"SOFTNESS" IN INTERNATIONAL INSTRUMENTS— THE CASE OF TRANSNATIONAL CORPORATIONS

Harri Kalimo & Tim Staal[†]

CONTENTS

---

† Professor Harri Kalimo is a Programme Director at the Institute for European Studies, Vrije Universiteit Brussel (VUB). Tim Staal is a doctoral researcher at the Amsterdam Center for International Law (ACIL), Universiteit van Amsterdam (UvA). The authors would like to thank Jean d'Aspremont for his very useful comments. We are also grateful for the comments of Sebastian Oberthür and other colleagues at the Institute of European Studies (VUB) on a draft version of this paper.

I. INTRODUCTION

A. Prelude: Chevron Case and the Challenge of Governing Transnational Corporations Through "Soft Law"

After 18 years of litigation, on February 14, 2011 an Ecuadorian judge ordered the oil conglomerate Chevron to pay 18 billion dollars in damages, "the largest judgment ever awarded in an environmental lawsuit,"[1] in the oil contamination case *Afectados* ('the Affected') *v.*

1. *See* Patrick R. Keefe, *Reversal of Fortune*, THE NEW YORKER (Jan. 9, 2012),

Chevron.[2] The judgment was affirmed on appeal a year later,[3] yet the case is far from over. The liable parties remain to be called to account and the environmental damage is still to be remedied. Chevron no longer has considerable assets in Ecuador,[4] it has lodged an appeal with the Ecuadorian Supreme Court, and an UNCITRAL arbitration before the Permanent Court of Arbitration (PCA) in The Hague has witnessed a number of interim awards in favor of Chevron.[5] In the media the case has been described as a local plaintiffs' apparently fruitless legal struggle in a society with a corrupt judiciary and political and economic dependence on foreign oil companies.[6]

The *Chevron* case evidences the difficulties in properly governing transnational corporations (TNCs), sometimes even to prevent the most egregious of abuses. Multiple international and domestic laws may be applicable, but that often seems detrimental rather than helpful. Weaknesses in the content, implementation and enforcement of laws may allow the politically and economically powerful parties to dominate the situation. Thus, in cases such as *Chevron,* alternative means of governance are desperately needed to address the failures of classic international and domestic law in protecting the environment and human rights. "Soft law" is then often hailed as the remedy. Chevron, for example, is indeed an active participant in several voluntary initiatives and schemes, such as the Social Responsibility Group of the International Petroleum Industry Environmental Conservation Association (IPIECA).[7] Chevron was also one of the companies consulted during the drafting of UN Special Representative John

---

available at http://www.newyorker.com/reporting/2012/01/09/120109fa_fact_keefe (last visited Mar. 26, 2014).

2. Aguinda y Otros v. Chevron Corp., (2011) Trial No. 2003-0002, Provincial Court of Justice of Sucumbios (Ecuador), *available at* http://chevrontoxico.com/assets/docs/2011-02-14-Aguinda-v-ChevronTexaco-judgement-English.pdf (last visited Mar. 26, 2014).

3. Aguinda y Otros v. Chevron Corp., (2012) Case No. 2011-0106, Provincial Court of Justice of Sucumbios (Ecuador), *available at* http://chevrontoxico.com/assets/docs/2012-01-03-appeal-decision-english.pdf (last visited Mar. 26, 2014).

4. *See* Patrick R. Keefe, *Why Chevron will Settle in Ecuador*, THE NEW YORKER (Jan. 4, 2012), *available at* http://www.newyorker.com/online/blogs/newsdesk/2012/01/why-chevron-will-settle-in-ecuador.html (last visited Mar. 26, 2014).

5. Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador (U.S. v. Ecuador), 2009-23 (Perm. Ct. Arb. 2013) ("Fourth Interim Award on Interim Measures"); Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador (U.S. v. Ecuador), 2009-23 (Perm. Ct. Arb. 2012) ("Third Interim Award on Jurisdiction and Admissibility").

6. *Reversal of Fortune*, *supra* note 1, at 2.

7. *See* International Petroleum Industry Environmental Conservation Association (IPIECA), *available at* http://www.ipieca.org/ (last visited Feb. 3, 2014).

Ruggie's UN Guiding Principles on Business and Human Rights.[8]

Proposing "soft law" as the solution in more effectively governing transnational giants such as Chevron leads, however, to a fundamental conundrum: it remains quite unclear what the notion of "soft law" entails, and why and how it could be able to provide an adequate policy response. The objective of this paper therefore is to clarify the discussion through a detailed theoretical analysis of "soft law", and to test the findings in the practically pivotal area of the environmental and human rights conduct of TNCs.

B. The Thesis and the Objectives

This paper claims, using the fields of environmental protection and human rights as examples, that *"soft law" is conceptually and substantively inadequate and misleading in filling the voids left by classic "hard law" in governing TNCs. A reconceptualization of, and a more systematic approach to, soft instruments is required if they are to play a constructive part in filling the void.*

The paper proceeds in five steps to prove its thesis and to propose remedies to the identified shortcomings. The first objective is to show that what has been called classic "hard law" – state laws and the formal sources of international law – seems to fail in adequately governing transnational corporations (TNCs). Second, the paper explains why other, "soft law" instruments are believed to address the void, but reveals as the third step that the current way of understanding such other, "soft law" instruments is inadequate and too general for assessing the successes or failures of such a very diverse group of instruments. The paper therefore seeks as its fourth objective to create and assess better methods for approaching the void, and proposes to that account a tool that re-conceptualizes and systemizes the soft law discourse. Fifth, preliminary tests of such a new tool are conducted by applying it to practical case studies of TNC behavior in the fields of environmental and human rights protection. The paper concludes by showing how the notion of "soft law" is not only obscure and inadequate, as has been previously contended by other scholars, but that it also is conceptually deceptive in ways that risk leading towards ineffective policy instruments. "Softness" on the other hand does seem instructive for better understanding and reacting to the challenges of managing transnational corporations.

8. Obviously, the "soft law" instruments cited here date from after the relevant facts of the *Chevron* case.

II. THE CHALLENGE OF GOVERNING TRANSNATIONAL CORPORATIONS (TNCS)

A. Business Across the Borders

The first objective of this paper is to show how classic "hard law" seems to fail in adequately governing transnational corporations (TNCs). The UN's Special Representative on business and human rights has stated that TNCs come in many varieties on a scale from little to almost complete reliance on transnational activities.[9] The qualification of a company as a TNC is thus not based on its legal personality; corporations of various legal forms can be included in the category of TNCs. More important than an undisputable definition of a TNC is, however, that there are important factual and regulatory problems that arise as a consequence of corporations pursuing activities in multiple jurisdictions. Globalization of the marketplace has driven companies to operate across borders. Many companies have become TNCs, and many TNCs have become global actors. This is no longer limited to developed country based businesses; numerous TNCs are Asian or South American companies. With the emergence of multiple trade areas (such as ASEAN in South-East Asia or the Andean Community in Latin-America) the TNC has truly 'gone global.'

B. The Sanctuary of Multiple Jurisdictions

The activities of TNCs are spread among the territories of many so-called *host* states. In the majority of cases, and often due to requirements in domestic laws, they are nonetheless *based* in a single *home* state. In contrast to domestically operating businesses, however, they do not fall under the complete control of a single jurisdiction, not even that of their home state. They are partially subject to the *domestic* legal systems of their home state and of all the host states in which parts of their fragmented, networked activities take place or have effects.

Domestic laws are to an increasing extent harmonized by international law, such as customary law and conventions. On many issues, however, domestic legal systems still vary considerably, in particular in the implementation and enforcement of law. This variance may create a void: activities in a particular jurisdiction risk escaping the (legal) consequences that would and should have followed. A hazardous part of waste treatment activities may be located in a country

9. *See* Rep. of the Special Representative of the Secretary General of the U.N. Human Rights Council, 8th Sess., *Protect, Respect and Remedy*, ¶¶ 6-7, 15, U.N. Doc. A/HRC/8/5 (2008) (by John G. Ruggie).

where such activities are not subject to (stringent) standards, for example, or labor-intensive work in the textile sector is set up in a country where labor laws permit longer working hours, or the part of operations that is subject to high taxes in the company's *de facto* home state is formally relocated to a tax haven.

Innovative judges may find ways around the issue of multiple jurisdictions with different substantive standards. In some of the recent judgments from the lower court and the court of appeals in the *Chevron* case, for example, the judges were not held back by the fact that neither environmental standards nor legal protection of the areas belonging to indigenous people existed in Ecuador at the time of the tort. Yet the judges reasoned that it was enough that "the existence of damages has been verified," combined with "the right to obtain compensation for damages suffered in its various forms, which was recognized by the Civil Code well before the start of Texpet [Texaco, predecessor of Chevron] activities in the Amazon."[10] Thus, a specific prohibition of an environmental harm was not deemed necessary to establish a tort. In various Western jurisdictions, arguments are being forwarded that the home state standards should apply to 'their' TNCs' activities in the host states as well.[11]

C. Resistance Towards the Implementation and Reform of Domestic Law and International Law

The opportunities of globalization have made many transnationally operating companies extremely wealthy, superseding in economic terms many nation states. The largest TNCs have become especially influential economic and political players, both in the various domestic jurisdictions where they operate, as well as on the global level. For example, many developing countries rely on TNCs to use their resources. The TNCs may thereby have a clear advantage over local actors in influencing the creation or implementation of law by domestic authorities, although this will vary case by case. Unlike local companies, TNCs can often rather easily shift their activities from one country to another, should a local government advocate for instance to

10. *Aguinda*, Case No. 2011-0106 at para. 9 (further arguing by the Appeals Court found "the fact that there is no express mention of environmental damages in references to contingent damages in the Civil Code does not mean that environmental damages cannot be contingent damages, nor does it mean that the legislature wished to exclude the possibility that environmental damages could be considered to be contingent damages.").

11. *See* Jonathan Verschuuren, *Overcoming the Limitations of Environmental Law in a Globalised World* (Tilburg Univ. Legal Studies Working Paper Series, Paper No. 20, 2010), *available at* http://dx.doi.org/10.2139/ssrn.1582857 (last visited Mar. 26, 2014).

more stringently enforce costly environmental standards. TNCs are also often backed by Bilateral Investment Treaties (BITs), concluded between their home state and their host state. The BITs may allow the TNCs to threaten to sue the host state for expropriation, should the enforcement of laws risk harming the company economically. Such a BIT is also the basis for Chevron's claim before the PCA in the *Chevron* case.[12]

TNCs—especially when acting together through sectorial global business associations or high-profile events such as the World Economic Forum in Davos[13] — are also a powerful force influencing the decisions made in international organizations and diplomatic negotiations. The scope of the TNCs' organizations gives them a global overview and a strategic grip of the policy discourse that particularly the developing states may struggle to match. This power may allow the TNCs to create or sustain a void on the global level, which moves or keeps parts of the corporations' operations beyond the reach of the domestic and international legal orders.

D. Domestic Law and the Legal Void in Regulating TNCs – Host State and Home State Dimensions

The ability of the TNCs to escape full regulatory control and to exert political pressure on decision makers clearly creates the risk of a legal void.[14] This paper defines a legal void as *a regulatory situation in which a TNC behavior, permitted in a host state, would have been in violation of the laws of the TNC home state or of international law*. The legal void may be viewed as part of a (wider) policy void, whereby the public policy objective on the particular question is not reached.

The legal void reveals itself in a slightly different fashion in the home states (where the company is incorporated) than in the host states (where the TNCs operate). As De Feyter submits, "developing and transition countries [i.e. often the '*host states*'] compete to attract

12. Ecuador Bilateral Investment Treaty, U.S.-Ecuador, Aug. 27, 1993, S. TREATY DOC. NO. 103-15.

13. The publicly visible tip of the proverbial iceberg of this political influence occurred at the yearly World Economic Forum in Davos, Switzerland. *See* Ellen Payne, *The Road to the Global Compact: Corporate Power And The Battle Over Global Public Policy at The United Nations*, GLOBAL POL'Y FORUM (Oct. 2000), *available at* http://www.globalpolicy.org/images/pdfs/GPF_The_road_to_the_global_compact_October_2000.pdf (last visited Mar. 23, 2014). Incidentally, the 1999 Forum was also one of the earliest occasions where the UN Global Compact was formally and informally discussed. *Id.*

14. The UN Guiding Principles on Business and Human Rights speak of "governance gaps created by globalization." *See* Ruggie, *supra* note 9, at 3.

foreign investment and technology to exploit natural resources, and are often reluctant to impose human rights and other conditions on foreign companies."[15] In the case of developing country host states, there thus may be a system of laws that is applicable—the problem is that it either sets very low standards (in which case the legal void is qualitative) or it does not properly apply the higher standards (in which case the legal void is one of enforcement).

On the other hand, De Feyter continues, "[t]he *home state* is faced with the difficulty that, in principle, the reach of domestic law is limited to its own territory."[16] To overcome the limits of home country jurisdiction, some states exceptionally recognize universal or extra-territorial civil jurisdiction over torts outside their territory.[17] However, the potential of such extra-territorial jurisdiction is for various reasons quite limited.[18] Suffice it to say here that international law allows extra-territorial (or universal) jurisdiction only for a few crimes under international customary law. These offenses may be enforced by any state(s) regardless of their ties with the offense.[19]

Another possibility to overcome the home state problem is the active nationality principle, which allows a state to exercise prescriptive and adjudicative jurisdiction over its nationals for offenses they commit abroad. In practice, however, states are not likely to use this option more than sparsely, and have done so in the past only for a limited number of crimes. An important reason for this is that it conflicts with competing jurisdictional claims of other states, primarily the territoriality principle. Another reason is that international law does not allow states to enforce such jurisdiction abroad, for example to collect evidence or to make arrests.

E. International Law and the Legal Void in Regulating TNCs

If there is a void in domestic law regulating TNC activities, one might assume that *international* law could better succeed in addressing this distinct group of actors. Surely international law, which can

15. Koen De Feyter, *Globalisation and Human Rights*, *in* INTERNATIONAL HUMAN RIGHTS IN A GLOBAL CONTEXT 68, 81-82 (Felipe Gómez Isa & Koen de Feiter eds., 2009).

16. *Id.* at 82 (emphasis added).

17. *See* United States' Alien Tort Statute, 28 U.S.C. § 1350 (2011).

18. *See also* Donald F. Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 142-63 (2006).

19. Universal civil jurisdiction of U.S. courts remains nonetheless a tool of at least some usefulness for the most gruesome abuses that remain unprosecuted in the states where they occur.

potentially contain universal or near-universal rules,[20] could help in filling the void left by domestic law. In addition, it could be argued that the international legal order is positioned 'close' to the transnational sphere, where TNCs themselves operate.

There are four ways in which international *human rights* law may apply or be applied to TNCs:[21] (1) it can be applied directly, (2) almost directly, (3) transposed into national law or (4) applied indirectly. In international *environmental* law, the picture is somewhat different, because directly and almost directly applicable international law is practically non-existent. The application of most international law to individuals depends on transposition or indirect application. Particularly those two means of application do not overcome a number of obstacles to effectively regulating TNCs through international law. As noted earlier, the matter is elaborated here through the examples of international environmental and human rights law.

1. Lack of International Law (Almost) Directly and Specifically Applicable to TNCs

In contrast to states and intergovernmental organizations, TNCs are generally not considered subjects of international law, and are as such not directly bound by most of it.[22] TNCs entertain only certain rights and have a limited set of obligations[23] on the basis on international law directly. These rights and obligations are similar to those directly applicable to all private actors.[24] Direct applicability of international law entails that both national judicial organs of home, host and potentially other states, as well as international tribunals, enforce the international law obligations directly, even without such provisions being transposed into national law.[25] The direct applicability of international law to the conduct[26] of TNCs as private actors is limited to a few international human rights related crimes, such as genocide and

20. Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993).

21. This section uses the taxonomy suggested by J. Knox. J. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1 (2008).

22. P.A. NOLLKAEMPER, KERN VAN HET INTERNATIONAL PUBLIEKRECHT 58-59 (5th ed. 2011). For human rights specifically *see* e.g. R. McCorquodale, *Corporate Social Responsibility and International Human Rights Law*, 87 J. BUS. ETHICS 385 (2009).

23. If a legal provision requires an action or inaction from an actor, it is a legal obligation.

24. *See* Knox, *supra* note 21, at 2 (speaking generally of *private duties*).

25. The question of extraterritoriality arises in the context of applying it in home states, however. *See infra* Section 2.5.2.

26. The present paper does not focus on the *rights* of TNCs.

crimes against humanity, based on customary international law.[27] As mentioned above, universal jurisdiction to enforce such obligations is the least controversial.

There is another set of obligations that, in Knox's terminology, is applied "almost directly" to private actors. These obligations are not directly applicable, but they specifically instruct states—including dualist states—how to place requirements on private actors and how to enforce them through domestic laws. The transposition of such provisions is thus strictly predetermined.[28] The Convention Against Torture[29] as well as the Convention on Child Labor[30] contain examples of such "almost directly applicable international law." However, the limited number of these kinds of provisions leave many parts of the legal void uncovered. Another reason for the void is that the provisions do not tend to address the behavior of TNCs specifically.[31]

As far as the international obligations that are placed "almost directly" upon the individuals are specific, they *de facto* create quasi-universal domestic criminal law. In other words, the global application is decentralized, so that the direct applicability, and almost direct applicability, approaches can make good use of domestic courts' enforcement capacities, which are far superior to those of international judicial institutions. Political will permitting, this seems the most promising international law track to pursue in governing TNCs. It could in theory combine a universal and precise prescription of

27. In the words of the human rights scholar John Knox, "virtually all of these duties are found in international criminal law. The paradigmatic example is the Genocide Convention, which states that 'genocide . . . is a crime under international law' that the parties 'undertake to prevent and to punish,' through both domestic tribunals and 'such international penal tribunal as may have jurisdiction.'" Knox, *supra* note 21, at 28. These provisions are not only directly targeted at, but also internationally enforced upon individual parties, including TNCs. *Id.* Direct applicability to companies is sometimes seen to be contrary to the basic *consensual* premise of international law. *Id.* How can TNCs have obligations on the basis of international law to which they have not consented?

28. *Id.* at 28-29. The obligations concern duties such as the prohibitions on slavery (Supplementary Convention on the Abolition of Slavery the Slave Trade, and Institutions and Practices Similar to Slavery, April 30, 1956) and torture (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984). The states parties to these conventions are obliged to make slavery and torture criminal offences under their domestic laws, and to enforce them upon private parties. *Id.*

29. Knox, *supra* note 21, at 28-29

30. Worst Forms of Child Labour Convention, June 17, 1999, 87 I.L.C. 182.

31. An example of the latter is arguably the International Convention on Civil Liability for Oil Pollution Damage ('CLC'), *1992 International Convention on Civil Liability for Oil, Pollution Damage (Cosilidated Text of the 1969 Convention, Incorporating the Amendments of 1976, 1992, and 2000)*, November 29, 1969, INT'L MARITIME ORG., *available at* http://www.iopcfund.org/npdf/Conventions%20English.pdf (last visited Mar. 25, 2014).

obligations specifically for transnational commercial activities with the high enforcement capacities of domestic authorities. A contracting state would not fulfill its own international obligations, should it not enforce the provisions against TNCs under its jurisdiction.

2. *Poor Domestic Implementation and Enforcement of International Law – Back to Square One?*

The third and fourth types of international law that deal with the internal policies of developed western states, including international human rights law and international environmental law, are not directly applicable to TNCs.[32] International treaty provisions need to be properly transposed into the domestic legal system in order to create the intended legal effect on the TNCs. The states often retain a large measure of freedom in this respect. For example, many environmental treaty provisions, such as the provisions in the Montreal Protocol on the downscaling of the production of ozone depleting substances, must be first transposed into domestic law and then properly implemented if a state is to meet its obligations under the treaty. The treaty will in this way become binding, not only on the state in question, but also in the form of national law on those operating a production facility of ozone depleting substances within the jurisdictions.

The obligation to incorporate and enforce the international norm rests on the states and it is left to the state in question to decide exactly how it will incorporate and enforce the international law provisions. This is problematic if the content of the international norm is too vague to establish clearly whether a state has failed to discharge its duties or not. This is often the case in international human rights law and international environmental law.

Finally, international law may also be indirectly applicable on TNCs. Indirect applicability means that the (existing) laws of the domestic legal system are construed, i.e. interpreted in a manner that is as much in conformity with international law as possible.[33] Most of the international human rights law and international environmental law can be considered indirectly applicable.[34]

---

32. On indirect applicability, see *infra* note 33.

33. André Nollkaemper & Gerrit Betlem, *Giving Effect to Public International Law and European Community Law Before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation*, 14 EUR. J. INT'L L. 569 (2003).

34. The two general international human rights conventions—the International Covenant on Civil and Political Rights, December 16, 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, December 16, 1966 (ICESCR)—are prominent examples of such international law obligations that apply indirectly to TNCs. The

For example, state parties must take the above noted provisions of the Montreal Protocol on the down-scaling of the production of ozone depleting substances duly into consideration in interpreting their relevant domestic norms, to be consistent with their obligations under the treaty. The interpretation will affect also the TNCs operating within the jurisdiction.

There is certain hierarchy in the way that domestic courts rely on direct and indirect applicability of international law. In striving to achieve conformity with the international norm, the courts give priority to consistent interpretation, i.e. indirect applicability. Only if the domestic law is so inconsistent with international law that it is not reconcilable by favorably interpreting domestic law, will the courts rely on international law directly.[35] Indirect applicability of international law is thus the primary means of trying to fill in the gaps of domestic law on TNCs.

However, the value added of all the not-directly-applicable provisions of international law in diminishing the void left by domestic law is often quite limited. The very same "host state problem" that was explained for law of purely domestic origin resurfaces, unsurprisingly, in the transposition, implementation and interpretation of international obligations in domestic law.[36] The broad and generic language of international agreements often leaves states ample room for discretion in incorporating international law into domestic legislation, and even more in enforcing it. The TNCs are able to exert their clout as with any other domestic law. The *in*direct application of interpreting international law by courts would be in a better position, should the courts be more resilient to (external political) pressure than the legislature. This is not necessarily the case in practice, however. Yet even where free from external pressures, the fragmented, transboundary nature of TNC activities may in the end preclude any nation state—or multiple states—from effectively enforcing an international obligation.[37]

The international law obligations are thus rarely globally *directly* and specifically *applicable* to TNCs. The policy void of TNCs cannot

---

same goes for international obligations on states in the realm of environmental protection: they have ultimately some impact upon the legality of natural and legal persons' behavior. This is true for both monist and dualist states.

35. R.H. LAUWAARS & C.W.A. TIMMERMANS, EUROPEES GEMEENSCHAPSRECHT IN KORT BESTEK 100 (4th ed. 1997); *see also* Nollkaemper & Betlem, *supra* note 33, at 569.

36. Questions relating to the monistic versus dualistic systems in transposing international law are left aside here.

37. De Feyter, *supra* note 15, at 81-82.

be fully and effectively addressed through present international law.

3. *Nigerian Farmers v. Shell – the Absence of International Law in 'Home State' Cases*

The *Nigerian Farmers v. Shell* case is a good example of how international law is still absent in 'home state' court cases that involve 'home state' TNCs. In that case, four inhabitants of Oruma (Nigeria) sued Shell and its subsidiary companies before a civil court in the Netherlands, *i.e.* the 'home state' of Shell.[38] The case concerned an oil leakage from a Shell pipeline that had, according to the plaintiffs, caused damage to the local environment and to the incomes of fishermen and farmers. The domestic court in The Hague[39] decided that according to Dutch conflict of laws rules on tort cases, it had to apply Nigerian law to the dispute. Indeed, the case is a classic attestation of the home state problem, where only the below-par developing country standards are applied to TNCs.

Having decided that Nigerian law was applicable, the Dutch court took another important procedural decision: it denied the plaintiffs access to documents solely in possession of Shell *cum suis,* even though the documents could have given further insight into the causes and consequences of the oil leakage. The court concluded that Shell and its Nigerian daughter company had, on the face of the evidence already available to the court, not acted in violation of any obligations under Nigerian law.

In making its decision, the court did not check whether Nigerian law was in accordance with international environmental, human rights or labor law. For example, the court concluded that under Nigerian law, an oil company does not seem to be under an obligation to replace deteriorated pipelines. Yet, the court did not examine whether there were international rules that would have forced Nigeria to enact such an obligation, or that would have mandated it to interpret Nigerian law in accordance with international law. The obligation would have existed in the legal system of The Netherlands and other developed countries. The court also disregarded all potential violations of international law in concluding that under Nigerian law, only the owner of a polluted fishing pond or property was able to claim losses, and that future losses could not be claimed.

The stance taken by the Dutch court seems understandable from

38. Milieudefensie v. Royal Dutch Sell PLC and Shell Petroleum Development Company, Merits Decision of 30 January 2013 (LJN: BU3535) [Language: Dutch].

39. To be clear, this is not one of the Hague international courts and tribunals.

the viewpoint of sovereignty. It would be quite far-reaching if a court were to rule on the compatibility of another country's law with international standards. It is also doubtful whether any international standards were sufficiently precise so as to enable a meaningful conformity check. Still, it seems somewhat illogical that as soon as a foreign law becomes applicable, international law will no longer be of relevance. And what would be the difference between applying foreign law and applying international norms to which the foreign state has consented? Whatever the merits of the above considerations, it seems unlikely both in practice and in legal theory that international law will fill the legal void in cases like this.

F. "Hard Law" As an Insufficient Means to Address TNCs

To summarize, the current framework of domestic law and international law appears incapable of fully managing the effects of globalization, in particular the global nature of commercial activities. The variation in domestic laws, together with the TNCs' economic and political power and ability to partially avoid falling under the laws of a specific state, allows the corporations to operate to some degree in a legal void. As defined above, a legal void is a regulatory situation in which a TNC behavior in a host state would have been in violation of the laws of the TNC home state or of international law. There is very limited directly applicable international law, and the transposition, implementation and enforcement of international law usually leave the several state institutions/branches with (considerable) room for maneuver. International law is therefore unable to improve the situation.

As a result of the problems that both national and international law have in controlling TNCs, there is room for misconduct. In the words of the UN Special Representative:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization—between the scope and impact of economic forces, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.

The *Chevron* case, introduced at the outset of this paper, is a case in point on these challenges. The Ecuadorian government had been in a joint venture with the oil company at the time of the pollution. It thus appears to have been at least silently complicit in the abuses. The whole of the Ecuadorian economy had been dependent on the exploitation of oil resources, so there was a counter-incentive to faithfully implement

national legislation or international rules. The Ecuadorian judicial system offered no remedy, either, as it proved to be extremely weak and corrupt. Several judges had to step down during the long process amidst accusations of corruption, while others were seen to have a clear allegiance with either side of the conflict.[40]

In terms of environmental law, Chevron did acknowledge the environmental pollution to some degree, but argued that its predecessor Texaco had acted "completely in line with the standards of the day" and that "[t]he practices did not directly violate Ecuadoran law; in fact, the country had no meaningful environmental regulations at the time."[41] In other words, behavior that presumably would have been illegal in the United States at the time,[42] was in all earnestness claimed to be perfectly legitimate in Ecuador. However, the courts in the United States, where the case had originally been brought in 1993, found in 2001 that the case had "everything to do with Ecuador and very little to do with the United States."[43] It thereby refused an extra-territorial application of U.S. law, affirming that a U.S. company did not have to live up to U.S. standards as long as it acted abroad and the judicial system there did not take issue with the activities.

It is telling that probably the clearest invocation of international law in the *Chevron* case was on the part of the TNC-defendant Chevron. The legal representatives of the company moved the forum to the Permanent Court of Arbitration on the basis of the Bilateral Investment Treaty between the U.S. and Ecuador. All in all, the *Chevron* case is a tangible illustration of the failures of domestic, extraterritorial and international law in governing TNCs in a global environment.

It has so far proven impossible to come to a formal international agreement, or a treaty specifically addressing TNCs or transnational commercial activities to alleviate the void. Perhaps such a treaty even could not alleviate the matter, as it too may be bound to suffer from many of the structural problems previously explained. It appears very unlikely that the causes behind the void will disappear any time soon. The governance of TNCs (or transnational commercial activities more generally) clearly appears to require responses beyond classic "hard law".

---

40. *Reversal of Fortune*, *supra note* 1, at 4.

41. *Id.* at 5.

42. "In the United States, it is standard practice, once the oil has been isolated from this mixture, to 're-inject' the produced water, pumping it deep underground into dedicated wells, in order to prevent damage to the local habitat." *Id.* at 5.

43. *Id.* at 6.

III. FILLING WITH "SOFT LAW" THE VOID LEFT BY "HARD LAW"?

The last two decades have witnessed a continuous proliferation of instruments—public, private and any combination thereof—that specifically address TNCs, but seem to do so by expanding beyond the notion of classic "hard law". Strictly speaking, instruments that fall outside the category of "law" cannot perhaps alleviate a *legal* void. But they may, in more general terms, address the practical problem at stake, which is abusive company behavior. Instruments other than legal ones can, in other words, alleviate the *policy* void in question.

The term "soft law" has often been used to denote these types of instruments. The multiplicity, volume and variance of such soft instruments, as well as their coexistence with the "hard law" framework has created a regulatory situation that is much more difficult to understand than the 'straight-forward' formal agreements.[44] Scholarly and practical attention seems necessary to better understand the possibilities and shortcomings of using "soft law" instruments in filling the void left by "hard law."

The reasons that are often presented for using "soft law"[45] may be divided into three generic groups.

Necessity—there exists only limited binding and effective hard now and in the foreseeable future;

Uniqueness—the coverage of "soft law" instruments is extensive, and may influence TNCs in ways that "hard law" does not. They can be much more specific to TNC behavior, and their adoption and adaptation may be more flexible and quicker; and

Inevitability—the emerging transnational space renders it inevitable that a separate transnational normative order emerges as well. It inevitably consists of other types of instruments, as the non-state actors who operate in this space cannot make "hard law."

A more careful look into these three, partly overlapping groups appears instructive for properly understanding the reasons that have been proposed to explain the emergence "soft law" (Sections A and B, *infra*). It is important to shortly describe also the views of those more pessimistic about the use of "soft law" as an alternative or a complement to classic "hard law". Some authors see "soft law" rather as working antagonistically against "hard law" (see Section C, *infra*).

---

44. The normativity of "hard law" also remains to a large extent a mystery. *See* Martti Koskenniemi, *The Mystery of Legal Obligation*, 3 INT'L THEORY 319 (2011).

45. *See also* Jean d'Aspremont, *The Politics of Deformalization in International Law* 3 Goettingen J. INT'L L. 503 (2011).

A. Turning a Political Necessity into a Virtue – "Soft Law" as an Alternative or Precursor to "Hard Law"

First of all, non-binding instruments appear to be in many cases a sheer necessity. As long as no directly applicable, legally binding instruments specifically aimed at the behavior or TNCs will be adopted by states, nor existing international and national laws reformed to this effect, the rationalist perspective is to see "soft law" as the alternative.[46] The large and diverse array of non-legal instruments may simply be the best attainable means to govern TNCs. A binding international agreement to govern TNCs directly is indeed unlikely in the foreseeable future,[47] as many states and much of the private sector continue to resist the idea for the reasons and with the means explained below. At the same time, however, a certain willingness to adopt instruments of a voluntary character can be observed.

A related point is to see soft instruments as precursors to formal agreements. In a situation where an outright formal agreement is politically unattainable, other types of instruments can be used as intermediate steps towards it. These alternative instruments may be used to, for example, experiment with a new rule or to innovatively encourage changes in the behavior of relevant actors. Exposure to the new ideas will, the theory assumes, prepare the regulators and regulatees up to a point where they are ready to take the ultimate step towards "hard law".[48] This is relatively common in areas with considerable (scientific) uncertainty regarding the optimal contents and effects of the policies in tackling a particular problem.[49] However, this

---

46. Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 722 (2010).

47. The last attempt, the 'Norms on Responsibility' did not make it above the level of a sub-commission of the Human Rights Council. *See, e.g.*, De Feyter, *supra* note 15, at 81-82. And the more recent UN Guiding Principles make explicit that they are not intended as the precursor to a binding international agreement. *See* Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises & Report from the Special Representative of the Secretary General to the U.N. Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31 (Mar. 21, 2011), *available at* http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (last visited Feb. 12, 2014).

48. JOHN J. KIRTON & MICHAEL J. TREBILCOCK (eds.), HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE 28 (Ashgate, ed. 2004).

49. *See, e.g.*, Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271 (2008).

type of precursory role for soft instruments is relatively weak in areas where the obstacles to "hard law" are political, rather than relate to uncertainty.

Finally, soft law instruments may be seen as a necessity also from the perspective of non-state actors, in case they themselves act as regulators: these parties obviously do not even have the direct means to develop classic "hard law".

B. Unique Qualities of "Soft Law" – A Complement to "Hard Law"

Soft law instruments often are unique in terms of their versatility, scope and/or "depth." The large number of different kinds of soft instruments means that they are many times aimed much more specifically at the problems caused by the activities of TNCs than are formally binding instruments. They may be used to address TNC behavior in more elaborate detail than, for instance, international human rights conventions, which have an evident legacy as acts aimed primarily at *state* behavior and rarely are very specific as to what amounts to proper or improper behavior. It seems important also for these reasons to gauge whether and how this large body of instruments may actually alleviate the policy void on TNCs.

Another, interlinked argument is that soft instruments possess *different qualities* than formal international law. Many policy tools work in ways that are not dependent upon the core characteristic of "hard law", which is to create legally binding rights and obligations on parties. Constructivists in particular argue that soft law can promote discursive, experimentalist processes that can transform the way norms are perceived and created.[50] Such means may even be preferable from the perspective of responsive governance.[51] In comparison with rules that need to go through the entire legislative or treaty-making process, they may also be much faster to set up and to flexibly change afterwards. But whether and how exactly such "soft law" could complement "hard law" is precisely the question that deserves further clarification. This is all the more so, considering that soft instruments may even be *inevitable* or *inherent* in the phenomenon of globalization. According to Nijman and Nollkaemper, "[o]ne of the challenges that globalization poses to legal theory is precisely the emergence of 'non-State' legal orders, and the resulting need for a conceptual framework

50. Shaffer & Pollack, *supra* note 46, at 722.

51. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1019-20 (2004).

which enables our discipline to accommodate different legal cultures."[52] In other words, these instruments may correctly reflect the fact that the activities of TNCs are of such a special kind that they warrant a unique approach. As noted, if TNCs, NGOs and other non-state parties act themselves in these transnational normative orders as rule makers, then there may not even be any other choice but to resort to soft instruments. TNCs and NGOs simply do not have the capacity under international law to make legal instruments, nor are they directly subjects of international law.

C. Counter-Productive Uses of Soft Law – the Antagonist Approach

Shaffer and Pollack claim that all three principle schools of thought that address the strengths and weaknesses of soft law and "hard law"—positivists[53], rationalists[54] and constructivists[55]—tend to see them as alternatives or mutually supporting complements.[56] These authors raise doubts about the proposition that new soft instruments are always adopted with a view to decreasing the policy void. More attention should be paid to "soft law" as an *antagonist* to "hard law",[57] because it frequently leads to inconsistencies and conflicts among norms. Or

52. JAMES NIJMAN & ANDRE NOLLKAEMPER, NEW PERSPECTIVES ON THE DIVIDE BETWEEN INTERNATIONAL AND NATIONAL LAW 349 (Oxford University Press, ed. 2007) (paraphrasing WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY 51 (Butterworths 2000)) ("Today, a picture of law in the world must deal with a much more complex picture involving established, resurgent, developing, nascent and potential forms of legal ordering." *Id.* Twining furthermore asks: "[c]an public international law, as traditionally conceived, cope adequately with such problems as environment, international crime, and basic human needs or rights at the global level?"); *see also* Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power* (Osgoode CLPE, Working Paper NO. 45, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185031 (last visited Apr. 1, 2014).

53. *See, e.g.*, Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT'L. 381 (1998); Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413 (1983).

54. *See, e.g.*, Charles Lipson, *Why Are Some International Agreements Informal?*, INT'L ORGS. 495 (1991); Andrew Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579 (2005); ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONALIST CHOICE THEORY (Oxford University Press 2010); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).

55. *See, e.g.*, David Trubek, Patrick Cottrell & Mark Nance, *"Soft Law," "Hard Law," and European Integration: Toward a Theory of Hybridity*, *available at* http://eucenter.wisc.edu/OMC/Papers/EUC/trubeketal.pdf (last visited Apr. 1, 2014).

56. Shaffer & Pollack, *supra* note 46, at 707-08.

57. This argument has been made by others before, albeit in a less comprehensive way. For example, NGOs, who have long held this position, oppose voluntary instruments in part because they tend to bring hard law" negotiations to a standstill.

worse, this may have been the aim from the outset. The antagonistic behavior has specific implications in a fragmented legal system, resulting in a "strategic hardening of "soft law" regimes and softening of hard-law regimes, or in a pre-emption of "hard law" through "soft law." These kinds of situations arise under conditions of distributive conflicts between states and in regime complexes, in particular.[58] They also fit well the notion of legal pluralism, where numerous heterogeneous legal orders coexist, interact and compete without clear hierarchies.[59] "Soft law" in this sense is inevitably a part of globalization.

D. Interactions Between "Soft Law" and "Hard Law"

The last-mentioned, antagonistic perspectives on "soft law" are not at the core of this paper, which focuses on the ability of "soft law" to fill the void left by "hard law". It is nevertheless important to realize, following Shaffer and Pollack, that "hard law" and soft law are not in a binary either/or relationship. Rather, their interaction is rather one where specific conditions are conducive to making the actors employ them as alternatives, complements or antagonists.[60] This paper strives to contribute to the discourse by exploring the notion of softness and how that characteristic may reflect in the choice of the instrument in each individual case. The analysis leads to observations about how on occasion, *neither a* hard *nor* soft type of an instrument is able to fill a policy void, and that a focus on "soft law" may in fact only be leading the attempts astray.

IV. FROM THE DEFICIENT NOTION OF "SOFT LAW" TOWARDS AN ACCURATE CONCEPTUALIZATION OF SOFTNESS

In order to understand whether "soft law" instruments may succeed in alleviating the *policy* void in governing TNCs, and if so, how, it is next pertinent to define in more detail what "soft law" actually means. As the analysis below will reveal, the term "soft law" is rather problematic: there seem to be more suitable terms than "soft law" to

58. Shaffer & Pollack, *supra* note 46, at 709, 728.

59. *See, e.g.*, Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT. L. 553 (2002); Roderick A. MacDonald, *Metaphors of Multiplicity: Civil Society, Regimes, and Legal Pluralism*, 69 ARIZ. J. INT. & COMP. L. 75 (1998).

60. Shaffer & Pollack, *supra* note 46, at 709.

describe instruments that are not part of "hard law" in the classic sense of the term. The terminological analysis will lead to a conceptualization of instruments, which is believed to be more instructive for understanding their key characteristics in terms of "softness." With the tool, the suitability of a number of leading human rights and environmental instruments that govern TNCs may then be analyzed in the ensuing Section 5.

A. Definitional Deficiencies of "Soft Law"

1. An Incorrect Concept

The instruments looked at in this paper have often been grouped together under a single concept: 'soft law.' 'Soft law' is widely used as a concept to denote all normative instruments that do not amount to classic "hard law". As Jan Klabbers, a staunch critic of the concept, has submitted

> "[w]e tend to use the term soft law in order to describe things which are difficult to describe as "hard law". Thus, guidelines, codes of conduct, resolutions, recommendations and action programs, indeterminate provisions of treaties, unratified conventions, perhaps even the opinions of advocates general or dissenting opinions of individual judges of the ICJ or the various human rights courts, they may all perhaps be qualified as 'soft law.' Clearly they are not "hard law"; clearly they are not totally irrelevant either, so *voilà*: soft law it must be."[61]

Klabbers and some other international legal scholars denounce the idea that law can be "soft." "As soon as soft law is to be applied to any specific set of circumstances, it collapses into either "hard law", or no law at all."[62] In a binary world of law and non-law, soft law as an in-between is incorrect: there either are or are not normative obligations that are created when the law is applied *ex post*. The 'soft' part of the concept creates confusion from another perspective. It glosses over the fact that many 'soft instruments' have direct effects on the behavior of states, TNCs and other actors, and they have indirect legal effects by transforming subsequently into formal international law. Mechanisms often employed by "soft law", such as economic incentives and reputational costs, can be much more compulsory than the term soft would indicate. They may be more effective than "hard law" itself, as some of the authors noted in Section 3 have suggested.

---

61. Klabbers, *supra* note 53, at 385.
62. *Id.* at 382.

As for the 'law' part of the concept, it seems rather odd to use it where states or international organizations have usually quite purposefully chosen "an instrument that lies *outside* the realm of law," and have thus indicated their specific intention "not to legally commit themselves."[63] Using the term "law" for something that is adopted explicitly as something other than law threatens to blur the "normativity threshold." This is so in particular if and when there is a point of transition between law and non-law, between what does and does not constitute a legal norm.[64]

2. Too Generic a Concept

While soft law may be inaccurate as a concept, it also seems much too generic to properly guide our understanding regarding the very different nature, properties and normativity of the various instruments relating to TNCs and their behavior. As long as there are the soft and hard ends to the spectrum of instruments, it seems inevitable that there are also shades of softness and hardness in between. At the very least, there must be such spectrums from softer to harder within the two binary categories of law and other instruments. A sharp binary categorization seems unlikely to be helpful in explaining all the legal as well as non-legal instruments, each with their different characteristics. This is so especially for legal instruments with soft dimensions and for non-legal instruments with hard dimensions. There is no denying the growing disaggregation of power into myriad spheres of authority, which may not (fully) be public authorities and that deliver formal and informal rules and norms of various kinds.[65] There is considerable variance, whichever way one may wish to create categories.[66] This is certainly so with respect to instruments addressing the behavior of TNCs.

Although it is thus not possible to describe all such variance with a single term "soft law," it would seem equally unadvisable to limit the use of the term to only a clear but narrow sub-group among the variance. In this latter case, there is likely to exist a more accurate

63. Jean d'Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials* 19 EUR. J. INT. L. 1075, 1081-82 (2008) (emphasis added).

64. BLACK'S LAW DICTIONARY (7th ed. 2000); WEIL, *supra* note 51, at 415.

65. Martti Koskenniemi, *The Fate of Public International Law: Between Techniques and Politics*, 70 MOD. L. REV. 1 (2007); James Rosenau, *Governing the Ungovernable: The Challenge of Global Disaggregation of Authority*, 1 REGULATION & GOVERNANCE 88, 88 (2007).

66. S. Karlsson-Vinkhuyzen & A. Vihma, *Comparing the Legitimacy and Effectiveness of Global Hard and Soft Power: An Analytical Framework*, 3 REGULATION AND GOVERNANCE 400, 401 (2009).

descriptive term than "soft law" to explain the instruments in question.

Therefore, a simple dichotomy between "hard law" and soft law (and also between law and "non-law") *alone* seems too stiff and inaccurate to be useful for fully understanding the instruments, which the terms intend to cover.[67] It remains important to maintain that binary distinction, because in some contexts—such as domestic or international adjudication—the legal status of an instrument continues to be relevant for its softness or hardness. Yet it *also* seems vital to understand norms to be on a continuum with a lot of diversity along numerous other variables.[68]

One may thus agree with for example d'Aspremont that a binary approach to law is not in conflict with the growing complexity of regulatory tools in contemporary international relations.[69] A binary division may be maintained, but while distinguishing *e.g.* the different regulatory choices and the gradations of normativity in the language that are available for *both* legal and non-legal norms. The nuance and the binary approach are not mutually exclusive.[70]

B. The Lay of the Land in the Theory of "Soft Law"

Numerous attempts have been made to make sense of "soft law." Problematic in these approaches has been the disregard for the idea of maintaining the binary distinction in parallel with the more fluid characterizations. The empirical basis of the attempts has also often been wanting.[71] This Section highlights the views of authors that appear the most insightful, and which therefore have served as the basis in this paper for developing the methodology for assessing "soft law."

---

67. László Blutman, *In the Trap of a Legal Metaphor: International Soft Law*, 59 INT'L & COMP. L. Q. 605, 611 (2010); Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GERMAN L. J. 1865, 1869 (2008) (Goldmann remarked that the term "soft law" is not much more than a slightly more elegant way of saying "underconceptualized law." Accordingly, he continues, we should use formal criteria to divide it into subspecies, each with its own characteristics).

68. Karlsson-Vinkhuyzen & Vihma, *supra* note 66, at 402. *See also* Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010), 100-01, 106-07 (emphasizing the importance of both legal status, as well as various other characteristics).

69. d'Aspremont, *supra* note 63, at 1075.

70. *Cf.* Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT'L L. 167, 180 (1996) ("law itself, for all its binariness, is capable of reflecting a whole spectre of subtleties and nuances; . . . law itself can accommodate various shades of grey without losing its binary character").

71. Karlsson-Vinkhuyzen & Vihma, *supra* note 66, at 401.

1. The Three Dimensions of Softness

Amongst the most quoted authors in describing "soft law" are Abbott et al., who have proposed a continuum of legalization,[72] where the softness or hardness of legalization may be measured in terms of the "*obligation*, *precision* and *delegation*" of the measure. Obligation means the (legally or otherwise) binding nature of the rule, precision reflects the ability of the rule to unambiguously define conduct and delegation refers to the extent to which an implementing and interpretive authority has been defined.[73] Taking these three dimensions seriously, *most* international instruments, including those on the 'law' side of the binary distinction, seem soft in many respects.[74] This is certainly true of global environmental and human rights treaties with their many indeterminate provisions and limited delegation to third parties.

To be more specific, the dimension of "*obligation*" is dependent on the mandatory, normative—Abbott et al. use "binding"—nature of the rule. Obligation seems to be a concept with multiple meanings. It may indicate especially the mandatory quality of the language of the instrument. The authority of the actors that adopted the instrument, or a more general sentiment of obligation caused by the legitimacy of the instrument is also central. Obligation thus can be linked to the concept *author*, which Neil Komesar finds important from an institutional perspective.[75] As he has suggested, the implications of a policy may differ greatly according to the author.

"*Precision*", the second dimension proposed by Abbott et al., measures the extent that "that rules unambiguously define *the conduct* they require, authorize, or proscribe."[76] The third dimension, "*delegation*", reminds us that not only the authority of the *adopting* entities matters. The instrument's *implementation, enforcement* and *interpretation* are quite relevant.[77] It needs to be determined who, if

72. These authors define legalization as "global regulation through diverse types of norms."

73. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401 (2000).

74. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 422 (2000).

75. N. KOMESAR, 'IMPERFECT ALTERNATIVES': CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY 4-5 (Univ. of Chi. Press 1997).

76. Abbott et al., *supra* note 73, at 402.

77. The relevance of delegation to the normativity of international norms was already stressed in Lauterpacht's critical analysis of the auto-interpretive character of international law, or what he called "self-judging obligations." *See* HERSCH LAUTERPACHT, THE FUNCTION OF INTERNATIONAL LAW IN THE INTERNATIONAL COMMUNITY (Oxford Univ. Press

anyone, is in charge, and how much authority is being delegated.

The approach of Abbott and Snidal to instrument choice, which builds on these three dimensions of legalization, emphasizes the role of different types of legalization in the instrumentalist hands of powerful states.[78] For example, Chinkin's categories of "soft law" reflect these three dimensions.[79] Weakening one or more of the dimensions turns legal arrangements conveniently into "soft law" or vice versa. This is essential from the perspective of governance, because TNCs may be able to exert pressure towards the governing authorities on the types of instruments that will be created.

2. Softness v. Effectiveness

It may be noted that Abbott et al. deliberately avoid assessing the instruments' effects, as that would conflate delegation with effective action.[80] Also in the analysis of this paper effectiveness is understood as conceptually distinct from softness; the two must be evaluated separately. While softness refers to low levels of obligation, precision and delegation seems to correlate negatively with effectiveness, the interrelationship between the two appears rather complex and case-specific.[81] There are many intervening external factors, such as the degree of stakeholder agreement on the issue, reputational risks and potential fringe benefits of compliance. Softness is not a *conditio sine qua non* of ineffectiveness, nor is hardness a prerequisite of effectiveness, even if the former usually increases the latter.[82] Indeed, soft measures can be effective, otherwise the prospect of them acting as alternatives to "hard law" would not materialize. Similarly, there would be no need to complement or replace "hard law", if it could not be

---

1933).

78. Abbott & Snidal, *supra* note 74, at 421.

79. Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L. Q. 850 (1989). The degree of legalization (as defined by Abbot et al.'s obligation, precision and delegation) is the independent variable, effectiveness and legitimacy the dependent variables in determining softness. Abbott et al., *supra* note 73.

80. Abbott et al., *supra* note 73, at 402.

81. *See* Karlsson-Vinkhuyzen & Vihma, *supra* note 66, at 414. *See, e.g.*, Jean-Marie Kamatali, *The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Companies: Is it Time for an ICJ Advisory Opinion?*, 20 CARDOZO J. INT'L & COMP. L. 437, 449-50 (2012); Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1, 43-45 (2012); Deborah E. Rupp & Cynthia A. Williams, *The Efficacy of Regulation as a Function of Psychological Fit: Reexamining the /Soft Law Continuum*, 12 THEO. INQ. L. 581, 594-95 (2011).

82. *See* Karlsson-Vinkhuyzen & Vihma, *supra* note 66, at 414.

ineffective. Thus, by *not* conflating softness and effectiveness, the analysis of the instruments of governance remains more detailed and transparent on the surface. The focus of this paper is precisely on this softness aspect.

Karlsson-Vinkhyuzen and Vihma take a similar view in their comparison of international norms: softness is the independent variable, while *effectiveness*, together with *legitimacy,* emerge as the central, overarching dependent variables.[83]

3. Instrumentum and Negotium

d'Aspremont proposes on the basis of the *theory of legal acts* that in contemporary international law, it is either the *instrumentum* ("the container") or the *negotium* (the "content") that can be softened.[84] The softness of the *instrumentum* thus pertains to the choice of an instrument outside the realm of law, defined as formal treaties or binding unilateral declarations.[85] A soft *instrumentum* can also produce legal effects, such as interpretative guidelines of other legal acts, or even customary law in the long run. However, being such *legal fact,* capable of creating *legal effects,* is according to d'Aspremont not sufficient to qualify it as a *legal act.* The latter creates effects only at the explicit will of its authors, hence the distinction to "hard law".[86]

As for the *negotium* (the content) of a legal act, it can also be softer or harder. Soft, non-normative content does not produce rules that would commit the subjects. The *negotium* of a *legal act* can be softened without invalidating it or transforming it to a *legal fact.*[87] The softness of the *negotium* will not affect the status of the instrument as law. It will, however, reduce law's ability to oblige the parties, reflecting on the obligation and precision dimensions of Abbot et al.

---

83. *Id.* at 401. Their approach thus is wide as it relies on both rationalist and constructivist theories to cover, respectively, the utilitarian political economy aspects and the culturo-anthropological aspects of the issue. Effectiveness is for these authors interdependent with legitimacy, and they both consist of numerous components. Effectiveness can be understood as the degree to which the set policy objective is achieved as a consequence of the measure. Note the difference between effectiveness and compliance. K. Raustiala & D. Victor, *Conclusions*, *in* THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE 659-708 (K. Raustiala, D. Victor & E. Skolnikoff eds., 1998). Note also the difference between behavioural effectiveness and problem-solving effectiveness. Ariel Underdal, *One Question, Two Answers, in* ENVIRONMENTAL REGIME EFFECTIVENESS 3-45, at 6-7(E. L. Miles et al. eds., 2001).

84. d'Aspremont, *supra* note 63, at 1084.

85. *Id.* at 1084-85.

86. *Id.* at 1084-87.

87. *Id.* at 1084.

Blutman takes a similar approach using the notions of legal (formal) source and the substance of the norm.[88] He further notes that current studies group "soft law" into three: (1) *non-binding* decisions of *international organisations* (2) *non-obligatory* agreements of *states* and (3) recommendations of *non-state parties* (NGOs).[89] In the first two groups, the softness emanates from what d'Aspremont called the *negotium* – the lack of *obligation* of the non-binding content of the norm. In the third group, softness is caused by the *instrumentum* and the legislating *party*. Blutman does not consider the authority of the author, and indeed probably not the *delegation* or the *instrumentum* either. Moreover, neither precision, effectiveness nor legitimacy, are directly relevant in this type of categorization. The strength of categorizations such as Blutman's, lies in their simplicity and ease of application, as well as the direct link to existing types of instruments.

C. Making Use of the "Soft Law Theories"

It would seem that the above selection of approaches to "soft law" have varying degrees of explanatory power. Many of them consist of dimensions that from the perspective of softness constitute continuums rather than either or type binary choices. A careful combination of the dimensions, whether continuums or not, appears a useful way to better conceptualize "soft law" and to understand specific cases of instruments' softness in international governance.

It seems possible to combine the assessments of softness along many such dimensions onto a single, summarizing scale. A summary value of softness may be useful in providing an overview of the characteristics of the instrument that one is dealing with. It might even be possible to define a point, a dividing line between soft and hard, similar to that which we recognize between law and "non-law". One may wonder, however, to what extent such a point is actually relevant. First of all, all instruments, be they soft or hard in the end, are in any event analyzed along the same dimensions of softness, just as water may be measured for its coldness/hotness. But like water, is there a metaphysical "melting point" where the definition of an instrument changes from hard to soft in a way that would represent a drastic change in its qualities, like (solid, hard) ice changes into (liquid, soft) water? Most of the instruments are likely to have some degree of softness/hardness anyway; only at the extremes are instruments entirely hard or soft.

88. Blutman, *supra* note 67, at 606.
89. *Id.* at 607-08.

Second, it seems important to perceive that any such dichotomy between soft and hard is indeed only a summary of many aspects. It appears more relevant to understand what the constitutive dimensions of each summary value of softness in a particular case may be, in particular on those dimensions that are close to the extreme ends of the scales. This is so especially as regards the "*instrumentum*". On the one hand, there are legal instruments, which in the context of international governance consist of the formal sources of international law; conventions, customary law and binding decisions of international organizations. On the other hand, there are non-legal instruments, which are all the other international or transnational public or private instruments that are not formal sources of international law.[90] A hard *instrumentum* thus refers to formal "law", while a soft *instrumentum* means that one is not dealing with law. This in turn implies that to qualify as soft an instrument that in terms of its *instrumentum* dimension is "hard (law)", it would need to rank quite low (soft) on many if not all other dimensions. Conversely, to consider as hard[91] a non-legal (and thus *prima facie* soft) instrument, it would need to rank high across many, if not all, dimensions beyond the *instrumentum*. A precise obligation by an authoritative NGO with strong oversight on the implementation could perhaps achieve such hardness in a soft *instrumentum*.

Third, an understanding of softness as relative and measured against the same criteria for all kinds of instruments, whether formal law or something else, is important. As could be seen in the discussion in Section 2 on the voids left by (international) "hard law" in governing TNCs, various types of instruments may have important roles to play. Perhaps an instrument is not just a second best solution in a particular case - or for particular ends within that case - but indeed the best, or even the only means of achieving a policy outcome?[92] The situation for which the instrument is intended needs to be analyzed along the same dimensions to know what type of an instrument is required.

Finally, there is still an important aspect from the viewpoint of the instruments' functioning that could be called *systemic coherence*. It relates closely to the above points noted by Shaffer and Pollack: all legal and non-legal instruments, whether hard or soft, also affect one

90. According to Guzman a categorical difference between harder and softer types of governance is created here. Guzman, *supra* note 54, at 580.

91. Blutman describes that it is a common misconception that non-binding "soft law" would influence less the actions of a state than a binding norm. Blutman, *supra* note 67, at 612.

92. For further explanation look to the arguments made in Section 3.

another. Indeed, as was described above, soft instruments are often seen as an alternative or complement to international "hard law". Treaties can generate secondary (delegated) rules that may be non-legal. Treaties can harden existing non-legal instruments, and non-legal instruments may not only be an alternative or complement to legal instruments, but also soften them. Non-legal instruments may even become antagonists that work directly against treaties, as Shaffer and Pollack have pointed out.[93]

The types of conceptualizations portrayed in this Section can be useful when the hardness/softness of multiple instruments, both legal and non-legal, is assessed comparatively against one another. As Karlsson-Vinkhuyzen and Vihma point out,[94] the development of a legal or non-legal instrument, and subsequently its qualities as a "harder" or "softer" instrument in global governance, is only one variable in the evolution that determines the long-term policy outcome. Moreover, the choice as explained often involves a highly complex set of interrelated, time- and place-specific variables and impacts. This touches the very core of modern politics that struggles to address the dynamics of globalism.

D. Towards a More Accurate Conceptualization of Softness in Instruments

Linguistic conventions such as "soft law" are difficult to fight against.[95] Political scientists make the observation that "[a] few international institutions and issue-areas approach the theoretical ideal of hard legalization, but most international law is soft in distinct

93. Shaffer & Pollack, *supra* note 46, at 788-96. This would seem to imply that the effectiveness of an instrument can even be negative from the perspective of the policy objective: it decreases rather than increases the ability to reach the set policy goal. This is an important aspect explaining the reasons behind the existence of a legal void in TNC governance. As was explained earlier, the void on TNCs is in part created by their ability to influence law-making at various levels of governance. An important way to do so is to swap from the role of a subject of international norms to that of an author of international (private) norms by creating alternative (non-legal) norms that are *antagonistic* to the objectives of prevailing legal instruments, or to other public instruments such as decisions of international organizations or joint declarations of states. In other words, if we were to measure the effectiveness of antagonistic instruments, a scale would need to continue from "weekly positive" and "none" onto a "negative," when the point of reference are the prevailing policy objectives rather than the alternative or direct objective of the law or other instrument in question. Because this paper focuses on ways to fill in the voids left by "hard law", the antagonistic aspects of non-legal instruments are however, not discussed further. *Id.*

94. Karlsson-Vinkhuyzen & Vihma, *supra* note 66, at 400, 401.

95. Blutman, *supra* note 67, at 605.

ways."[96] The proposal here is to take the above-noted dimensions of softness, fine-tune them, and use them to describe the instruments more accurately. The assumption is that such a systemization/categorization may be helpful to the understanding of policy instruments, distinguishing for example between their softness and effectiveness. [97]

It is further proposed here that each of these dimensions of softness of Abbott et al. (obligation, precision and delegation) be specified a step further into a few more accurate, particularly significant sub-dimensions. The proposed sub-dimensions improve the tool, because their values seem especially instructive for the processes being studied in this paper: the behavior of TNCs.[98]

The 'obligation' dimension is perhaps the most ambiguous. As indicated above, it seems that Abbott et al.[99] equate 'obligation' with 'legal obligation'. Such a definition of obligation would, however, not clearly distinguish the dimension from (*i.e.* would limit it to) the concept of *instrumentum.* The hard v. soft *instrumentum* distinction in this paper makes a difference between two types of public instruments: those that are and those that are not (formal) law. Only formal sources of law oblige in the hardest sense of *legally binding* the parties and being capable of *enforcement through judicial* means. These qualities could be qualified as sub-dimensions of obligation, but because of the importance of the either-or type *binary* distinction between what is or is not a legally binding formal source of law, it seems appropriate to turn them into a dimension of their own. *Instrumentum* must therefore be lifted out of the obligation dimension.

The obligatory nature of the instrument however also appears to depend on the authority of the 'author' of the instrument and on its mandatory quality. These should be the focus of the obligation dimension. First, the authority sub-dimension of obligation reflects the authority of the author over the addressees of the instrument. Some institutions that adopt instruments on TNC behavior have more authority over TNC behavior than others. There are various factors on which such authority may be based. Authority will depend upon whether there has been some grant of authority from the addressees of the instrument to the author. It also turns on the involvement of experts during the drafting, the perceived quality of the instrument, and whether

96. Abbott et al., *supra* note 73, at 421.

97. Obviously, there is likely to be overlap between the dimensions. A similar pragmatic approach is taken by Shaffer and Pollack. Shaffer & Pollack, *supra* note 46, at 714.

98. *See* Abbott et al., *supra* note 73, at 403.

99. *Id.* at 401.

the process leading to the text has allowed for consultations with the addressees. In other words, the relationship between the authors and the constituency of the instrument matters. This also explains why a single institution ("author") may have authority in one specific case, but less so in another. A higher level of authority will make the instrument more obliging, and hence harder, regardless of its public or private character.

Instruments created by the addressees themselves are usually referred to as self-regulation, distinguishing them from other private rule making by third parties. It is difficult to generalize whether a rule to which specific private parties (such as TNCs) have committed themselves is more obligatory or less obligatory than that created by some other private parties without the involvement and/or assent of the former (i.e. TNCs). Some NGOs are more highly regarded by TNCs than others in terms of their expertise or trustworthiness, whereas others may be more feared because of their effective publicity campaigns. All such factors influence whether TNCs regard instruments to be authoritative. It would also seem important to extend the obligation dimension to the *negotium*, the contents of the instrument. A legal *instrumentum* can contain a *negotium* devoid of any obligatory language, such as 'shall'. At the same time, a non-legal *instrumentum* can contain a *negotium* that is worded in unmistakably mandatory terms.[100] The provisions of both legal and non-legal instruments can attempt to guide the behavior of their addressees "in a stronger or weaker fashion."[101] The obligation dimension hence would seem to consist of two sub-dimensions: *authority* and the *mandatory nature* of the instrument.

Also the precision dimension would, at least with regard to the particular subject-matter of TNCs, seem to be improved if divided into two sub-dimensions. Abbott et al.'s concept of precision related to the object of the rule *ratione materiae*: "that rules unambiguously define *the conduct* they require, authorize, or proscribe."[102] This is the *accuracy* of the instrument. But precision would also seem to include the *specificity* of an instrument towards certain actors or issues. Softness or hardness of an instrument in terms of a certain group of actors such as TNCs, also depends on whether the rules specifically address *that*

100. *See* A. Aust, *Alternatives to Treaty-Making: MOUs as Political Commitments*, *in* THE OXFORD GUIDE TO TREATIES 46-72 (D. B. Hollis ed., Oxford University Press 2012).

101. D. BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 103 (Harvard Univ. Press 2010).

102. Abbott et al., *supra* note 73, at 401.

group. The softness in other words is influenced also by the scope of the instrument *ratione personae*. A narrow, specific scope increases hardness especially in the international context, where the absence of an institutional framework moves the *ex post* interpretation and application of general rules to the hands of the actors to be governed—the TNCs, in this case, and also states within whose jurisdiction the TNCs act.[103] The precision dimension therefore is enhanced by including the sub-dimension of "specificity" in addition to what could be redefined as its "accuracy".

Delegation,[104] finally, concerns primarily the question of how much authority to implement and enforce the instrument is delegated to others, how much is retained by the author of the instrument, and how much simply remains undetermined. Delegation to third parties increases hardness, and is vital where precision in terms of specificity is low.[105] Delegation of interpretive authority is a variety of delegation that links back directly to accuracy, i.e. precision *ratione materiae*.

Furthermore, the softness of the delegation also appears to depend on to whom exactly the authority is delegated, *i.e.* the authorship of the delegated acts. Close ties, even a shared identity amongst those authorized to implement the instrument and those addressed by it soften the delegation dimension. Delegation is harder when an auditor or NGOs enforce the instrument, than where the TNCs, as the subjects of the instrument, enforce their own rules. It is also important to distinguish between delegation in rule-making and dispute settlement (*i.e.* judicial) functions.[106]

To sum up, the tool proposed here incorporates the following dimensions of softness:

- the *instrumentum* (formal source of law v. other instruments);
- obligation (authority and mandatory nature of the language);
- precision (accuracy and specificity); and
- delegation (extent and authority of delegation).

These softness-related dimensions measure only specific qualities of the instrument. They may be combined and may interact with numerous other qualities of the instruments, such as how quickly they

103. *Id.* at 414.

104. "*Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules." *Id.* at 401.

105. *Id.* at 451.

106. *Id.* at 408.

can be enacted, how representative they are, etc. A discussion on the qualities of the instrument itself also easily merges into a discussion on the impacts that the instruments have. International lawyers and legal scholars often concentrate on compliance, while political scientists assess e.g. the effectiveness, dynamic and static efficiency, legitimacy and administrative burden of the instrument, with a clear emphasis on effectiveness.[107] Mitchell convincingly argues that compliance is only a subset of effectiveness, and indeed from the perspective of this paper it is the final policy outcome—a change in the environmental and human rights behavior of TNCs—that is relevant.[108] As this paper specifically addresses the question of the aptness of "soft law" instruments to govern TNCs, the effectiveness of instruments thus is a relevant, yet limited part of the analysis. It is worth repeating that softness and effectiveness are separate but interrelated issues, and that only softness-related qualities are analyzed in this article; the other qualities of the instruments are not assessed.[109]

The following tool emerges:

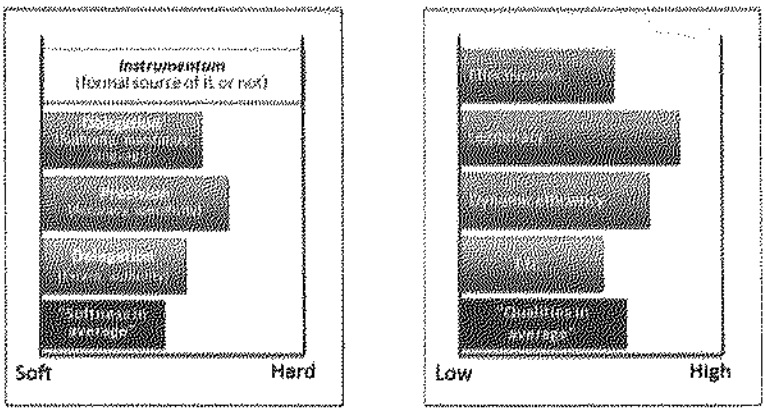

Figure 1. Assessing "softness" and other characteristics of instruments.

107. R.B. MITCHELL, INTERNATIONAL POLITICS AND THE ENVIRONMENT 146-80 (Sage 2010).

108. *Id.*; Karlsson-Vinkhuyzen & Vihma, *supra* note 66.

109. Qualities such as static and dynamic efficiency, and administrative burden, are typically assessed.

The aspect of systemic coherence—the complementing, replacing, precursory or antagonistic impacts that the instruments have against each—seems worth bringing forth in some examples in view of the earlier discussion. The coherence may be depicted as follows:

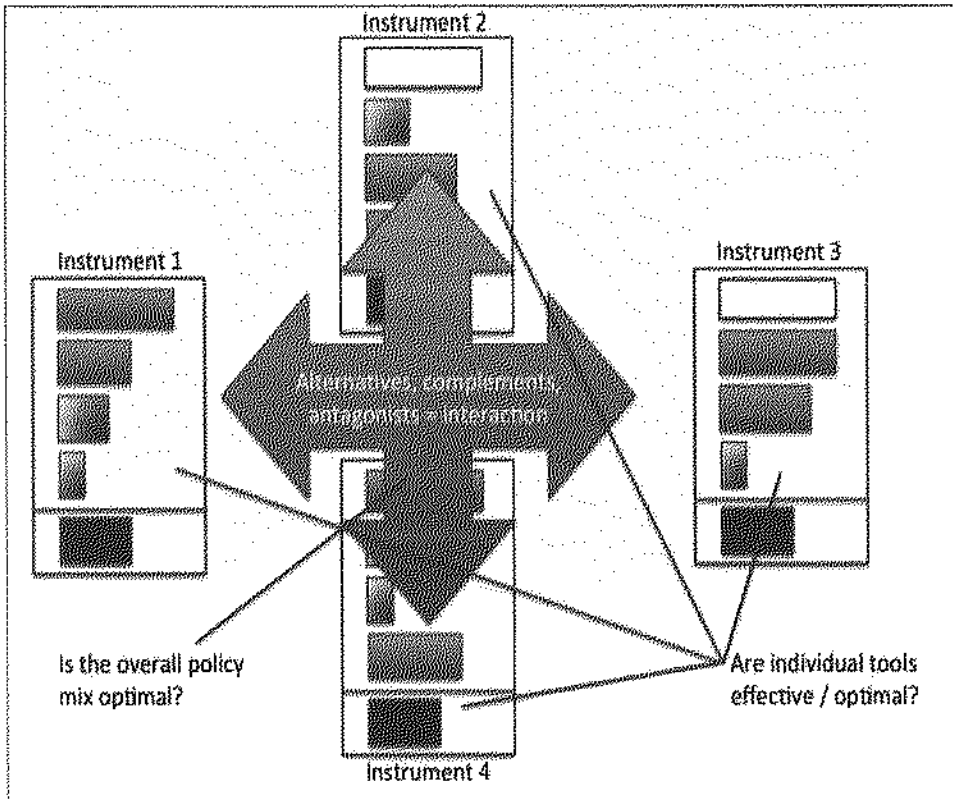

Figure 2. Systemic coherence of soft law instruments.

E. Applying the Tool on Public Legal Instruments, Public Non-Legal Instruments and Private Instruments

In order to structure the application of the tool to particular environmental and human rights instruments in Section V, it is useful to categorize the instruments in a preliminary fashion. First, as was indicated in Section IV.A., it is possible to distinguish between the formal sources of international law (legal instrumentum) and the non-legal or "soft" instrumentum. It is not implied that non-legal instruments cannot bind actors politically, nor that they cannot be successful in addressing a policy problem. The distinction simply reflects that such

instruments cannot legally bind states and can in most cases not be enforced through judicial means. Therefore, there are some good reasons why non-legal instruments cannot operate in the same way as legal instruments.

Second, the broad non-legal category can be further sharpened[110] by separating public instruments from private instruments.[111] Three broad categories of instruments can thus be identified:[112]

- Public Legal Instruments are the formal sources of international law – i.e. the legal instrumentum within the context of the international legal order – consist primarily of conventions, customary law and binding decisions of international organizations. These instruments are in the left column of Table 1, while non-legal instruments form the right column.
- Public Non-Legal Instruments include the output of international organizations, two or more states collectively, or even more loose gatherings of public officials (such as collaborative networks), that are however not laid down as formal international law.[113] 'Public' thus denotes the centrality of public actors: state representatives, intergovernmental organizations, other public officials.
- Private Instruments[114] in contrast include the output of private or primarily private transnational initiatives, such as guidelines or standards. A few instruments, such as the UN Global Compact and other public-private partnerships, partly fit under either category, public or private. The distinction public/private may be particularly relevant in the area of TNCs, where the private authorship of an instrument

110. Cf. *Id.*

111. Compare the IN-LAW project which leaves private formal instruments outside of its ambit. JOOST PAUWELYN, RAMSES WESSEL & JAN WOUTERS (eds.), INFORMAL INTERNATIONAL LAWMAKING (Oxford University Press 2012).

112. These three groups are different from those distinguished by Blutman: the output of international organizations; non-binding output of states directly other than what is part of the formal sources of international law; and the output of civil society which is per definition non-binding. Blutman, *supra* note 67, at 607.

113. Blutman distinguishes more categorically between state instruments and instruments adopted by international organizations. However, because the adoption of instruments within international organizations is heavily influenced by states a further distinction would not seem useful or justifiable.

114. The type of private instruments that this article analyses are never legal instruments, so that the addition 'non-legal' is superfluous. Private actors are of course perfectly capable of adopting legal instruments in the form of private law contracts, but those are outside the scope of this research.

usually points to the involvement of either the regulated TNCs themselves or their staunchest critics, NGOs. The difference between the Public Non-Legal and Private (Non-Legal) Instruments (as well as the overlap between them) is highlighted with background shadings in the right-hand column of Table 1 below.

The most noteworthy environmental and human rights instruments can be grouped into these three categories of Public Legal Instruments, Public Non-Legal Instruments and Private Instruments as shown in Figure 3 below.

	LEGAL INSTRUMENTUM (Formal Sources of International Law)	NON-LEGAL INSTRUMENTUM (Other than formal sources of international law)
PUBLIC (States and IOs)	V.A. Public Legal Instruments • ICCPR, ICESCR, other human rights treaties; • Multilateral Environmental Agreements-Security Council Decisions	V.B. Public Non-Legal Instruments • UN Guiding Principles on Business and Human Rights • OECD Principles on Multinational Enterprises • UNEP Guidelines[115]

115. *E.g.*, Charles Thomas, Tessa Tennant & Jon Rolls, *The GHG Indicator: UNEP Guidelines for Calculating Greenhouse Gas Emissions for Businesses and Non Commercial Organizations* (2000), *available at* http://www.unepfi.org/fileadmin/documents/ghg_indicator_2000.pdf (last visited Mar. 25, 2014).

PUBLIC-PRIVATE (Mix of States/ IOs and TNCs/ NGOs)	—	• UN Global Compact • UN Business Partnerships • Equator Principles • Voluntary Principles on Security and Human Rights
PRIVATE (TNCs)	—	V.C. Private Instruments • Corporate Codes of Conduct • Extractive Industries Transparency Initiative
PRIVATE (NGOs)	—	• Forest Stewardship Council's Forest Principles • ISEAL Alliance-labels • Social Accountability International Standards

Figure 3. Categories of environmental and human rights instruments.

It seems that instruments belonging to different categories are likely to denote certain recurring combinations of dimensions of softness. These dimensions are marked in Figure 4 below, although there may also of course be other soft characteristics as the analysis further below will clearly show.

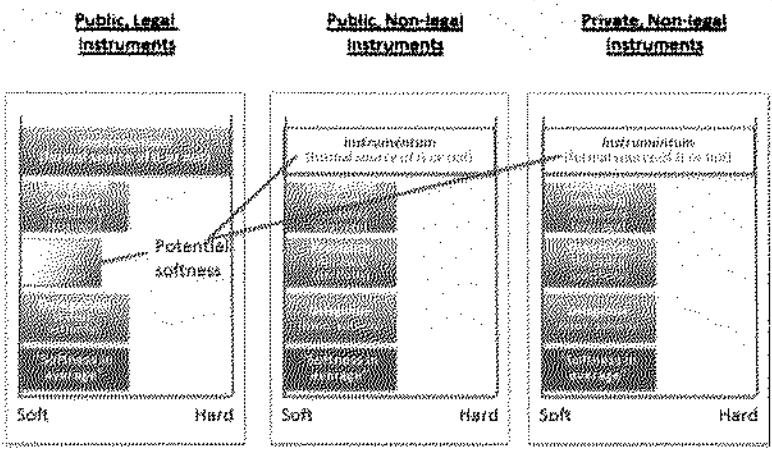

Figure 4. Hypothetical Illustration of the "softness" of instruments.

The possibility of such different dynamics of softness, as well as different underlying explanations, justify a separate analysis of instruments from each of the three categories. The categories of Public Legal Instruments, Public Non-Legal Instruments and Private Instruments thus constitute Sections V.A., V.B. and V.C. in the discussion that follows below.

V. APPLYING THE CONCEPTUAL TOOL ON SOFTNESS TO PRACTICAL CASES

In this Section, the conceptual tool created in the preceding Section is applied to practical case examples on human rights and environmental instruments that deal with TNCs. The approach has two objectives. First, the tool's scores along the dimensions of softness enable a sharper differentiation of the numerous instruments that apply to TNCs. Second, the application of the tool will allow for observations of potential connections between the instrument's softness (both along individual dimensions and overall) and how it operates. Ultimately, this

enables preliminary reflections on the relationship between (categories of) instruments' softness and their effectiveness. It might even enable the grouping of measures into some type of sub-categories on the basis of their softness, as measured along the dimensions.

The instruments that are to be analyzed have been selected for their central place in the legal system for this area (Human Rights Covenants), for their high profile (UN Guiding Principles, OECD Guidelines) or their visibility towards the public (UN Global Compact, Forest Stewardship Council). In the TNC context, instruments often combine human rights with environmental protection.

As may be recalled from the previous Section, the preliminary application of the tool grouped instruments into three general categories, that are each discussed in the Sections that follow: Public Legal Instruments (Section A), Public Non-Legal Instruments (Section B) and Private Instruments (Section C).[116] The instruments have been chosen so as to provide case examples that are representative of each of those categories.[117] The selected instruments for each category will be scrutinized along the (sub)dimensions of softness of the conceptual tool—obligation (authority and mandatory nature of the language); precision (accuracy and specificity); and delegation (extent and authority of delegation)—to add further nuance to the analysis.

A. Public Legal Instruments

1. Preliminary Observations

Instruments that are formal sources of international law—treaties and binding decisions of international organizations—possess a legal instrumentum, and have thereby specific characteristics compared to non-legal instruments: only formal sources of law are capable of creating obligations that are hard in the sense of being legally binding and capable of enforcement through judicial means.

Most international law, aside from a few obligations under customary law, is nonetheless not applicable to TNCs directly[118] as was explained in Section II. Treaties and binding decisions of international organizations also usually do not specifically address TNC behavior.

116. A few of the examples amount to such an important participation of both private and public actors that they may also be considered to constitute a separate public-private category.

117. The first group, Public Legal Instruments, were already discussed in Section 2 to establish the existence of a legal void. The observations in the following section on them will therefore build upon the previous analysis in Section 2.

118. NOLLKAEMPER, *supra* note 22, at 58-59.

The hardness of the instrumentum of Public Legal Instruments is therefore in the particular context of international governance not equaled in the negotium part when measured along the dimensions of creating obligations on TNCs and being specific in doing so.

Authority as a sub-dimension of "obligation" emanates in this category of instruments from public authors, states and, to a much lesser extent, international organizations. However, a state as a public authority is not always authoritative as a rule maker, when it adopts instruments to address its own behavior, the obliging authority of the instrument is at the state's own discretion, and thus lower than when it is set by a binding Security Council Chapter VII resolution. States also do not have much authority over activities that take place outside their jurisdictions, which is very relevant in the context of TNCs. This type of exception therefore limits public authorities' power in terms of the obligatory nature of the enacted instrument.

On the other (sub-)dimensions in the tool, the softness of Public Legal Instruments may in principle vary like it varies in all other types of instruments. In the absence of direct obligations and likely poor specificity, the tool places special emphasis on the delegation dimension of international public law instruments. Are the implementing tasks comprehensively delegated, and do the delegatee bodies possess the necessary authority to oversee the process? It should be kept in mind that because the states in any event need to act in-between the international requirements and TNCs, there already are two steps in applying international public law instruments. The delegation dimension of the tool shows how there is one further step to be taken into account.

The state's implementing authority and responsibility to apply the international provisions is often delegated to a public body such as a ministry or agency. Although an actor other than the TNCs themselves, the authority of the delegation is limited by the fact that it was these very states that adopted the instruments in question, and they are addressed to these very same states. The implementing and interpretive authorities are in this sense not delegated to a truly independent actor. The state's independent authority in the delegation will depend on many factors, but there is often little in the instruments to guarantee it, and much to restrain it. For example, the interests of the state may be too close to that of the TNCs for it to exercise 'independent' delegated authority over the corporations. This holds true for host states, as the Chevron case vividly illustrated, but also for home states, which may be unwilling to constrain the operations of 'their' corporations abroad.

Another problem is that international jurisdictional laws limit the authority that is legally delegated to the home state. Home state organs enforcing or adjudicating on 'their' corporations may rightly fear that such extensive exercises of jurisdiction are for the most part prohibited by international law. The Shell Nigeria case showed that even where a home state judge declares itself competent, it may only be able to apply the law of the host state, which in that case was far below the standards prescribed by the home state.[119] Third, a state may be unlikely to proactively enforce the rules, and will often only intervene if the victims or their representatives bring a case against the state authorities. Local inhabitants or vigilant NGOs may be required to force the state to assume its role as the delegatee. An example is again the Chevron case, where only a decades-long effort by interest groups was able to move the case forward.

Truly relevant delegation would mean third party oversight over the states' performance of their delegated tasks with regard to TNCs. The following sections will show that such oversight is nevertheless often deficient on all levels: national, regional as well as international. In conclusion, also the delegation sub-dimension seems therefore rather soft for many Public Legal Instruments on TNCs.

A tentative picture can thus already be envisaged before applying the tool to provisions of particular Public Legal Instruments in areas of human rights covenants and multilateral environmental agreements. Public Legal Instruments are formally binding upon states that are parties to them, but not upon TNCs nor do they generally contain mandatory and precise requirements specifically about their behavior, or delegation of oversight regarding state actions vis-à-vis TNCs. Public Legal Instruments thus appear soft along all dimensions in their application to TNCs. The conclusion seems almost counter-intuitive. 'Hard law' could leave a void in terms of TNCs because it is in fact not hard at all.

2. The Human Rights Covenants

The human rights covenants ICCPR (International Covenant on Civil and Political Rights) and ICESCR (International Covenant on Economic, Social and Cultural Rights) illustrate the softness that may plague Public Legal Instruments in the field of human rights. The Covenants amount only to what Knox calls a due diligence obligation,

119. *See supra* Section 2.5.3; *Milieudefensie v. Dutch Royal Shell* (LJN: BU3535) (2013).

"an obligation of conduct and effort, not of result,"[120] regarding human rights violations between private actors such as TNCs and individual citizens. It is sufficient for the state governments to satisfy their obligations to just take "reasonable steps" in trying to prevent violations. Individual states and national legal orders retain rather large discretion to determine appropriate measures.

Admittedly, the Human Rights Committee has commented that states must protect individuals "also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private parties or entities."[121] But how exactly the rights apply to private actors, and which actions are required of states in particular situations is left to the states themselves to determine. Moreover, the General Comments of the Covenant's bodies are not legally binding. Research conducted under the UN Special Representative for business and human rights' mandate shows that in practice, very few states actually have "special policies, programs, or tools designed specifically to deal with corporate human rights challenges."[122] The conclusion is that the "due diligence" standard leads to a low level of obligation, and that the lack of accurate guidance on which actions are a part of that due diligence standard amounts to a low level of precision, both in terms of accuracy and specificity.

As for the duties of home states to oversee that corporations based within their jurisdiction respect human rights extra-territorially, the Covenants are even more ambiguous: "The committees have not expressly interpreted the treaties as requiring states to exercise extraterritorial jurisdiction over abuses committed abroad by corporations domiciled in their territory. Nor however, do they seem to regard the treaties as prohibiting such action, and in some situations they have encouraged it." For example, the Committee on Economic, Social and Cultural Rights has suggested that state parties take steps to "prevent their own citizens and companies" from violating rights in other countries.[123] Thus, the dimensions of obligation and precision appear to be for home states even softer than for host states.

120. Knox, *supra* note 21, at 22.

121. Human Rights Comm., General Comment No. 31, ¶ 8, UN Doc. CCPR/21/Rev.1/Add.13 (May 26, 2004).

122. *See* Human Rights Council, Human Rights Policies and Management Practices: Results from Questionnaire Surveys of Governments and the Fortune Global 500 Firms, UN Doc. A/HRC/4/35/Add. 3 (Feb. 28, 2007).

123. Ruggie, *supra* note 9, at 830.

Is the softness of such low levels of obligation and precision mitigated through oversight by third parties, delegation? The Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (the Human Rights Bodies) may be considered as a kind of 'secondary' delegatee: they monitor whether the states complete their delegated task of providing horizontal protection. Such interventions by the Human Rights Bodies will not be able to strengthen the delegation much in practice, however, as it is widely acknowledged that these UN bodies have only very limited powers. The so-called 'views' the HRC adopt in specific cases are non-binding as are the General Comments of both committees.

Regional courts such as the European Court of Human Rights have declared themselves incompetent to assert jurisdiction outside the territory of the member states of the European Convention on Human Rights, except where a member state exercises effective control, but this is only possible in cases of either full occupation[124] or military action on the ground.[125] In the developing regions, where the consequences of the void are felt most, oversight mechanisms are much weaker. They are practically absent in Asia,[126] while the African Court of Human and Peoples' Rights is slowly starting to make use of its competences.[127] The Inter-American Court of Human Rights seems in this respect most promising in the short term. However, the primary focus of all these courts often is, or at least should be, in scrutinizing government's own inappropriate conduct. Scrutiny of governmental oversight of corporate conduct would seem a second-tier priority.

The Shell-Nigeria case implies that home state courts will at most oversee that the state applies to national corporations the domestic law of the host state, but not that it applies the ECHR or the ICCPR. The OECD National Contact Points are a very modest attempt to oversee human rights violations outside ECHR territory. The Contact Points fall in this paper under the next category of Public Non-Legal Instruments.

---

124. *Cyprus v. Turkey*, A. 25781/94, 35 Eur. Ct. H.R. 731, ¶ 76, (2001); *Loizidou v. Turkey*, App. 15318/89, 20 Eur. H.R. Rep. 99, ¶ 62, (1995).

125. *See Al-Skeini v. United Kingdom*, A. 55721/07, 53 E.H.R.R. 18, (2011); *Bankovic & others v. Belgium*, A. 52207/99, 12 December 2001, para. 82.

126. The ASEAN Intergovernmental Commission on Human Rights (AICHR) has as of yet no real judicial powers. *See* James Munro, *The Relationship Between the Origins and Regime Design of the ASEAN Intergovernmental Commission on Human Rights (AICHR)*, 15 INT'L J. HUM. RTS., (2011).

127. A first decision was issued on 15 December 2009, in the matter of *Michelot Yogogombaye v. The Republic of Senegal*. *See* Chacha Bhoke Murungu, *Judgment in the First Case Before the African Court of Human and Peoples' Rights: A Missed Opportunity or a Mockery of International Law in Africa?*, 3 J. AFRICAN & INT'L L. 187 (2010).

These examples are well aligned with the conclusions of the UN Special Rapporteur. States seem to escape effective oversight by other delegated bodies, irrespective of the level of governance.

3. Environmental Agreements

The previous discussion on Public Legal Instruments in the field of human rights indicated that these tools often lack in terms of their obligation, precision and delegation. International environmental agreements may however be used to illustrate that such deficiencies are not an unavoidable characteristic of Public Legal Instruments, but rather a consequence of more or less deliberate choices in constructing the instruments. In other words, hardness is possible to achieve, also in international law. The International Convention on Civil Liability for Oil Pollution Damage (the CLC Convention) 1992,[128] provides an instructive example. The CLC Convention is an international maritime treaty that was adopted to ensure that adequate compensation is available for oil pollution damage caused by accidents of oil tankers.[129] Article IX of the Convention states that "[e]ach Contracting State shall ensure that its Courts possess the necessary jurisdiction to entertain such actions for compensation."

The convention is extremely precise and framed in mandatory terms. It reads almost like an insurance contract.[130] Paradoxically, as the

128. International Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention, (CLC)), International Maritime Organization (Nov. 29, 1969), *available at* http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx (last visited Mar. 27, 2014).

129. *See* International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 14097, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%20973/volume-973-I-14097-English.pdf (last visited Mar. 30, 2014).

130. For example, paragraphs 1-3 of Article V state:

> The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount calculated as follows:
> 4,510,000 units of account for a ship not exceeding 5,000 units of tonnage;
> for a ship with a tonnage in excess thereof, for each additional unit of tonnage, 631 units of account in addition to the amount mentioned in sub-paragraph (a);
> provided, however, that this aggregate amount shall not in any event exceed 89,770,000 units of account
> The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.
> For the purpose of availing himself of the benefit of limitation provided for in paragraph 1 of this Article the owner shall constitute a fund for the total sum

text of for example the Preamble and Articles III and V of the Convention show, a central aim of the Convention is in fact to limit the liability of the ship owners. A number of scholars indeed criticize the way in which a regime, which was meant to establish a balance between the needs of the victims of oil spills (compensation for the harm) and the needs of the economic actors (continuation of activities), favors the latter.[131] The victims of a recent oil spill, caused by the tanker Erika, have for that reason sought to escape the limitations of the international civil liability regime. They try to rely on the more protective provisions of national criminal law or EU waste legislation,[132] instead.[133] All other public law instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms ("HR Convention") also seem incapable of alleviating the victims' concerns. The precision and delegation of the HR Convention is low and much inferior to that of the CLC Convention.

The example demonstrates how a Public Legal Instrument can be very hard in terms of its obligations, precision and delegation, and that

representing the limit of his liability with the Court or other competent authority of any one of the Contracting States in which action is brought under Article IX or, if no action is brought, with any Court or other competent authority in any one of the Contracting States in which an action can be brought under Article IX. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the Contracting State where the fund is constituted, and considered to be adequate by the Court or other competent authority. *Id.*

131. *Cf.* A.E. Boyle, *Globalising Environmental Liability: The Interplay of National and International Law*, 17 OXFORD J. ENV. L. 3 (2005); EDWARD H. P. BRANS, LIABILITY FOR DAMAGES TO PUBLIC NATURAL RESOURCES: STANDING, DAMAGE, AND DAMAGE ASSESSMENT (2001); LIABILITY FOR DAMAGE TO THE MARINE ENVIRONMENT (Colin M. De la Rue ed., 1993); Gotthard M. Gauci, *Protection of the Marine Environment Through the International Ship-Source Oil Pollution Compensation Regimes*, 8 REV. EUR. COMP. & INT'L ENVT. L. 29 (1999); Magnus Göransson, *Liability for Damage To The Marine Environment*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 345, 345-58 (Alan Boyle & David Freestone eds., 1999); David Wilkinson, *Moving The Boundaries of Compensable Environmental Damage Caused by Marine Oil Spills: The Effect of two New International Protocols*, 5 OXFORD J. ENVTL. L. 71 (1993). For more critical approaches, *see* Anne Daniel, *Civil Liability Regimes as a Complement to Multilateral Environmental Agreements: Sound International Policy or False Comfort?*, 12 REV. EUR. COMP. & INT'L ENVT. L. 225 (2003); Michael Faure & Wang Hui, *The International Regimes for the Compensation of Oil-Pollution Damage: Are They Effective?*, 12 REV. EUR. COMP. & INT'L ENVT. L. 242 (2003); Armelle Gouritin, *The International Regime for the Compensation of Oil-Pollution Damage. A Good Candidate to Have a Human Rights Approach?*, 20 REV. EUR. COMP. & INT'L ENVT. L.194 (2011); and Dramé Ibrahima, *Recovering Damage to the Environment per se Following an Oil Spill: The Shadows and Lights of the Civil Liability and Fund Conventions of 1992*, 14 REV. EUR. COMP. & INT'L ENVT. L. 63 (2005).

132. *See* Case C-188/07, Commune de Mesquer v. Total Fr. SA, 2008 E.C.R. I-4501.

133. *See* Gouritin, *supra* note 132, at 194-207.

it may then tend to be working to shield rather than to govern the specific powerful group of TNCs, in the quoted example the shipping companies.

4. Concluding Perspectives on Public Legal Instruments

The application of the softness tool on Public Legal Instruments reveals that they tend to score low on the mandatory language, precision and specificity in terms of managing TNCs and other private actors. The level of obligation for states in fulfilling their tasks as delegatees also remains ambiguous. Especially the extra-territorial enforcement of home state laws against national corporations is rare. In many respects, the 'hard law' turns out not to be hard at all, even if there clearly is potential for it be so.

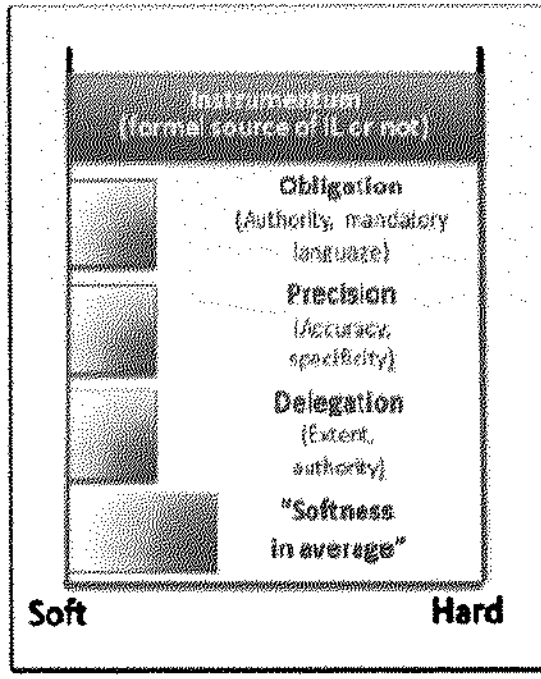

Figure 5. Softness of TNC related Public Legal Instruments in human rights and environmental protection.

B. Public Non-Legal Instruments

1. Preliminary Observations

The second group, Public Non-Legal Instruments contains agreements between state parties, state-centric institutions or even

looser gatherings of public officials. The proliferation of international organizations has increased the importance of public yet non-legal instruments,[134] and this is also true for the governance of TNCs. Such instruments are therefore not a new phenomenon in international governance, and their longstanding role has been described by scholars such as Schachter, Lipson and Aust.[135]

The obvious observation on the softness of the entire category of Public Non-Legal Instruments is what distinguishes them from formal law: that governments and international organizations (IOs) have opted for a non-legal instrumentum, that is not formal law. The non-legal nature of the instrumentum is often reflected in the denominations of the instruments, such as 'recommendations' or 'guidelines'. Sometimes a closer analysis of the IO's constitutive instrument, or of the content of the agreement, is necessary to establish that one is indeed dealing with a non-legal instrumentum.

Many Public Non-Legal Instruments that relate to TNC behaviour are adopted through, or by, IOs such as the Organization for Economic Cooperation in Europe (OECD), the United Nations (UN) and the United Nations Environment Programme (UNEP). Their authority tends to vary on a case-by-case basis: the UN as an eminent organization can assert great moral authority on state and TNC activities, while the OECD is regarded highly by TNCs for its competence and expertise on economic issues. The obligations created by the authority of other IOs, for instance UNEP, towards TNCs are in many cases softer. What is relatively new in Public Non-Legal Instruments is that increasingly they contain a mixture of provisions that are intended to directly cover the behaviour of non-state actors, even though the non-state actors have no official part in the adoption of such instruments. This increases the obligatory nature of the instruments towards TNCs. On the other hand, the member states of international

134. JOSÉ E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005). *See, e.g.*, CHRISTIAN BRUTSCH & DIRK LEHMKUHL, *Complex Legalization and the Many Moves to Law*, *in* LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS 9, 9-27 (Christian Brutsch & Dirk Lehmkuhl eds., 2007) (discussing the increase in international law making and legalization of transnational relations); Kal Raustiala, *Institutional Proliferation and the International Legal Order*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 293, 293-316 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012) (referring to institutional proliferation and the rise of institutional density).

135. *See* Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787 (1986); Charles Lipson, *Why are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977).

organizations voting in favor of such instruments tend to equate them with political agreements. The language of the instruments is not mandatory, and hence does not create obligations: not on the TNCs, the states, nor on the IOs adopting them. The member states rather tend to share the idea that the TNCs' behaviour needs to change in certain ways, and wish to point each other's actions into that direction. The instruments that are directly addressed to TNCs only encourage them to act in a certain way.

The sub-dimensions of precision—the accuracy and specificity of the instruments — appear to vary widely in Public Non-Legal Instruments. Specificity perhaps tends to be the 'harder' sub-dimension of the two, as the instruments occasionally address specific kinds of businesses and specific types of TNC behavior, but are less often very accurate about what exactly the states and TNCs are in practice expected to do.

Finally, the delegation dimension tends to be low across Public Non-Legal Instruments, as the implementation and interpretation of the instruments is mostly left to the enacting states and IOs themselves.

2. The OECD Guidelines and National Contact Points

The Organization for Economic Cooperation and Development (OECD) adopted the OECD Guidelines for Multinational Enterprises in 1976, and revised them in 2000 and 2011. The OECD Guidelines are "recommendations addressed by governments to multinational enterprises operating in or from" OECD Member States adhering to the Guidelines.[136] They "provide non-binding principles and standards for responsible business conduct in a global context,"[137] thus apparently aiming to fill the void left by the Human Rights Covenants with their unclear stance on extra-territoriality. The Guidelines encourage companies to "[r]espect the internationally recognised human rights of those affected by their activities,"[138] "wherever they operate."[139]

In terms of precision, the OECD Guidelines are thus specifically addressed at multinational enterprises and are quite accurate as to what is expected from them. For example, the Guidelines state that

136. Org. for Econ. Co-operation and Dev., *OECD Guidelines on Multinational Enterprises* 3 (2011), *available at* http://www.oecd.org/corporate/mne/48004323.pdf (last visited Feb. 11, 2014) [hereinafter *OECD Guidelines*].

137. *Id.*

138. *Id.* at 19.

139. *Id.* at 17.

[a] State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights.[140]

However, much of the language is not phrased as obligations. In most provisions, 'should', 'seek ways to' or 'does not diminish the expectation' in the provisions just quoted above prevail over 'shall',[141] It remains unclear where in the Guidelines an obligation for the TNCs[142] to actually act in accordance with them is really created. Perhaps it flows from the 'procedural' obligations that are phrased in more mandatory terms.[143] For instance, TNCs—if acting in accordance with the Guidelines—must have an internal policy on human rights, carry out human rights due diligence and "provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts."[144] Yet the Guidelines do not mention any sanctions on transnational corporations that do not carry out such tasks. It should be recalled that for the TNCs, the Guidelines indeed only establish non-binding principles. The ability of the procedural provisions of the Guidelines to set obligations that amount to a high level of hardness in the sense of the tool will hence depend on the authority of the instrument, and the OECD more generally. As was noted above, the corporate community would seem to regard the organization rather highly.[145]

A further dimension along which to measure the hardness of the Guidelines is the delegation of their implementation and enforcement. The Guidelines do set legally binding obligations on the OECD member states in this respect. The states must, amongst other things, establish "National Contact Points" ("NCPs") to assist companies and their stakeholders in complying with the Guidelines.[146] This obligation finds a legal backrest in Article 5(a) of the OECD Convention, which specifically mandates state parties to follow the OECD Guidelines' procedural and institutional rules regarding the setting up of NCPs and

140. *Id.* at 38.

141. *See e.g.*, *OECD Guidelines*, *supra* note 137, art. IV.1-IV.3.

142. The OECD Guidelines uses the terminology "MNEs." *Id.*

143. *Id.* art. IV.4-IV.6.

144. *Id.*

145. For an example of a critical approach to the authority of the OECD Guidelines, *see* Oldenziel & Wilde-Ramsing, *OECD Guidelines lack teeth, influence*, OECD WATCH (Sept. 25, 2009), *available at* http://oecdwatch.org/news-en/oecd-guidelines-lack-teeth-influence (last visited Mar. 25, 2014).

146. *OECD Guidelines*, *supra* note 137, Part II.1.

the proceedings that they are to follow. [147] However, it is doubtful whether the NCPs may be considered independent from the executive branch of the states that establish them. As noted, this triggers problems on the role of the state as a delegatee.[148] This problem is slightly less serious in OECD Guidelines than in many Public Legal Instruments, because the state is implementing standards that apply directly to the TNCs instead of relying on their indirect application through the duty to protect. It has been argued that the NGOs also play the role of a delegatee, next to the NCPs themselves, because the procedure allows NGOs to bring cases to the attention of the NCPs.[149] In practice, this is the way in which a case usually reaches an NCP.

A more serious problem is the limited extent of delegation. The ultimate power of the NCPs resides in their ability to make public statements. While the power of negative publicity in inducing changes in TNC behavior (or at least in the image it wishes to promote) should not be underestimated, it usually still falls short of the obligatory force of for instance monetary fines or the judicial prosecution of individuals. There are nevertheless good reasons to doubt the extent to which the NCPs are, or can be expected to be, performing their tasks as effective implementers and interpret of the Guidelines. In fact, there is no sign that TNCs would actually have been publically reproached in more cases than the odd one out. For example, in the eleven cases over a period of ten years—a low figure in itself—on which the NCP of the Netherlands so far has reached a Final Report, not once did it find a reason to publicize the violations of substantive rights.[150] In but a few cases did it find that transparency, communication and other such more

147. *Convention on the Organisation for Economic Co-operation and Development*, art. 5(a), OECD (Dec. 14, 1960), *available at* http://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm (last visited Mar. 25, 2014) [hereinafter *COECD*].

148. The Netherlands tried to mitigate this problem by making its NCP a more independent body, but the OECD Guidelines require at least some measure of government involvement, so that independence could only partially be achieved. For instance, the Minister of Foreign Affairs can still make a statement before a report is made public. *See Dutch National Contact Point: Aspirations and Expectations Met? Report of the NCP Peer Review Team* (2010), *available at* http://www.oesorichtlijnen.nl/sites/www.oesorichtlijnen.nl/files/final_peer_review_report_dutch_ncp_with_annexes_17_march_2010.pdf (last visited Mar. 25, 2014).

149. *COECD*, *supra* note 148, at 1774. According to Schuler, another possible role of *delegatee* is reserved for the OECD Investment Committee, but its role is limited to posting clarifications of a general nature and it cannot overrule statements by NCPs in specific cases.

150. *OECD Guidelines for Responsible Business Conduct*, MINISTRY OF FOREIGN AFFAIRS, *available at* http://www.oecdguidelines.nl/ncp/closedcomplaints/ (last visited Mar. 25, 2014).

secondary issues were below the OECD standard.[151] It urged the companies in question to improve those particular points, or only congratulated them for having already done so. In the remainder of the cases, the NCP concluded that no 'investment context' or 'nexus' existed, so that the situation fell outside the scope of the OECD Guidelines,[152] or that bilateral talks between the NGO complainant and the company had already brought the issue to a close.[153] The figures on the Dutch NCP reflect those on other OECD member states.[154]

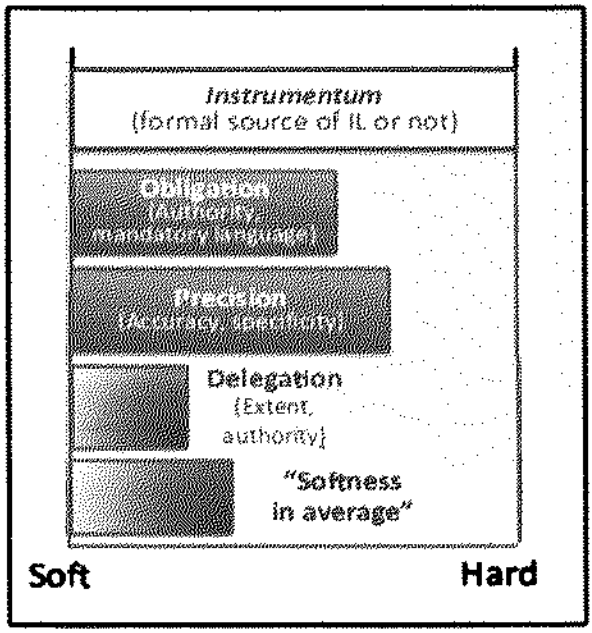

Figure 6. "Softness" of OECD Guidelines.

151. *See e.g.*, Neth. Nat'l Contact Point, Final Statement of the Dutch NCP on the "Complaint (May 15, 2006) on the Violations of Pilipinas Shell Petroleum Corporation (PSPC), Pursuant to the OECD Guidelines for Multinational Enterprises" (July 14, 2009), *available at* http://www.oecd.org/corporate/mne/43663730.pdf. (last visited Mar. 30, 2014).

152. *See* Neth. Nat'l Contact Point, Final Statement of the Dutch NCP on the Specific Instance Raised by Shehri-CBE Concerning Makro-Habib Pakistan Limited, Raised on 9 October 2008 (Feb. 2010), *available at*: http://www.oecd.org/daf/inv/mne/46085466.pdf (last visited Mar. 30, 2014).

153. *See* Neth. Nat'l Contact Point, Final Report of the National Contact Point for the OECD Guidelines in the Netherlands on the Specific Instance Notified by CEDHA, INCASUR Foundation, SOMO and Oxfam Novib Concerning Nidera Holding B.V. (Feb. 3 2012), *available at*: http://www.oesorichtlijnen.nl/sites/www.oesorichtlijnen.nl/files/final_statement_nidera.pdf (last visited Mar. 30, 2014).

154. *See* J. OLDENZIEL, J.WILDE-RAMSING AND P. FEENEY, OECD WATCH 10 YEARS ON - ASSESSING THE CONTRIBUTION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES TO RESPONSIBLE BUSINESS CONDUCT 10-11 (OECD Pub. 2010).

3. *The United Nations Guiding Principles on Business and Human Rights ("UN Guiding Principles")*

The UN Guiding Principles are the result of a UN Human Rights Council mandate to the Special Representative of the UN Secretary-General, John Ruggie. On the basis of the mandate, Ruggie was to develop such principles within the framework proposed in his Report to "Protect, Respect and Remedy".[155] The Principles rest accordingly on the Report's three pillars of protection, respect and remedy:

The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial.[156]

The text of the UN Guiding Principles was consulted extensively with a wide variety of relevant actors ranging from governments to businesses and NGOs.[157] The substantive principles of the UN Guiding Principles are quite similar to the OECD Guidelines, which in their 2011 version were aligned with the former.[158] Yet, the UN Guiding Principles have a broader scope ratione personae, because they include TNCs from all UN member states, rather than from the industrialized OECD countries only. Ratione materiae, the UN Guiding principles are not limited to investment settings, as are the OECD Guidelines. In other words, the UN Principles apply to a larger number of states and TNCs, and to a wider array of situations.

The UN Guiding Principles were adopted by the geographically representative UN Human Rights Council. The Principles' hardness along the obligation dimension of the tool is likely to benefit from the rather strong systemic coherence with the human rights Covenants. As explained previously, systemic coherence denotes the influence that one instrument may have on the performance of another along the

155. Ruggie, *supra* note 9.

156. UN Office of the High Commissioner of Human Rights, *Guiding Principles on Business and Human Rights*, Intro., ¶ 6 A/HRC/17/31 (Mar. 21, 2011), *available at* http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited Mar. 30, 2014).

157. *Id.* ¶ 12.

158. This is understandable since the most recent version of the OECD Guidelines (2011) explicitly states that they are in line with the UN Guiding Principles. *OECD Guidelines*, *supra* note 137, at 3.

dimensions of the tool. The interaction between a similarly aligned Public Legal Instrument, such as a human rights Covenant, and a Public Non-Legal Instrument, such as the UN Guiding Principles, could mutually increase the hardness of both instruments. In this case both instruments are even a part of the UN human rights system. The Principles could lead judiciaries to interpret more specifically the obligations of states as delegatees vis-à-vis TNC conduct under the Covenants.[159] Since all parties to the human rights Covenants are also parties to the UN, the UN Guiding Principles could be argued to constitute a subsequent agreement or practice that contributes to the interpretation of the pre-existing international human rights obligations of states.[160] Alternatively, the UN Guiding Principles could be considered a part of the opinio juris in the formation of new customary rules.[161] Most relevant in this respect is that Part I of the UN Guiding Principles deals with what the state "duty to protect" amounts to for companies. The notion of systemic coherence thus provides insights in how one instrument may have a high level of obligation but lack in precision, while for another one the situation is the other way around. Taken together, the instruments may alleviate each other's softness.
The obligations created by the UN Guiding Principles could therefore be harder than the principled, non-legal nature of their form would lead to assume, if they are 'hardened' by their close links to existing "hard law" instruments. Conversely, the UN Guiding Principles could oblige states, and consequently TNCs, by further 'hardening' the obligations that the states have earlier agreed to as delegatees under human rights Covenants.

This line of reasoning nevertheless holds in practice only where the Public Non-Legal Instrument in question is actually hard comprehensively, i.e. is also precise and uses mandatory language. It is questionable whether this is the case for the UN Guiding Principles. First, the duties of states in the Principles are not phrased in a mandatory or particularly accurate fashion. The duty of the states towards 'abuses by private actors' is in the Principles defined by using wordings such as 'appropriate steps', 'discretion' and 'should

159. Arguably, there is no reason why this would not be true as well to some extent for the OECD Guidelines, just as for all other Public Non-Legal Instruments, which may influence the development of the law through interpretation or the development of customary international law.

160. UN Office of the High Commissioner of Human Rights, *supra* note 157; *see also* Vienna Convention on the Law of Treaties, art. 31(2)(b) (1969).

161. This is what happened to some of the principles established in the famous Rio Declaration on Environment and Development (1992).

consider'.[162] Compared with how state duties have developed in the jurisprudence of the international human rights bodies, the UN Guiding Principles may therefore be a step backwards in terms of accuracy. The vagueness about what the duty to protect amounts to leaves the states a wider margin of discretion on what is acceptable TNC behavior.[163] A closer analysis of the Principles thus reveals evidence of systemic incoherence, or antagonism, in contrast to what initially seemed like a case of coherence.

Moreover, the express emphasis in the Principles that no international obligations are set on the corporations directly, only on the states, obviously dilutes the obligatory character of the Principles on TNCs. In the period before the drafting of the Principles, the idea of setting legal obligations for companies was still taken seriously.[164] The 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'[165] were however dismissed, after which the appointment of the Special Representative followed. The part that directly applies to companies speaks only of responsibilities to respect, but not of obligations in the same more explicit sense as the duties laid on states. The concept of 'responsibility' is not defined any further than that a certain standard of conduct is "expected" of the businesses.[166] Moreover, the UN Guiding Principles do not state on what basis this responsibility arises. Clearly, it is not on the basis of a legal instrumentum. Since TNCs are not legally bound by the Principles, the Principles represent to the TNCs, a mere reiteration of pre-existing legal obligations, and a consensually agreed moral obligation to reach beyond such legal obligations. The hardness of such a moral obligation would depend on the authority of the instrument.[167]

---

162. UN Office of the High Commissioner of Human Rights, *supra* note 157, Commentary on Foundational Principle 1, 3-4 (emphasis added).

163. Nicola Jägers, *UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Accountability?*, 29 NETH. Q. HUM. RTS. 159, 161 (2011).

164. *Id.* at 160 ("From the very beginning professor Ruggie has steered determinedly away from the concept of human rights obligations for corporations and instead placed exclusive emphasis on the State as the sole duty-bearer."). *See also* De Feyter *supra* note 15, at 78.

165. U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

166. U.N. Office of the High Commissioner of Human Rights, *supra* note 157, Commentary to Principle 11.

167. Special Representative Ruggie notes quite positively the numerous consultations he had with companies in establishing the Principles. *See* UN Guiding Principles, Introduction, ¶ 7, ¶12. It is difficult to assess whether the consultations have truly supported the authority of the Principles, or were merely something that TNCs participated in to maintain a constructive image and to influence any obligations they could be subjected to.

In terms of precision, the UN Guiding Principles represent the high end in this paper's examples of instruments. They are slightly less specific than the OECD Guidelines, because the drafters broadened their scope of application to all businesses rather than to TNCs alone. Also accuracy is reasonably high, with elaborate commentaries to each of the 'Operational Principles'. The part that sets out the desired scope and content of the companies' human rights due diligence processes seems to some extent comparable to an environmental impact assessment.[168] The focus of the Principles is on prevention, which the TNCs have direct influence on, and which is often more effective than remediation.

However, although precise, much is laid out in descriptive and explanatory concepts that do not amount to new mandatory requirements from the perspective of the dimension of obligation. So while accurate, the Principles and their Commentaries at most reiterate existing legal requirements. They, for example, note that in many jurisdictions, complicity in committing a crime can lead to criminal liability, even on TNCs, but they do not in any way expand the scope of such liability.[169]

Even precise obligations on companies need to be interpreted when they are implemented into practice. The implementation is optimally delegated to separate authorities. Yet on delegation, the UN Guiding Principles are considerably softer than, for example, the OECD Guidelines. An earlier version of the Principles envisaged an Ombudsperson,[170] but this role was apparently removed. The Principles in the part on the state Duty to Protect probably confused rather than clarified the role of states as delegatees in the implementation and enforcement of international human rights law on TNCs.[171] The part on Access to Remedy calls for various kinds of national and company-based non-judicial grievance mechanisms to complement the state-based judiciaries. In other words, the Principles neither strengthen the role of home states nor do they create a centralized authority to coordinate the implementation. They only advocate a very soft form of delegation that excludes the power to take decisions. Moreover, such mechanisms are only encouraged, rather than made mandatory. The contrast to the National Contact Points (NCPs), mandated by the OECD Guidelines, is clear.

168. *Id.* at Principles 17-21.
169. *Id.* at Principle 17.
170. Ruggie, *supra note* 9, ¶103.
171. Jägers, *supra* note 164.

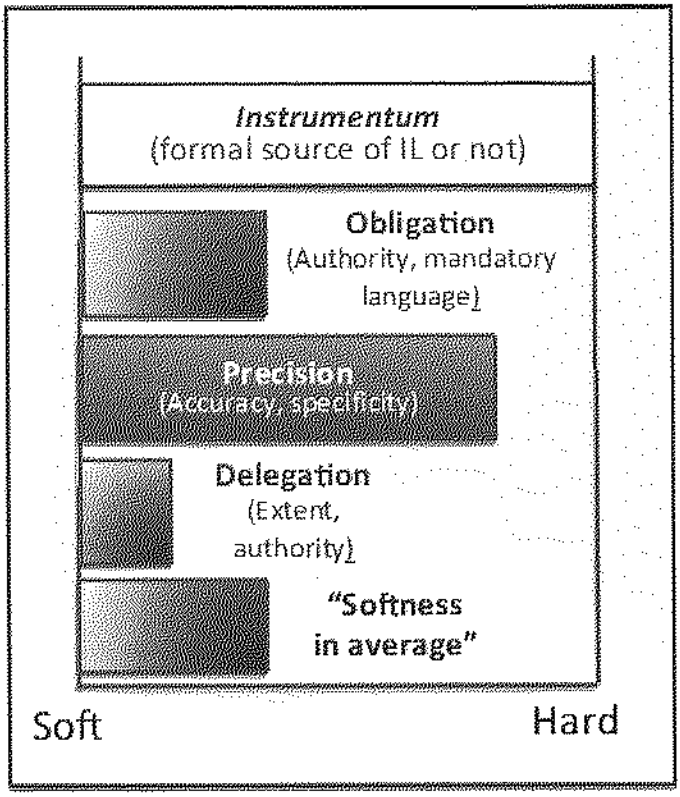

Figure 7. Softness of UN Guiding Principles

4. Concluding Perspectives on Public Non-Legal Instruments

Public Non-Legal Instruments score around the average on several dimensions of softness in the tool. While scoring rather high on the dimension of precision, the Public Non-Legal Instruments in this paper score low on the scale of delegation. They are low on the scale of obligation as well, because the two sub-dimensions of obligation—authority and the mandatory nature of the language—give contradictory results. The language used is often overtly non-mandatory, and this fact cannot be fully compensated by the respectability of the IOs involved, which is likely to reinforce the authority of the instruments. Public Non-Legal Instruments, such as the OECD Guidelines and the UN Guiding Principles, by definition lack the legally binding character of their counterparts in formal treaties. Unless they are considered

interpretive agreements, they cannot be invoked before a judge as directly applicable to a dispute. Systemic coherence therefore could influence the softness or hardness of a non-legal instrument. However, unless that dynamic clearly increases the level of obligation and delegation, the softness along these two dimensions only appears to permit average levels of hardness in this category of instruments.

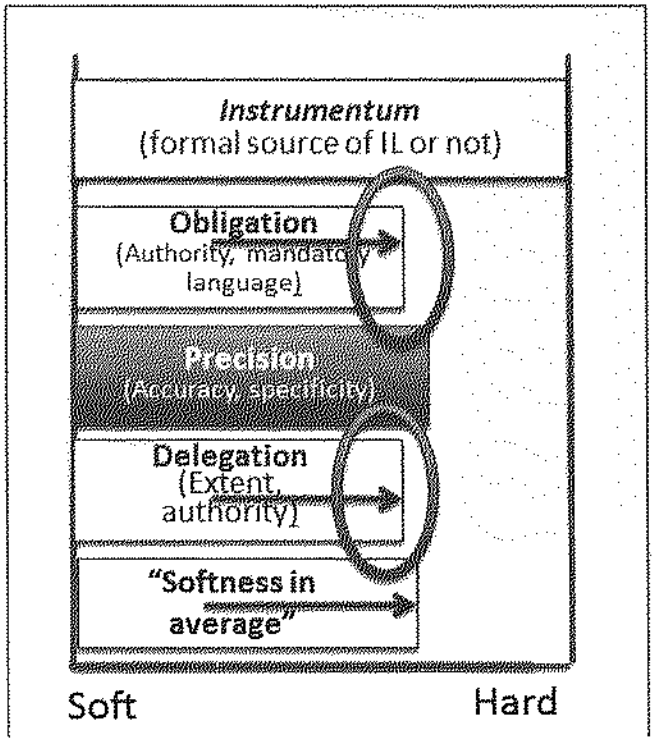

Figure 8. Effects of systemic coherence – hardening Public Non-Legal Instruments through hard law.

C. Private Instruments

1. Preliminary Observations

There are a great number of instruments that belong to the third group: private instruments with direct relevance to TNC behavior. Despite the variance among the instruments in this category, it is possible to make some general assumptions on how they score on the dimensions of the tool.

Private instruments, as explained above in Section IV, derive their denomination from the fact that their dominant authors are neither states nor state-centric international organizations. These types of

organizations do not have the capacity to adopt instruments that qualify as formal sources of international law, i.e. as Public Legal Instruments. None of these instruments in other words has a legal instrumentum. At the same time, however, such authors do have the capacity to agree among themselves on instruments that are of private kind.

Private instruments vary significantly by the (combinations of) authors adopting them. These authors are principally businesses or their associations, as well as national and international non-governmental organizations (NGOs). In many fields TNCs and NGOs have even entered into a veritable contest to set the applicable standards. Sometimes a single instrument is ultimately agreed upon by TNCs and NGOs together, such as the much discussed Forest Stewardship Principles and Criteria. Some private instruments are adopted together with or without the support of states or international organizations that result in some cases in so-called public-private partnerships (PPPs).[172] It is for that reason not always easy to distinguish between private and public instruments, although in most cases either the public or the private actors will be in a dominant role. The Voluntary Principles on Security and Human Rights (VPSHR) and the Extractive Industries Transparency Initiative (EITI) are, respectively, examples of a venture purely among TNCs and a venture between TNCs and a few states. In some cases, such as the UN Global Compact, NGOs have heavily criticized PPPs for being dominated from the outset by business interests under the umbrella of what was formally a state or IO initiative.[173]

It is difficult to make generalizations along the tool's dimension of authority with so many different author-addressee combinations. Public authors are generally, but not always, more authoritative than private parties, and the views on the authority of self-regulation vary greatly. Low authority indicates low obligation, and hence softness. Mandatory nature of the language differs widely as well: the Forest Stewardship Council confronts a TNC with mandatory language, while the UN Global Compact does not. It is voluntary to sign up for either instrument.

Generally, the dimension of delegation is very soft across the board, in particular where private instruments are a form of self-

172. Peter Utting & Ann Zammitt, *United Nations-Business Partnerships: Good Intentions and Contradictory Agendas*, 90 J. BUS. ETHICS 39 (2009).

173. Payne, *supra* note 13, at 13-14. *See also* J. Martens, *Precarious Partnerships: Six problems of the Global Compact between Business and the UN*, GLOBAL POL'Y FORUM, *available at* http://www.globalpolicy.org/component/content/article/225/32252.html (last visited Mar. 20, 2014).

regulation. The role of the state as delegatee is absent in the context of private instruments. In the NGO-led schemes, there may be some delegation to the NGOs, and the TNC schemes sometimes rely on external firms that perform corporate social accountability audits. Yet neither of them wields the investigative and prosecutorial power of the state.

Specificity is often high, not only ratione personae, but also ratione materiae, as companies are the only addressees. The used language may range from the very accurate and mandatory expressions of, technical standards to the very open and loosely formulated texts that are predominant in the human rights and environmental context, such as the Corporate Social Responsibility declarations of TNCs. Finally, on precision there is again much variance. The NGO principles usually score higher on this dimension than their TNC counterparts.

2. *The United Nations Global Compact ("UN Global Compact")*[174]

The United Nations Global Compact is a cooperative initiative of the UN and businesses, based on the multi-stakeholder ideology of UN-Business Partnerships that became prevalent in the UN in the 1990's.[175] The Global Compact is based on the voluntary incorporation by TNCs of a set of ten principles on human and labor rights, environmental rights and fight against corruption into all their activities. The companies also undertake to actively defend these values within their 'sphere of influence'.[176] The Global Compact is completely voluntary, both in regards to the initial registration as well as the subsequent adherence to the rules. In earlier versions, the principles were quite vague, but recently they refer to the UN Guiding Principles' chapter on the responsibilities of businesses. The link subjects companies to the more elaborate set of principles. They give more accurate, yet clearly non-mandatory guidance about the steps that TNCs can take not to violate existing legal rules. One may clearly notice the effects of positive systemic coherence between the Compact and the Principles. For example:

> Principle 2: "Businesses should make sure they are not complicit in human rights abuses," or

174. The content of this section is derived partly from Tim Staal, *The Roles of Hard Law and Soft Law in the Regulation of Global Business Conduct* (2010) (unpublished Master's Thesis, Vrije Universiteit Brussels).

175. Utting & Zammitt, *supra* note 173, at 39-40.

176. *See* U.N GLOBAL COMPACT, *available at* http://www.unglobalcompact.org/AboutTheGC/index.html (last visited Mar. 20, 2014).

Principle 9: "Businesses should encourage the development and diffusion of environmentally friendly technologies."

The Global Compact awards companies who report their efforts on a regular basis the right to sport the Global Compact Logo. A sanction exists in the form of 'de-listing' a company that does not report on its efforts over three consecutive one-year periods.[177] But in order to remain listed, a company need not do anything substantive. This TNC-favorable overall set-up attests to the private sector dominance in the Compact, and speaks for analyzing this public-private arrangement under the category of Private Instruments.

The Global Compact is based on the idea of forming a "community among the participants in which each individual actor strives to appear as appropriate in relation to other members of the network and to their stakeholders at large, a stance that should drive them to act according to the articulated principles."[178] Thus, the success of the Global Compact seems to depend on the plausibility of this relation between (superficial) peer accountability, the attractiveness of the Logo, and a TNC improved human rights and environmental record. This outcome seems quite case specific: what for a diligent TNC with high brand recognition and many aggressive competitors may create a hard instrument, may for a low profile free rider appear completely soft. The difficulty in even measuring such attributes against the tool illustrates well in fact the uncertainties and vagueness inherent in this type of an instrument.

In terms of softness, the drafters of the Compact seem to expect that the lack of mandatory and precise wording, as well as the emphasis on the Compact's voluntary nature, are compensated through the hardness of other dimensions. The primary means here is the delegation of the supervision over self-implementation to 'other members of the network and to their stakeholders at large'. These groups include other TNCs and NGOs. This has, however, arguably remained an empty promise. First of all, a single group of actors, the TNCs themselves, "appear[s] as rule setters, rule enforcers, rule followers and rule monitors."[179] This is at odds with the very idea of delegation. Second, the delegation of authority to 'stakeholders at large' points to two

177. *Integrity Measures,* U.N. GLOBAL COMPACT, *available at* http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html (last visited Feb. 18, 2014).

178. K. Sahlin-Andersson, *Emergent Cross-sectional Soft Regulations: Dynamics at play in the Global Compact Initiative*, *in* SOFT LAW IN GOVERNANCE AND REGULATION: AN INTERDISCIPLINARY ANALYSIS 140 (U. Mörth ed., Edward Elgar Pub 2004).

179. *Id.* at 141.

groups of actors: the general public and NGOs. The former may be expected to react at press stories about serious violations, but will not actively compare company behavior to the principles. So in that sense the general public has a limited, if any task at all, in the governance of the Global Compact. The most visible part of the public, NGOs, have from the beginning played an ambivalent role in the Compact. NGOs can be members, just like TNCs, and can therefore present a matter of alleged 'egregious abuse' to the Global Compact Board. However, the ultimate sanction is the 'de-listing' of the TNC. Such an outcome seems superficial at best, and thus makes for a very unsatisfactory route for NGOs. Compared to the OECD Guidelines' National Contact Points or to the human rights treaty bodies, one may conclude that barely any delegation of authority takes place under the Global Compact.

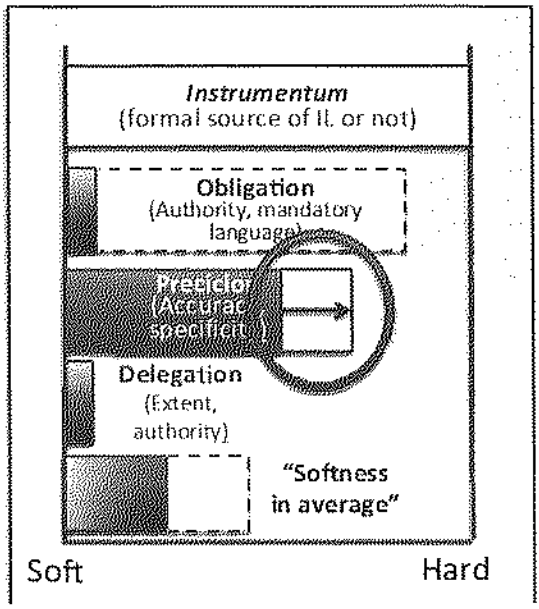

Figure 9. "Softness" of the UN Global Compact, with the impact of systemic coherence highlighted.

3. *The Forest Principles of the Forest Stewardship Council (FSC)*

Forestry is an area where nation states have consistently failed to reach a global legally binding agreement. Negotiations on a global forest convention were called off already at the Rio Earth Summit of 1992.[180] The International Tropical Timber Agreement (ITTA) is

180. B. Cashore et al., *Can Non-state Governance 'Ratchet Up' Global Environmental Standards? Lessons from the Forest Sector*, 16 RECIEL 158, 160 (2007).

criticized for focusing on trade issues and leaving environmental protection practically entirely at domestic discretion. What is left are a number of initiatives that in the course of the 1990's resulted in non-binding instruments with weak substance.[181] Possibly for these very reasons, forestry was one of the first fields where a new form of private transnational regulation appeared: the NGO-based certification scheme of the Forest Stewardship Council (FSC) aims directly at changing the behavior of large forestry companies,[182] often TNCs.

The FSC stands both for a governance scheme, the Forest Stewardship Council, and for a set of principles on forestry.[183] These "Forest Principles and Criteria" are further "elaborated through more specific global standards, which are adapted to local conditions by national or regional chapters."[184] FSC-certified forests must have a continuously updated management plan, the implementation of which is to be monitored and periodically verified by an accredited third-party auditor.[185] Participating companies may actually be obliged to change their policies, even in ways that are not necessarily cost-effective.[186] The Principles are specific in that they refer to one particular sector with its own demands, and they are also quite accurate. There are detailed

---

All substantive provisions of the ITTA 2006, which entered into force 7 December 2011, are indeed formulated as 'objectives' (Article 1), that are to be implemented through 'policy work and projects' (Article 24) and funding (Article 21) and the conduct of 'studies (Article 27). *See* International Tropical Timber Agreement, Jan.27, 2006, U.N. Doc. TD/TIMBER.3.12 (Jan. 27, 2006).

181. Intergovernmental Panel on Forests; Intergovernmental Forum on Forests; United Nations Forum on Forests, which produced the "Plan of Action" and the "Programme of Work", contained in E/CN.18/2001/3/Rev.1, which Dimitrov describes as "masterpieces of Machiavellian diplomacy". R.S. Dimitrov, *Hostage to Norms?: States, Institutions and Global Forest Politics*, 5 GLOBAL ENVIRONMENTAL POLITICS 11 (2005).

182. The high intensity of research on the FSC shows that if any private regulatory instrument is taken seriously and seen as a forerunner, it is the FSC. Interestingly, this literature has also ventured into the complement-substitute-or-antagonist debate referred to above. *See* E. Meidinger, *The Administrative Law of Global Private-Public Regulation: the Case of Forestry*, 17 EUR. J. INT'L L. 75-76 (2006); Cashore et al., *supra* note 181; J. Zeitlin, *Pragmatic Transnationalism: Governance Across Borders in the Global Economy*, 9 SOCIO-ECON. REV 196-97(2010); T. Bartley, *Transnational Private Regulation in Practice: The Limits of Forest and Labor Standards Certification in Indonesia*, 12 BUS. & POL. 7-8 (2010); T. Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 THEORETICAL INQUIRIES L. 517 (2011) [hereinafter *Transnational Governance*].

183. *Principles and Criteria for Forest Stewardship FSC-STD-01-001 (version 4-0)*, FSC INTERNATIONAL (1996), *available at* http://ic.fsc.org/principles-and-criteria.34.htm (last visited Feb. 10, 2014).

184. Zeitlin, *supra* note 183, at 196-97.

185. *Id.*

186. Cashore et al., *supra* note 181, at 161.

provisions on tenure and use rights (Principle 2), indigenous peoples' rights (Principle 3), community relations (Principles 4) and environmental impacts (Principle 6). Moreover, all the mentioned principles are phrased in clearly mandatory terms with every provision using the verb "shall".

On the macro level, the hardness of the obligation will depend on how many producers have been willing to join the scheme. Participation is in principle voluntary, but the pressure to join is nowadays rather high due to the strong developed country industry buy-in and increasing consumer awareness. In 2012, it was estimated that 168.364 million hectares,[187] compared to over 4 billion hectares in total forest coverage,[188] are FSC-certified. Overall, the high authority of the scheme and its mandatory language render the scheme quite hard in terms of the created obligation.

Delegation seems at first sight to be quite far reaching as well, although ultimately it is the softest link in the FSC. The governance of the FSC is in the hands of the tripartite Board of Directors, with members representing Environmental, Social and Economic (i.e. business) constituencies, and an equal participation from the global North and South.[189] This multi-stakeholder set-up has arguably boosted the authority of implementing the FSC. The interpretation of the Forest Principles, discussed above, is in the hands of the FSC's organs, not in that of the timber producing participants. The Board of Directors has indeed from time-to-time issued interpretive decisions on TNC activities.[190] Moreover, fulfillment by a timber producer of the FSC Principles is validated by independent certification bodies, which have in turn been accredited by the FSC.[191]

However, there are at least two reasons why the FSC and the certification bodies as delegatees do not reach a high level of delegation. First, it is quite impossible for the certification bodies to regularly check the companies' adherence with the principles. Its executive capacities fall far short of those of public authorities, even in

187. Forest Stewardship Council, *Facts & Figures*, FSC INTERNATIONAL (2014), *available at* https://ic.fsc.org/facts-figures.19.htm (last visited Feb. 10, 2014).

188. Food and Agric. Org. of the U.N., *State of the World's Forests 2012*, 15, FAO (2012), *available at* http://www.fao.org/docrep/016/i3010e/i3010e.pdf (last visited Feb. 10, 2014). In other words, about 4.2 % of total global forest coverage is certified by FSC.

189. Forest Stewardship Council, *Governance*, FSC INTERNATIONAL (2014), *available at* http://ic.fsc.org/governance.14.htm (last visited Mar. 26, 2014).

190. *See id.*

191. Forest Stewardship Council, *Accreditation*, FSC INTERNATIONAL (2014), *available at* http://ic.fsc.org/accreditation.28.htm (last visited Mar. 26, 2014).

developing countries. Its knowledge of 'local dynamics' is often inadequate to really assess compliance with the FSC Principles' criteria.[192] Second, and also connected to the lack of government resources and the authority involved, the only sanction available is the suspension of a forest's certification. As in most timber exporting developing states, FSC certified forests still amount to only a fraction of total production, this can hardly be called an effective sanction. To summarize, a private, non-local authority without effective means of enforcement makes for a 'softer' delegatee than a public, local authority.

The weaknesses in delegation are further aggravated by the FSC's lack of legal instrumentum. FSC is a telling example of how the softness of the dimensions of precision and obligation is quite limited, yet the scheme still will have to yield in case of conflict with other, formal rules such as domestic laws on forestry. As Bartley has insightfully hypothesized and empirically researched with Indonesia as case study, the design of private instruments such as the FSC and its criteria disregard the domestic regulatory setting in which the rules are expected to operate. For example, FSC Principle 2 requires that the exploitation of certified local forests respects "the tenure and use rights to the land and forest resources", and that such rights may only be given up through the "free and informed consent" of the involved communities. However, in the large forestry industry country Indonesia, the FSC requirements conflict with the domestic Forestry Act. The Act has "affirmed state control over forest land", and although the Forestry Act does protect local rights, "roughly ninety percent of the twelve million hectares of state forest land in Indonesia has not been properly defined".[193] The FSC certifications have added another layer of rules, with requirements that are in part contradictory to domestic laws. Yet in case of conflict, the local formal law obviously prevails, as is even explicitly stated in FSC Principle 1.1.[194] This problem may lead the FSC to "crumble under its own contradictions": a company must, to

192. *Transnational Governance*, *supra* note 183, at 533 (in the context of the community land use rights demanded by Principle 2.2) ("One former auditor suggested that assessment teams generally do not spend enough time on the ground to understand community dynamics, explaining that you are 'lucky if there's an NGO there,' or it can be difficult to learn the real situation.").

193. *Id.* at 532.

194. *Revised FSC Principles and Criteria for Forest Stewardship FSC-STD-01-001 (V5-0)*, FSC INTERNATIONAL 12 (Rev. 2012), *available at* https://ic.fsc.org/principles-and-criteria.34.htm (last visited Feb. 19, 2014) ("Principle 1: Compliance with Laws: The Organization shall comply with all applicable laws, regulations and nationally-ratified international treaties, conventions and agreements.").

be in conformity with the Forest Principles, both act in accordance with local law, as well as in contravention of it.[195] Had the FSC's Principles been laid down by states in a formal source of international law, it would have been much less clear that domestic forestry law would have prevailed in case of a conflict. The example shows well how the instrumentum dimension is fundamentally important.

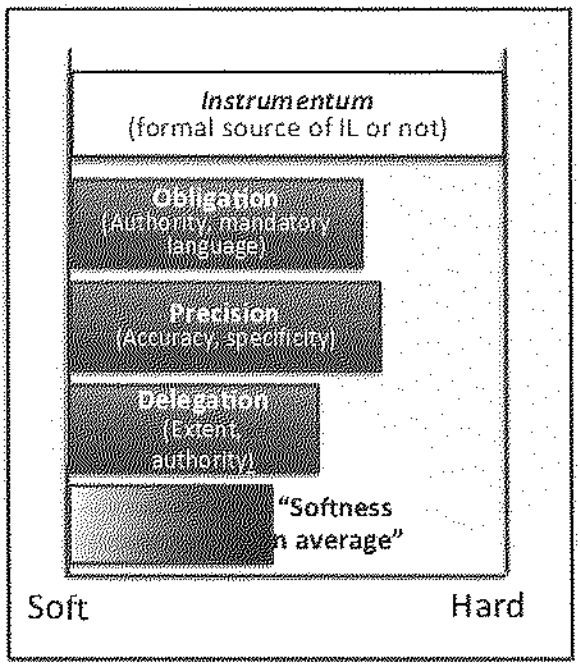

Figure 10. "Softness" of FSC.

4. Concluding Perspectives on Private Instruments

There are many labeling initiatives such as the FSC,[196] and many voluntary standards with an approach similar to the UN Global Compact. Some of them are even aimed at more specific sectors, problems or groups of TNCs, such as the Voluntary Principles on Security and Human Rights (VPSHR) and the Extractive Industries Transparency Initiative (EITI).

195. *Transnational Governance*, *supra* note 183, at 534. Compare the above stated umbrella to Principle 1 with Principle 1.8: "The Organization shall demonstrate a long-term commitment to adhere to the FSC Principles and Criteria in the Management Unit, and to related FSC Policies and Standards. A statement of this commitment shall be contained in a publicly available document made freely available." *Id.* at 13.

196. Many of these are assembled under the ISEAL alliance. *See generally About Us*, ISEAL ALLIANCE, *available at* http://www.isealalliance.org/ (last visited Mar. 26, 2014).

Two main problems became apparent from the analysis of these much-discussed private instruments. First, the great weakness in terms of delegation is, in the words of Sahlin-Andersson, that "it is not so clear who is governing whom."[197] Are NGOs governing TNCs? Or are TNCs governing themselves—or even each other? What role remains for governments? Second, it is unclear where obligation in these instruments really comes from. They often refer to 'international human rights standards', and stress that lower local standards, local government abuses, or lack of government enforcement do not impede what companies 'should' do. Yet it is not clear what exactly leads to raise the requirements above the level of a mere moral obligation, beyond a bare exclusion from a voluntary scheme. Is the marketplace already sophisticated enough to create such an impact?

It was apparent that even an instrument that on the surface seems to have a relatively high level of delegation, the FSC, in practice has rather limited implementation resources. It moreover has to recede where it conflicts with formal legal instruments that often maintain a lower environmental or human rights standard. Although the implementing authority is clearly delegated, its reach remains limited.

VI. CONCLUSIONS—THE MYRIAD EFFECTS OF SOFTNESS

The tool developed in this paper has two aims. First, it aims to contribute to the "soft law discourse" by promoting a move beyond the inaccurate and overly generic term "soft law".[198] This term appears problematic in the global governance of TNCs. It is proposed here, on the one hand, because it is more accurate and useful in the legal and political discourse to describe instruments on the basis of the three general categories introduced in the previous Section: Public Legal Instruments, Public Non-Legal Instruments and Private Instruments.[199] The categories build on the work of for example d'Aspremont[200] and

197. Sahlin-Andersson, *supra* note 179, at 130.

198. *See generally* Abbott et al., *supra* note 73. With international law, they mean to include explicitly formal sources of international law such as conventions/treaties. *Id.* at 402.

199. Compare these three groups with those distinguished by Blutman, who noted output of international organizations; non-binding output of states directly other than what is part of the formal sources of international law; and the output of civil society which is per definition non-binding. Blutman, *supra* note 67, at 607.

200. d'Aspremont, *supra* note 63, at 1082-87.

Blutman.[201] The basic distinction lies in the dimension of instrumentum: the "container" of the instrument as opposed to its negotium, the "contents."

On the other hand, it would add further, important nuance to the understanding of the instruments to perceive them along four dimensions of softness: the softness of the instrumentum, and of three aspects of the negotium, namely obligation (authority and the mandatory nature of the language); precision (accuracy and specificity); and delegation (extent and authority of delegation). These dimensions of softness, proposed originally by Abbott et al.[202], and developed further here, fine-tune the analysis by bringing forth key characteristics of the instruments.

Second, through the tool the paper explores how such re-systemization of instruments functions in the specific framework of the TNCs, taking into account the challenge of finding solutions to the void in their governance. The paper focuses in particular on how softness as a characteristic manifests itself in different types of TNC related instruments, and how this may link to the perceived void, and further to the instruments' effectiveness. It may even be possible to contemplate certain dimensions of softness, and combinations of thereof, that are necessary in reaching effectiveness in different circumstances. Finally, the utility and potential weaknesses of the conceptual tool itself may be elaborated upon during its application to practical case examples on the global governance of TNCs.

A. Effective Softness?

The application of the tool to various TNC related instruments, including legal public instruments, illustrates well how an analysis of softness is by no means limited to what is incorrectly called "soft law" instruments. All kinds of hard and soft instruments can, and indeed should, be scrutinized for their softness.

From the practical perspective of applying the instruments, the essential question is whether, and to what extent, the observed softness of an instrument correlates with its effectiveness. While the research in this paper is not geared to answer this question with any definitiveness, it is designed to prop exploratory insights onto what such a relationships might be. The first observation along this trajectory is the usual claim that "soft law" might be able to act as a supplement or a complement, or

201. Blutman, *supra* note 67, at 607.

202. Abbott et al., *supra* note 73, at 401.

even an alternative, to "hard law."[203] The claim assumes that somehow an instrument that is soft along one or more of the depicted dimensions can be effective in reaching a policy outcome. It can even potentially be more effective in doing so than a "hard law" instrument would be.

The effectiveness in other words may link to softness—but how exactly? At least two options appear to arise. In the first option, the softness of one (or more) dimension(s) directly contributes to the fact that the policy outcome is reached. This would reflect the scenario of "soft law" acting as an alternative to "hard law": it is because of its hardness along all the dimensions that a "hard law" instrument would not able to reach the desired outcome. Softness would under this assumption correlate positively with effectiveness.

The second option is that softness along one (or more) of the dimension(s) is unavoidable for an instrument to be legally, politically, technically, and/or in some other manner possible. Softness is the critical prerequisite for a policy instrument to be created, yet it is the other, hard dimension(s) of the instrument that in fact directly determines the instrument's effectiveness. Soft instruments are in this scenario a complement to "hard law". Softness as a characteristic only has an indirect role. Without the subtlety the instrument would not exist, and hence its qualities could not have an impact. The unique quality of 'soft' instruments as complements is their achievability.[204] They are, as explained in Section III, a necessity if "hard law" options are not at all, or not initially, available. But softness in itself will rather work against, than for, the effectiveness of the instrument. Softness is in these instruments just limited enough not to impede reaching the policy objective in a sufficient manner. The perceptions on what is considered sufficient may be quite subjective and, as the examples of using soft instruments to govern TNCs implied, not always representative of the reality.

The first option, i.e. the direct role and relevance of softness in an instrument's performance, can be tested through a number of propositions. The most different case approach would lead one to ask whether there are instruments that are soft on all the dimensions, yet still perform effectively. A positive answer would point towards effective instruments that are already quite removed from classic command-and-control law. Although the limited scope of the research does not exclude the possibility, the TNC case studies conducted in this

203. "Soft law" may also be seen in some cases as an antagonist to "hard law", but these questions are beyond the focus of this piece.

204. Abbott et al., *supra* note 73, at 401-03.

paper did not offer support for this hypothesis. Rather, the observations on the case studies seemed to point to the opposite direction: when defined along the dimensions used in this paper, there seems to be a negative correlation between softness and effectiveness. A negative correlation would hence perceive soft instruments in a paradoxical way: one should seek for the vital aspects of hardness in defining effective soft instruments. If the hypothesis on a positive correlation held, the ensuing question would then be whether an instrument's effectiveness could be associated with a particular aspect of softness.

B. Effective Hardness?

Indeed, looking back at the three categories of instruments and the empirical examples within them, the observations would appear to point into the opposite direction: some measure of hardness may be required on at least one, if not most, of the dimensions also for instruments to be effective. Turning this around, even the absence of hardness on one or two dimensions beyond the instrumentum—for instance lack of precision and specificity in the human rights treaties, or the incomplete delegation in the case of the FSC—may be fatal for its effectiveness. The conclusion of the case studies was that none of the instruments in any of the categories of Public Legal Instruments, Public Non-Legal Instruments and Private Instruments seemed to satisfactorily achieve the set human rights and environmental governance objectives regarding TNCs. The disappointing observation could hence have an explanation: each one of the TNC related instruments—even the "hard law" instruments—lacked one or more crucial hard dimensions that would have allowed them to be effective in that particular instance.

1. Over-Reaching

One may wonder, however, if the need to consider hard dimensions in soft instruments is already a sign of "over-reaching": have the soft instruments been set to achieve objectives that only instruments that are hard on all dimensions can achieve? Are they surpassing the limits of what soft instruments in directly filling a policy void can reach, even theoretically? In cases of over-reaching, soft instruments cannot act as complements nor as alternatives to "hard law"—except perhaps in some narrow respects.

As may be remembered from the development of the tool, the instrumentum is a core dimension of classic "hard law" instruments. Soft instruments lack this key characteristic; only in the first group, which consists of the formal sources of international law, are the instruments formally speaking law. Private instruments as defined in

this paper are adopted by private actors, either amongst themselves or in collaboration with public authorities. Because private actors completely lack the capacity to legislate, they cannot create formal instruments of international law. The instrumentum is not legal. A logical reaction would be to seek to increase hardness on the other dimensions of obligation, precision and delegation—potentially even all of them. The OECD Guidelines from the group of Public Non-Legal Instruments and Forest Stewardship Council (FSC) from the group of Private Instruments served as examples. As noted above, while perhaps practically possible, such across-the-board hardness would mean that the instrument measures hard in average, so much so as start to conceptually changing its nature from soft to hard, and even from non-law to law, if hardened along the instrumentum to a legislative act. In other words, the soft instrument has been "over-reaching", if the aim had been in policy objectives that can in fact only be reached with formal legal instruments that are hard on all accounts. It does not seem justified, or even possible, to contemplate Public Non-Legal Instruments or Private Instruments as effective alternatives or complements to "hard law" in these types of situations. Their role would remain partial, at best.

2. Under-Reaching

The fact that an instrument's effectiveness is tied to more hardness on a particular dimension does not have to imply that all effective instruments be considered "hard law". In practice, the relevance of such labels of hardness or softness is linked to the ability of the tool to help in creating the impetus to amend (i.e. to harden) an existing instrument in a tailored and adequate manner so as to reach the set objective. The situation may be different to the above examples of over-reaching. In cases of "under-reaching", the soft instrument is not fulfilling its complete promise, which would still be within the boundaries of what under the three categories and the four dimensions still constitute soft instruments. Hardening a particular aspect of an under-reaching instrument not would not always require pushing it beyond the boundaries of what conceptually are soft instruments. Understanding that the level of obligation and precision in the OECD Guidelines is sufficient, but that it is mainly the delegation aspect of the instrument that is lacking, could lead to amend the instrument in the correct fashion. This would point towards amending the practice of NCPs to become considerably more aggressive in publically reproaching the companies for their violations of human rights law.

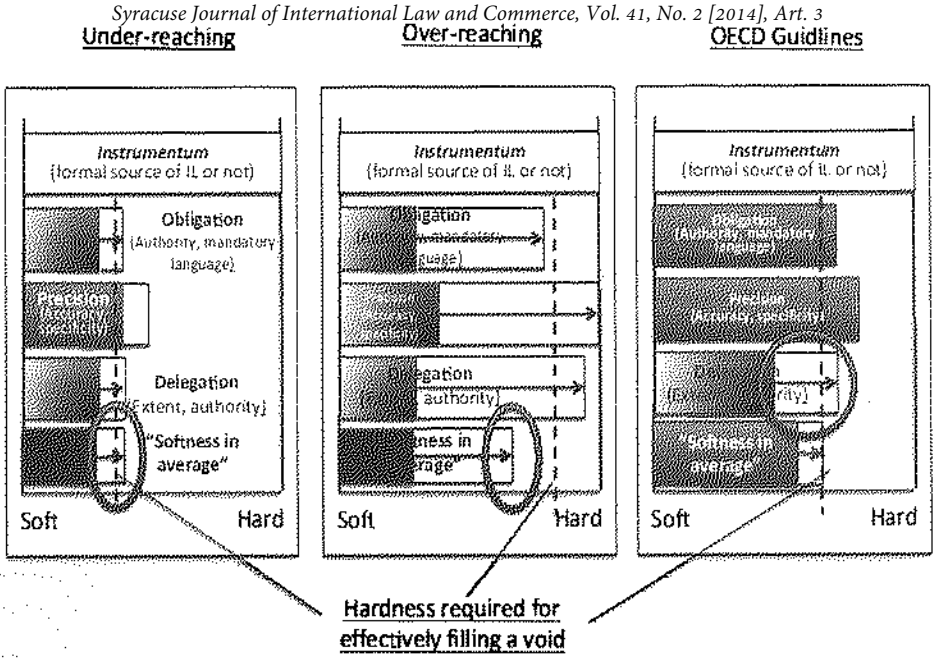

Figure 11. Instrument's achieved v. potential hardness in cases of under-reaching and over-reaching instruments.

Indeed, delegation appears to be a dimension on which practically all of the TNC-instruments that were used as case examples measured on the soft end of the scale. This implies an almost structural deficiency in delegating the implementation of the instruments. The observation finds clear parallels in the discourse on the deficiencies of "hard law": poor implementation and enforcement is also often cited as the weak point of hard international environmental and human rights law. In this important respect "soft law" therefore appears to offer very limited remedies. To state this differently: non-legal instruments could most fundamentally remedy the deficiencies of "hard law" if their unique characteristics could innovatively improve enforcement. To reiterate the above example: the impact of negative media coverage on TNCs image can be drastic, and hence prompt sweeping changes in company behavior. For example, heavy media attention led the company Chiquita (formerly United Fruit) to completely overhaul in the early 1990s its dreadful corporate social responsibility policies on exotic fruit business. Chiquita outsourced for example the corporate environmental and social audits to an external NGO, the Rainforest Alliance.[205] Yet to actually create such an impact, the application of this instrument needs to be delegated to a party that is prepared and equipped to publicize it

205. DANIEL ESTY & ANDREW WINSTON, FROM GREEN TO GOLD. HOW SMART COMPANIES USE ENVIRONMENTAL STRATEGY TO INNOVATE, CREATE VALUE AND BUILD COMPETITIVE ADVANTAGE 88, 183 (Yale University Press 2006).

without hesitation and delay —not just in theory, but in practice. This is a far cry from the current state of affairs, should the application of the media provisions of the OECD Guidelines offer a representative example in this respect.

It appears possible to give examples of under-reaching "soft law" also in terms of all other dimensions of softness. The UN Guiding Principles were an example of an instrument where the wording on what is really expected is both ambiguous and drafted in non-mandatory terms. More precise use of words that are clearly obligating would harden this instrument in a way that would appear to be vital for increasing its effectiveness in filling the policy void. Precision is a dimension on which the non-legal instruments may score quite well, because the tools can contain quite accurate provisions specifically targeted at TNCs. It is in fact the legal instruments that may be under-reaching on this aspect. The systemic coherence between soft and hard instruments could in a useful way combine the precision of the soft instruments with e.g. the hard instrumentum of for instance the Human Rights treaties.

C. Softness – A Combination of Multiple Dimensions

It seems possible with the help of the developed conceptual tool to synthesize the findings regarding the over-reaching and under-reaching soft instruments a few steps further, still. The values of all the dimensions of an instrument may be combined into a single value of "average softness," as was explained in Section IV.D. above. The softness/hardness of an instrument is only a single variable amongst many other time- and space-specific, inter-related variables that affect the overall policy outcomes in a globalized environment.[206] Yet a summary value may be useful in having an overview on the characteristics of the instrument that one is dealing with, even if the line between soft and hard is a subjective continuum, not a "metaphysical border" where the overall characteristics of an instrument would suddenly drastically change like the qualities of water change in the melting and boiling points. This may be exactly the point of using the model proposed here: the fact that any instrument consists of four dimensions with their "sub-dimensions" should quickly lead to a realization that the denomination of an instrument as "hard law" or "soft law" actually reveals very little of its characteristics. It is the constitutive dimensions of the instrument that matter. Instrumentum is

206. Karlsson-Vinkhuyzen & Vihma, *supra* note 66.

central, and admittedly the distinction of the formal sources of international law implies a binary dimension.

But its binary nature and importance are tempered by the other, continuum-type dimensions. They too can be crucial, depending on such factors as the instrument's objectives and addressees. The case studies on Public Legal Instruments showed how "hard law" may be quite soft. Case studies across the groups of instruments seemed to suggest that weak delegation of implementing tasks in some cases 'softens' the instrument more than a low measure of precision or obligation. The continuums are therefore useful; they make an analysis of the instruments more flexible and accurate, and facilitate detailed comparisons between them. As Abbot et al. noted[207] while developing these three dimensions, they can also serve to trace an instrument's evolution over time. The dimensions were used here as a means to understand, explain and to propose nuanced improvements to various kinds of TNC related instruments.

One might also speculate whether there are specific combinations of these dimensions of softness that are particularly well or poorly adapted for certain kinds of policy objectives and/or circumstances. Such "pairing" could support the policy making process. The case studies gave anecdotal evidence of such interconnections. For example, in the case of FSC, the hardness of the instrument along the dimensions of precision and delegation considerably alleviated the need to have fully hard obligations. Market pressures on TNCs also contributed to a lesser emphasis on delegation in this particular example.

States and IOs often seem to enforce international law upon TNCs in a rather lenient fashion: the delegation dimension was soft on virtually all the analysed instruments. Only very limited delegation to more independent, international bodies seems likely in the near future as well. Hardness along the other dimensions may alleviate that shortcoming only in some cases, such as the example of FSCs above. More precise and specific provisions will make it harder for states to argue that they are not under an obligation to act in a given situation.

D. Systemic coherence

Many authors have highlighted the importance of the systemic coherence between different instruments. Soft instruments may, according to these views, act either as complements, alternatives or antagonists to "hard law". This paper does not have as its objective to

207. Abbott, et al., *supra* note 73, at 405.

delve into the systemic coherence of instruments. It does shed some light on some of the interrelationships that were noticeable between the UN Global Compact, UN Guiding Principles, the OECD Guidelines, the Forest Stewardship Council, the human rights Covenants and domestic law. In particular, the systemic inconsistencies and antagonistic relations deserve further research particularly in order to better understand the prospects of governing TNCs. The discussion merges here with themes such as the fragmentation and integration of international law[208] and the management of institutional complexity in global governance.[209]

E. Prospects of Governing TNCs with "Soft Law"

1. "Soft Law" as a Misnomer – But Softness as an Asset

The analysis above has elaborated on whether "soft law" may help in filling the policy void left by "hard law" in governing transnational corporations in the areas of environmental protection and human rights. Softness may indeed be a quality that explains the characteristics of policy instruments in a manner that is useful. However, this benefit has often gone undetected or has been overshadowed by misunderstandings.[210] The softness of an instrument tends to correlate negatively with its effectiveness—if any straightforward relationship between the two is even verifiable. Softness as an overarching conceptual construct might end up not only correlating with ineffectiveness, but being defined by it. The notion of soft instruments, let alone "soft law", as an optimal gap filler for legal voids appears in this sense fundamentally flawed. Soft instruments may remedy policy problems, but in most cases exactly despite of their softness.

Gearing the policy strategy towards "soft law" without properly defining it could hence essentially threaten to misguide the entire effort. Perhaps the clearest example is the UN Global Compact, which relies

208. *See* Koskenniemi & Leino, *supra* note 59, at 553; *see also* Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi).

209. For institutional interaction, *see generally* Thomas Gehring & Sebastian Oberthür, *The Causal Mechanisms of Interaction between International Institutions*, 15 EUR. J. INT'L REL. 125 (2009).

210. *See* d'Aspremont, *supra* note 63, at 1083; *See also* d'Aspremont's recent introduction in the Leiden Journal of International Law where he apologizes for devoting a whole issue of the journal to such an oft-debated theme. Jean d'Aspremont & Tanja Aalberts, *Which Future for the Scholarly Concept of Soft International Law? Editors' Introductory Remarks*, 25 LEIDEN J. INT'L L. 309 (2012).

on softness quite explicitly.[211] "Soft law" is therefore not only a vague and overly generic concept—it may be a precarious misnomer. The case studies on the governance of TNCs gave insights into how "soft law" approaches may create false assumptions, and might lead to skewed policy pathways and meager outcomes.[212] The conceptualisation of the instruments and of the issue at stake, as well as the definition of the desired policy objectives, need to take place in much more accurate and authentic terms.

2. *Soft Instruments as Complements and Alternatives to "Hard Law"*

While "soft law" may be a misnomer, softness as a characteristic that is first properly defined may prove to be quite useful. It helps in explaining the characteristics of individual instruments. The notion of softness may also be useful in more correctly understanding the general characteristics that are commonly associated with soft instruments as we noted them in Section III: their necessity, uniqueness and unavoidability;[213] and their role as complements or alternatives[214] to "hard law". The uniqueness of soft instruments can mean a number of things. It can refer either to the instrument as a whole or to some of its particular characteristics. This observation prompts us to rethink the categories of Shaffer and Pollack, soft instruments as complements or alternatives to "hard law". A unique instrument would seem to mean that it combines softness and hardness in a different way along the dimensions of obligation, precision and delegation. Unique soft instruments are soft enough to be achievable—unlike a fully hard and legal instrument—yet hard enough to be effective. Thus, they are able to complement "hard law" in the narrow sense of addressing policy questions that "hard law" simply could not address at this moment. This is different from the occasional misconception that soft instruments are unique and effective for their softness only. The notion of a soft

211. "The initiative seeks to combine the best properties of the UN, such as moral authority and convening power, with the private sector's solution-finding strengths and the expertise and capacities of a range of key stakeholders. The Global Compact is global and local; private and public; voluntary yet accountable." *Overview of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT (Apr. 22, 2013), *available at* http://www.unglobalcompact.org/AboutTheGC/index.html (last visited Mar. 26, 2014).

212. *See* Utting & Zammitt, *supra* note 173, at 44, 47 (showing the wide belief within the UN in the late 1990's that soft approaches are preferable, because of lack of UN implementation powers).

213. *See* Section 3, *supra*.

214. The role of soft instruments as antagonists to hard law were excluded from the scope of this paper.

instrument constituting in these cases an "alternative"[215] also seems misleading: it hints at the existence of a choice—yet if the soft instrument is unique in this narrow sense, there is none.

If the uniqueness of the entire instrument refers to its distinctiveness from a "hard law" instrument, yet does not entail the filling of policy gaps beyond what "hard law" can do, it seems to offer an alternative to reaching a policy objective. Because certain softness on some dimensions is "permissible" in terms of reaching adequate effectiveness, a soft instrument can be the preferred alternative for other reasons, such as for being less costly to negotiate, lighter to administer or quicker to adapt to the evolving circumstances.

The uniqueness of certain (combinations of) characteristics, instead of the entire soft instrument, leads to a different kind of complementarity—the type Shaffer and Pollack described.[216] The differences in the softness of a soft and a hard instrument lead them to interact in a way that, together, creates a complementary result. The complementary characteristics may make up for certain soft dimensions in legal instruments—on which the complementing instrument is in fact harder—and result in even harder combinations. Some non-legal instrument may in this way prove harder on important dimensions than many existing legal instruments, particularly on precision, even though they are soft on others.

As for the unavoidability of soft instruments as a consequence of globalization, the nuance that can be identified in the softness of instruments calls for a similarly delicate attention in managing such instruments. To the extent that globalization implies the predominance of instruments without a hard instrumentum, it may imply doubtful effectiveness. Yet this is not at all self-evident, and can only be determined on a context-specific instrument-by-instrument analysis. The complication would offer one explanation to why it is so difficult to create clear-cut theories and approaches about the global governance of TNCs, or governance through regime complexes more generally speaking.

F. Epilogue: Revisiting the Chevron Case

While the Chevron case dragged on in the Ecuadorian judiciary and now continues in the arbitration bodies, Chevron has aligned itself with the Voluntary Principles on Security and Human Rights (VPSHR) and the Extractive Industries Transparency Initiative (EITI). Will these

215. Shaffer & Pollack, *supra* note 46, at 717-21.

216. *Id.* at 721-22.

soft instruments offer a remedy to address the considerable environmental degradation? Could they prevent similar cases from taking place in the future? The EITI aims at transparent financial flows between the extractive industry and their host governments. VPSHR aims to prevent human rights abuses that would be a consequence of companies' private security operations. Already in terms of the subject matter, these instruments do not present comprehensive solutions to address issues of environmental protection or human rights protection. Regrettably, when assessed through the tool developed in this paper, they appear moreover to be of the softest type. Both are predominantly private, non-legal instruments, with some involvement of governments in the VPSHR. The rather vague and non-mandatory principles are quite soft in terms of precision and obligation, and auditing as the only measure of delegation leaves this dimension soft as well. In fact, the principal aim of both instruments may rather be to shield companies from further liability rather than addressing fundamental aspects of human rights or environmental protection related conduct. In other words, a closer analysis of softness reveals there to be little hope for these particular soft instruments preventing, let alone remedying, the situation in cases such as Chevron.

More promising, at least for future cases, could be the National Contact Points under the revised 2000 OECD Guidelines for Multinational Enterprises. Especially insofar as the damage can be qualified as (environmental) human rights or labor rights violations, a 'specific procedure' can be commenced before the United States NCP.[217] As was discussed above in section V.C., such procedures may lead to public statements by the NCP, or to a settlement of the dispute between the parties. However, due to the very limited delegation dimension, an NCP cannot order damages; it can primarily be useful in ceasing the TNC conduct.

217. *See U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises*, U.S. DEPARTMENT OF STATE, *available at* http://www.state.gov/e/eb/oecd/usncp/index.htm (last visited Mar. 26, 2014).