

SYMPOSIUM ON INDUSTRY ASSOCIATIONS IN TRANSNATIONAL LEGAL ORDERING

THE INFORMATION REGULATION OF BUSINESS ACTORS

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A [transnational legal order](#) (TLO)¹ is emerging regarding the role of businesses in respecting human rights. This [legal order includes](#) multistakeholder initiatives, international organization recommendations and guidelines, NGO certifications, and other voluntary instruments.² Many of the norms within this TLO are nonbinding and therefore lack mandatory compliance; what they may possess is persuasive power, particularly when the norms are developed, endorsed, and managed by reputable organizations. It is that reputational, or legitimacy, advantage that matters for encouraging industry associations to comply with the nonbinding norms associated with these organizations. Industry associations and other business actors will gravitate more towards legitimacy enhancing organizations when their own legitimacy is at stake. They pivot towards public organizations such as the United Nations or private NGO initiatives like the Rainforest Alliance, seeking to associate themselves publicly with these organizations that enjoy more perceived legitimacy. These business relationships with legitimizing bodies can take the form of partnerships, certifications, or other arrangements where an industry association adopts and incorporates nonbinding norms when it otherwise might not. In this essay, I discuss three transnational legal processes that encourage industry associations, their members, and other business actors to abide by nonbinding transnational legal norms concerning business and human rights.

Promoting Nonbinding Transnational Norms Through Priming, Pivoting, and Identity Struggle

Priming, pivoting, and identity struggle are all related transnational legal processes that encourage industry associations and business actors to incorporate nonbinding transnational norms into their policies and practices. *Priming* refers to creating conditions for an association's willingness to change its practices. *Pivoting* occurs when an association develops closer ties to public organizations or private NGOs, often adopting nonbinding norms associated with these organizations. *Identity struggles* occur when an industry association or other business actor tries to change its identity to appear more legitimate in public perception.

At the international level, transnational institutions create information effects that prime industry associations or other business actors for change. For example, the Sub-Commission on the Protection and Promotion of

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¹ Terence C. Halliday & Gregory Schaffer, [Transnational Legal Orders](#), in TRANSNATIONAL LEGAL ORDERS 3, 15 (Terence C. Halliday & Gregory Schaffer eds., 2015).

² See, e.g., John Ruggie (Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises), [Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework](#) 4, UN Doc. A/HRC/17/31 (Mar. 21, 2011); [Our Strategy](#), UNITED NATIONS GLOBAL COMPACT; OECD, [OECD Guidelines for Multinational Enterprises](#) (2011).

Human Rights adopted the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (TNC Norms) in August 2003. The TNC Norms raised several concerns among certain industry associations, such as the International Chamber of Commerce (ICC) and International Organization of Employers (IOE). Those associations [expressed concern](#) that the TNC Norms represented a shift in human rights obligations from state actors to private actors.³ The debate over the TNC Norms created [important information effects](#) regarding the conduct and attitudes of the ICC, IOE, and other business actors that helped to prime these actors for cooperation with subsequent nonbinding tools on business and human rights.⁴

At the domestic level, civil lawsuits and government investigations can also prime transnational business actors for voluntary organizational change and encourage their pivot towards transnational nonbinding law. News of government investigations communicates information to stakeholders regarding character attributes and financial risks of the business actors under investigation, thereby serving a priming function and rendering that business actor more willing to engage in organizational change to reestablish its perceived legitimacy. We see these dynamics at work in the [government investigation](#) of several individuals associated with Fédération Internationale de Football Association (“FIFA”).⁵ This investigation created an environment conducive for pivoting by FIFA because it fostered a legitimacy crisis for FIFA that subsequently grew into a financial crisis. Scandals are not new for FIFA but the government investigation appears to have created a unique [legitimacy crisis](#) for the transnational organization.⁶

Priming only influences the susceptibility or willingness of an organization to change its practices; it does not guarantee that the organizational change will be a socially desired one. The type of organizational change we can expect is influenced by which organizations an association *pivots* towards. Pivoting occurs when an association (or other business actor) tries to copy another organization. Pivoting is important because the organization to which an association pivots can serve as a template for organizational change within that pivoting association or its members.

Pivoting is important because the organizations towards which an association pivots may have limited ability to influence the association otherwise. A pivoting association may borrow institutional practices from the organization it is pivoting towards but may not do so without a legitimacy crisis motivating it. Outside actors can have limited capacity to command a particular association or other business actor to incorporate and enforce the nonbinding policies, practices, and guidelines of multistakeholder initiatives, NGOs, the United Nations, and so forth. All these organizations lack coercive capability; what they do possess is legitimacy. When [confronted with a legitimacy crisis](#), business actors may pivot towards these noncoercive organizations in order to enhance their own legitimacy.⁷

³ Int'l Chamber of Com., [Joint Views of the IOE and ICC on the Draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”](#) 2 (Nov. 24, 2003).

⁴ Emily Rabin, [In the Hot Seat: Shell VP Robin Aram](#), GREEN BIZ (June 21, 2004) (explaining that industry opposition to the Norms created certain reputational costs because it “linked business with a perception of hostility to human rights”); David Kinley et al., [The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations](#), 25 CO. & SEC. L.J. 30, 41 (2007); Alison Maitland, [Problem that Is Gaining Higher Political Profile](#), FIN. TIMES (Nov. 29, 2004) (explaining that the debate over the Norms drew attention to the issue of the role of the business sector in protecting human rights).

⁵ U.S. Dep't of Justice, Press Release, [Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption](#) (May 27, 2015).

⁶ FIFA, [2016 FIFA REFORM COMMITTEE REPORT](#) 1 (Dec. 2, 2015). It also experienced significant financial loss following the scandal due to withdrawn support from corporate sponsors. Martyn Ziegler, [Sponsorship exodus leaves Fifa \\$550m short of revenue target](#), THE TIMES (Feb. 26, 2016).

⁷ See Alex Bitektine, [Legitimacy-Based Entry Deterrence in Inter-Population Competition](#), 11 CORP. REPUT. REV. 73, (2008) (“[W]hen two organizations are linked through a transaction, partnership or public endorsement, the legitimacy ‘flows’ through such a link from the more legitimate to a less legitimate organization.”).

For example, following the debate over the TNC Norms, the UN Special Representative on Business and Human Rights, [John Ruggie](#), introduced a tripartite framework for business and human rights known as the “Protect, Respect, and Remedy Framework” (Ruggie Framework).⁸ The Framework was followed by the UN Guiding Principles on Business and Human Rights that provides guidance on implementing the Framework.⁹ The ICC and IOE engaged with the Ruggie Framework and the UN Guiding Principles in a more [cooperative manner](#) compared to their hostility to the Norms.¹⁰ Other industry associations also developed their own strategies for implementing the Ruggie Framework and the Guiding Principles. For example, [IPIECA](#), the global oil and gas industry association, created a manual for implementing operational-level grievance mechanisms in the oil and gas industry and used the effectiveness criteria provided in the UN Guiding Principles.¹¹ In this way, UN norms indirectly contribute to transnational legal ordering through their impact on industry positions and practices.

Similarly, FIFA pivoted towards the United Nations amidst the government investigations that were compromising its legitimacy. In December 2015, it requested that John Ruggie recommend strategies for how FIFA could embed [human rights norms](#) throughout its operation.¹² By pivoting toward the United Nations to enhance its own legitimacy, FIFA set itself up to borrow [institutional practices](#) from that organization.¹³ FIFA may not have pivoted towards the United Nations on its own; however, the reputational and financial consequences following the government investigation, along with continuing criticism regarding its human rights practices, facilitated [FIFA's pivot](#) towards the United Nations.¹⁴ We have yet to see what comes from this pivot and what steps FIFA takes based on these recommendations for improving its human rights practices. Yet this episode illustrates the complex relationship of national and international public organizations with transnational associations and their governing norms and practices.

Finally, pivoting away from one organization and towards another often involves an identity struggle for an association as it tries to distance itself from its old identity that was delegitimized and solidify its new identity; this identity struggle also fosters organizational change in accordance with nonbinding transnational law norms. Identities inform the choices that organizations make, especially when there are significant reputational and financial consequences of that identity formation. These identity struggles can lead to organizational changes within an association or other business actor as well as shifts between these organizations.¹⁵

⁸ John Ruggie (Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises), [Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect and Remedy: A Framework for Business and Human Rights](#), UN Doc. A/HRC/8/5 (Apr. 7, 2008).

⁹ Ruggie, [supra note 2](#).

¹⁰ Kishanthi Parella, [Treaty Penumbra](#), 38 U. PA. J. INT'L L. 275 (2017).

¹¹ *See generally*, IPIECA, [COMMUNITY GRIEVANCE MECHANISMS IN THE OIL AND GAS INDUSTRY: MANUAL FOR IMPLEMENTING OPERATIONAL-LEVEL GRIEVANCE MECHANISMS AND DESIGNING CORPORATE FRAMEWORKS](#) (2015) (providing a practical guide to aid planning and implementing operational-level community grievance mechanisms).

¹² FIFA, Press Release, [FIFA to further develop its human rights approach with international expert John Ruggie](#) (Dec. 14, 2015).

¹³ *Id.*; John Ruggie, [“For the Game. For the World.” FIFA and Human Rights](#) 29–35 (April 2016) (providing recommendations for improving human rights practices).

¹⁴ *See, e.g.*, Matthew Futterman, [FIFA Has Work to Do in Human Rights](#), WALL ST. J (Apr. 14, 2016) (“FIFA has come under attack in recent years because the organization and the host countries of its marquee event, the World Cup, have conducted businesses in ways that at times do not conform with the United Nations Guiding Principles on Business and Human Rights.”).

¹⁵ *See* Sarah Dadush, [Industry Associations and Transnational Governance](#) (working draft), at 25 (discussing “identity conflicts” within industry associations).

For example, in 2016, FIFA filed a [request for restitution](#) arguing that it was the victim of the corruption caused by many of its former leaders, and requested restitution for the reputational harm and other financial costs associated with the corruption scandal.¹⁶ This request was not just about money but also [about identity](#) as the “claim seeks to cement FIFA’s place as a victim in the eyes of both prosecutors and the public and to telegraph the organization’s distance from generations of disgraced leaders.”¹⁷ It used the restitution request to communicate to the public a division within FIFA between the parties responsible for the corruption and the rest of the organization. This victim narrative was important because in order to retain this image—particularly to a doubtful global audience—FIFA had to take action consistent with this narrative. These are the institutional constraints created by an identity struggle.

Implications

Negative reputational consequences can drive industry actors toward nonbinding instruments in order to redeem their reputations. These processes of priming, pivoting, and identity struggle have implications for how we imagine the relationship between different governance strategies in the transnational context. First, [reputational costs](#) are still imposed by governance strategies that otherwise “fail,” such as treaty negotiations that break down or civil lawsuits that are dismissed.¹⁸ These processes and the battles contained within them can create reputational costs and information effects that encourage industry associations and their members to pivot towards nonbinding instruments. These pivoting functions may necessitate reevaluation of the metrics we use to determine whether a particular governance strategy “failed” to facilitate a socially desirable outcome.

Second, many types of governance strategies, at both the domestic and international level, create reputational costs for business actors. Business actors may be more likely to change when they are subject to reputational costs imposed by multiple governance strategies because the combination of reputational costs produced by these different strategies can increase the pressure for reform. Additionally, the reputational costs produced may also vary by governance strategy, therefore offering business actors different incentives for change—an issue that calls for further research.

¹⁶ [FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION’S VICTIM STATEMENT AND REQUEST FOR RESTITUTION](#) 4, 22 (Mar. 15, 2016).

¹⁷ Rebecca Ruiz, *FIFA, Embracing Role as Victim, Seeks to Collect Millions in U.S. Case*, N.Y. TIMES (Mar. 16, 2016).

¹⁸ Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. (forthcoming 2018).