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Order at the Margins

The Legal Construction of Interface Conflicts over Time

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Order at the Margins: The Legal Construction of Interface Conflicts over Time

Nico Krisch[*], *Francesco Corradini*[**], *and Lucy Lu Reimers*[***]

Legal multiplicity in the global realm, and the interface conflicts that ensue from it, are widely thought to have a destabilizing effect, blocking the path towards a more integrated and perhaps constitutionalized global order. While this diagnosis may appear plausible if interface conflicts are seen as snapshots, it is less convincing if we regard them, from a diachronic perspective, as part of social processes that define the relation between different norms over time. This paper works towards such a diachronic account, and it creates a typology of interface conflicts and the actors involved in them which helps to generate expectations about the likelihood that these conflicts result in friction. It then uses two case studies of 'irritative' conflicts at the interface between economic governance and human rights to illustrate the dynamics and consequences of this type of conflict. Both cases appear as instances of prolonged norm contestation which, despite continued irresolution of the underlying conflicts as a matter of law, have resulted in a significant reorientation and (partial) consolidation around new interpretations. This suggests that interface conflicts can fruitfully be seen as a pathway for change in the otherwise rigid structure of international law.

I. Introduction

Legal multiplicity in the global realm, and the interface conflicts that ensue from it, are widely thought to have a destabilizing effect. Interface conflicts – situations in which actors invoke competing norms to justify their diverging positions (Kreuder-Sonnen and Zürn forthcoming) – are seen to enhance the potential for conflict because actors lack a jointly accepted reference point for settling their disputes and are instead free to pursue

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diverging paths with reference to norms in their favor. The legal irresolution that results from these conflicts is seen to lead to greater unpredictability, forum-shopping and non-compliance, blocking the path towards a more integrated, perhaps constitutionalized, global order.

Yet this common depiction of the effects of interface conflicts sits uneasily with recent empirical observations, and it suffers from a significant bias because of its static nature. In a static picture, interface conflicts invite binary choices and forum-shopping on the part of individual actors. From a diachronic perspective, however, such conflicts are part of social processes that define the relation between different norms over time. These processes can be of a frictious kind with prolonged uncertainty and tension, but they can also lead to convergence, consolidation and widespread acceptance. Moreover, these processes are not necessarily characterized solely by antagonism between (colliding) institutions, but often involve a variety of actors that utilize and navigate between colliding norms and contribute to the construction of relations between them, thus shaping the global order 'after fragmentation'.

In this paper, we work towards an account of interface conflicts that includes this longer-term perspective. Interface conflicts appear not only as individual instances of distributional conflict, but instead as a particular form of norm contestation. While sometimes causing friction and uncertainty in the short term, they may in the long term be a pathway for change in an otherwise rigid structure of international law.

We develop this account on the basis of a distinction of different types of interface conflicts and the actors which play a part in them. The transformative dimension of interface conflicts is particularly prominent in 'irritative' interface conflicts – conflicts that emerge not out of a contest over which institution governs a particular issue, but out of an attempt by actors in one context to irritate (and change) existing norms developed in another.

We illustrate the dynamics of such irritative conflicts with two cases at the interface between global economic governance and human rights. Pitting two spheres of authority with dissimilar rationales and institutional structures against each other, these conflicts might be expected to generate the friction diagnosed in many existing accounts of pluralism or fragmentation. Observed over time, however, the picture turns out to be far more complex. It is characterized by phases of tension as well as significant convergence even as actors maintain diverging views on the relationship between competing norms. Despite this irresolution, these interface conflicts have contributed to a significant, if partial, reorientation of the global legal order.

II. Fragmentation and friction

Regime complexity and legal multiplicity have by now been accepted as conditions of the contemporary global order. In many, perhaps most, issue areas of global governance, different norms and institutions come with overlapping claims to compliance on the part of their addressees, and there is no obvious resolution – legal or otherwise – of the tension between those claims.

While this diagnosis is widely shared and many studies have tackled the origins of complexity and fragmentation (Raustiala and Victor 2004; Abbott, Green, and Keohane 2016), the consequences of the phenomenon are less well understood. When it comes to the outcome of conflicts between competing norms, analyses diverge significantly – some accounts highlight the role of powerful actors, others the influence of dispute settlement institutions, yet others the openings created for weaker states (Alter and Raustiala 2018, 340–43; Wisken 2018). Less understood are the *systemic* consequences of complexity. Most assumptions here circle around the destabilizing effects of norm collisions (Gómez-Mera 2016, 569–70). When actors cannot resort to a jointly accepted norm to settle their disputes and are instead free to pursue diverging paths with reference to norms in their favor, prolonged conflict is seen to become more likely. In this image, the irresolution of norm conflicts also undermines the stabilizing force of legal norms and the potential transformation of the global order through constitutionalization. If compliance depends – as is widely thought – on the precision of the respective norm, it is bound to be negatively affected if norms compete and call each other into question. The international rule of law stands to suffer from such fragmentation as a consequence (Peters 2017, 678–80).

The primary focus in such analyses is on states' cross-institutional strategies to evade existing international obligations (Alter and Meunier 2009, 15–17, 20; Gómez-Mera 2016). Complexity, and norm collisions in particular, opens up a variety of tools to governments to legitimize deviation from commitments in one context by reference to another. States can exploit the strategic inconsistencies so created, and they can forum shop between different institutions (Raustiala and Victor 2004, 299–302). They can also engage in broader "regime shifting" by moving an issue into a different context, or even by creating new treaty regimes and institutions in order to counter existing ones (Helfer 2004; J. C. Morse and Keohane 2014).

One central element in this analysis is the *legal* irresolution of norm collisions. This irresolution is not inevitable – norm collisions in law are ubiquitous but, for the most part, they tend to be innocuous. Legal orders provide conflict norms that determine which of two colliding norms takes precedence – often through hierarchies or later-in-time or *lex specialis* rules. They also often provide institutional mechanisms – typically courts – to decide instances that remain unclear.

In the global context, however, we only find rudimentary analogues to such structures. International courts have limited jurisdiction and are typically confined to the interpretation of particular instruments, unable to speak authoritatively on conflicts between norms from different origins (Kingsbury 2011). The World Trade Organization (WTO) Appellate Body, for example, approaches norm collisions from the vantage point of world trade law, and other norms play a lesser role in its proceedings. Even the International Court of Justice is often limited to the interpretation of particular treaties. It only enjoys general jurisdiction – spanning different parts of international law – where the states involved have explicitly consented to it doing so. Most instances of interface conflicts thus cannot be authoritatively resolved by an international court.

The global legal order also has few equivalents to the conflict norms available in domestic systems. International law has established certain internal hierarchies (such as the concept of *ius cogens* and Article 103 of the Charter of the United Nations (UN)) and it knows the *lex posterior* and *lex specialis* norms typical of national legal orders. The

International Law Commission has emphasized these in its attempt at dealing with the phenomenon of fragmentation in international law (International Law Commission 2006) and they may constitute the kernel of a common language across regimes (Birkenkötter forthcoming). Yet these norms are of limited applicability in many practical cases of interface conflicts – mainly because the colliding norms tend to be enshrined in instruments with different sets of parties, which in the consent-based order of international law makes it difficult to use one instrument to interpret the other (Pulkowski 2014, 287–93). Furthermore, international law's conflict norms apply only to collisions between norms of formal international law, whereas many important collisions involve international and domestic norms, as well as informal norms of various kinds. As a matter of law, therefore, many interface conflicts do not have a straightforward solution.

The practical effects of such irresolution may be mitigated by a shift to new tools of interpretation – tools that focus on 'communicative compatibility' rather than consistent interpretation (Pulkowski 2014), or that provide bridging mechanisms on the part of dispute settlers (Delmas-Marty 2009; Young 2012; Andenas and Bjorge 2015; Peters 2017). These do indeed reduce the potential for friction in individual cases as they eschew hard choices in favor of one or the other of two colliding norms. However, especially with minimalist solutions or pragmatic attempts at avoiding principled stances, the reduced friction in one case may generate greater instability later on, as actors do not find guidance as to future behavior and continued contestation may ensue (Krisch 2010, chap. 6).

III. The dynamism of interface conflicts

The typical image of interface conflicts and their consequences is that of a snapshot: a dispute between two or more actors at a given moment in time, with diverging norms being invoked, and sometimes one or more authorities involved in settling the dispute. In this snapshot, the lack of settlement is pronounced – no clear answer can usually be given as to what the governing norm is, and the risk of friction so widely emphasized in the literature appears real.

Yet interface conflicts do not occur as snapshots. They emerge, prosper and sometimes fade over a considerable period of time, and the moments in which actors are in the dark over the norms they need to comply with may well be relatively short. Irresolution may persist as a matter of formal law, but background understandings often shift and consolidate in such a way as to provide guidance as to the respective weight of the competing norms. Phases of friction may then be contingent episodes which bring out the contestatory potential of norm collisions but will often give way to a more settled construction of norm relations.

During such phases of friction, actors use different tools to respond to the interface conflict. Some will seek to claim primacy of one norm over the other and try to gain support for such claims if they are not yet widely shared. Others may make interpretive moves towards finding common ground or engage in efforts at active coordination and the creation of linkages (Stone Sweet 2012; Faude 2015; Green and Auld 2017; Megiddo 2019). Many of these moves, and the reactions they trigger, have feedback effects, with the potential effect that the norms themselves as well as their relation with one another may

look very different at the outset than at a later stage in the development of an interface conflict.

Contestation and consolidation

The dynamism of norm collisions comes into sharper relief when observed from a historical distance. Consider the process through which the fight against the slave trade became established as an exception to the principle of flag state consent on the high seas (Grewe 2000, 554–69; Kern 2004). When the slave trade was abolished in several countries around the turn of the 19th century, the customary principle of flag state consent turned out to be a major obstacle for effective enforcement. Especially Great Britain, which had outlawed the trade in 1807, sought to change the rules of 'visitation' of other countries' ships with a view to policing the prohibition (Kern 2004, 239–40). But it ran into difficulties when trying to reach a broader, multilateral agreement on such change. In response, it began a strategy of 'regime-shifting' by turning to multilateral and bilateral agreements containing (formally reciprocal) visitation rights, eventually concluding agreements with twenty countries. This strategy was also designed to challenge the restrictive customary rules to justify searches of ships flying the flag of non-participating countries, in particular the United States. For long, however, this goal remained elusive – still in 1856, Britain had to admit that, in its relation with the US, "we have no legal claim to the right to visit" (Kern 2004, 256). It was only with the onset of the civil war that the US gave up its resistance, clearing the way for the slave trade to be recognized as another exception to the customary flag state principle.

The norm collision between the customary rule and new norms contained in bi- and multilateral treaties unfolded over half a century, and during that time, it left the state of international law unsettled. It created space for British attempts to police the slave trade and bring other countries to accept the right to do so, but it also led to uncertainty and a range of new disputes and incidents. Yet with the benefit of hindsight, this episode also appears as one of contestation and change, eventually leading to the adaptation of international law to a changed moral landscape. The creation of colliding norms helped to shape an environment in which it was ever more difficult to uphold the original rule as a matter of law.

This more dynamic, interactive picture is very different from that typically painted of regime complexity, in which actors forum-shop between different, fixed bodies of norms and rival institutions. Where the latter suggests friction and opportunistic moves to strengthen opposed positions, the former highlights the potential for adaptation, convergence and stabilization over time, and it lets interface conflicts appear as elements of the contestatory processes that unfold in the international order at all times (Wiener 2018; Zürn 2018; Gholiagha, Holzscheiter, and Liese forthcoming). The two elements may be two sides of the same coin, but looking at the dynamic, longer-term process helps us to see not only the unresolved character of individual interface conflicts, but also the effects of actors' attempts at positioning themselves towards them. These attempts reshape the normative structure in which they operate, potentially leading to the acceptance of a new relation of the norms at issue.

Varieties of interface conflicts

Whether an interface conflict leads to stability or instability will depend in large part on the positioning of the actors involved. We can expect even strategic actors to be more cooperative in an iterated game than in a one-off game, and this helps to shift basic assumptions about the level of friction in norm collisions when taking their unfolding over time into view (Gehring and Faude 2014). Moreover, not all interface conflicts are the same, and the degree of instability that comes with them is likely to vary depending on the characteristics of a particular conflict. As we will see below, three characteristics appear as particularly consequential: the degree of institutional rivalry, the relation with the social context, and the kinds of interpreters involved in the conflict.

The most emblematic (and most widely-studied) cases of interface conflicts are those that are deliberately created to pitch *rivalrous* sites of regulation against one another. Actors then struggle over which authority emerges as central – and which substantive norms prevail. An example here would be the contest over intellectual property regulation and the collision between WTO and World Intellectual Property Organization (WIPO) approaches (and law-making processes) in which the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) served to consolidate gains on the WTO side. In this type of conflict, coordination and compromise can arise – for example, a division of labor between institutions may emerge spontaneously or through an agreement (Faude 2015; Faude and Fuß forthcoming). Yet forum shopping is also a real possibility: rivalrous institutions will often have much at stake and are thus more likely to reject compromise; institutional rivalry may then persist until a winner emerges (see also Orsini, Morin, and Young 2013, 33–35).

Yet many interface conflicts are created not in order to rival, but to *irritate* an existing body of norms or regulatory institutions. An example is the adoption of the Cartagena Protocol on Biosafety in the institutional context of the Biodiversity Convention. The Protocol was not meant to replace the WTO (specifically the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement)) as the major forum for the regulation of trade in goods with genetically modified organisms, but was instead aimed at recalibrating the interpretation of SPS norms in the direction of a more precautionary approach (Pollack and Shaffer 2009, 152–58).

Moreover, not all relevant interface conflicts consist in deliberate challenges – some come about as somewhat unintended *side effects* of the production or interpretation of norms in another context (Faude 2015, 54–58). Such side effects may arise, for example, as a result of technological change, as, for example, when the rise of the internet led to greater salience of privacy issues in telecommunications regulation. Or they may come about as a consequence of heavily bounded rationality, for example when new policymakers have limited knowledge of prior legal rules (Mallard 2014, 447).

Interface conflicts that arise as unintended side effects are less likely to lead to substantial friction – actors who stumble upon an accidental norm collision will typically be more inclined to seek an accommodating stance than actors who strategically provoke an interface conflict. Yet the deliberately created types do not necessarily lead to prolonged instability either; much depends here on the way in which the conflict is managed (Introduction to this Special Issue). What is often overlooked, however, is that

not all types of deliberately created conflicts are equal in their potential for destabilization. Irritative norm collisions are likely to be more conducive to accommodation than rivalrous ones, as irritation can be met by gradual adjustments while rivalry (especially institutional competition) often forces binary choices. Moreover, irritative conflicts are usually a form of 'applicatory' contestation which does not challenge the authority of a norm or institution as such, but instead calls into question merely the way in which it is applied (see also Deitelhoff and Zimmermann forthcoming).

Changing social contexts

Interface conflicts vary not only in the ways in which they are brought about, but also according to the social contexts in which they are embedded. The typical picture of a norm collision largely abstracts from that context and portrays actors as taking an active part in such collisions for their own benefit, bringing their power position to bear and instrumentalizing existing institutions for their benefit. This picture emphasizes the *distributional* aspect of the interface conflict.

Yet all conflicts between institutionalized norms are also part of a broader social context which assigns these norms differential weights, and many are part of a change process in which these weights are being readjusted (see also Gholiagha, Holzscheiter, and Liese forthcoming; Moe and Geis forthcoming). The development of an interface conflict over time will often be intertwined with this process of social change, and the linkage between both relates to the *transformative* aspect of the conflict. Distributional and transformative elements typically co-exist in a particular case. To take an example, the famous case of the tension between intellectual property norms under the TRIPS Agreement and the provision of essential medicines had a significant distributional component as it turned on profit expectations of Northern pharmaceutical industries and the costs of health provision in developing countries. Seen over time and with more attention to the social context, the interface conflict also had a transformative side: it can hardly be understood without taking into view the growing societal contestation of international intellectual property norms (Sell and Prakash 2004). The moral challenge of intellectual property (IP) norms by advocates of health and development issues fueled the invocation of competing formal norms, just as that invocation fed back into the contestation. This led to a relatively rapid readjustment of the weights of the colliding norms in public discourse, which was eventually ratified in the WTO context (Helfer 2004).

Attention to the social context helps us to better assess the destabilizing effects of the legal uncertainty that comes with an interface conflict. Where a norm is already subject to societal contestation, the invocation of a competing norm does not itself create uncertainty – it is merely a new, and potent, form of expressing such contestation, made easier in an environment of legal multiplicity. Furthermore, where societal contestation gains strength over time, recourse to a competing norm may be a means for the legal system to adjust to the new environment and track social change. In an otherwise rigid international legal order, with high hurdles for formal change, norm collisions can provide an opening for responding to changing circumstances (see also Krisch 2010, 240). Seen from this perspective, interface conflicts may help to avoid the instability that would derive from a

gap between formal norms and social values, and provide a path towards an order in which the two are (more) in sync.

Different interpreters

How the relation between colliding norms is defined also depends on which actors undertake the work of definition. In debates around regime complexes and interface conflicts most attention is paid to interpreters that are institutionally associated with one or the other of the competing norms. The WTO Appellate Body is institutionally wedded to the WTO agreements, and we can expect it to emphasize WTO law over other norms when it perceives an antinomy between the two (Young 2007; but see also Flett 2012). More generally, international institutions are likely to promote and defend the rules produced through, in and around them; it is then unsurprising if these bodies, when faced with an interface conflict, give primacy to their 'own' norms. Even if they use the common language of international law (Birkenkötter forthcoming), they will typically do so from their own, particularistic perspective. Between such bodies, open divergence and contestation is not preordained, but it remains relatively likely.

However, not all interpreters have such firm commitments, and in many interface conflicts, the landscape is instead populated by third actors – actors who, as dispute settlers, addressees or interested individuals, make pronouncements about the relation of conflicting norms without being clearly associated with one norm or the other. These may be judicial bodies, such as the International Court of Justice which is not an organ of any particular treaty regime and claims a place 'above' the different parts of a fragmented international legal order (Guillaume 1995, 861–62). National governments often take interpretive positions, and domestic courts and regulators, too, can be seen as such third actors insofar as they are not wedded to any particular international or transnational body of norms but merely construe norm relations when resolving disputes or drafting domestic regulation. But the range of third parties reaches further into the private realm: for example, banks need to situate themselves vis-à-vis competing bodies of transnational financial regulation, and multinational companies need to respond to the variety of codes of conduct and corporate social responsibility (CSR) norms that are produced transnationally.

All these actors contribute to the decentralized process of constructing and defining the relation between colliding norms. How they position themselves is less predictable than for those interpreters directly associated with one or the other of these norms, and will have to do with a variety of factors – material interests, reputational costs and benefits, social norms in their environment, and broader conceptions of the global legal order. Yet we can expect that for those third actors, the scope for pursuing accommodation and balance is greater than for the institutionally-defined ones as they have less determined commitments and may frequently have a greater interest in arriving at one, predictable (compromise) solution than in the pursuit of one or the other positions at the cost of continued irresolution (see also Megiddo 2019, 127–31).

IV. Norm collisions over time: two vignettes

In the following, we use two case studies at the intersection of global economic governance and human rights to illuminate the dynamics of norm collisions over time. The cases involve two spheres of authority with diverging rationales and institutional contexts which tend to produce tensions in the struggle over the direction of global capitalism (but see Moyn 2018). Because of their diverging rationales, they are likely to generate friction rather than easy accommodation (Introduction to this Special Issue). By focusing on two cases of irritative conflict, we also aim to explore whether this type of conflict may indeed, as predicted above, be more conducive to stabilization in the longer term.

Human rights in World Bank policies

The World Bank's launch, in October 2018, of its new Environmental and Social Framework (ESF) made visible, yet again, the interface conflict that has characterized the relationship between the Bank and human rights for four decades (Heupel 2017). The ESF is a new set of environmental and social policies which will progressively replace the older Safeguard Policies. While the Bank claims it will help manage environmental and social risks of projects, the human rights community has been far more skeptical – UN human rights experts have publically criticized the ESF for its lack of 'any meaningful references to human rights and international human rights law, except for passing references in the Vision statement and Environmental and Social Standard' (OHCHR 2014). The Bank, however, insisted that a 'human rights-based approach is outside the scope of the ESF' (World Bank 2018, 47) and kept human rights references to a minimum.

These competing positions are embedded in a decades-long struggle over the relation between the Bank's regulatory institutions and human rights, driven in large measure by interactions between Bank lawyers, states, international institutions and civil society actors engaged in struggles for social and environmental justice in the many sites affected by Bank-financed projects (Fox and Brown 1998). Early manifestations of this tension began in the 1970s and early 1980s when environmental and indigenous issues gained traction within the Bank. The struggle of indigenous peoples against land dispossession around the Polonoroeste project in the Brazilian Amazon triggered various iterations of a rule-making process for projects with an impact on indigenous groups (Kingsbury 1999; Eastwood 2011). Importantly, those policies drew inspiration, but also distanced themselves, from international standards existing at the time.

From the 1980s to the 1990s, civil society actors construed a second wave of irritations through the invocation of Bank's policies and international human rights norms against controversial Bank-funded projects. Much of it was fueled by protests of local and transnational non-governmental organizations (NGOs) against the Sardar Sarovar dam project in India. These protests, jointly with pressure by the US Congress, led to the Morse report, an independent investigation commissioned by the Bank. The report gave an account of the flaws in the Narmada case that meshed together Bank policies and human rights norms, and thus provided a push for greater engagement (B. Morse and Berger 1992). However, a follow-up internal review a year later failed to refer to any of the human rights norms mentioned in the Morse report (Wyss 1993).

Still, this episode of contestation did lead to significant institutional innovation, in particular the establishment of the World Bank Inspection Panel (Bradlow 1993). In spite of significant resistance on the part of the Bank as well as of some borrowing states, the Panel soon became a potent tool in the hands of social movements. Yet NGOs also criticized the Panel process, targeting especially the limited scope of its mandate which formally excludes jurisdiction over human rights violations. While this exclusion remains in place today, after different rounds of reforms, the Panel has found subtle ways to construe an engagement between Bank's policies and human rights (Vita, Tan, and Panjshiri 2017).

This approach reflects the winding process through which the World Bank has managed the tension between its own rules and international human rights norms more generally (Sarfaty 2012). Traditionally, the scope of that relationship was seen to be legally constrained by the 'political prohibition' rule in the Articles of Agreement which provides that 'the Bank and its officers shall not interfere in the political affairs of any member'. While human rights advocates tend to invoke the general applicability of human rights norms to international organizations, the World Bank has long regarded the Articles of Agreement, and especially the political prohibition rule, as *lex specialis* (Genugten 2015). However, through creative interpretation, some lawyers at the Bank have opened up space for a greater weight of human rights norms, with one General Counsel going as far as to state that 'the Articles of Agreement permit, and in some cases require the Bank to recognize the human rights dimensions of its development policies and activities' (Dañino 2006). More recent interpretations have returned to somewhat more cautious positions (Palacio 2006; Leroy 2012). The incorporation of certain, selected human rights norms – for example, indigenous rights or gender equality norms – into the Bank's internal policies took place in the shadow of this broader constitutional question.

The struggle over the relationship between World Bank rules and human rights is ongoing, with positions of the Bank and human rights advocates still far apart. Yet between the 1970s and today, the relative weights of, and distance between, the two bodies of norms have shifted, and the Bank has, albeit cautiously and selectively, come to take human rights concerns into account in a way that would have been unlikely in the past. If human rights claims continue to irritate the Bank, they express ongoing political contestation over the nature of development projects. Yet the resulting picture has little to do with the frequent assumption of destabilization brought about by an interface conflict. It is rather a picture in which an irritative norm collision contributes to a process of incremental change in an institution that remains stable (and has traditionally been relatively immune to challenges from the outside).

Corporate social responsibility and international human rights law

Globalization has given rise to multinational corporations (MNCs) and transnational corporate networks with global reach, the individual components of which are typically incorporated separately into different national jurisdictions. Since the 1970s, efforts at closing the protection gaps arising from this legal fragmentation have spurred norm production in many sites, public and private, and they have engendered competing approaches, expressed in part in colliding norms (Zerk 2006). In the early stages, human rights were largely a marginal concern. The push for a code of conduct for transnational

corporations was motivated, on the part of developing countries, by a concern about the intrusive nature of MNCs as agents of 'neo-imperialism'. The focus was thus primarily on the reassertion of government control and development objectives, while developed countries – typically MNC's home states – sought to achieve protections for the companies' investments. This focus is reflected in the (eventually unsuccessful) UN negotiations on a *Code of Conduct for Transnational Corporations* as well as in the 1976 OECD *Guidelines on Multinational Enterprises* and also dominates the 1977 ILO *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (Sauvant 2015).

The human rights discourse about multinationals stands in tension with this approach, in that it focuses on the avoidance of specific harm and ensuring accountability as opposed to the focus on voluntary, responsible behavior in the CSR discourse. Since the 1980s, concerns about MNCs were increasingly framed in human rights language, driven largely by civil society organizations which responded to well-publicized cases of corporate wrongdoing, social and environmental harm and egregious human rights abuses (Ramasastry 2015). The environmental disaster at the Union Carbide pesticide plant in Bhopal, India, and Shell's complicity in crimes committed by Nigeria's military in Ogoniland stand out in this regard.

For long, the impact of this discursive shift was limited. The *OECD Guidelines* incorporated a (very cautious) human rights clause only in 2000. At the same time, significant differences emerged in the human rights camp between proponents of a (non-binding) responsibility of corporations to uphold human rights and those of a (binding) obligation to do so. This divide reflects positional differences about the scope and applicability of human rights law to corporations and, more specifically, the question of whether corporations (should) have direct human rights obligations under international law or whether only states (should) carry such obligations (Zerk 2006, 7–8). The difference became institutionally manifest in the contrast between the 2000 *UN Global Compact*, which expresses a voluntary, non-binding commitment in rather soft ('should') language, and the 2003 *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, which speak of corporations' 'obligation' to respect human rights and formulate specific prescriptions in much stronger ('shall') form (Weissbrodt and Kruger 2003).

While the 2003 *Norms* never made it beyond the sub-committee in which they were drafted, the *Global Compact* enjoyed greater attention, but its human rights language was not seen as sufficient to reorient the landscape of corporate social responsibility, with its myriad of company- and industry-specific codes. The UN thus initiated a stronger push on business and human rights from which emerged, first, the 2008 *Protect, Respect and Remedy Framework*, and then the 2011 *UN Guiding Principles* (UNGPs), both endorsed by the UN Human Rights Council (Bernaz 2016). The UNGPs have since been referenced and incorporated in a wide range of CSR documents, most notably the *OECD Guidelines*, which added a human rights chapter in 2011, and the *ILO Declaration* in its 2017 revision, but also in many more specific industry or company codes.

The emergence of the UNGPs as a central yardstick in the field has not, however, removed contestation. On the one hand, their uptake is still not uniform, and some codes contain merely symbolic references to the UNGPs. On the other hand, there remain challenges from proponents of a harder approach (Wettstein 2015). In 2014, the Human

Rights Council voted to establish an intergovernmental working group mandated to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'. Introduced by Ecuador and South Africa and supported by a civil society coalition and many countries from the developing world, it was strongly opposed by the US and the European Union who favored voluntary commitments. Whatever the outcome of the treaty process, the norm posited by its proponents – hard law obligations under human rights law (with legal ramifications in case of non-fulfilment) – continues to provide a challenge to the softer norm of corporate responsibility to respect human rights as set out in the UNGPs (de Schutter 2016).

Even if this challenge persists, the longstanding collision between CSR norms and human rights norms has found a certain consolidation and produced a new normative bottom line on business and human rights. The gravitational force of the UNGPs is such that other bodies of norms are compelled to position themselves in relation to the UNGPs through resolutions, declarations, cross-references, and even incorporation into their respective normative frameworks. The UNGPs occupy a central position in this entangled web of norms, which is illustrative of the way in which normative frameworks operate, are created and enforced in the global arena (Zumbansen 2011). The norm collision is still far from finally settled, but we can see how here – as in the World Bank case – it has been not so much a destabilizing force but a driver of change. It was an expression of societal contestation which, in the end, has pushed CSR into a more widely acceptable direction.

V. Conflict, contestation, and emerging order

The interface conflicts in our two cases are not fully resolved – contestation around the place of human rights in World Bank policies is ongoing, and in the corporate social responsibility case, gaps and challenges remain despite the substantial convergence around the UNGPs. In both cases, actors continue to diverge not only on the interpretation of the primary norms at play, but also on which secondary norms are relevant. Human rights advocates construe human rights norms as generally applicable across the international legal order, creating obligations also for international organizations (such as the World Bank) and private actors (such as transnational corporations). These claims clash with invocations of a *lex specialis* by the World Bank, and with a more limited construction, on the part of those favoring voluntary CSR norms, of international law's relevance in the wider sphere of transnational regulation.

Yet this continuing irresolution has not led to chaos or friction of a kind that would call the rule of law into question. Actors have not simply turned from a norm-oriented to an interest-oriented mode of interaction, but have instead pursued norm-based strategies in a decentralized yet cooperative fashion, seeking support from their audiences for their interpretation of the relevant primary and secondary norms (see also Introduction to this Special Issue). This process has led to a gradual reconfiguration of norms that, despite lingering issues of dispute, is widely recognized by societal actors. Human rights have left a mark on the World Bank, even if not altogether officially, without undermining the stability of the Bank's operations or policies. Similarly, in the CSR example, the remaining

openness of the linkage between the UN Guiding Principles and other bodies of norms is not such as to heavily destabilize the latter. CSR norms have clearly shifted towards human rights protection as a result of the collision, and even if the precise relationship between both is not altogether resolved, the scope of possible interpretations has been narrowed down significantly – and CSR norms have come to enjoy greater legitimacy as a result of the contestation. The proliferation of different codes with similar content has led to a consolidation of a normative core.

Both our cases were of the irritative kind – they concerned interface conflicts that did not pit rivalrous institutions against each other but centered on attempts to use one body of norms to influence the other. We had expected that these were more prone to gradual accommodation over time, and this is precisely what we could observe. Moreover, both cases had a strong transformative aspect in that the conflict of formal norms was inscribed in a broader process of social change in which human rights norms gained further prominence vis-à-vis other values and interests. The invocation of competing norms was an expression of this change and helped to sustain and foster it, leading to a readjustment of the international legal landscape more in line with the changed social context.

The cases also shed light on the contrasting roles of different interpreters. In the World Bank case, institutionally stable and committed interpreters within the Bank remained predictably reluctant to take external norms on board, albeit with some variation between them. In the CSR case, established institutional actors – for example, the OECD and the ILO – were also slow to accept the challenge from human rights and only revised their codes significantly after the UN Guiding Principles had emerged as a widely recognized focal point. Some of the National Contact Points under the OECD Guidelines, equipped with a certain institutional independence, showed greater openness by drawing on international human rights standards not formally included in the Guidelines (OECD 2009). On the other hand, from the late 1990s onwards, the UN and especially John Ruggie – first as Assistant Secretary-General, then as Special Representative – managed to build a bridge between traditional, business-leaning codes and human rights concerns – a bridge then formalized in the Guiding Principles (Backer 2016). On the way, other consequential actors not directly committed to one or the other bodies of norms – from the G-8 to business associations – recognized the need for connecting corporate social responsibility and human rights (Ruggie 2007).

The global legal order is one of many voices and norms, but this multiplicity does not generally lead to a particular instability or friction. Interface conflicts are commonplace in this order, but in many instances they merely reflect existing societal contestation – the invocation of competing norms gives expression to, and to a certain extent absorbs, legitimacy challenges already raised by states or non-governmental actors. As we have seen, the perception of norm collisions as destabilizing is often connected to a particular, rivalrous type of collision whereas irritative collisions often lend themselves to more gradual forms of accommodation. Moreover, irresolution and friction often seem pronounced only when we take a snapshot of an interface conflict. But when we observe conflicts over time, we become aware of the tools with which interpreters create relations between different norms that help to reduce uncertainties. And we can perceive how interface conflicts are embedded in broader processes of social change which, over time, establish more settled normative expectations about the respective weights of the

different norms involved. This may or may not lead to proper legal consolidation – often actors will continue to disagree over the details of competing norms, and also over the secondary norms governing their relationship. Yet this residual contestation should not overshadow the fact that in many instances interface conflicts are not antithetical to order but creative of it – by redefining the margins, the relationships between different bodies of norms, they help to adjust and reconfigure a global order that has few procedures to guide change in more structured ways.

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