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Closing the Gap

A human rights approach to regulating corporations

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List of Abbreviations

BHR	Business and Human Rights
BIT	Bilateral Investment Treaty
CAT	Convention Against Torture
CED	International Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	Convention on Elimination of all forms of Discrimination Against Women
CERD	International Convention on Elimination of all forms of Racial Discrimination
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of People with Disabilities
CSO	Civil Society Organization
CSR	Corporate Social Responsibility
FWCTC	Framework Convention on Tobacco Control
GNI	Gross National Income
HDI	Human Development Index
HR	Human Rights
HRC	United Nations Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICSID	International Centre for the Settlement of Investment Disputes
IGO	Intergovernmental Organization
IHRL	International Human Rights Law
ILO	International Labour Association
MNC	Multinational Corporation
NGO	Non-governmental Organization
OECD	Organization for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
PRR	Protect, Respect, and Remedy
SRSR	United Nations Secretary-General's Special Representative on human rights and transnational corporations and other business enterprises
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNGPs	United Nations Guiding Principles
UN Norms	Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

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1 Introduction

On April 24, 2013 the world witnessed the collapse of Rana Plaza in Bangladesh. The previous day the factory had been evacuated due to large cracks in the walls, but on April 24, the workers were forcefully made to continue their work. More than 1,100 lost their lives and over 2,000 were injured (Daly 2015). It was not the first disaster at a Bangladeshi factory, but it was the worst (Pearshouse 2013). As the disaster unraveled, a situation with horrible working conditions, physical abuse, and slave-like wages was revealed. When searching for survivors, labels from over 20 multinational corporations (MNCs) were found, revealing that Rana Plaza had been a production site for large brands like Primark, Wal-Mart, and Benetton (Clean Clothes Campaign 2015).

Following the disaster one was left with the question on distribution of responsibility. Was it the responsibility of the Bangladeshi government? Was it the responsibility of the factory owner? Was it the responsibility of the companies using the factory? Or was it a combination? As such, Rana Plaza is a good illustration of a contemporary challenge in the protection of human rights; balancing obligations and securing effective protection. Given that the human rights system was established as a response to massive human rights violations by States during WWII, one may argue that it is not reflective of today's situation. In fact, some argue that "economic globalization...ha(s) rendered a state-centered focus obsolete," as MNCs may hold larger economies than low-income states (Andreassen 2010:150). Further, MNCs have been given a central role in development, taking on responsibilities previously allocated to states (Deva 2012:3). Consequently, one risks a situation where human rights exist in practice, but cannot be translated into action. To reduce this risk, demands for a global treaty on business and human rights have grown (HRC 2014b).

In light of these developments, and considering the challenge of balancing rights and responsibilities, a question arises:

How do we best regulate MNCs to secure greater human rights protection?

This is the overarching research question for the following analysis. To address the research question, the paper takes an interdisciplinary, human rights approach and assesses three questions. *First*, based on the assumption that one has to move away from a state-centered focus, it asks if there is a protection gap in the current system. In order for there to be a need to alter regulation there has to be a gap in protection. If there is no gap in protection, we should already have the answer to how we best regulate MNCs. *Second*, it asks whether corporate or sectorial standards can be an alternative to a global treaty regulating States and corporations. As the UN Human Rights Council (HRC) adopted a resolution on the initiation of work on a global treaty (HRC 2014b), answering this question will also comment on whether or not a global treaty is the best way to go to increase protection of human rights. *Third*, in order to evaluate the possible impact of a treaty on a protection gap, it asks whether treaties, here represented by the Framework Convention on Tobacco Control (FWCTC), have an effect on the development of domestic legislation. As the FWCTC gives direct obligations for business based on human rights concerns about public health, e.g. limiting advertising to reduce consumption, it serves as a good sample in the discussion on a global treaty. If the FWCTC generates change in legislation this gives support for the strength of a treaty and its ability to increase the protection of human rights. Generally, in answering these, the overarching question is considered through the lens of the current debate on whether or not to push global treaty.

Throughout the text, the (global) system on business and human rights refers to the *direct* obligations on corporations with regards to human rights. As such, *indirect* obligations, and International Human Right Law (IHRL) not relating to corporations specifically, are not included in the term. One could argue that these are part of the system, however as this analysis primarily assess business standards the definition has been confined. Further, to reflect the diversity of actors, corporation, company, business and MNC are used interchangeably to denote business.

1.1 Regulatory Challenges

IHRL establishes the obligation of States to respect, protect, and fulfil human rights of their population (ESC 1987:24). This includes negative obligations on non-interference, as well as positive obligations on enhancing protection. Consequently, in the case of Rana Plaza, the Bangladeshi government had an obligation to effectively protect the workers, and hold the factory owner responsible. While the government did do the latter, arresting owner Sohel Rana and four other factory owners operating in the same building (BBC 2013), victims and their families have faced difficulties in securing compensation. Further, there have been limited improvements on the working conditions in other factories, indicating an inadequacy (or lack of will) of the Bangladeshi government in addressing the issue (HRW 2014:2).

Where IHRL sets out the obligations of states, distribution of responsibility to multinational corporations (MNCs) is less clear. The 2011 UN Guiding Principles (UNGPs) establishes a corporate responsibility to respect and remedy human rights, but this is not legally binding (HRC 2014: para 14). As will be shown, most efforts to regulate business have been of a voluntary character. An exception is the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms)(ESC 2003); however these were not adopted, presumably due to strong language and legal character (Deva 2012:104f). In the case of Rana Plaza, a fund has been established to ensure corporate contributions to compensation for victims. The goal was to secure 30 million dollars, but two years later 9 million are still pending. Additionally, not all of the MNCs have contributed and many refuse to reveal the size of their contribution (Clean Clothes Campaign 2015). Beyond financial remedies pushed through by Civil Society Organizations (CSOs), there are limited consequences for the corporations. Consequently, even though safeguards exist, one may arguably question the sufficiency of these protections.

While right holders are struggling to find support for their complaints, a system has developed which gives protection to corporations in their international relations with states. Un-

der international investment law, corporations have been given the right to bring consenting states in front of international arbitration tribunals. Arbitration tribunals are left to their own discretion to consider whether human rights obligations of states are valid arguments for regulatory or legislative action, resulting in a variety of approaches.¹ As a result, some tribunals find that corporate interests weigh heavier than human rights.² Arguably, considering how a protection on investors and corporations from state violations has developed, one should also be able to protect right holders from corporate violations despite regulatory challenges. This supports an assumption of a protection gap, with victims of human rights abuses as the losing party.

However, one should keep in mind that business can also be good for human rights. Where states are violating human rights, the introduction of MNCs can increase protection. Economic development spurred by corporate investments can lead to a better protection of rights – the *trickle-down* effect (Andreassen 2010:152). This line of reasoning is visible in the discourse of the business sector. In Norway, it is argued that domestic corporations bring Norwegian values with them when operating abroad – human rights being one of these (ILPI 2014:7f). This can be seen in conjunction with the idea that investment in a rights-violating state is likely to spur economic growth and corporations’ central role in the economic and social development of states (Deva 2012:3f). Unfortunately, empirical evidence on the impact of investments is not unambiguously clear, pointing to a possible need for regulation (Colen et al. 2013:115).

1.2 Adapting to New Challenges

A response to regulatory challenges regarding corporations has been to introduce international standards regulating business on human rights as well as social and environmental issues. The OECD and the ILO were early in adopting policies addressing these challenges.

¹ Compare *CMS v. Argentina* *LG&E v. Argentina*.

² See *St. Elena. v. Costa Rica*.

In 1976, the first version of the OECD Guidelines for Multinational Enterprises was published (OECD 2011), and in the following year the ILO issued their Tri-partite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO 2014). Since then there has been a proliferation of standards in a variety of forms. Efforts within the UN include the Global Compact in 2000 (Global Compact 2000), the UN Norms in 2003 (ESC 2003), and the work of the Special Representative for the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (SRSG) in 2008 and 2011 (HRC 2008a; HRC 2011). The latter being the UNGPs, which have been at the focus of most debates following 2011.

Further, in 2014 the HRC passed two resolutions on business and human rights (BHR). The first resolution requests elaboration of an international legally binding instrument and was brought by Ecuador, South Africa, Venezuela, and Cuba (HRC 2014b). Building on the language of the SRSG with corporate responsibility to respect human rights, the draft resolution calls for the creation of binding regulation on corporations grounded in the human rights framework. The second resolution is an elaboration of implementation of the UNGPs brought by twenty-two states under the leadership of Norway (HRC 2014a). It recognizes challenges with implementation of the UNGPs, but stresses their value, aiming to increase implementation and focusing efforts rather than creating a new regulatory system. The content of these resolutions illustrates one of the largest debates in the field of BHR; whether or not one should push for a global treaty.

Theoretically this debate can be seen as a discussion between proponents of responsive regulation and proponents of deterrence. Responsive regulation supports a soft approach to the regulation of business (Ayres and Braithwaite 1992:35). It argues for flexible self-regulation of corporations, adaptable to different structures and settings. If there is a recurrence of violations reflecting ineffective regulation, stronger mechanisms will be enforced until one reaches a point where it “becomes rational to comply” (Braithwaite 2011:484). On the other end of the scale are the proponents of deterrence. Deterrence theory assumes that hard regulation with hard sanctions will induce compliance simply through

the threat of their existence (Fisse 1982). In order to secure effective sanctions, one needs an international regime which facilitates their enforcement. In the intersection between the theoretical assumptions, Deva (2012) argues for an integrated approach to regulation of corporations. Critiquing the theory of responsive regulation he argues for using hard *and* soft mechanisms of enforcement in “a synergy between persuasion and punishment” (Deva 2012:193). In his view, this enables a more effective use of the mechanisms, and eliminates the strategic calculation of costs the responsive regulation allows for through the predictability of development in enforcement. A central argument is the necessity of integrating human rights issues with business issues in an effort to *humanize business*, i.e. make companies comply with their obligations on human rights. Reflecting on the international trade and investment regime, the integrated theory aims at rectifying “asymmetries between rights and responsibilities for corporations” (Deva 2012:196). Through assessing existing standards from a human rights perspective, this paper contributes to the debate on which approach is preferable by reflecting on empirical evidence of how the system is working.

1.3 Hypotheses and Structure

Central to the discussion on whether or not there is a need for a binding treaty is the debate on how to best regulate corporate behavior - through binding or voluntary guidelines. In order to decide how best to move forward to protect right-holders, an understanding of how the system is currently working is key. To address these issues, the following analysis reflects on three main questions: Is there an international protection gap? What are the alternatives to a binding treaty? Do international treaties have an impact?

1.3.1 Is there an international protection gap?

The need for an international treaty on BHR is reliant on acceptance of the assumption that the current system holds a protection gap with regards to human rights. An initial analysis consequently has to assess this question and identify what the system looks like – beyond the protections of the UNGPs. Consequently, this paper analyzes the system as a whole; describing characteristics and analyzing the implications. Given the assumption that corporations can be a positive contribution to rights protection, and knowing that some interna-

tional standards are directly aimed at corporations by corporations, the protection gap could possibly be covered.

Chapter three addresses this question by analyzing trends in the adoption and content of global standards on human rights. Despite the current debate on binding or voluntary guidelines there is little empirical research in the field. The launch of the business and human rights company- and governmental action platform by the Business and Human Rights Resource Centre (BHRRC 2015) is a step towards further insight into how corporations adapt to the UNGPs, but more work is necessary. As the use of international standards has become increasingly popular, an analysis of their content and scope will be a valuable tool in understanding what today's regulatory system is and how corporations respond to it. By getting an overview of the system and which protections exist, one is better equipped to decide how to move forwards. Consequently, a database has been constructed to facilitate a comparative quantitative analysis of adopted standards. A review of existing research and theories on adoption of human rights treaties and international standards is followed by an empirical analysis of the collected data.

1.3.2 What are the alternatives to a binding treaty?

Having identified major trends in the contemporary system of international standards, some alternatives to the question of corporate regulations appear. One would assume that a binding treaty on corporations would be signed by states. Further, the statement on elaboration of the binding treaty indicates that the treaty would be universal in scope (HRC 2014b). However, based on the character of current standards and theories of corporate commitment to human rights, an alternative with corporate-driven or sectorial standards might be as effective (Campbell 2007:953). In order to assess whether or not a binding treaty is the better option, one has to look into whether alternatives give an opportunity to secure a stronger protection of rights. Subsequently, question two leads to two different sub-questions both addressed in chapter four.

The first sub-question relates to the standards drafted and adopted by corporations. How do corporate driven standards protect against human rights violations? A theory on commitment assumes that corporations are more likely to comply if they have been part of the drafting process, and if it is an expression of self-regulation (Fransen 2012:176). Consequently, looking at the coverage of corporate standards and comparing them to other alternatives on scope, strength, and drafting allows us to identify differences. Further testing what explains the variance on corporate commitment will be indicative as to whether corporate standards are a strong and viable alternative to a binding treaty.

The second sub-question concerns sectorial standards. How do sectorial standards protect against human rights violations? A possible strength of sectorial standards is that they allow for protection of sector specific issues. Based on the assumption of the possibility to tailor protections to risks, one could assume that sectorial standards hold stronger, but less human rights protections – consequently impacting its design. In order to assess whether it is a viable alternative, the sectorial standards are compared against each other as well as the possibility of a global treaty. Sectorial development can be an important factor as it indicates difference in protection across sectors. Tests are run for human rights language, enforcement, and coverage.

1.3.3 Do international standards have an impact?

A last question raised is whether current international standards have an impact on the behavior of States and corporations, and accordingly the protection of human rights. Through a literature review and a case study of the WHO Framework Convention on Tobacco Control (FWCTC), the analysis in chapter five examines the legislative effects, i.e. adoption of new legislation, of its adoption and ratification. Using data on Gross National Income (GNI), mean years of education, human development, implementation of laws, and tracing development towards ratification of the FWCTC one can assess possible effects of ratification (Helfer and Voeten 2014). Further disaggregation on region and wealth introduces control variables which may enable a more statistically significant result and allow for a greater explanation of variance.

2 Methodology

As the overall aim of the paper is to make an empirical contribution to the discussion on how the international society should proceed to increase protection of victims of human rights abuses, the paper takes a quantitative approach. To facilitate progress in protection, the analysis has to reflect on how the system is evolving and a general approach looking at existing trends and progress enables this. Quantitative analysis gives room to “disprove commonly held assumptions about human rights” (Meyers 1996:382). Given the lack of empirical approaches to BHR this may be necessary. If it turns out that corporate driven standards include as strong a human rights protection as multi-stakeholder or state-driven approaches, this could change the discourse, laying the groundwork for an alternative theory of effective human rights protection. The causality of why these trends occur can only be covered to a limited extent in the quantitative analysis as it identifies varying degrees of explanatory factors. However, following this empirical discussion, a qualitative assessment of protections could increase the validity of the argumentation as well as understanding of the current challenges.

While quantitative analysis requires a simplification of issues, and may limit an in-depth understanding of a particular standard, it is well suited for a comparable analysis. Given the aim of identifying general trends, a qualitative approach would limit the explanatory effect as it is difficult to make general assumptions based on a small sample or narrower study. Qualitative studies could be conducted following this analysis to assess the fit and strength of the predictions made. Beyond allowing for a comparison, benefits of quantification include limited selection bias and an extensive scope (Landman 2002:919ff). Although the analysis compares standards and not states, it relies on similar strategies of measurement. Further, transparent quantification simplifies falsification through replicability of the results.

However, there are some challenges to the use of quantitative methods. First, while it allows for identification of trends, it has limited ability to explain the actual situation in the protection of rights at the individual level (Green 2001:1078f). Consequently, one is unable to capture to what degree corporations are following the standards – or corporate compliance with the standards. This is particularly an issue where there are insufficient mechanisms that monitor behavior (Laufer 2003). A second challenge of quantification is the ability to secure relevant, valid, reliable, simple, timely, and objective information which both allows for comparisons and disaggregation (Yamin and Falb 2012:358). In light of the challenges, Deva (2012:2) argues that one cannot feasibly conduct an evaluation of all regulatory initiatives on corporations. Reflecting on amongst other the difference in their design, scope, and capture, he takes a qualitative approach to assessing their effect. While Deva does raise some important points, one can arguably conduct a comparative analysis of standards to identify trends. Through operationalizing characteristics of structure and human rights protections, one can make general assumption.

2.1 Database

In order to address the question of a global system, a database has been assembled. The database is newly constructed and codifies international standards on business and human rights. It consists of 46 variables including strength, human rights inclusion, certification, reporting, reference to other international documents or standards, fragmentation, drafting - and adopting parties.³ As the first source which holds quantifiable information on international standards on business and human rights, it speaks to the debate on business regulation offering an empirical approach. This database serves as the empirical foundation for chapters three and four.

Standards included in the database are defined as *international standards*, which can be *explicitly applied* to the business sector. As the standards have to explicitly apply to busi-

³ See Annex IV for Coding Manual.

ness, instruments like ICESCR are excluded from the standards specifically analyzed to differentiate between direct and indirect effect of regulations. Further, the limitation to international standards excludes sole and unilateral jurisdictional ones – including regulations within the EU, and exclusively bilateral standards. Even though exclusively bilateral standards are excluded from the analysis, standards which open up for adoption or adherence by other parties in other jurisdictions have been included as they are considered either to have or aspire to an international scope. A last criterion for inclusion is that it has to refer to social responsibility. Considering the vast amount of standards and agreements that regulate corporate behavior in different operational spheres, this allows for limiting the selection size and tailoring the analysis.

The collection of data was a collaborative effort initiated as a research project aimed at identifying how many global standards actually address corporate responsibility for human rights. The standards were taken from a spreadsheet developed by Natasha Telson, Daniela Kistler and Malcolm Langford and slightly supplemented by extra research. The methodology for selecting and coding the sample was developed by me and Malcolm Langford. Relying on the abovementioned definition of global standards, the data reflects existing universal, sectorial, and sub-sectorial standards. The standards have been randomly selected through an inductive method, and should not be considered an all-inclusive sample. Further research should aim at strengthening the database allowing for an even broader understanding of the current system.

2.2 Testing Impact

Chapter five is an attempt to merge the gap between the development of international trends and the actual impact of standards. Although relying on quantitative method as opposed to a qualitative approach, it broadens the explanatory power of the analysis. The FWCTC was a strategic choice as it has near universal ratification, is binding, and allows for time-based comparison.

To assess the impact, data on tobacco control laws has been analyzed up against the process of drafting, negotiating, adopting and ratification of the FWCTC. Using dummy variables, the analysis tests the development of legislation towards these critical points in time for the FWCTC. Based on the presumption on the development of domestic legislation as a response to international regulation, this will allow one to assess if there are correlations between the development of domestic and international law (Helfer and Voeten 2014:15ff). Although a correlation is an indication of causality, the analysis cannot establish this for certain. Checking for control variables can strengthen the analysis, but the result is not conclusive. The collection and coding of data will be further addressed in chapter five.

3 Is There a Protection Gap?

With the UNGPs, the SRSG operationalized the “Protect, Respect, and Remedy Framework” (PRR) developed in 2008 (HRC 2008a). Attempting to bridge the current international standards with the regulatory framework on states, the SRSG and the UNGPs have become central in the debate on BHR. Taking a conceptual approach, the framework elaborates on the state duty to protect, the corporate responsibility to respect, and the joint obligation to remedy violations. In the discussion, the SRSG supports the argument of a protection gap triggered by globalization, and reflects on the threat of over-expanding markets (HRC 2008a: para 11).

The UNGPs describe state responsibility to shape corporate culture, and secure policy alignment between the different government ministries and the overall implementation of human rights obligations. The corporate responsibility to respect is separated from the state obligation to protect on the grounds of differing responsibility. It further argues for an independent corporate responsibility to avoid the distinction of primary and secondary obligations (HRC 2008a:17). An important difference between the corporate and state responsibility is that the SRSG limits the corporate responsibility to “do no harm,” both through direct impact, but also through leverage or control over actors which do harm.⁴ This differentiation of responsibility reflects the abovementioned state-focused international law, which one could argue is inadequately equipped to deal with the expanding threat of non-state actors (Alston 2005:4).

⁴ Additionally, the SRSG shifted the focus “from *obligations*...to states’ policy rationales to protect human rights in their international relations” (emphasis added) (Augenstein and Kinley 2013:273). However, there is no consensus on this issue, and the discussion on extraterritorial obligation of states is ongoing (See Langford 2012:1180f).

Although the UNGPs may have had the effect of unifying a complex system of BHR, they do not give a holistic image of how individuals are protected against violations, how corporations are regulated or committed to protection, or the scope of state responsibility. The development of international standards both prior to and following their adoption is an expression of how actors are adapting to new challenges. This chapter will describe the structure and foundation of the system of standards, to address the overall question of whether or not there is a protection gap on individual human rights. First it discusses the theoretical expectations of a protection gap, before elaborating on the method. The analysis and presentation of data discuss how the current system reflects the theoretical expectations and the implications of the findings. Hence, the overarching alternative hypothesis for this chapter is that there *is* a protection gap in today's system.

3.1 Theoretical Approaches

In order to assess whether or not there is a protection gap one has to understand which protections exist. As emphasized above, the current system of human rights protection is state-centric. States have the obligation to protect, respect, and fulfil human rights within the scope of application of treaties to which they are parties.⁵ However, some protections are guaranteed regardless of ratification – *ius cogens* norms and human rights in customary international law. An implication for legal obligations is that where states neglect to uphold their responsibility, individuals hold a legitimate claim against the state. Although one would not argue that the current system effectively guarantees universal protection of all human rights, as no state perfectly protects their population from all human rights violations, the responsibility of the state is clear. Consequently one could argue that any violation committed by a corporation is a result of the state in question's lack of protection of rights. Taking this approach, one could disregard the question of a protection gap. However, there are issues which merit further discussion.

⁵ To be discussed further in the following sub-section.

3.1.1 Protection of Human Rights

While some human rights treaties are almost universally ratified, there are variances. The USA for example is reluctant to ratify conventions with economic, social, and cultural rights, while China has yet to ratify the ICCPR. Deviation in ratification can arguably entail a protection gap, and can become a challenge as MNCs operate across borders. Expectations on corporations may vary greatly from their *home state* to their *host state*, and one may face difficulties when assessing which regulation to follow (De Schutter 2013:XX). Further, this may influence where corporations chose to register and where they chose to do business, ultimately affecting right-holders.

Even though states are primary duty bearers, specific articles and provisions within existing instruments link responsibility, or the ability to violate rights, to business. CEDAW, CRC, and CRPD all reference specific risks or obligations to mitigate violations by entities other than states.⁶ Further, several UN treaty bodies have elaborated on the necessity to mitigate; the Human Rights Committee (CCPR 2004: para 8), the Committee on ICESCR (ESC 2002: para 23), and the Committee on the CRC (CRC 2013: para 8). However, although they all recognize a specific threat related to corporate abuse, the protections are an expression of the system's focus on state responsibility, reflecting the state-centric nature of the human rights system. This approach is also visible in the domestic sphere. In their recommendation to Total, and repeated in Wal-Mart, the Norwegian Council of Ethics stated that "Only states can violate human rights directly. Companies can, as indicated in paragraph 4.4 [of the ethical guidelines], contribute to human rights violations committed by states. The Fund may in its turn contribute to companies' complicity through its ownership" (Chesterman 2011:56).⁷ This interpretation reflects the assumption that it is states, not corporations, which violate human rights.

⁶ CEDAW art 2(e); CRC art 32; CRPD art 4(e).

⁷ *Total S.A. Recommendation* section 3.1; *Wal-Mart Recommendation*.

In spite of the argued protection gap, the SRSG does not identify a corporate *obligation* to respect, only a responsibility. This distinction is important because where responsibility refers to a voluntary or moral commitment, an obligation is legally binding. Relying on an argumentation where corporate responsibility is grounded on their place in society, the SRSG emphasizes that "...business enterprises... (are) required to comply with all applicable laws and to respect human rights." (HRC 2011:6) In the operationalization of the framework, the SRSG specifies that the UNGPs do not create or attempt to create new international obligations on business. Despite the SRSG's rejection of the assumption that corporations have an obligation, there is no consensus on this issue. Reflecting on developing domestic law and international customary law, Deva (2012) argues for a trend towards acceptance of corporate obligations, beyond profit maximization. Through unpacking the structure of corporations, he argues that corporations are "aggregation(s) of individuals glued together" (Deva 2012:146); emphasizing how individuals have obligations they should not cease to hold simply because they started to act together as corporation.

Perhaps one of the most challenging issues in this discussion on attribution of responsibility is piercing the "corporate veil" (Mestad 2011:84). The corporate veil refers to the structuring of MNCs with subsidiaries in separate jurisdictions, making it difficult to allocate responsibility for violations. It can appear as though MNCs are securing limited liability and avoiding regulatory initiatives to reduce the likelihood of being linked to and held responsible for violations (Mestad 2011:88). Due to the fact that corporate entities are registered in different states and consequently jurisdictions, becoming separate legal entities, a major challenge is finding the right jurisdiction to hear claims. If one establishes jurisdiction over one entity, one has to establish and prove a string of commands; "this legal leeway ipso facto makes MNCs difficult regulatory targets" (Deva 2012:50). Consequently, in order to address the challenge of appropriate jurisdiction, proponents of a legally binding document argue for extraterritorial state obligations (Deva and Biltschitz 2013:23).

Higgins addresses the issue of contemporary challenges of regulating corporations. She argues that due to the developments within international law, and particularly within the

frame of bilateral investment treaties (BITs) and arbitration, corporations do have the ability to bear international responsibility, as they have become actors in the field (Higgins in Ruggie 2007:8). The expansions of the international protections of MNCs addressed by Higgins hold specific protections against state abuse. These protections are based on the presumption that the rule of law within the host state is not satisfactory, and that additional protection of investments are necessary (Dolzer and Schreuer 2012). The distrust of fair protection within the domestic sphere of the host state is argued to be the primary motivational factor for upholding the current system of international investment law, including the necessity of maintaining investor-state dispute settlement rather than using domestic courts. Following this argumentation from a human rights perspective is difficult. If a corporation assumes that the state in which they are investing does not have a fair legal system, how can one expect that an individual victim of a human rights abuse stemming from the investment will get fair remedies? Arguably this can represent a protection gap.

However, there are some challenges to balancing corporate and state responsibility. Alston (2005:4ff) argues that it will be difficult to distinguish who should bear the responsibility, and when. If a corporation violates its responsibility to respect human rights, is it the failure of the state to protect or the failure of the corporations to respect? A consequence of the distribution of responsibility could be to exempt states from their obligation to the detriment of corporations. It is beyond doubt that states are still primary violators of human rights, and any distribution of responsibility has to not only be legally grounded, but also take possible consequences into account.

3.1.2 International Standards and Voluntary Self-regulation

International standards differ on legal, political, and economic strength. Relying on a legal approach, Deva takes the starting point that current regulatory regimes are “inadequate to make companies accountable for human rights abuses” (Deva 2012:46). Reflecting on the theory of responsive regulation (Ayres and Braithwaite 1992) he argues that the regulatory power over corporations is limited due to, amongst other, inequality in power and challenges in identifying corporate motives. Assuming insufficient protection, the argument is that

one has to put in place a binding international framework, which can be strengthened and specified at institutional and domestic level (Deva 2012). While recognizing current challenges to the system, the SRSG disagrees with the necessity to create an international framework which is binding on corporations. Taking a polycentric approach, he holds that the current global system is only - and should only be, binding on states. He argues that the responsibility of corporations should be enforced through domestic legislation, while maintaining the development of international voluntary guidelines (HRC 2008a:15f).

Including spheres of political influence and impact, the SRSG's approach connects state and corporate responsibility through positive reinforcement (HRC 2008:10). The mutual push towards strengthened protection could in some ways reflect on Ayres and Braithwaite's' (1992) reflexive approach, where the protections adapt to upcoming challenges through gradual strengthening. However, a polycentric approach could arguably be more pro-active in character than the reflexive adaptation. Based on a polycentric approach to the global system one could establish that the strengths of the human rights protection are more nuanced than binding – voluntary.⁸ Dynamic interpretation of the provision held within an international standard or international law, may influence its human rights protection. Consequently, quasi-judicial or non-judicial mechanisms can greatly impact law (Taylor 2011:11). Taking this approach gives strength to the SRSGs argument of mutual reinforcement. Similarly, standards which allow for interpretation of its provisions may adapt to legal developments. The inclusion of new protections in the framework could indicate acceptance of the responsibility. Linking the standard to the right could be interpreted as a movement towards a more binding character of the human rights protections. In the consideration of a polycentric approach to regulation, time is of vital importance. In order for the system to progress towards better protection, the development must run its course. Consequently, there is still a gap in protection, which *may* or *may not* be addressed in the near future.

⁸ See also Prenkert and Shackelford (2014).

As most of the international standards are voluntary in scope, they can be considered as an expression of voluntary self-regulation. Consequently, economists of the Chicago School might argue that they hold inherent challenges (Lessig 1998). From the view of rational choice theory, self-regulation is limited in character due to the lack of effective enforcement of non-compliance (Campbell 2007; Posner 1998). Going even further in the lack of belief in the international system, Posner (2014:59) argues that legally binding obligations on states expressed through international treaties does not contribute to an improved protection of rights. However, there is no consensus on the limited or non-existing impact of binding or voluntary obligations. Accepting legal limitations to enforcement of voluntary self-regulation, Leisinger (2006:11) argues that introduction of effective methods or monitoring may enhance the effect of self-regulation – particularly if it is comparable to other corporations. Following this approach, the system of international standards may hold better protection than a strict legal positivist or rational choice argument would assume.

3.1.3 Which Human Rights to Include?

Issues that arise when discussing the current system relate to how the obligations of corporations should be designed, and which human rights should be included. The UN Norms argues for an approach which makes corporations responsible for violations within their “spheres of influence” (ESC 2003: para 1). The SRSG elaborates on the UN Norms’ spheres of influence, linking it to direct impact of its operations and the power the corporation holds over other actors (HRC 2008a:19). This inclusion of impact beyond direct operations has consequences for how one perceives corporate responsibility and which human rights to include. The UN Norms and the interpretation by the SRSG expand the understanding of stakeholders beyond worker and shareholder concerns. As such, the SRSG takes a holistic approach, and argues for the inclusion of all human rights – i.e. the protections in the international human rights treaties and the UDHR (HRC 2008a).⁹ Given the

⁹ CERD, ICCPR, ICESCR, CEDAW, CAT, CRC, CMW, CED, CRPD.

consensus on the UNGPs an expansive approach that takes both spheres into account seems appropriate.

The holistic approach of the SRSG, arguing that a limitation to a specific group of rights will result in loss of protection, stands in opposition to the approach of realist political scientists like Michael Ignatieff. Ignatieff holds that in order to secure corporate compliance, one should limit the scope to particular rights relevant to the specific sector, sub-sector, or business (Posner 2014:94f). The SRSGs argumentation reflects the stakeholder approach of the variety of effected stakeholders of corporate actions – beyond shareholders and employees. However, the following review of existing standards reveals a tendency to limit the understanding of corporate responsibility to that of its workers. This could be linked to the argumentation of effectiveness policy framing (Sullivan and Hachez 2012). Without a substantive reference to particular rights, and primarily referring to the general respect for human rights, one can risk dissolution of substantive protections. In the report on the PRR Framework, the SRSG presents a list of human rights claims from over 300 cases (HRC 2008b). Although this list should not be considered as exhaustive of all possible human rights violations, it is a good indication that a more expansive approach to business responsibility is necessary (HRC 2008a: para 52).

3.2 Method

In order to identify trends in regulation, this chapter analyzes descriptive statistics of standards. As specified in the previous chapter, the sample should not be considered exhaustive. The data collected includes 59 independent standards not counting revisions and 82 standards when revisions are included. Revisions are included in order to allow for time-based comparison. As there has been limited empirical research on the field to date, there is limited comparable data available.

As the aim of this chapter is to identify core trends in the structure and characteristics of the current system, the data are presented in a descriptive manner. Due to the discussions on the existence of a protection gap, the alternative hypothesis is that there is a protection gap

with regards to human rights protection. If the gap exists, this will strengthen the argumentation for the need of reform or development of the system of BHR. In order to assess whether there is a gap, the standards are compared on the inclusion of human rights, inclusion of human rights treaties, adopting parties, its binding character, and methods of monitoring – specifically complaints, reporting, and certification.

With regards to human rights, the system is characterized by the breadth of its human rights inclusion; 1) none or only specific, 2) partial inclusion, and 3) full inclusion. In order to be considered fully inclusive, the standard has to have its foundation in the international bill of rights – a holistic approach to human rights. Standards which reference a substantial number of ILO Standards, specific international treaties, or a long list of substantial human rights, fall into the category of partial inclusion. Even though ILO conventions are closely connected to human rights, their focus on workers' rights limits the holistic approach to the scope of protection, which is why they are coded as partial inclusion. Standards which only refer to specific human rights, or have no reference at all beyond a social responsibility, fall into the last category. Further, the human rights included in the standards are differentiated on whether or not they figure as a reference or a substantive protection. As there are no definite limits to the characterization of human rights inclusion, there may be difference of opinion on the classifications made. However, the standards have all been coded by the same person securing consistency and limiting the threat of inter-coder unreliability.

3.3 What does the system look like?

The database and subsequent analysis includes 82 international standards. With regards to scope, most are Global-Universal (39%), including standards like the UN Global Compact. These standards are applicable beyond a specific sector or region. Following close behind are the Global-Sectorial (37.8) standards like the Clean Clothes Campaign Code of Labour Practices for the Apparel Industry. While it addresses the apparel industry, it does not differentiate between different sectors of production. The third most common group holds the

Global-Sub-Sectorial (17.1) standards like the International Code of Marketing of Breast-Milk Substitutes, a sub-sector of food products. While Regional (6%) standards¹⁰ like the SGE21 Norm, are least represented in this analysis. Given that the primary aim is to analyze global standards, this should be considered an outcome of strategic sampling. More in-depth characteristics of standards will be discussed in the following sub-chapters.

3.3.1 Strength

As expected, a great majority of the standards are voluntary regulatory initiatives. Of the 82 standards included in the analysis, three were binding on corporations, three were characterized as a combination of voluntary and binding requirements and the rest were voluntary. From a legal point of view, and following Deva (2012:46), this implies insufficient protection. Standards that have been characterized as voluntary may hold requirements that appear binding on some actors. However, binding refers to legally binding documents, which can (or should) be legally enforceable. Consequently, requirements which are mandatory within a standard do not render it legally binding. All of the standards which are binding have states as adopting parties. Referring to the theoretical discussion of the state of international law above, this is a reflection of how it influences the development of human rights protections. Consistent with the discussion above, the voluntary protections of human rights strengthens the argumentation for the existence of a protection gap.

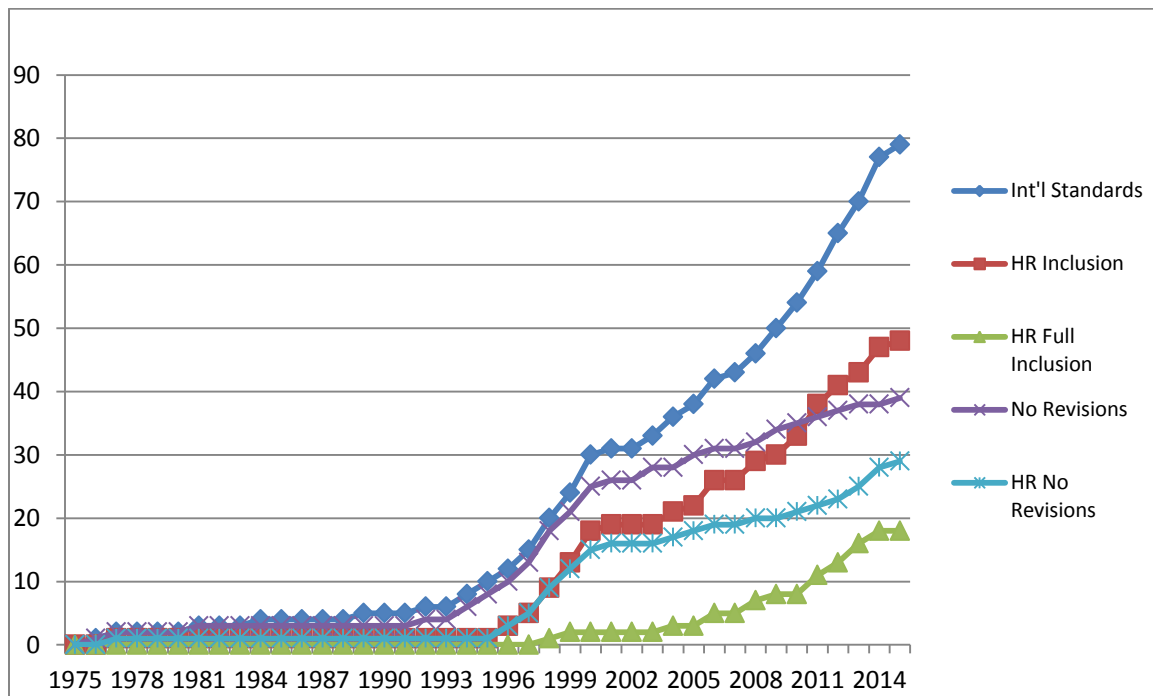
However, following the argumentation of the benefit of polycentric regulation and political influence, the lack of binding regulations on corporations in itself does not establish a protection gap. Considering the argumentation of responsive regulation (Braithwaite 2011), international standards with political power may in fact yield greater effect than those that are legally binding. This is due to the fact that effective enforcement demands political or judicial will as well as sufficient sanctions. In order to approach a conclusion one has to consider if there has been movement on the human rights protection within existing stand-

¹⁰ Disaggregated as the universal standards.

ards, or comparatively between older and newer standards with the same target group. A movement will not equal an improvement in protection, but will help falsify a null hypothesis claiming no impact of the international standards. Further, from an economic point of view the classification is similarly inconclusive on the effective impact. Rather, one would consider the existence of monitoring or certification mechanisms equally or more important than the legal characteristic of the standard itself. For example, if the lack of certification reduced the corporation's access to the market, the economic cost of non-compliance may have greater effect on corporate behavior than a legal requirement (Auld et al. 2008:195).

3.3.2 Growth and Human Rights Protection

As shown in Graph 1, there has been a rapid growth in international standards. The first wave of standards appears between 1994 and 2000, with a short slow down before it keeps growing. However, as the database includes revisions, an additional line is added to show the growth in adoption of new standards. This reveals that while there has been an increase in standards following 2000, many of these are revisions. There is an increase in the amount of standards, but the growth rate is lower for new adoptions.



Graph 1: Entry into Force (cumulative)

Further, 1994 marks a point where the standards increasingly include partial or full human rights protections. As the HR Inclusion line indicates, the number of standards which hold human rights protection is rapidly growing. Comparing the growth of HR Inclusion and HR Full Inclusion reveals that full protection is a more recent phenomenon.

Interestingly, when one includes revisions it seems as though there is an increasing gap between standards and inclusion of human rights. Comparatively, the distance between newly adopted standards and inclusion of human rights is smaller and more stable. This could be an indication that it is easier to include human rights at the outset of working with an international standard, while it may be more challenging to amend existing regulation. However, disaggregation of the nature of the standards and inclusion of human rights protection reveals that the majority of those that give full protection are revisions of existing standards; countering the assumption made above. The revisions are more equally distributed across the variety of human rights inclusion, while the original standards are more unevenly distributed.

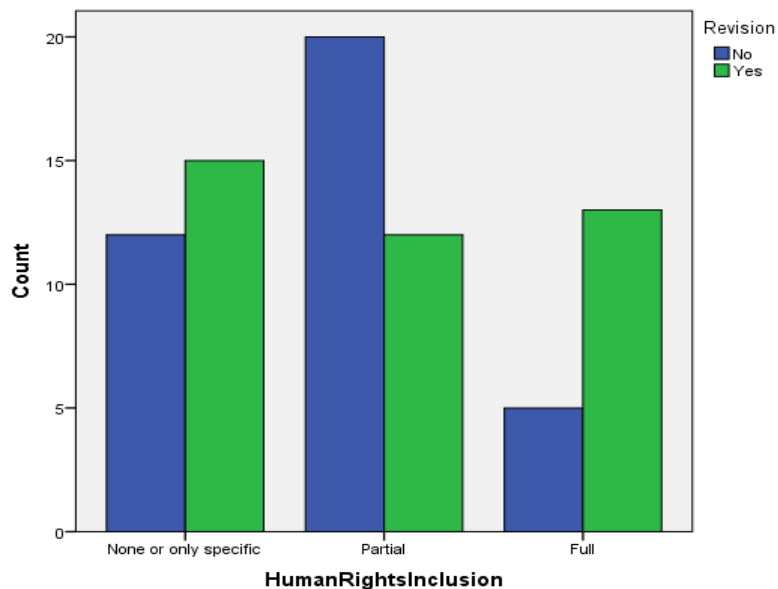


Figure 1: Human Rights Inclusion

3.3.3 The Actors

Considering the variety of the regime, who are the actors that structure it? In order to assess the actors, a distinction is made between those who draft and those who adopt the standards. The database refers to sixteen possible combinations of four different categories of actors; states, corporations, IGOs, and CSOs/NGOs. Figure 2 holds the distribution of the four categories and reveals that when the participation of actors is aggregated, corporations have signed more standards than any other group, while CSOs have been the most active drafters.

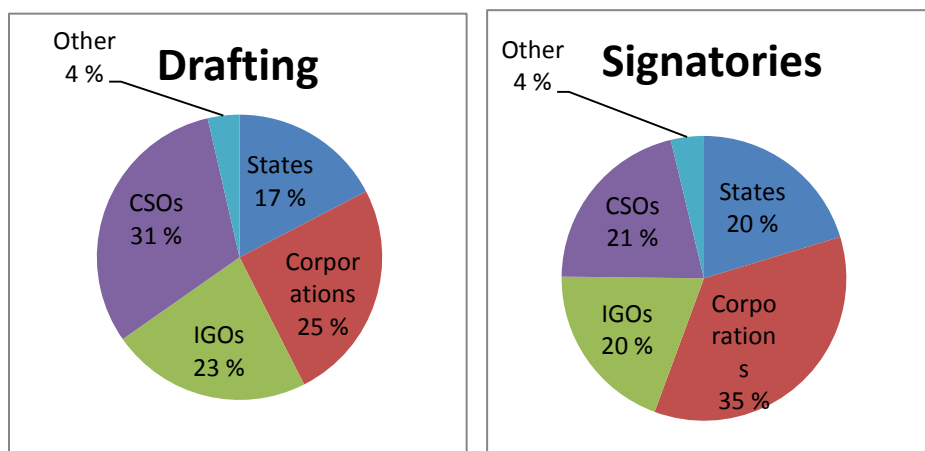


Figure 2: The Actors Drafting and Signing Standards

The disaggregated data reflecting all the combinations reveal that corporations are the primary signatories and sole adopter of 30 percent of the standards – twice as much as states.

Despite the targeting of standards for corporations, the drafting of standards is predominantly multi-stakeholder, i.e. drafted by more than one type or category of actor. With regards to drafting, an all-inclusive process or cooperation between corporations and CSOs is most frequently used. From a political point of view a multi-stakeholder approach may hold greater influential power, with cross-issue actors (Auld et al. 2008). Although one might expect a correlation between active actors and time, the data does not support this assumption.

3.3.4 Sectors

Approximately a third of the standards are sector specific. However three sectors dominate, representing over 70 percent. As shown in Figure 3 on the next page, the three most regulated sectors are; agriculture, forestry and fishing, mining and quarrying, and manufacturing. While agriculture, mining, and manufacturing have multiple regulations, most sectors have no sectorial regulation at all.¹¹ Although there are challenges to identifying causes for the different sectorial approaches from the data, it is interesting to note that the most regulated sectors are the ones that dominate the global trade market (World Bank 2015a). Regulation on services on the other hand, a primary driver of GDP in most developed states (World Bank 2015b), is limited. Following the argumentation of the SRSR that the reinforcing nature of standards and regulations will drive increase in protection (HRC 2008a:10), one could argue that the sectorial development within certain sectors is the result of efforts to close the gap. Fransen (2012:171) argues that an increase in standards could also imply a “race to the bottom” in regulation – creating new standards with a narrower protection, due to the increase in competition for market capture.

An interesting observation on the most regulated sectors is that these are industries in which environmental CSOs have been working over a longer period as well. In the agriculture sector many of the standards regulate forestry and logging. Here there are cross-cutting issues concerning both protection of the forest to maintain its ability to “catch” CO₂, and the protection of human rights; perhaps particularly the protection of indigenous rights. Similar issues can be found within the mining sector. Arguably, there may be a connection between the cross cutting issues, the broader alliances, and reputational concerns – triggering development of regulation. However, in an analysis of certification schemes on forests and forestry, Auld et al. (2008:191) note that the development within these standards was to a large extent triggered by producers that were unsatisfied with the institutional design of the Forest Stewardship Council’s (FSC) certification. The dissatisfaction was

¹¹ See Annex I.

directly linked to “the ability of environmental and social interests to outvote economic interests” (Auld et al. 2008:191). Consequently one may question whether the number of standards and certifications increase protection of human rights.

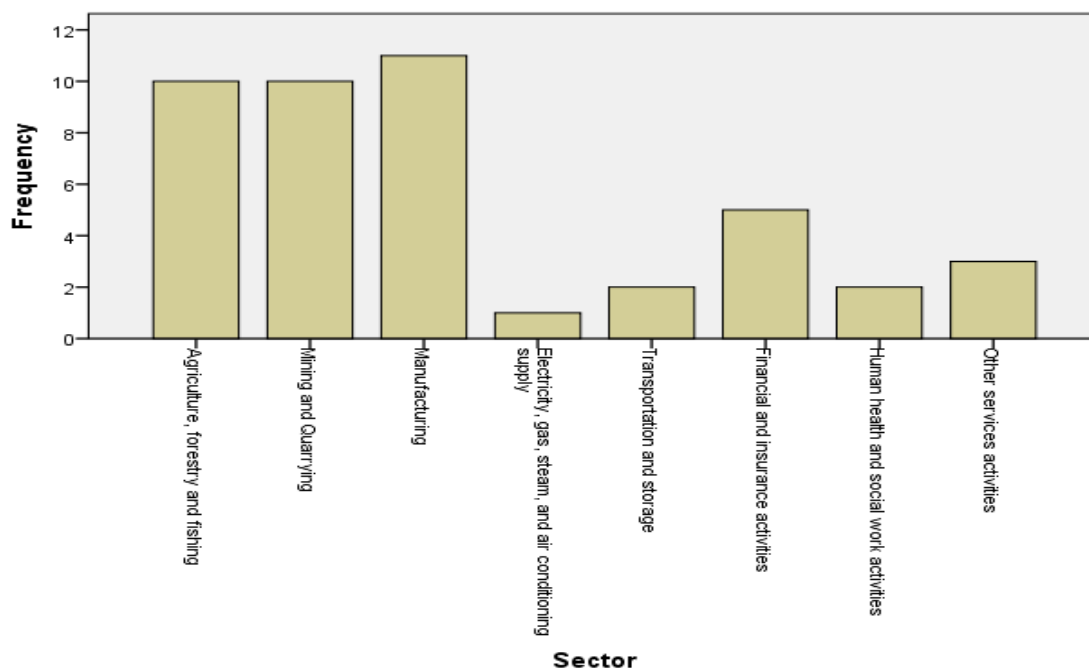


Figure 3: Distribution of Sectorial Standards

Disaggregated at the sub-sectorial level, forestry and logging as well as manufacture of textiles are most frequent; however at the sub-sectorial level the standards are more evenly dispersed. When comparing the year the sectorial and sub-sectorial standards entered into force, it is difficult to identify specific waves. However in the mining and quarrying sector, one had a rapid development with the establishment of four standards in 2004 and 2005. The causes of this movement, the protections within the different sectors, and possible explanations for the difference in progress as well as the different characteristics of the sectors will be further discussed in the next chapter.

3.3.5 Human Rights

As described above, the standards hold a varying degree of human rights protections. But which human rights are most common to include, and what language do they use? Table 1 on page 29 gives an overview of all the human rights that have been included in a standard.

From this table it becomes clear that non-discrimination is by far the most included of all human rights. Following non-discrimination, one finds the core ILO worker's rights; child labor, slavery, and freedom of association. On the other end of the scale are the rights that have barely been included, either through a reference or substantially; social security, adequate standard of living, arbitrary detention, freedom of religion, and disability rights. Regarding the scope of protection of human rights, a majority of the standards are limited to human rights reference.

The rights that have been included the most are closely linked to worker's rights. This is particularly visible through the relatively high inclusion of the right to fair wages and decent living, and the right to join trade unions. Consequently, one could argue it is less surprising that companies, as employers, to a higher extent accept standards that include these. From a theoretical point of view this represents a more narrow understanding of corporate human rights responsibility, more similar to Ignatieff than the SRSB. However, Alston (2004:507,518) predicts that the preference for worker's human rights may be a result of the strategic policy choice of the ILO. In the late 1990's ILO decided to narrow their focus to core principles culminating in the declaration on "Fundamental Principles and Rights at Work." The core principles overlap with the most commonly referenced human rights: collective bargaining, slavery, child labor, and discrimination.¹² If the "Fundamental Principles and Rights at Work" has had this impact on the development of global standards, it will be interesting to see whether the UNGPs will have a similar effect as they have been argued to broaden the discussion and understanding of the scope of corporate responsibility (Taylor 2011:19f). A challenge the UNGPs face is that it may be easier to include the ILO core principles due to their minimalist nature. However, if the development of the standards is an expression of a legitimization with the ILO principles as the reference point, one could expect a substantive impact.

¹² See Table 1.

Human Rights

Type	Human Right	Frequency	Percent
Other	Social security	1	.3
<i>Group</i>	<i>Disability rights</i>	<i>1</i>	<i>.3</i>
<i>Group</i>	<i>Minority rights</i>	<i>1</i>	<i>.3</i>
Other	Fair trial	1	.3
Other	Freedom of religion	1	.3
Other	Privacy	1	.3
Other	Adequate standard of living	2	.6
Other	Arbitrary detention	2	.6
Other	Freedom of movement	2	.6
Other	Own property	2	.6
Labor	Right to leisure	3	.9
Labor	Work	3	.9
Other	Best interest of the child	3	.9
Other	Education	3	.9
Other	Life	4	1.2
Other	Access to justice	5	1.5
Other	Food (free from hunger)	5	1.5
<i>Group</i>	<i>Women's rights</i>	<i>6</i>	<i>1.7</i>
Other	Dignity	6	1.7
Other	Information	7	2.0
Other	Self-determination	7	2.0
Other	Cruel, degrading or inhuman treatment	8	2.3
Labor	Join trade unions	11	3.2
<i>Group</i>	<i>Indigenous rights</i>	<i>14</i>	<i>4.1</i>
Other	Healthy environment	17	4.9
Other	Health	20	5.8
Labor	Fair wages and decent living	22	6.4
Labor	Freedom of association	28	8.1
Labor	Slavery	30	8.7
Other	None	31	9.0
Labor	Child labor	34	9.9
Other	Non-discrimination	63	18.3
	Total	344	100.0

Table 1: Human Rights
 Labor Rights in bold, Group Rights in italics

Although standards primarily reference human rights, the language they use is quite strong. More than 50 percent of the time, the strongest words (must or shall) are used, closely followed by should. What explains the strong use of words despite the primacy of reference to substantive is not clear.

3.3.6 Human Rights Treaties

When it comes to human rights treaties there is a strong correlation between when the standard entered into force and the inclusion of treaties in the framework.¹³ This may be an expression of the move towards a higher inclusion of human rights. The increase in human rights treaties can indicate several things, two of which may be contradictory. First, it may indicate that the drafting parties see an added value of referring to treaties in order to strengthen the commitment. This would link to the argumentation of the positive impact of human rights treaties as tools for mobilization and increased protection. Second, it may indicate strategic inclusion of treaties consistent with an increased push for transparency. The inclusion of a treaty may serve as legitimation, consistent with the idea of strategic ratification and tactical concessions to avoid CSO pressure (Simmons 2009:113). As the analysis does not include an evaluation of actual compliance with the standards, little can be said on what the implications of the reference to treaties entail.

Further, there is a positive correlation between when the standards entered into force, the inclusion of treaties in the standard's text, and the number of treaties referenced.¹⁴ This could signal a development towards a higher inclusion of human rights treaties in international standards, although one has yet to falsify this assumption. Out of the treaties, the UDHR is most cited (43), followed by the ICCPR (34), ILO (33), ICESCR (32), and the CRC (20).

¹³ Significant at 0.01 percent level; See Annex I.

¹⁴ Significant at the 0.01 level.

3.3.7 Enforcement; Reporting, Complaints, and Certification

The mechanisms for enforcement and monitoring of compliance with the standards vary. While a majority of the standards have limited mechanisms aimed at securing compliance, some standards have strong institutional measures through certification, reporting or complaints mechanisms. As shown in Figure 4, approximately 40 percent of the standards have mechanisms for certification, while only 17 percent have complaints mechanisms.¹⁵ Complaints mechanisms do not include internal corporate grievance mechanisms for stakeholders, as there is limited information available on these. Further it would require a corporate level analysis which this paper does not aim to address.

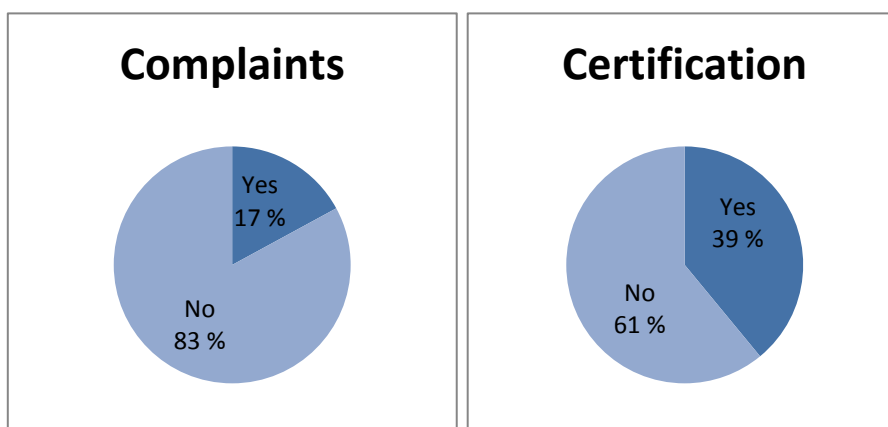


Figure 4: Enforcement

The numbers for reporting are somewhat higher than the complaints and certification mechanisms.¹⁶ As shown in Figure 5, almost half of the standards require reporting from signatories. Reporting is counted when there is an expressed provision in the standard, requiring periodic reporting on compliance and/or progress. Consequently, it does not reflect random or incident-specific reporting. On the strength of reporting, a majority of the mechanisms are not independent, but either self-reporting or a combination between self-

¹⁵ See Annex I.

¹⁶ See Auld et al. (2008) for trends in adoption and impact of certification mechanisms.

reporting and multi-stakeholder input. Considering the economic argumentation on self-regulation and effectiveness, this may weaken the effect of the reporting mechanism, unless there are sufficient mechanisms to verify the reports (Leisinger 2006). However, it can be an effective way of norm-diffusion as one makes the parties use a human rights and norm-consistent language (Risse and Sikkink 1999:27). Considering costs, the standards which include certification mechanisms may imply a stronger protection of rights compared to standards which hold stronger legal protection but lack effective methods of measuring and ensuring compliance.

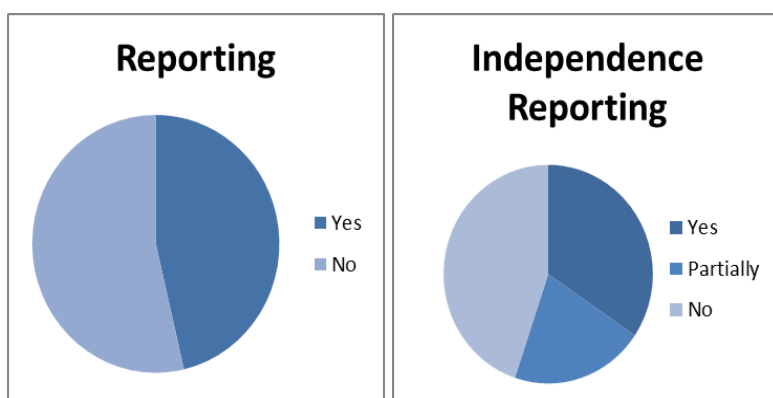


Figure 5: Reporting

There is a positive correlation between certification and scope, indicating that sectorial standards are more prone to certification.¹⁷ Considering that universal standards are less specific this is as expected. It may be difficult to impose a certification mechanism on all businesses regardless of size or sector relying on general protection. Consequently, the economic argument for sectorial rather than universal standards to improve protection of rights is strengthened. However, as many sectors are not able to develop certification mechanisms, global protection can help close the gap. Certification will be further discussed in chapter four.

¹⁷ Significant at 0.05 level; see Annex I.

3.4 Conclusion

The global system of standards is rapidly developing. Although one could argue that the increase in international standards indicates an improved protection of human rights, the facts are not conclusive. Arguable, one is witnessing an increase in the inclusion of human rights, but the distance between full inclusions of rights to the amount of standards supports the assumption of a protection gap. The fact that the most utilized human rights can be linked to the right of workers is another indication of the distance between protections in international law and the protections within the standards. Following Alston's (2004) argumentation of the impact of the ILO's decision to focus on core rights, a shift in discourse following the work of the SRSG may result in a more inclusive protection (Taylor 2011:20). While the global system does protect human rights better today than it did in 1977, one cannot claim that the protection gap does not exist. In the next two chapters, different approaches to closing the gap will be addressed.

4 Alternatives to a Binding Treaty

As chapter three outlines, the global system of BHR is diverse. Different approaches are used, creating or adapting to the rapidly increasing field of BHR. Following the UNGPs, the creation of a legally binding instrument has increasingly become an issue of debate. The push for the development of an international treaty is linked to the assumption that law strengthens human rights protection (Simmons 2009:118f). However, when the aim is to increase protection, and assuming that corporate compliance with human rights will help increase this protection, it is of interest to assess if there are other alternatives that could be more effective, or other alternatives that secure greater compliance. In the environmental field for example, corporate-driven regulations have been more proactive than government, and initiatives have been strengthened in cooperation with CSOs to compensate for failure of governmental actions (Auld and Guldbrandsen 2013:399).

The aim of this chapter is to examine which approach would be better to increase the protection of human rights. First, it elaborates on existing theories of corporate compliance and theories on treaty effectiveness; assessing arguments for a legally binding document, responsive regulation and corporate driven standards, and sectorial regulation. Then, drawing on findings in chapter three, it elaborates on the characteristics of sectorial standards and assesses trends in corporate adoption and human rights.

4.1 Regulatory Alternatives

4.1.1 Legal

To increase the protection of right holders globally, efforts have been made to create an international framework to strengthen regulation on states as well as creating obligations on corporations; most recently with the draft resolution on a BHR treaty (HRC 2014b). As mentioned, the rationale for pushing for stronger regulation builds on the idea that law will strengthen compliance and increase protection (Simmons 2009:118f). From a legal per-

spective, an extension from voluntary regulations to include States strengthens provisions, as they are the primary duty-bearers under IHRL. Given that states already have a domestic obligation, the focus for proponents of legally binding regulation has been clarification of extraterritorial obligations of states, as well as legal obligations for corporations (Deva and Biltschitz 2013:4).

Considering the presumption that legal provisions will enable compliant behavior, establishing a framework which sets out the obligations will be important (Deva and Biltschitz 2013). Legally binding provisions can influence the institutional protections of human rights which may be important in constraining corporate behavior (Campbell 2007:947). In the context of the push for a global treaty, clarification of legal responsibility may strengthen the regulatory power of states. Ecuador for example, has been struggling to hold MNCs responsible and secure remedies to victims of human rights abuses (BHRRC 2012). In this context, a binding regulation could give states and victims more leeway in securing effective protection, which may be why Ecuador is pushing for a global treaty.

A legal approach could further ensure consistency in expectations and eliminate the threat of a *prisoner's dilemma* (Deva 2012:10). One may become subject to a prisoner's dilemma when one has to choose whether or not to comply with a standard based on a cost-benefit analysis of presumed advantage in the two scenarios. E.g. it may be more economically beneficial to not comply with a standard if it allows you to offer a competitive price at the expense of human rights protection, if the cost of non-compliance is low (Deva 2012:10). If the provision is legally binding however, one would assume that the cost is higher. From a human rights perspective, legal protections could further secure diffusion of norms on the scope of corporate responsibility (Risse and Sikkink 1999:27f). With regards to corporate standards, norm diffusion could influence the corporate rationale for compliance, moving from strategic adaption to changing culture. Additionally, work on the effect of human rights treaties points to the positive impact of treaty ratification in transitional states (Simmons 2009:152). While a business and human rights treaty is targeting host and home states, rather than state obligations for its population, the argued success of treaties in en-

hancing human rights protection should be noted in the discussion as the impact of a global treaty on business could be similar.

There are some challenges to a global treaty. One of the primary concerns is that a global treaty will not be able to address specific or sectorial issues which will ultimately lead to a weaker protection of human rights (Posner 2014:93). Generalized obligations have to be formulated in a way which allows for adoption across and within different sectors and states. This may weaken the language and in conjunction the protection of the right. Additionally, although parties to treaties are bound to uphold them, enforcement is a challenge for human rights treaties. Further, there is no consensus on the scope of or ability for corporate responsibility under international law. Consequently, the treaty would be laying the groundwork for the direction of international law in this regards. As experienced with the UN Norms, there are practical challenges to developing binding obligations. However, one should note that sectorial treaties have developed, one of which will be assessed in the chapter five – the FWCTC.

4.1.2 Responsive Regulation

As chapter three describes, a large number of standards are driven and adopted by corporations as a means of self-regulation. Where proponents of a treaty can be argued to represent an exogenous approach to corporate regulation, self-regulation represents an endogenous approach. Rather than imposing regulations from above onto companies, corporate standards represent steps to regulate from within (Moravscik 2012:100; Laufer 2003). Steps to ensure self-regulation are connected to a responsive approach, responding to complaints of violations (Braithwaite 2011:481). Similarly, the incrementalist approach of the SRSG argues that corporate compliance and consequently human rights protection will increase over time through a bottom-up approach (De Schutter 2013:xix).

Theoretically, one assumes that parties are more likely to accept and comply with regulation they have participated in drafting (Campbell 2007:955). Considering the data in chapter three, the high presence of labor rights may be an indication of this.¹⁸ Reflecting on argumentation of self-regulation and corporate willingness to comply, effective protection may be stronger in corporate standards despite the lack of legal strength. Further, arguments on corporate regulations have a reflexive character, where non-compliance will lead to a consequence which may or may not impact profit, which therefore may or may not impact protection (Braithwaite 2011:482f). Consequently, corporate standards would be an effective way to enhance protection of human rights as they allow for a flexible adaption to the different challenges (Taylor 2011).

Proponents of corporate standards often rely on argumentation connected to the “business case” for human rights. The premise of the business case is that corporations will benefit from human rights compliance, linking the two as mutually reinforcing (Deva 2012:139). Further, building on the assumptions of rational choice theory, corporations will be more compelled to comply if this is included in the cost-benefit analysis (Elster 1986). With an aim to increase corporate participation and compliance, this may be a strength of corporate-driven standards.

Although standards drafted and adopted by corporations are not of a legal character, they can hold a possibility for strong enforcement mechanisms like certification. Certification mechanisms allow for comparability and opens up for consumer pressure (Auld et al. 2008). Through certification one can ensure a degree of protection, and increase the benefit of compliance. In certain contexts, only certified products may be granted access. While the total exclusion of non-certified products would be linked to state regulations or state efforts, the threat of market exclusion would be a strong economic incentive for corporate

¹⁸ See Table 1 at 3.3.5.

actors (Auld et al. 2008:195). Further, it is an accessible way for CSOs and media to identify and address discrepancies.

Considering corporate standards from a human rights perspective, introduces some challenges. As the business case builds on the rationale of complying to secure a competitive advantage, rather than acknowledging a responsibility, one faces the risk of corporate capture (Deva 2012).¹⁹ This can also be a challenge if one considers the theory of norm entrepreneurs who may gain an advantage of early adoption (Gillies 2010). Further, compliance with regulation without belief in the necessity and rights of the protection may weaken the content of the right, leaving you with strong language but weak protections (Jochnick 1999; World Bank 2003).

In relation to strategic compliance a challenge is the increased likelihood of a *prisoner's dilemma* (Deva 2012:10). Given the diversity and difference in protections, corporations may calculate strategic non-compliance. Considering the regulatory challenge today with the difference in standards and regulations, the rationale behind enhancing compliance through corporate standards is weak from a human rights perspective; as such compliance with corporate standards may have limited value.

4.1.3 Sectorial

Sectorial standards are in the intersection between the general characteristics of a global treaty and the specificity of corporate standards; combining the elements of the strength of hard law and the focus of corporate regulations. Sector specific standards is a general term and includes both corporate/industry driven, and states or multi-stakeholder initiatives. In this discussion, sectorial standards will primarily be referred to as state or multi-stakeholder

¹⁹ Corporate capture is understood as when corporations capture the regulation that is directed at them (Dal Bó 2006).

initiatives, as the challenges and benefits of corporate driven sectorial standards are similar to those addressed in the previous subchapter.

Sectorial standards have the ability to tailor provisions to context. Building on Campbell's (2007:947) argumentation of institutional constraints, one can design a framework enabling compliance. Having identified specific challenges, one can tailor responses to address these challenges through stronger language. Consequently, in the debate on the global treaty, an alternative could be to create sectorial treaties, tailored to the specific challenges faced within the different industries. As chapter three reveals, sectorial development has been particularly strong within three sectors; forestry, manufacture of textiles, and mining.²⁰ Considering the different characters of these sectors one may find different reasons for the development. From a rational choice or institutionalist point of view, one would expect that the development of standards is linked to reputational concerns or degree of exposure (Campbell 2007). Reflexive regulation on behalf of the state could respond to the exposed violation to secure compliance, and corporations would act to uphold competitive advantage (Deva 2012).

The flexibility of sectorial adapting could consequently indicate that sectorial standards are a good alternative to the global treaty. However, some challenges remain; what about the sectors that are not exposed? What happens when corporations operate in more than one sector? How do states treat corporations from the different sectors? The inequality in regulations and their development raise a series of questions on how the different actors can behave. If the development of regulations is made within sectors rather than globally or nationally, this may limit the diffusion of norms which has been highlighted as central in the effect of international treaties.

²⁰ See above at 2.3.4.

Beyond the unequal development, and despite the promise of sectorial standards, a challenge from a human rights perspective is that regardless of state, sector or corporate characteristics, human rights must be protected. Although one has a specific challenge with e.g. conflict minerals, the protection of rights for those affected by the enterprises should be as good here as in any other field. Or if we turn it around, the presence of specific challenges which have in fact triggered sectorial development of standards does not indicate that similar protections are necessary in other industries. Further, as with the corporate driven standards, there may be a tendency to include only those human rights which are perceived threatened by corporate behavior. This may be countered with a general approach to sectorial standards, building on the operationalization of the PRR framework, and the holistic approach of the SRS (HRC 2011).

4.2 Method and Hypotheses

The overarching question of this chapter is whether alternatives to a global treaty may give greater protection for right-holders than a global treaty. In order to address how the system works considering theories of compliance, this chapter takes a quantitative approach to compare and identify characteristics. Similar to chapter three, the method reflects the aim of the paper to assess the state of the global system. Through testing different hypotheses, the analysis assesses whether human rights language and human rights inclusion are factors of sectorial or global standards. Independent variables which may influence the explanatory power of the model are included to strengthen the analysis.

In addition to testing for explanatory power of the model this chapter examines different hypotheses on the level of corporations and sectors. Due to the characteristics of the data the analysis is not aimed at proving the alternative hypothesis, but rather disproving the null hypothesis (Field 2009). Generally, the null hypothesis is that “there is no effect in the population” (Field 2009:53). Consequently, if there are significant results above .05, the null hypothesis is considered disproved as it is highly unlikely that it will occur. If the data are not significant, the null hypothesis is not proved, but there is a higher chance that the hypothesis will not occur (Field 2009:54).

4.2.1 UN Driven v Corporate Driven

A reoccurring argument is that a UN driven global treaty will hold broader human rights protections than the current system. Building on this presumption, the first alternative hypothesis is that corporate driven standards will give greater human rights protection than a UN driven global treaty. The corresponding null hypothesis is that corporate driven standards will not give greater protection. In order to assess this hypothesis, tests are run on adoption and the strength of human rights protections. Testing adoption for correlations between the drafting and adopting parties will assess whether one is more likely to achieve corporate adoption of standards if they are the drivers.

With regards to the strength of standards, Fransen (2012:172) argues that corporate driven standards hold weaker protections than multi-stakeholder ones. Comparing standards on forestry, clothing, IT-Electronics, and chemicals, Fransen and Conzelmann (2014:16) find that the corporate driven standards in IT-Electronics and chemicals are more lenient than the two other sectors where the drafting had been multi-stakeholder. Although the results were inconclusive on all but sectorial fragmentation, they allow for a hypothesis on the connection between corporate drafting and strength of regulation. These assumptions correspond with the argumentation of Leisinger (2006) and Posner (2014) on the weakness of self-regulation. To assess this relationship, a test will be conducted on the strength of human rights language, inclusion of human rights, and binding character of the standard.

4.2.2 Global v. Sectorial

A second alternative hypothesis reflects on the difference between sectorial and universal standards. Similar to the corporate driven standards, a test will be conducted on the strength of the human rights provisions. As an argument for the sectorial standards is linked to the ability to tailor protection, the analysis will reflect on the strength of the human rights language, scope of inclusion, and the strength of the standard as binding or voluntary. Further, sectorial standards facilitate certification mechanisms as a tool for increasing compliance. As certification mechanisms have been linked to compliance from both an economic and political viewpoint, with an increase in costs, the existence of these will be assessed to-

wards development of new standards in the same field (Auld et al. 2008:194). The benefit of this analysis is that it assesses how certification relates to development of standards. If there is a positive relationship and the standards which hold certification appear strong, this could influence the disproving of the null hypothesis.

Chapter three discussed the development of standards within specific sectors. Looking at the sectorial development from the theory of norm cascading (Gillies 2010; Finnemore and Sikkink 1998) one could expect that the development of one standard within a sector has facilitated the development of other standards within the same sector. Consequently, one could expect to see a development of standards, perhaps with increased protection of human rights. A time-based analysis of the development of human rights protections and the inclusion of treaties or rights within a sector could allow for acceptance of falsification of a null hypothesis of no relationship between the increase in protection and increase in standards. Beyond testing whether one could be witnessing a norm cascade, this approach will address the incrementalist approach of the SRSG, who argues that time will gradually increase the protection of rights (HRC 2011:4).

4.2.3 Exposure

Related to issues of corporate or sectorial development is the rational approach of compliance as a factor of exposure. As discussed above, exposure to consumers as well as CSOs could influence the level of compliance and development of standards (Campbell 2007). Consequently, an alternative hypothesis tests the relationship between development of standards based on degree of exposure, as well as the strength of the human rights provisions included. The null hypothesis is that there is no connection between the degree of exposure, sector, or strength of standards.

4.3 Findings

4.3.1 UN Driven v. Corporate Driven

As visible in Table 2 there is a significant correlation between corporate drafting and corporate adoption of standards. This strengthens the assumption that corporations are likely to

adopt standards they have drafted themselves. A linear regression analysis further identifies this relationship. Significant at the 0.05 level, corporate drafting does increase the likelihood of corporate adoption. However, corporate drafting only explains 11.7 % of the variance indicating that other factors greatly influence corporate adopting.²¹

		Correlations	
		Corporate Adopting	Corporate Drafting
Corporate Adopting	Pearson Correlation	1	,342**
	Sig. (1-tailed)		,001
Corporate Drafting	Pearson Correlation	,342**	1
	Sig. (1-tailed)	,001	

** . Correlation is significant at the 0.01 level (1-tailed).

Table 2: Correlation Corporate Adopting - Corporate Drafting

Testing for strength of the different standards, there is no correlation between corporate or multi-stakeholder initiatives and the strength of human rights provisions. This indicates that the assumption of weaker provisions in global instruments may be false. Further, there is no significant relationship between the strength of the human rights provision and the binding character of the standard. While this could be connected to the fact that a majority of the international standards are voluntary in scope, it is an indication that strong human rights language is not necessarily consistent with strong human rights protections. Considering the tests on the relationship between corporate drafting, corporate adoption, strength and scope of human rights provisions, one cannot disprove the null hypothesis.

4.3.2 Global v. Sectorial

Visible in Figure 6 on page 45, sectorial standards do in fact hold stronger human rights language than universal standards. However, when checked for the inclusion of human

²¹ See Annex II.

rights within the standards, those that are global have a higher degree of full and partial inclusion comparatively to none or only specific. To assess the explanatory factor of sector on the strength and inclusion of human rights, a linear regression analysis was done; however, there were no significant findings to report. This is in itself a finding, as it indicates that it is less likely that sectorial standards will hold stronger human rights protection than universal standards. In other words, the results do not disprove the null hypothesis.

With regards to certification, there is a significant correlation between the strength of the human rights language and existence of certification mechanisms. Although the number of standards which hold certification mechanisms is quite low, lowering the sample size, the correlation is nonetheless interesting. Testing the relationship in a linear regression reveals that certification explains 10.4 percent of the variance in human rights language.²² The existence of a certification mechanism increases the probability that the human rights language will be stronger. Considering theoretical assumptions on the impact of certification mechanisms as method of enforcement the assumptions these findings have some implications on the understanding of human rights protection. However one should note that there is a difference in the impact of certification (Auld et al. 2008).

On the relationship between certification and development of standards, a simple crosstab analysis reveals that all but one of the certification mechanisms can be found within the three sectors holding the majority of the standards. Drawing on the finding on the relationship between certification and strength of human rights language, one could argue that the sectorial standards that have been developed within the dominating sectors are strong, but the data is not conclusive enough to disprove the null hypothesis.

²² See Annex II; this is only significant at the 0.09 level.

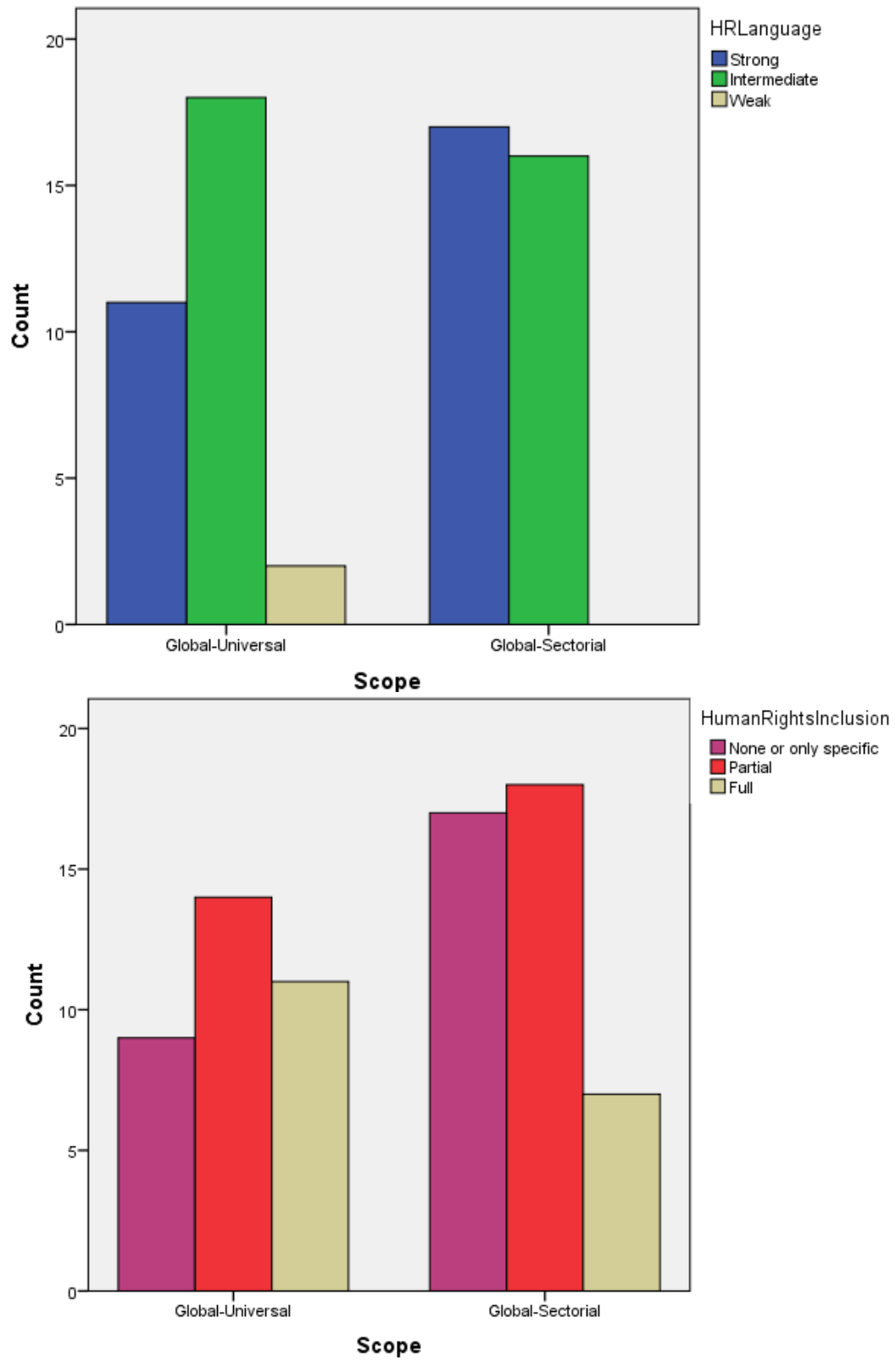
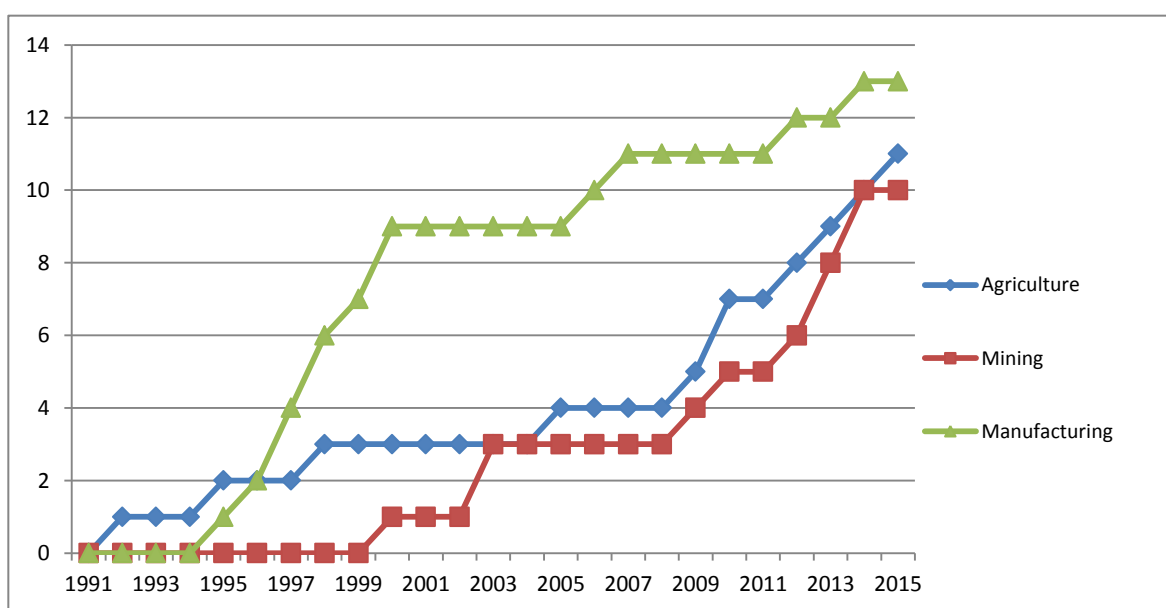


Figure 6: Strength of Human Rights

Further, as the alternative hypothesis questions, there is no link between certification mechanisms and the development of new standards within a sector; i.e. the existence of a certification mechanism does not stop the development of new standards in the same field. Rather, it appears to trigger the development of new mechanisms. This can limit the strength of certification (Auld et al. 2008).

As Graph 2 indicates there have been periods with more rapid expansion of standards. While development in mining and agriculture has been quite similar, manufacturing standards developed early. Checking for human rights language and inclusion of human rights, the development is virtually equally distributed.



Graph 2: Increase in Sectorial Standards (cumulative)

Based on the findings it is difficult to assess whether the null hypothesis is disproved or not. Assessing the strength of the human rights provisions, one could argue that the data is not sufficient to disprove the null hypothesis given the degree of human rights inclusion. However, on certification, the data supports the alternative hypothesis as it solidifies strength to the sectorial standards. With regards to the norm cascade, the developments in

the fields of agriculture, mining, and manufacturing, indicate intra-sectorial cascades, weakening the alternative hypothesis. It is likely that one could find support for the alternative hypothesis; however, given the inconsistency of significant relationships, it is difficult to disprove the null hypothesis.

4.3.3 Exposure

A crosstab of sectors and exposure reveals that almost all the sectors which have seen a development of standards (with the exception of half of the standards on mining and quarrying) are exposed to CSO or consumer pressure. As there is no registered information on the sectors which have yet to develop standards, one cannot infer causality. However, it is an indication of a connection between exposure and sectorial development. Further, there is significant²³ correlation between strong human rights language and sectorial exposure. As shown in Table 3, it explains 15.6 % of the variance in human rights language, supporting the assumption of a positive link.

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.395 ^a	.156	.121	.345

a. Predictors: (Constant), HRLanguage

Table 3: Exposure - Human Rights Language

Consequently, one could argue that the null hypothesis of no connection is disproved, as it is likely that one will develop standards if operating within an exposed sector. An interesting implication would be to assess what this means for non-exposed sectors; that they will not develop or that other factors matter more. Further, one should remember that the sectors that have yet to develop standards may be exposed to consumer pressure. Before concluding on causality further tests would have to be run.

²³ At the 0.05 level.

4.4 Implications

The analysis of the data reveals that corporations are prone to adopt self-regulation or regulation from other corporations. Further, there is not significant support for an assumption that multi-stakeholder initiatives give greater protection of human rights than corporate driven standards. However, the lack of correlation between multi-stakeholder initiatives and strength of human rights protections does not in itself say that corporate driven standards hold better protections. While certification mechanisms support the strength of both corporate and sectorial standards, their varying effect challenges the assumption (Auld et al. 2008:201ff). The data are not conclusive in establishing the relationship which makes it difficult to say something specific about the connection. Corporate adopting is not the same as corporate compliance. Consequently, one cannot establish whether corporate standards are a sufficient alternative to a UN driven treaty in protection, but one can establish that corporate adoption is greater if corporations are the drafters. In the debate on the treaty process, corporate participation may arguably be important to secure corporate buy-in.

Reflecting on the enforcement of standards, the connection between certification and human rights language could indicate that strong human rights language can lead to effective protection if there are certification mechanisms. Considering the connection between certification and the three dominating sectors the assumption of a link between certification and halt in development of standards is considered disproved. In light of the assumption on the strength of certification in shaping behavior, through amongst other thing determining access to markets, this is an interesting observation. If it is consistent at the global level, one could perhaps question whether new mechanisms are created to avoid compliance with those in existence and if a variety of standards with certification limits the cost of non-compliance. However, these are just speculations, and more research is necessary to address them. Overall, certification mechanism should be considered a strength of the sectorial standards.

Considering enforcement, sectorial standards appear to be a possible alternative to universal standards given the strength of certification mechanisms and the strength of the lan-

guage in human rights provisions. However, from a human rights perspective, the lack of development in a majority of economic sectors, which may or may not be exposed to CSOs or consumer pressure, raises some concerns. Given the finding that strong human rights language is not correlated with high inclusion of human rights, understood as reference to human rights treaties and substantive human rights provisions,²⁴ one diminishes the value of a strong language. As such, the use of strong language cannot be seen as a strong human rights protection in itself. Further, the degree of inclusion of human rights protections is higher in the universal standards. Whether the effective protection of the included human rights is stronger in the sectorial standards is not clear. Consequently, one could argue that a universal treaty would give broader human rights protection than sectorial standards.

Balancing the different observations, universal standards appear to hold the greatest human rights protection through the breadth in their inclusion; given compliance with the provisions as well as clarification in the division of corporate and state obligations. Where the sectorial standards are limited, is the degree of self-regulation. In the fields of agriculture, mining and quarrying, and manufacture, standards with certification mechanisms have developed. However, in the remainder of the sectors only a limited number or no protections at all have evolved. This could be due to limited exposure or the absence of early movers as norm entrepreneurs. Consequently, from a human rights perspective universal standards hold more promise. The inclusion of states and the link to international law gives additional strength to the argument. However, focusing on a global universal standard should not discourage sectorial development as they may be complementary.

4.5 Conclusion

Assessing the alternatives to a universal global treaty reveals that there are some challenges to the universal treaty which other alternatives may be better at addressing. With regards to the strength of the human rights protections and the possibility of enforcement, it appears

²⁴ See chapter 3.2 above.

that sectorial standards through the use of certification mechanisms may be an important contribution. Additionally, the willingness of corporations to adopt standards which were drafted by them or other corporations, is an important observation when considering how to secure corporate buy-in. Getting corporations to adopt a universal treaty is an issue which is often raised in the debate on the way ahead, and was frequently discussed at the third annual UN Forum on Business and Human Rights in Geneva.²⁵ However, the strength of the alternatives do not seem to balance out the importance of securing a global framework, both to establish universal standards on minimum protection, but also to address inconsistencies in the different spheres of international law. As changes to the regime of international law will require state participation and a unified approach, it is difficult to envision a holistic increase in protection of rights without the treaty. This leads to a preliminary conclusion of a combination of a global treaty and sectorial enforcement. The possible legislative impact of a universal treaty will be assessed in the following chapter.

²⁵ Dec. 1-3, 2014.

5 Do International Standards Have an Impact?

Identifying the system of international standards and alternative methods of regulation allows for a description of which protections already exist. However, it gives less insight into whether or not these protections work as intended. In considering the debate on a binding treaty on BHR, one should reflect on how current regulatory systems have influenced state and corporate behavior. Consequently, as a final examination on how to protect human rights in the light of state and corporate violations, this chapter analyzes legislative effects of the WHO Framework Convention on Tobacco Control (FWCTC).

5.1 Background - What is the FWCTC?

The FWCTC is an international treaty on regulation of tobacco control. It marks the first use of the World Health Assembly's regulating powers established in the WHO constitution of 1948 (WHO 2009).²⁶ As an international health organization WHO draws its mandate from the UN Charter and the human right to health, established both in UDHR and ICESCR²⁷. The strong link between the right to health and control over tobacco regulation is solidified in the Open Working Group's proposal to the post-2015 Sustainable Development Goals (SDGs). In the SDGs continued implementation of the FWCTC is included as a target under goal 3a to "ensure healthy lives and promote well-being for all at all ages" (OWG 2014:13).

The FWCTC entered into force Feb. 27 2005, and with 180 parties since its adoption it has reached nearly universal ratification. Concerns about the health risk of the use of tobacco peaked in the early 90's as reports showed that tobacco was the number one cause of premature deaths (WHO 2015). As a response to the rapidly increasing global health challenges

²⁶ See also WHO Constitution art 19.

²⁷ See UDHR art 25 and ICESCR art 12.

connected to the use of tobacco, the World Health Assembly initiated work on the FWCTC in 1996 (WHO 2015). Following the establishment of a technical working group in 1999, negotiations on the convention started in 2000, and the World Health Assembly adopted the final version in 2003. The aim of the convention is to lower the demand and usage of tobacco products. Core provisions include the use of price and non-price measures to “reduce the demand for tobacco.”²⁸ This includes regulation on content, labeling, communication, and advertising. It consequently gives states room and responsibility to act to limit the efforts of companies.

Although the convention is only binding on states, it arguably affects the companies’ enjoyment of rights as it sets global boundaries for how they can do business. Provisions regulating how one can market products, and which limits the states can set on branding, packaging, and advertisement, are arguably directly binding not only on states but also on corporations (given that the protections are implemented in the states). An illustration of the convention’s relevance to business is the current corporate legal challenge to Australia and Uruguay’s implementation of regulation concerning plain packaging. This is firmly supported by the FWCTC. However, following the enactment of regulation, Philip Morris issued a request for arbitration claiming indirect expropriation of their investment in the states.²⁹ Beyond reflecting the tension between the different regulatory systems of investment and human rights law, it points to the effect the FWCTC can have, or has, on corporate behavior.

5.1.1 Changes in Policy and Regulation

Changes in regulation have not only occurred in Australia and Uruguay. A study from 2013 shows that following the entry into force of the FWCTC, the amount of cigarette packages with health warning labels jumped from 8.42 to 22.33 percent from 2003-2013 compara-

²⁸ FWCTC page V.

²⁹ See *Philip Morris v. Uruguay* and *Philip Morris v. Australia*.

tively to 1984-2003 (Sanders-Jackson et al. 2013). This indicates that there may have been an effect of the FWCTC on the development of regulation. Whether these developments stem from the treaty itself or from the treaty process may be less clear, as there may be different explanations to why regulation developed; the adoption or ratification of the FWCTC, the negotiation process of the treaty, and external factors.

With regards to the effect of ratification, a rationale with a treaty is that states will alter their behavior to comply with the provisions in it (Posner 2014:60). Following the VCLT art 26, states must perform the treaty in good faith. Consequently, one could expect that the ratification may have an impact on policy. Arguing that the negotiation process for the FWCTC was influential in policy adoption, Wipfli and Huang (2011:113) find that there was a rapid diffusion of norms following the initiation of the treaty process by the WHO. Using data on adaption and adoption of policies regulating tobacco, they find that a majority of states had adopted at least one new policy on tobacco regulation in the period from 1995-2005. Although focusing their research on three thematic groups of policies - advertisement, warning labels, and public smoke restrictions, their findings indicate that the treaty negotiations process triggered an increase in policy adoption. Despite not being debated by Wipfli and Huang, this could arguably also be linked to a rational state strategy of adapting behavior prior to ratifications in order to reduce the cost of post-adoption compliance (Posner 2014:60). Beyond the treaty process, external factors may play a role in policy change. Wipfli and Huang (2011) identify some that had a significant impact on policy adoption in the negotiations phase of the FWCTC; GNI, population size, democracy, geographical region, tobacco production within country, gender smoking prevalence, and GLOBALink³⁰ participation.

³⁰ GLOBALink is an international control community for tobacco control and global health

5.1.2 Observed Progress

As the FWCTC recently celebrated its ten-year anniversary, different analyses of the effect of the treaty have been conducted. In their research on the effectiveness of tax and price policies Chaloupka, Straif, and Leon (2010) find a positive relationship between increase in price and decrease in demand of tobacco. Similarly, Yach (2014) argues that the WHO framework has contributed strongly to the decrease in demand for tobacco. He specifically points to what the WHO has recognized as the most efficient evidence-based tools for reducing the demand - MPOWER (WHO 2013:11f). These measures include; Monitoring tobacco use and tobacco control policies; Protecting people from the dangers of tobacco smoke; Offering help to quit tobacco; Warning the public about the dangers of tobacco; Enforcing bans on tobacco advertising, promotion and sponsorship; and Raising tobacco taxes (WHO 2008). The yearly reports from the WHO reveal that an increasing amount of parties are adapting to the framework (WHO 2013).

However, despite the reduction in demand, and the increase in ratifications, there seems to be a discrepancy between the developed and the developing countries. While smoking rates are going down in the developed world, the use of tobacco products is increasing in developing countries, particularly in China (Tobacco Atlas 2015). Further, in a clip from 2008, a tobacco executive stated that this was “probably the most profitable”³¹ time ever. Numbers from the *Campaign for Tobacco-Free Kids* (2014) similarly reveal that the value of cigarette production is surpassing the retail value. On a global scale, large production companies, like Philip Morris, are outgrowing the local brands of tobacco (Campaign for Tobacco-Free Kids 2014). An example of the persistent use of tobacco is found in Indonesia, where school kids use tobacco on a daily basis; perhaps most famously the child that was addicted to tobacco from the age of two.³²

³¹ Last week with John Oliver (2015) at 2:19.

³² Last week with John Oliver (2015) at 3:00.

Reflecting on how an international treaty may influence the development of rights within a community has been a reoccurring issue in the human rights field. Risse and Sikkink (1999:17ff) have developed a spiral model, aiming at explaining the diffusion of international norms into domestic legislation and opinion. As a foundational theory within human rights, it assumes that in order for norm diffusion to be effective there has to be both international and national push from civil society. Simmons (2009:153) argues that the impact of an international treaty will be greater in transitional democracies, where the political leeway may be largest. Consequently, one should expect a greater change in behavior in countries in a developing phase rather than within those with more stable political regimes. Linking this assumption to the question of implementation of the provisions within the FWCTC, one would assume a greater change in lower or middle-income countries. From an economic perspective, the cost of ratification will be lower for the states that already have provisional protection in order at the time of ratification. This might explain some of the variance in the effect of the treaty - as there is less adaption to be done.

5.2 Theories of Impact

Addressing the creation and impact of international norms, Finnemore and Sikkink (1998:895ff) identify a three stage process from *norm emergence* through a *norm cascade* to *internalization*. Norm emergence is initiated by *norm entrepreneurs* or early actors driven by persuasion of the necessity of a given norm. A norm cascade is described as a process of “broad ...acceptance” (Finnemore and Sikkink, 1998:895) of the norm following pressure from the early adopters. Understanding the emergence of international norms through this model, one would argue that there are some norm entrepreneurs which generate a norm cascade based on the cost of non-compliance. As a result of broad acceptance of the norm, it becomes internalized in domestic or corporate policies. Gillies (2010) applies the framework to the emergence of transparency norms within the oil sector, where the early actions of British Petroleum (BP) in increasing transparency in their operations in Angola led to a cascade of increased transparency and regulation within the sector. Consequently, it became more challenging to maintain a lower level of transparency. Using Wipfli and Huang’s (2011) findings, one could debate whether the WHO is a norm entre-

preneur or if the FWCTC is part of a norm cascade. Following their argumentation, it appears that the process of negotiation was a driver of regulatory change, indicating that the movement within the WHO to push for change was a tipping point triggering the following norm cascade.

The challenge of withstanding a norm cascade can be linked to elements of rational choice theory. As foreshadowed, Gillies argues that the reputational concerns of oil sector corporations increased the cost of not adopting codes of conduct which focus on transparency; “transparency served the reputational agendas of several prominent international actors” (Gillies 2010:104). Consequently, it was economically rational for the corporations to adopt a policy on transparency despite the possible costs of adaption. As competitors adapt to regulation the weighted benefit of non-compliance is balanced against a competitive advantage. Balancing of costs and benefits is the core of rational choice theory. Scholars who write within this field draw on the assumption that all actors, in this case corporations and states, will do a cost-benefit analysis (based on perfect information) before changing behavior. In his discussion on the institutional frameworks of corporate regulations Campbell (2007:947) draws on these assumptions and argues that given rational choice theories, one should assume that corporations will always act in socially irresponsible ways to secure the highest attainable profit. However, this is not always the case. Some corporations are frontrunners in the development of international regulation. Trying to understand this behavior, Gillies (2010) identifies the competitive advantage of early movement; attracting goodwill and participation in the framing process. A corporation or state’s ability to move first on these issues can be limited by the economic or institutional structures they operate within.

Drawing on institutionalism, Campbell (2007:954) argues that the institutional structures can enable socially responsible behavior. Using historical empirical examples from the meat packing industry and work place security, he links change in corporate behavior to regulatory measures from the state. Institutional constraints or institutional leeway can be reflected in Simmons’ (2009:126f) argument on the impact of rights framing. Through a

study on the effect of treaty ratification and a focus on mobilization, Simmons argues that the existence of a treaty enables CSOs within a state, alone or in cooperation with international CSOs, to claim an increased protection of human rights. This can be linked to the institutional protections an international treaty system creates. Advantages of the existence of international institutions can thus be an argument for the necessity of binding regulations, as with the FWCTC.

The idea of institutional constraints is not necessarily in conflict with the structures identified by Finnemore and Sikkink (1998:894). Arguably, state regulation could be an expression of a norm cascade pushed through government by norm entrepreneurs. The legally binding character of regulations increases the cost of non-compliance – given enforcement, and the internalization of the norm into the business. Within the discussion on institutional constraints is the question of sectorial exposure. Deva (2012:193) envisions a framework where social naming and shaming is a central sanction in an integrated approach of regulation. In order for strategies of naming and shaming to be effective, they have to have an impact on the income or economy of the corporation. Naming and shaming is to a large extent targeted at altering consumer behavior. Consequently, the corporations have to be exposed to consumers. As witnessed with the global campaign on palm oil, where consumers strategically avoided products which included palm oil due to the expressed reason of the use of palm oil, the cost of non-adaptation triggered alterations. While naming and shaming may have an impact where consumer behavior has the power through consumption, it is less effective where corporations are less or not exposed to consumers. Consequently, it can be limited in triggering all-round behavioral change.

5.3 Method

The FWCTC was selected for analysis for several reasons. First, it is an internationally binding document which enables state regulation on corporations as well as creating obligations on corporations. Second, as it is celebrating its tenth anniversary this spring, a sufficient amount of time has passed to yield a valuable analysis. Third, as it is monitored by the WHO, there is readily available information on country development on relevant issues.

5.3.1 Assumption and Hypothesis

The research question for this analysis is whether international standards have an effect, specifically, whether the FWCTC has had a legislative effect on domestic legislation. Domestic legislation (DomesticLeg) serves as the dependent variables in the analysis. Having domestic legislation as a dependent variable enables understanding of development of adaption. Similar to the work of Helfer and Voeten (2014) on movement on LGBT issues in Europe in relation to landmark rulings at the ECtHR, the analysis looks at whether ratification of the FWCTC has had an observable effect on adoption of domestic legislation and regulation. Both updated regulation and adoption of laws are included in the analysis as regulation signals adaptation through policy changes in addition to law. Further, including regulations expands the understanding of development, as it captures broader state measures on tobacco control issues. However, as states regulate differently, there may be some instances where one law in one country might hold the same protections as three regulations in another. This could inflate the numbers, but as Tobacco Control Laws (2015), which is the source of the data, only assesses regulation in the fields of smoke free places, tobacco advertising, promotion and sponsorship, and tobacco packaging and labelling, rather than general legislation on tobacco, the differences are limited. Additionally, these are the same legislative and policy fields that were surveyed by Wipfli and Huang (2011:108). Although there are some similarities, the data in this analysis have not been weighted as strong or weak due to limitations in time. Further research could include this aspect to attain more disaggregated data and in-depth understanding.

In order to address the question of what explains the difference in compliance with the FWCTC, and following the work of Wipfli and Huang (2011), data has been collected on the year of ratification of the convention, mean years of education, GNI per capita, and entry into force of domestic legislation on tobacco control. Further, the data can be disaggregated by geographic region. Analyzing whether the variables correlate with domestic legislation as the dependent variable allows for identification of possible connections between action and impact. If treaty ratification and state of existing legislation are strongly

linked, this should be included in the discussion on the future of the binding treaty on BHR - as a global treaty that authenticates state regulation of corporate behavior.

With domestic legislation as the dependent variable, tests are run on whether there are regional, financially, or development triggered differences. Given the observations on the rate of smoking in developing v developed countries, one would expect a difference in behavior when adapting to the FWCTC. Further, drawing on the assumption of cost of adopting, an initial test is conducted on the existence of a connection between adoption in the early 1990s, adoption in the negotiations phase (1999-2003), and adoption following the conventions entry into force. Ultimately the analysis answers two alternative hypotheses:

H1: The FWCTC has generated adoption of new regulation/legislation

H0: The FWCTC has not generated adoption of new regulation/legislation

H2: There is a significant difference in adoption of regulation/legislation between developed and developing countries

HO: There is not a significant difference in adoption of regulation/legislation between developed and developing countries

5.3.2 Collection of Data

Due to limitations of time the analysis is restricted to a sample size of 63 countries.³³ These are strategically selected based on region, availability of data, and GNI. Consequently, there may be some selection bias which could influence the result, but given a transparent process - and availability of the information gathered, the data is verifiable. The selection is representative of the different regions, and the balance of wealth; within the region and globally. All countries are members of the FWCTC.

³³ See Annex III for list of countries.

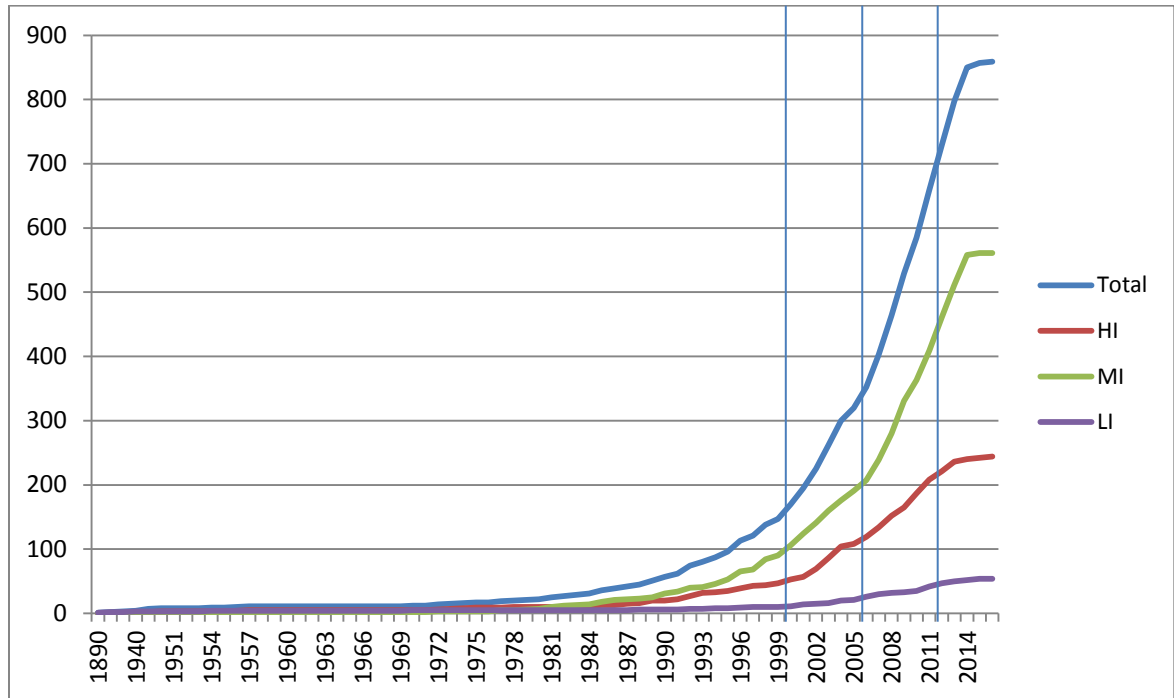
Data has been collected from different existing databases. Information on legislation was accessed at Tobacco Control Laws (2015), as they have systematically reviewed legislation on tobacco in all but 13 of the states in this analysis. Further, they hold data on legislation in the remaining 13, allowing for counting and classifying the development. Data on GNI was collected from the World Bank (2015c) database, while data on HDI and Mean Years of Education was collected from the UNDP (2014). To measure democracy, the analysis uses Freedom House (2015), as it was the only measure of democracy which holds information on all the countries, and for every year except those prior to 1972.

Relying on a second party analysis of legislation raises some issues. However, due to the time constraint of this project this was chosen as the preferable alternative as it allows for a comparable analysis of regulations. Further, as data for the different variables are collected from one source, it is easy to reproduce and is more likely to be internally consistent. Using data from the UNDP and the World Bank may be less problematic than Tobacco Control Laws as these are the result of a global development of indicators with standardized methods. Further, they have readily accessible documents on method of collection and analysis. Freedom House has been criticized amongst other things, for being politicized. However, if one is aware of the criticism and a potential bias, it is an acceptable indicator for comparison as the aim is not to assess democracy in itself.

5.4 Findings

Graph 3 shown below visualizes the growth in domestic regulation on tobacco control. The first line marks the year 1999, when the work on the FWCTC was initiated. The second line marks the year 2005, the year the treaty entered into force. Consistent with the findings of Wipfli and Huang (2011), there appears to be an increase in legislation and regulations in the drafting process of the FWCTC. Further, there is a rapid increase in legislation following the entry into force of the convention. Although it is a very recent trend, the rapid expansion seems to be slowing down. The cause of an eventual slowdown is not clear. Observing the increase in legislation and regulation it might indicate that countries have

adapted their regulation to comply with the treaty and that therefore the need for adopting new legislation lessens. However, this is highly speculative.



Graph 3: Growth in International Legislation and Regulation on Tobacco. Cumulative number of regulations/legislation by year

The slow-down may be seen in conjunction with the third line, marking the year 2011. In 2010 Philip Morris brought Uruguay to arbitration at the International Centre for Settlement of Investment Disputes (ICSID),³⁴ and in 2012 Philip Morris brought Australia to arbitration at the Permanent Court of Arbitration (PCA)³⁵ following domestic trials. The reason for the inclusion of the line is to see if there are indications of a *chilling effect* following the arbitration cases. A *chilling effect* is understood as neglecting to introduce new laws or regulations due to the fear of counter law suits. The response of Philip Morris can be seen as a backlash to the expansion of domestic legislation. Already in 2003 a senior

³⁴ *Philip Morris v. Uruguay*.

³⁵ *Philip Morris v. Australia*.

executive expressed concern that work on the FWCTC “has had a significant influence on us, simply because it has accelerated the pace of regulation in individual countries” (Davies 2003 in Wipfli and Huang 2011:108).

A test for correlation, shown in Table 4, confirms the observed development. It shows a significant relationship between the two, supporting the assumption that the increase in domestic regulation correlates to ratification. The rate reveals that ratification increases the chance of development of new regulation by 22.6%.

		Correlations	
		DomesticLeg	Ratification
DomesticLeg	Pearson Correlation	1	.226**
	Sig. (2-tailed)		.000
	N	443	443
Ratification	Pearson Correlation	.226**	1
	Sig. (2-tailed)	.000	
	N	443	443

** . Correlation is significant at the 0.01 level (2-tailed).

Table 4: Correlation Domestic Legislation - Ratification

As the correlation between domestic legislation and ratification is strong, a test was done to check whether states that had adopted legislation prior to the negotiation on the FWCTC, continued to adopt legislation after the work on the treaty was initiated. Additionally, tests were run on whether there was a link between existing legislation and adoption of regulations following the convention’s entry into force. In line with the findings of Wipfli and Huang, and visible from Graph 3, there was an increase in regulation/legislation following the start of negotiation. However, when tested for whether or not the state had adopted legislation prior to negotiations, the assumption was somewhat weakened as almost all of the states in the sample adopted regulation between 1990 and 1998.³⁶ Only one state has not

³⁶ See Annex III.

adopted regulation, and only two states adopted one or less following 1998. Additionally, only three states have yet to adopt regulation following the entry into force of the FWCTC. Further, the regression analysis reveals that ratification does impact adoption of regulation and legislation on tobacco control, explaining 5.1% of the variance. The general trend appears to be that countries adopt an increasing amount of regulations and legislation following their ratification of the treaty. Introducing control variables to the analysis adds little to the understanding of the development as most are not statistically significant. The only independent variable that is statistically significant is GNI. GNI explains 4.8% of the variance, indicating that an increase in GNI increases the likelihood of domestic legislation.³⁷ Additionally, level of democracy, while not statistically significant at the 0.01 or 0.05 levels, may influence development of regulation; with more democratic countries being prone to hold higher protections.³⁸ However, to get a more comprehensive understanding of the impact of the FWCTC, more research is necessary.

When tested against each other, the independent variables behave consistent with expectations on income group, mean years of schooling, level of democracy, and HDI. Consistent with expectations refers to observations on the relationship between GNI, democracy, and HDI in international ratings. This indicates that these are modelled correctly, but have no significant impact on why states develop national legislation. With regards to the impact on the overall analysis, this finding of no connection strengthens the assumption of influence and importance of the FWCTC.

5.5 Implications

What is interesting about the findings is the strong link between ratification and adoption of legislation and/or regulation. Visible in all income groups and regions - despite differences in GNI, mean years of education, or human development, out of the measured variables the FWCTC appears to be a significant driver of the development of new domestic legislation.

³⁷ See Annex III.

³⁸ See Annex III.

Combining the findings here with those of Wipfli and Huang (2011) further strengthens the assumption. Consequently, one can establish that in the first alternative hypothesis, the null hypothesis is disproved, as the FWCTC does appear to have an impact on the development of new legislation and/or regulation. Further, the null hypothesis in the second alternative hypothesis is not disproved, as there is limited evidence that supports the assumed difference in adoption.

In the debate on the global treaty this can support the argument of those in favor of a universal treaty, but also those in favor of a sectorial agreement. As the form of regulation is a treaty, those who back the work on a global universal treaty will arguably find support for the argument of increase in protection with hard law. However, as the FWCTC is a sectorial treaty with global reach, one could argue that a universal treaty will not have the same effect as it has to cover all sectors. Reflecting on the existing global human rights treaties, and the debate on their effectiveness, one might find more support for specific regulations which are more easily enforced.

What becomes apparent from the data, due to the limitations of the model to explain the variance in adoption, is that much is connected to domestic sphere as anticipated by Hillebrecht (2014) and Simmons (2009). However, as quantification of domestic or sociological factors can be challenging it is difficult to include these factors in the analysis. Instead one should rely on qualitative observations to understand some of the influence of these external factors. A relevant study on smoking/tobacco regulation was done in the USA by Kagan and Skolnick (1993). They find that securing compliance with new regulations on smoking in public places was surprisingly uncomplicated to implement. The link to public health and the development of “norms on civility” (Kagan and Skolnick 1993:79) facilitated the simplicity of implementing regulations on smoking. Given that the FWCTC was drafted and adopted by the WHO, the link to public health issues and policies is clear. Domestic movement on accepting smoking as a health issue may further have influenced the impact of the treaty. As the findings reveal, almost all countries had adopted regulations on

tobacco control prior to the treaty, the treaty thus may have become a tool to further implement and secure a general approach.

On the diffusion of norms, the existence of regulation prior to the negotiation and adoption of the convention may have facilitated the continued strength of its protections. As the convention was established following actions of early movers this can to a degree be viewed as international pressure enhancing domestic protections. As such, the international move on addressing smoking as a public health issue may have been key to the success of the convention as a combined effort against tobacco production and consumption. Consequently, the convention can be part of a norm cascade (Wipfli and Huang 2011). Through creating an international institutional framework, one is enhancing compliant behavior. The impact of the establishment of the institutional framework can be seen through the countermovement of tobacco corporations, generating opposition in international channels.

Despite the success of the convention, following the international arbitration cases driven by Philip Morris, there could appear to be a growing backlash against the strengthening of regulations. As discussed in the previous chapters, balancing different spheres of international law can be challenging, and it will be interesting to see how countries react to the threat of corporate suits against health policy. The FWCTC may be a tool in this context as it can support an argument of non-discriminatory measures based on the framework almost universally accepted to improve public health and human rights. In fact, in the pending case of Philip Morris v. Uruguay, the FWCTC has been explicitly mentioned by Uruguay.³⁹ From a human rights perspective, the convention could consequently play an important role in securing the protection of public policies from international lawsuits, enhancing the protection of human rights.

³⁹ *Philip Morris v. Uruguay* para 158 and 162.

5.6 Conclusion

The FWCTC has been an important driver of the development of new legislation on tobacco control. Legislation and regulation has been developed in a majority of countries following the entry into force or domestic ratification of the treaty, regardless of state characteristics. Although the data should not be considered as an ultimate test of the effect of the convention, it does strengthen the argument for continued work on a global treaty. If the current indication of regulatory slow-down continues, this could strengthen the observation on the importance of the FWCTC as its introduction triggered massive adaption, but further research is necessary. The development and implications of the current investment arbitrations brought by Phillip Morris against Australia and Uruguay should be considered in this context as these may contribute to regulatory chills. Further quantitative research could assess the outcome of the treaty measured by a proxy for success or another dependent variable, e.g. smoking rates. The data could also be reviewed against qualitative reports on progress from the WHO, to see if the increase in regulations has the desired effect on public health.

6 Implications – Concluding Remarks

This paper has examined the current system regulating state and corporate behavior with regards to human rights. The aim of the analysis was to identify strengths and weaknesses of the system and use the observations to comment on how the international society should proceed when working for stronger human rights protections. As chapter three concludes, one can establish that there is a protection gap. Efforts should be made to close this gap. While the UNGPs may already have made an important contribution through expanding the scope of rights which merit corporate protection, it appears as if a harder regulatory system is necessary. In chapter four, the analysis showed that while corporate driven regulations may entail greater likelihood of corporate adoption it does not secure greater rights protection. Similarly, the voluntary scope of the UNGPs can have the consequence of limiting the diffusion of norms as it is not sufficiently clear on the relationship between corporations and states. As shown with the legislative success of the FWCTC, an international treaty may have a large effect on domestic change, which will be imperative in changing actual behavior. But a treaty is not an easy way out. Not only will there be challenges in drafting and securing adoption, but clarification issues regarding regulation of corporation, the scope of state responsibility with regards to MNC, balancing spheres of international law, and the scope of rights to be protected. As experience with the UN Norms reveals, this will most likely be a challenging exercise.

Before further addressing implications of the findings, some limitations of the analysis should be considered. The approach of the article was to quantitatively assess the state of the current system on human rights and business. Inherently in choosing a quantitative method, the depth of the analysis is limited. Consequently, variations may have declined through operationalization of concepts and rights. In order to get a more in depth understanding of the variations, the analysis could be complemented by more qualitative studies into specific sectors or sub-sectors. Beyond the methodological constraints, the timeframe

of the issues addressed is quite narrow. Given what seems to be an important impact of the ILO Fundamental Principles of Rights at Work it is difficult to fully incorporate the foreshadowed impact of the UNGPs with what is claimed to be a more holistic approach. Additionally, one has to consider that existing regulation does not automatically imply compliance. Assessing the behavior of states and corporations against the law will add insight to understanding how to best approach and close the gap.

However, while we are waiting to see if and how the UNGPs may impact current or new standards, the need for increasing the protection of rights is imminent. While work on a possible treaty may be challenging, the analysis has shown little support for arguments against it. The current system has a protection gap, and the necessity of clarification of responsibility and a uniform framework can address these challenges. Consequently, one could argue that it boils down to a question of what the aim of the treaty is. If the aim is to effectively create protections for right holders, the preferred option might be to create sectorial standards which are more specific and therefore perhaps more easy to put into action. This is in line with the critique that has been raised on the human rights treaties and the challenge of operationalizing protections (Merry 2011). Within the UN system, and visible through the UNGPs, there is a push for development of indicators highlighting the added value of operationalization and measuring progress (Chan 2007; HRI 2008). However, if the aim is to simultaneously create a global framework the impact of the FWCTC on the development of new legislation is also important. Following the arguments of diffusion of norms (Gillies 2011), one could consider that through creating an international institutional framework, the rights of those affected may increase. It would allow for clarification of state and corporate responsibility, and contribute to the discussion on the scope of corporate duties. Further, as shown with the FWCTC, it could generate a new norm cascade that may significantly improve the protection of human rights.

As the current battle between Philip Morris and Australia and Uruguay reveals, balancing the different regulatory regimes will be important. With regards to business, this may be particularly linked to the development of the investment regime due to the breadth of inves-

tor rights (and the financial crisis in 2008). Additionally, the ever increasing global market calls for a universal framework. Here, a treaty would be valuable. A solution could be to combine the two alternatives and create a global universal treaty which establishes the framework on how state and corporate duties are to be balanced both between themselves, and between the different legislative regimes, and use sectorial treaties to establish specific minimum protections based on fundamental human rights. This would ensure a more uniform approach to the issue of corporate human rights violations, which should be in the interest of both states and corporations. For corporations it enhances predictability through a clear expression of expected behavior as well as binding obligations, while for states it may enable new policies.

To sum up, work on the global, universal treaty appears to be an important step to ensure increased human rights protection. Not only can it ensure universal protection, but it can clarify obligations of the different parties and balance spheres of international law. In the reality of *hyperglobalization* (Rodrik 2011), this will be important. As the issue in question is human rights violations, human rights protection must remain the primary concern. Given the human rights focus, continued work on a global treaty appears to be a preferable option, perhaps particularly if accompanied by sectorial specifications. This combination will make the global system simpler to use and contribute to closing the gap between state, corporate, and individual rights and duties.

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CEDAW International Convention on Elimination of all forms of Discrimination Against Women, New York, Dec. 18, 1979

CERD International Convention on Elimination of All Forms of Racial Discrimination, Mar. 7, 1966

CRC Convention on the Rights of the Child, New York, Nov. 20, 1989

CRPD Convention on the Rights of Persons with Disabilities, New York, Dec. 13, 2006

FWCTC	Framework Convention on Tobacco Control, Geneva, May 21, 2003
ICCPR	International Covenant on Civil and Political Rights, New York, Dec. 16, 1966
ICESCR	International Covenant on Economic Social and Cultural Rights, New York, Dec. 16, 1966
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, New York, Nov. 18, 1990
UDHR	Universal Declaration of Human Rights, GA Res. 217A (III), 1948
VCLT	Vienna Convention on the Law of Treaties, Vienna, May 23, 1969
WHO	World Health Organization Constitution, New York, July 22, 1946

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Annex I – Chapter Three

3.3.4 Sectors:

Sectors included in database, those with standards in bold:

Agriculture, forestry and fishing

Mining and quarrying

Manufacturing

Electricity, gas, steam and air conditioning supply

Water supply; sewerage, waste management and remediation activities

Construction

Wholesale and retail trade; repair of motor vehicles and motorcycles

Transportation and storage

Accommodation and food service activities

Information and communication

Financial and insurance activities

Real estate activities

Professional, scientific and technical activities

Administrative and support service activities

Public administration and defense; compulsory social security

Education

Human health and social work activities

Arts, entertainment and recreation

Other service activities

Activities of households as employers; undifferentiated goods- and services-producing activities of households for own use

Activities of extraterritorial organizations and bodies

3.3.6 Human Rights Treaties

		Entry Into Force	Strength	Treaties	Nr. Of Treaties	HR Inclusion
Entry Into Force	Pearson Correlation	1	-,145	,471**	,301**	-,014
	Sig. (2-tailed)		,214	,000	,007	,904
	N	78	75	78	78	74
Strength	Pearson Correlation	-,145	1	-,099	-,087	-,075
	Sig. (2-tailed)	,214		,387	,444	,524
	N	75	79	79	79	74
Treaties	Pearson Correlation	,471**	-,099	1	,153	,438**
	Sig. (2-tailed)	,000	,387		,169	,000
	N	78	79	82	82	77
Nr. Of Treaties	Pearson Correlation	,301**	-,087	,153	1	-,014
	Sig. (2-tailed)	,007	,444	,169		,904
	N	78	79	82	82	77
HR Inclusion	Pearson Correlation	-,014	-,075	,438**	-,014	1
	Sig. (2-tailed)	,904	,524	,000	,904	
	N	74	74	77	77	77

** . Correlation is significant at the 0.01 level (2-tailed).

3.3.7 Enforcement

Complaints

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	68	82,9	82,9	82,9
	Yes	14	17,1	17,1	100,0
	Total	82	100,0	100,0	

Certification

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	50	61,0	61,0	61,0
	Yes	32	39,0	39,0	100,0
	Total	82	100,0	100,0	

Reporting

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	44	53,7	53,7	53,7
	Yes	38	46,3	46,3	100,0
	Total	82	100,0	100,0	

IndependenceReporting

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	10	12,2	34,5	34,5
	Partially	6	7,3	20,7	55,2
	No	13	15,9	44,8	100,0
	Total	29	35,4	100,0	
Missing	System	53	64,6		
Total		82	100,0		

Correlations

		EntryIntoForce	Reporting	Complaints	Certification	Scope	Strength
EntryIntoForce	Pearson Correlation	1	,234*	,147	,348**	,102	-,050
	Sig. (2-tailed)		,034	,188	,001	,360	,663
	N	82	82	82	82	82	79
Reporting	Pearson Correlation	,234*	1	,163	,159	,129	,092
	Sig. (2-tailed)	,034		,143	,154	,249	,419
	N	82	82	82	82	82	79
Complaints	Pearson Correlation	,147	,163	1	,102	-,019	,000
	Sig. (2-tailed)	,188	,143		,361	,866	1,000
	N	82	82	82	82	82	79
Certification	Pearson Correlation	,348**	,159	,102	1	,239*	,094
	Sig. (2-tailed)	,001	,154	,361		,030	,410
	N	82	82	82	82	82	79
Scope	Pearson Correlation	,102	,129	-,019	,239*	1	-,122
	Sig. (2-tailed)	,360	,249	,866	,030		,284
	N	82	82	82	82	82	79
Strength	Pearson Correlation	-,050	,092	,000	,094	-,122	1
	Sig. (2-tailed)	,663	,419	1,000	,410	,284	
	N	79	79	79	79	79	79

*. Correlation is significant at the 0.05 level (2-tailed).

**. Correlation is significant at the 0.01 level (2-tailed).

Annex II – Chapter Four

4.3.1 Corporate Drafting – Corporate Adopting

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	,342 ^a	,117	,106	,471

a. Predictors: (Constant), CorporateDrafting

4.3.2 Certification

Correlations

		Sector	Certification	HRLanguage
Sector	Pearson Correlation	1	-,184	,191
	Sig. (2-tailed)		,215	,288
	N	47	47	33
Certification	Pearson Correlation	-,184	1	-,322**
	Sig. (2-tailed)	,215		,009
	N	47	82	65
HRLanguage	Pearson Correlation	,191	-,322**	1
	Sig. (2-tailed)	,288	,009	
	N	33	65	65

** . Correlation is significant at the 0.01 level (2-tailed).

Certification – HRLanguage

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	,322 ^a	,104	,089	,531

a. Predictors: (Constant), Certification

Annex III – Chapter Five

Selection of states

Regions⁴⁰	High Income⁴¹	Middle Income	Low Income
<i>Region of the Americas</i>	Canada, Chile, Uruguay	Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Jamaica, Panama, Peru, Suriname, Venezuela	
<i>European Region</i>	France, Iceland, Ireland, Israel, Norway, Spain, Sweden, Russia, Poland, UK	Turkey, Ukraine, Serbia, Georgia, Romania, Hungary, Moldova	
<i>African Region</i>	Equatorial Guinea	Algeria, Congo, Mauritius, Namibia, Senegal, Seychelles, South Africa	Benin, Burkina Faso, Chad, Kenya, Madagascar, Niger, Tanzania
<i>Eastern Mediterranean Region</i>	Saudi Arabia, UAE	Egypt, Jordan, Lebanon, Tunisia	
<i>South-East Asia Region</i>		Thailand, India	Bangladesh
<i>Western Pacific Region</i>	Australia, Brunei Darussalam, Japan	China, Fiji, Malaysia, Philippines, Tonga, Viet Nam	

⁴⁰ WHO Regions.

⁴¹ World Bank rating.

Ratification, GNI, Democracy

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	,230 ^a	,053	,050	,933
2	,290 ^b	,084	,079	,918
3	,290 ^c	,084	,077	,920

a. Predictors: (Constant), Ratification

b. Predictors: (Constant), Ratification, GNI

c. Predictors: (Constant), Ratification, GNI, Democracy

ANOVA^a

Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	19,019	1	19,019	21,858	,000 ^b
	Residual	341,953	393	,870		
	Total	360,972	394			
2	Regression	30,347	2	15,173	17,990	,000 ^c
	Residual	330,626	392	,843		
	Total	360,972	394			
3	Regression	30,361	3	10,120	11,969	,000 ^d
	Residual	330,611	391	,846		
	Total	360,972	394			

a. Dependent Variable: DomesticLeg

b. Predictors: (Constant), Ratification

c. Predictors: (Constant), Ratification, GNI

d. Predictors: (Constant), Ratification, GNI, Democracy

Coefficients^a

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	1,340	,067		19,858	,000
	Ratification	,439	,094	,230	4,675	,000
2	(Constant)	1,241	,072		17,274	,000
	Ratification	,368	,094	,193	3,898	,000
	GNI	1,218E-5	,000	,181	3,665	,000
3	(Constant)	1,257	,143		8,778	,000
	Ratification	,370	,095	,193	3,886	,000
	GNI	1,189E-5	,000	,177	2,954	,003
	Democracy	-,005	,035	-,008	-,129	,897

a. Dependent Variable: DomesticLeg

Regulation/Legislation Periodic

Correlations

		OneBe- Be- foreNinetyEi ght	TwoOrMore	OneAfter	TwoOrMore After	OneEntryInto
OneBeforeNinetyEight	Pearson Correlation	1	,574**	,129	,003	,078
	Sig. (2-tailed)		,000	,314	,982	,543
	N	63	63	63	63	63
TwoOrMore	Pearson Correlation	,574**	1	,074	,106	,130
	Sig. (2-tailed)	,000		,564	,410	,308
	N	63	63	63	63	63
OneAfter	Pearson Correlation	,129	,074	1	,701**	,568**
	Sig. (2-tailed)	,314	,564		,000	,000
	N	63	63	63	63	63
TwoOrMoreAfter	Pearson Correlation	,003	,106	,701**	1	,810**
	Sig. (2-tailed)	,982	,410	,000		,000
	N	63	63	63	63	63
OneEntryInto	Pearson Correlation	,078	,130	,568**	,810**	1
	Sig. (2-tailed)	,543	,308	,000	,000	
	N	63	63	63	63	63

** Correlation is significant at the 0.01 level (2-tailed).

GNI

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	,220 ^a	,048	,046	,932

a. Predictors: (Constant), GNI

Coefficients^a

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	1,400	,060		23,528	,000
	GNI	1,480E-5	,000	,220	4,484	,000

a. Dependent Variable: DomesticLeg

Annex IV – Coding Manual

Coding Manual Global BHR Standards

Unit – Standard

Definitions:

Global BHR Standard: A standard which can be explicitly applied to the business sector holding specific responsibility for corporations. This excludes international covenants on human rights, as they are only applicable to states and individuals. Global BHR standards include a reference to social responsibility, distinguishing it from other corporate regulations.

International Standard: Standards which in theory are not limited to a sole or unilateral jurisdiction, e.g. the EU. Exclusively bilateral standards are also disregarded as international.

Variables:

I. Name

What is the name of the standard?

Open ended

II. Entry into force

Date of entry into force

III. Subject to Revision

Has this version been subjected to revisions?

0. No

1. Yes

IV. Revision

Is it a revision of an existing standard?

2. No

3. Yes

V. Last Revision

Is it the last revision of an existing standard?

0. No

1. Yes

VI. Adoption

How many signatories were there to the standard at the time of adoption?

Open ended

VII. Formal Adherence

How many signatories are there to the standard as of December 31, 2014?

Open ended

Nature of the standard

VIII. Scope

What is the scope of the standard?

1. Global – Universal
2. Global – Sectorial
3. Global – Sub-Sectorial
4. Regional – Universal
5. Regional – Sectorial
6. Regional – Sub-Sectorial
7. Other

IX. Sector

What Sector does the standard cover? (List from <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=27>)

1. Agriculture, forestry and fishing
2. Mining and quarrying
3. Manufacturing
4. Electricity, gas, steam and air conditioning supply
5. Water supply; sewerage, waste management and remediation activities
6. Construction
7. Wholesale and retail trade; repair of motor vehicles and motorcycles
8. Transportation and storage
9. Accommodation and food service activities
10. Information and communication
11. Financial and insurance activities
12. Real estate activities
13. Professional, scientific and technical activities
14. Administrative and support service activities
15. Public administration and defense; compulsory social security
16. Education
17. Human health and social work activities
18. Arts, entertainment and recreation
19. Other service activities

20. Activities of households as employers; undifferentiated goods- and services-producing activities of households for own use

21. Activities of extraterritorial organizations and bodies

X. Sub-Sector

What Sub-Sector does the standard cover? (List from <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=27>)

Agriculture, forestry and fishing

1. Crop and animal production, hunting and related service activities
2. Forestry and logging
3. Fishing and aquaculture

Mining and quarrying

4. Mining of coal and lignite
5. Extraction of crude petroleum and natural gas
6. Mining of metal ores
7. Other mining and quarrying
8. Mining support service activities

Manufacturing

9. Manufacture of food products
10. Manufacture of beverages
11. Manufacture of tobacco products
12. Manufacture of textiles
13. Manufacture of wearing apparel
14. Manufacture of leather and related products
15. Manufacture of wood and of products of wood and cork, except furniture; manufacture of articles of straw and plaiting materials
16. Manufacture of paper and paper products
17. Printing and reproduction of recorded media
18. Manufacture of coke and refined petroleum products
19. Manufacture of chemicals and chemical products
20. Manufacture of basic pharmaceutical products and pharmaceutical preparations
21. Manufacture of rubber and plastics products
22. Manufacture of other non-metallic mineral products
23. Manufacture of basic metals
24. Manufacture of fabricated metal products, except machinery and equipment
25. Manufacture of computer, electronic and optical products
26. Manufacture of electrical equipment
27. Manufacture of machinery and equipment n.e.c.
28. Manufacture of motor vehicles, trailers and semi-trailers
29. Manufacture of other transport equipment
30. Manufacture of furniture
31. Other manufacturing
32. Repair and installation of machinery and equipment

- Electricity, gas, steam and air conditioning supply
 - 33. Electricity, gas, steam and air conditioning supply
- Water supply; sewerage, waste management and remediation activities
 - 34. Water collection, treatment and supply
 - 35. Sewerage
 - 36. Waste collection, treatment and disposal activities; materials recovery
 - 37. Remediation activities and other waste management services
- Construction
 - 38. Construction of buildings
 - 39. Civil engineering
 - 40. Specialized construction activities
- Wholesale and retail trade; repair of motor vehicles and motorcycles
 - 41. Wholesale and retail trade and repair of motor vehicles and motorcycles
 - 42. Wholesale trade, except of motor vehicles and motorcycles
 - 43. Retail trade, except of motor vehicles and motorcycles
- Transportation and storage
 - 44. Land transport and transport via pipelines
 - 45. Water transport
 - 46. Air transport
 - 47. Warehousing and support activities for transportation
 - 48. Postal and courier activities
- Accommodation and food service activities
 - 49. Accommodation
 - 50. Food and beverage service activities
- Information and communication
 - 51. Publishing activities
 - 52. Motion picture, video and television programme production, sound recording and music publishing activities
 - 53. Programming and broadcasting activities
 - 54. Telecommunications
 - 55. Computer programming, consultancy and related activities
 - 56. Information service activities
- Financial and insurance activities
 - 57. Financial service activities, except insurance and pension funding
 - 58. Insurance, reinsurance and pension funding, except compulsory social security
 - 59. Activities auxiliary to financial service and insurance activities
- Real estate activities
 - 60. Real estate activities
- Professional, scientific and technical activities
 - 61. Legal and accounting activities
 - 62. Activities of head offices; management consultancy activities
 - 63. Architectural and engineering activities; technical testing and analysis
 - 64. Scientific research and development

- 65. Advertising and market research
- 66. Other professional, scientific and technical activities
- 67. Veterinary activities

Administrative and support service activities

- 68. Rental and leasing activities
- 69. Employment activities
- 70. Travel agency, tour operator, reservation service and related activities
- 71. Security and investigation activities
- 72. Services to buildings and landscape activities
- 73. Office administrative, office support and other business support activities

Public administration and defense; compulsory social security

- 74. Public administration and defense; compulsory social security

Education

- 75. Education

Human Health and social work activities

- 76. Human health activities
- 77. Residential care activities
- 78. Social work activities without accommodation

Arts, entertainment and recreation

- 79. Creative, arts and entertainment activities
- 80. Libraries, archives, museums and other cultural activities
- 81. Gambling and betting activities
- 82. Sports activities and amusement and recreation activities

Other service activities

- 83. Activities of membership organizations
- 84. Repair of computers and personal and household goods
- 85. Other personal service activities

Activities of households as employers; undifferentiated goods- and services-producing activities of households for own use

- 86. Activities of households as employers of domestic personnel
- 87. Undifferentiated goods- and services-producing activities of private households for own use

Activities of extraterritorial organizations and bodies

- 88. Activities of extraterritorial organizations and bodies

XI. Strength

What is the strength of the standard?

- 1. Binding
- 2. Voluntary
- 3. Combination
- 4. Other

XII. Competing standards

Are there competing standards?

- 0. No

1. Yes
- XIII. Reporting**
Is there a reporting mechanism?
0. No
1. Yes
- XIV. Independence Reporting**
Is the reporting mechanism independent?
1. Yes
2. Partially
3. No
98. Unknown
- XV. Complaints**
Does the standard include a complaint mechanism?
0. No
1. Yes
- XVI. Independence Complaints**
Is the reporting mechanism independent?
1. Yes
2. Partially
3. No
- XVII. Transparency Proceedings**
Are the complaint proceedings transparent?
1. Yes
2. Partially
3. No
- XVIII. Treaties**
Does the standard refer to any treaties?
0. No
1. Yes
- XIX. Treaty Name**
Which treaties does the standard refer to?
1. (UDHR) The Universal Declaration of Human Rights
 2. (ECHR) European Convention on Human Rights
 3. (ACHPR) African Charter on Human and People's Rights
 4. (ACHPR OP) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
 5. (ICCPR) The UN Covenant on Civil and Political rights
 6. (ICESCR) The UN Covenant on Economic, social and Cultural rights
 7. (CRC) Convention on the Rights of the Child
 8. (CEDAW) Convention on the Elimination of discrimination Against women

9. (CAT) Convention Against Torture
10. (ESC) European Social Charter (Original or Revised)
11. (BELEM DO PARA) Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women
12. (CAIRO) Cairo Declaration
13. (BEIJING) Beijing Declaration 1995 – Fourth World Conference on Women
14. (YOGYAKARTA) Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity
15. (ILO) International Labour Organisation Declaration on Fundamental Principles and Rights at Work
16. (DRIP) UN Declaration on the Rights of Indigenous Peoples
17. (CERD) Convention on the Elimination of All Forms of Racial Discrimination
18. (CMW) Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
19. (CRPD) Convention on the Rights of People with Disabilities

XX. Business and Human Rights standards

Which BHR standards does it refer to?

1. UNGPs
2. OECD guidelines
3. FSC
4. Global Compact
5. UN Norms
6. CCC
7. ETI Base Code
8. GRI
9. Fair Labor Association
10. ILO Tripartite
11. Other

XXI. Human Rights Inclusion

How much of the Human Rights regime does the standard cover?

1. None or only specific
2. Partial
3. Full

Adopting

XXII. Number Adopting

How many signatories are there to the standard?

Open ended

XXIII. Adopting Parties

Which parties have adopted the standard?

1. States

2. Corporations
3. IGOs
4. CSOs/NGOs
5. Other

Adherence

XXIV. Adherence

Can parties adhere to the standard?

0. No
1. Yes

XXV. Adherence Number

How many signatories adhere to the standard?

Open ended

XXVI. Adopting Parties

Which parties adhere to the standard?

1. States
2. Corporations
3. IGOs
4. CSOs/NGOs
5. Other

Certification

XXVII. Certification

Does the standard include a certification scheme?

0. No
1. Yes

XXVIII. Reporting

Does the certification scheme demand reporting?

0. No
1. Yes

XXIX. Independence

Is the certification scheme independent?

1. Yes
2. Partially
3. No
4. Unknown

XXX. External

Does the certification scheme include external verification?

0. No

1. Yes

Drafting

XXXI. Parties

Who were involved in the drafting?

1. States
2. Corporations
3. CSOs
4. IGOs
5. Other
98. Unknown

XXXII. Drafting Parties List

List of drafting parties

Open ended

XXXIII. Location

Where was the standard drafted?

Open ended

XXXIV. Transparency

Was the drafting of the standard transparent?

1. Yes
2. Partially
3. No

Human Rights

XXXV. Human Rights List

Which human rights does the standard refer to?

1. Self-determination
2. Non-discrimination
3. Work
4. Fair wages and decent living
5. Join trade unions
6. Social security
7. Family
8. Adequate standard of living
9. Food (free from hunger)
10. Health
11. Education
12. Life
13. Cruel, degrading or inhuman treatment

14. Slavery
15. Arbitrary detention
16. Dignity
17. Freedom of movement
18. Fair trial
19. Access to justice
20. Privacy
21. Freedom of Religion
22. Freedom of expression
23. Freedom of assembly
24. Freedom of association
25. Seek Asylum
26. Right to marry
27. Own property
28. Right to Leisure
29. Best interest of the child
30. Child labor
31. Minority rights
32. Indigenous rights
33. Women's rights

XXXVI. Reference

Does the standard refer to human rights?

0. No
1. Yes

XXXVII. Substantive

Does the standard include substantive responsibilities or obligations concerning human rights beyond a reference?

0. No
1. Yes

XXXVIII. Human Rights Language

How is the human rights responsibility framed?

1. Must/Shall
2. Requires
3. Should
4. Could
5. May
6. Other

Sectorial Information

XXXIX. Timing

Did the standard enter into force prior to a legal or policy development at country level?

1. No
2. Yes
3. Other
98. Unknown

XL. Exposure

Is the sector exposed to consumer pressure?

1. Yes
2. Partially
3. No
98. Unknown

XLI. Traceable

Are the products traceable?

0. No
1. Yes

XLII. Market Size

How large is the sectorial turnover? In USD

XLIII. Standard Size

What percentage of this turnover does the standard include?

Fragmentation

XLIV. Production Fragmentation

Is the production fragmented?

0. No (concentrated)
1. Yes

XLV. Distribution Fragmentation

Is the distribution fragmented?

0. No (concentrated)
1. Yes

XLVI. Retail Fragmentation

Is the retail fragmented?

0. No (concentrated)
1. Yes