments sought to negotiate the United Nations Code of Conduct on Transnational Corporations (UNCTNC) which was meant to establish a multilateral framework defining the rights and obligations of both host states and

[130] Caroll, p. 89
[131] Bernaz (n 32) 210.
[132] ibid.
[133] Adeyeye (n 64) 7.
[134] Bernaz (n 32) 211.
[135] Adelle Blackett, 'Global Governance, Legal Pluralism and the Decentered State: A Labour Law Critique of Codes of Corporate Conduct' (2001) 8 Indiana Journal of Global Legal Studies 401, 401.
[136] Bernaz (n 32) 211.
[137] Deva (n 38) 74.
[138] Blackett (n 140) 401.
[139] Bernaz (n 32) 163.
[140] ibid.

MNEs.[141] Considering the global context of TNCs operations, the aim was to ensure that efforts to regulate TNCs should be global.[142] The draft UNCTNC composed of two main parts, where the first aimed at regulating TNC's activities and the second directed to protect foreign investment.[143] Provided the complexity and extensiveness of the coverage as well as additional regulatory, economic and political circumstances the effort to adopting UNCTNC was left in vain.[144]

However, global efforts to regulate corporations and more specifically TNC's conduct was then followed with negotiations on issue-specific agreements.[145] Hence, fragmented standards and codes have been developed by some of UN's affiliated institutions such as the UNCTAD and the International Labour Organization (ILO).[146] Then again, the regulatory initiatives discussed below have a non-binding and recommendatory nature reckoning them as soft law initiatives.[147] Accordingly, four regulatory initiatives will be assessed herein below, namely, Organization for Economic Cooperation and Development (OECD) Declaration on International Investment on Multinational Enterprises, the UN Global Compact, the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (Tripartite Declaration) and the UN Guiding Principles on Business and Human Rights.

2.2.1 The OECD Guidelines for Multinational Enterprises

The OECD's Guidelines for Multinational Enterprises (OECD Guidelines, hereafter)[148] initially came into effect in 1976 as part of the Declaration on International Investment and MNEs (OECD Declaration).[149] The OECD Guidelines are recommendations by OECD governments, composed of developed countries, establishing behavioural norms for the activities of MNCs.[150] The Guidelines provide for non-binding principles and standards for responsible business conduct in a global context and the guidelines are enacted pursuant to the applicable laws and internationally recognized standards.[151] The Guidelines are not intended to create a distinct set of treatment for MNEs but rather reflect a good practice both for MNEs and domestic corporations.[152]The OECD Guidelines recognize the importance of international investment to the world economy and the contribution of international cooperation in this regards.[153]

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[141] Sauvant (n 120) 11.
[142] ibid 18.
[143] Bonfanti (n 80) 234 & 235.
[144] Sauvant (n 120) 56.
[145] ibid 18.
[146] Bernaz (n 32) 169.
[147] ibid 163.
[148] OECD (2011) OECD Guidelines for Multinational Enterprises, OECD Publishing. http://dx.doi.org/10.1787/9789264115415-en
[149] Deva (n 38) 80.
[150] OECD, 'The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts' 7.
[151] OECD (n154).
[152] OECD (n 155) 9.
[153] Preamble, Declaration on International Investment and MNEs, 25 May 2011 (OECD Declaration)

The OECD Guidelines when adopted in 1976 contained chapters such as General Principles, Disclosure of information and Employment and Industrial Relations and later added other chapters including Concepts and Principles, Environment and Human Rights.[154] The 2011 OECD Guidelines also strengthened the employment and industrial relations' provisions.[155] In regards to environment, the OECD Guidelines expects business enterprises' to duly consider the need to protecting the environment, public health and safety and even conduct their activities in a manner that contributes to the wider goal of SD.[156] In this regards, businesses are expected to establish and maintain a system of environmental management which incorporates a regular monitoring and verification of progress towards environmental-objectives set.[157] Also, the OECD Guidelines dictate the need for businesses' in assessing and addressing impacts from the full-life cycle of the business with a view to avoid or mitigate environmental impacts; training workers on environmental matters; maintaining contingency plans to prevent, mitigate and control environmental damages; and continually seeking to improve environmental performance of the enterprise including supply chain, where appropriate.[158]

Additional to the environment related provisions, the OECD Guidelines also instil the need for enterprises to undertake labour protection steps by complying with labour standards.[159] The OECD Guidelines stipulate for businesses to observe employment standards and also calls for enterprises not to offer less favourable treatment than those observed by comparable employers in host state.[160] Moreover, in cases where comparable employers may not exist, corporations are recommended to provide best possible wage, benefits and conditions of work within government policies, in a manner satisfying corporations' economic positions as well as satisfying workers' basic needs.[161] Moreover, employing local workers to the greatest extent possible and providing training to improve skills and respecting as well as facilitating the establishment of trade unions and development of collective agreements also make up the recommendations.[162]

Evident from the postulations and provisions noted above, the OECD Guidelines provides a normative framework addressing benchmark standards to apply RI. As a positive attribute of the OECD Guidelines, MNCs are also encouraged to disclose publicly information on the social, ethical and environmental policies of the enterprise as well as other codes of conduct ascribed.[163] This would in effect allow to evaluate the performance of the MNCs with regards to the standards in place.

[154] Sauvant (n 120) 28.
[155] Deva (n 38) 81.
[156] OECD Guidelines, Chapter V): Environment.
[157] OECD Guidelines, Chapter VI (1)).
[158] OECD Guidelines, Chapter VI ((3)(7)(5)(6)).
[159] OECD Guidelines, Chapter V: Employment and Industrial Relations.
[160] OECD Guidelines Chapter V (4)).
[161] OECD Guidelines Chapter V (4)).
[162] OECD Guidelines Chapter V(1(c)(d)) and Chapter V (2).
[163] Deva (n 38) 81.

2.2.2 The UN Global Compact

The UN Global Compact (Global Compact, hereof) is one of the standardization instruments used as means to socialize common concerns at the international level.[164] This instrument was launched in July 2000 by the then, UN Secretary General Kofi-Annan.[165] The instrument is also deemed as one of the world's largest Multi-stakeholder initiative[166] as the development of the instrument was a resultant of group efforts by UN Agencies, NGOs, companies, the International Labor Organization (ILO, herein) and other forms of groups.[167] Additionally, a voluntary rather than a regulatory instrument, the Global Compact principles drew their inspiration from instruments and documents which the international community has attained accord.[168]

The Global Compact in its ten principles, calls upon business enterprises to 'embrace, support and enact', a set of core values in four covered areas, within their sphere of influence.[169] The areas identified are those of human rights, labour standards, anti-corruption and the environment.[170] The ten principles are said to attempt filling the void between the regulatory regimes and voluntary codes of industry conduct.[171] Furthermore, as rightly put by Ambassador Betty, the development of the Global Compact '*in its simplest form is the dissemination of and adherence to good business practices.*'[172] In this regards, the Global Compact is for the purpose of this paper deemed as an instrument promoting good investment practices in the pertinent areas of labour and environment.

Global Compact lays out its labour standards under the heading of four principles while dedicating three of its principles for environment.[173] With respect to the labour principles, the Global Compact followed on the ILO's four fundamental labour rights.[174] Accordingly, the four labour principles under the Global Compact relate to: the promotion of the freedom of association and recognition of the collective bargaining right; elimination of forced and compulsory labour; abolition of child labour; and elimination of discrimination on employment and occupation.[175] Additional to the labour principles, the Global Compact principles on environment under principle eight guide investors to undertake initiatives in promoting greater environmental responsibility.[176] Recognizing the growing linkages among various environmental issues such as food, water and climate, the Global Compact in relation to

[164] Laurence Boisson De Chazournes, 'Standards and Guidelines: Some Interfaces with Private Investments' in Tullio Treves, Francesco Seatzu and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge 2014) 103.
[165] ibid.
[166] Newton (n 1) 67.
[167] Deva (n 38) 92.
[168] De Chazournes (n 169) 103.
[169] Deva (n 38) 92.
[170] De Chazournes (n 169) 103.
[171] Deva (n 38) 92.
[172] Betty King, 'The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations' (2001) 34 Cornell International Law Journal 481, 482.
[173] https://www.unglobalcompact.org/what-is-gc/mission/principles accessed on 18 August, 2019
[174] International Labour Office, 'The Labour Principles of the United Nations Global Compact: A Guide for Business' 9.
[175] https://www.unglobalcompact.org/what-is-gc/mission/principles accessed on 18 August, 2019
[176] Abebe (n 8) 117.

environment is designed to helping companies develop a holistic and comprehensive strategy.[177] Set out under principles seven to nine, the Global Compact stipulates the need for businesses to support precautionary approaches to environmental challenges (Principle 7) and also directing businesses to encourage the development and diffusion of environmentally friendly technologies (Principle 9).[178]

Principles adopted in the Global Compact have set examples for other instruments. For instance, it has influenced the development of the UN Guiding Principles' section on 'corporate responsibility to respect HR.'[179] Also, this instrument has stirred the development of sets of principles by companies' as well as Codes of Conducts by and for MNCs.[180] Renowned MNCs Total Group and Nestlé can be taken as exemplary instances that have endorsed the Global Compact's principles in their Codes of Conducts.[181] Hence, the UN Global Compact can be deemed as one of the influential soft law initiatives pushing for the allocation of responsibility in the areas of regulating social impacts by FI.

2.2.3 The ILO Tripartite Declaration

Labour rights and the initial development of labour standards stretches its history back to the Industrial Revolution.[182] Upon ILO's establishment, international labour law has been regulating businesses' conduct in limiting their adverse impacts on workers via its standards encompassed in Conventions, Protocols or recommendations.[183] The ILO has identified eight fundamental principles and rights at work, also known as 'the eight ILO core Conventions' dealing with varying subjects with applicability effect irrespective of ratification.[184] With a specific reference to imposing some responsibilities on MNEs, the ILO Tripartite Declaration of Principles concerning MNEs and Social Policy (The Tripartite Declaration)[185] was adopted in 1977 alongside the ILO labour standards.[186]

The Tripartite Declaration was from its inception a voluntary instrument addressed jointly to governments, employers and workers' organizations and TNCs.[187] The Tripartite Declaration is aimed at encouraging the positive contribution undertaken by MNEs to economic and social progress.[188] Most of the guidelines in the Tripartite Declaration deal with four major areas of

[177] https://www.unglobalcompact.org/what-is-gc/our-work/environment accessed on 18 August, 2019
[178] ibid
[179] De Chazournes (n 169) 103.
[180] ibid.
[181] See the Codes of Conduct of the Total Group online at: https://www.total.com/sites/default/files/atoms/files/total_code_of_conduct_va_0.pdf (Accessed on 17August 2019) and the Code of Conduct of the Nestlé Group https://www.nestle.com/asset-library/documents/library/documents/corporate_governance/code_of_business_conduct_en.pdf (Accessed on 17August 2019).
[182] Bernaz (n 32) 43.
[183] ibid 44.
[184] ibid 51.
[185] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (Adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions)) [Tripartite Declaration]
[186] Bernaz (n 32) 51.
[187] Sauvant (n 120) 29.
[188] Preamble, The Tripartite Declaration.

labour rights: (i) employment; (ii) training; (iii) conditions of work and life such as wages, benefits and work conditions, minimum age and safety and health; (iv) industrial relations such as freedom of association and collective bargaining.[189]

Focusing on the social policy of TNCs activities, the implementation of the instrument is dependent on the active cooperation of businesses given the tripartite nature of the instrument.[190] As set out under Paragraph 10 of the Tripartite Declaration, the recommendations are addressed to home and host states as well as MNEs.[191] Whereas Paragraph 11 recommends for MNEs to consider established policy objectives of host states and comply with national law as well development priorities and social aims, host states governments' are also expected in the same provision to promote good social practice among MNEs operating in their territories.[192]

With respect to wages, benefits and conditions of work, the Tripartite Declaration envisages that MNEs should take into consideration of two elements in offering the favourable or best possible wages: (i) Determining workers and their families' needs, pursuant to the country's general level of wages, cost of living, social security benefits and relative living standards of other social groups; and (ii) economic factors such as requirements of economic development, productivity levels and desirability of attaining higher level of development.[193] While the Declaration does not specifically provide for employing business to mandatorily supply workers with basic amenities such as housing, food and medical care, if the business does so, the Tripartite Declaration recommends for it to be of good standard.[194]

MNEs are recommended to recognize worker's rights for collective bargaining and also conduct negotiations with management representatives of each country in addition to providing the necessary facility to enable workers' in effectively exercising their collective bargaining rights.[195] Host state governments of developing countries, specifically shall in this regards is expected to effort in adopting measures suitable in ensuring that lower income groups and less developed areas benefit from MNEs activities. Furthermore, Paragraph 63 of the Tripartite Declaration also recommends that MNEs as well as national enterprises should devise systems, by mutual agreement between employers and workers and workers' representatives, for regular consultation on matters of mutual concern.[196] However such consultation is not deemed as a substitute for the collective bargaining right.[197] The Tripartite Declaration has made a cross-reference under Paragraph 10 to the UN Guiding Principles discussed below which ignites the human rights-labour rights debate to be noted in the fourth chapter.

[189] Deva (n 38) 89.
[190] Sauvant (n 120) 29 & 30.
[191] Paragraph 10, Tripartite Declaration
[192] Paragraph 12, Tripartite Declaration.
[193] Paragraph 41, Tripartite Declaration
[194] Paragraph 41, Tripartite Declaration
[195] Paragraph 55-62, Tripartite Declaration
[196] Paragraph 63, The Tripartite Declaration
[197] Paragraph 63, The Tripartite Declaration

2.2.4 The UN Guidelines on Business and Human Rights (UNGBH)

The UN Guiding Principles on Business and Human Rights (UN Guidelines or UNGBH, hereafter)[198] is the continuation of an earlier effort to adopt the Draft UN Norms.[199] The UN Commission on Human Rights had attempted to complete and adopt the Draft Norms on HR responsibilities of TNCs and other business enterprises.[200] Though the Draft UN Norms extended HR responsibilities to corporations in a manner equivalent to governments,[201] the effort was finally left in vain for lacking governmental support.[202] Yet again, there was an evident lack of a specific reference to HR in the soft law instruments discussed above.[203] As such, Professor John Ruggie was appointed as the UN Secretary-General Special Representative (SGSR), in resolving the lack of clarity and continuing to develop an instrument in this regards.[204]

Professor Ruggie developed a conceptual framework elucidating corporations' responsibility to respect under a framework known as '*Protect, Respect, Remedy*'.[205] The Framework relies on three fundamental pillars: (i) the State's duty to protect against human rights; (ii) the corporate responsibility to respect human rights and the need for due diligence; and (iii) Access to effective remedy.[206] The UNGBH was later endorsed by the UN Human Rights Council on 16 June 2011 as a non-binding, voluntary and multi-stakeholder initiative, providing for thirty-one Guiding Principles.[207]

The UNGBH is considered robust in promoting corporate human rights responsibilities.[208] Providing for the State's duty to protect under principles one to ten, the UNGBH indicates that it recognizes States' existing obligations to 'respect, protect and fulfil' human rights and fundamental freedoms.[209] Moreover, the UNGBH also envisages that States should set out the expectations that all business enterprises in their jurisdiction to respect HR throughout operations.[210] This very principle promotes the right as well as duty to regulate as it dictates for the setting of expectations prior to the commencement of the investments.

States are expected to protect HR under the UNGBH not only in terms of exercising their general regulatory and policy enactment functions and ensuring policy coherence with institutional and normative frameworks, but also in relation to businesses affiliated with the state

[198] UN Human Rights Council, Guiding Principles for Business and Human Rights, 2011
[199] Bernaz (n 32) 190.
[200] Newton (n 1) 42.
[201] ibid 43.
[202] Bernaz (n 32) 190.
[203] Karin Buhmann, 'The Development of the "UN Framework": A Pragmatic Process Towards a Pragmatic Output' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, vol 39 (Martinus Nijhoff Publishers 2012) 87.
[204] Newton (n 1) 43.
[205] ibid 44.
[206] ibid 65.
[207] ibid 46.
[208] Deva (n 38) 105.
[209] *General Principles*, UNGBH
[210] Principle 2, UNGBH

with some form of interest or under commercial transaction.[211] Hence, states are also required to protect HR when undertaking business transactions themselves. The State's duty to protect as Ruggie put it, is '*the bedrock of protection against corporate human rights abuse*.'[212]

The UNGBH is complemented for the due diligence requirement it has set up aimed to identify, prevent, mitigate and account how to address adverse HR impacts by businesses.[213] In this regards, the due diligence requirement is expected to include not only impacts arising from its activities but also impacts arising from its directly linked business relationships, products or services.[214] The UNGBH also dictates on the process of undertaking the HR due diligence and actions in terms of integrating the outcomes of HR assessments by means of the due diligence.[215]

The UNGBH also stipulates guidance on developing one of the CSR initiatives pointed out in preceding sub-section, HR policies.[216] Accordingly, with a view to expressing their commitment to respect HR and carry out their responsibility accordingly, Principle 16 entails guidance on the manner by which a company should adopt a policy statement.[217] In this regards the Principle among others provides that, the policy should: be approved by the at most senior level of the company; contain a stipulation on the HR expectations of those personnel, partners and other parties, linked directly through operations, products or services; be embedded in the operational policies of the Company.[218] Further, the principle makes reference to an explicit commitment of the company to be made on the policy in regards to respecting all internationally recognised human rights standards.[219]

[211] Principles 3-6 and 8-10, UNGBH
[212] Bernaz (n 32) 194.
[213] Principle 17, UNGBH
[214] Shaw (n 89) 198.
[215] Principle 18 & 19, UNGBH
[216] UNGBH, Principle 16 cum section 2.1.
[217] Principle 16, UNGBH
[218] Principle 16, UNGBH
[219] Newton (n 1) 94.

CHAPTER THREE

SCHEMES TO ATTRACT FDI: INVESTMENT INCENTIVES AND SEZ

BACKGROUND

The 1990's had presented a wide-ranging and unprecedented FDI liberalization in both developed and developing states.[220] Developing states' interests on FDI were particularly triggered by situations including changes from import substitution to export oriented economic system and progressive exemplary industrializations in East Asian states.[221] FDI complements local development efforts in many ways. Some of these include increasing financial resources, boosting export competitiveness, generating employment, reinforcing skills base, enhancing technology transfer and also protecting environment and social responsibility.[222] The motivation behind foreign firms' decision to invest in a certain state is a matter of critical economic importance particularly for developing states.[223] Consequently, host states' governments have created numerous investor-friendly policy measures in their effort to attract foreign capital through FDI.[224]

There are variety of policy tools that host states use in their venture to promote FDI with some of the most common ones being the partial or complete exemption from corporate taxes and import duties.[225] Ethiopia, a developing state whose economy has experienced strong, broad-based growth, has been widely engaging in the promotion of its destination for foreign investors.[226] The FDRE government has continued to offer investment incentives and increasingly develop SEZs. However, less has been said regarding adverse impacts and RI vis-a-vis the incentives-based approach of the State, particularly given the cost intensity of SEZs. This Chapter aims to highlight two arrangements by which host states exert efforts to attracting FDI, namely, investment incentives and SEZs. Prior to scrutinizing each of these schemes, the chapter will first look at the nexus between ITL and IIL in respect to three notable principles. Continuing with a discussion on investment incentives and SEZs, the last section will briefly introduce the Ethiopian investment incentives and SEZ regulatory framework.

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[220] OECD, *Foreign Direct Investment, Development and Corporate Responsibility* (OECD 1999) 88\ <https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-development-and-corporate-responsibility_9789264174139-en> accessed 3 August 2019.
[221] Sauvant (n 120) 59.
[222] Ramkishen S Rajan, 'Measures to Attract FDI: Investment Promotion, Incentives and Policy Intervention' (2004) 39 Economic and Political Weekly 12, 12.
[223] Krista Tuomi, 'The Role of the Investment Climate and Tax Incentives in the Foreign Direct Investment Decision: Evidence from South Africa' (2011) 121 Journal of African Business 133, 133.
[224] Crt Kostevc, Tjasa Redec and Matija Rojec, 'Scope and Effectiveness of Foreign Direct Investment Policies in Transition Economies', *Multinational Corporations and Local Firms in Emerging Economies* (Amsterdam University Press 2011) 155.
[225] Gordon H Hanson, 'Should Countries Promote Foreign Direct Investment?' (United Nations 2001) Research Papers for the Intergovernmental Group of Twenty-Four on International Monetary Affairs UNCTAD/GDS/MDPB/G24/9 3.
[226] https://www.worldbank.org/en/country/ethiopia/overview, accessed on 19 August, 2019

3.1. NEXUS BETWEEN ITL AND IIL

ITL involves States assumption of international legal obligations on regulating or abstinence from regulating on matters related to particular goods or services.[227] The WTO agreements mainly concerning goods, services and intellectual property, promote liberalization principles with some of them directly associated to FI.[228] The WTO General Agreement on Trade in Services (GATS)[229] for instance, incorporates the provision on services through commercial presence of a foreign supplier, as one of the four modes of service supply covered.[230] Also, WTO's Trade-related in Investment Measures (TRIMs) is an instrument primarily considering, developing host states and recognizing the trade-restrictive and distorting effect of certain investment measures in respect to goods.[231] As such, TRIMs proscribes conditions on foreign investors such as local content or export performance requirements that may explicitly distort trade.[232]

IIL on the other hand, targets benefiting foreign investors from a similar treatment accorded to nationals of host states through BITs concluded with home states or agreements entered with investors.[233] Subject to prodigious historical chronologies, IIL's inception and history has been aligned with the right to property followed by conceptions such as diplomatic protection and the Calvo doctrine.[234] Upon the development of investment protection standards, the creation of International Centre for the Settlement of Investment Disputes (ICSID) has enabled foreign investors to directly settle disputes with host states.[235] Thus, IIL unlike ITL grants a more active role to the private sector via directly entering into agreement and also bringing an arbitral claim against host state.[236]

Still, convergence in the two frameworks has been ensuing from factors including conjunction of common legal terrain in covering FDI.[237] Factual and legal issues as well as arguments and rulings across both systems are also impossible to ignore and often appear to overlap.[238] Here, the multiplicity of varying mechanisms to settle disputes indicates States' favouring of investors.[239] However, such multiplicity also presents two sides of the same coin where both

[227] Wagner (n 30) 4.
[228] World Trade Organization, *Understanding the WTO* (World Trade Organization 2015) 25.
[229] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [GATS].
[230] Jurgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press 2016) 10.
[231] Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [TRIMS].
[232] Kurtz (n 235) 10.
[233] Wagner (n 30) 4.
[234] Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, vol 4 (Martinus Nijhoff Publishers 2011) 1–4.
[235] ibid 3–4.
[236] Bernaz (n 32) 121.
[237] Kurtz (n 235) 10.
[238] ibid 14.
[239] Andrea Bjorklund, 'Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working' (2007) 59 Hastings Law Journal 241, 256.

duplication but also fragmentation stands out.[240] *Canfor v the USA*[241], the long-standing softwood lumber dispute between Canada and United States, which triggered claims in both the WTO and North American Free Trade Area (NAFTA) is an outright manifestation of such intertwines of these two systems.[242] Also, host States continue to conclude Bilateral Trade Agreements (BITs) or Free Trade Agreements (FTAs) in order to attract FI.[243]

Further to the commonalities of ITL and IIL in the economic front, both also entertain the challenges of reconciling with another broader area of law, i.e. international human rights law.[244] The entanglement especially comes with respect to the limitation that ITL and IIL pose on host states adoption of regulatory measures. The WTO tribunals have been considering defences of a HR nature by respondents for allegations raised about breaching WTO principles.[245] Unlike the ITL regime, consideration of HR issue in IIL depends on the contents of the BIT clause/investment contract in question, jurisdiction triggered or even applicable law.[246] Present role of HR in the investment arbitration context is described as being on the periphery though HR considerations still play a role in arbitral tribunal's reasoning.[247] Conversely, due to host states' efforts to regulate on issues of public interest, which presumably include common concerns, there is a likely interference in this respect.[248] Despite commitments to liberalize trade and investment, policy space held by host states in undertaking their international HR obligations also bring the nexus of the two regimes .[249] A host state, for instance, by lowering existing labour and environment standards owing to BITs or FTAs concluded, may face failure in fulfilling its HR obligations regarding labour and environment. Recent investment arbitration awards have also started to expressly and directly address impact of host states HR obligations on their IIL commitments.[250] Thus, in the interest of addressing RI, a leeway in both frameworks permitting host states to regulate will be significant.

In evaluating a mid-way between a state's right to regulate on labour and environment while retaining the commitments entered under the ITL or IIL regime, notions whose applicability is reflected in ITL and IIL regimes are pondered below under three headings, namely, general exceptions, non-discrimination and legitimate expectations.

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[240] ibid.
[241] Softwood Lumber cases, Canfor Corporation v United States, Order of the Consolidation tribunal, IIC 349 (2005), 15 (5) World Trade Arbitration Materials 171, 7th September 2005, Ad Hoc Tribunal (UNCITRAL)
[242] Kurtz (n 235) 13.
[243] Subedi (n 35) 161.
[244] Bernaz (n 32) 124.
[245] ibid 125 & 126.
[246] ibid 126.
[247] ibid 126 & 127.
[248] David A Collins, 'A New Role for the WTO in International Investment Law: Public Interest in the Post Neoliberal Period' 25 Connecticut Journal of International Law 1, 18.
[249] Bernaz (n 32) 124.
[250] Attila Tanzi, 'Public Interest Concerns in International Investment Arbitration in the Water Services Sector: Problems and Prospects for an Integrated Approach' in Tullio Treves, Francesco Seatzu and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge 2011) 325.

i) General Exceptions

The ITL regime under the WTO framework is considered as a model to guiding reforms in the IIL regime regarding general exceptions to liberalization.[251] Small number of BITs have begun comprising general exceptions that are modelled after the renowned Article XX of GATT 1994 and Article XVI of GATS.[252] As stated under the chapeau of Article XX of the GATT 1994, notwithstanding the requirement to apply measures in a manner not constituting arbitrary or unjustifiable discrimination, States are allowed to adopt or enforce measures on list of subject matter areas.[253] Thus, Article XX provides a condition that the measures should not discriminate between import sources or constitute restriction on international trade.[254] Some issues permissible for states to take measures on relate to: protecting human, animal or plant life or health; public morals; products of prison labour.[255]

One issue that could be raised in the ITL-IIL nexus would be the issue of interpreting general exceptions appearing in FTAs and/or BITs by mirroring GATT's Article XX.[256] In this regards, the *WTO's China Raw Materials* case as confirmed by WTO's Appellate Body (AB), has underscored that the WTO Agreement's preamble reflects the balance struck by WTO members between trade and non-trade related concerns including SD.[257] Intrinsically, the scope of Article XX is interpreted as a closed category for balancing concerns relating to trade, exclusively.[258] Similarly to the generalized exceptions under GATT Article XX, with the introduction of the US Model BIT generalized exception is growingly being present in modern BITs.[259] Henceforth, it can be asserted that a replication or importation of the WTO's regime of exceptions is observed in concluding BITs.[260]

Additional to BITs, investment tribunals have been considering matters regarding such exceptions.[261] The *International Thunderbird Gaming Corporation v Mexico*[262] tribunal for instance, in considering the need to protect public morals, stated: *'The role of Chapter Eleven in this case is therefore to measure the conduct of Mexico towards Thunderbird against the international law standards set up by Chapter Eleven of the NAFTA. Mexico has in this context a wide regulatory "space" for regulation; in the regulation of the gambling industry, governments have a particularly wide scope of regulation reflecting national views on public morals.*'[263]

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[251] Kurtz (n 235) 11.
[252] Asif H Qureshi, 'The FTA Paradigm for the Configuration of World Trade and Foreign Investment: The Case of Outward Processing Zones' (2014) 48 Journal of World Trade 111, 118.
[253] Article XX, GATT 1994
[254] Subedi (n 35) 185.
[255] Article XX (b), XX(e) and XX(a), GATT 1994
[256] Qureshi (n 257) 118.
[257] China-Measures Related to the Exportation of Various Raw Materials (WT/DS394/AB/R) 2012, Para 306.
[258] Qureshi (n 257) 118.
[259] Kurtz (n 238) 11 & 12 Cum Subedi (n31) 187.
[260] Subedi (n 35) 185.
[261] ibid 187.
[262] UNCITRAL, *International Thunderbird Gaming Corporation v The Mexican States* (Award of 26 January 2006).
[263] International Thunderbird Gaming Corporation v Mexico (Award), para 127.

Therefore, States have begun recalibrating their commitments vis-à-vis foreign investors by creating flexibilities for state regulation.[264] Thus, the IIL regime can be seen as taking after the ITL system of embedding liberalism balance with state's power to regulate by means of the generalized exceptions.[265]

ii) Non-discrimination

Another notable convergence feature in world trade and foreign investment is their approach towards restriction against state discrimination.[266] Especially in ITL, one of the key principles is that there should be no discrimination between 'like' products.[267] Both systems restrict discrimination of host states either in the form of National Treatment (NT) or Most Favoured Nation (MFN).[268] As Jurgen puts it, "*the two disciplines operate as a first-order guarantee of equality of competitive opportunity between foreign and domestic goods , services and investors*."[269]

A principle based on reciprocity, MFN treatment, in the context of FI relates to a host state's less favourable treatment of investors of one foreign country than any other foreign country.[270] The inclusion and operation of MFN clause in a BIT is different from the ITL context as it may have an effect of universalizing every provision of a BIT.[271] MFN principle in respect to foreign investment admission is being included in treaties concluded in the recent past with some even being extended to pre-investment conditions dragging an expectation on host states to create non-discriminatory conditions for new investors and admit their investments under similar conditions.[272]

Additional to the MFN, National Treatment (NT) is a non-discrimination principle acclaimed under the WTO instruments but also increasingly featured in IIL. As noted in the *S.D. Meyers vs Canada*[273]*,* two factors are to be considered in determining whether measures are contrary to NT.[274] The first factor is whether the measure's practical effect creates disproportionate benefit for nationals over non-nationals while the second factor has to do with whether the measure appears to favour nationals over non-nationals protected by the pertinent treaty.[275] The S.D. Meyers case had also established a nexus between the IIL's minimum investment protection standards and NT provisions of the NAFTA.[276]

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[264] Kurtz (n 235) 11.
[265] ibid 11 & 12.
[266] ibid 11.
[267] Bernaz (n 32) 133.
[268] Kurtz (n 235) 11.
[269] ibid.
[270] Subedi (n 35) 69.
[271] Sornarajah (n 17) 271.
[272] Subedi (n 35) 70.
[273] *S.D. Meyers V Government of Canada* (NAFTA Arbitration under UNCITRAL Arbitration Rules) (Partial Awards, 13 November, 2000).
[274] *S.D. Meyers v Canada*, Para 252.
[275] S.D. Meyers v Canada, Para 252
[276] S.D. Meyers v Canada, Para 266

Protections afforded by BITs are increasingly including various liberalizing provisions particularly NT, included even at the pre-establishment phase of an investment extending the furthest possible mandatory protection for investors.[277] Some BITs are even stipulating the right to entry and establishment of investments to nationals of other contracting states.[278] With an effect to limit host state's denial of foreign investor's entry, such clauses stand against a host state's right to regulate the entry of foreign investments flow that basically runs from the notion of sovereignty.[279] Yet, when entering into such agreements, states have enunciated their decision to limit part of their sovereign rights.[280]

iii) Legitimate Expectations

The third notion is that of legitimate expectations. Legitimate Expectations is a principle drawn by investors from the promises and guarantees made by the host state.[281] In *International Thunderbird Gaming Corporation v Mexico*[282], the tribunal depicted the concept of 'legitimate expectations' as relating to situations where a state's conduct creates reasonable and justifiable expectations on the investor; hence, failure by a NAFTA member to honour expectations could cause damages on the investor and/or investment.[283] States are confronted with addressing the ever-changing domestic situations including common concern issues while honouring promises made to foreign investors when admitted to invest.[284] As considered by the *Saluka Investments v Mexico*[285] arbitral tribunal, an investor should reasonably not expect that prevailing circumstances of host state would remain unchanged.[286] Moreover, in *Saluka Investments* the tribunal noted the need to consider, host state's legitimate right to regulate domestic matter in the public interest when determining the justifiability and reasonability of the foreign investor's expectations.[287]

In *Total v Argentine Republic*[288], the ICSID tribunal reminisced two outstanding concerns arising in relation to the standard of legitimate expectations when signing investment treaties.[289] On the one hand, the importance of a stable, predictable and consistent legislation to the investor in enabling it in the planning of its investments is noted.[290] On the contrary, the host state's ability not to relinquish its regulatory powers or limit its responsibilities in terms of amending its

[277] Sauvant (n 120) 58.
[278] Sornarajah (n 17) 88.
[279] ibid.
[280] Subedi (n 35) 161.
[281] Bonfanti (n 80) 231.
[282] International Thunderbird Gaming Corporation v Mexico (n 269), para 147.
[283] Ibid..See also Surya Subedi, 164.
[284] Subedi (n 35) 164.
[285] UNCITRAL, Saluka Investments BV (The Netherlands) v the Czech Republic (Partial Award), 17 March 2006 (Saluka Investments BV v the Czech Republic) Para 305.
[286] Saluka Investments BV v the Czech Republic, Para 305
[287] Saluka Investments BV v the Czech Republic, Para 305
[288] ICSID, Total v Argentine Republic, (27 December 2010) (Decision on Liability), ARB/04/1. (Total v Argentine Republic)
[289] Total v Argentine Republic, paras 114 & 115
[290] Total v Argentine Republic, paras 114

legislations was highlighted.[291] As such the need of legal certainty from the side of the investor and the host state's ability to maintain its regulatory power remain to stand reflecting on each other.

In summary, it can be noted that both ITL and IIL provide for loopholes by means host states can exercise their right as well as duty to regulate. Exercised with the purview of state's right to regulate, the following section will look into the second major theme of this paper, investment incentives.

3.2. INVESTMENT INCENTIVES

Incentives are essential policy tools in the global competition to attract FDI.[292] This statement provokes a question as to what investment incentives are and the implication of these policy tools to FDI regulation, which will be evaluated below.

Broadly, 'Incentive' includes any form State's assistance to investors whereas narrowly, it covers specific types of assistance to investors.[293] The WTO's Agreement on Subsidies and Countervailing Measures (SCM)[294] is the only multilateral agreement defining 'subsidy', a term relatable to incentives.[295] The SCM defines 'Subsidy' to encompass a list of financial contributions by a government including direct transfer of funds (grants, loans) or government revenue otherwise forgone or uncollected by means of fiscal incentives.[296] Notwithstanding overlaps between the terms 'subsidy' and 'incentive' in the SCM's description, the purpose of SCM is establishing an international control mechanism concerning the granting of trade-related subsidies for goods.[297]

The main rationale for investment incentives is limited to possibilities of FDI spill overs such as knowledge and technology.[298] Investment incentives include tax holidays and tax rebates for foreign firms, income tax exemptions, investment allowance and exemptions from customs duty and exemption from duty and value-added tax.[299] The United Nations Conference on Trade and Development (UNCTAD) identified three main categories of investment incentives applied by host states, namely, financial incentives, fiscal incentives and other incentives.[300] Financial incentives, such as outright grants and loans at concessionary rates and fiscal incentives, including the likes of tax holidays and reduced tax rates are the most frequently applied

[291] Total v Argentine Republic, paras 115
[292] United Nations Conference on Trade and Development (UNCTAD), 'INCENTIVES' (UNCTAD 2004) UNCTAD/ite/iit/2003/5 8.
[293] ibid 11.
[294] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14. (SCM, hereafter)
[295] United Nations Conference on Trade and Development (UNCTAD), 'INCENTIVES' (n 297) 11.
[296] Article 1, SCM
[297] United Nations Conference on Trade and Development (UNCTAD), 'INCENTIVES' (n 297) 11 & 12.
[298] Kostevc, Redec and Rojec (n 229) 155.
[299] United Nations Conference on Trade and Development (UNCTAD), 'Economic Development in Africa Report 2014: Catalysing Investment for Transformative Growth in Africa' (United Nations 2014) UNCTAD/ALDC/AFRICA/2014 64.
[300] United Nations Conference on Trade and Development (UNCTAD), 'INCENTIVES' (n 297) 5.

incentives.[301] UNCTAD's third category of incentives is much wider including subsidized infrastructure, foreign exchange privileges and regulatory concessions including exemptions from non-economic standards such as health, labor and environment.[302] Eventually though, spill over effects of FDI economically justify the incentive schemes to the point that private benefits equate broader social benefits.[303] However, from the perspective of policy, the desirability and obtainability, the efficiency and effectiveness as well as relationship to FDI, investment incentives are considered as controversial.[304]

Evaluating the costs and benefits of incentives is a difficult task mainly because the costs are hidden from outside observers.[305] Investment incentives are usually perceived from the perspective of their advantage disregarding potential disadvantage and costly effects of incentives. Opportunity costs of incentives, administrative costs, misusing of incentives which would otherwise have been used for social development purposes, discriminatory effects amongst firms introducing distortive effects are some amongst many disadvantages of incentives.[306] Moreover, direct fiscal incentives by means of reduced tax rates and tax holidays also puts the host state in a situation where it loses its treasure unless the resulting FDI delivers positive externalities with a value exceeding the incentives.[307] In this regards, many states apply incentives together with performance requirements and restrictions on FDI to partially offset the negative impact arising from the investment.[308] Then again, investment incentives together with another policy tool, performance requirements, are usually applied by host states in tandem.[309] Performance requirements, as described by David Collins refer to, conditions imposed on MNEs and other foreign investors to meet certain requirements and goals that need to be achieved with respect to their commercial activities in the host state.[310] Often linked to host states' incentives, performance requirements may be explicitly trade distorting such as local content obligations or export performance requirements.[311] As such, obligations not to impose or enforce performance requirements of different varieties are incorporated under many BITs and also the WTO Agreement on Trade-Related Investment Measures (TRIMs).[312]

In overcoming the disadvantages of incentives, it is important to focus on investment deign policies.[313] One of such proposed policy designs is the offering of incentives over a period of

[301] ibid.
[302] ibid.
[303] Kostevc, Redec and Rojec (n 229) 158.
[304] Frank L Bartels, Sadiq N Alladina and Suman Lederer, 'Foreign Direct Investment in Sub-Saharan Africa: Motivating Factors and Policy Issues' (2009) 10 Journal of African Business 141, 151.
[305] Thomas (n 41) 40.
[306] ibid 41.
[307] Bartels, Alladina and Lederer (n 309) 152.
[308] Bernard Hoekman and Kamal Saggi, 'Assessing the Case for Extending WTO Disciplines on Investment-Related Policies' (2000) 15 Journal of Economic Integration 629, 630.
[309] David Collins, *Performance Requirements and Investment Incentives under International Economic Law* (Edward Elgar Publishing Limited 2015) 9.
[310] ibid 10.
[311] Kurtz (n 235) 10.
[312] ibid 11. See also: Annex on Illustrative List of TRIMs; Article 7 of the 2004 Canadian Model BIT and Article 8 of the 2012 US Model BIT
[313] Thomas (n 41) 46.

time instead of making an upfront offer during the entry of investors.[314] Moreover, not only for new entrants but also for current beneficiaries of the investment incentives, another proposition is for the host state to enter into a contract with investors regarding explicit goals and performance requirements to be satisfied by the investor such as knowledge transfer.[315] Here inserting certain RI goals and ensuring the fulfilment can satisfy the possible imbalance of host states' focus on boosting investment over the cost of RI. More so, by providing for a clawback of incentives awarded in cases of breaches pursuant to the contracts, host states are also said to be able to mitigate the shortcomings of investment incentives.[316]

The positive effect of tax incentives in developing countries has been associated with another effective policy instrument for attracting MNEs to targeted regions, known as Specialized Economic Zones (SEZ), which is discussed below.

3.3. SPECIALIZED ECONOMIC ZONES (SEZs)

The historical origins of SEZs can be traced all the way back to the ancient Greece.[317] However, in its present form the definition by Thomas Farole in a leading WB study can broadly describe the term: *'SEZs are spatially delimited areas within a country's national boundary that function with administrative, regulatory and often fiscal regimes that are different, typically more liberal than, those of the domestic economy.*'[318] SEZ itself is also a constituent of another broader category, 'Economic Zones' which also composes related terms whose forms and functions differ including Free Trade Zones, Free Ports, Export Processing Zones (EPZ), free ports, enterprise zones, economic cooperation zones and Industrial Parks.[319] However, there are three main structural features common to all zones, though definitions vary across states.[320] These are: (i) the demarcation of a specific regulatory regime, primarily in a delineated portion of land or secondarily legal spaces with liberal rules (spatial); (ii) centralized or decentralized dedicated governance (governance); and (iii) provision of physical infrastructure usually including real estate, roads, electricity and water (infrastructural).[321]

Although there are some States making no distinction on taxation in their zones[322], SEZs are generally tax free and lightly regulated zones.[323] The Indian government has invested in world-class infrastructure to support SEZs' operations with the hope of growing India's economy and

[314] ibid.
[315] ibid 46 & 47.
[316] ibid 47.
[317] Cheng (n 4) 34.
[318] Thomas Farole, *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experience* (The World Bank Group 2011) 17.
[319] Claude Baissac, 'Brief History of SEZs and Overview of Policy Debates' in Thomas Farole, *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experience* (The World Bank Group 2011) 23.
[320] ibid 24.
[321] ibid 24 & 25.
[322] ibid 23.
[323] Jeffrey Owens, 'Tax and Investment: UNCTAD's Contribution to the BEPs Debate' (2015) 32 International Tax Review 32, 37.

raising employment rate.[324] China also had made efforts to attract foreign investment relying on SEZs by building more than hundred zones in its territory offering lower taxes and infrastructure.[325] These zones have become the principal means by which preferential policies are offered by the Chinese government to foster development of technology and industry.[326]

As an important policy instrument to attract FI, SEZs contribute significantly to: the growth in exports and employment; global trade integrations; and industrialization.[327] However, SEZs' performance has been mixed and their establishment has always not necessarily guaranteed success in boosting trade and investment.[328] Long term adverse impacts of establishing SEZs such as environmental pollution has been one of the many limitations.[329] Also, host states with large populations of uneducated poor and/or educated but unemployed people are at a disadvantage of their good number of population being engaged to work at low wages.[330] The undesirable outcome of SEZs have been attributed to reasons including poor site locations, uncompetitive policies, poor development practices and ill-designed administrative structure.[331] Although, most zones programs are designed to serve as a trade and investment instrument, they are built around low labour costs, trade preferences and fiscal incentives.[332]

The reliance for competitiveness being on low wages, preferences and incentives lead to unsustainable outcome and also creating pressures for distortions and race to the bottom policies.[333] In overcoming the limitations, HR or CSR should be considered in tandem for the operations insider SEZs.[334] Aiming at enhancing the economic development of States, SEZs in the past, were mainly established and operated by the government.[335] Governments were in charge from the planning, financing and administering the SEZs regime all the way to promoting, interfacing with investors and managing via building, renting and maintaining the SEZs' infrastructures.[336] The failure of SEZs established and operated by governments ensued rules enabling private investors to engage in investing and managing the SEZs.[337] SEZs are therefore developed to act as a growth catalyst.[338] One of the developing countries applying this catalyst is Ethiopia, whose regulatory framework has been briefly introduced subsequently.

[324] P Pakdeenurit and others, 'Special Economic Zones: Facts, Roles and Opportunities of Investment', *International MultiConference of Engineers and Computer Scientists* (2014) 2 <http://www.iaeng.org/publication/IMECS2014/IMECS2014_pp1047-1051.pdf> accessed 10 July 2019.
[325] Thomas Farole and Gokhan Akinci (eds), 'China's Investment in Special Economic Zones in Africa', *Special Economic Zones: Progress, Emerging Challenges, and Future Directions* (The World Bank 2011) 70.
[326] ibid.
[327] Farole (n 323) 17.
[328] Cheng (n 4) 38.
[329] Pakdeenurit and others (n 329) 4.
[330] Preeti Sampat, 'Special Economic Zones in India' (2008) 43 Economic and Political Weekly 25, 26.
[331] Cheng (n 4) 38.
[332] Farole (n 323) 9.
[333] ibid 10.
[334] Pakdeenurit and others (n 329) 4.
[335] ibid 1.
[336] Baissac (n 324) 37.
[337] Pakdeenurit and others (n 329) 3.
[338] Baissac (n 324) 25.

3.4. INVESTMENT INCENTIVES AND SEZ REGULATION IN ETHIOPIA

This sub-section explores the Ethiopian investment and FDI framework by looking at the incentives-based approach of the SEZ framework.

The untapped resources available in the Eastern Africa nation, Ethiopia, has made the country attractive for foreign investors.[339] The FDRE government promotes the country as being business-friendly, politically stable, serving low energy cost, possessing raw materials, and a great deal of cheap labour.[340] UNCTAD's 2018 World Investment Report indicated that Ethiopia was one of the top five host economies for FDI IN 2017.[341] The second largest FDI recipient in Africa, Ethiopia has attracted recently some of the world's leading international clothing brand suppliers like the US fashion supplier PVH with their businesses being located in Ethiopia's Industrial Parks (IP).[342] With the prevalence of IPs being germane to Ethiopia, from among other SEZs, the development of SEZs is effected by: (i) federal or regional governments (currently developed by federal governments only); (ii) development through Public-Private-Partnerships (PPP) with the Industrial Parks Development Corporation (IPDC) and (iii) developments by private developers.[343]

Ethiopia's development has been guided by a five year Growth and Transformation (GTP) Plan which is on its second phase running from 2016 to 2020.[344] SEZs are identified under the GTP as one of the means for industrialization encompassing various medium and large scale manufacturing industries including but not limited to textile and garment, leather an leather products and pharmaceuticals.[345] Widely promoting the SEZs framework, the FDRE government has been entering into development agreements with Chinese and Turkish investors as well as the World Bank to develop the SEZ infrastructures.[346]

The law and accompanying SEZs regulations is considered as key in the development of any zone program.[347] SEZs in this regards are regulated in Ethiopia within the broader investment legal regime, whereas particular legislations also address SEZs. Ethiopia's investment legal regime hierarchically comprises of the 1994 FDRE Constitution, international commitments through BITs signed and ratified by Ethiopia, the Investment Proclamation No. 769/2012[348], the

[339] Marie Durane, 'Made in Ethiopia - The New Norm in the Garment Industry' (2015) 15 Sustainable Development Law and Policy 24, 24.
[340] ibid.
[341] UNCTAD, 'World Investment Report 2018: Investment and New Industrial Policies' (United Nations 2018) 38.
[342] ibid 41.
[343] Xiaodi Zhang and others, 'Industrial Park Development in Ethiopia' (United Nations Industrial Development Organization 2018) Working Paper Series 21/2018 19.
[344] United Nations Development Programme (UNDP), 'Comparative Study on Special Economic Zones in Africa and China' (United Nations Development Programme (UNDP) 2015) 06.2015 15.
[345] ibid.
[346] ibid 16.
[347] Farole (n 323) 165.
[348] Investment Proclamation No. 769/2012, Federal Negarit Gazette, 18th Year, No. 63, 17 September, 2012 as amended by Proclamation No. 849/2014 [Investment Proclamation]

1960 Civil Code and the Investment Regulations as well as directives thereof.[349] The FDRE Investment Proclamation in respect to SEZs provides a broad definition to the Industrial Development Zones (IDZ) rather than SEZs depicting it as: '*an area with a distinct boundary designated by the appropriate organ to develop identical, similar, and interrelated industries together or to develop multifaceted industries..*'.[350] The long-drawn definition encompasses four main elements that characterizes IDZs: (i) fulfilment of infrastructural development such as road, electric power and water; (ii) Provision of incentives schemes; (iii) mitigation of environmental pollution impacts; and (iv) administering urban development of the IDZs with plan and system.[351] Notwithstanding the applicability of the investment proclamation itself, Article 35 directs on the establishment of a distinct organ at the federal level engaging with the development activities as well as the issuance of a regulation separately addressing overall issues including incentives.[352] It is in this regards that Proclamation No. 886/2015[353] (IP Proclamation) was issued to address the regulation on Industrial Parks (IP). Three entities are identified as being regulated under the IP Proclamation namely, IP developer, IP Operator and IP enterprise.[354] The scope and coverage of this paper is with respect to IP enterprise/s/ which is construed as '*a public, private or public-private enterprise owned by Ethiopians, foreigners or jointly and possess developed land under the IP through sub-lease to engage in manufacturing activity or in service provision for profit making in accordance with investment proclamation and Investment Regulation, Industry park enterprise permit and industrial park enterprise agreement.*'[355]

Both the investment instruments as well as the IP regulatory instruments offer a generous incentives package the details of which are to be reviewed in detail in the next chapter. However, in offering such generous incentives, the question will be as to how much RI inside the SEZs has been mitigated. The next chapter will thereof focus on offering an analysis on the investment incentives framework vis-à-vis RI by providing backgrounds on standardization of labour and environmental protections and also implementing CSR into the IIL framework.

[349] Martha Belete Hailu and Zeray Yihdego, 'The Law and Policy of Foreign Investment Promotion and Protection in Ethiopia: An Appraisal of Theories, Practices and Challenges' in Zeray Yihdego and others (eds), *Ethiopian Yearbook of International Law 2017*, vol 2017 (1st edn, Springer International Publishing 2017) 20.
[350] Article 2 (17), Investment Proclamation
[351] Article 2 (17), Investment Proclamation
[352] Article 35, Investment Proclamation
[353] Industrial Park Proclamation No. 886/2015, Federal Negarit Gazette, 21th Year, No. 39, 9 April 2015 [IP Proclamation]
[354] Article 2(10), 2(11) and 2(12), IP Proclamation
[355] Article 2(12), IP Proclamation

CHAPTER FOUR

ANALYSIS ON BALANCING INVESTMENT INCENTIVES VIS-À-VIS RESPONSIBLE INVESTMENT

BACKGROUND

Host states, pursuant to their territorial sovereignty have the right to decide on the entry and admission of foreign investors and their investments.356 One of the major objections against states when exercising the screening of foreign investors is the discrimination between foreign investors and nationals.[357] In this regards, unless a pre-entry rights of establishment is guaranteed under BITs or MITs as in the case of NAFTA and US Model BITs, host states are able to freely exercise their screening on any inward FDI pursuant to their domestic legislations.358 Yet again, in the absence or even tallying with IIL commitments, host state's policies and standards, be it domestic or international, also tend to likely reflect the State's stands on addressing common concerns. Thus, in evaluating a State's leniency in ensuring RI as well as exercising its right and duty to regulate on non-economic concerns so as to balance with its economic interest, the policy objectives and standards in place serve as a reflective instrument. Standards are factual yardsticks for social behaviour with a special emphasis on the average conduct of a reasonable person.[359] Many standards are contained in negotiated instruments such as treaties or resolutions of international organizations while others may be laid down in other instruments hard to qualify, some of which are pinpointed as regulatory initiatives in the second chapter.[360]

In this regards, the need to consider existing standards in more detail, both at the international and Ethiopian level would enable to fairly view the balance between attracting foreign investment and approach to address common concerns with a view to realizing RI. The subsequent two sub-sections will therefore explore the need for standards in general and particularly looking at issues into integrating labour and environmental issues into the IIL and ITL framework. The last section with then assess mechanisms to integrate RI into the Ethiopian SEZ regulatory framework will be analysed

4.1. THE NEED FOR STANDARDIZATION

The definition for the notion 'legal standards' tend to be easy to recognize but challenging to precisely demarcate.[361] As such, explicating a strong definition of the term 'standard' may be implausible when used in the legal context.[362] Still standards serve as a means of driving social

[356] Dolzer and Schreuer (n 18) 28.
[357] Sornarajah (n 17) 137.
[358] ibid.
[359] Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Kluwer Law International BV 2012) 23.
[360] De Chazournes (n 169) 101.
[361] Diehl (n 364) 17.
[362] ibid 17.

conduct.[363] Through socialization, values at the international level emerge and rise pursuant to treaties negotiated, customary law, resolutions and decisions of international organizations.[364] Consequently, legal standards are tangled at times with legal rules and principles that drive or regulate social conduct and can flow from all possible sources of law embodied in codes, statutes or treaties.[365]

Standardization by means of soft law instruments serve the utmost primary purpose of fixing norms.[366].In doing so, there is no need for the soft law instruments to be supplemented by positive law unlike hard law instruments.[367] Thus, international regulation must not necessarily be considered from the viewpoint of rules encompassed within the abovementioned ICJ sources of law or only from the standpoints of hard law. Rather, stipulations enumerated in the soft law initiatives and serving as standards shall also be given similar voice as they play a prominent role in fixing social conduct in the international framework. In this regards, the regulatory initiatives discussed in the second chapter, such as the Global Compact and the UNGBH, are exemplary soft law instruments fixing norms around RI practices.[368] Though not bounded by any of the regulatory initiatives, the recommendations, guidelines and principles enables both investors and states to have a benchmark in fixing their conduct around RI and establish responsibilities, thereof, pursuant to the standards incorporated in each of the instruments.

With the presence of varying international standards especially in the HR law front, localization of universality has become a key issue.[369] In this regards, certain HR which have attained jus cogens character such as on the prohibition of forced labour, torture and genocide shall have no such divergence.[370] Nevertheless, the lack of a precise contour for many universal human rights such as the right to fair wages, right to strike and right to clean environment[371], allows for States to localize and adopt their own standards. This by itself presents a challenge and opportunity for MNCs in determining which standard they need or want to apply. Three sets of standards, namely home standards, host standards and international standards will be available for MNCs to choose and apply from.[372] There is no conflict where both host and home standards are actually complied with.[373] However, divergence amongst the home, host and international standards presents a challenge for MNCs as they would need to adopt separate codes of conduct and separate implementation strategies for each of the country they operate in.[374] At the same time, the divergence also presents an opportunity for the MNCs as they will

[363] De Chazournes (n 169) 100.
[364] ibid 103.
[365] Diehl (n 364) 17 & 22. See also United Nations, *Statute of the International Court of Justice*, 18 April 1946
[366] De Chazournes (n 169) 102.
[367] ibid.
[368] ibid 103.
[369] Deva (n 38) 152.
[370] ibid.
[371] ibid.
[372] ibid 175.
[373] ibid 156.
[374] ibid 155.

be able to choose from either of the three standards depending on chosen approaches to guiding their decisions. In this regards, *Surya Deva*, suggests two approaches guiding MNCs decisions, namely, 'the business' and 'the human' approaches: the business approach focusing on MNCs' interest, presents inconsistent policy makings by the MNCs all across their operations depending on how best it fits for the business while the human approach proposes balancing the interests of different stakeholders in adopting standards.[375]

4.2. Integrating environment and labour standards into the IIL & ITL Frameworks

Developing host states' governments ambition to appropriately regulate MNCs emanate from their venture to facilitate competitive markets and intent to uphold widely-valued social and public goals.[376] Some developing host states have a limited say on the effects of economic activity on issues of labour and environmental rights.[377] Then again, some others also hesitate to regulate due to their international obligations under ITL and IIL.[378] In regards to ITL, the WTO trade rules require governments to make their trade policies transparent by notifying the WTO about their laws in force and adopted measures through regular reports.[379] The WTO trade rules, though requiring members to commit to lowering their customs tariffs and trade barriers, the rules also offer special treatments to developing states.[380] With a consideration to developing states' inability to fulfil all the standards and requirements of WTO rules, exceptions have been made under the WTO prescribing special treatment for developing states. Moreover, WTO dispute panels have not had to deal with cases involving outright conflicts between ITL and human rights law though they have widely dealt with cases relating to environment and public health in particular.[381] The WTO Agreements do not deal with labour standards as such but there is a clear consensus on governments commitment to a narrower set of internationally recognized 'core' standards.[382]

IIL has also similarly entertained issues related to common concerns, ultimately covered under the human rights law, in a handful of arbitral tribunals.[383] Host States are not entitled to bringing claims against investors but in the context of counterclaims, states are able to raise concerns on the behaviour of investors.[384] Additional to the tribunal decisions, some BITs are also making explicit exceptions for states exercise their regulatory powers. The 2012 US Model BIT in this regards provides for a host state's exception to taking measures including regulatory ones as long as it fulfils the non-discrimination.[385]

[375] ibid 158.
[376] ibid.
[377] ibid 868 & 869.
[378] Bernaz (n 32) 132.
[379] World Trade Organization (n 233) 23.
[380] ibid.
[381] Bernaz (n 32) 132 & 133.
[382] World Trade Organization (n 233) 74 & 75.
[383] Bernaz (n 32) 137.
[384] ibid 138 & 139.
[385] Article 3(3(c(i-iii))) of the 2012 US Model BIT

There are however two main concern areas in regards to states exercise of their regulatory powers. The first one relates to 'Regulatory Chill', whereby states are faced with fear of potential impediment on protected foreign investments and triggering adjudication in case where they raise their social standards.[386] A concrete example of regulatory chill in a BIT context had taken place in Indonesia where 150 mining Companies threatened Indonesia with initiating international arbitration, for issuing forestry laws prohibiting open-cast mining on the grounds of environmental concerns.[387] The second one concerns stabilization clauses, which restricts the host state's capacity to regulate.[388] Stabilization clauses are tools assisting investors to manage risks from future changes in law and are usually used in agreements with developing states.[389] Thus stabilization clauses would have far-reaching consequences to implement human rights and promoting social welfare.[390] In both cases, developing states have a weaker bargaining power for their imminent need of foreign capital is apparent. As such, adopting standards pursuant to IIL framework once an investor has been admitted and also after entering into an IIL commitment, presents a complex circumstance with a far-reaching consequence unless mechanisms to imposing RI on investors is set beforehand.

The right of a state in controlling FI is unlimited and exclusively in the hands of the host state itself.[391] The whole process of FI's operations could be controlled by the host state's laws including specifying the legal vehicle that foreign investments can be made, the nature of foreign capital resources that should be brought from outside, the planning and environmental controls the manufacturing plant should be subject to and more.[392] Investment policies such as domestic content or performance requirements, joint venture requirements, caps on foreign ownership, technology licensing, location or local employment requirements and similar other requisites have proven to have mixed results on FDI inflow.[393] In this regards, the attempts by MNEs to integrate the production network of affiliates' operations all across the board may be compromised with the existence of such policies.[394] This may have a detrimental effect on the concerned host state as the MNEs may consider these policies as a factor to advancing their FDI venture, elsewhere, without compromising integration arrangements.[395] The MNEs are in this regards in a better position to influence the policy decisions by posing risks on the FDI inflows into the host state. Yet again, the entry of the investors is largely viewed from the economic interest-perspective associated with the MNEs rather than or at least relatively considering impositions of RI as a factor to consider during the entry of investors. The following

[386] Mouyal (n 39) 67.
[387] ibid 68.
[388] ibid 211.
[389] ibid 211 & 212.
[390] ibid 212.
[391] Sornarajah (n 17) 88.
[392] ibid 90.
[393] Rajan (n 227) 15.
[394] ibid.
[395] ibid.

sub-sections attempt to assess labour and environmental standards in respect to the IIL and ITL regimes.

4.2.1. Labour and Environment Standards under IIL and ITL

In the development of SEZs, it is suggested that a legal and regulatory framework addressing the mechanism to ensure compliance with labour and environmental standards, amongst others, shall be set out clearly and in a transparent manner.[396] In understanding the regulatory framework on which the standards are based on, the following section highlights the IIL regime's consideration and reflection on environmental and labour standards:

i) Environment Standards

Host states are under obligation of both customary and conventional international law to take measures to protecting the environment.[397] Concurrently, investment activities undertaken in the manufacturing and mining extraction activities often involve environmental impacts.[398] Hence, investment protection and environmental protection stand out as clashing objectives.[399]

A number of BITs are now recognizing host states right to adopt regulatory measures designed in protecting the environment.[400] However, in the race to attract FI, national environmental law has been playing a decisively competitive role both in attracting foreign investment and selling products abroad.[401] Thus, developing states have been adopting a less stringent environmental legislations in order to attract foreign investments.[402] International environmental law has limitations to reinforce its role to protect the environment on FDI and therefore the protection and conservation of environment is in the host states' hands.[403] Thus, owing to newer obligations under international environmental law and pursuant to environmental standards adopted by host states, stricter standards on issues like pollution, chemicals discharge and emission of harmful substances may be assumed.[404] Formerly Investment tribunals gave less regard to environment as can be observed from the tribunal in *Santa Elena v Costa Rica*[405], which stated as follows:

"*Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental*

[396] Farole (n 323) 11.
[397] Subedi (n 35) 165.
[398] Mekdes Tadele Woldeyohannes, 'Regulating the Environmental Impact of Direct Investment in Developing Countries The Need to Shift from a Command-Abd Control Mechanism to a Multi-Stakeholder Approach' (2013) 4 Bahir Dar University Journal of Law 66, 75.
[399] Paolo Vargiu, 'International Investment and the Environment' (2015) 11 McGill International Journal of Sustainable Development Law and Policy 379, 381.
[400] Subedi (n 35) 161.
[401] Saverio Di Bendetto, *International Investment Law and the Environment* (Edward Elgar Publishing Limited 2013) 5.
[402] ibid 6.
[403] ibid 7.
[404] Subedi (n 35) 165.
[405] Compañía Del Desarrollo de Santa Elena, S.A v The Republic of Costa Rica, ICSID Case No. ARB/96/1 (Final Award, 17 February 2000)

purposes, whether domestic or international, the state's obligation to pay compensation remains.'[406]

The above decision as M. Sornarajah puts it was 'a blanket denial' of environment's significance to investment arbitration which can be considered as an outdated view considering decisions taken later on.[407] However, later decisions in Tecmed v Mexico[408] and particularly Methanex v USA[409], the consideration of regulatory measures on environmental issues as part of IIL regime.[410] In Methanex v the USA…, the tribunal underscored that a non-discriminatory regulation enacted for a public purpose in accordance with due process but with an effect to affect a foreign investor or investment is not deemed as expropriatory or compensable unless the regulating government gave specific commitment, to the contrary.[411] Methanex thereof demonstrated that measures to protect the environment are to be construed as regulatory expropriations and therefore regulatory measures by host states could be justified for environmental reasons.[412] Mehthanex was also a major test to the meaning of National Treatment under the NAFTA in which the tribunal unlike the S.D. Myers case disregarded the direct application of ITL concepts on IIL obligations.[413] In this regards, even though the environmental standards encompassed in host states legislations or under international instruments are not part of the investment treaties/agreements, the standards are supposed to be read as exceptions for they constitute international obligations.[414]

In addition to investment tribunals decisions, international instruments such as the 1992 Rio Declaration[415] on Environment and Development, also envisage under Principle 2 regarding the responsibility of states to ensure activities in their jurisdiction does not cause environmental damage even to other States and areas beyond their own national jurisdiction.[416] Additional to the Rio Declaration, a number of BITs recognize states right to adopt measures designed to ensure environmental protection.[417]

The soft law regulatory initiatives also dictate through their Principles and recommendations as to the necessity for MNEs in upholding environmental standards. The UN Global Compact for instance inculcates the need for businesses to support precautionary approach to environmental challenges.[418] The Global Compact commends that corporations in supporting such a precautionary approach adopt measures such as: developing a code of conduct for its operations, developing company guideline to ensure consistent application, establishing a two-

[406] Santa Elena v Costa Rica, Para 72.
[407] Sornarajah (n 17) 472.
[408] ICSID, Tecmed v The United Mexican States, ARB (AF)/00/2, 29 May 2003.
[409] UNCITRAL, Methanex Corp v USA, Final Award of Tribunal on Jurisdiction and Merits, 7August, 2002.
[410] Sornarajah (n 17) 472.
[411] Methanex, para 7
[412] Sornarajah (n 17) 472.
[413] Nathalie Bernasconi-Osterwalder and Lise Johnson, 'International Investment Law and Sustainable Development: Key Cases from 2000-2010' 84.
[414] Sornarajah (n 17) 472.
[415] Rio Declaration on Environment and Development 1992, Principle 2
[416] Di Bendetto (n 415) 7.
[417] Subedi (n 35) 167.
[418] Principle 7, The UN Global Compact

way communication with stakeholders to communicate uncertainties and potential risks and joining industry-wide efforts.[419] The OECD Guidelines also, in addition to addressing environment in a separate section, makes a specific reference to environment under the disclosure section whereby it recommends enterprises to apply high quality standards of both financial and non-financial disclosure.[420] In regards to the non-financial disclosure, the Commentary on the Guidelines elaborates that the application of reporting standards in the fields such as labour, environment and risk reporting is encouraged.[421]

ii) Labour Standards

Population growth brings additional challenges into much of the efforts being made to achieve some if not all of the SDG goals such as poverty eradication.[422] The increased population however does not only offer a challenge but also opportunity. The growth of the working population is one of such opportunities enabling in the attainment of an accelerated economic growth.[423] In this regards, MNEs and FDI, in general, evidently contribute to the creation of jobs for the growing population.[424] Moreover, MNEs are able to provide millions of employment opportunities which rebalance the revenue losses and displacement resulting from constructing the SEZs.[425] Given the craving of SEZs push for labor- intensive production, much of the workers into the SEZs are drawn from informal and agricultural sectors nearby the SEZs.[426]

Labour rights or freedoms deemed as fundamental by the ILO's basic principles are those of freedom of association and collective bargaining, freedom from forced labour and discrimination and abolition of child labour.[427] Due to their similarity in coverage and sharing of similar sets of values, both labour rights and human rights are to tangle but also tend to overlap.[428] More so, in addressing labour issues, the term rights, principles and standards are used in an oddly confusing manner. The term 'principle' is described as falling short of the status of human right while 'right' offers a stronger entitlement.[429] Distinctively from principles, 'labour standards' on the other hand encompass labour rights which are human rights as used in the context of workplace context only but also involve the detailed regulation of the employment relation.[430] Even more put easily, labour standards are those applied regarding the treatment of workers.[431]

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[419] https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-7 accessed on 28 August, 2019
[420] Part III (4), OECD Guidelines
[421] OECD Guidelines commentary, p. 29
[422]'WPP2019_10KeyFindings.Pdf'<https://population.un.org/wpp/Publications/Files/WPP2019_10KeyFindings.pdf>accessed 18 August 2019.
[423] ibid.
[424] John Donaldson, 'Multinational Enterprises, Employment Relations and Ethics' (2001) 23 Employee Relations 627, 627.
[425] Sazzad Parwez, 'Modified Labour Welfare Measures for Special Economic Zone & Implications' (2015) 50 Indian Journal of Industrial Relations 386, 388.
[426] ibid.
[427] Ajit Singh and Ann Zammit, 'Labour Standards and the "Race to the Bottom": Rethinking Globalisation and Workers Right from Developmental and Solidaristic Perspectives' (ESRC Centre for Business Research, University of Cambridge 2004) Working Paper No. 279 1.
[428] Bernaz (n 32) 54.
[429] ibid 56.
[430] ibid.
[431] World Trade Organization (n 233) 74.

There is a potential for labour standards established under the eight fundamental ILO Conventions and four core Labour standards reiterated under the Tripartite declaration, to be conflicting with international rules protecting foreign investments.[432]

ITL's WTO instruments do not address labour standards, per se.[433] There are claims that ITL in its present form encourages a 'race to the bottom' but the claims are controversial.[434] For IIL on the other hand, specific workers' rights' protection have been considered in investment treaties' provisions.[435] In coordinating standards of common concerns including labour standards, into IIL instruments, the first mechanism is to make a reference to labour rights within the instruments, particularly in the preamble.[436] A stipulation of labour right protection clause under a BIT, enables to have investment contracts that integrate human rights better.[437] The US Model BIT in this regards sets an example by stipulating, '*..desiring to achieve these objectives in a manner consistent to protection of health, safety, and the environment and the protection of internationally recognized labour rights.*[438]' In addition to making a mere reference to the protection of international labour rights, the second mechanism involves the inclusion of a stipulation that prevent host states from taking a commitment to weaken worker's rights protection in order to attract investment.[439]

It is worth notetaking of the 2012 US Model BIT as it explicitly remarks that encouraging investment by weakening or reducing protections afforded in domestic labour laws is deemed as inappropriate.[440] Here, the inclusion of 'not lowering standards' clauses can be seen as curbing the possibility of a reliance on racing to the bottom. The inclusion of 'Minimum standard' clauses and 'Right to Regulate' clauses are the additional options to integrating labour rights into IIL instruments.[441] With a view to even increase, instead of not just preventing the lowering of standards, BITs such as the 2002 Belgian Model BIT incorporate the recognition and protection to be afforded not only to host state's labour principles but also internationally recognized labour rights.[442] More so, clauses dictating on the host states right to regulate also prescribes for the consideration of regulatory measures relating to labour concerns.[443] Henceforth, host states prior to entering into a BIT or investment agreement, can be able to ensure the protection of investment as well as protection of labour rights, in parallel.

SEZs present key challenges some of which include: restriction and banning of unionization, replacement of trade unions with other types of workers' organizations; limitation on collective

[432] Brugnatelli (n 79) 302.
[433] World Trade Organization (n 233) 75.
[434] Bernaz (n 32) 148.
[435] Brugnatelli (n 79) 308.
[436] ibid 307.
[437] Bernaz (n 32) 145.
[438] 2012 US Model BIT
[439] Brugnatelli (n 79) 310.
[440] Article 13 (2), 2012 US Model BIT.
[441] Brugnatelli (n 79) 312 & 313.
[442] ibid. See also: Article 6.4, 2002 Belgian Model BIT.
[443] ibid 314.

bargaining and also strikes and gender-based discrimination.[444] The establishment of minimum labour standards particularly in developing countries is a divisive subject matter.[445] Developed countries including the USA have been campaigning to institute higher labour standards in developing states which defiantly has been opposed by developing states.[446] Developing states argue that such proposed 'higher standards' can be too high for them and the efforts into binging standards into multilateral trade negotiations are too little more than a protectionism smokescreen.[447]

Extended mandatory protection to foreign investors in most post-2000 BITs tend to include provisions not to lower environmental and social standards by making references to some of the soft law initiatives such as the OECD Guidelines.[448] As such, host states will continue to retain their power on regulating economic and financial activities in a manner not affecting the purview of the agreements entered under the ITL or IIL frameworks.[449] Ethiopia as in the words of Marie Durane. is striving to become 'China of Africa for the garment industry'.[450] With the increase in the cost of doing manufacturing businesses in China, businesses have been looking for cheaper alternatives in Africa, with Ethiopia being one of the major ones, in this respect.[451]

4.3. Evaluation of the Ethiopian SEZ regulatory framework

The development of SEZs in Ethiopia is aimed at addressing some of the challenges in the promotion and facilitation of investments such as the lack of serviced land where investors would be able to access sheds that have the necessary infrastructures.[452] The establishment of the parks have been credited for promoting investment and attracting FDI inflows into the country.[453] In addition to their contribution into promoting investment, IPs are said to facilitate export growth and foreign exchanges, elicit knowledge transfer and technology spilllover as well as fostering sustainable growth.[454] With this background, the FDRE government has been constructing IPs by looking towards the increase in investment and hoping for the creation of higher number of jobs in the manufacturing sector.[455] Amongst the sixteen IPs intended to be developed by the federal government, two have become operational with the Bole Lemi IP creating 11,000 jobs where as the eco-friendly Hawassa IP is expected to host 60,000 jobs.[456]

As laid down under Article 9, one of the rights of IP enterprise is that of obtaining tax, customs duty and other incentives as to be provided in applicable laws once it obtains the investment

[444] https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/presentation/wcms_546534.pdf accessed on 18 August, 2019
[445] Singh and Zammit (n 441) 1.
[446] ibid.
[447] World Trade Organization (n 233) 75.
[448] Sauvant (n 120) 58.
[449] Subedi (n 35) 161.
[450] Durane (n 344) 24.
[451] ibid.
[452] Hailu and Yihdego (n 354) 30.
[453] Zhang and others (n 348) 34.
[454] ibid 34–39.
[455] Hailu and Yihdego (n 354) 31.
[456] ibid 30.

permit under 9 (2).[457] The FDRE government avails a wide-ranging incentives package especially targeting priority sectors with high export potential, one of which being IP enterprises.[458] The incentives package for IP enterprises as provided under the different investment and IP regulations include: income tax exemption up to ten years[459], exemption of capital goods and construction materials from customs duty; exemption of spare parts up to 15% of the capital goods' total value; exemption from duty free to import raw materials for export commodities[460]; up to five years of income tax exemption for expatriate employees.[461] In addition to the fiscal incentives, other regulatory incentives such as offering one-stop shop service, expedited and special visa procedure for IP expatriates and dependants, subsidized utility rate, owning and operating foreign currency account make up the long-list of incentives package for IP enterprises.[462]

Provided that the investment activities do not endanger public order, moral, safety and security as well as human, health and plant life, IP enterprises are allowed to freely exercise their investment activities pursuant to the terms and conditions of the permit.[463] An exception similar to that of the Article XX of the GATT seems to have been applied in this provision. In addition to the rights, the IP Proclamation also provides for the obligations of the IP enterprises including commencement of activity in accordance with the permit and within the period specified; allowing for entrepreneurship trainings and also ensuring knowledge transfer to Ethiopians from expatriate employees.[464] Also, a broad remark on compliance to environmental and labour obligations has been made.[465] Article 10 (4) thus stipulates that an IP enterprise is expected to comply with its obligations not only under the IP Proclamation and regulation but also all other environmental, social and other employer obligations contained in pertinent laws.[466] Unlike the independent regulation and administration of SEZ matters, discussed above, the IP Proclamation requires for the application of laws not particular to the SEZs being applied for SEZs. The IP Regulation[467] which has been enacted in 2017 takes further step into specifying conditions and responsibilities particularly associated to the protection of labour rights and standards.

A clear proof of the imbalance between investment incentives offered to investors and RI schemes is evident in the application of the law and not just the mere provisions under the IP laws. As such, the IP Proclamation and Regulation dictate that IP enterprises are required to

[457] Article 9 (2), IP Proclamation
[458] Zhang and others (n 348) 41.
[459] Article 2 (2)- Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers (Amendment) Regulation No. 312/2014
[460] Article 6, 7, 13 and 14 Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation No. 270/2012
[461] Article 34, Industrial Parks Council of Ministers Regulation No. 417/2017, Federal Negarit Gazette, 23rd Year, No. 93, 15 September, 2017 [IP Regulation]
[462] Zhang and others (n 348) 41–43.
[463] Article 9 (3), IP Proclamation
[464] Article 10((1)(2)(3) & (5)), IP Proclamation
[465] Article 10 (4), IP Proclamation
[466] Article 10 (5), IP Proclamation
[467] IP Regulation

observe the laws of the country by making a specific remarks to environmental and labour laws.[468] Despite such requirement to observe environmental and labour laws, reports on payment of low wages insufficient to cover, forcing workers beyond the legally mandated eight hours of work and even prohibitions on workers to form unions have been made regarding one of the privately run IPs.[469] Indeed, urbanization as well as mitigation of environmental pollution's impact while also helping with providing support to large scale-unemployment has all called for the development of the SEZs.[470] However, investors while benefiting from the expansive incentives-based approach the country follows shall at least be required to satisfy minimum labour and environmental law standards. RI and investment can go hand in hand as long as the country gives both economic and RI concerns equal or at least balancing attention. Ethiopia shall thereof make sure to ensure such balance.

[468] IP Proclamation
[469] Hailu and Yihdego (n 354) 31.
[470] ibid 29.

CHAPTER FIVE: CONCLUSION

FDI may not be strong in countries with poorer absorptive capacity and host states shall therefore have certain qualities allowing them to absorb benefits linked to FDI flows.[471] In this regards, countries competition to making their respective destinations an investor-friendly one has regarded many of them to disregard RI. However, ensuring the effective implementation of RI is not only a State's obligation but also the investors, most of whom are corporations.

Corporations are required to comply with human rights norms considering the fact that they are social organs, themselves.[472] Despite suggestions that corporations are pure wealth maximizing economic entities, they are equally social organs too.[473] Hence, their responsibility in terms of advancing social standards as well as adversely impacting common concerns of the modern day-world. However, as an entity having both the rights as well as duty to protect of its citizens and beyond, a state's role in ensuring the compliance of corporations with human rights norms or RI, for the purpose of this paper, will be indubitable. As globalization continue to wonder the world with liberalization in trade and investment fields, host states should at least address both the non-economic concerns of their public as well as the proper undertaking corporations' social responsibility by means of their right to regulate.

Developing nations such as Ethiopia have been promoting their destinations by applying schemes such as investment incentives and also developing SEZs across the country. The country offers immense incentives package which undeniably have a negative impact in the country's economy. Considering the booming in SEZs developed throughout, the country's expenditure by means of investment incentives and developing SEZs should at least be mitigated with a mechanism to address RI. Hence, with the aim of maintaining balance between the investment incentives offered and RI practices, especially with respect to the Ethiopian SEZs framework, the following measures are recommended during the admission of investors:

- Altering the incentives regime in order to offer incentives based on investor's performance on RI;
- Requiring investors to undertake performance requirements devised to address RI whenever offering them with incentives.
- As noted in the third chapter, with view to controlling the nature and extent of inward FDI, some countries use performance requirements together with investment incentives.[474] This is associated with businesses' receptiveness to investment incentives is dependent on the

[471] WNW Azman-Saini, Ahmad Zubaidi Baharumshah and Siong Law, 'Foreign Direct Investment, Economic Freedom and Economic Growth: International Evidence' (2010) 27 Economic Modelling 1079, 1079.
[472] Surya Deva, *Regulating Corporate Human Rights Violations* (Routledge 2012) 146. See also J. Zerk, Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law, Cambridge: Cambridge University Press, 2006, p. 32
[473] ibid.
[474] Collins (n 314) 36.

stage it is given during its life-cycle and also the extent to which the incentive offered matches its interest at that very moment.[475]

- Assessing previous non-financial disclosures on RI as part of the screening process;
- Demanding investors to undertake CSR activities including adopting code of conduct and due diligence requirement;
- Setting up or ensuring the formation of voluntary CSR practices within IPs to improve self-regulation schemes.

[475] ibid.

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