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Summary

The body of international environmental law consists of framework agreements with vague norms that cannot be used in an operative manner. At the same time, sustainable development law promotes an integrated approach to social, economic and environmental issues, including other actors than states, which involves an increased pressure on private actors to take part in the efforts to protect the environment. The increased pressure on corporations is perceptible in the oil and mining sector, due to the significant environmental risks of the sector and multinational corporations as its main actors that operate in developing states with insufficient capacity to protect their environment. Due to the increased pressure on the companies to act environmentally responsible and the lack of substantive international environmental norms, multinational companies and industry associations have started to create environmental standards of their own.

The objective of my thesis is to determine if private norms could replace national legislation and become principles of international law. This would allow also private actors to develop vague international environmental agreement provisions into operative international environmental norms and serve as a source of public international law.

As a part of environmental protection, environmental impact assessment (EIA) constitutes a cornerstone of sustainable development and is fundamental to any regulatory system seeking to promote sustainable development. The confusion is, though, if a company operates in a state that lacks adequate regulatory system for EIAs, the company will have to seek international environmental norms to comply with. If such norms are not provided in international legal instruments, the companies will be forced to seek and create norms within the private sphere. In Mauritania, a developing state, there is a lack of substantive national environmental regulation in the oil and gas sector, and the regulators refer to private norms for the performance of EIAs of the oil companies.

In my conclusions, I have detected that the norms created by the industry represent through consensus “best practice,” and is referred to in national legislation as a substitute for normative provision. Although, oil companies’ voluntary achievements and management regarding environmental protection cannot replace national legislation, it does not prevent that the norms created as voluntary initiatives can be incorporated into domestic law and substitute the lack of substantive norms in a legal system. Using ready-made private norms by having a reference to best practice in national legislation could be an alternative for a state in order to have a regulatory system in place fast. This is in particular relevant for developing states with little experience as oil states, like Mauritania. The private standard products incorporated into legal instruments on a national level can thereby become “hard” law and influence international law as state practice in accordance

with article 38(1)(b) of the Statute of International Court of Justice. However, the enforcement problems in developing states, for instance like Mauritania, will undermine the effectiveness of the voluntary guidelines in national environmental laws and the likelihood for private norms to become binding law is much reduced. However, the principles developed by private actors that are authoritative as guidance in industry practice, national courts, international organisations and in treaty making process, and could be regarded as “general principles” in the meaning of article 38(1)(c) of the Statute of International Court of Justice, which would open up for private actors to be regarded as lawmakers in some sense.

Résumé

Le corpus de texte du Droit international de l'environnement est constitué d'accords-cadres et de normes manquant encore de précision et qui, par conséquent, ne peuvent être utilisés à des fins opératoires. Parallèlement, la législation des activités de développement durable encourage une démarche intégrée des enjeux sociaux, économiques et environnementaux, incluant entre autres acteurs les États. Une pression insistante encourage en particulier les acteurs privés à mettre en œuvre des stratégies de conservation de l'environnement. Cette pression accrue et soutenue imprimée à l'entreprise est notamment perceptible dans le secteur minier et pétrolier où les risques environnementaux sont élevés et où les multinationales, acteurs de premier rang de ce secteur, opèrent dans des pays développés dotés de très peu de moyens pour mettre en place de réels plans de protection de l'environnement. La pression importante exercée sur ces multinationales d'une part, et d'autre part le manque de normes et lois environnementales substantives ont poussé les entreprises du secteur minier et pétrolier à façonner leurs propres normes environnementales.

L'objectif de cette thèse est de déterminer si des normes émanant d'organismes privés peuvent remplacer une législation nationale voire des principes de Droit international. Cette démarche d'acteurs privés s'articulerait autour de l'intégration des principes de Droit international de l'environnement, encore flous, à l'intérieur de leur propre corpus de normes environnementales internationales, créant ainsi une synergie potentielle de développement d'un Droit public international de l'environnement.

Partie intégrante de la protection de l'environnement, l'étude d'impact environnemental (EIE) constitue la pierre angulaire des stratégies de développement durable et reste fondamentale à tout système de régulation visant à promouvoir une gestion durable de l'environnement. Mais lorsqu'une firme internationale exerçant ses activités au sein d'une entité étatique dépourvue du cadre légal nécessaire au bon déroulement des EIE souhaite mettre en place de telles stratégies, il lui est impossible de s'en remettre à des structures normatives étatiques, faute de cadre légal clair. Elle doit donc se tourner vers des stratégies normatives privées. En Mauritanie, pays en développement, un cadre de régulation environnementale pour l'industrie minière et pétrolière fait encore défaut. Et les instances régulatrices font elles-mêmes appel au cadre normatif privé quant à l'évaluation de la performance des EIE des compagnies pétrolières.

Les conclusions auxquelles mène cette réflexion nous indiquent que les normes créées par les acteurs privés constituent, par voie de consensus, un guide de « bonnes pratiques » auquel il convient de se référer en l'absence de substance normative normalement fournie par la législation nationale. Cependant, l'existence d'une démarche volontaire de bonne gestion et de protection de l'environnement mise en œuvre par les compagnies pétrolières

n'empêche en rien l'intégration de ces normes volontaires dans le cadre légal national et le rôle qu'elles peuvent accomplir dans un contexte légal domestique lacunaire. L'utilisation de ces normes « prêt à l'emploi » peut s'avérer une alternative légale pour des États désireux d'implanter rapidement une régulation. Cette stratégie peut se révéler particulièrement pertinente dans le cas d'États qui, comme la Mauritanie, disposent de peu d'expérience dans la mise en place d'une régulation de l'industrie du pétrole. Les normes et standards émanant d'un cadre privé peuvent par la suite être incorporés dans le corpus légal national et adopter dès lors un caractère coercitif et, par voie de conséquence, influencer sur le rôle gouvernemental que revêt le Droit international en accord avec l'article (38)(1)(b) du statut de la Cour internationale de Justice. Pour autant, les difficultés d'applications que rencontrent les pays en développement, comme la Mauritanie, risquent de saper l'efficacité de normes et directives volontaires dans un cadre légal international ainsi que la possibilité pour ces normes de devenir coercitives dans ce même cadre. Néanmoins, ces principes de bonne gouvernance faisant autorité non seulement dans un cadre privé mais également dans un cadre légal national et international, pourraient dès lors être considérés comme « principes généraux » dans l'esprit de l'article (38)(1)(c) du statut de la Cour internationale de Justice, élevant ainsi, toute mesure gardée, des acteurs privés au rang de législateur.

Preface

A number of persons have assisted me, and contributed their time, effort and inspiration in the writing of this thesis. First, I would like to thank to my supervisor Ulf Linderfalk for his invaluable support and cautious guidance to keep me on the track. Second, I would like to thank Fabiana Issler at the UN Developing Programme, who recommended me for an internship for a project of incorporating biodiversity concerns into the oil and gas sector at the country office in Mauritania, which has been the starting point of this thesis. I am also grateful for the feedback given by Radu Mares in the beginning of my research.

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Abbreviations

CBD	Convention on Biological Diversity
EIA	Environmental Impact Assessment
Espoo Convention	Convention on Environmental Impact Assessment in a Transboundary Context
GTZ	Deutsche Gesellschaft für Technische Zusammenarbeit
ICJ Statue	Statue of the International Court of Justice
IPIECA	International Petroleum Industry Environmental Conservation Association
IUCN	International Union for Conservation of Nature
MARPOL	International Convention on the Prevention of Pollution by Ships
NGO	Non-Governmental Organisation
OECD	Organization for Economic Cooperation and Development
OGP	International Association of Oil and Gas Producers
Ramsar	Convention on Wetlands of International Importance
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention on Climate Change

1 Introduction

1.1 Background

International environmental law is based on framework agreements consisting of vague provisions providing general principles and goals, which need to be implemented by each state party at a national or regional level in order to give the provisions a normative content. However, not all state parties have the capacity or political will to implement and develop the provisions, which will render them incomplete and even meaningless. The absence of conform and consistent state practice in the international environmental legal field obstructs the determination of the concrete content of obligations in international environmental law. At the same time, the concept of sustainable development has emerged; promoting an integrated approach to social, economic and environmental issues. This approach puts pressure not only on states but also on private actors to take part in the efforts to protect the environment, and has led to discussions of corporate environmental responsibility. Multinational companies are expected to act according to international environmental norms and standards, irrespective of the jurisdiction in which they operate, and in particular, if they operate in developing states lacking adequate legislation and regulation. The increased pressure on corporations is perceptible in the oil and mining sector with significant environmental risks, multinational corporations as the main actors and operations often located in developing states.

As a part of environmental protection, environmental impact assessment (EIA) has a fundamental role. Through environmental assessment processes, regulators identify and assess the environmental, social, and economic consequences of proposed projects to assist them in determining whether projects should be approved, and if so, under what conditions. The EIA constitutes a cornerstone of sustainable development and is fundamental to any regulatory system, which seeks to prevent or minimise environmental harm, or to promote sustainable development. If such norms are not provided in the national legislation or in international legal instruments, the companies will be forced to seek and create norms within the private sphere. Due to the increased pressure on multinational companies to act environmentally responsible and the lack of substantive international environmental norms, multinational companies and industry associations in the oil sector have started to create their own environmental standards.

1.2 Purpose of the Study; questions to be investigated

My overarching objective is to determine whether private norms could be regarded as principles of international environmental law and serve as a source of international law. To achieve my objective, I will investigate the involvement of private actors in the process of developing vague international environmental agreement provisions into operative international environmental principles. I will examine how such norms are used in national legislation, and how they are conceived in international legal forums in order to evaluate the legal value of the norms.

As background for my research, I have performed a field study in Mauritania, a developing state in West Africa, which will serve as an example of an oil state with little capacity to protect its environment. In Mauritania, oil was recently discovered and a legal framework was created to regulate the potential environmental risks arising from the oil and gas sector. The purpose of my field study is to examine the influence of private regulation in the development of the EIA procedure and to answer following questions: What impact do norms created by private actors have when Mauritania attempts to create a national EIA legislation? Could private standards for EIAs replace provisions in the national legislation? What significance do private norms have for determining the international requirements for EIAs?

1.3 Methodology

In my research, I have used both practical field experiences from Mauritania and information acquired from academic legal literature. Concerning the academic literature review, I have utilized both traditional legal textbooks and scientific articles. The legal textbooks have been used to provide a general description of international environmental law and its principles. The description has served as a base when dealing with private actors' involvement in international environmental law. Since the involvement of private actors have not been considered extensively in the legal textbooks due to the freshness of the topic, I have turned legal scientific journals to follow the international legal debate for further understanding of how private actors are being dealt with in international law.

In regards to the practical part of the research, i.e. the field study in Mauritania, I have commenced with gathering background information on the development and current situation in the oil and gas sector of Mauritania using reports from international agencies such as the UN Developing programme, International Union for Conservation of Nature (the IUCN) and the World Bank. Furthermore, I have scrutinized the legal frameworks regulating the oil and gas sector, in particular the decree dealing with the EIA procedure. The last part of my field research has consisted of

interviews with representatives dealing with different aspects of the oil and gas sector. This has included interviews with employees of private oil companies to investigate how they have performed their EIAs, according to which norms and how they have handled weak regulation issues. I have also interviewed with governmental representatives and legal advisors dealing with the environmental aspects in the extractive industry sector to discuss the development of the legal framework, as well as to assess the current situation of the legislation and its possible weaknesses. In addition, I have interviewed representatives from the World Bank, the IUCN and bilateral aid agencies involved in environmental and extractive industry to obtain other aspects of the situation and to be able to investigate specific legal matters concerning the EIA procedure. By using both legal instruments, reports from different organisations and interviewing representatives working with diverse sides of the oil and gas industry, my ambition has been to give an objective picture of the situation and to evaluate the environmental regulation of oil and gas sector in Mauritania.

After gathering all the information from Mauritania, I have analysed in conjunction with the academic literature and compared the results to determine trends in the use of private environmental norms in the oil and gas sector and its consequences in international law. By using the practical experience, I have tried to put the theoretical hypothesis into a concrete context in order to draw my conclusions.

1.4 Outline

This paper consists of five main chapters, starting with this short introduction presenting background information, main objective, methodology and outline. The following chapter two provides a general description of international environmental law, its relation to sustainable development law and the influence of private actors. This description aims to explain how international environmental law can be distinguished from other fields of public international law and how its distinction opens up to enable private involvement. I also provide a picture of the current involvement of private actors in the environmental field and an overview of the existing global instruments for corporate responsibility.

In the third chapter, I continue to examine the oil industry and the application on international environmental norms from a national context of a developing state: Mauritania. A general presentation of Mauritania is included to enable the reader to understand the particular problems and opportunities existing in Mauritania. The chapter also attempts to describe the unique context in which the oil and gas companies operate within. In this chapter, I will go through the existing international legal instruments regulating the oil and gas sector, and the available private initiatives. Specifically, I examine the instruments for EIA procedures. My aim with this chapter is not only to give an overview of the general situation of the oil industry but also of the specific situation of Mauritania.

The last chapter is an attempt to connect the practical experiences from my field research in Mauritania, together with my academic research, to make a survey of the tendencies in international environmental law under the influence of private actors. In this chapter, I describe the roles of states and private actors in setting the international environmental standards of today and I examine the potential of private companies to become lawmakers of international law.

At the end of my thesis, I will draw my conclusions in chapter five.

2 International Environmental Protection and Corporate Environmental Responsibility

2.1 International Environmental Law

The aim of international environmental law is to protect the biosphere from major deterioration that could imperil its present and future condition.¹ It is a relatively new and distinct field of public international law with its own characteristic approaches to issues of process and structure. Environmental protection seen as a global ‘common concern’ has challenged the traditional interstate view of international law, since the problems reach beyond state boundaries and demand solutions that involve actors other than states.² The concept of common concern may limit the freedom of action for states, even where other states’ sovereign rights are not affected in a direct transboundary context envisaged by the no-harm principle.³ International environmental law includes not only public international law, but also relevant aspects of private international law as well as borrowed examples from domestic law.⁴ Although governments have assumed the principal responsibility for assuring environmental protection, the roles are changing, with the private sector becoming a more active partner. An earlier emphasis on strict governmental regulations has ceded ground to corporate self-regulation and voluntary initiatives. In this context, multinational companies do not only accept their responsibility to not harm the environment, but some go even further and create their own rules and codes of conduct in favour of the environment. The companies can act alone, in groups, in industry associations or in conjunctions with non-governmental organisations (NGOs). In addition, a number of international initiatives have been created to promote corporate participation in the environmental field.⁵ The lines between public and private, international and domestic domains are indistinct, with norms origin primarily from private rather than governmental conduct. Consequently, international environmental standards

¹ Kiss, A. & Shelton, D. *International environmental law* (Transnational Publishers, 2004), 11.

² de Chazournes, B.L., Introductory Remarks to “International Law at the Beginning of the 21st Century” (2006), American Society of International Law. Proceedings of the Annual Meeting, 303.

³ Bäckstrand, K., “Democratizing Global Environmental Governance? Stakeholder Democracy after the World Summit on Sustainable Development”, (2006) 12, *European Journal of International relations*, 474-475.

⁴ Birnie P. & Boyle A. *International Law and Environment* (Oxford University Press, 2002), 1.

⁵ Mazurkiewicz, P. “Corporate Environmental Responsibility: Is a Common CSR framework possible?” (2004) World Bank publication, available at World Bank website: <<http://siteresources.worldbank.org/EXTDEVCOMSUSDEVT/Resources/csrframework.pdf>>

can be found in legal as well as non-legal instruments, including framework convention approaches, tacit amendment procedures, collaboration through decision of the parties that are not formally binding, and “soft law” instruments such as codes of conduct and guidelines.⁶

2.2 The Structure of International Environmental Law

2.2.1 Framework Instruments and Soft Law Norms

The last three decades have seen the establishment of numerous international instruments for environmental protection, which have generally taken the form of treaties, conventions and agreements. Collectively, they comprise a body of multilateral environmental agreements. The international environmental treaties are dynamic arrangements, in which the treaty text establishes ongoing legal processes.⁷ The agreements are in most cases framework instruments with provisions expressed as overall goals and/or general policies, and therefore lack precise substantive content. The emphasis of the multilateral environmental agreements is to place the main decision-making at national or regional level, where the state parties are expected to develop the overall goals/policies provisions in their national legislation to give substantial meaning to the instruments.⁸

The international environmental lawmaking process faces problems of urgent and rapidly changing nature, such as climate change, biodiversity conservation and prevention of pollution of the sea and atmosphere, which creates a number of difficulties while trying to develop universal standards for environmental protection. Regulation of environmental issues may require modification of economic policies and may be perceived as inhibiting development and growth. Therefore, an increasing use has been made of half-way stages in the lawmaking process on environmental matters in the form of codes of practice, recommendations, guidelines, resolutions, declarations of principles, standards, often within the context of framework treaties in a way that does not fit into the categories of legal sources referred to in Article 38 (1) of the ICJ Statute. These instruments attract the

⁶ Kiss, A. & Shelton, D. *International environmental law* (Transnational Publishers, 2004), 69.

⁷ See Siegele, L. & Ward, H. “Corporate Social Responsibility: A Step towards Stronger Involvement of Business in MEA implementation?” (2007) 16, *Review of European Community & International Environmental Law*, 135. Hey, E “International Law at the Beginning of the 21st Century” (2006), *American Society of International Law. Proceedings of the Annual Meeting*, 311.

⁸ Brunnée, J “International Law at the Beginning of the 21st Century” (2006), *American Society of International Law. Proceedings of the Annual Meeting*, 308.

description soft law.⁹ Soft law refers to international norms that are deliberately non-binding in character but still have legal relevance, located “in the twilight between law and politics”.¹⁰ These instruments are clearly not law in the sense used by Article 38 (1) of the ICJ Statute, although they can be authoritative. It is characteristic that these instruments are carefully negotiated, and often cautiously drafted statements, which are in many cases intended to have some normative significance despite their non-binding form. There is at least a desire to influence the development of state practice and an element of lawmaking intention. Thus, they may provide a good evidence of *opinio juris*, or constitute guidance on the interpretation or application of a treaty, or serve as agreed standards for the implementation of rules of customary law. International practice indicates that soft law norms serve an important role in the development of international environmental law. The soft law approach allows that norms are adopted through flexible techniques, which can respond in a suitable manner to new global environmental problems, which can be technical complex, highly uncertain and rapidly changing.¹¹ However, the imprecise nature of flexible norms is ill suited for generating the kinds of detailed rules necessary to regulate environmental issues in a strict sense, such as hazardous materials or trade in endangered species. It could have the opposite result, where broad provisions make the instrument toothless and cover up for inaction and inability for the international community to take action for international environmental protection.¹² The soft law approach allows states to tackle a problem collectively at a time when they do not want to shackle their freedom of action in a too strict manner. The states retain control over the degree of commitment; nonetheless, the very existence of soft law environmental instruments encourages a trend towards hardening the international legal order.¹³

International environmental law provides numerous examples of the soft law approach, expressed in terms of aspirations, goals, hortatory rhetoric, or vague guidelines.¹⁴ Several international bodies have made special use of soft law, most notably the UN Environment Programme. Environmental soft law is often important for setting standards of best practice or due diligence to be achieved by the parties when implementing their obligations. Such standards are essential in giving hard content to the overly-general and open-textured terms of framework environmental treaties. Soft law has made an important contribution in establishing a new legal order in a fast-

⁹ Birnie P. & Boyle A. *International Law and Environment* (Oxford University Press, 2002), 25-25.

¹⁰ Skjærseth, J. B. *et al.* “Soft Law, Hard Law, and Effective Implementation of International Environmental Norms”, (2006) 6, *Global Environmental Politics*, 104.

¹¹ Kiss, A. & Shelton, D. *International environmental law* (Transnational Publishers, 2004), 89-90.

¹² Bodansky, D., “International Law at the Beginning of the 21st Century” (2006), *American Society of International Law. Proceedings of the Annual Meeting*, 305-307.

¹³ Birnie P. & Boyle A. *International Law and Environment* (Oxford University Press, 2002), 26-27.

¹⁴ Huang, P., “International Environmental Law and emotional rational choices” (2002) 31, *Journal of legal studies*, 238-239.

growing field as international environmental law, since such norms manifest general consent to certain basic principles that are acceptable and practicable for both developed and developing countries. To this extent, it contributes to the evolution of new international and national law, and to the harmonisation of environmental law and standards at the global level.¹⁵

2.2.2 Compliance

Instead of using traditional interstate compliance techniques, such as the determination of state responsibility or the use of remedies in case of a breach of treaty, international environmental regimes have developed their own compliance arrangements. In general, these compliance procedures are political and pragmatic, rather than strictly legal, and reflect the blurring in international environmental law between law and politics. The very terminology used in international environmental regimes reflects the vague boundaries between law and politics, for instance ‘commitments’ rather than ‘obligations’, ‘non-compliance’ rather than ‘breach’ and ‘consequences’ rather than ‘remedies’ or ‘sanctions’.¹⁶ The problem of international environmental law is that the obligations and rights in the environmental instruments are not reciprocal, and a breach of a provision will not have a direct effect of another state, with the exception of environmental transboundary damage. Therefore, states are reluctant to bring claims on other states, unless they are directly affected, due to the non-compliance with an environmental regime. In addition, since the provisions in environmental agreements have general formulations, it can be difficult to establish cases of non-compliance. Instead, environmental treaties focus on procedures for the parties to report, and adopt national action plans etc.¹⁷

2.3 Sustainable Development Law and Corporate Environmental Responsibility

Sustainable development law consisting of legal principles, treaties and instruments integrates international environmental, social and economic law. No legal instruments have elaborated in depth on the principle of sustainable development and made it into an operational principle.¹⁸

¹⁵ Birnie P. & Boyle A. *International Law and Environment* (Oxford University Press, 2002), 26-27.

¹⁶ Bodansky, D., “Rules vs. Standards in International Environmental Law” which is included in “New Directions in International Environmental Law”, (2004), American Society of International Law Proceedings of the Annual Meeting, 276.

¹⁷ Cordonier Segger, M-C., “Significant developments in sustainable development law and governance: A proposal”, (2004) 28, *Natural Resources Forum*, 66-67.

¹⁸ Campins-Eritja M. & Gupta, J., “Non-State Actors and Sustainability Labelling Schemes : Implications for International Law”, (2002) 2, *Non-State Actors and International Law*, 217-218.

Although the concept has been around for a while, it was not until the Rio Declaration, adopted at the UN Conference on Environmental and Development in 1992, that it received its defining role in evolution of environmental international law and policy. Sustainable development is one of the main themes in the Rio Declaration, which is an important and fundamental instrument in setting down the legal implications of the term sustainable development. The concept has a central role in international policies, but it is still unclear how far sustainable development has become a part of international law.¹⁹

Although most recent multilateral environmental agreements promote environmental protection within the context of sustainable development, an important insight is that international sustainable development law is not a 'softer' word for international environmental law, since the environmental aspect constitutes only a part of sustainable development law.²⁰ The emerging concept of sustainable development has brought increasing emphasis on the private actor to and their role in the process.²¹ In the aftermath of the 2002 World Summit on Sustainable Development in Johannesburg, sustainable development has emerged as a domain for experimenting with new modes of hybrid governance, which has had a considerable impact on contemporary international law. The responsibility for implementing sustainable development does not rest on governments alone, but is diffused among other actors, such as NGOs and private sector.²² Most recent environmental agreements have the potential to influence economies because they encourage business and industry to cooperate in order to protect the environment and call for collective conduct of governments, private investors and other stakeholders in pursuit of certain environmental objectives.²³

Multinational corporations play a significant role in the utilization of the global natural resources and have potential to affect these resources adversely, especially in developing countries, because of their economic power and worldwide scale of activities.²⁴ The international environmental frameworks are mainly limited to states, but transnational companies act over the state borders, which results in a gap of legal frameworks to meet

¹⁹ French, Duncan. *International law and policy of sustainable development* (London: Manchester University Press, 2005) p. 43-45

²⁰ Cordonier Segger, M-C., *Corporate Social Responsibility: International Strategies and Regime*. In Cordonier Segger, M-C. & Weeramantry, C.G., *Sustainable Justice* (Leiden: Martinus Nijhoff Publishers, 2005).

²¹ Eweje, G., "Strategic Partnerships between MNEs and Civil Society: the Post-WSSD Perspectives", (2007) 15, *Sustainable Development*, 16.

²² Bäckstrand, K., "Democratizing Global Environmental Governance? Stakeholder Democracy after the World Summit on Sustainable Development" (2006) 12, *European Journal of International relations*, 471.

²³ Siegele, L. & Ward, H. "Corporate Social Responsibility: A Step towards Stronger Involvement of Business in MEA implementation?" (2007) 16, *Review of European Community & International Environmental Law*, 138.

²⁴ Morgera, E., "From Stockholm to Johannesburg: From Corporate Responsibility to Corporate Accountability for the Global Protection of the Environment?", (2004) 13, *Review of European Community & International Environmental Law*, 215.

the realities of the global markets.²⁵ The concept of corporate responsibility is based upon the perception that corporations should consider the environmental implications of their actions and comply with international environmental standards to fill the legal void in the jurisdictions that lack environmental protection norms, in response to the expectations and assumptions of international society.²⁶ Thus, corporate environmental responsibility refers to the existence of substantive standards on the contribution of multinational corporations to maintain and promote sustainable development, and perhaps, more specifically, to implement environmentally sound policies, operational standards, practices and technologies.²⁷ In terms of their potential positive contribution to global protection of the environment, private companies possess technologies, research and development capacities that are likely to respond to many environmental problems, and couple environmental management with an economic and industrial growth.²⁸ Government programs have so far a relatively weak record of defining and pursuing sustainable development. Thus, the growth of private regulatory programs offers a fresh hope by creating new institutional arenas in which sustainable development may be defined and implemented.²⁹

Private voluntary initiatives are putting measures and norms in place to implement corporate responsibility.³⁰ Codes of conduct are the most familiar instruments. They declare principles that corporations adopt and operate accordingly to.³¹ However, these codes of conducts are criticised for being without impact and for being internal without any disclosure whether the companies comply or not. Their legal quality is hard to assess and considered as non-legal, unenforceable, and predominantly voluntary self-imposed obligations.³²

²⁵ Schmitz-Hoffmann, C. *Mainstreaming Of Standards and Standards For The Mainstreaming – Experiences Of Standard Initiatives In Public-Private Partnerships and Multi-Stakeholder Approaches*. In Pedersen, E.R. & Huniche, M. (eds) *Corporate Citizenship in Developing Countries, New Partnership Perspective* (Copenhagen: Business School Press, 2006), 251.

²⁶ Cordonier Segger, M-C., “Sustainability and Corporate Accountability Regimes: Implementing the Johannesburg Summit Agenda”, (2003) 12, *Review of European Community & International Environmental Law*, 295.

²⁷ Morgera, E., “From Stockholm to Johannesburg: From Corporate Responsibility to Corporate Accountability for the Global Protection of the Environment?”, (2004) 13, *Review of European Community & International Environmental Law*, 220.

²⁸ Morgera, E., “From Stockholm to Johannesburg: From Corporate Responsibility to Corporate Accountability for the Global Protection of the Environment?”, (2004) 13, *Review of European Community & International Environmental Law*, 216.

²⁹ Meidinger, E., “Private” Environmental Regulation, Human Rights, and Community”, (2000) 7, *Buffalo Environmental Law Journal*, 125-126.

³⁰ Cordonier Segger, M-C., “Sustainability and Corporate Accountability Regimes: Implementing the Johannesburg Summit Agenda”, (2003) 12, *Review of European Community & International Environmental Law*, 297.

³¹ Cordonier Segger, M-C., “Sustainability and Corporate Accountability Regimes: Implementing the Johannesburg Summit Agenda”, (2003) 12, *Review of European Community & International Environmental Law*, 297.

³² Zumbansen, P., “The Parallel Worlds of Corporate Governance and Labor Law”, (2006) 13, *Indiana Journal of Global Legal Studies*, 295.

Internationally agreed environmental principles provide the legal basis for environmental interests to be included within the corporate governance regime. In a broader context, the international community has begun to frame a set of principles for the conduct of business worldwide. These are the principles reflecting new norms that global business will be increasingly pressured to uphold. Therefore, it is arguable that corporations are also required to achieve sustainable development in their business activities, and corporate pursuit of this objective provides the catalyst for the possible inclusion of environmental protection as a further consideration of corporate governance.³³

2.4 Global Initiatives to promote Corporate Responsibility

Corporate environmental responsibility can be promoted through global initiatives. Three leading examples of global voluntary initiatives are the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, the Equator Principles and the UN Global Compact. However, these initiatives seem to contain principles formulated in a general manner aiming to solve many problems simultaneously. The lack of specificity of the principles avoids the clash of what corporate responsibility means and how it should be applied in different jurisdictions. Thus, the effect of such global initiatives seems to be more to promote environmental responsibility on a policy level, and not to be used in a physical context.

2.4.1 The OECD Guidelines

The OECD Guidelines are recommendations addressed by governments that are members of OECD to multinational corporations operating in or from adhering countries. They provide voluntary principles and standards for responsible business conduct in areas such as employment, human rights, environment, information disclosure, combating bribery, consumer interests, and taxation.³⁴ As an international set of recommendations for responsible corporate behaviour, the OECD Guidelines are the only multilaterally endorsed and comprehensive code that governments are committed to promote.³⁵ The aim of the Guidelines is to encourage the positive contributions that multinationals can make to economic, environmental and

³³ Ong, D., "The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives", (2001) 12, *Journal of Environmental Law*, 694-695.

³⁴ The Organization for Economic Cooperation and Development (OECD) website: <http://www.oecd.org/departement/0,3355,en_2649_34889_1_1_1_1_1,00.html>

³⁵ Hsia, S., "Foreign Direct Investment and the Environment: Are Voluntary Codes of Conduct and Self-imposed Standards enough?", (2003) 9, *The Environmental Lawyer*, 683-684.

social progress, within the framework of sustainable development.³⁶ The Guidelines constitute an attempt to apply home-country standards, used by corporations operating within OECD member countries to all corporate activities irrespectively where they are located, and provide a link between states and corporations through the establishment of national contact points in each home country.³⁷

The text of the Environmental Chapter in the Guidelines broadly reflects the principles and objectives of Agenda 21 of the Rio Declaration, and reflects standards contained in instruments such as the International Standard Organization Standards on Environmental Management System.³⁸ The Guidelines require maintenance of systems of environmental management, consultation with local communities, adoption of the precautionary principle and preparation of EIA reports.³⁹ The formulation of the text of the Environmental Chapter is intended to leave the design of the basic framework to the OECD members. Hence, it provides little guidance on how to apply the international environmental legal principles in a concrete manner.⁴⁰ For instance, Article 3 of the Environmental Chapter suggests that multinationals should:

“assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.”

The text does not include in concrete terms how an EIA should be performed and what elements it should contain.

However, there are several problems with the approaches in the Guidelines. The evaluation lacks transparency and there is no enforcement mechanism to accompany the guidelines; compliance is voluntary and rests on the willingness of the companies.⁴¹

³⁶ Dine, J., “Multinational Enterprises: International Codes and the Challenge of ‘Sustainable Development’”, (2001) 1, *Non-State Actors and International Law*, 91.

³⁷ Cordonier Segger, M-C., “Sustainability and Corporate Accountability Regimes: Implementing the Johannesburg Summit Agenda”, (2003) 12, *Review of European Community & International Environmental Law*, 298.

³⁸ Hsia, S., “Foreign Direct Investment and the Environment: Are Voluntary Codes of Conduct and Self-imposed Standards enough?”, (2003) 9, *The Environmental Lawyer*, 685.

³⁹ Dine, J., “Multinational Enterprises: International Codes and the Challenge of ‘Sustainable Development’”, (2001) 1, *Non-State Actors and International Law*, 92.

⁴⁰ Hsia, S., “Foreign Direct Investment and the Environment: Are Voluntary Codes of Conduct and Self-imposed Standards enough?”, (2003) 9, *The Environmental Lawyer*, 687.

⁴¹ Bridgeman, N. & Hunter, D., “Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism”, (2008) 20, *Georgetown International Environmental Law Review*, 215-216.

2.4.2 The UN Global Compact

The UN Global Compact is both a policy platform and a practical framework that involves the UN, corporations, NGOs and other parties. It is not a regulatory instrument, but rather a voluntary initiative that relies on public accountability, transparency and disclosure to complement regulation. Specifically, Global Compact includes ten principles, all drawn up from existing UN documents, framed in general terms to ensure the flexibility to adapt to different business cultures. The scope of Global Compact is to encourage the private sector to commit its support to the ten principles, thereby expecting companies to integrate them into their core business operations, and to pursue activities that advance implementation of the principles and other UN-related objectives, such as the Millennium Development Goals.⁴² Global Compact is meant to identify and promote good practices by committing member corporations to certain undertakings. The intention of the Global Compact is to provide a common framework within which corporations could operate, creating a coordinated response with less differentiation in quality. There are some speculations that certain Global Compact provisions might become customary law through the consensus of governments. However, the normative force of these principles depends on the degree of specificity and legal status of their content, their respective addressees, the acceptance of them as an expression of consensus and their actual application. The Global Compact has three paragraphs devoted to the protection of the environment formulated in a general manner aiming to solve many problems at once and therefore lack necessary specificity, which renders a homogeneous application hard.⁴³

2.4.3 The Equator Principles

In 2003, the Equator Principles were developed by International Finance Corporation, the private sector arm of the World Bank, as a way to encourage private lenders to consider social and environmental issues prior funding projects. These principles have focused mainly on issues that arise as a result of project financing in developing states and are defined as “a financial industry benchmark for determining, assessing and managing social risk in project financing”.⁴⁴ The Equator Principles consist of ten principles, and are among the best-known examples of soft law on best practice, particularly in the mining industry. The principles establish requirements for prospective borrowers that include conducting rigorous social and environmental assessments for their projects, conforming to the

⁴² Morgera, E., “The UN and Corporate Environmental Responsibility: Between International Regulation and Partnerships”, (2006) 15, *Review of European Community & International Environmental Law*, 99.

⁴³ Cordonier Segger, M-C., “Sustainability and Corporate Accountability Regimes: Implementing the Johannesburg Summit Agenda”, (2003) 12, *Review of European Community & International Environmental Law*, 298-299.

⁴⁴ Andrew, J., “Responsible Financing?: The Equator Principles and Bank Disclosures”, (2009) 14, *The Journal of American Academy of Business*, 305.

International Finance Corporation's social and environmental standards. The principles are voluntary, but they establish some kind of contractual soft law within the international project finance community. The weakness of the Equator Principles lies in the fact that they have no influence over project, which do not need project financing.⁴⁵

The Equator Principles legitimise a set of norms as international best practice. First, it establishes a template for social and environmental protection that developing country governments can adapt and incorporate into their own laws, thereby making the norms mandatory for projects in their countries. Second, it breaks down the resistance of industry to the adoption of the Equator Principles' norms as mandatory national standards. Thus, the Equator Principles, although voluntary and adhered to by financial institutions rather than governments, in concept, solidify the soft law on international best practice with respect to social and environmental protection in project development, turning into 'hard law' as it is adopted and adapted in the laws and regulations of developing countries. That soft and hard law in turn influences the behaviour of international industry, which now tends to embrace the principles.⁴⁶

2.5 The Concept of Best Practice

The concept of 'best practice' or 'international accepted practice' represents a kind of prevailing global or regional consensus among representatives of governments, industry and international development finance institutions as to what constitute appropriate ground rules and protections for the achievement of private objectives of industry and public goals of government. Ideally, best practice can be thought of as creating a condition of equilibrium and convergence between public and private goals in a particular industry which, when attained in a jurisdiction, enables the maximisation of both public and private benefits from the relevant industrial activity. In reality, best practice is a set of policies, norms, procedures and protections that industry and lawmakers, especially in developing states, can look at as a template that has produced relatively predictable results in other countries.⁴⁷ This multilevel regulatory environment is characterised by coexistence of soft norms generated by quasi-public expert commissions, hard statutory law, and by cross-national benchmarking of standards and norms.⁴⁸

⁴⁵ Williams, J., "International Best Practice" in *Mining Who Decides and How Does it Impact Law Development?*, (2008) 39, *Georgetown Journal of International Law*, 697-698.

⁴⁶ Williams, J., "International Best Practice" in *Mining Who Decides and How Does it Impact Law Development?*, (2008) 39, *Georgetown Journal of International Law*, 699.

⁴⁷ Williams, J., "International Best Practice" in *Mining Who Decides and How Does it Impact Law Development?*, (2008) 39, *Georgetown Journal of International Law*, 693.

⁴⁸ Zumbansen, P., "The Parallel Worlds of Corporate Governance and Labor Law", (2006) 13, *Indiana Journal of Global Legal Studies*, 280.

The general idea of what constitutes best practice influences international business behaviour, where corporations adopt such international best practices into their policies and practices. This may also affect the behaviour of the institutions and officials, who regulate industrial activity domestically. The international best practice does not involve the creation of any formal law as such, rather it involves the development of a combination of international soft law and national hard law that influence each other. Both are based in large part on a regional or global consensus as to the most appropriate policies, norms, procedures and protections for the regulation of a specific industrial sector as being the best practice.⁴⁹

⁴⁹ Williams, J., "International Best Practice" in Mining Who Decides and How Does it Impact Law Development?", (2008) 39, Georgetown Journal of International Law, 696-697.

3 Oil Industry and International Norms in the National Context of the Developing State Mauritania

In 2001, crude oil reserves were discovered in Mauritania after several years of prospecting onshore as well as offshore. The recent oil discovery is expected to have positive effects on the Mauritanian economy, but it also raises concerns of the potential impacts the oil exploitation could have on the fragile ecosystems and upon the important fishery industry, due to the questionable ability of the government to regulate and monitor the oil activities in sustainable manner.⁵⁰

3.1 Mauritania

Mauritania is situated in Northwest Africa on the Atlantic coast. The country, slightly larger than three times the size of France, has a dry desert climate with a population of approximately three million. The main source of foreign revenue since the 1960s has been from exporting fish and iron ore.⁵¹ Even though economic growth of Mauritania has been relatively good in recent years, with a nearly \$938 per capita income in 2007,⁵² it is extremely poor and underdeveloped. Mauritania is ranked 115 out of 135 countries in the Human Development Index (2008)⁵³ with half the population living below the poverty line.⁵⁴ The political history is dominated by coup d'états and a lack of democracy. In 2007, Mauritania held a presidential election, considered to be free and fair by the international community. In August 2008, however, the elected president was overthrown in a coup by the military.⁵⁵ A new presidential election was

⁵⁰ Goodland, R. "Mauritania: Oil and Gas Sector Environment Mission Report", written on the behalf of the Ministry of Energy and Petroleum, commissioned by GTZ, (2006), 9-10.

⁵¹ CIA website (2009-09-11): <<https://www.cia.gov/library/publications/the-world-factbook/fields/2116.html>>

⁵² The World Bank website (2009-09-10):

<<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/MAURITANIAEXTN/0,,menuPK:362350~pagePK:141132~piPK:141107~theSitePK:362340,00.html>>

⁵³ Human Development Report 2009, Country Facts, UNDP website (2009-11-23):

<http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_MRT.html>

⁵⁴ Human Development Report 2009, Country Facts, UNDP website (2009-11-23):

<http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_MRT.html>

⁵⁵ The World Bank website (2009-09-10):

<<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/MAURITANIAEXTN/0,,menuPK:362350~pagePK:141132~piPK:141107~theSitePK:362340,00.html>>

held in July 2009 and the coup leader General Mohamed Ould Abdel Aziz was proclaimed to be the election winner.⁵⁶

3.2 The Oil Discovery and related Problems and Risks in Mauritania

Mauritania is a young oil state with little experience and capacity to regulate and control the growing oil industry with increasing presence of international companies. Given that Mauritania's oil "boom" is predicted to last no more than 20 years, it is an imperative for the country to conserve and effectively manage natural resources that are critical for its long-term economic development, such as the fishery.⁵⁷ The political situation is unstable, which causes internal problems within the ministries. To ensure a sustainable oil development, the government of Mauritania has to minimise the potential environmental risks of the oil industry, by having adequate legislation and well maintained monitoring procedures. The combination of low local capacities and high value ecosystems imply higher demands on corporate responsibility on the oil and gas firms.⁵⁸

The first oil drawn offshore in the oilfield Chinguetti took place in February 2006 by Woodside,⁵⁹ an Australian oil company. The production met 10,000 barrels per day in May 2009 and is much lower than originally expected.⁶⁰ With an average oil production capacity of 45,000 barrels per day, the expected production period was to be approximately 20 years. However, average production has declined, from 30,600 barrels per day in 2006 to some 10,500 barrels per day over the first 8 months of 2008.⁶¹

Regarding onshore operations, an environmental challenge is to protect the water sources, such as oasis, humid zones and zones of agriculture, like the valley of the Senegal River. There are also some valuable cultural sites that

⁵⁶ The New York Times website (2009-09-11):
<<http://www.nytimes.com/2009/07/20/world/africa/20mauritania.html?scp=5&sq=mauritania+&st=nyt>>

⁵⁷ The World Bank website (2009-09-10):
<<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/MAURITANIAEXTN/0,,menuPK:362350~pagePK:141132~piPK:141107~theSitePK:362340,00.html>>

⁵⁸ Van Vliet, G. & Magrin G., Panel Scientifique Indépendant des Experts en Mauritanie, personal interview, 2009-02-02.

⁵⁹ In December 2007, Woodside sold their exploitation rights to Petronas, a Malaysian firm. Woodside is no longer operating in Mauritania. van Vliet, G., Panel Scientifique Indépendant des Experts en Mauritanie (2009-02-02).

⁶⁰ van Vliet, G., Magrin, G., van Dessel & Chabason B. "Panel scientifique independent sur les activités pétrolières et gazères en République Islamique de Mauritanie" Rapport définitif (2009), 10.

⁶¹ The World Bank website 2009-09-30:
<http://siteresources.worldbank.org/INTMAURITANIA/Resources/MAURITANIA_data.pdf>

need to be dealt with caution.⁶² The main challenge is, however, the offshore operations. The coastal area of Mauritania is very rich in its biological diversity and essential for many ecosystems with a great number of species of birds and fish that come there to reproduce each year there.⁶³ Mauritania's coastal waters are among the world's richest fishing grounds. The fishery industry accounts for 40% of the country's export and employs approximately 40.000 people. The fishery is both commercial and artisan. Mauritania benefits from a fishing agreement with international operators, such as the European Union.⁶⁴ The Mauritanian Government has established reserves and national parks to protect this particular flora and fauna.⁶⁵

The local civil society in Mauritania engaged in environmental issues is very weak, which is not divergent to other developing states. The only exception is the international NGO, the IUCN, which has a local office in Mauritania and has played an important role in the oil development. Apart from the IUCN, there is an absence of organised and specialised groups and a lack of interest and/or knowledge in the local community to take an active part in the issues of environmental protection in the oil industry.⁶⁶

3.3 International Legal Frameworks and Oil Development

There is no significant all-embracing international legal framework addressing international oil industry activities within the borders of individual states.⁶⁷ International agreements regulating oil spill, oil accidents and liability in connection with maritime traffic aiming to ensure

⁶² At present, Total, an oil company is prospecting near to the cultural heritage Oudane, which is UNESCO-listed town At present, Total, an oil company is prospecting near to the city. UNESCO website: <<http://whc.unesco.org/en/list>>

⁶³ Moliner, M. & Chambord, A. par la Mission Économique de Nouakchott, "Analyse des risques pour l'exploitation pétrolière notamment off-shore en Mauritanie", Études de mission Économique, (2005), 77.

⁶⁴ The World Bank website:

<<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/MAURITANIAEXTN/0,,menuPK:362350~pagePK:141132~piPK:141107~theSitePK:362340,00.html>>

⁶⁵ The national park Banc D'Arguin, which includes approximately 30% of the Northern coast is on the list of the world heritage of UNESCO since 1989. UNESCO website: <<http://whc.unesco.org/en/list>>

⁶⁶ van Vliet, G., Magrin, G., van Dessel & Chabason B. "Panel scientifique independent sur les activités pétrolières et gazères en République Islamique de Mauritanie" Rapport définitif (2009), 12.

⁶⁷ See Bruch, C. & Pendergrass, J., "Type II Partnerships, International Law, and the Commons", (2003) 15, Georgetown International Environmental Law, 866-867; Wawryk, A., "International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies", (2002) 13, CEPMLP Internet Journal, 2-3. Kloff, S. & Wicks C., "Environmental management of offshore oil development and maritime oil transport" (2004), a document produced on the behalf of the Regional Coastal Network West Africa (PRCM), 48.

safety in shipping and marine environmental protection exist,⁶⁸ but these do not address actual oil operations. Therefore these agreements will not be discussed further in this paper. Important environmental conventions, such as the UN Convention on Biological Diversity (CBD)⁶⁹, the UN Framework Convention on Climate Change (UNFCCC)⁷⁰, the Convention on Wetlands of International Importance (Ramsar)⁷¹, the UN Convention on Law of the Sea (UNCLOS)⁷², and the UNESCO World Heritage Convention (the UNESCO Convention)⁷³ do not formulate specific restrictions. Thus, the regulation of oil exploitation and production falls within the domestic jurisdiction of Mauritania. Nevertheless, these conventions contain general principles of importance for the oil industry. Hence, Mauritania, a state party to these environmental conventions, should ensure that the oil industry develops in accordance with relevant principles. These principles originate from the declarations of the UN Conference on the Human Environment in 1972 (the Stockholm Declaration)⁷⁴ and in the 1992 UN Conference on Environment and Development (the Rio Declaration)⁷⁵, and include:

- The no-harm principle in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, which emphasise the sovereign right for a state to exploit its own resources and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond their jurisdiction. This principle is reconfirmed in Article 3 of CBD, in Article 193 of UNCLOS, and in the preamble of UNFCCC. The no-harm principle is relevant for Mauritania

⁶⁸ The international agreements include the 1974 Safety of Life at Sea Convention (SOLAS), the 1978 Protocol to SOLAS with additional safety features for oil tankers and other large vessels, the 1954 London Convention for Prevention of Pollution of the Sea by Oil and the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL). These agreements constitute international regulation of the environmental risks of transporting oil and other substances by sea. Birnie P. & Boyle A. *International Law and Environment* (Oxford University Press, 2002), 361-362.

⁶⁹ Convention on Biological Diversity, 31 ILM (1992), 818. Mauritania became a state party in 1996. Convention of Biological Diversity website:
<<http://www.cbd.int/convention/parties/list/>>

⁷⁰ Framework Convention on Climate Change, 31 ILM (1992), 851. Mauritania became a State party in 1994. UN Climate Change Convention website:
<<http://maindb.unfccc.int/public/country.pl?country=MR>>

⁷¹ Convention on Wetlands of International Importance, 11 ILM (Ramsar, 1972), 963. Entry into force in Mauritania 1982 and currently four Ramsar sites exist in Mauritania. Ramsar official website:
<http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-36-123^23808_4000_0__>

⁷² UN Convention on the Law of the Sea, 21 ILM (1982), 1261. Mauritania became a State party 1996. UN Ocean and Law the Sea website:
<http://www.un.org/Depts/los/reference_files/status2008.pdf>

⁷³ UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, 11 ILM (1972), 1358. Mauritania became a State party 1981 and Banc D'Arguin national park is listed as a natural UNESCO protected site. UNESCO website:
<<http://whc.unesco.org/en/statesparties/>>

⁷⁴ Declaration of the United Nations Conference on the Human Environment (Stockholm, 1972), UN Doc. A/CONF/48/14/REV.1.

⁷⁵ Declaration of the UN Conference on Environment and Development (Rio, 1992), UN Doc. A/CONF.151/26/REV.1 Report of the UNCED, vol. 1 (New York).

when there is a risk of transboundary environmental damage from the oil activities, which could be the case in offshore oil fields near the coasts and in Economical Exclusive Zones of Senegal and Morocco.

- The principle of due diligence, formulated in Principle 11 and 13 of the Rio Declaration, requires states to enact effective environmental legislation and administrative control applicable to public and private conduct. It also calls for states to develop national and international law regarding liability and compensation for victim of environmental damage. The principle is reflected, in Article 194 of UNCLOS, in Article 5 of UNESCO and in Article 4 of UNFCCC. As far as the oil industry in Mauritania is concerned, this would entail an obligation for Mauritania to have adequate legislation in place and to have effective control over the activities. Due diligence can be compared to the principle of “common but differentiated responsibility” insofar as considerations of effectiveness of territorial control, the resources available to the state, and the nature of the specific activities may all be taken into account for justifying differing degrees of diligence.⁷⁶ Thus, this could lower the expectations on Mauritania’s ability to comply fully with the obligations set out in the conventions because of its status as a developing country with lacking resources.
- Principle 15 of the Rio Declaration includes the precautionary approach. The precautionary approach shall be widely applied by states according to their capabilities in order to protect the environment and it is not limited to transboundary risks. This implies that if there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation. This principle is reflected in the preamble of CBD and in Article 3 of UNFCCC. The precautionary approach obliges Mauritania not to use its lack of knowledge of the consequences of the oil industry activities as explanation for not taking all necessary measures to avoid environmental damages.
- Principle 17 of the Rio Declaration refers to the need of addressing environmental impact assessments (EIAs), contingency plans and human resource development. The principle is reflected in Article 14 of CBD, in Article 4 (f) of UNFCCC and in Article 206 of UNCLOS.

3.4 Environmental Impact Assessment

The most urgent task for Mauritania is to create legislation for the primary phases of the oil activities. This includes having an adequate EIA procedure in place in accordance with Principle 17 of the Rio Declaration.

⁷⁶ Birnie P. & Boyle A. *International Law and Environment* (Oxford University Press, 2002), 112-113.

3.4.1 The Purpose of an Environmental Impact Assessment

EIA is a procedure used to identify the environmental effects of a proposed development project prior to activity taking place and to plan appropriate measures to reduce or eliminate its adverse effects. The requirement to conduct an EIA as a prerequisite to the approval of major resource development projects is one of the strongest trends in global extractive industry. EIA requirements are contained in treaties, national laws and industry guidelines, and are imposed as conditions of lending and assistance by international financial organisations, such as the World Bank.⁷⁷ The EIA procedure is regarded to be fundamental to any regulatory system, which seeks to prevent or minimise environmental harm, or to promote sustainable development. A large number of states have incorporated EIA procedures within their national legislation. Although features of the EIA procedures can vary between jurisdictions, there are a number of common elements. Consultation and dissemination of information to the public are important elements of EIAs.⁷⁸

3.4.2 Environmental Impact Assessment in International Instruments

International instruments commonly outline that states should not undertake or authorise activities without prior consideration, at an early stage, of their environmental effects.⁷⁹ EIA requirements, even though they are not directly addressing the oil and gas development, are contained in various international instruments of environmental law, as mentioned above, including Principle 17 of the 1992 Rio Declaration; Article 14(1)(a) of CBD; Article 4(f) of UNFCCC; and Article 206 of UNCLOS. The most detailed procedures are contained in the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention).⁸⁰ The importance of EIA is also recognised in regional systems, most notable in Europe where European Directive 85/337/EEC of June 1985 obliged European Community members to have a national EIA legislation in place by July 1988.⁸¹

⁷⁷ Wawryk, A., "International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies", (2002) 13, CEPMLP Internet Journal, 7.

⁷⁸ Birnie P. & Boyle A. *International Law and Environment* (Oxford University Press, 2002), 130.

⁷⁹ Kiss, A. & Shelton, D. *International environmental law* (Transnational Publishers, 2004), 237.

⁸⁰ Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991), 30 ILM (1971), 802. Mauritania is not a State Party to the Espoo Convention, which is a regional European agreement.

⁸¹ Wawryk, A., "International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies", (2002) 13, CEPMLP Internet Journal, 7.

Although, the Espoo Convention is a regional European convention and not binding for Mauritania, it still contains some important elements relevant for EIAs in general. The Espoo Convention requires state parties to establish an EIA procedure with regard to the listed activities that are “likely to cause significant adverse transboundary impact”. The list of 17 activities includes major mining, offshore oil production and storage of petroleum. Impact is defined as any effect caused by the proposed activity on the environment, including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or interaction among these factors or the interaction among these factors. It also includes effects on cultural heritage or socioeconomic conditions. For these activities, the party of origin must prepare an EIA.⁸² Even though the threshold in international treaties referring to EIA differs, while some referring to ‘measurable’ effects, and other to ‘appreciable’ or ‘significant’ harm, it is highly likely that oil activities, both onshore and offshore, are comprised.

While the Espoo Convention is only dealing with EIA in a transboundary context, Principle 17 of the Rio Declaration, among many other international instruments, extends the rule of prior assessment of potentially environmental harmful activities also within a state.⁸³ An obligation to assess environmental impacts of oil activities in a national context is found in Article 206 of UNCLOS⁸⁴ that obliges states to carry out EIAs before commencing the potential harmful activity.⁸⁵ This obligation applies to any part of the marine environment, including marine waters under national jurisdiction. Article 14(1)(a) and (b) of the Biodiversity

⁸² Kiss, A. & Shelton, D. *International environmental law* (Transnational Publishers, 2004), 242.

⁸³ Kiss, A. & Shelton, D. *International environmental law* (Transnational Publishers, 2004), 238-239.

⁸⁴ **Article 206 of UNCLOS Assessment of potential effects of activities**

”When states have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.”

⁸⁵ UNCLOS articles 192-194, 206. Kloff, S. & Wicks C., “Environmental management of offshore oil development and maritime oil transport” (2004), a document produced on the behalf of the Regional Coastal Network West Africa (PRCM), 48-52.

Convention⁸⁶ concerns both the national and international aspects of the issue and requires parties to “as far as possible and appropriate” to “introduce appropriate procedures” to perform an EIA when proposed projects are “likely have significant adverse impacts on the biological diversity”, and “to introduce appropriate arrangements”. The vague terms used in the provision weakens the requirement for an EIA. It does not create a precise obligation as for what kind of activities that requires an EIA or the type of essential documentation necessary in the EIA. How the EIA shall be carried out in practical terms is not further explained. By leaving much detail to the individual judgement of state parties, as well as requiring them to act only “as far as possible and appropriate” to assess whether or not particular programmes are likely to have a significant adverse impacts, the parties may well escape any form of EIA,⁸⁷ although EIAs are mandatory for certain projects according to CBD.⁸⁸ An EIA is also listed in Article 4(1)(f) of UNFCCC as an example of an appropriate method for minimising adverse effects on the environment as well as public health and economy. There is no further guidance on the performance and requirements of such EIA. In Article 13 of the regional Convention for the Co-operation in the protection and development of marine and coastal environment of the West and Central African Region (the Abidjan Convention),⁸⁹ there is a requirement for state parties to perform an EIA for any activity within its territory that may cause significant and harm to the environment in the Convention area. The text does not provide a specific description of how the EIA should be undertaken, but the parties are obliged to develop technical

⁸⁶ **Article 14(1)(a) and (b) of CBD Impact Assessment and Minimizing Adverse Effects:**

1. Each Contracting Party, as far as possible and as appropriate, shall:
 - (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;
 - (b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account.

⁸⁷ Birnie P. & Boyle A. *International Law and Environment* (Oxford University Press, 2002), 575-576.

⁸⁸ The obligation to perform an EIA is if the project activity is located within or proximity to legally protected areas or will have an adverse effect on them. Convention on Biological Diversity, Conference of the Parties (COP) Decision V/1/7, UN Doc ENEP/CBD/COP/6/20, Annex, 70, para.18 (b).

⁸⁹ Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African (Abidjan, 1981) 21 ILM (1982), 52. Mauritania has signed the convention but not ratified it yet. UNEP's website for Abidjan Convention:
<http://www.unep.org/AbidjanConvention/The_Convention/Contracting_Parties/index.asp>

guidelines to assist the planning of their development projects in the Convention area to minimise their harmful impacts.⁹⁰

It might, however, be said that the practice of states when dealing with impacts that are solely of domestic concern is not evidence of an international legal obligation to conduct an EIA. Evidence of *opinio juris* for such rule is confined to Principle 17 of the Rio Declaration, UN Environment Programme's soft law EIA principles, and the reference to domestic EIA in the CBD. In any event, there is little state practice to support the existence of an obligation to perform EIA in a non-transboundary context in customary law. At present, EIA is at most obligatory under general international law only in cases of transboundary risk to the environment of other states or to the marine environment.⁹¹

3.5 Private Regulation in the Oil and Gas Industry

3.5.1 The Development of Private Norms

The international extractive industry, including international oil industry, has a number of rather unique characteristics, which causes significant challenges for both companies and regulators. While markets for extractive industry are global, and companies compete internationally for resources, mining and oil activity is fundamentally a local immovable industry, where the extractive companies must go where the minerals are located, and become subject to the jurisdiction of the mineral country. The oil companies are often among the first investors in developing states that are newly opened up to private investment,⁹² and where the environmental laws often are ineffective as they are substantively inadequate and/or poorly enforced. When a state fails to effectively regulate and control the oil industry, the environmental protection is highly depended on the corporations' voluntary responsibility. Thus, academics, practising lawyers and human rights and environmental activists call on transnational oil companies to improve their performance in such countries.⁹³ The oil companies themselves have also

⁹⁰ UNEP's website for Abidjan Convention: <<http://www.opcw.org/chemical-weapons-convention/related-international-agreements/toxic-chemicals-and-the-environment/marine-and-coastal-environment-west-and-central-africa/>>

⁹¹ Birnie P. & Boyle A. *International Law and Environment* (Oxford University Press, 2002), 132.

⁹² Williams, J., "International Best Practice" in *Mining Who Decides and How Does it Impact Law Development?*, (2008) 39, *Georgetown Journal of International Law*, 694-695.

⁹³ Wawryk, A., "International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies" (2002) 13, *CEPMLP Internet Journal*, 1.

recognised the need to operate in a responsible manner due to the political and economical risks as well for their reputation.⁹⁴

The international environmental norms related to the oil industry have vague formulations in the international environmental conventions. Instead, international oil industry has created own environmental standards.⁹⁵ In this context, guidelines, voluntary codes of conduct, statements of environmental principles and best operation practices developed by the oil companies or oil industry associations, at times in conjunction with NGOs or other international organisations, constitute major efforts to achieve environmental standards and operating practices for universal acceptance.⁹⁶ The development by major oil industry associations of internationally acceptable environmental standards and best operating practices is part of broader and growing trend among industry in general.⁹⁷

The guidelines and standards created by the International Association of Oil and Gas Producers (OGP) and the American Petroleum Institute are particularly prominent in this context. The OGP represents oil companies from around the world and the American Petroleum Institute, due to the history of the dominance of American oil companies in the international oil industry, has strong influence as well. The International Petroleum Industry Environmental Conservation Association (IPIECA) is an organisation that integrates oil and gas industry on key environmental issues. The members of IPIECA are industry associations like OGP and American Petroleum Institute, as well as company members such as Shell, Total and BP, to mention a few. IPIECA serves as a forum for discussion and cooperation involving industry and international organisations to encourage continuous improvement of industry performance, and provides one of the industry's principal channels of communication with the UN. The members are committed to conduct their operations and activities in accordance with applicable law related to environmental and social issues and ethical business practices, and to develop, share and promote implementation of sound practices and solutions with others in industry.⁹⁸

⁹⁴ Williams, J., "International Best Practice" in *Mining Who Decides and How Does it Impact Law Development?* (2008) 39, *Georgetown Journal of International Law*, 695.

⁹⁵ Kloff, S. & Wicks C., "Environmental management of offshore oil development and maritime oil transport" (2004), a document produced on the behalf of the Regional Coastal Network West Africa (PRCM), 48.

⁹⁶ Wawryk, A., "International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies" (2002) 13, *CEPMLP Internet Journal*, 4-5.

⁹⁷ One examples is the 'Mining minerals for sustainable development' (MMSD), an initiative promoted by a group of nine of the largest mining companies, acting through the World Business Council for Sustainable Development (WBCSD). The MMSD Project began in April 2000, consisting of stakeholder consultations and research activities at both the international and regional levels. It was directed specifically at the mining industry and represents the effort to confront the poor ethical reputation of the mining industry and the resultant pressure placed on the industry to transform. Wawryk, A., "International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies" (2002) 13, *CEPMLP Internet Journal*, 5.

⁹⁸ The IPIECA website (2009-11-18): <http://www.ipieca.org/ipieca_info/about.php>

The guidelines of various NGOs and intergovernmental organisations have also significant authority, including the IUCN, the UN Environment Programme, the International Standards Organisation, the World Bank, the International Chamber of Commerce and the World Business Council for Sustainable Development.⁹⁹ The increased environmental awareness and pressure on the industry, has also created interesting interactivity between corporation and NGOs. The creation of corporate-NGO partnerships is mapping the potential for such private initiatives to influence proactively the public international regulatory agenda.¹⁰⁰ The OGP and IPIECA have prepared several guidelines regarding oil operations, on its own and in cooperation with NGOs and intergovernmental organisation such as UN Environment Programme, which represent “internationally acceptable operation practices”. The OGP and IPIECA have, for instance, prepared among other guidelines “A Guide to Developing Biodiversity Action Plans for the Oil and Gas Sector” and “Oil and Natural Gas Industry Guidelines for Greenhouse Gas Reduction Projects: Carbon Capture and Geological Storage Emission Reduction Project Family”.¹⁰¹ The American Petroleum Institute members have pledged to comply with American Petroleum Institute’s eleven environmental principles, which is a condition of membership.¹⁰² American Petroleum Institute has also produced guidelines for environmental practices. Other environmental policies, codes, and guidelines for protection of the environment adopted by national and regional oil industry associations include Australian Petroleum Production and Exploration Association’s “Environmental Policy” and “Code of Environmental Practice” for companies in Australia; Regional Association of Oil and Gas Companies in Latin America and the Caribbean’s “Code of Environmental Conduct”; and the United Kingdom Offshore Operators’ Association’s “Environmental Principles”.¹⁰³

The standards developed by the industry can also be useful to countries and regions willing to formulate their own legal framework. In the extractive industry sector, soft law on best international practice helps define a template for those aspects of law that need to be incorporated into national law, which national governments are often incapable of developing without

⁹⁹ Wawryk, A., “International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies”, (2002) 13, CEPMLP Internet Journal, 3.

¹⁰⁰ Tully, S., “Corporate-NGO Partnerships and the Regulatory Impact of the Energy and Biodiversity Initiative”, (2004) 4, Non-State Actors and International Law, 111.

¹⁰¹ The IPIECA website (2009-11-18):

<http://www.ipieca.org/publications/publications_home.php>

¹⁰² American Petroleum Institute website:

<<http://www.api.org/aboutapi/principles/index.cfm>>

¹⁰³ Regional Association of Oil and Gas in the Caribbean, Code of Environmental Conduct, <www.arpel.org/code_e_c.htm>, Australian Petroleum Production and Exploration Association, “APPEA Code of Environmental Practice”. <www.appea.com.au/environment/code.html>, United Kingdom Offshore Operator’s Association, “Environmental Principles”, <www.ukooa.co.uk>

assistance. International best practices can be translated and adapted in a particular jurisdiction and function as regulation for oil activities.¹⁰⁴

3.5.2 Environmental Impact Assessment Norms created by Industry

Due to the vague requirements of EIAs in general international law regarding oil activities within a state jurisdiction, the OGP recommends the use of EIA in its publications “View of Environmental Impact Assessment” (1986) and “Principles for Impact Assessment: the Environmental and Social Dimension” (1997).¹⁰⁵ These guidelines represent “internationally acceptable operation practices” and fully endorse the EIA process. It provides recommendations and guidance to oil companies on the EIA process. The OGP guidelines emphasise the importance of social and environmental impact assessment for assessing, predicting, avoiding and mitigating the negative impacts on physical and as well as cultural environment.¹⁰⁶ The OGP has identified a number of advantages of performing an environmental assessment for oil and gas companies. EIA allows the companies to demonstrate a management capability for self-regulation thus avoiding unnecessary regulation by governments. In particular, firms transpose national regulations with respect to EIA into business management systems for the purposes of regulatory compliance.¹⁰⁷

International business in general has supported the use of EIA, as demonstrated by the International Chamber of Commerce 1991 Business Charter for Sustainable Development. The Charter has been formally endorsed by hundreds of companies all over the world, including many major international oil and gas companies. The Charter comprises 16 principles for environmental management which is stated to be a vitally important aspect of sustainable development. According to principle 5, entitled “prior assessment”, companies should assess environmental impacts before starting a new activity or project and before decommissioning a facility or leaving a site.¹⁰⁸

¹⁰⁴ Williams, J., “International Best Practice” in *Mining Who Decides and How Does it Impact Law Development?*, (2008) 39, *Georgetown Journal of International Law*, 707-708.

¹⁰⁵ Wawryk, A., “International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies”, (2002) 13, *CEPMLP Internet Journal*, 8.

¹⁰⁶ Wawryk, A., “International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies”, (2002) 13, *CEPMLP Internet Journal*, 8.

¹⁰⁷ Tully, S., “Corporate-NGO Partnerships and the Regulatory Impact of the Energy and Biodiversity Initiative”, (2004) 4, *Non-State Actors and International Law*, 114.

¹⁰⁸ International Chamber of Commerce (ICC), “the Business Charter for Sustainable Development: Principles for Environmental Management” <http://www.iccbo.org_home/environment/charter.asp>.

In 2001, four leading international oil companies and five prominent environmental conservation organisations¹⁰⁹ created the Energy and Biodiversity Initiative, a business-NGO relationship to promote best practice and formulate guidelines for integrating biodiversity into oil and gas operations.¹¹⁰ Given the lack of clarity for industry and the need to manage and communicate biodiversity issues, the oil companies were particularly motivated to establish industry wide norms and standards for this purpose. The Energy and Biodiversity Initiative aligned itself with the work programme of the Biodiversity Convention for developing intergovernmental EIA guidelines for ready incorporation by individual firms.¹¹¹ They complement permit negotiations with government, induce commitments with local communities, communicate corporate responsibility, enable collaborations with international secretariats and make internal operations more effective. The Energy and Biodiversity Initiative guidelines additionally suggest what should be expected from companies' operations and what policy standards that could be seen as best practice, since the guidelines was intended to codify the position of market leaders. The guidelines are commercially oriented to the extent that they update existing management systems and assist regulatory compliance. For other firms the behavioural impact of the initiative remains to be seen as a result of inter-corporate dialogue on what standards and practices companies should be adhering to. The participating firms will attempt to influence commercial opinion through the best available guidance for industry.¹¹² The members ceased the formal activities in 2007; however, the products are still used by the industry.¹¹³

3.6 Mauritania and the Environmental Management of the Oil Sector

The oilfields in Mauritania are divided into different blocks. The government signs contracts with the operators for exclusive rights of prospecting certain blocks. The contracts together with the national legislation regulate the activities and set the obligations and rights of the operators. The operators are in charge of progress of the prospecting, and of

¹⁰⁹ The participating oil companies were: BP, ChevronTexaco, Shell and Statoil, and the five participating conservation organisations were: Conservation International, Flora and Fauna Conservation, the IUCN, the Nature Conservancy and the Smithsonian Institution.

¹¹⁰ Tully, S., "Corporate-NGO Partnerships and the Regulatory Impact of the Energy and Biodiversity Initiative", (2004) 4, *Non-State Actors and International Law*, 121-122.

¹¹¹ Affolder, N., "The private life of environmental treaties", (2009) 103, *The American Journal of International Law*, 515.

¹¹² Tully, S., "Corporate-NGO Partnerships and the Regulatory Impact of the Energy and Biodiversity Initiative", (2004) 4, *Non-State Actors and International Law*, 126-127.

¹¹³ The Energy and Biodiversity Initiative website:
<<http://www.theebi.org/abouttheebi.html>>

the exploitation in the event of oil discovery.¹¹⁴ Each one of these contracts envisages three periods of three years exploration.¹¹⁵

3.6.1 The Actors

The principal ministries involved in the oil and gas development are Ministry of Petrol and Energy, Ministry of Environment, Ministry of Fishery and Ministry of Transport. Mauritania lacks the involvement of a strong civil society, with the exception of the IUCN. It has played a significant role as the safeguard for protected areas. The IUCN was also requested by the Mauritanian Government to set up a panel of experts, the Panel Scientifique Indépendant des Experts en Mauritanie (the Panel Petrole), consisting of four oil and gas experts, to assist the government in Mauritania with technical advice. The experts have undertaken three missions in Mauritania with the purpose to provide guidance of how to protect the environment in the oil and gas industry.¹¹⁶

The Mauritanian oil sector interests international companies of all horizons and has approximately 20 enterprises operating.¹¹⁷ The companies differ regarding level of activity, size of the company, experience, technical capacity, as well as environmental demands and awareness. While some of the operating companies are internationally recognised, others are relatively unknown.¹¹⁸ The principal operators are CNPCI (a Chinese company), Total (a French company), Repsol (a Spanish company), Petronas (a Malaysian company), Dana Petroleum (a British company), Al Thani Corporations (a Saudi Arabian company) and IPG (a Russian company). There are also number of smaller operators such as Zaver (a Pakistani company) and ASG (a Saudi Arabian company).¹¹⁹ At present, Petronas is the only company producing oil in Mauritania, while the other companies are in the prospecting phase.¹²⁰

¹¹⁴ Moliner, M. & Chambord, A. par la Mission Économique de Nouakchott, “Analyse des risques pour l’exploitation pétrolière notamment off-shore en Mauritanie”, Études de mission Économique, (2005), 87.

¹¹⁵ Moliner, M. & Chambord, A. par la Mission Économique de Nouakchott, “Analyse des risques pour l’exploitation pétrolière notamment off-shore en Mauritanie”, Études de mission Économique, (2005), 89.

¹¹⁶ van Vliet, G. & Magrin G., Panel Scientifique Indépendant des Experts en Mauritanie, personal interview, 2009-02-02.

¹¹⁷ According to the listed contracts at the official website of the ministry of Energy and Petrol: <<http://www.petrole.gov.mr/minesindustrie/index.aspx>>

¹¹⁸ van Vliet, G., Magrin, G., van Dessel & Chabason B. “Panel scientifique indépendant sur les activités pétrolières et gazères en République Islamique de Mauritanie” Rapport définitif (2009), 12.

¹¹⁹ The official website of Ministry of Petrol and Energy of Mauritania:

<<http://www.petrole.gov.mr/MinesIndustrie/Documents/Contrats/listedescontrats.htm>>

¹²⁰ van Vliet, G., Magrin, G., van Dessel & Chabason B. “Panel scientifique indépendant sur les activités pétrolières et gazères en République Islamique de Mauritanie” Rapport définitif (2009), 12.

In Mauritania, the oil companies have created an informal oil club, to discuss and share information on the situation in the oil and gas sector of Mauritania. The oil club consists of six core members: Petronas, Total, Dana Petroleum, CMPH, ASB and Repsol.¹²¹

3.6.2 Legislation

The Government of Mauritania has created some legal instruments to control the oil and gas sector. There are two main legislative texts directly addressing the oil industry: law 2004-029 titled “Portant création du Régime fiscal simplifié au profit de l’industrie pétrolière”; and the ordinance 88/151 titled “Portant Code des hydrocarbures”. These laws do address environmental protection, with the exception in Article 21 of ordinance 88/151, which obliges operators to perform in a manner to ensure preservation of natural resources and to protect the environment.¹²² The provisions of the oil instruments are often ambiguous, and with several lacunas in regard to the environmental protection.¹²³

Instead, the relevant texts relating to environmental protection can be found in other more general environmental laws, such as: the code on the environmental protection; the code of fishery; and the code of mining. These laws provide elements to define the environmental protection measures for the oil sector. The law on environmental protection (law 2000-045 titled “Loi-cadere sur l’environnement”) requires an EIA for the oil activities. This law was complemented by decree 2004-094 that specifically regulated the EIA procedure, and was modified and supplemented by decree 2007-105 on EIA). The environmental law 2000-045 also establishes general principles such as precautionary principle in Article 6 and the polluter pays principle in Article 7. The principles constitute the base of a national environmental policy according to Article 1.¹²⁴ The articles do not, however, provide any guidance on how to apply the principles in practice. The law on mining (law 99-013 titled “Portant Code minier”) contains a certain number of conditions for the general management of the environment in relation to the mining operations and applies to oil activities since they are covered by the definition of the mining activities. Articles 33

¹²¹ Seyfoullah Ould Abbas & Mama Ould Mohammed, M.E., Exclusive representatives for the oil company Groupe Ahmed Salem BUGSHAN (ASB), personal interview, 2009-02-03.

¹²² **Article 21 of ordinance 88/151 “Portant Code des hydrocarbures” :**

Les Opérations Pétrolières devront être entreprises de manière à assurer la bonne conservation des ressources nationales et à protéger l’environnement. Dans ce but, les titulaires de droits exclusifs d’exploration et d’exploitation devront mener leurs travaux à l’aide des techniques les plus fiables utilisées dans l’industrie pétrolière et prendre les mesures nécessaires pour garantir que leurs activités ne préjudicient à la sécurité de l’homme et à la préservation de l’environnement.

¹²³ van Vliet, G., Magrin, G., van Dessel & Chabason B. “Panel scientifique independent sur les activités pétrolières et gazères en République Islamique de Mauritanie“ Rapport définitif (2009), 14.

¹²⁴ Articles 1 and 4-7 of Law 2000-045 titled “Loi-cadere sur l’environnement”.

and 34 require that a licence for exploitation should be subjected to the measurements defined by the national and international laws into force in Mauritania. Article 53 requires that exploitation of the mineral resources is carried out according to the principles of sustainable development.¹²⁵ In regards to offshore oil exploitation, there is no specific marine environmental protection legislation currently in place.¹²⁶

3.6.3 The Obligations in the Contracts

The standard contracts of production sharing, based on a model contract of 1994 (“Contrat type de partage de production d’hydrocarbures de 1994”), are renegotiated with each contractor. It is a type of commercial concession agreement governed by Mauritanian law containing some elements of obligations for the operator to undertake concerning the environment.¹²⁷

Some types of foreign investment contracts establish a relationship between the host government and the investor that can have direct deregulatory effects of environmental legislation, if they include a ‘stabilisation clause’. This clause is intended to eliminate the regulatory risk for changes in environmental standards, or the application of standards throughout the concerned project. Such clauses go far beyond the legal leniency a multinational corporation would be able to obtain in its home country and this shifts the balance of power towards the corporation and away from the host country.¹²⁸ By using voluntary standards-based provisions, the contracts allow companies to lay down derogation to host country legislation, thereby undermining national legislation and international treaty obligations.¹²⁹ In the Mauritanian model contract, there is not such clause that displaces national legislation. Article 27.1 of the contract states that the petroleum operations shall be governed by the national laws and regulations, and Article 27.2 states that the contractor shall be subject at any time to the laws and regulations in force in Mauritania. In Article 27.3 however, there is a right for the contractor to not be exposed to any legislative provision that give rise to an aggravation in the charges and obligations arising from the contract or from the legislation in force on the date of signing the contract. This will probably have the effect that newly adopted provisions that are

¹²⁵ Articles 33-34 and 51 of Law 99-013 titled “Portant Code minier”.

¹²⁶ van Vliet, G., Magrin, G., van Dessel & Chabason B. “Panel scientifique indépendant sur les activités pétrolières et gazères en République Islamique de Mauritanie” Rapport définitif (2009), 14.

¹²⁷ Official website of Ministry of Petrol and Energy:
<<http://www.petrole.gov.mr/MinesIndustrie/Documents/Secteur+Petrole/partagehydrocarbure.htm>>

¹²⁸ Bridgeman, N. & Hunter, D., “Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism”, (2008) 20, Georgetown International Environmental Law Review, 198.

¹²⁹ Leubuscher, S., “The Displacement of International Obligations: BITs and the Commodification of the Environment” which is included in “New Directions in International Environmental Law”, (2004), American Society of International Law Proceedings of the Annual Meeting, 281.

more stringent could be displaced if they are not in force on the date for signing the contract, and in some sense function as a type of stabilisation clause.

In the model contract, there are references to ‘good international petroleum industry practice’.¹³⁰ In Article 2, regulating the scope of the contract, there is a general obligation in subparagraph 5 for the contractor to observe good international petroleum industry practice when performing petroleum operations. The reference is also used in Article 6, titled “Contractor’s obligations relating to the conduct of petroleum operations” in subparagraph 1. The term good international petroleum practice is not further defined, the exact meaning of the expression is unclear, and there is no guidance in the contract on how to apply such provision.

More specific on environmental obligations, regulated in Article 6.4 of the model contract,¹³¹ the oil companies are obliged to “prendre toutes les mesures nécessaires à la protection de l’environnement” (“any necessary action for the protection of the environment”). In the subparagraphs, the contractor is obliged to ensure good maintenance of facilities and equipment, avoid losses and discharges of petroleum, protect water and rehabilitate petroleum operation sites, but the provision does not contain more guidance on how to fulfil these environmental obligations. To apply this provision and hold companies accountable on the basis of the contract

¹³⁰ References to good international petroleum industry practice in the model contract of 1994 in articles 2.5, 4.4, 6.1, 7.1, 9.1, 9.10, 9.14, 10.1. Available at the official website of the ministry of Petroleum and Energy:

<<http://www.petrole.gov.mr/NR/rdonlyres/BF424E0A-ADBE-4082-A98C-B62396EA0AED/0/contrattypéenfranc.pdf>>

¹³¹ **Article 6.4 of the model contract of 1994** (Contrat type de partage de production d’hydrocarbures de 1994) :

Le Contractant devra au cours des Opérations Pétrolières prendre toutes les mesures nécessaires à la protection de l’environnement.

Le Contractant devra notamment prendre toutes les dispositions raisonnables pour :

- a) S’assurer que l’ensemble des installations et équipements utilisés pour les besoins des Opérations Pétrolières sont en bon état et correctement maintenus et entretenus pendant la durée du présent Contrat ;
- b) Eviter les pertes et rejets d’Hydrocarbures produits ainsi que les pertes et rejets de la boue ou de tout autre produit utilisés dans les Opérations Pétrolières ;
- c) Assurer la protection des nappes aquifères rencontrées au cours des Opérations Pétrolières et fournir au Directeur des Mines et de la Géologie tous les renseignements obtenus sur ces nappes;
- d) Placer les Hydrocarbures produits dans les stockages construits à cet effet ;
- e) S’il y a lieu, restaurer les sites des Opérations Pétrolières à l’achèvement de chaque Opération Pétrolière.

Available at the official website of the ministry of Petroleum and Energy:

<<http://www.petrole.gov.mr/NR/rdonlyres/BF424E0A-ADBE-4082-A98C-B62396EA0AED/0/contrattypéenfranc.pdf>>

for not observing environmental protection seems to be impossible due to the vague formulation of the obligations in contract.¹³²

In the negotiated contracts with the companies, there is an obligation included to put in place an environmental management plan, which is not included in the model type contract.¹³³ There is no guidance available of the content of the environmental management plan, which includes the performance of an EIA. Also, there is not prescribed in the contract the need for periodical reports or studies for the evaluation or approval of the plans. The responsible ministry can ask for modifications for approval, but the contracts do not contain any fixed requirements of the environmental management plans.¹³⁴

3.6.4 Environmental Impact Assessment Procedure in Mauritania

Prior authorising of oil and gas projects in Mauritania, an EIA is required on the basis of national legislation as well as on contracts. According to the environmental international conventions it has ratified, Mauritania has an international obligation to put in place an adequate EIA legislation. The EIA process has often been criticised with respect to its ineffectiveness in developing states.¹³⁵ This is evident in the case in Mauritania, where the EIA procedure suffers from a number of weaknesses, which needs to be addressed for Mauritania to fully comply with its international obligations as a state party of UNCLOS, CBD and UNFCCC.

The EIA procedure is set out in decree 2007-105, titled “relatif à l’application de la loi 2000-045 sur les études d’impact environnemental (EIE)” and should be applied together with law 2000-45 on the environment. Decree 2007-105 defines the procedural matters of an EIA and contains an annex with a list of projects having possible negative impacts on the environment that have to undergo an EIA procedure. The list includes

¹³² Moliner, M. & Chambord, A. par la Mission Économique de Nouakchott, “Analyse des risques pour l’exploitation pétrolière notamment off-shore en Mauritanie“, Études de mission Économique, (2005), 75.

¹³³ For instance, an environmental management plan (“plan de gestion de l’Environnement”) is required in 6.4 of the sharing contract between Woodside and the government on block 2, signed 2006. Available at the website of ministry of petrol and energy: <<http://www.petrole.gov.mr/NR/rdonlyres/A8951DFB-C8EF-4CCE-BD2D-7CD51B948C57/0/CPWoodsideBloc2.pdf>>

¹³⁴ Baum, I. GTZ, legal advisor for the government of Mauritania and for The Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ). GTZ runs a project aiming to harmonize environmental law in Mauritania’s legal framework. GTZ is not working specifically with oil and gas sector, but it works with how to make EIAs operational, and to enforce the existing legal instruments, personal interview, 2009-01-26.

¹³⁵ Wawryk, A., “International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies”, (2002) 13, CEPMLP Internet Journal, 11.

most oil related activities.¹³⁶ The decree requires that: an EIA is carried out to within adequate time (prior the decision of authorisation and the beginning of the activities); a dialogue has to taken place with the qualified ministries; an obligatory agreement with the Ministry of the Environment on environmental feasibility; adoption of an environmental management plan; and instigation a control system with respect to the Ministry of Environment.¹³⁷ In the procedure, the enterprise responsible for the project is required to set up terms of reference, organise meetings with other stakeholders and create opportunities for public participation. However, the EIA decree is a general decree dealing exclusively with procedural matters and it is not specifically addressing oil and gas projects. The EIA legislation lacks fundamental definitions relevant for the oil and gas projects, as well as binding technical and quantitative norms. For instance, the EIA legislation does not provide provisions for permitted chemicals or maximum level of usage. Thus, there are no substantive norms in place for the oil operators to apply in their EIA reports. The legislation is incomplete, which complicates the implementation for the companies. Under these conditions, it is impossible to perform a follow-up environmental evaluation to authorise projects, whatever the capacities and the means available for ensuring the environmental protection. Without clear rules, the EIA cannot be effective and the EIA result cannot be used in to establish environmental management plans in a practical manner.¹³⁸

When the oil activities commenced, Mauritania initially attempted to create national EIA legislation in cooperation with one of the first operators: the Australian company Woodside. Due to the lack of legislation in Mauritania, Woodside decided to build the Mauritanian EIA legislation upon an Australian model. The Government of Mauritania intended to use the knowledge of the company to create strong environmental protection. The work was never properly completed because of the coup d'état in 2005.¹³⁹

In the absence of detailed provisions, enterprises are obliged to refer to external norms when performing an EIA. In the oil industry, companies often use European standards, standards set by OGP, standards from their home countries, or standards designed by international consultants and refer

¹³⁶ Décret 2007-105 relatif à l'application de la loi 2000-045 sur les études d'impact environnemental (EIE), annexe I, p. 9 Energie petrole, including activities such as seismic campaigns for oil prospecting, transport of hydrocarbons, oil drillings, creations of offshore platforms etc.

¹³⁷ van Vliet, G., Magrin, G., van Dessel & Chabason B. "Panel scientifique independent sur les activités pétrolières et gazères en République Islamique de Mauritanie" Rapport définitif (2009), 14.

¹³⁸ van Vliet, G., Magrin, G., van Dessel & Chabason B. "Panel scientifique independent sur les activités pétrolières et gazères en République Islamique de Mauritanie" Rapport définitif (2009), 14.

¹³⁹ Cheikh Ould Khaled, Previous Technical Advisor at Ministry of Fishery, Mauritania. At present Technical Advisor at the Ministry of Transport, personal interview, 2009-01-25.

to them in their environmental management plans.¹⁴⁰ In the extractive industry, it is a common practice to have EIAs prepared and carried out by private consultancies paid by the companies for projects drawn up under commercial agreements. Since the contracts lay down environmental norms based on “good international petroleum industry practice”, the private consultants use this definition as a departure point while creating environmental management plans and perform EIAs. Some two hundred industry standards are currently in use, producing a serious fragmentation of norms. The diversity of provisions makes implementation, monitoring, and enforcement almost impossible.¹⁴¹ The consequence of this practice is, even though the norms correspond to international standards, the government has difficulties to evaluate the technical detailed EIA studies with varying content and appearance.¹⁴²

3.6.5 The Lack of Coordination

Another problem in Mauritania considering the EIAs is the lack of coordination among the ministries responsible for the oil and gas sector. The EIA decree of 2007 clearly specifies the assigned role of each ministry in the EIA procedure. According to the legislation, the Ministry of Environment is in charge of the EIAs, while Ministry of Petrol and Energy is in charge of the contracts and the concessions.¹⁴³ The Ministry of Environment authorises the permits and hands it over to the Ministry of Petrol and Energy. In practice, however, the procedure is ambiguous. For instance, within the Ministry of Petrol and Energy, there is an environmental unit which started to take over some of the functions of the environmental ministry, contrary with the legislation.¹⁴⁴ With the current practice, the procedure for obtaining a concession involves contact only with the Ministry of Petrol and Energy, which receives the request and contacts the Ministry of Environment for initiating the EIA procedure. Although, Article 15 of the law on the environment and the Article 6 of EIA decree indicate that EIA procedures must precede the decisions relating to the projects

¹⁴⁰ Baum, I., legal advisor at the government of Mauritania and at GTZ, personal interview, 2009-01-26.

¹⁴¹ Leubuscher, S., “The Displacement of International Obligations: BITs and the Commodification of the Environment” which is included in “New Directions in International Environmental Law”, (2004), American Society of International Law Proceedings of the Annual Meeting, 282.

¹⁴² van Vliet, G. & Magrin G., Panel Scientifique Indépendant des Experts en Mauritanie, personal interview, 2009-02-02.

¹⁴³ Abderrahmane Ould Limame, Facilitator for the Panel Scientifique Indépendant des Experts en Mauritanie and Analyst at the International Union for Conservation of Nature (IUCN) in Mauritania, Personal interview, 2009-01-20.

¹⁴⁴ Haroune Ould Sidatt, Operations Analyst, World Bank. The World Bank is running a capacity building project for mining and oil sector (PRISM2). The Bank has engaged the Italian firm D’Appolonia to perform a Strategic Environmental and Social Assessment (SESA) in the oil and gas sector in Mauritania. All the activities of the Bank are currently suspended due to the coup and the SESA has not been completed. Personal interview, 2009-01-07.

subjected to EIA, the current procedure allows the EIA to be carried out after the delivery of the authorisation by the qualified technical ministry, i.e. the Ministry of Petrol and Energy.¹⁴⁵ Article 33 of the decree of 2007 on the EIA specifies that the Ministry of Environment is in charge of the follow-up of the EIAs and the environmental management plans in collaboration with the other ministers concerned. Article 34 and 35 of the EIA decree, open up for possibilities of direct control by the Ministry of Environment, which can be useful if the ministries concerned with the technical issues, like the Ministry of Petrol and Energy, do not exert their environmental matter responsibilities. Reciprocally, the existence of strong environmental departments within the technical ministries can be useful in the event of a failure of the Ministry of Environment.¹⁴⁶ Prior experiences indicated that, when a conflict occurs regarding the interests within the same ministry between its economic matters and the environmental stakes, the latter were often undervalued and marginalised.¹⁴⁷ It is one of the reasons for which environmental ministries were established. In Mauritania, the Ministry of Environment is a recent creation that formed part of a necessary decision because of the increasing importance of environmental stakes. In practice, however, the Ministry of Environment has neither the means nor effective legitimacy to take charge of the environmental issues in the concerned technical ministry.¹⁴⁸

3.6.6 The Lack of Human Resources

Oil activities involve complicated technical issues that require specific expertise. At present in the Mauritanian ministries, there is no staff with the right qualifications and/or skills to deal with environmental management in regards to the oil sector.¹⁴⁹

The reason behind the lack of human resources in the ministries is rooted in the restructuring within the ministries, which started in the 1990s. After the ratification of several important environmental conventions, including the Climate Change Convention, the Convention of Biodiversity, Convention to Combat Desertification and International Convention on the Prevention of Pollution by Ships (MARPOL), the government created the Ministry of

¹⁴⁵ van Vliet, G., Magrin, G., van Dessel & Chabason B. “Panel scientifique independent sur les activités pétrolières et gazères en République Islamique de Mauritanie“ Rapport définitif (2009), 15.

¹⁴⁶ van Vliet, G., Magrin, G., van Dessel & Chabason B. “Panel scientifique independent sur les activités pétrolières et gazères en République Islamique de Mauritanie“ Rapport définitif (2009), 18.

¹⁴⁷ Moliner, M. & Chambord, A. par la Mission Économique de Nouakchott, “Analyse des risques pour l’exploitation pétrolière notamment off-shore en Mauritanie“, Études de mission Économique, (2005), 76.

¹⁴⁸ van Vliet, G., Magrin, G., van Dessel & Chabason B. “Panel scientifique independent sur les activités pétrolières et gazères en République Islamique de Mauritanie“ Rapport définitif (2009), 28.

¹⁴⁹ Baum, I., legal advisor at the government of Mauritania and at GTZ, personal interview, 2009-01-26.

Environment to implement these conventions. The Ministry of Environment was meant to have the function to facilitate and coordinate when dealing with environmental issues. However, the coup in 2005, led to interruption in the structural changes of the ministries and the work of the restructuring was never completed. While studying the practice of the new Ministry of Environment, it is unclear who is in charge of what among the ministries. The environmental ministry is only equipped with coordination skills, nevertheless, a large number of technical issues are being transferred to it, although it lacks technical expertise to deal with these issues.¹⁵⁰

Thus, when the government deals with the comprehensive EIA studies, usually consisting of a several 100 pages, there is no technical capacity in the government to perform an adequate evaluation of them. The revising of the EIAs is time consuming and there are often delays in the approval of the EIAs. Haroune Ould Sidatt, in charge at the World Bank for capacity building in the Mauritanian Government,¹⁵¹ confirms that staff in the oil and gas sector lacks knowledge of the environmental risks that the oil development involves.¹⁵² In reality, environmental precautions rely highly on the voluntary responsibility and the competence of the oil companies. There is high competence in the industry, but the problem is how the government can profit from this without ending up in a biased situation.¹⁵³

3.6.7 The Oil Companies and the Environmental Protection in Mauritania

With its incomplete environmental legislation and lack of human resources, Mauritania has insufficient means to monitor the operations of the oil companies. The inaccessible localisation of the activities, at sea and in the desert, contributes to the monitoring difficulties. In the current situation, the hope falls on the oil companies to act in a responsible manner.¹⁵⁴

The oil company Petronas, main operator of the offshore field Chinguetti, has taken over the EIA of Woodside, the Australian company, and operates

¹⁵⁰ Cheikh Ould Khaled, Previous Technical Advisor at Ministry of Fishery, Mauritania, personal interview, 2009-01-25.

¹⁵¹ The World Bank in Mauritania is mostly focused on the mining sector within the frames of its project PRISM2, which focus on small business entrepreneurship. In 2006 when the oil activities started in Mauritania, some additional funds were set off for the oil sector. The World Bank's project with the oil and gas sector is concentrated to capacity building. The World Bank executed a strategic environmental study assessment. An Italian firm D'Appolia was in charge for the study, but the study has been cancelled because of the coup d'état. Haroune Ould Sidatt, Operations Analyst, World Bank, Personal interview 2009-01-07.

¹⁵² Haroune Ould Sidatt, Operations Analyst, World Bank, Personal interview 2009-01-07.

¹⁵³ Confirmed by several actors involved in the oil sector. Cheikh Ould Khaled, Previous Technical Advisor at the Ministry of Fishery, personal interview, 2009-01-25., van Vliet, G. & Magrin G., Panel Scientifique Indépendant des Experts en Mauritanie, personal interview, 2009-02-02. Haroune Ould Sidatt, Operations Analyst, World Bank, Personal interview 2009-01-07.

¹⁵⁴ Haroune Ould Sidatt, Operations Analyst, World Bank, Personal interview 2009-01-07.

in accordance to the environmental management plan of Woodside. Woodside was the first operator to undertake and complete an EIA for oil exploration and production in Mauritania.¹⁵⁵ The EIA was carried out in August 2004 and the final Environmental Impact Statement was published in January 2005. Woodside involved private consultants like Bowman Bishaw & Gorham and CSR Consultants to perform field studies and OSE Consultants for stakeholder engagement in the EIA. When performing the EIA, Woodside referred to international best practice for guidance. The mentioned guidelines include the OPG/UN Environment Programme's "Environmental management in the oil and gas exploration"; The World Bank's "The Environmental Assessment Process"; the International Association for Impact Assessment/EIA's "Principles of Environmental Impact Assessment: Best Practice"; and in corporation with Shell the "Manual for integrated Environmental Impact Assessment".¹⁵⁶ The EIA summarised the principal environmental risks related to the production of hydrocarbons and suggested measurements to limit the risks. The risk assessment also included an evaluation of existing oil spill risks to the coastline, and the extent to which the project of Woodside has increased that existing risks. The EIA report also contained how development of Woodside's environmental management plan has acted as a catalyst to national authorities in Mauritania to finalise and implement their national plans.¹⁵⁷ To combat the risks of oil pollution, the company adopted standards and technologies that are generally retained in the international oil industry. Thus, Woodside/Petronas' measures to minimise pollution in Mauritania are similar to those of the other offshore oil platforms in other states and are not specially adjusted to the environment of Mauritania. 19 May 2008, the Panel Petrole made a visit to the FPSO Berge Helene, a floating installation of production, storage, and starting of oil and pumped gas at Chinguetti field.¹⁵⁸ The purpose of the visit was to gain a better understanding of the state of the FPSO and in particular concerning environmental management and records. The overall level of housekeeping seemed in conform to the standards set out in Woodside's EIA/environmental management plan. The Panel Petrole made a brief check on the daily reports and environmental management documentation, and stated that it was done in a correct manner. Two government representatives from the Ministry of Petrol and Energy were permanently on board to monitor activities and reporting. The representatives did not, however, at the

¹⁵⁵ The World Bank website: <http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187283&siteName=WDS&entityID=000160016_20060627152915>

¹⁵⁶ Woodside "Chinguetti Development Project – Environmental Impact Statement (EIS), Final" (2005), 14-15.

¹⁵⁷ Woodside "Chinguetti Development Project – Environmental Impact Statement (EIS), Final" (2005), 54-56.

¹⁵⁸ Moliner, M. & Chambord, A. par la Mission Économique de Nouakchott, "Analyse des risques pour l'exploitation pétrolière notamment off-shore en Mauritanie", Études de mission Économique, (2005), 25.

time perform any independent verification of analyses.¹⁵⁹ Petronas have not taken any anti-pollution measurements specific to Mauritania: the created zone of exclusion near the FPSO and the heightened surveillance of the production site are supplementary measures that Petronas has carried out.¹⁶⁰

The Chinese company CNPCI started onshore exploration drilling in 2004.¹⁶¹ CNPCI operates four exploration projects in Mauritania.¹⁶² At Heron-1 site¹⁶³ drilling exploration was undertaken for five months, starting in October 2006. The exploration terminated after the production tests failed, even though some hydrocarbon was discovered. Prior the drilling in May 2006, CNPCI has performed an EIA by hiring a private consultant, Worley Parsons Komex, that presented an EIA report with a proposed programme of the oil exploration drilling. The report was considered to have been comprehensive containing valuable information, although there were a number of gaps in the environmental management, in particular concerning the treatment and final destination of wastes, the abandonment of quarry and drill site, the close location to the National Park Parc Diawling and the protection of the groundwater layers. On 2 February 2008, Panel Petrole visited the abandoned onshore site Heron-1 and it reported after its visit that the site itself had been cleaned up with no litter, equipment or waste left behind, although some traces of oily substance were observed.¹⁶⁴

Total, a French company, explores onshore in Mauritania and is one of the main operators. The Panel Petrole visited the onshore site of the company between 13-15 February 2009, the with the objective to briefly evaluate the environmental and socio-economic outcomes related to the activities of exploration carried out by Total in the oil field located in the basin of Taoudéni, close to the old city Oudane, a UNESCO World heritage-listed city.¹⁶⁵ The panel was of the opinion from their brief observations that the fundamental Health, Safety, Environment standards were respected. For instance, a Health Safety Environment Officer was on the site during the visit, the equipment for the collection of waste, indication of safety, and materials were in good state. However, a certain number of questions were raised during the visit. The work of constructing a road to the drilling site

¹⁵⁹ Notes sur les visites de terrain, Report of visit to Petronas, Annexe 2, van Vliet, G., Magrin, G., van Dessel & Chabason B. "Panel scientifique indépendant sur les activités pétrolières et gazères en République Islamique de Mauritanie" Rapport définitif (2009), 35-36.

¹⁶⁰ Moliner, M. & Chambord, A. par la Mission Économique de Nouakchott, "Analyse des risques pour l'exploitation pétrolière notamment off-shore en Mauritanie", Études de mission Économique, (2005), 83.

¹⁶¹ Abderrahmane Ould Limame, IUCN in Mauritania, Personal interview, 2009-01-20.

¹⁶² <<http://www.cnpc.com.cn/en/cnpcworldwide/mauritania/Mauritania.htm>>

¹⁶³ Heron-1 site is situated in Block 20, in the South West of Mauritania, close to the boarder of Parc Diawling, a national park.

¹⁶⁴ Notes sur les visites de terrain, Report of visit to CNPCIM Heron-1 abandoned site. van Vliet, G., Magrin, G., van Dessel & Chabason B. "Panel scientifique indépendant sur les activités pétrolières et gazères en République Islamique de Mauritanie" Rapport définitif (2009), 38-39

¹⁶⁵ UNESCO World heritage list website: <<http://whc.unesco.org/en/list/750>>

had begun before an EIA had been carried out. Nevertheless, it appears difficult to separate the construction of the road, which was intended to convey the material from the drilling activities. Also, the EIA of 2005 was not available on-site; and the Mayor and the person in charge of a local NGO were unaware of its existence. The question of the dust from the building site does not seem to have received the necessary attention. The inhabitants of Oudane have during several discussions expressed their concern of the potential impacts of dust may have on the productivity of their palm plantations, which is an important economical source. According to the Panel Petrole, the communication around the environmental issues with the local population needs to be improved in the future development of the project. The Total Community development program, intended to prevent negative social impacts, does not address the question concerning the mitigation of the environmental impacts of project. A person in charge of the environmental communication appears to be necessary to prevent possible adverse impacts in the future.¹⁶⁶

The Mauritanian Government needs external technical support, which could be provided by the oil companies who possess a great capacity of knowledge regarding competence and finances.¹⁶⁷ Dana Petroleum, an oil company in Mauritania has offered the government technical assistance on environmental issues because of the slow pace of the government to evaluate EIA reports. It is in the interest of oil companies to speed up the process in the ministries and to increase their capacity. The government has difficulties in accepting the external assistance from the oil companies to help with the evaluation of the EIAs, since they subjects to the evaluation.¹⁶⁸

3.6.8 Concluding Remarks

Even though, the operators give the impression that they place emphasis on environmental protection, the comprehension of the delicate environmental issues of the oil activities in the particular environmental context of Mauritania appears to be limited for the oil companies. After undertaken the oil site visits, the Panel Petrole confirms that the executives of the oil firms have a weak knowledge of operations' impact on the fragile ecosystems and the nearby societies.¹⁶⁹ For instance, the measures suggested by Woodside in its EIA for diminishing impacts of the offshore oil platforms are general

¹⁶⁶ Notes sure les visites de terrain, Report of visit to CNPCIM Heron-1 abandoned site. van Vliet, G., Magrin, G., van Dessel & Chabason B. "Panel scientifique independent sur les activités pétrolières et gazères en Republique Islamique de Mauritanie" Rapport définitif (2009), 43-45.

¹⁶⁷ van Vliet, G. & Magrin G., Panel Scientifique Indépendant des Experts en Mauritanie, personal interview, 2009-02-02.

¹⁶⁸ Seyfoullah Ould Abbas & Mama Ould Mohammed, M.E., Exclusive representatives for the oil company ASB, personal interview, 2009-02-03.

¹⁶⁹ van Vliet, G., Magrin, G., van Dessel & Chabason B. "Panel scientifique independent sur les activités pétrolières et gazères en Republique Islamique de Mauritanie" Rapport définitif (2009), 19.

in their nature and not specifically addressing the particular context of the ecosystems in Mauritania.

In accordance with Mauritanian legislation, the EIAs are produced either by the operators themselves or by their consultants. The operators are the proponents with the greatest stake in acceptance of the project, which could lead to the possibility of biased and inadequate environmental impact statements.¹⁷⁰ Although EIAs should be conducted prior the commencement of an activity, in practice, environmental assessments are conducted only after economic and technical feasibility studies have been completed, investment decisions have been made and the developer has already committed to a project in its proposed format. EIAs and environmental management plans are often drafted only after some prospecting has already taken place and the contracts have been signed.¹⁷¹ In the majority of developing states, environmental ministries are bypassed by other more powerful ministries, in particular ministries concerned with resource exploitation, which obstructs the compliance with EIA legislation.¹⁷² In Mauritania, the Ministry of Petrol and Energy is powerful with great resources and the Ministry of Environment is weak and unequipped.¹⁷³ Many developing states may give support to a project on economic grounds prior an EIA. Often governments and companies view the EIA as a hurdle to development, rather than a useful tool to protect the environment. The imperative of economic development and often-stated view that countries cannot afford to increase environmental protection results in approval of development projects that are often not environmentally sustainable.¹⁷⁴ In Mauritania, there is a clash between the Ministry of Environment and the Ministry of Petrol and Energy, where the Ministry of Petrol and Energy can sign agreements without the approval by the Ministry of Environment, which means that projects can be approved despite the results of the EIA.¹⁷⁵

¹⁷⁰ Wawryk, A., "International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies", (2002) 13, CEPMLP Internet Journal, 10.

¹⁷¹ Zaver has performed prospecting onshore. The next step in the process is to develop an environmental management plan according to the contract. In the EMP, the water shelf has to be managed and the ministry of petrol is in charge of the plan. This is linked to the engagement plan that all companies are required to have in place. Zaver is in the process working on the environmental plan which have to be completed before the operation can commence. Also an EIA has to be completed. Chbih Cheikh Malainine, representative for the oil company Zaver Petroleum, personal interview, 2009-02-02.

¹⁷² Wawryk, A., "International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies", (2002) 13, CEPMLP Internet Journal, 17.

¹⁷³ Cheikh Ould Khaled, Previous Technical Advisor at Ministry of Fishery, Mauritania, personal interview, 2009-01-25.,

¹⁷⁴ Wawryk, A., "International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies", (2002) 13, CEPMLP Internet Journal, 10.

¹⁷⁵ Cheikh Ould Khaled, Previous Technical Advisor at Ministry of Fishery, Mauritania, personal interview, 2009-01-25. van Vliet, G. & Magrin G., Panel Scientifique Indépendant des Experts en Mauritanie, personal interview, 2009-02-02.

EIA systems in general suffer from a lack of post-decision monitoring. Baseline socio-economic and environmental data is inaccurate, difficult to obtain or non-existent. The consideration of alternatives within EIAs is often weak, and the alternative of no-action is not a viable choice. EIA reports can be difficult to obtain for the general public, such as in the case of Total in Oudane. It should be noted that multinational companies are more likely to observe good practices compared to local firms in countries where environmental protection are either un- or de-regulated. The Panel Petrole confirms that Petronas, an OPG-member, is an environmental responsible actor in Mauritania, and sensitive to environmental reputation. Dana Petroleum is also one of the main actors and seen as a more environmental responsible company compared to others. Consequently, any programme of responsibility must take into account the relationship between local and transnational practices and the influence of multinational corporations thereon, and the possibility that multinationals will be standard setters, rather than standard lowerers.¹⁷⁶

¹⁷⁶ Muchlinski, P., "Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by International Governmental Organisations", (2003) 3, Non-State Actors and International Law, 135.

4 Legal Impacts of Private Norms in International Environmental Law

4.1 A Growing Trend

The gravitational pull of environmental treaties is felt not only by states, but also by corporations, which make efforts to comply with the treaties as well.¹⁷⁷ Under pressure, the industry has risen the occasion and adopted a number of voluntary codes of conduct, guidelines and management systems, intended to modify and restrict multinational corporations' behaviour. The use of a non-legal form is dictated by lack of formal lawmaking capacity of corporations.¹⁷⁸ Governments participate as well in these processes and a number of private sector and hybrid programmes have even been regulated and/or certificated by governments.¹⁷⁹ Private standards are easier to negotiate than governmental ones because of their adaptability and private norms are becoming more influential in the international legal forum.¹⁸⁰ For instance, in the case of the oil and gas sector, measures for environmental protection, such as performing EIAs, could become standard practices expected by the international community for every government to require of oil and gas corporations in the future. Furthermore, leading international companies prepare EIAs and implement environmental management plans, even when national laws do not require them, as a hedge against future liability for failing to meet international standards.¹⁸¹

Academic opinion on the international legal personality of multinational companies is diverse and controversial. Since the 1970s, international initiatives have attempted to create a useful body of rules regulating the conduct of corporations.¹⁸² International private-public codes of conduct come in a variety of legal forms as the law does not stipulate rules of the form for such codes, nor recognise them as formal sources of law. The legal effects of each code provision thus have to be determined separately, and

¹⁷⁷ Affolder, N., "The private life of environmental treaties", (2009) 103, *The American Journal of International Law*, 510.

¹⁷⁸ Chinkin, C., *Normative Development in the International Legal System*. In Shelton, D. *Commitment and Compliance* (New York: Oxford University Press, 2003), 29.

¹⁷⁹ Campins-Eritja M. & Gupta, J., "Non-State Actors and Sustainability Labelling Schemes: Implications for International Law", (2002) 2, *Non-State Actors and International Law*, 238.

¹⁸⁰ Meidinger, E., "Private" Environmental Regulation, Human Rights, and Community", (2000) 7, *Buffalo Environmental Law Journal*, 225.

¹⁸¹ Wawryk, A., "International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies", (2002) 13, *CEPMLP Internet Journal*, 25.

¹⁸² Arts, B, Noortmann, M. & Reinalda, B., *Non-State Actors in International Relations*, (Ashgate, Aldershot, 2001) 69.

depend on the intentions and competencies of the member states, corporations and organisations of the code.¹⁸³ It is only possible to consider international legal obligations of multinationals if, and to the extent that international codes of conduct contain duties directly imposed upon multinational corporations, as well as rights ascribed to them as against the host state, come into effect. Regarding human rights obligations and corporations, there are existing rights and duties of multinationals that can be found in international human rights instruments, and a growing trend affirms that multinational corporations are increasingly held responsible for human rights violations in foreign domestic courts. This shows that corporations are at least in a transitional phase between being the object and subject of international law, which suggests that international corporate activities are no longer conducted outside the realm of international law. Corporate rights and duties have been increasingly internationalised. Corporations can make legal claims and be held responsible on the basis of international legal instruments, and as such, they may be qualified as new subjects. However, the content and the scope of the corporate form of international legal personality are still in a state of confusion.¹⁸⁴

4.2 Private Environmental Standards References in Domestic Legal Systems

The traditional assumption is that multinational corporations operating in the sovereign territory of a state will be subjected to laws, courts, and enforcement authorities of that jurisdiction, i.e. the host country laws. In practice, as mentioned above, host country laws in many developing states do not provide a realistic framework for the protection of local communities and the environment,¹⁸⁵ as can be seen in the case in the oil and gas industry of Mauritania. The voluntary standards and norms undeniably fill a normative gap located between the state-centred focus of international law and the often inadequate or unenforced standards of the developing country host for multinationals. The private standards and norms have the potential to improve the performance of corporations' compliance with international legal and ethical norms, both by voluntary adoption by companies or references in national legislation or in contracts. At present, companies operate in a 'norm-rich' environment that lacks effective governance

¹⁸³ Cordonier Segger, M-C., "Sustainability and Corporate Accountability Regimes: Implementing the Johannesburg Summit Agenda", (2003) 12, *Review of European Community & International Environmental Law*, 298.

¹⁸⁴ Arts, B, Noortmann, M. & Reinalda, B., *Non-State Actors in International Relations*, (Ashgate, Aldershot, 2001) 70-71.

¹⁸⁵ Bridgeman, N. & Hunter, D., "Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism", (2008) 20, *Georgetown International Environmental Law Review*, 194.

structures for monitoring or enforcing compliance with applicable standards and norms.¹⁸⁶

4.2.1 Reference to Best Practice

Commercial agreements regulating the activities of private investors in a state often apply environmental norms based on ‘international best practice’ or ‘international good industry practice’ that refer to voluntary standards formulated by private actors.¹⁸⁷ For instance, the oil and gas sharing contracts used in Mauritania refer to ‘good international petroleum industry practice’.¹⁸⁸ Such reference to best/good practice in commercial contracts as well in national legislation in developing states, functions as a substitute for the lack of substantive norms in the national legal system. A large number of such standards regulating the conduct of international business originate from non-binding soft law instruments created by the industry itself.¹⁸⁹ Thus, industry statements of best practice can be binding through their application by national courts, which can invoke guidelines to interpret petroleum contracts negotiated with governments or to interpret legislative provisions that require use of best/good international practice. The term ‘best practice’ is, however, vague, and the national courts will be faced with the challenging task to determine which guideline that represents the international accepted one among a diversity of existing guidelines. Nevertheless, if industry guidelines are generally endorsed and implemented by international companies, national courts can use the guidelines as evidence of industry best practice in litigation against the corporation.¹⁹⁰ Good/best practice requirements are generally expressed in terms of the practices accepted internationally, thus an oil corporation can be held responsible for environmental damage to a finding they did not follow best practice as set out in an international guideline, even in the case the oil company is not a member of the industry association issuing the guideline. The argument is of course stronger if the oil company is a member and it

¹⁸⁶ Bridgeman, N. & Hunter, D., “Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism”, (2008) 20, *Georgetown International Environmental Law Review*, 189-190.

¹⁸⁷ Leubuscher, S., “The Displacement of International Obligations: BITs and the Commodification of the Environment” which is included in “New Directions in International Environmental Law”, (2004), *American Society of International Law Proceedings of the Annual Meeting*, 282.

¹⁸⁸ References to good international petroleum industry practice in the model contract of 1994 in articles 2.5, 4.4, 6.1, 7.1, 9.1, 9.10, 9.14, 10.1. Available at the official website of the ministry of Petroleum and Energy: <<http://www.petrole.gov.mr/NR/rdonlyres/BF424E0A-ADBE-4082-A98C-B62396EA0AED/0/contrattypéenfranc.pdf>>

¹⁸⁹ Kimerling, J. “Corporate Ethics in the Era of Globalization: the Promise and Peril of International Environmental Standards”, (2001), 14, *Journal of Agricultural and Environmental Ethics*, 426-427.

¹⁹⁰ Muchlinski, P., “Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by International Governmental Organisations” (2003) 3, *Non-State Actors and International Law*, 127-129.

participated in the formulation of the guideline.¹⁹¹ In addition, compliance with private environmental norms can be a way to avoid liability and be used as a 'due diligence' defence. Hence, private standards can play a supplementary indirect role in shaping regulatory standards. Private voluntary programs can be incorporated implicitly into government regulatory systems without going through formal legislative or rule making processes. In Canada, for instance, a court has treated the failure to receive industry certification as a failure of the due diligence defence.¹⁹² Although, this might be a trend in Canada and other western countries, in developing states, like Mauritania for example, such lawsuit against an oil company for environmental damage will probably not occur as the legal system appears today, unless there is a case of a major accident of international dimensions.

Although many oil companies participate to develop guidelines for their operations, many difficulties are associated with the use of the private standards in developing states that might undermine their effectiveness due to the voluntary character. The effect of guidelines depends of the existence of a strong and independent judiciary to enforce the guidelines and that is prepared to hold oil companies accountable for their actions.¹⁹³ In Mauritania, several articles in the sharing contracts refer to 'good international petroleum industry practice' without defining the term or providing any guidance for determining the scope of the obligation, which makes the effect of the reference doubtful. At present, there has been no case for the national court to examine this expression or other judicial consequence, at least none that has been publicly announced.

Commercial agreements differ from international environmental treaties in the approach of how they gauge the state of the environment. Leubuscher argues that contracts using voluntary standard-based provisions with the term best international practice are quietly displacing international environmental law because they allow companies to derogate from the host country legislation in favour to use norms created by themselves. This could lead to states regulating environmental protection directly through commercial agreements, and at the same time displacing international environmental agreements. Thus, the origin of the environmental standards will differ. For instance, in the case of EIAs, Leubuscher states that multinational environmental agreements base their EIAs on findings by intergovernmental bodies on scientific and technical information, tempered by economic and political constraints, while EIAs in commercial contracts are typically carried out by private consultancies using private norms.¹⁹⁴

¹⁹¹ Wawryk, A., "International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies", (2002) 13, CEPMLP Internet Journal, 25-26.

¹⁹² Meidinger, E., "Environmental Certification Programmes and U.S. Environmental Law: Closer Than You Think", (2001) 31, The Environmental Law Reporter, 10171.

¹⁹³ Wawryk, A., "International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies", (2002) 13, CEPMLP Internet Journal, 27.

¹⁹⁴ Leubuscher, S., "The Displacement of International Obligations: BITs and the Commodification of the Environment" which is included in "New Directions in

However, most international environmental agreements do not contain scientific and technical requirements for EIAs, even if they originated from bodies with such competencies. In Mauritania, the oil companies hire international consultants to perform the EIAs on the basis of best industry practice using soft law instruments such as guidelines developed by oil association bodies.¹⁹⁵ The reference to best practice could be seen as filling a void of substantive norms in the national legislation, and replaces rather than displaces international environmental agreements, and even develops the provisions in the agreements.

4.2.2 The Role of the Government when using Private Standards

Domestic law is increasingly complemented by codes of conduct, best practice, corporate codes, guidelines, and standards in the environmental field due to the inherent attractiveness of ready-made environmental standards.¹⁹⁶ Soft law of corporate governance can be seen as reactions against incapacities of the state to create adequate legislation.¹⁹⁷ As it happens, national legislatures will be tempted to change standards to reflect the particular concerns in the particular context in their countries, as they have done with model legislation in other areas of law. At the same time, demands for international consistency on privately generated standards are growing, and such standards could prove rather robust.¹⁹⁸

The role of governments is shifting from being the provider of environmental protection, to its enabler and supervisor. Governments in developing countries facilitate private involvement by setting the framework for the environmental performance with reference to private standards. Leubusher argues that multinationals take over state functions by allowing them to operate according to voluntary standards-provisions without being monitored or controlled by national authorities in the host country.¹⁹⁹ This scenario could be confirmed in the oil and gas sector in Mauritania, due to lack of resources to monitor the companies, which result that in practice, the companies can be seen as responsible for environmental protection and in a way carrying out state functions. However, despite Mauritania's inadequate

International Environmental Law", (2004), American Society of International Law Proceedings of the Annual Meeting, 282-283.

¹⁹⁵ Baum, I., legal advisor at the government of Mauritania and at GTZ, personal interview, 2009-01-26.

¹⁹⁶ Zumbansen, P., "The Parallel Worlds of Corporate Governance and Labor Law", (2006) 13, Indiana Journal of Global Legal Studies, 266.

¹⁹⁷ Zumbansen, P., "The Parallel Worlds of Corporate Governance and Labor Law", (2006) 13, Indiana Journal of Global Legal Studies, 290-291.

¹⁹⁸ Meidinger, E., "Environmental Certification Programmes and U.S. Environmental Law: Closer Than You Think", (2001) 31, The Environmental Law Reporter, 10169.

¹⁹⁹ Leubuscher, S., "The Displacement of International Obligations: BITs and the Commodification of the Environment" which is included in "New Directions in International Environmental Law", (2004), American Society of International Law Proceedings of the Annual Meeting, 281.

legislation and insufficient means for enforcement, the government maintains the formal control over environmental protection and the oil companies are subordinated the national judicial authorities.

Governments that include private actors when developing environmental frameworks, could lead to, in case if there is an investment partner with significant influence, that the environmental requirements will follow those of the country's primary investment partner's.²⁰⁰ In Mauritania for instance, the main oil operator, Woodside, was setting the model for the first attempt to create a national EIA legislation.²⁰¹ The main thrust of opposition to such corporate involvement in legislative matters is that is the responsibility of politicians to regulate corporations and of corporations to follow the law. Corporate managers should not be expected to make decisions outside their proper sphere of competence and take over state functions. Corporations can act improperly; the nature of their operations is to make them profitable.²⁰² Thus, international corporate codification must not be allowed to replace the continuing responsibility of states in these areas. It can be of use where the state fails to develop, or apply, its own policy in accordance with international standards. In addition, assertion of the primacy of the state in the obligation to respect and uphold international environmental standards, given the wide definition of what this entails, must imply recognition of the continuing role of the state as regulator.²⁰³

The proliferation and institutionalisation of private standards may signal a general shift in political power from some actors to others, where traditional nation states are clearly losing ground, while corporate industrial interests and self-regulatory organisations are gaining in the emerging global regulatory system. The overall pattern is one of increasing control by large, powerful actors, working as often through private governance processes as through state ones.²⁰⁴ Voluntary law, if supported and encouraged by state regulation, could provide effective and influential sources of law. It regulates directly the primary actors in the international system without intermediation.²⁰⁵ Without a national enforcement mechanism, compliance remains with the private actors. The lack of effective compliance mechanism may undermine the credibility and effectiveness of the voluntary

²⁰⁰ Hsia, S., "Foreign Direct Investment and the Environment: Are Voluntary Codes of Conduct and Self-imposed Standards enough?", (2003) 9, *The Environmental Lawyer*, 681.

²⁰¹ van Vliet, G. & Magrin G., Panel Scientifique Indépendant des Experts en Mauritanie, personal interview, 2009-02-02.

²⁰² Muchlinski, P., "Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by International Governmental Organisations", (2003) 3, *Non-State Actors and International Law*, 150-151.

²⁰³ Muchlinski, P., "Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by International Governmental Organisations", (2003) 3, *Non-State Actors and International Law*, 152.

²⁰⁴ Meidinger, E., "Environmental Certification Programmes and U.S. Environmental Law: Closer Than You Think", (2001) 31, *The Environmental Law Reporter*, 10177.

²⁰⁵ Alkoby, A., "Non-State Actors and the legitimacy of international environmental law", (2003) 69-70.

standards and norms, which will lead to an accountability gap between the aspirational quality of the standards and norms and their implementation.²⁰⁶

Although the private environmental regulatory systems are officially separated from formal legal systems, they interact and are likely to do so increasingly more in the future. The standards they set and the institutions they create can augment, displace, or conflict with legal regulation. Governments will therefore be forced to make choices regarding how to deal with private regulatory programs. Private standards are likely to bleed into legal systems through such avenues as best management practices requirements in regulatory systems and tort liability standards.²⁰⁷

4.3 Time for International Law to let Private Actors into the Lawmaking Process?

4.3.1 The Impact of the Emerge of Norms created by Private Actors

The legal effects of voluntary instruments for corporate responsibility are subject to considerable concern for their impacts on international law.²⁰⁸ The private norms can lead to consensus forming within industry and thereby promote new rules in the future. However, these concept and principles are not legitimate since they are not developed through a legitimate process.²⁰⁹ That does not imply that such codes are rendered to complete legal ineffectiveness. The soft law in corporate governance can be described as legal pluralism, consisting of best practices, guidelines and corporate codes, that can viewed as informal ongoing search for 'better law' without due regard to political or geographical borders. This can be seen as a parallel system of norms: a sort of a privatisation of legislation. The emerge of the highly fragmented and decentralised body of norms challenges traditional state-based understanding of lawmaking, and provides a common ground on which to assess the emergence of privatised corporate law regimes, and corporate codes of conduct.²¹⁰ To root a distinction between corporate soft law initiatives directed at companies and treaties

²⁰⁶ Bridgeman, N. & Hunter, D., "Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism", (2008) 20, *Georgetown International Environmental Law Review*, 191.

²⁰⁷ Meidinger, E., "Private" Environmental Regulation, Human Rights, and Community" (2000) 7, *Buffalo Environmental Law Journal*, 232.

²⁰⁸ Dine, J., "Multinational Enterprises: International Codes and the Challenge of 'Sustainable Development'", (2001) 1, *Non-State Actors and International Law*, 82-83.

²⁰⁹ Campins-Eritja M. & Gupta, J., "Non-State Actors and Sustainability Labelling Schemes : Implications for International Law", (2002) 2, *Non-State Actors and International Law*, 229.

²¹⁰ Zumbansen, P., "The Parallel Worlds of Corporate Governance and Labor Law", (2006) 13, *Indiana Journal of Global Legal Studies*, 291-292.

directed at states, would exclude that an interaction could exist between private governance and public international law.²¹¹

4.3.2 The Traditional View on International Law

The conception of public international law is that of a system regulating the relations between sovereign states, in which corporations have no formal status.²¹² Emerging soft law norms that are not generated by officially recognised sources constitute a challenge to the state-based concept of lawmaking.²¹³ Article 38(1) of the ICJ Statute is generally acknowledged as the most authoritative statement as to the sources of international law.²¹⁴ It states that:

“the court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognised by civilised nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

Even though, private actors have become increasingly involved in the formulation, implementation and enforcement of international norms, their influence, which is primarily achieved by informal means, is not yet fully reflected in the design of international institutions.²¹⁵ For instance, paragraph 1(b) of Article 38 is interpreted as including state practice only, which inherently excludes the practice of non-state actors.²¹⁶ However, the exclusive state control is challenged by the insertion of Article 38 (1)(c) that recognizes ‘general principles of law’ as a source of international law. The formulation of paragraph 1(c) of Article 38 allows the ICJ to seek principles common to national law that have not been enshrined in custom or treaty.²¹⁷ Nevertheless, contemporary legal doctrine considers international lawmaking as one of the essential prerogatives of states and beyond the powers of non-state actors. According to Noortmann, this view ignores the trends in treaty making with increasingly active private actors and impact of

²¹¹ Affolder, N., “The private life of environmental treaties”, (2009) 103, *The American Journal of International Law*, 511.

²¹² Alkoby, A., “Non-State Actors and the legitimacy of international environmental law”, (2003) 3, *Non-State Actors and International Law*, 23-24.

²¹³ Zumbansen, P., “The Parallel Worlds of Corporate Governance and Labor Law”, (2006) 13, *Indiana Journal of Global Legal Studies*, 290-291.

²¹⁴ Shaw, M, *International law*, (Cambridge: Cambridge University Press, 2003) 66.

²¹⁵ Alkoby, A., “Non-State Actors and the legitimacy of international environmental law”, (2003) 3, *Non-State Actors and International Law*, 25.

²¹⁶ Noortmann, M., “Globalisation, Global Governance and Non-State Actors: Researching beyond the State”, (2002) 4, *International Law Forum du droit international*, 37-38.

²¹⁷ Chinkin, C., *Normative Development in the International Legal System*. In Shelton, D. *Commitment and Compliance* (New York: Oxford University Press, 2003), 21.

globalisation on the formation of customary international law. Noortmann argues that the process of globalisation and the proliferation of actors on the global scene make the differentiation between states and non-state actors obsolete.²¹⁸

4.3.3 From Soft Law to Hard Law?

Despite absence of formal recognition, norms developed by multinational corporations, with or without the support of NGOs and intergovernmental organisations, have emerged as a new important source of international law, as the diversity of the international community and the complexity of the problems to be addressed have made it harder for states to obtain consensus of legally binding rules. Over time, such soft law instruments may contribute to the formation of binding international law, either through the incorporation of initially non-binding norms into a treaty, or when these guidelines, codes and principles are viewed as legally authorities by a sufficient number of countries over a sufficient length of time, through the creation of customary law.²¹⁹ For these purposes, the origin of a legal principle in a soft law instrument, such as a voluntary code of conduct is little of consequence if a consensus develops that the principle in question should be viewed as an obligatory standard due to subsequent practice.²²⁰ In the oil and gas sector, the reference in contracts and national legislation to best practice for environmental protection, which includes the use of standards and guidelines drafted by the private sector, could be regarded as general principles in accordance with Article 38(1)(c), if they are being used by national courts to determine the legal requirement of best practice. In both the international and national sphere, these soft law norms have the potential to harden into binding law.²²¹

4.3.4 New role of Private Actors as Lawmakers?

Considering the growing importance of multinational corporations in the international arena, to dismiss voluntary sources of international or national corporate responsibility standards as irrelevant, seems to fail to appreciate how formal rules and principles of law emerge. The very fact that an increasing number of non-binding codes is being drafted and adopted in this area, suggests a growing interest among important groups and organisations – corporations, industry associations, NGOs, governments and

²¹⁸ Noortmann, M., “Globalisation, Global Governance and Non-State Actors: Researching beyond the State”, (2002) 4, *International Law Forum du droit international*, 37-38.

²¹⁹ Wawryk, A., “International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies”, (2002) 13, *CEPMLP Internet Journal*, 24-25.

²²⁰ Muchlinski, P., “Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by International Governmental Organisations”, (2003) 3, *Non-State Actors and International Law*, 127-128.

²²¹ Wawryk, A., “International Environmental Standards in the oil industry: Improving the operations of transnational oil companies in emerging economies”, (2002) 13, *CEPMLP Internet Journal*, 24.

intergovernmental organisations – and is leading to the establishment of a rich set of sources from which new binding standards can emerge.²²²

Furthermore, Noortmann highlights the question whether the codes of conduct adopted by multinational corporations are less relevant than resolutions of the UN General Assembly or the practice of a single state for the development and determination for customary law. The process of lawmaking at international level has to be reconsidered in the light of the increase in numbers of actors and participants in this process. If the process of globalisation does have an impact on the development of international law, the practice and opinions of non-state actors can no longer be excluded from an assessment of that law.²²³

Corporate initiatives, developing environmental guidelines for companies to comply with international standards, loops between the private and public spheres and orientates the governmental frame of reference towards reforming international legal systems. Regulatory objectives identified by governments initiate the parallel process by non-state actors analogous to treaty interpretation, implementation and monitoring on voluntary basis but tailored towards regulatory compliance, achieving commercial objectives or more effective conservation effort. For instance, biodiversity conservation in the Biodiversity Convention is characterised by vague regulatory requirements, ongoing policy imperatives and controversy between NGOs and companies. Corporations and NGOs share an interest in shaping public policy and pertinent state practice as much as governments seek a successfully implemented regulatory agenda through consultation, as it was done in the Energy and Biodiversity Initiative between oil enterprises and international environmental organisations. The initiative developed the Biodiversity Convention in an operational manner. The advocacy activities of non-State actors set in motion processes, which develop provisions in international conventions and cannot be completely discounted in the formation of customary international law.²²⁴

Corporate management systems contribute to the progressive development of international environmental law. They represent an attempt to circumvent legitimacy problems in international environmental law by finding a purchase in company law rather than environmental law. By implementing currently non-binding environmental principles and standards into domestic corporate governance regimes may be able to achieve sustainable development objectives that have so far eluded international environmental law.²²⁵ What remains crucial is the assessment of times and places when

²²² Muchlinski, P., "Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by International Governmental Organisations", (2003) 3, *Non-State Actors and International Law*, 129-130.

²²³ Arts, B, Noortmann, M. & Reinalda, B., *Non-State Actors in International Relations*, (Ashgate, Aldershot, 2001) 65-68.

²²⁴ Tully, S., "Corporate-NGO Partnerships and the Regulatory Impact of the Energy and Biodiversity Initiative", (2004) 4, *Non-State Actors and International Law*, 127-128.

²²⁵ Ong, D., "The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives", (2001) 12, *Journal of Environmental Law*, 687.

and where a certain legal program is being promoted and the rhetoric that is being employed to that effect. Lawmaking never takes place in a void. Instead, the tension between state regulation and corporate self-regulation can be seen as resonating with a much larger trend in contemporary international legal thinking.²²⁶ As Koskenniemi argued, the current state of theorising in international law is characterized by a 'turn to ethics' and an ironic reversal of the normal and the exception. Only the exception challenges us.²²⁷ One finds it hard to separate this observation from assessments of the developments in international economic law. In both public international law and international economic law, it seems to be erosions of formalism. An ethical turn could dissociate decision-making process from any procedural critique of how this process is composed and into which larger regimes of law creation, law enforcement, and power distribution it is embedded.²²⁸

Voluntary standards may be precedent setting. It must be kept in mind that initiatives from the private sector, if successful, may de facto operate as a constraint in the domestic and international market. Such initiatives, however, do not need to follow the principles of good governance and the rule of law at international level. This implies a shift in rule making power from international bodies to other bodies. Decision-making is increasingly taking place within informal networks between government and non-government officials who need confidentiality and informality to reach decisions. The essence of the network is a process rather than an entity. Private initiatives are unlikely to be legitimate tools for international policymaking. As such, there may be considerable resistance from exporting countries influenced by the extra territoriality of either foreign domestic regulation or domestic private sector initiatives.²²⁹ In this regard it is important to not to forget that multinational corporations themselves are at the forefront of developing corporate social responsibility standards. Their codes form a significant source for international instruments.²³⁰ The exclusive role of states in global forums is being challenged and non-state actors are gaining increasing influence in the international law making process.²³¹

²²⁶ Zumbansen, P., "The Parallel Worlds of Corporate Governance and Labor Law", (2006) 13, *Indiana Journal of Global Legal Studies*, 298.

²²⁷ Koskenniemi, M., "'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law", (2002) 65, *The Modern Law Review*, 159-160.

²²⁸ Zumbansen, P., "The Parallel Worlds of Corporate Governance and Labor Law", (2006) 13, *Indiana Journal of Global Legal Studies*, 299.

²²⁹ Campins-Eritja M. & Gupta, J., "Non-State Actors and Sustainability Labelling Schemes: Implications for International Law", (2002) 2, *Non-State Actors and International Law*, 239.

²³⁰ Muchlinski, P., "Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by International Governmental Organisations", (2003) 3, *Non-State Actors and International Law*, 150.

²³¹ Alkoby, A., "Non-State Actors and the legitimacy of international environmental law", (2003) 3, *Non-State Actors and International Law*, 63.

5 Conclusions

The oil and gas industry is an area of concern, particularly in the light of its environmental impacts and worldwide scale operations, seen as a thematic gap in international law with no overreaching instrument to control the activities. The gap has led to the development of environmental norms through consensus within the oil industry representing best practice and are increasingly applied by domestic courts in developing states as well as in developed. Private standards, guidelines, codes of conduct do not only influence national legislation and commercial agreements, they can also be viewed upon as a consensus in international negotiations for international instruments. Such best practice consensus can be seen an intersection point where public international law and private sector meet and create norms that reflects the reality of the international community with its diverse actors. Best practice consensus in the industry adopted by governments and international organisations should be recognized for having a legal value in international law.

Although, oil companies' voluntary achievements regarding environmental protection cannot replace national legislation, it does not prevent that norms created as voluntary initiatives can be incorporated to substitute the lack of substantive norms in a legal system. Using ready-made private norms by having a reference to international good practice in national legislation could be a way for a state to get a regulatory system into place quickly, which is relevant for developing states with little experience as oil states, like Mauritania. However, private norms should not be implemented on a voluntary basis by the companies, which has proved to be inefficient, but enforced by judicial authorities. The main problem in Mauritania, and in other developing states, is the absence of a strong independent judiciary together with a strong committed government to protect the environment. Hence, governments resign from their responsibility to protect the environment from potential environmental harmful activities taking place in its jurisdiction by simply placing the responsibility of these functions on the companies. The enforcement problems in states undermine the effectiveness of existing national environmental laws and the likelihood that voluntary guidelines will harden into binding national law is much reduced.

Besides the problems of enforcement, private norms are in fact increasingly used in national legislation and applied by national courts. States are expected by the international community to regulate the activities of multinational companies. The use of private norms could be regarded as state practice in the meaning of Article 38(1)(b) of the ICJ Statute, if it can be determined to be general, conform and consistent. Although, this would still not recognize private actors as lawmakers of international law, since it will be the practice of states determining. However, the principles developed by private actors used as guidance in industry performance, national legislation, national courts, international organisations and in treaty making

process, could be regarded as “general principles” as mentioned in Article 38(1)(c) of the ICJ Statute, which would open up for private actors to be regarded as lawmakers in some sense.

Due to the specific character and problems of international environmental law with agreements, treaties and conventions encouraging the involvement of private actors show that the exclusive role of states as lawmakers is being challenged. International environmental lawmaking process not includes but also needs private actors in the process of developing and implementing provisions of environmental framework agreements. This needs to be highlighted, recognized and dealt with in public international law.

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