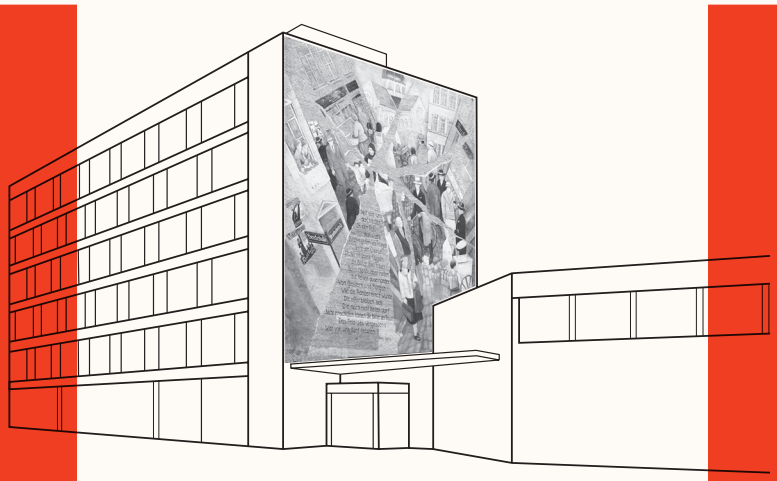

Karsten Nowrot

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Rechtswissenschaftliche
Beiträge der
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# Contents

## A. Introduction: Towards a Merger of Investors' Rights and Obligations in Investment Treaty Law*

The international legal framework on the protection of foreign investments has in particular since the beginning of the 1990s emerged as one of the most dynamic and practically important areas of international law in general and international economic law in particular.[1] Essentially, this general rise of international investment law, especially in the form of treaty law,[2] can be regarded as the result of a transitional process from what might be labeled as "first generation" bilateral investment treaties concluded since the end of the 1950s to the "second generation" investment agreements entered into mostly in the 1980s, the 1990s as well as the beginning of the previous decade. This former transition period was overall characterized by an enhancement of the legal protection of foreign investors and their investment activities based on a broad political consensus recognizing these protective aims as the sole – or at least primary – purpose pursued by international investment agreements. This treaty practice, aimed at establishing and fostering an "international investment protection law" in the true sense of the term, saw the introduction of improved levels of substantive guarantees for investors as well as – and particularly noteworthy – also the stipulation of investor-state dispute settlement provisions that were far from common in older bilateral investment treaties.[3]

At present, we are again witnessing in the development of international investment law a major – and potentially even more fundamental – era of reformation or "reconceptualization".[4] Whereas the previous period first and foremost resulted in foreign investors having – particularly on the basis of access to effective international legal remedies – experienced a notable strengthening of their international legal protection and status, thereby also "marking another step in their transition from objects to subjects of international law",[5] the currently visible

* The contribution is based on a presentation given by the author at the conference "WTO, International Economic Law and Emerging Challenges – Asia Pacific Perspective", jointly organized by the Asia WTO Research Network (AWRN) as well as the China International Business and Economic Law Initiative (CIBEL) of the University of New South Wales Faculty of Law, at the University of New South Wales Faculty of Law in Sydney/Australia on 17/18 August 2018.

1 On this perception see for example *Collins*, International Investment Law, 1-2 ("Yet, within a relatively short period of time this area of law witnessed a phenomenal growth to become one of the most dynamic and intensively studied spheres of international law.").

2 On the various different sources of international investment law see, e.g., *Dolzer/Schreuer*, Principles of International Investment Law, 12 *et seq.*; *Reinisch*, in: Tietje (ed.), Internationales Wirtschaftsrecht, 398 (400 *et seq.*); *Salacuse*, The Law of Investment Treaties, 51 *et seq.*

3 On this last-mentioned issue see for example *Muchlinski*, Multinational Enterprises and the Law, 695 ("Early BITs did not cover the issue of disputes between the host state and the investor."); *Tietje/Sipiorski*, in: Bjorklund/Reinisch (eds.), International Investment Law and Soft Law, 192 (193, 205 and 217 *et seq*.); *Tietje/Nowrot/Wackernagel*, Once and Forever? The Legal Effects of a Denunciation of ICSID, 18 *et seq*.

4 On this perception see, e.g., *Puig/Shaffer*, American Journal of International Law 112 (2018), 361 ("The tide is turning. Ferment is in the air. Reform or even transformation of foreign direct investment governance appears on the way."); *Miles*, in: Lewis/Frankel (eds.), International Economic Law and National Autonomy, 295 *et seq.*; *Mann*, Lewis and Clark Law Review 17 (2013), 521 *et seq*. See also UNCTAD, World Investment Report 2014, Investing in the SDGs: An Action Plan, 2014, 126 ("The IIA regime is undergoing a period of reflection, review and reform.").

5 *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 141 ("For all these reasons, Article 26 ECT provides to a covered investor an almost unprecedented remedy for its claim against a host state. […] By any standards, Article 26 is a very important feature of the ECT which is itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law."); concerning the international legal status of foreign investors on the basis of investment agreements see also, e.g., *BG Group Plc. v. Argentina*, UNCITRAL Arbitration, Award of 24 December 2007, para. 145 ("The proliferation of bilateral investment treaties has effected a profound transformation of international investment law. Most significantly, under these instruments investors are entitled to seek enforcement of their treaty rights by directly bringing

transitional phase from the already mentioned "second generation" of investment agreements to the rise of a new "third generation" of investment policies[6] that increasingly also finds its manifestation in treaty practice[7] is, quite to the contrary, first and foremost also characterized, and indeed largely dominated, by intensified efforts in all parts of the world to progressively develop the international legal basis of investment protection with a view to fostering its contribution to the realization of sustainable development objectives[8] and, albeit closely related, by various efforts of states to regain some of their "policy space" vis-à-vis foreign investors.[9] In light of certain negatively perceived effects of the previously established framework of international investment protection,[10] it is by now ever more recognized among governments of industrialized and developing countries, practitioners and scholars alike, that at the level of designing investment agreements as well as in the realm of investor-state dispute settlement,

action against the State in whose territory they have invested."); *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility of 15 January 2008, paras. 167 *et seq.* ("In the Tribunal's view, the NAFTA confers upon investors substantive rights separate and distinct from those of the State of which they are nationals. It is now clear that States are not the only entities which can hold rights under international law; individuals and corporations may also possess rights under international law. […] In the case of Chapter XI of the NAFTA, the Tribunal considers that the intention of the Parties was to confer substantive rights directly upon investors. That follows from the language used and is confirmed by the fact that Chapter XI confers procedural rights upon them."); *Tietje*, The Applicability of the Energy Charter Treaty, 13 ("[…], Art. 26 ECT and its consequent substantive investment protection regulations of Part III ECT clearly indicate that investors gain the status of subjects of international law under the ECT."); *Spiermann*, Arbitration International 20 (2004), 179 (185) ("It would take an excessively narrow, albeit not unprecedented standard of interpretation to find that bilateral investment treaties do not vest rights in the investor as a subject of international law."); *Nowrot*, Indiana Journal of Global Legal Studies 18 (2011), 803 (825 *et seq.*); *Douglas*, The International Law of Investment Claims, 10 *et seq.* For a more critical perception see, e.g., *Reinisch*, in: Noortmann/Reinisch/Ryngaert (eds.), Non-State Actors in International Law, 253 (262) ("Ultimately, the question whether investors are partial subjects of international law or not retains an artificial flavor.").

6 Generally on this perception see also, e.g., UNCTAD, World Investment Report 2018, Investment and New Industrial Policies, 2018, 95 *et seq.* ("new generation of IIAs"); UNCTAD, Investment Policy Framework for Sustainable Development, 2015 Edition, 12 *et seq.* ("new generation of investment policies"); *Spears*, Journal of International Economic Law 13 (2010), 1037 *et seq*. Specifically on the differences between first, second and third generation investment agreements see also already *Nowrot*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 227 (230 *et seq.*).

7 See more recently on the trend towards renegotiating international investment agreements for example *Meyer/Park*, Journal of International Economic Law 21 (2018), 655 (657 *et seq.*).

8 Generally on these developments see for example UNCTAD World Investment Report 2017, Investment and the Digital Economy, 2017, 119 *et seq.*; UNCTAD, World Investment Report 2016, Investor Nationality: Policy Challenges, 2016, 1 *et seq*.; UNCTAD, World Investment Report 2012, Towards a New Generation of Investment Policies, 2012, 89 *et seq.*; *VanDuzer/Simons/Mayeda*, Integrating Sustainable Development into International Investment Agreements, 2012; the contributions in *Cordonier Segger/Gehring/Newcombe* (eds.), Sustainable Development in World Investment Law, 2011; as well as *Dubava*, in: Cremona/Hilpold/Lavranos *et. al.* (eds.), Liber Amicorum for Ernst-Ulrich Petersmann, 389 *et seq.*; and *Nowrot*, Journal of World Investment and Trade 15 (2014), 612 *et seq.*

9 See, e.g., *Tietje*, ICSID Review – Foreign Investment Law Journal 24 (2009), 457 (461) ("The need for a 'policy space' for governments, i.e. autonomy in national policy-making without constraints by international law and particularly international investment protection law, is one of the most significant consequences of the proliferation of investment law and the fragmentation of international law in general. We are currently witnessing discussions about the necessary policy space in the area of foreign investment, on both the national and international levels."). See also for example *Griebel*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 106 *et seq.*; *Broude/Haftel/Thompson*, in: Roberts/Stephan/Verdier/Versteeg (eds.), Comparative International Law, 527 *et seq.*; *Lee*, in: Chaisse/Lin (eds.), International Economic Law and Governance, 131 *et seq.*; *Roberts*, American Journal of International Law 112 (2018), 410 *et seq.*; *Nowrot*, in: Justenhoven/O'Connell (eds.), Peace Through Law, 187 (195 *et seq.*); as well as the quite comprehensive analyses by *Titi*, The Right to Regulate in International Investment Law, 32 *et seq*.; and *Mouyal*, International Investment Law and the Right to Regulate, 8 *et seq.*, each with numerous further references.

10 On the respective perceptions see for example UN Human Rights Council, Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/11/13 of 22 April 2009, para. 30 ("Nevertheless, recent experience suggests that some treaty guarantees and contract provisions may unduly constrain the host Government's ability to achieve its legitimate policy objectives, including its international human rights obligations."); *Van Harten*, Investment Treaty Arbitration and Public Law, 45 *et seq*.; *Butler/Subedi*, Netherlands International Law Review 64 (2017), 43 (46 *et seq.*); *Nowrot*, International Investment Law and the Republic of Ecuador, 18 *et seq.*

the central challenge lawmakers and arbitrators are as of today faced with is to provide for an appropriate and thus acceptable balance between the legally protected economic interests of foreign investors and the domestic and international steering capacity of host states to allow the later to pursue the promotion and protection of other (non-economic) public interest concerns like the protection of human rights and the environment, the promotion of public health, and the enforcement of internationally recognized labor and social standards.[11] As a consequence of these developments and in order to avoid a serious "backlash" against the international investment regime as a whole,[12] also a broader discussion on possible "counterweights" to investors' rights[13] is gaining momentum in recent years.

In the course of these efforts aimed at incorporating broader public interest concerns into international investment agreements, also the possibility to address the issue of investors' obligations in the respective investment treaty-making processes is increasingly among the regulatory options ever more seriously discussed and considered in this regard. In order to fully measure the quite innovative character of this approach, it seems appropriate to recall that the topic of obligations of investors has until recently not featured very prominently in the discussions on and policy approaches towards the international treaty regime dealing with the protection of foreign investments. As for example already indicated by the fact that most of the currently more than 2.930 bilateral investment treaties[14] are titled "Treaty Concerning the Promotion and Protection of Investments" or in line with some variations thereof, international investment law is traditionally – and also today – primarily concerned with the protection of foreign investors and their investments.[15] And indeed, in furtherance of these goals, most investment treaties so far still confine themselves to stipulating reciprocal obligations of the contracting state parties and do not impose any direct legal responsibilities on investors under international law.[16]

11 See thereto also, e.g., UNCTAD, UNCTAD's Reform Package for the International Investment Regime, 2017, 19 ("Typically, IIAs set out few, if any, responsibilities on the part of investors in return for the protection that they receive. One objective of IIA reform therefore is ensuring responsible investor behavior."); Guiding Principles for the African, Caribbean and Pacific Group of States (ACP) Countries' Investment Policymaking, jointly developed by the ACP Group and the UNCTAD Secretariat, ACP/85/037/17 Rev. 1 of 22 May 2017, 4 ("Principle 4: Balanced Rights and Obligations"), available on the internet under: <http://www.acp.int/content/joint-acp-unctad-guiding-principles-investment-policymaking-approved> (accessed 7 January 2020); as well as for example *McLachlan/Shore/Weiniger*, International Investment Arbitration, 23 *et seq.* ("A balance between the rights of investors and host States"); *Sornarajah*, Resistance and Change in the International Law on Foreign Investment, 348 *et seq.* ("Balanced treaties as the solution"); *Tamada*, in: Gal-Or/Ryngaert/Noortmann (eds.), Responsibilities of the Non-State Actor, 203 ("there is a need to adjust the balance of interests between investors and host States"); *Bazrafkan/Herwig*, in: Ambrus/Rayfuse/Werner (eds.), Risk and the Regulation of Uncertainty in International Law, 237 (241 *et seq.*) ("Balancing investment protection and host state's right to regulate").

12 On this perception see, e.g., *Crawford*, Brownlie's Principles of Public International Law, 609 ("generated a backlash against investment treaties"); generally thereto see also for example already *Waibel/Kaushal/Chung/Balchin* (eds.), The Backlash Against Investment Arbitration – Perceptions and Reality, 2010; *Kaushal*, Harvard International Law Journal 50 (2009), 491 *et seq.*

13 See also for example *Tietje/Crow*, in: Griller/Obwexer/Vranes (eds.), Mega-Regional Trade Agreements, 87 (107 *et seq.*) ("Towards a Symmetrical System of International Investment Law"); *Peters*, Beyond Human Rights, 339.

14 UNCTAD, World Investment Report 2019, Special Economic Zones, 2019, 99. See also, more recently, UNCTAD, Investment Policy Monitor, Issue 22, December 2019, 5.

15 On this perception see also for example *Salacuse*, The Law of Investment Treaties, 124 *et seq.*; *Salacuse*, The Three Laws of International Investment, 355 *et seq.*

16 See also, e.g., *Dolzer/Schreuer*, Principles of International Investment Law, 25 ("BITs give guarantees to investors but do not normally address obligations of investors, […]."); *Barnes*, Journal of International Dispute Settlement 10 (2019), 328 (348) ("The principal reason why responsible business practices, sustainable development or human rights considerations do not usually form part of the language of BITs is because in BITs the relationship between investors and host States is asymmetrical in nature. That is, BITs usually confer only rights on investors, without necessarily imposing any obligations concerning human rights."); *Peters*, Beyond Human Rights, 340; *Tamada*, in: Gal-Or/Ryngaert/Noortmann (eds.), Responsibilities of the Non-State Actor, 203 ("normally don't impose any obligations upon investors"); *Muchlinski*, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights, 346 (367); *Nowrot*,

Admittedly, the overarching perception underlying the approach of incorporating investors' obligations into international investment agreements, namely the idea that private investors and other economic actors are – beyond their motive to make profit – expected and required to also contribute in the course of their business activities to the promotion and realization of broader public interest concerns like the protection of human rights, core labor and social standards as well as the environment in the various societies in which they operate, is in principle far from entirely new. At the domestic level, the origins of the underlying concept of corporate social responsibility itself date back already some centuries ago.[17] With regard to its implications in the field of international investment relations, as early as in the 1770s no lesser person than *Edmund Burke* remarked on the activities of a distant predecessor to today's transnational corporations, the East India Company,[18] that "the prosperity of the natives must be previously secured, before any profit from them whatsoever is attempted".[19]

Within the international regime governing foreign investments itself, however, these concerns have been conventionally for the most part addressed in separate fora and on the basis of distinct steering approaches that remained outside of the realm of modern international investment law in the narrower sense of the meaning.[20] Whereas from the end of the 1950s onwards, the protection of foreign investors was and is explicitly enshrined in investment agreements in the form of legally binding obligations of the contracting state parties, the requirements of these private actors to contribute to the promotion of community interests had been, beginning in the 1970s, until recently more or less exclusively listed in soft law or other non-binding steering instruments and regimes like for example the OECD Guidelines for Multinational Enterprises, originally adopted by the OECD Ministerial Council and adhering governments on 21 June 1976 as an annex to the Declaration on International Investment and Multinational Enterprises and last updated in May 2011,[21] the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy as adopted by the ILO Governing Body on 17 November 1977 and most recently amended in March 2017,[22] the United Nations Global

Ein notwendiger "Blick über den Tellerrand", 18; *Mbengue/Schacherer*, in: Roberts/Stephan/Verdier/Versteeg (eds.), Comparative International Law, 547 (558 *et seq.*); as well as UNCTAD, UNCTAD's Reform Package for the International Investment Regime, 2017, 61 ("Most IIAs are asymmetrical in that they set out obligations only for States and not for investors.").

17 See thereto for example ISO Advisory Group on Social Responsibility, Working Report on Social Responsibility, 30 April 2004, para. 1.

18 Generally on the chartered trading corporations as predecessors of modern transnational enterprises, see, e.g., *Carlos/Nicholas*, Business History Review 62 (1988), 398 (399 *et seq.*); *Kokkini-Iatridou/Waart*, Netherlands Yearbook of International Law 14 (1983), 87 (101 *et seq.*); *Eells*, Global Corporations, 242 *et seq.*; *Wallace*, The Multinational Enterprise, 15; *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 246; *Nowrot*, Normative Ordnungsstruktur und private Wirkungsmacht, 106 *et seq.*, with further references.

19 Cited after: *Metcalf*, Ideologies of the Raj, 19. See also in this connection for example *Litvin*, Empires of Profit, 32 ("By dint of its size, the company [British East India Company] had become a symbol for reformers, a feature in the intellectual landscape of the eighteenth-century Britain against which emerging moral and political movements could position themselves.").

20 On this observation see also already *Salacuse*, Journal of Air Law and Commerce 50 (1985), 969 (1008); *Muchlinski*, in: Noortman/Ryngaert (eds.), Non-State Actor Dynamics in International Law, 9 (28 *et seq.*).

21 Reprinted in: I.L.M. 15 (1976), 969 *et seq.*; for the text of the updated OECD Guidelines as well as accompanying documents see OECD Guidelines for Multinational Enterprises, 2011, available at: <http://www.oecd.org/dataoecd/43/29/48004323.pdf> (accessed 7 January 2020). On the origins of the OECD Guidelines, their content as well as the more recent review process see *Huarte Melgar/Nowrot/Wang*, The 2011 Update of the OECD Guidelines for Multinational Enterprises, 5 *et seq.*; *Weidmann*, Der Beitrag der OECD-Leitsätze für multinationale Unternehmen zum Schutz der Menschenrechte, 172 *et seq.*, with numerous further references.

22 Reprinted in: I.L.M. 17 (1978), 422 *et seq.*; the current version of the ILO Tripartite Declaration of March 2017 is available on the internet under: <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> (accessed 7 January 2020). Generally thereto see, e.g., *Weilert*, Max Planck Yearbook of United Nations Law 14 (2010), 445 (464 *et seq.*).

Compact, founded in 1999 at the initiative of the then UN Secretary-General *Kofi Annan*,[23] as well as the United Nations Guiding Principles on Business and Human Rights as endorsed by the UN Human Rights Council in its resolution 17/4 on 16 June 2011.[24]

It is indeed only in the course of the previous decade that we can see an emerging understanding that, first, foreign investors are – as a kind of *quid pro quo* for the legal protection they enjoy under investment agreements[25] – expected and required to contribute in the course of their business activities to the promotion and realization of other public interest concerns like the protection of human rights, core labor and social standards as well as the environment based on internationally recognized standards, and that, second, these expectations and obligations should be somehow addressed in international investment treaties as well as other sources of investment law themselves. The underlying reasons for the linkages between investment protection and investors' responsibilities being now increasingly emphasized, and thus for the idea of a merger of respective rights and duties in investment treaties gaining ground, are most certainly manifold. Thereby, in addition to the already mentioned and ongoing structural developments within the realm of international investment law aimed at a reformation or reconceptualization of this transnational legal realm, most certainly also – from the perspective of investment law – "external" causes and influences have to be taken into account when assessing the reasons for the growing emphasis on obligations of investors.

Prominently among the external factors whose implications reach well beyond the rather specific realm of international investment relations are the growing importance of and attention currently devoted to the activities of non-state actors in the international system as well as the corresponding intensified discussion on whether and how to integrate them into the global legal order as addressees of rights, but especially also of responsibilities concerning the promotion of community interests.[26] In the present context, it is particularly noteworthy that among the different categories of non-state actors concerned, transnational corporations – the dominant type of foreign investors[27] – are literally at the center of these discourses. In order to illustrate this perception, one only needs to draw attention to the ever-growing literature on respective international obligations of transnational corporations[28] as well as numerous related initiatives, prominently among them the Open-ended Intergovernmental Working Group on

23 Additional information on the United Nations Global Compact are available under: <www.unglobalcompact.org/> (accessed 7 January 2020). For a more detailed evaluation of this transnational steering regime, including its origins, institutional structure and the so-called "integrity measures" provided for, see for example the contributions in: *Rasche/Kell* (eds.), The United Nations Global Compact, 2010; and *Nowrot*, The New Governance Structure of the Global Compact, 5 *et seq.*, with further references.

24 Resolution 17/4 is reprinted in: Report of the Human Rights Council, UN Doc. A/66/53 (2011), 136 *et seq*. For the text of the Guiding Principles see Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Annex, UN Doc. A/HRC/17/31 of 21 March 2011.

25 See, e.g., UNCTAD, Social Responsibility, UNCTAD/ITE/IIT/22 (2001), 5; *Muchlinski*, in: Muchlinski/Ortino/Schreuer (eds.), International Investment Law, 637 (643).

26 The contributions on the role played by non-state actors in international law are by now more than legion. See generally for example *Clapham*, Human Rights Obligations of Non-State Actors, 2006; *Alston*, in: Alston (ed.), Non-State Actors and Human Rights, 3 *et seq.*; *Nowrot*, Indiana Journal of Global Legal Studies 6 (1999), 579 *et seq.*; *Noortmann/Reinisch/Ryngaert* (eds.), Non-State Actors in International Law, 2015; d'Aspremont (ed.), Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law, 2011; *Klabbers*, in: Petman/Klabbers (eds.), Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniemi, 351 *et seq.*

27 See also, e.g., *Tietje*, in: Tietje (ed.), International Investment Protection and Arbitration, 17 (32); *Kulick*, Global Public Interest in International Investment Law, 57.

28 On this perception see more recently, e.g., *Henriksen*, International Law, 82 ("a booming literature"). From the numerous contributions see for example *Ruggie*, Just Business – Multinational Corporations and Human Rights, 1 *et seq.*; *De Schutter*, in: Bekker/Dolzer/Waibel (eds.), Making Transnational Law Work in the Global Economy – Essays in Honour of Detlev Vagts, 245 *et seq.*; *Nowrot*, Philippine Law Journal 80 (2006), 563 *et seq.*; *Heinemann*, in: Fastenrath *et al.* (eds.), From Bilateralism to Community Interest – Essays in Honour of Judge Bruno Simma, 718 *et seq.*; *Zerk*, Multinationals and Corporate Social Responsibility – Limits and Opportunities in International Law, 2006.

Transnational Corporations and other Business Enterprises with Respect to Human Rights established by the UN Human Rights Council in its resolution 26/9 of 26 June 2014[29] that has more recently – in July 2019 – published its revised (second) regulatory draft document entitled "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises".[30] Furthermore, the 1990s bore witness to numerous civil lawsuits in the domestic courts of many States against corporations based on alleged human rights violations committed by them while operating abroad or by their foreign subsidiaries, the best-known and most controversially discussed example being – or in light of recent judgments of the United States Supreme Court more accurately happened to be[31] – the respective claims brought in the United States under the Alien Tort Claims Act.[32]

These broader discourses and developments undoubtedly also exercise a considerable influence on the current policy shift in investment law. Indeed, even within the general discussions it is precisely the comparatively strong protection enjoyed by non-state economic actors on the basis of international investment agreements that is frequently referred to as indicating the need to also highlight the responsibilities of, and stipulate respective obligations for, foreign investors. To mention but one example, the following excerpt taken from the 2008 Report of the Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *John G. Ruggie*, vividly illustrates this proposition: "Take the case of transnational corporations. Their legal rights have been expanded significantly over the past generation. This has encouraged investment and

29 UN Human Rights Council, Resolution 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/RES/26/9 of 14 July 2014, para. 1 ("*Decides* to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises; […]."); concerning the activitites of this working group see subsequently for example Human Rights Council, Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an Internationally Legally Binding Instrument, UN Doc. A/HRC/31/50 of 5 February 2016; Human Rights Council, Report on the Second Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/34/47 of 4 January 2017; Human Rights Council, Report on the Third Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/37/67 of 24 January 2018; Human Rights Council, Report on the Fourth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/40/48 of 2 January 2019; as well as for a preliminary assessment of this process *Thielbörger/Ackermann*, Indiana Journal of Global Legal Studies 24 (2017), 43 *et seq.*; *Simons*, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights, 48 *et seq.*; *Catá Backer*, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights, 105 *et seq.*; *Deva*, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights, 154 *et seq.*

30 Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Revised Draft of 16 July 2019, available on the internet under: <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx> (accessed 7 January 2020); see also already in this regard: Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft of 16 July 2018, available on the internet under: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx> (accessed 7 January 2020); Elements for the Draft Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights of 29 September 2017, available on the internet under: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> (accessed 7 January 2020).

31 See in particular more recently US Supreme Court, *Joseph Jesner et al. v. Arab Bank, PLC*, No. 16-499, judgment of 24 April 2018.

32 Generally thereto for example *Davis*, Justice Across Borders – The Struggle for Human Rights in U.S. Courts, 2008; *Joseph*, Corporations and Transnational Human Rights Litigation, 2004; *Felz*, Das Alien Tort Statute – Rechtsprechung, dogmatische Entwicklung und deutsche Interessen, 2017; *Koebele*, Corporate Responsibility under the Alien Tort Claims Act, 2009.

trade flows, but it has also created instances of imbalances between firms and States that may be detrimental to human rights. The more than 2,500 bilateral investment treaties currently in effect are a case in point. While providing legitimate protection to foreign investors, these treaties also permit those investors to take host States to binding international arbitration, including for alleged damages resulting from implementation of legislation to improve domestic social and environmental standards […] At the same time, the legal framework regulating transnational corporations operates much as it did long before the recent wave of globalization."[33]

Another, albeit closely related, external factor worth mentioning is the increasingly important role played by civil society groups on the international scene. While previously largely absent from the evolution of the normative structure on foreign investments, NGOs are more recently also actively involved in, and concerned with, the rule-making and enforcement processes in this area of law, with calls as well as suggestions for an international regulation of foreign investors being quite high on their agenda.[34] A telling early example is the "Model International Agreement on Investment for Sustainable Development", published by the International Institute for Sustainable Development (IISD) already in April 2005 that provides, *inter alia*, for a quite extensive list of investors' obligations.[35]

In light of these findings, the present contribution intends to present some thoughts on the current state and future potential of these public interest obligations of investors as a normative ordering idea and comparatively new regulatory experiment in the realm of international investment law, thereby particularly drawing attention on the one hand to recent investment policy and treaty-making practice as well as, on the other hand, to the consequences potentially to be drawn from these comparative new developments for the future evolution of another principal branch of international economic law, namely international trade law, and in this regard especially for its central multilateral regime in the form of the WTO legal order. In the following, an attempt will be made to approach this research subject in three main steps and by way of adopting three different perspectives. The first section adopts a substantive law perspective and identifies the different manifestations of investors' obligations in current international investment agreements (B.). In a subsequent second step the approaches to this comparatively new regulatory experiment in, as well as its implications for, the realm of international investment dispute settlement are addressed (C.). Finally, in the third part, adopting an international trade law perspective, an attempt will be made to identify the lessons for the progressive development of the WTO legal order potentially to be learned from the current reformation taking place in the realm of international investment agreements (D.).

33 Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, UN Doc. A/HRC/8/5 7 April 2008, paras. 12–13; see in this connection also, e.g., Human Rights Council, Business and Human Rights: Further Steps towards the Operationalization of the 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/14/27, 9 April 2010, paras. 20 *et seq*.; Human Rights Council, Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/11/13, 22 April 2009, paras. 30 *et seq*.; Human Rights Council, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc. A/HRC/4/35, 19 February 2007, paras. 2 *et seq*.

34 Generally concerning the importance of NGOs as a contributing factor to the current policy shift in investment law see also, e.g., *Muchlinski*, in: Alvarez/Sauvant (eds.), The Evolving International Investment Regime, 30 (33 *et seq.*).

35 The text of the IISD Model Agreement is for example available under: <http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> (accessed 7 January 2020); see also, e.g., *Malik*, in: Cordonier Segger/Gehring/Newcombe (eds.), Sustainable Development in World Investment Law, 565 *et seq.*

## B. Substantive Law Perspective: Identifying and Systemizing Investors' Obligations in International Investment Agreements

The international legal framework on the protection of foreign investments comprises first and foremost of treaty law. The currently more than 2.930 bilateral investment treaties together with roughly 380 other international agreements that provide for investment provisions[36] constitute the public international law "backbone" of this legal regime. In light of this finding, it is hardly surprising that this contractual source of investment law also occupies a prominent position in the current discourses on, and practical approaches to, the issue of investors' obligations. Thereby, in order to conceptualize the respective proposals and their implementation in investment treaty practice from a systematic perspective, it is helpful to distinguish between three different types of legal obligations of investors, namely direct obligations of conduct, indirect obligations of conduct as well as provisions signaling a commitment to corporate social responsibility by the contracting parties.[37]

### I. The (Still) Rare: Stipulating Direct Obligations of Conduct for Foreign Investors

The first category in this regard concerns legal obligations of investors as explicitly stipulated and directly addressed to them in bilateral investment treaties and other investment agreements. Although at first sight probably the most expected and natural approach in light of common regulatory techniques, this normative steering method has *de lege lata* until now not gained anything even close to widespread recognition in investment treaty practice. This observation does not imply that the inclusion of investors' obligations in investment agreements is without precedent. Early examples can be found in a number of regional treaties concluded by developing countries since the 1980s. The Community Investment Code of the Economic Community of the Great Lakes Countries, signed on 31 January 1982, stipulates in its Article 19 that any authorized investor benefiting from the economic, financial and tax advantages under the regime established by this agreement shall agree to, and is thus required to, *inter alia*, "respect and ensure staff rights", "establish and keep to a programme for training local manpower and promoting the advancement of managerial staff who are nationals of the member countries of the Community" as well as "see to the protection of the environment".[38] In addition, the Articles 17 and 19 of the Charter on a Regime of Multinational Industrial Enterprises in the Preferential Trade Area for Eastern and Southern African States of 21 November 1990 list a number of obligations incumbent upon multinational enterprises and their subsidiaries. Among them are the duties to "produce goods of acceptable quality at competitive prices", to supply information concerning the ownership of the shares, to "refrain from entering into restrictive business practices" and to contribute to a "Special Development Tax".[39]

36 UNCTAD, World Investment Report 2019, Special Economic Zones, 2019, 99; see also, more recently, UNCTAD, Investment Policy Monitor, Issue 22, December 2019, 5.

37 See thereto in principle also already *Nowrot*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1154 (1160 *et seq.*).

38 Community Investment Code of the Economic Community of the Great Lakes Countries of 31 January 1982, reprinted for example in: UNCTAD, International Investment Instruments: A Compendium, Vol. II, 1996, 251 *et seq.*

39 Charter on a Regime of Multinational Industrial Enterprises in the Preferential Trade Area for Eastern and Southern African States of 21 November 1990, reprinted for example in: UNCTAD, International Investment Instruments:

More recently, the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area, adopted on 22/23 May 2007, states in its second part – tellingly titled 'rights and obligations' – in Article 11 the objectives of the agreement "to provide COMESA investors with certain rights in the conduct of their business within an overall balance of rights and obligations between investors and Member States".[40] In this regard, the treaty stipulates in its Article 13 initially merely the largely undisputed obligation of foreign investors to "comply with all applicable domestic measures of the Member State in which their investment is made", a provision which for example is also included in Article 8 of Annex 1 of the Southern African Development Community (SADC) Protocol on Finance and Investment as approved by the SADC Summit in Lesotho on 18 August 2006 and amended on 31 August 2016[41] as well as in Article 11 of the bilateral investment treaty concluded between Argentina and Qatar on 6 November 2016[42].

More noticeable and specific, however, Article 16 of the 2007 COMESA Investment Agreement also proscribes in connection with the issue of movement of labour that, while investors have in principle the right "to hire technically qualified persons from any country", they are required to "accord a priority to workers who possess the same qualifications and are available in the Member State or any other Member State" of COMESA. Furthermore, and again in the geographical context of Africa, the Economic Community of West African States (ECOWAS) Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS that was signed on 19 December 2008 and entered into force one month later on 19 January 2009[43] stipulates in its Chapter III ("Obligations and Duties of Investors and Investments") a quite notable number of direct obligations of conduct. Among them are the requirement of foreign investors "to strive through their management policies and practices, to contribute to the development objectives of the host States and the local levels of government" under Article 11 (3), the duty to conduct environmental and social impact assessments of planned investments (Article 12), the obligation to refrain from involvement in corrupt practices in accordance with Article 13 as well as the normative expectation to establish and maintain "liaison processes" with local communities under Article 15 (3). In addition, Article 14 (2) of the ECOWAS Supplementary Act stipulates that foreign investors "shall uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental or social obligations, to which the host State and/or home State are Parties". This provision is supplemented and concretized by Article 14 (3), foreseeing that foreign investors shall not "by complicity with, or in assistance with others, including public authorities, violate human rights

A Compendium, Vol. II, 1996, 427 *et seq.*

40 Investment Agreement for the COMESA Common Investment Area of 22/23 May 2007, available on the internet under: <http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/invagreecomesa.pdf> (accessed 7 January 2020).

41 Southern African Development Community (SADC), Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment, as signed by the Heads of State or Government of SADC Member States in the Kingdom of Swaziland on 31 August 2016, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3383> (accessed 7 January 2020).

42 Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar of 6 November 2016, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3706> (accessed 7 January 2020).

43 Economic Community of West African States (ECOWAS) Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS of 19 December 2008, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3547> (accessed 7 January 2020).

in times of peace or during socio-political upheavals", as well as by Article 14 (4), requiring that investors shall act in accordance with the fundamental labour standards as enshrined in the ILO Declaration on Fundamental Principles and Rights at Work as adopted on 18 June 1998[44].

Another quite remarkable example – and obviously inspired by the above-mentioned ECOWAS Supplementary Act – for the presence of direct obligations of conduct in the current investment treaty-making processes is provided by the bilateral investment agreement concluded between Morocco and Nigeria on 3 December 2016.[45] Article 14 of this investment treaty requires foreign investor, in the respective pre-establishment phase, to conduct environmental as well as social impact assessments of their potential investments and, in this regard, to apply the precautionary principle to their environmental assessment screening processes. Article 17 stipulates a prohibition of investors to engage in practices of corruption and Article 19 requires these actors to "meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices" (lit. a) as well as to establish local community liaison processes in accordance with internationally accepted standards (lit. b). Furthermore, Article 18 of the agreement states in the realm of post-establishment obligations that investments have to maintain an environmental management system (paragraph 1), that investors "shall uphold human rights in the host state" (paragraph 2), that they act in accordance with core labour standards (paragraph 3) and do not "manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties" (paragraph 4).

Furthermore, Belarus and India have signed on 24 September 2018 an investment treaty that stipulates in its Article 11 (ii) the obligation that investors "shall not, either prior to or after the establishment of an investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of a Party as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage nor shall be complicit in inciting, aiding, abetting, or conspiring to commit such acts".[46] Moreover, Article 11 (iv) of the same agreement foresees that foreign investors "provide such information as the Parties may require concerning the investment in question and the corporate history and practices of the investor, for purposes of decision making in relation to that investment or solely for statistical purposes". In addition, a number of countries like for example Ghana and Botswana[47] as well as more recently India[48]

44 ILO Declaration on Fundamental Principles and Rights at Work of 18 June 1998 (Annex revised 15 June 2010), available on the internet under: <https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm> (accessed 7 January 2020).

45 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria of 3 December 2016, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3711> (accessed 7 January 2020). See thereto also, e.g., *Gazzini*, Investment Treaty News, Volume 8, Issue 3, September 2017, 3 *et seq.*; *Santacroce*, ICSID Review – Foreign Investment Law Journal 34 (2019), 136 (145-146); as well as more comprehensively *Ejims*, ICSID Review – Foreign Investment Law Journal 34 (2019), 62 (74 *et seq.*).

46 Treaty between the Republic of Belarus and the Republic of India on Investments of 24 September 2018, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3839/belarus---india-bit-2018-> (accessed 7 January 2020).

47 See thereto *Alschner/Tuerk*, in: Baetens (ed.), Investment Law within International Law, 217 (228).

48 See Chapter III of India's Model Bilateral Investment Treaty of 28 December 2015, available on the internet under: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560> (accessed 7 January 2020); on this aspect of the 2015 model agreement see also, e.g., *Hanessian/Duggal*, ICSID Review – Foreign Investment Law Journal 32 (2017), 216 (225); as well as generally *Ranjan/Anand*, Northwestern Journal of International Law & Business 38 (2017), 1 *et seq.*; *Nedumpara*, in: Morosini/Sanchez Badin (eds.), Reconceptualizing International Investment Law from the Global South, 188 *et seq.*

and international organizations like SADC[49] and the African Union[50] have included respective provisions on investors' obligations in their model bilateral investment treaties and related guiding instruments.

From a broader perspective, these few examples already further support the for valid reasons overwhelmingly shared perception that modern public international law does no longer recognize any kind of *numerus clausus* of international legal subjects, but constitutes also in this regard an increasingly encompassing, open and thus inclusive system.[51] Consequently, there are in general also no systematic objections to an incorporation of private entities like foreign investors in the international legal order as addressees of obligations enshrined in investment treaties. In other words, stipulating direct legal obligations of conduct for this category of non-state actors in respective international agreements is, from the point of view of general public international law, undoubtedly a possible and admissible option when discussing potential regulatory techniques aimed at ensuring an appropriate balance in the realm of investment treaty practice between the legal protection granted to foreign investors on the one side and their responsibilities towards the societies in which they operate on the other side.

And indeed, it is also precisely this first type of investors' obligations that has in particular in recent years attracted considerable attention and support in the literature as well as in the practice of certain international bodies. Among the wide range of legal responsibilities proposed and discussed in this regard are substantive and procedural obligations aimed at the protection of human rights, core labour and social standards as well as the environment, but also duties ensuring fair competition, providing for non-financial reporting, preventing corruption and even obligations of a more active character like requirements to contribute to the host States' economic development.[52]

In the realm of civil society and its increasing occupation with the issues of investors' obligations, it is in particular the alternative approach adopted by the already mentioned IISD Model International Agreement on Investment for Sustainable Development that has received quite positive responses.[53] This applies in particular also to its comprehensive stipulation of direct obligations of conduct for foreign investors in Part Three of the Model Agreement. The respective legal responsibilities include, *inter alia*, compliance with the laws and regulations of the host State in accordance with Article 11, conducting in the pre-establishment phase a social

49 SADC Model Bilateral Investment Treaty Template with Commentary, July 2012, Articles 10 *et seq*., available on the internet under: <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 7 January 2020).

50 Articles 19 *et seq.* Draft Pan-African Investment Code, African Union Commission, Economic Affairs Department, December 2016, in: United Nations Economic and Social Council, Draft Pan-African Investment Code, UN Doc. E/ECA/CM/50/1, AU/STC/FMEPI/MIN/1(III) of 8 February 2017.

51 See thereto also already, e.g., *Tietje*, in: Tietje (ed.), International Investment Protection and Arbitration, 17 (32); *Nowrot*, Indiana Journal of Global Legal Studies 6 (1999), 579 (621).

52 UNCTAD, Development Implications of International Investment Agreements, IIA Monitor No. 2 (2007), 6 ("Such obligations may be merely passive, that is, an obligation to refrain from activity of a certain type, such as activity that would violate human or labour rights, damage the environment, or constitute corruption. The obligations, however, could also be active in nature, such as an obligation to make a development contribution."); UNCTAD, UNCTAD's Reform Package for the International Investment Regime, 2017, 61 *et seq.*; *Sornarajah*, The International Law on Foreign Investment, 174 *et seq.*, 263 *et seq.*, 275; *Hang*, Fordham International Law Journal 37 (2014), 1215 (1259 *et seq.*); *Hepburn/Kuuya*, in: Cordonier Segger/Gehring/Newcombe (Hrsg.), Sustainable Development in World Investment Law, 589 *et seq.*; *Krajewski*, Human Rights in International Investment Law, 8-9; *Sheffer*, Denver Journal of International Law and Policy 39 (2011), 483 (507 *et seq.*); *Choudhury*, University of Pennsylvania Journal of International Law 38 (2017), 425 (463 *et seq.*).

53 See in this regard for example *Jacob*, International Investment Agreements and Human Rights, 40 ("considerable achievement"); *Muchlinski*, in: Alvarez/Sauvant (eds.), The Evolving International Investment Regime, 30 (59) ("the IISD Model Agreement offers a useful, though by no means uncontroversial, step forward"); for further perceptions see also, e.g., *Malik*, in: Cordonier Segger/Gehring/Newcombe (eds.), Sustainable Development in World Investment Law, 565 (577 *et seq.*).

and environmental impact assessment as stipulated in Article 12, refraining from corruption (Article 13), promotion of human rights and core labour standards in line with Article 14 as well as disclosure of information under Article 15.

Despite these proposals and the by now in principle almost generally recognised need to introduce at least some changes to the traditional normative framework on international investments in order to retain or provide for an adequate counterbalance to the legal protection enjoyed by foreign investors, the incontrovertible fact remains that most countries are still more than reluctant to stipulate respective direct obligations of investors in international agreements. This overall rather reserved attitude does not merely reflect a lack of political will, skepticism towards respective innovations and probably a so far quite successful resistance from the side of the business community. Rather, it can also be attributed to certain substantive and procedural challenges connected with the implementation of such a regulatory approach in treaty practice.

From a substantive law perspective the complex issues arise which standards on precisely what concerns should be included in international investment treaties as binding obligations of investors as well as how detailed the respective provisions need to be phrased in order to provide for a workable guidance for these actors' conduct. In addition, the relationships between these stipulations in investment agreements and, first, the domestic law standards of the host States as well as, second, other more specific international legal regimes on, for example, the protection of human rights and the environment as well as the promotion of core labour and social standards would need to be addressed.[54]

A mere incorporation by reference of existing international agreements on respective issues – an approach well-known from other areas of international economic law as, *inter alia*, evidenced by Article 2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in the realm of the WTO[55] – would ultimately amount to an unreflected application to private persons and entities of obligations originally addressed to states only and thus might not adequately take into account the distinctive challenges and need for modifications resulting from such a regulatory technique in light of the different spheres of responsibility of, and means available to, governmental and non-state actors respectively. As rightly emphasized in the literature, providing feasible and acceptable answers to all these substantive questions in practice has most certainly the potential to considerably complicate and prolong the negotiating and drafting processes on new bilateral or regional – not to mention multilateral – investment agreements.

However, the idea of including direct obligations of conduct for foreign investors in international treaties does not only give rise to substantive law issues. Equally important is the procedural question how respective obligations should be enforced. Traditional investment treaty regimes proceed on the conceptual basis of stipulating obligations of the host states to guarantee certain standards of protection that can in turn be enforced by foreign investors of other contracting parties through the respective investor-state dispute settlement clauses. This currently still predominant treaty approach does not – and obviously doesn't need to – provide any procedures for the enforcement of investors' obligations. In order to be effective, incorporating respective direct legal responsibilities thus first and foremost also requires a decision on, and inclusion of, new enforcement venues, another step that would considerably modify

54 See also for example *Muchlinski*, in: Muchlinski/Ortino/Schreuer (eds.), International Investment Law, 3 (37 *et seq.*); *Muchlinski*, in: Muchlinski/Ortino/Schreuer (eds.), International Investment Law, 637 (681 *et seq.*); *Jacob*, International Investment Agreements and Human Rights, 36 *et seq.*

55 Agreement on Trade-Related Aspects of Intellectual Property Rights, reprinted for example in: *Tams/Tietje* (eds.), Documents in International Economic Law, 260 *et seq.*

the normative structure of investment agreements.[56] That said it is not implied that respective proposals have not yet been made and even occasionally implemented in investment treaty practice.[57] Rather, this finding merely illustrates another obstacle that is very likely to have contributed to the presently still clearly visible reluctance of most countries to stipulate direct obligations of investors in international agreements. Thereby, it also explains why, despite the more recently recognized need for a certain reformation of investment law, states in general have until now in investment treaty practice primarily taken recourse to more indirect approaches when dealing with the issue of investors' responsibilities. To them the analysis now turns.

## II. The (More) Common: Regulating Indirect Obligations of Conduct

Among these regulatory techniques is the inclusion of what might be characterised as indirect obligations of conduct for foreign investors. This second category refers to provisions in international investment treaties that do not stipulate obligations as directly addressed to investors but require the contracting parties to the agreements to consider and adopt measures aimed at regulating as well as guiding the behaviour of these private actors. For example, Article 72 of the Economic Partnership Agreement between the CARIFORUM States and the European Union and its Member States, titled "behaviour of investors", foresees that the parties "shall cooperate and take, within their own respective territories, such measures as may be necessary, inter alia, through domestic legislation, to ensure that" investors comprehensively abstain from engaging in corruptive business practices (lit. a), act in accordance with core labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights at Work (lit b), do not "manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements" signed and ratified by the parties (lit. c) as well as "establish and maintain, where appropriate, local community liaison processes" (lit. d).[58] Furthermore, the Investment Agreement for the COMESA Common Investment Area provides in its Article 7 (2) lit. d that the CCIA Committee shall be responsible for "making recommendations to the Council on any policy issues that need to be made to enhance the objectives of this Agreement". Thereby, it explicitly refers to "the development of common minimum standards relating to investment in areas such as" environmental and social impact assessments, labour standards, respect for human rights and corruption.

In addition, this category of indirect obligations also encompasses respective provisions whose scope of application does cover, but is not limited to the behaviour of foreign investors. To mention but one example, Article 9 of the bilateral investment treaty between Japan and Jordan of 27 November 2018 stipulates that "[e]ach Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations".[59]

56 *García-Bolívar*, ICSID Review – Foreign Investment Law Journal 24 (2009), 464 (484) ("It seems that the most difficult task would be to device the enforcement mechanisms for those obligations […].").

57 See thereto also *infra* under C.

58 Economic Partnership Agreement between the CARIFORUM States and the European Union and its Member States, reprinted in: Official Journal of the European Union, No. L 289/I/3 of 30 October 2008.

59 Agreement between Japan and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments of 27 November 2018, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3881/japan---jordan-bit-2018-> (accessed 7 January 2020). See also, e.g., Article 11 of the Agreement between the Government of Japan and the Government of the Republic of the

## III. The (Dominant) Gentle: Including Provisions Signaling a Commitment to Corporate Social Responsibility

The third type of stipulations worth highlighting in the present context are provisions in investment agreements that signal a commitment to corporate social responsibility by the contracting parties. It is in particular this regulatory approach that is gaining ground in current treaty practice.[60] Thereby, a number of agreements emphasize the importance of these issues in their preambles.[61] Among them is the bilateral investment treaty between Austria and Kosovo of 22 January 2010 whose preamble expresses the "belief that responsible business behaviour, as incorporated in the OECD Guidelines for Multinational Enterprises, can contribute to mutual confidence between enterprises and host countries" and takes "note of the principles of the UN Global Compact".[62] The preamble of the bilateral investment treaty concluded by China and Tanzania on 24 March 2013 states that the contracting parties encourage investors to respect corporate social responsibility.[63] Furthermore, the free trade agreement between Albania and the EFTA States of 17 December 2009, as amended by a protocol of 18 September 2015, for example, includes in its preamble the intention of the parties to acknowledge "the importance of good corporate governance and corporate social responsibility for sustainable development", and, in this regard, to affirm "their aim to encourage enterprises to observe internationally recognized guidelines and principles in this respect, such as the OECD Guidelines for Multinational Enterprises, the OECD Principles of Corporate Governance and the UN Global Compact".[64] In addition, the bilateral investment treaty concluded between Iran and Slovakia, signed on 19 January 2016 and having entered into force on 30 August 2017, emphasizes in its preamble the determination of the contracting parties to "promote corporate social accountability".[65]

Other bilateral investment treaties and free trade agreements even provide in their

Union of Myanmar for the Liberalization, Promotion and Protection of Investment of 15 December 2013, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/country/105/treaty/2155> (accessed 7 January 2020).

60 On this perception see also already UNCTAD, World Investment Report 2011, Non-Equity Modes of International Production and Development, 2011, 119-120; *Hepburn/Kuuya*, in: Cordonier Segger/Gehring/Newcombe (Hrsg.), Sustainable Development in World Investment Law, 589 (601 *et seq.*).

61 Generally on the functions and importance of preambles from the perspective of treaty interpretation, see for example ICJ, *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia v. Malaysia), Judgment of 17 December 2002, ICJ Reports 2002, 625 (652, para. 51); ICJ, *Asylum Case* (Colombia v. Peru), Judgment of 20 November 1950, ICJ Reports 1950, 266 (282); ICJ, *Case Concerning Rights of Nationals of the United States of America in Morocco* (France v. USA), Judgment of 27 August 1952, ICJ Reports 1952, 176 (196); European Court of Human Rights, *Golder v. United Kingdom*, Application No. 4451/70, Judgment of 25 February 1975, para. 34; *Gardiner*, Treaty Interpretation, 205 *et seq.*; *Dörr*, in: Dörr/Schmalenbach (eds.), Vienna Convention on the Law of Treaties, A Commentary, Article 31, para. 49. Specifically in the context of investor-state dispute settlement see for example *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Award of 20 August 2007, para. 7.4.4.

62 Agreement for the Promotion and Protection of Investment between the Government of the Republic of Austria and the Government of the Republic of Kosovo of 22 January 2010, available on the internet under: <https://www.ris.bka.gv.at/.../COO_2026_100_2_726968.pdfsig> (accessed 7 January 2020). See also, e.g., *Reinisch*, in: Brown (ed.), Commentaries on Selected Model Investment Treaties, 15 (21).

63 Agreement between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments of 24 March 2013, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/990> (accessed 7 January 2020).

64 Free Trade Agreement between the Republic of Albania and the EFTA States of 17 December 2009, as amended by the Protocol amending the Free Trade Agreement between the Republic of Albania and the EFTA States, signed on 18 September 2015 and entered into force on 1 June 2017, available on the internet under: <http://www.efta.int/free-trade/Free-Trade-Agreement/Albania> (accessed 7 January 2020).

65 The text of the agreement is available under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3633> (accessed 7 January 2020).

operational sections specific provisions asking the parties to encourage corporations – and thus the primary type of foreign investors – to fulfil the societal expectations in connection with their business conduct. A vivid example is provided by Article 14 of the bilateral investment treaty concluded between Canada and Mongolia on 8 September 2016 and entered into force on 24 February 2017: "Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties should remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies."[66]

In addition, Article 11 of the bilateral investment treaty between Nigeria and Singapore of 4 November 2016 stipulates that "Singapore reaffirms the importance of encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by Singapore" (paragraph 1), and that "Nigeria is to encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies such as statements of principles that have been endorsed or are supported by Nigeria. These principles address issues such as labour, the environment, public health, human rights, community relations and anti-corruption" (paragraph 2).[67] Article 5 (2) of Chapter 9 (Investment) of the Pacific Agreement on Closer Economic Relations (PACER Plus) concluded on 14 June 2017 between Australia, New Zealand as well as twelve Pacific island states, namely the Cook Islands, the Federated States of Micronesia, the Independent and Sovereign Republic of Kiribati, the Republic of Nauru, Niue, the Republic of Palau, the Republic of the Marshall Islands, the Independent State of Samoa, Solomon Islands, the Kingdom of Tonga, Tuvalu, and the Republic of Vanuatu, holds that "[t]he Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party".[68]

Related stipulations are also enshrined, *inter alia*, in Article 9.17 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) concluded on 8 March 2018 between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam,[69] in Article 14.17 of the Agreement between the United States of America, the United Mexican States, and Canada (USMCA) of 30 November 2018,[70] in Article 16 of

66 Agreement between Canada and Mongolia for the Promotion and Protection of Investments of 8 September 2016, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/country/35/treaty/3698> (accessed 7 January 2020).

67 Investment Promotion and Protection Agreement between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore of 4 November 2016, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3705> (accessed 7 January 2020).

68 Pacific Agreement on Closer Economic Relations (PACER Plus) of 14 June 2017, available on the internet under: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/pacer/pacer-plus-full-text/> (accessed 7 January 2020).

69 For the text of this agreement and its annexes see the information under: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/> (accessed 7 January 2020).

70 Chapter 14 of the USMCA is for example available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3841/usmca-2018-> (accessed 7 January 2020).

the bilateral investment treaty between the Hong Kong Special Administrative Region of the People's Republic of China and the Republic of Chile of 18 November 2016,[71] in Article 17 of the bilateral investment treaty between Argentina and Japan of 1 December 2018,[72] in Article 816 in the investment chapter of the free trade agreement between Canada and Colombia that entered into force on 15 August 2011,[73] in Article 16 of the Australia-Hong Kong bilateral investment treaty of 26 March 2019,[74] in Article 7 of the new Dutch Model BIT published by the Dutch government on 22 March 2019,[75] in Article 24 of the already mentioned investment agreement between Morocco and Nigeria, in Article 12 of the bilateral investment treaty signed on 6 November 2016 by Argentina and Qatar,[76] in Article 14 of the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol of 7 April 2017,[77] in Article 15 of the investment cooperation and facilitation agreement signed between Brazil and Suriname on 2 May 2018,[78] in Article 14 of the respective international investment treaty concluded by Ethiopia and Brazil on 11 April 2018[79] and in Article 14.17 of the Australia-Indonesia Comprehensive Economic Partnership Agreement of 4 March 2019.[80]

Furthermore, in a Joint Declaration concerning Guidelines to Investors attached to the Association Agreement between Chile and the European Union as well as its Member States of 18 November 2002, the contracting parties "remind their multinational enterprises of their recommendation to observe the OECD Guidelines for Multinational Enterprises, wherever they operate".[81] Article 8.17 of the free trade agreement between Australia and Peru signed on 12 February 2018 states that "[e]ach Party encourages enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that

71 The text of the agreement is available under: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3717> (accessed 7 January 2020).

72 Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment of 1 December 2018, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3871/argentina---japan-bit-2018-> (accessed 7 January 2020).

73 Canada-Colombia Free Trade Agreement of 21 November 2008, available on the internet under: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/background-contexte.aspx?lang=eng> (accessed 7 January 2020).

74 For the text of this agreement see for example: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/4893/australia---hong-kong-investment-agreement-2019-> (accessed 7 January 2020).

75 Dutch Model BIT of 22 March 2019, available on the internet under: <https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden> (accessed 7 January 2020). Generally thereto see also, e.g., *Duggal/van de Ven*, Arbitration International 35 (2019), 347 *et seq.*

76 For the text of this bilateral investment treaty see: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3706> (accessed 7 January 2020).

77 The text of the protocol is available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3772> (accessed 7 January 2020).

78 The text of the agreement is available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3815> (accessed 7 January 2020). Generally on this new type of Brazilian investment agreements see for example *Muniz/Duggal/Peretti*, ICSID Review – Foreign Investment Law Journal 32 (2017), 404 *et seq.*; *Sanchez Badin/Morosini*, in: Morosini/Sanchez Badin (eds.), Reconceptualizing International Investment Law from the Global South, 218 *et seq.*; *Gabriel*, Conflict Resolution Quarterly 34 (2016), 141 *et seq.*; *Monebhurrun*, Journal of International Dispute Settlement 8 (2017), 79 *et seq.*

79 For the text of this investment treaty see: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3816> (accessed 7 January 2020).

80 Australia-Indonesia Comprehensive Economic Partnership Agreement of 4 March 2019, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/4890/australia---indonesia-cepa-2019-> (accessed 7 January 2020).

81 Agreement Establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, of 18 November 2002, available on the internet for example under: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/chile/> (accessed 7 January 2020).

have been endorsed or are supported by that Party".[82] Moreover, attention should in this connection also be drawn to the already quantitatively potentially quite far-reaching implications resulting from the fact that the European Parliament in its resolution on the future European international investment policy of 6 April 2011 "asks the Commission to include, in all future agreements, a reference to the updated OECD Guidelines for Multinational Enterprises" and "[r]eiterates, with regard to the investment chapters in wider FTAs, its call for a corporate social responsibility clause and effective social and environmental clauses to be included in every FTA the EU signs".[83]

Although this last mentioned type of provisions does not envision any legally binding obligations for foreign investors, it already is surely noteworthy in the present context for its explicit recognition of investors' public responsibilities and the importance attached to them by the contracting parties.[84] The creation of certain linkages as a result of these developments between the previously largely separated realms of international investment agreements and the protection of investments enshrined therein on the one side and societal expectations on the conduct of investors on the other side is another obvious indication that the idea of a merger of investors' rights and responsibilities is slowly but steadfastly gaining momentum in investment treaty practice.

## C. Enforcement Perspective: Investors' Obligations and International/Domestic Investment Dispute Settlement

Most certainly, the idea of investors' responsibilities does not involve issues of substantive law alone. This concept also entails a strong procedural dimension by giving rise to the questions where and by which means respective obligations can be enforced. Thereby, it is first and foremost the possible approaches to this issue in, as well as its implications for, the currently predominant regime of international investment dispute settlement that are of particular interest from the perspective of investment treaty law. Whereas other regulatory approaches aimed at providing for what is perceived as a more balanced and thus more appropriate investment treaty regime like the specification of the scope of application of the traditionally often rather broadly phrased and thus quite indeterminate substantive protection standards[85] can in principle be quite easily integrated in, and thus do not fundamentally alter, the system of investor-State arbitration, a different finding appears to be warranted in particular concerning the inclusion of direct obligations of conduct for foreign investors in investment agreements.

Already in light of the fact that until now very few investment treaties proscribe respective

82 Australia-Peru Free Trade Agreement of 12 January 2018, available on the internet under: <http://dfat.gov.au/trade/agreements/not-yet-in-force/pafta/full-text/Pages/fta-text-and-associated-documents.aspx> (accessed 7 January 2020).

83 European Parliament Resolution on the future European international investment policy, 2010/2203(INI), 6 April 2011, paras. 27-28; see also, e.g., European Parliament resolution on corporate social responsibility in international trade agreements, 2009/2201(INI), 25 November 2010; European Parliament resolution on EU-Canada trade relations, P7_TA(2011)0257, 8 June 2011, paras. 8, 11 and 12; European Parliament resolution on EU-China negotiations for a bilateral investment agreement, P7_TA(2013)0411, 9 October 2013, para. 33.

84 See also, e.g., UNCTAD, World Investment Report 2011, Non-Equity Modes of International Production and Development, 2011, 120 ("such clauses nevertheless serve to flag the importance of CSR in investor–State relations, which may also influence the interpretation of IIA clauses by tribunals in investor–State dispute settlement cases, and create linkages between IIAs and international CSR standards"); as well as UNCTAD, UNCTAD's Reform Package for the International Investment Regime, 2017, 62-63.

85 See thereto for example *Echandi*, in: Yannaca-Small (ed.), Arbitration under International Investment Agreements, 3 (12 *et seq.*); *Boor/Nowrot*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 91 *et seq.*

direct obligations, it is not surprising that this issue has hardly been dealt with in the practice of investment arbitration. This does not imply that the conduct or rather "misconduct" of investors is not increasingly taken recourse to by investment tribunals when determining whether a specific investment is covered by the scope of application of an investment agreement or whether the host State has actually violated a protection standard enshrined therein. However, it needs to be emphasised that the respective legal consequences of "investments made in breach of fundamental principles of the host State's law, e.g. by fraudulent misrepresentation or the dissimulation of true ownership" as already for some time quite intensively discussed in arbitral practice,[86] and the implications of other forms of "unconscionable conduct" on the side of the foreign investor,[87] do not concern direct investors' obligations in the narrow sense of the meaning. Rather, they more closely resemble, in the context of international investment law, behavioural expectations being incumbent upon investors on the basis of the principle of good faith,[88] a violation of which does not give rise to compensation, but "merely" results in a legal disadvantage with the investor forfeiting the protection under the respective investment agreement[89] or, alternatively, might be taken into account in calculating the damages to be awarded to the claimant investor.[90]

Nevertheless, another indirect approach particularly in the form of counterclaims initiated by the host country in investor-State arbitration proceedings[91] has also occasionally been suggested with regard to the enforcement of investors' direct obligations of conduct as stipulated in investment agreements. For example the already mentioned 2005 IISD Model International Agreement on Investment for Sustainable Development foresees in its Article 18 that, *inter alia*, a host or home State may raise a breach of an investor's obligation under Article 13

86 *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008, para. 104; see also, e.g., *World Duty Free Company Ltd. v. Kenya*, ICSID Case No. ARB/00/7, Award of 4 October 2006, paras. 138 *et seq.*; *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, paras. 112 *et seq*.; *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006, paras. 181 *et seq.*; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, paras. 100 *et seq.*; as well as from the literature for example *Douglas*, ICSID Review – Foreign Investment Law Journal 29 (2014), 155 *et seq.*; *Diel-Gligor/Hennecke*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 566 *et seq.*; *Sipiorski*, Good Faith in International Investment Arbitration, §§ 4.34 *et seq.*; *Brower/Ahmad*, in: Yannaca-Small (ed.), Arbitration under International Investment Agreements, 455 *et seq.*; *Lorz/Busch*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 577 *et seq.*, each with further references.

87 *Azinian et al. v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award of 1 November 1999, reprinted in: I.L.M. 39 (2000), 537 (553 *et seq*.); see also for example *Muchlinski*, International and Comparative Law Quarterly 55 (2006), 527 (536 *et seq*.).

88 On the principle of good faith as the basis of these behavioural expectations see also, e.g., *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, paras. 100, 106 *et seq*.; *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, para. 144; as well as more recently the comprehensive assessment provided by *Sipiorski*, Good Faith in International Investment Arbitration, §§ 3.04 *et seq.*, with further references.

89 See thereto also already for example *Tietje*, in: Ehlers/Schoch (eds.), Rechtsschutz im Öffentlichen Recht, 63 (88); *Nowrot*, International Investment Law and the Republic of Ecuador, 40. Generally on this issue also, e.g., *Tamada*, in: Gal-Or/Ryngaert/Noortmann (eds.), Responsibilities of the Non-State Actor, 203 (213 *et seq.*).

90 On the last-mentioned approach see more recently *Bear Creek Mining Company v. Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017, Partially Dissenting Opinion of Philippe Sands, paras. 4 *et seq*. See thereto also *Krajewski*, Human Rights in International Investment Law, 6-7. See in this connection also Article 23 of the of the new Dutch Model BIT, published by the Dutch government on 22 March 2019: "Without prejudice to national administrative or criminal law procedures, a Tribunal, in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises."

91 Generally on counterclaims in international investment arbitration see, e.g., *Clodfelter/Tsutieva*, in: Yannaca-Small (ed.), Arbitration under International Investment Agreements, 417 *et seq.*; *Waibel*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1212 (1235 *et seq.*); *Hoffmann*, ICSID Review – Foreign Investment Law Journal 28 (2013), 438 *et seq.* Specifically on the importance of this approach for the effective incorporation of non-economic public interest concerns into the realm of investor-state dispute settlement proceedings see also more recently *Schill/Djanic*, ICSID Review – Foreign Investment Law Journal 33 (2018), 29 (52 *et seq.*).

(anti-corruption) as an objection to jurisdiction of an investment tribunal (lit. a), that "[w]here a persistent failure to comply with Articles 14 or 15 is raised by the host state defendant or an intervener in a dispute settlement proceeding under this Agreement, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim" (lit. d), and that a "host state may initiate a counterclaim before any tribunal established pursuant to this Agreement for damages resulting from an alleged breach of the Agreement [by an investor]" (lit. e).

In addition, it should be recalled in the present context that, according to more recent international arbitral practice, even in the absence of specific provisions allowing counterclaims by the respondent host states, this approach might under certain circumstances nevertheless legitimately also be taken recourse to in the enforcement of investors' obligations. In the case of *Urbaser et al. v. Argentina*, arising like so many other investment disputes in the wake of the Argentinian financial and economic crisis at the end of the 1990s, Argentina apparently for the first time filed a counterclaim against the foreign investors based on an alleged violation of the claimants' supposed human rights obligations in connection with the provision of access to water to the local population.[92] Relying on a comparatively broad reading[93] of the relevant provisions of Article 46 ICSID Convention[94] and of Article X of the bilateral investment treaty concluded between Argentina and Spain of 3 October 1991,[95] the arbitration tribunal indeed found that it has jurisdiction to deal with Argentina's counterclaim,[96] thus sending to interested host states the encouraging message that initiating counterclaims based on an alleged infringement of (human rights) obligations by foreign investors are not in principle inadmissible in the realm of investor-state arbitration proceedings. That said, a lasting challenge the award in *Urbaser et al. v. Argentina* is faced with, however, concerns the issues that, first, the underlying bilateral investment treaty between Argentina and Spain was not only devoid of any specific provisions allowing counterclaims but also did not explicitly stipulate any responsibilities for foreign investors, and that, second, the legal reasoning advanced by the members of the investment tribunal in order to substantiate the existence of respective (human rights) obligations on the side of private economic actors concerned[97] is quite far from being something even close to convincing.[98] But that is another story.

92 *Urbaser S.A. et al. v. Argentina*, ICSID Case No. ARB/07/26, Award of 8 December 2016, paras. 36-37.

93 On this perception see also already for example *Edward Guntrip*, *Urbaser v. Argentina*: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration, EJIL: Talk!, 10 February 2017, available under: <https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/> (accessed 7 January 2020); *Abel*, Brill Open Law 2018, 1 (9-10). For an apparently more narrow understanding of the legal requirements to be fulfilled by an admissible counterclaim see, e.g., *Sergei Paushok et al. v. Mongolia*, UNCITRAL Arbitration, Award on Jurisdiction and Liability of 28 April 2011, paras. 684 *et seq.*; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL Arbitration, Decision on Jurisdiction over the Czech Republic's Counterclaim of 7 May 2004, paras. 61 *et seq.*

94 Generally on the requirements stipulated in this provision see, e.g., *Schreuer/Malintoppi/Reinisch/Sinclair*, The ICSID Convention, Article 46, paras. 1 *et seq.*

95 The text of this agreement is available under: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/154> (accessed 7 January 2020).

96 *Urbaser S.A. et al. v. Argentina*, ICSID Case No. ARB/07/26, Award of 8 December 2016, paras. 1143 *et seq.*

97 See *Urbaser S.A. et al. v. Argentina*, ICSID Case No. ARB/07/26, Award of 8 December 2016, paras. 1182 *et seq.*; on this reasoning see also for example *Crow/Lorenzino Escobar*, Boston University International Law Journal 36 (2018), 87 (95 *et seq.*).

98 For a critical evaluation of the tribunal's argumentation in this regard see also already, e.g., *Edward Guntrip*, *Urbaser v. Argentina*: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration, EJIL: Talk!, 10 February 2017, available under: <https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/> (accessed 7 January 2020); *Abel*, Brill Open Law 2018, 1 (11 *et seq.*); *Krajewski*, Human Rights in International Investment Law, 4 *et seq.*; *Nowrot*, in: Krajewski (ed.), Staatliche Schutzpflichten und unternehmerische Verantwortung, 3 (17 *et seq.*).

At least equally important from the enforcement perspective is the observation that respective provisions explicitly allowing counterclaims by host states can in current treaty practice indeed also be found in some of the until now still comparatively few investment agreements that actually overtly stipulate direct obligations for investors. To begin with, Article 28 (9) of the 2007 Investment Agreement for the COMESA Common Investment Area states in this connection: "A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages." The same applies for example to Article 18 of the 2008 ECOWAS Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS titled "Relations of Investor's Liability to Dispute Settlement" and stipulating, among others, in its paragraph 4 that "[a] host Member State may initiate a counterclaim before any tribunal established pursuant to this Supplementary Act for damages resulting from an alleged breach of the Supplementary Act". In the realm of non-binding guiding instruments, attention can and should be drawn in this regard to, *inter alia*, Article 19 (3) of the 2012 SADC Model Bilateral Investment Treaty Template as well as to Article 43 of the African Union's Draft Pan-African Investment Code of December 2016 proscribing that "[w]here an investor or its investment is alleged by a Member State party in a dispute settlement proceeding under this Code to have failed to comply with its obligations under this Code or other relevant rules and principles of domestic and international law, the competent body hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award" (paragraph 1) as well as that "[a] Member State may initiate a counterclaim against the investor before any competent body dealing with a dispute under this Code for damages or other relief resulting from an alleged breach of the Code" (paragraph 2).

From the perspective of traditional international investment law, the attractiveness of this more indirect approach that primarily relies on counterclaims initiated by the host country lies undoubtedly in its procedural connectivity and thus the possibility to incorporate it in the present system of investor-state arbitration.

However, there obviously exist potentially also more far-reaching and advanced procedural options on how to enforce investors' direct obligations of conduct in the realm of international investment arbitration and beyond, the implementation of which would admittedly often require certain modifications of the currently predominant framework of investment dispute settlement. Among them is the possibility to grant host states a right to actively initiate respective proceedings against foreign investors, an approach so far uncommon under investment treaties and even in the practice of contract-based investor-State arbitration still quite rarely taken recourse to.[99] Furthermore, it has even sporadically been proposed in the literature to also consider the option of providing for standing of, *inter alia*, individuals, juridical persons and indigenous communities in the host states to launch respective claims for compensation against foreign investors – in the *fora* of international investment arbitration proceedings – based on an alleged violation of obligations imposed on them in an investment agreement.[100] Although

99 On the limited number of cases in which the host state acted as claimant in contract-based investor-state arbitration proceedings see, e.g., *Toral/Schultz*, in: Waibel *et al.* (eds.), The Backlash Against Investment Arbitration, 577 (589 *et seq.*); *Laborde*, Journal of International Dispute Settlement 1 (2010), 97 *et seq.*

100 See for example *Weiler*, Boston College International and Comparative Law Review 27 (2004), 429 (437 *et seq.*); *Chalamish*, Brooklyn Journal of International Law 34 (2009), 303 (351).

undoubtedly a rather innovative idea to cope with the challenge of how to ensure access to effective remedial processes for other actors negatively affected by an investment,[101] it appears, considering the reluctance displayed by states in this regard as well as in light of a number of other obstacles,[102] currently quite unlikely that this approach will acquire a prominent position in the international enforcement regimes established by investment treaty law any time soon.

While the door to legal remedies in the form of access to international investment arbitration proceedings for societal actors in the host countries that are negatively affected by the conduct of foreign investors thus seems to be currently not really wide open, recent investment treaty practice, in particular in the African context, reveals the emergence – and possible rise – of a regulatory approach that relies on the still not infrequently overlooked or neglected steering potential of the foreign investors' home countries. A vivid example to illustrate this comparatively new approach is provided by Article 20 of the bilateral investment treaty concluded between Morocco and Nigeria in December 2016: "Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state".[103] A related provision can be found in the 2008 ECOWAS Supplementary Act whose Article 29 stipulates that "[h]ome States shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of investors for damages resulting from alleged acts or decisions made by investors in relation to their investments in the territory of other Member States. […]."[104] Furthermore, Article 7 (4) of the new Dutch Model BIT published by the Dutch government on 22 March 2019 states that "[i]nvestors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state". In addition, to mention but one further example, Article 19 (4) of the 2012 SADC Model Bilateral Investment Treaty Template includes a quite similar stipulation: "In accordance with the domestic law of the Home State, the Host State, including political subdivisions and officials thereof, private persons, or private organizations, may initiate a civil action in domestic courts of the Home State against the Investor, where such an action relates to the specific conduct of the Investor, and claims damages arising from an alleged breach of the obligations set out in this Agreement."[105]

101 Generally on the underlying fundamental issue of providing individuals and groups affected by foreign investments with adequate access to justice, see also, e.g., *Francioni*, in: Dupuy/Francioni/Petersmann (eds.), Human Rights in International Investment Law, 63 (71 *et seq*.).

102 See thereto for example *Mann*, International Investment Agreements, Business and Human Rights, 14 ("In the view of this author, such an approach is illusory, given the costs of international arbitration processes in many cases, and the difficulties in mounting such cases before tribunals designed for commercial law purposes rather than enforcement of legislation or obligations against corporations.").

103 On this provision see also already, e.g., *Gazzini*, Investment Treaty News, Volume 8, Issue 3, September 2017, 3 (4) ("The final innovation is the provision on the investor liability before the tribunals of the home state, which may have a considerable impact on domestic litigation against investors – especially multinational companies – and help overcome jurisdictional hurdles and most prominently the *forum non conveniens* doctrine. This can be considered as an important development from the standpoint of the responsible conduct of investments, the redress of wrongful doings and the role of the home state."); as well as UNCTAD, UNCTAD's Reform Package for the International Investment Regime, 2017, 63.

104 See also on the stipulation of investor liability in the courts of the host state the provision of Article 17 of the 2008 ECOWAS Supplementary Act: "Investors shall be subject to civil actions for liability in the judicial process of their host State for acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host State.".

105 See also, again, concerning the respective stipulation of investor liability in the courts of the host state Article 19 (3) of the 2012 SADC Model Bilateral Investment Treaty Template: "In accordance with its applicable domestic law, the Host State, including political subdivisions and officials thereof, private persons, or private organizations, may initiate

In the same way as for example Article 4 (2) of the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions,[106] these provisions require the contracting state parties to provide for an extraterritorial application of their domestic laws to the activities of their private business actors while operating abroad. The regulations at issue thus establish, in addition to the national courts of the host state, also the domestic judicial bodies of the home states of foreign investors as suitable and potentially promising *fora* for the enforcement of investors' obligations at the initiative of individuals and other societal actors that have been negatively affected by the conduct of respective foreign investors.

## D. International Trade Law Perspective: Possible Implication for the Evolution of the WTO Legal Order

The analysis in the previous sections has shown that the concept of investors' responsibilities, while almost unknown in investment treaty practice until the previous decade, is currently emerging as a quite prominent and notable regulatory experiment in the ongoing processes of reforming the realm of international investment treaties. In light of the increasingly widespread practice of addressing the issue of corporate responsibility in the agreements that make up the global legal framework on the protection of foreign investments, the question might arise – when assessing these comparatively novel developments from the perspective of global trade law – as to their possible implications for progressive evolution of international trade agreements in general and the WTO legal order in particular.

Admittedly, given the undeniable differences also characterizing the relationship between these two branches of international economic law, there seem to be – at least at first sight – no obvious bases and compelling reasons for respective normative interactions among them or even norm transplantations from one legal framework to another, in particular when it comes to the issue of investors' obligations. To begin with, one can and should in this connection recall the general dissimilarities between the main types of economic transactions addressed by world trade law and international investment law, respectively. As for example vividly explained by *Rudolf Dolzer* and *Christoph Schreuer*, "'[m]aking a foreign investment is different in nature from engaging in a trade transaction. Whereas a trade deal typically consists of a one-time exchange of goods and money, the decision to invest in a foreign country initiates a long-term relationship between the investor and the host country. Often, the business plan of the investor is to sink substantial resources into the project at the outset of the investment, with the expectation of recouping this amount plus an acceptable rate of return during the subsequent period of investment, sometimes running up to 30 years or more. A key feature in the design of such a foreign investment is to lay out in advance the risks inherent in such a long-term relationship, both from a business perspective and from the legal point of view."[107]

Furthermore, at least equally noteworthy are the obvious and considerable structural

a civil action in domestic courts against the Investor or Investment for damages arising from an alleged breach of the obligations set out in this Agreement.".

106 OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997, available on the internet under: <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (accessed 7 January 2020). Article 4 (2) of the Convention includes the following stipulation: "Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, […]."

107 *Dolzer/Schreuer*, Principles of International Investment Law, 21.

differences between these two fields of international economic law. Emphasizing this aspect does not only, and in the present context not even primarily, refer to the well-known fact that the treaty regime on the protection of foreign investments, comprising of thousands of mostly bilateral and regional investment agreements, has always been a quite fragmented normative system, especially if compared with the in principle rather centralized international trade law regime and the important roles occupied by multilateral agreements and global international organizations like the WTO therein.[108] Rather, the divergences manifest themselves first and foremost also in the two overall fundamentally different approaches to the involvement of non-state economic entities in the respective regulatory processes of these two normative systems. Whereas on the one side, in the multilateral regime on trade in goods and services, private business actors usually do not enjoy any recognized legal status under WTO law,[109] in particular as far as the decision-making as well as dispute settlement processes are concerned, and are thus largely confined to informal means of participation, international investment law, on the other side, not only provides for various venues of direct involvement in the law-making and dispute settlement processes, but also contributes to the emerging recognition of corporations and other types of private investors as at least partial subjects of international law.[110] Again, it appears not too far-fetched to presume that the more direct involvement of foreign investors and the resulting "triangle relationship" comprised of these investors, their home states, and their host states as being so characteristic of international investment law can also be attributed to the specific business nature of foreign investments as compared to trade in goods and services. However, at least the argument that the granting of rights to private economic actors like foreign investors should be balanced by also imposing certain obligations on them, being so prominent in international investment law today, does not appear, in light of these structural differences, to be easily directly applicable to the normative realm established by the WTO.

That said, it seems nevertheless worth recalling that the protection of private actors is also at the core of a considerable number of provisions of the WTO legal order.[111] This is for example vividly illustrated by the statement of the Panel in *United States – Sections 301-310 of the Trade Act of 1974*: "However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market place. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish."[112] Against the background of these substantial benefits, albeit not necessarily legal entitlements, enjoyed by non-state economic actors also under the WTO

108 On this perception see, e.g., *Kurtz*, The WTO and International Investment Law, 41 ("the failure of the ITO marked a fundamental shift away from multilateralism in the coverage of investment issues"); *Kurtz*, in: Sacerdoti *et al.* (eds.), General Interests of Host States in International Investment Law, 104 (105) ("highly diffuse with no real common institutional core"); *Wu*, in: Douglas/Pauwelyn/Viñuales (eds.), The Foundations of International Investment Law, 169 *et seq.*; *Pauwelyn*, ICSID Review – Foreign Investment Law Journal 29 (2014), 372 (373 *et seq.*), with further references.

109 For a critical discussion of this finding, in particular in light of the clearly also "individual-oriented" dimension of WTO law, see already, e.g., *Tietje/Nowrot*, European Business Organization Law Review 5 (2004), 321 (324 *et seq.*), with further references.

110 For a more comprehensive assessment of these findings see *Nowrot*, Indiana Journal of Global Legal Studies 18 (2011), 803 (808 *et seq.*), with numerous further references.

111 See thereto, e.g., *Tietje/Nowrot*, European Business Organization Law Review 5 (2004), 321 (327 *et seq.*), with further references.

112 WTO, *United States – Sections 301-310 of the Trade Act of 1974*, Report of the Panel of 11 December 1999, WT/DS152/R, para. 7.73.

legal order, the idea of balancing them by also stipulating respective responsibilities or at least societal expectations in this multilateral trade regime appears not to be entirely unreasonable.

Moreover, and at least equally noteworthy, it has been rightly emphasized in the legal literature that, despite the existing differences between these two main branches of international economic law, one of the main reasons for an increasingly visible convergence of international trade law and international investment law is the common challenge of how to incorporate non-economic concerns like the protection of human rights and consumer interests, the promotion of sustainable development, cultural diversity and environmental objectives as well as the enforcement of core labor and social standards into the respective normative structures.[113] In particular, it thereby applies also to the realm of international trade law that the regulatory processes aimed at achieving "the balance […] between trade and non-trade-related concerns" in this connection[114] also increasingly involve a certain recognition of corporate (legal and social) responsibility for the protection and promotion of broader public interest concerns. Aside from related autonomous foreign trade instruments like the 2017 EU Conflict Minerals Regulation,[115] this trend is first and foremost evidenced by more recent treaty practice in the realm of free trade agreements and other regional economic integration arrangements. In the preamble of the Comprehensive Economic Partnership Agreement concluded between Indonesia and the EFTA States on 16 December 2018 the contracting parties acknowledge, among others, the "importance of good corporate governance and corporate social responsibility for sustainable development" and affirm "their aim to encourage enterprises to observe internationally recognised guidelines and principles in this respect, such as the OECD Guidelines for Multinational Enterprises, the OECD Principles of Corporate Governance and the UN Global Compact".[116] Furthermore, Article 13.6 (2) 2nd sentence of the EU-Korea free trade agreement that took effect in July 2011 stipulates in this regard that the parties "shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability".[117]

The same applies for example to Article 293 (3) of the EU-Ukraine association agreement of March/June 2014,[118] Article 271 (3) of the trade agreement concluded by the EU with Colombia and Peru on 26 June 2012[119] as well as Article 22.3 (2) lit. b, Article 24.12 (1) lit. c and Article 25.4 (2) lit. c of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU of 30 September 2016.[120] Even more recently, Article 16.5 lit. e of the Economic Partnership Agreement signed by the EU and Japan on 17 July 2018 and having

113 See more recently for example *Cho/Kurtz*, European Journal of International Law 29 (2018), 169 (170) ("In our view, the real convergence driver is a common strategic challenge. Both systems have been forced to overcome a structural (legal-institutional) prioritization of market access or protection of rights or privileges of foreign stakeholders (traders or investors) vis-à-vis competing social regulatory concerns. Striking an appropriate balance between these vital goals is central.").

114 WTO, *China – Measures Related to the Exportation of Various Raw Materials*, Report of the Appellate Body of 30 January 2012, WT/DS394, 395, 398/AB/R, para. 306 ("we understand the WTO Agreement, as a whole, to reflect the balance struck by WTO Members between trade and non-trade-related concerns").

115 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ EU L 130/1 of 19 May 2017. See thereto, e.g., *Nowrot*, in: Feichtner/Krajewski/Roesch (eds.), Human Rights in the Extractive Industries, 51 *et seq.*, with further references.

116 Comprehensive Economic Partnership Agreement the Republic of Indonesia and the EFTA States of 16 December 2018, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3873/efta-states---indonesia-epa-2018-> (accessed 7 January 2020).

117 OJ EU L 127/6 of 14 May 2011.

118 OJ EU L 161/3 of L161/3 of 29 May 2014.

119 OJ EU L 354/3 of 21 December 2012.

120 OJ EU L 11/23 of 14 January 2017.

entered into force on 1 February 2019 stipulates that the parties "shall encourage corporate social responsibility", and the subsequent Article 16.12 lit. e of the agreement states in this regard that the EU and Japan "cooperate to promote corporate social responsibility, notably through the exchange of information and best practices, including on adherence, implementation, follow-up, and dissemination of internationally agreed guidelines and principles".[121]

When applying the conceptual approach of systemizing the different types of investors' obligations as introduced above[122] to the present context of international trade law, it seems fair to say that most of the relevant provisions belong to the category of merely indirect obligations of conduct as well as especially to the class of stipulations that signal a commitment to corporate social responsibility by the contracting parties. This finding is not only in line with related observations made with regard to international investment agreements. Rather, it also appears to indicate an in principle quite suitable steering technique concerning the issue of corporate responsibility in the field of international trade law, bearing in mind that the stipulation of direct obligations of conduct is, in the realm of international investment law, currently often regarded as a necessary or at least desirable complement to the rights of foreign investors under the respective treaties; an element of direct legal empowerment that is until now missing in most regional trade agreements as well as in the normative regime established by the WTO. Consequently, relying on indirect obligations of conduct and CSR signalling provisions also seems to be the appropriate regulatory approach for the multilateral trading system and its legal order; a normative governance concept whose implementation could and in fact should also be realized in the realm of the WTO, if only in order to prevent this global legal regime from falling too far behind the essential dynamic and progressive developments increasingly visible in this regard in the realm of regional trade agreements.

## E. Conclusion

The issue of investors' public obligations towards the societies in which they operate is unlikely to vanish from the discourses on and practice of international investment law any time soon. Closely intertwined with and stimulated by the broader discussions on how to integrate non-state actors into the normative structure of the international system, numerous developments justify the conclusion that this subject has emerged as an important component of the current processes aimed at what can be qualified as no less than a reformation of this area of law by rebalancing the rights and obligations of states and investors. However, providing for politically feasible, acceptable, and thus sustainable answers to the questions surrounding the multi-faceted concept of corporate responsibility in international economic law is not only among the main tasks that need to be accomplished in the treaty-making processes of international investment law. The same applies to the – in this regard not so different – realm of international trade law as already today evidenced by the respective stipulations in an increasing number of regional economic integration agreements. In the interest of effectively promoting and protecting global public goods, it is to be hoped for that the WTO legal order – despite the numerous challenges it is currently faced with – is soon joining the ranks.

121 OJ EU L 330/3 of 27 December 2018.
122 See *supra* under B.

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