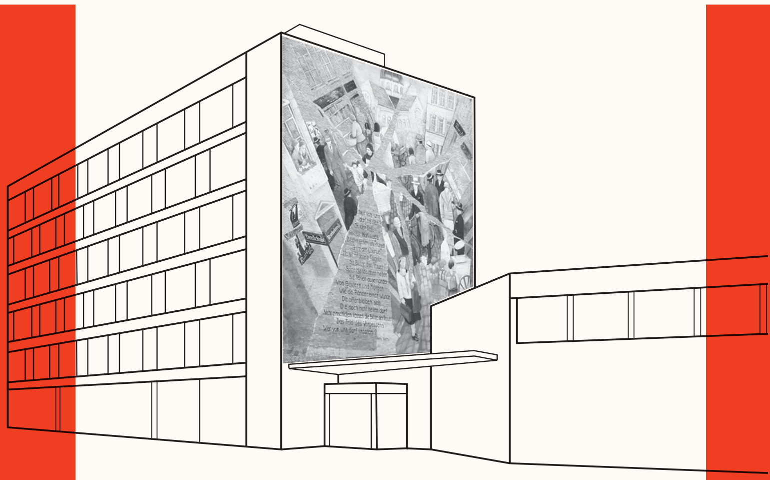

Kristina Hellwig/Karsten Nowrot

# Towards Investors' Responsibilities in International Investment Agreements – A Path for China?

Rechtswissenschaftliche
Beiträge der
Hamburger Sozialökonomie

Heft 46

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# Contents

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

Since the beginning of the 1990s, the international legal framework on the protection of foreign investments has 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 first decade of the new century. This transition period was overall characterized by an enhancement of the legal protection of foreign investors and their investment activities driven by 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 then older bilateral investment treaties.[3] Hence, this period first and foremost resulted in foreign investors experiencing a notable strengthening of their status and international legal protection, thereby also "marking another step in their transition from objects to subjects of international law", particularly on the basis of access to effective international legal remedies.[4]

* The contribution is based on a presentation given by the authors at the Webinar "New Dynamics in the Post-COVID Context: International Investment Law and Beyond" organized by the Herbert Smith Freehills China International Business and Economic Law (CIBEL) Centre of the University of New South Wales Faculty of Law in Sydney/Australia in the context of the 2021 CIBEL Global Network Conference "New Opportunities and Challenges to International Economic Law" on 1 October 2021.

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."); *Reinisch*, International Investment Law, 2 ("Other than the rather scarce case law of international courts, investment tribunals offered 'international law in action'").

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/Nowrot (eds.), Internationales Wirtschaftsrecht, 454 (457 *et seq.*); *Salacuse*, The Law of Investment Treaties, 52 *et seq.*

3 On this last-mentioned issue see for example *Radi*, Rules and Practices of International Investment Law, 13 ("It is worth mentioning that the first BITs concluded provided only for an inter-State dispute settlement mechanism."); *Muchlinski*, Multinational Enterprises and the Law, 680 ("Early BITs did not cover 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 *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., *David Aven et al. v. Costa Rica*, ICSID Case No. UNCT/15/3, Award of 18 September 2018, para. 738 ("Under international law of investments, particularly under DR-CAFTA, the investors enjoy by themselves a number of rights both substantive and procedural, including the right to sue directly the host State when it breaches its international obligations on foreign investment (Section A of Article 10 in DR-CAFTA)."); *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 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

At present, we are again witnessing a major – and potentially even more fundamental – era of reformation or "reconceptualization" in the development of international investment law.[5] In contrast to the previous period, the currently visible 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 finds its manifestation in treaty practice[7] is, first and foremost characterized and 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 the sometimes rather negatively perceived effects of the hitherto established international investment protection framework,[10] there is growing recognition among

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.").

5 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.").

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

governments of industrialized and developing countries, practitioners and scholars alike, that the central challenge lawmakers and arbitrators are facing today is the need to provide an appropriate and thus acceptable balance between the legally protected economic interests of foreign investors and the domestic and international governance capacity of host states in order 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 an increase in the negative perception of international investment law and 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, the possibility to address the issue of investors' obligations in the respective investment treaty-making processes is gaining recognition and momentum.[14] As the topic of investors' obligations has until recently not featured a very prominent role in discussions and policy approaches regarding the international treaty regime dealing with the protection of foreign investments, this developments are of rather innovative character. Overall, international investment law is traditionally – and also today – primarily concerned with the protection of foreign investors and their investments.[15] This is already indicated by the fact that most of the currently more than 2.940 bilateral investment treaties[16] are titled "Treaty Concerning the Promotion and Protection of Investments" or in line with some variations thereof. 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.[17]

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.*

11 See thereto also, e.g., UNCTAD, UNCTAD's Reform Package for the International Investment Regime, 2018 Edition, 23 ("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 20 October 2021); 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"); *Sornarajah*, The International Law on Foreign Investment, 271 *et seq.*; *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; *Reinisch*, International Investment Law, 3 and 129 *et seq.*; *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 See also, e.g., *Krajewski*, Business and Human Rights Journal 5 (2020), 105 (113) ("Incorporating investor obligations in international investment treaties constitutes an important element of the reform process of international investment law."); *Lam/Guo*, Journal of International Economic Law 24 (2021), 321 (324).

15 On this perception see also for example *Salacuse*, The Law of Investment Treaties, 142 *et seq.*; *Salacuse*, The Three Laws of International Investment, 355 *et seq.*

16 UNCTAD, World Investment Report 2021, Investing in Sustainable Recovery, 2021, 123.

17 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, […]."); *Marcoux/Bjorklund*, International and Comparative Law

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 contribute 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 course of their business activities within 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.[18] 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,[19] that "the prosperity of the natives must be previously secured, before any profit from them whatsoever is attempted".[20]

Within the international regulatory framework for foreign investments itself, however, these concerns have conventionally for the most part been 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.[21] While 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, 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,[22] the ILO Tripartite Declaration of Principles Concerning Mul-

Quarterly 69 (2020), 877 (894) ("the overwhelming majority of international investment agreements do not include direct obligations for foreign investors"); *Choudhury*, ICSID Review – Foreign Investment Law Journal 35 (2020), 82 (83) ("These asymmetries arise because the substantive content of IIAs is primarily devoted to outlining the standards of treatment that host States must accord to foreign investors, without imposing corresponding obligations on them."); *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); *Krajewski*, Wirtschaftsvölkerrecht, 216; *Nowrot*, 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, 2018 Edition, 65 ("Most IIAs are asymmetrical in that they set out obligations only for States and not for investors.").

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

19 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.

20 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.").

21 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.*).

22 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 20 October 2021). 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

tinational Enterprises and Social Policy as adopted by the ILO Governing Body on 17 November 1977 and most recently amended in March 2017,[23] the United Nations Global Compact, founded in 1999 at the initiative of the then UN Secretary-General *Kofi Annan*,[24] 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.[25]

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[26] – 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. In addition to the previously mentioned and ongoing structural developments within the realm of international investment law aimed at a reformation or reconceptualization of this transnational legal realm, 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.[27] 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[28] – are literally at the center of these discourses. In order to illustrate

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.

23 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 20 October 2021). Generally thereto see, e.g., *Weilert*, Max Planck Yearbook of United Nations Law 14 (2010), 445 (464 *et seq.*).

24 Additional information on the United Nations Global Compact are available under: <www.unglobalcompact.org/> (accessed 20 October 2021). 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.

25 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. Generally on the UN Human Rights Council established in 2006 see, e.g., *Higgins/Webb/Akande/Sivakumaran/Sloan*, Oppenheim's International Law, United Nations, Vol. II, 755 *et seq.*, with further references.

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

27 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.*

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

this perception, one only needs to draw attention to the ever-growing literature on respective international obligations of transnational corporations[29] as well as numerous related initiatives, prominently among them the Open-ended Intergovernmental Working Group on 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 that has more recently – in August 2021 – published its "Third Revised Draft" entitled "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises".[30] Furthermore, the 1990s as well as subsequent decades bore witness to numerous civil lawsuits in domestic courts 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 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]

Interest in International Investment Law, 57.

29 On this perception see more recently, e.g., *Henriksen*, International Law, 76 ("a booming literature"). From the numerous contributions see for example *Ruggie*, Just Business – Multinational Corporations and Human Rights, 1 *et seq.*; *Karavias*, Corporate Obligations under International Law, 6 *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.*; *Morgera*, Corporate Environmental Accountability in International Law, 2020; *Nowrot*, Philippine Law Journal 80 (2006), 563 *et seq.*; *Nowrot*, in: Tietje/Nowrot (eds.), Internationales Wirtschaftsrecht, 906 *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; *López Latorre*, Business and Human Rights Journal 5 (2020), 56 *et seq.*

30 See thereto *supra* under D.

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.

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

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 actively involved in, and concerned with, 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, with particular attention to recent investment policy and treaty-making practice on the one hand as well as to the potential role of China in these processes on the other hand. For these purposes, an attempt will be made to approach this research subject in three main steps and by way of adopting three different perspectives. The first part adopts a substantive law perspective and identifies the different manifestations of investors' obligations in current international investment agreements, among them direct obligations of conduct, indirect obligations of conduct as well as provisions signaling a commitment to corporate social responsibility by the contracting parties (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 briefly addressed (C.). Finally, in the third part, adopting a more overarching policy-oriented perspective, an attempt will be made to identify and assess the potential future global role of one of the central actors in today's international economic system and its legal order, the People's Republic of China, with regard to addressing the issue of investors' obligations in investment treaty-making processes (D.).

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., *Radi*, Rules and Practices of International Investment Law, 16-17; *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 20 October 2021); 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 2.940 bilateral investment treaties together with roughly 420 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 (I.), indirect obligations of conduct (II.) as well as provisions signaling a commitment to corporate social responsibility by the contracting parties (III.).[37]

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

The first category encompasses legal obligations of investors 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 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. For instance, 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 2021, Investing in Sustainable Recovery, 2021, 123.

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

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' – 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" in Article 11.[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] in Article 11 of the bilateral investment treaty concluded between Argentina and Qatar on 6 November 2016[42] as well as in Article 11 (a) of the Brazil-India investment agreement signed on 25 January 2020.[43]

More noticeable and specific, however, Article 16 of the 2007 COMESA Investment Agreement also stipulates 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[44] 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

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 20 October 2021).

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 20 October 2021).

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 20 October 2021).

43 Investment Cooperation and Facilitation Treaty between Brazil and India of 25 January 2020, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4910/brazil---india-bit-2020-> (accessed 20 October 2021).

44 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 20 October 2021).

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 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[45].

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.[46] Article 14 of this investment treaty requires foreign investors, 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. Further, 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). Additionally, 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), 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 signed an investment treaty on 24 September 2018 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".[47] Moreover, Article 11 (iv) of the same agreement foresees that foreign investors shall "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". Quite similar obligations of foreign investors are for example also stipulated in Art. 12 (b) and (d) of the Brazil-India investment agreement signed on 25 January 2020 as well as in Article 11 (ii) and (iv) of the bilateral investment treaty concluded by India with Kyrgyzstan on 14 June 2019.[48]

45 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 20 October 2021).

46 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 20 October 2021). 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); *Zugliani*, International and Comparative Law Quarterly 68 (2019), 761 *et seq.*; *Krajewski*, Business and Human Rights Journal 5 (2020), 105 (113 *et seq.*); as well as more comprehensively *Ejims*, ICSID Review – Foreign Investment Law Journal 34 (2019), 62 (74 *et seq.*).

47 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 20 October 2021).

48 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4909/india---kyrgyzstan-bit-2019-> (accessed 20 October

In addition, a number of countries like for example Ghana and Botswana[49] as well as more recently India,[50] Colombia,[51] the Belgium-Luxembourg Economic Union[52] and six economies of the Western Balkan region[53] as well as international organizations like SADC[54] and the African Union[55] have included respective provisions on investors' obligations in their model bilateral investment treaties and related guiding instruments.

From a broader perspective, already these few examples 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.[56] Consequently, there are in general also no systematic objections to incorporating 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 viewpoint of general public international law, undoubtedly a possible and admissible option when discussing potential regulatory techniques aimed at ensuring an appropriate balance 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 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.[57]

2021).

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

50 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 20 October 2021); 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.*

51 2017 Colombia Model BIT, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements> (accessed 20 October 2021).

52 See Article 18 (1) of the 2019 Belgium-Luxembourg Economic Union Model BIT, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements> (accessed 20 October 2021). See thereto also *Krajewski*, Business and Human Rights Journal 5 (2020), 105 (116).

53 See Western Balkans Six: Regionally Accepted Standards for Negotiating International Investment Agreements of 10 November 2020, p. 7, available on the internet under: <https://www.rcc.int/docs/562/wb6-regionally-accepted-standards-for-negotiating-iias> (accessed 20 October 2021). See thereto also UNCTAD, World Investment Report 2021, Investing in Sustainable Recovery, 2021, 127-128.

54 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 20 October 2021).

55 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.

56 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).

57 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, 2018 Edition, 65 *et seq.*; *Sornarajah*, The International Law

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.[58] 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 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 complex issues arise such as the questions which standards on precisely what concerns are to 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. This issue is reflected in the examples presented above, in which the chosen approaches are quite diverse regarding specific details. Further, the discussion on what could be the appropriate legal consequences for violations of investors' obligations in investment treaties is still far from being concluded. 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.[59]

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 World Trade Organization (WTO)[60] – would ultimately amount to an unreflected application to private persons and entities of obligations

on Foreign Investment, 176 *et seq.*, 271 *et seq.*, 284 *et seq.*; *Hang*, Fordham International Law Journal 37 (2014), 1215 (1259 *et seq.*); *Hepburn/Kuuya*, in: Cordonier Segger/Gehring/Newcombe (eds.), 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.*).

58 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.*).

59 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.*

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

originally addressed to states only. This approach 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, potentially new enforcement venues, another step that would considerably modify the normative structure of investment agreements.[61] That said it is not implied that respective proposals have not yet been made and even occasionally implemented in investment treaty practice.[62] 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. Therefore, the analysis will now turn to these more common approaches.

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

Among the applied 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 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.[63] 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

61 *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 […].").

62 See thereto also *infra* under C.

63 Generally on this regulatory approach in international law see also, e.g., *Vazquez*, Columbia Journal of Transnational Law 43 (2005), 927 (930); *Dörr*, Berichte der Deutschen Gesellschaft für Internationales Recht 50 (2020), 133 (144 *et seq.*); *Nowrot/Sipiorski*, in: Fach Gómez/Gougourinis/Titi (eds.), International Investment Law and Competition Law, 135 (142 *et seq.*).

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).[64] 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 Georgia of 29 January 2021 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".[65]

This approach provides more freedom in the potential domestic implementation of investors' obligations as the stipulated rules within the international treaties can leave considerable room for interpretation. Depending on the perspective, this can be seen both as a weakness and as a strength as, one the one hand, the overall possibility for investors' obligations within investment treaties provides states with the freedom to further social and community interests on a domestic level, however, on the other hand, very open formulations do not ensure that the potentially quite different national approaches still remain within the scope of the objective set by the contracting parties while implementing the treaties. Nonetheless, the embedding of similar provisions in investment treaties indicates that states are showing an increasing willingness to evolve the approaches that have prevailed to date.

### 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.[66] Thereby, a number of agreements emphasize the importance of these issues in their

64 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.

65 Agreement between Japan and Georgia for the Liberalisation, Promotion and Protection of Investments of 29 January 2021, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4962/georgia---japan-bit-2021-> (accessed 20 October 2021). See also, e.g., Article 9 of the 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 20 October 2021); Article 11 of the Agreement between the Government of Japan and the Government of the Republic of the 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 20 October 2021). Generally on this as well as other types of anti-corruption provisions see for example more recently *Yan*, Journal of International Economic Law 23 (2020), 989 *et seq.*, with additional references.

66 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 (eds.),

preambles.[67] 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".[68] 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".[69]

Moreover, Hungary and Kyrgyzstan stress in the preamble of their investment agreement concluded on 29 September 2020 their intention to "to ensure that investment is consistent with the protection of health, safety and the environment, the promotion and protection of internationally and domestically recognised human rights, labour rights, and internationally recognised standards of corporate social responsibility".[70] 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".[71]

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

Sustainable Development in World Investment Law, 589 (601 *et seq.*).

67 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.*; *Gardiner*, in: Hollis (ed.), Oxford Guide to Treaties, 459 (465); *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; *de Nanteuil*, International Investment Law, 378-379; *Gazzini*, Interpretation of International Investment Treaties, 157 *et seq.*

68 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 20 October 2021). See also, e.g., *Reinisch*, in: Brown (ed.), Commentaries on Selected Model Investment Treaties, 15 (21).

69 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 20 October 2021).

70 The text of the agreement is available under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4936/hungary---kyrgyzstan-bit-2020-> (accessed 20 October 2021).

71 The text of the agreement is available under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3633> (accessed 20 October 2021).

The Parties should remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies."[72]

In addition, Article 7.18 of the investment chapter included in the Comprehensive Economic Partnership Agreement signed by Indonesia and the Republic of Korea on 18 December 2020 states that "[e]ach Party reaffirms the importance of encouraging enterprises operating within its territory 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 that Party".[73] Moreover, 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).[74] 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,[75] 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".[76]

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,[77] in Article 14.17 of the Agreement between the United States of America, the United Mexican States, and Canada (USMCA) of 30 November 2018,[78] in Article 12 of the Brazil-India investment agreement signed on 25 January 2020, in Article 16 of the bilateral

72 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 20 October 2021).

73 Investment Chapter of the Indonesia-Korea Comprehensive Economic Partnership Agreement of 18 December 2020, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/4970/indonesia---republic-of-korea-cepa-2020-> (accessed 20 October 2021).

74 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 20 October 2021).

75 The respective Pacific island states include 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.

76 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 20 October 2021).

77 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 20 October 2021).

78 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 20 October 2021).

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,[79] in Article 17 of the bilateral investment treaty between Argentina and Japan of 1 December 2018,[80] in Article 816 in the investment chapter of the free trade agreement between Canada and Colombia that entered into force on 15 August 2011,[81] in Article 16 of the Australia-Hong Kong bilateral investment treaty of 26 March 2019,[82] in Article 7 of the new Dutch Model BIT published by the Dutch government on 22 March 2019,[83] in Article 16 of the new Canadian Model BIT as published on 12 May 2021,[84] 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,[85] in Article 14 of the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol of 7 April 2017,[86] in Article 15 of the investment cooperation and facilitation agreement signed between Brazil and Suriname on 2 May 2018,[87] in Article 13 of the Hong Kong-Mexico bilateral investment treaty that entered into force on 16 June 2021,[88] in Article 14 of the respective international investment treaty concluded by Ethiopia and Brazil on 11 April 2018[89] and in Article 14.17 of the Australia-Indonesia Comprehensive Economic Partnership Agreement of 4 March 2019.[90]

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

79 The text of the agreement is available under: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3717> (accessed 20 October 2021).

80 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 20 October 2021).

81 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 20 October 2021).

82 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 20 October 2021).

83 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 20 October 2021). Generally thereto see also, e.g., *Duggal/van de Ven*, Arbitration International 35 (2019), 347 *et seq.*; *Lavranos*, Arbitration International 36 (2020), 441 *et seq.*

84 Canadian Model Foreign Investment Promotion and Protection Agreement of 12 May 2021, available on the internet under: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng> (accessed 20 October 2021).

85 For the text of this bilateral investment treaty see: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3706> (accessed 20 October 2021).

86 The text of the protocol is available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3772> (accessed 20 October 2021).

87 The text of the agreement is available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3815> (accessed 20 October 2021). 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.*

88 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4968/hong-kong-china-sar---mexico-bit-2020-> (accessed 20 October 2021).

89 For the text of this investment treaty see: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3816> (accessed 20 October 2021).

90 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 20 October 2021).

they operate".[91] 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 have been endorsed or are supported by that Party".[92] 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".[93]

Although this last mentioned type of provisions does not envision any legally binding obligations for foreign investors, it 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.[94] 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 and even though not binding, such stipulation can, arguably to a rather limited degree, influence the overall interpretation of treaty provisions.

91 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 20 October 2021).

92 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 20 October 2021).

93 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.

94 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, 2018 Edition, 66-67; *Dimopoulos*, in: Delimatsis (ed.), The Law, Economics and Politics of International Standardisation, 338 (356 *et seq.*); see, however, for a more reserved perception also *Marcoux*, Leiden Journal of International Law 34 (2021), 109 (116 *et seq.*).

## 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[95] 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 stipulate respective 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,[96] and the implications of other forms of "unconscionable conduct" on the side of the foreign investor,[97] do not concern direct investors' obligations in the narrow sense of the meaning. Rather, they more closely resemble, behavioural expectations being incumbent upon investors on the basis of the principle of good faith,[98] 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[99] or, alternatively, might be taken into

95 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.*

96 *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.

97 *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.*).

98 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.

99 See thereto also already for example *Tietje/Klimke*, in: Ehlers/Schoch (eds.), Rechtsschutz im Öffentlichen Recht,

account in calculating the damages to be awarded to the claimant investor.[100]

Nevertheless, another indirect approach particularly in the form of counterclaims initiated by the host country in investor-State arbitration proceedings[101] 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 (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.[102] Relying on a comparatively broad reading[103] of the relevant provisions of Article 46 ICSID Convention[104] and of Article X of the bilateral investment treaty

85 (112); *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.*).

100 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; *Krajewski*, Business and Human Rights Journal 5 (2020), 105 (125 *et seq.*); as well as more generally *Marcoux/Bjorklund*, International and Comparative Law Quarterly 69 (2020), 877 *et seq.* See in this connection also Article 23 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."

101 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 discussion about 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.*); *Shao*, Journal of International Economic Law 24 (2021), 157 *et seq.*, with further references.

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

103 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 20 October 2021); *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.*

104 Generally on the requirements stipulated in this provision see, e.g., *Schreuer/Malintoppi/Reinisch/Sinclair*, The ICSID Convention, Article 46, paras. 1 *et seq.*; *Kalnina/Godbole*, in: Fouret/Gerbay/Alvarez (eds.), The ICSID Convention, Article 46, paras. 4.430 *et seq.*, each with further references.

concluded between Argentina and Spain of 3 October 1991,[105] the arbitration tribunal indeed found that it has jurisdiction to deal with Argentina's counterclaim,[106] 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[107] is quite far from being something even close to convincing.[108] But that is another story.

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"

105 The text of this agreement is available under: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/154> (accessed 20 October 2021).

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

107 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.*).

108 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 20 October 2021); *Abel*, Brill Open Law 2018, 1 (11 *et seq.*); *Krajewski*, Human Rights in International Investment Law, 4 *et seq.*; *Krajewski*, Business and Human Rights Journal 5 (2020), 105 (122 *et seq.*); *De Brabandere*, in: Krajewski/Hoffmann (eds.), Research Handbook on Foreign Direct Investment, 619 (624 *et seq.*); *Hilpold*, Berichte der Deutschen Gesellschaft für Internationales Recht 50 (2020), 185 (216 *et seq.*); *Nowrot*, in: Krajewski (ed.), Staatliche Schutzpflichten und unternehmerische Verantwortung, 3 (17 *et seq.*); *Nowrot*, in: Tietje/Nowrot (eds.), Internationales Wirtschaftsrecht, 906 (918).

(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.

Obviously, there are 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.[109] Furthermore, in the literature, it has even been sporadically proposed to 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.[110] Although 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,[111] it appears, considering the reluctance displayed by states in this regard as well as in light of a number of other obstacles,[112] 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".[113] A related provision can be found in the 2008 ECOWAS

109 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.*

110 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).

111 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*.).

112 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.").

113 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

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. […]."[114] 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."[115]

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,[116] 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.

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, 2018 Edition, 67.

114 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.".

115 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 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.".

116 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 20 October 2021). 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, […].".

## D. Overarching Policy-Oriented Perspective: What Role for China?

The analysis in the previous sections serves as a clear indication that the concept of investors’ responsibilities, while almost unknown in investment treaty practice until the beginning of this century, 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 this 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 legitimately be asked as to the potential future global role of one of the dominant players in today’s international economic system and its legal order, the People’s Republic of China, with regard to promoting the issue of investors’ obligations in investment treaty-making processes.

It is well-known that China’s network of investment agreements is vast and global in reach. As of October 2021, the country has concluded 124 bilateral investment agreements alone, of which 107 are currently in force. In addition, it has signed 24 other treaties with investment provisions (most of them regional economic integration agreements), with 19 of them in force.[117] That makes China one of the economies with the highest number of international investment agreements. Despite this high number of respective treaties, however, the issue of investors’ obligations is not prominently featured in most of China’s investment agreements; and this also applies to what we have termed here the more “gentle” – and more common – form of stipulations that signal a commitment to corporate social responsibility by the contracting parties.[118] Even if one rightly takes into account that China has concluded most of its investment treaties in the 1980s, the 1990s as well as the first decade of the new century and thus largely at a time before the current reformation processes in international investment law have started to gain momentum, this finding, in general, also holds true for the – comparatively few[119] – respective agreements signed more recently in the 2010s.

Among the few notable examples of the opposite is the bilateral investment treaty concluded by China and Tanzania on 24 March 2013 that entered into force on 17 April 2014 and states in its preamble that the contracting parties encourage investors to respect corporate social responsibility.[120] Moreover, the free trade agreement between China and Switzerland, signed on 6 July 2013 and admittedly stipulating in its Chapter 9 only comparatively limited provisions on investment promotion, 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 recognised guidelines and principles in this respect”.[121] Finally, and

117 See thereto the information provided by UNCTAD as available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> (accessed 20 October 2021).

118 See thereto *supra* under B.III.

119 For a discussion of the background and the possible reasons for this “abstinence” in particular as far as bilateral investment agreements are concerned see, e.g., *Chaisse/Kirkwood*, Journal of International Economic Law 23 (2020), 245 (246 *et seq.*), with further references. See, however, in this connection also for an in-depth assessment of the new domestic Foreign Investment Law of China that entered into force on 1 January 2020 *Zheng*, Journal of World Investment and Trade 22 (2021), 388 *et seq.*

120 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 20 October 2021).

121 Free Trade Agreement between the Swiss Confederation and the People’s Republic of China, in force since 1 July 2014, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3404/china---switzerland-fta-2013-> (accessed 20 October 2021).

despite the fact that its fate currently hangs somewhat in the balance, in this context, attention should also be drawn to the Comprehensive Agreement on Investment on which China and the European Union have reached and announced an agreement in principle on 30 December 2020. The currently envisioned text of this treaty's preamble emphasizes the commitment of the parties "to encourage enterprises to respect corporate social responsibility or responsible business conduct". In addition, the agreement includes a whole section bearing the title "Investment and Sustainable Development" (Section VI). This – judged by the standards of "ordinary" bilateral investment agreements – quite lengthy section stipulates, among others, in Article 2 (2) of its Sub-section I that each party "agrees to promote responsible business practices, including by encouraging the voluntary uptake of relevant practices by businesses, taking into account relevant internationally recognised guidelines and principles, such as the UN Global Compact, the UN Guiding Principles on Business and Human Rights, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the OECD Guidelines for Multinational Enterprises" and states in this regard in Article 2 (3) that the parties also "commit to exchanging information and, as appropriate, cooperating on promoting responsible business practices".[122]

Despite these examples the incontrovertible fact remains that China, in notable contrast especially also to other BRICS countries like Brazil, India and – albeit on the basis of a different investment policy approach that relies on domestic investment statutes – South Africa[123], is at present not at the forefront of the current global processes aimed at reforming and rebalancing international investment agreements and thus also does not demonstrate transformational governance leadership, as far as addressing and incorporating the issue of investors' obligations is concerned. These three examples taken from more recent Chinese investment treaty practice, albeit notable, can most appropriately be regarded as exceptions that prove the rule, rather than a new approach taken be China. In light of other economic agreements concluded recently by the respective countries or – in the case of the European Union – supranational organization, it can safely be presumed that, as far as the decision to address the issue of corporate responsibility in these three agreements is concerned, China was not the driver, but the driven; or – to phrase it surely more accurately – the negotiating party willing to accommodate the regulatory interests as articulated by the other respective partner.

In light of these findings, it appears indeed not entirely unjustified to categorize China in this regard, and thus also contrary to its current status and progressive activities in other institutional regimes and substantive areas of the international economic legal order,[124] as more of a "status quo country" that overall seems to have accepted and continues to support the mainstream structures, norms and rules of the by now perceived as more traditional investment treaty framework of the previous decades. China has until now rarely acted as a kind of alternative normative power in this international legal regime that actively sought significant changes in the realm of investment treaty-making on the basis of new regulatory approaches

122 For this text of the EU-China Investment Agreement following the agreement in principle announced on 30 December 2020 as published by the European Commission on 22 January 2021 on its website see <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237> (accessed 20 October 2021). For a preliminary assessment of the whole agreement see for example *Ünekbas*, Journal of World Investment and Trade 22 (2021), 347 *et seq.*

123 See UNCTAD, Investment Policy Monitor, Issue 20, December 2018, 4. For a more in-depth assessment of the new South African Protection of Investment Act that came into effect on 13 July 2018 and its investment policy context see, e.g., *Forere*, in: Morosini/Sanchez Badin (eds.), Reconceptualizing International Investment Law from the Global South, 251 *et seq.*

124 For a more in-depth assessment of these activities see, e.g., *Wang*, Journal of International Economic Law 23 (2020), 583 *et seq.*; *Paradise*, Journal of Chinese Political Science 21 (2016), 149 *et seq.*, each with additional references.

and concepts.[125]

Against this background, the question arises whether the current "status quo" approach adopted by China vis-à-vis investment agreements and the (non-)incorporation of investors' obligations therein should be considered as being in need of some modification and assessment or rather as perfectly appropriate in the bigger scheme. After all, it could at least at first sight very well be argued that China is far from alone in its approach towards investment treaty-making as many other countries all over the world have also until now refrained from normatively addressing the issue of corporate responsibility in their investment treaties.

Nevertheless, and quite to the contrary, it is submitted here that in particular in the case of China, the better arguments speak in favor of this country changing its investment policy approach regarding the topic at hand. Recognizing that this comparatively bold proposition appears to be neither self-explanatory nor, at least at first sight, to all readers entirely convincing, we would like to make three main observations and arguments in an attempt to at least briefly illustrate and substantiate some of the underlying considerations of our perception.

### I. China's Support of the UN Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights

First, it seems appropriate to recall that from the very beginning, China has been a supporter of the current initiative aimed at negotiating a treaty on business and human rights in the context of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights. In particular initially, this proposal was far from receiving universal appreciation and applause. The Working Group was established by the UN Human Rights Council in its resolution 26/9 of 26 June 2014. However, the resolution was adopted by a comparatively slim relative majority of 20 votes in favor to 14 against, with 13 abstentions.[126] That said, among the 20 countries that voted in favor of this resolution

125 On these findings as well as the characterization of China as a "status quo country" in the realm of international investment agreements see already *Morosini/Sanchez Badin*, in: Morosini/Sanchez Badin (eds.), Reconceptualizing International Investment Law from the Global South, 1 (35 *et seq.*); *Shaffer/Gao*, Journal of International Economic Law 23 (2020), 607 (627); *Don Harpaz*, Journal of Chinese Political Science 21 (2016), 123 (131 *et seq.*). See also, e.g., the perception expressed by *Cai*, The Rise of China and International Law, 136 ("However, none of these new investment rules have been proposed by China. It thus can be argued that China is still a rule-taker in international lawmaking for investment and has not yet made important progress in the norm entrepreneurship in international investment law."); *Bath*, in: Morosini/Sanchez Badin (eds.), Reconceptualizing International Investment Law from the Global South, 47 ("In practice, China's treaty activity does not demonstrate major dissatisfaction with the current [international investment law] regime or strong synergies with the other members of the Global South whose policies are discussed in this book.").

126 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

was also China. Moreover, China has also been an active participant in the subsequent discussions and negotiations in the Open-ended Intergovernmental Working Group[127] that has more recently – in August 2021 – published its “Third Revised Draft” entitled “Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises”.[128]

A central and quite innovative, albeit not entirely uncontroversially perceived,[129] regulatory element of this treaty project that has been suggested and discussed already during the first session of the Working Group in July 2015 and can also still be found in the most recent 2021 “Third Revised Draft” is concerned with clarifying – and in fact modifying – the relationship between international human rights law on the one hand and trade as well as investment agreements on the other hand on the basis of a treaty clause establishing the primacy of human rights over state obligations arising from international economic treaties.[130] The legally binding implementation of such a standard would clarify some current issues in the context of ongoing arbitration proceedings, however, it would also lead to fundamental changes in the investment

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; Human Rights Council, Report on the Fifth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/43/55 of 9 January 2020; Human Rights Council, Report on the Sixth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/46/73 of 14 January 2021.

127 Generally or an overview of the negotiations as well as for a preliminary assessment of this process see, e.g., *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.*; *McConnell*, International and Comparative Law Quarterly 66 (2017), 143 *et seq.*; *Markiewicz*, Minnesota Journal of International Law 26 (2017), 63 *et seq.*; *Ford/Methven O’Brien*, University of New South Wales Law Journal 40 (2017), 1223 *et seq.*; *Nowrot*, Vertragskonkurrenz zwischen Menschenrechtsverträgen und Wirtschaftsabkommen, 16 *et seq.*; *Papalia*, Perth International Law Journal 3 (2018), 96 *et seq.*; *Birchall*, Suffok Transnational Law Review 42 (2019), 289 *et seq.*; *Bialek*, Goettingen Journal of International Law 9 (2019), 501 *et seq.*

128 Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Third Revised Draft of 17 August 2021, available on the internet under: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session7/Pages/Session7.aspx> (accessed 20 October 2021); 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, Second Revised Draft of 6 August 2020, available on the internet under: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx> (accessed 20 October 2021); 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 20 October 2021); 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 20 October 2021); 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 20 October 2021).

129 See thereto more recently, e.g., Human Rights Council, Report on the Sixth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/46/73 of 14 January 2021, para. 39; as well as *Nowrot*, Vertragskonkurrenz zwischen Menschenrechtsverträgen und Wirtschaftsabkommen, 17 *et seq.*, 33 *et seq.*, with further references.

130 See thereto for example *Krajewski*, Ensuring the Primacy of Human Rights in Trade and Investment Policies, 8 (“During the second session of the Open-ended intergovernmental working group, a number of speakers and discussants raised the question of how a treaty on businesses and human rights might address the potential conflict between trade and investment policies and human rights, and called for treaty elements which would ensure the primacy of human rights.“); *Nowrot*, Vertragskonkurrenz zwischen Menschenrechtsverträgen und Wirtschaftsabkommen, 17 *et seq.*, 33 *et seq.*; *Bialek*, Goettingen Journal of International Law 9 (2019), 501 (523 *et seq.*); *Bilchitz*, Business and Human Rights Journal 1 (2016), 203 (214 *et seq.*); *Cantú Rivera*, University of New South Wales Law Journal 40 (2017), 1200 (1204) (“One of the most important issues raised was the hierarchy of international law, particularly focusing on the clash between international human rights standards and bilateral investment agreements.“).

protection regime as a whole. The most recent 2021 "Third Revised Draft" stipulates in this connection in its Article 14 (5) a twofold obligation of the future contracting parties, applying to existing trade and investment agreements on the one hand (lit. a) and respective future agreements on the other hand (lit. b). Article 14 (5) (a) foresees that the contracting parties shall ensure that all "existing bilateral or multilateral agreements, including regional or sub regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be interpreted and implemented in a manner that does not undermine or restrict their capacity to fulfill their obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments". At least equally noteworthy, with regard to treaties concluded by the contracting parties in the future, Article 14 (5) (b) stipulates that the parties ensure that all "new bilateral or multilateral trade and investment agreements shall be compatible with the States Parties' human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments".[131]

Against this background, and despite the obvious difficulties arising in connection with any reliable prediction as to the chances of this draft treaty on business and human rights being adopted and entering into force in the foreseeable future, it seems not too far-fetched to suggest that a country like China that has from the very beginning actively supported and promoted this treaty project should – particularly in view of a perspective of policy coherence – at least seriously consider how to ensure the compatibility of its investment treaties with the future international regime on the protection of human rights on the basis of, among others, the incorporation of respective investors' obligations.

### II. China's Increasingly Influential Role as a Rule-Maker in International Economic Governance

Second, an important consideration in the present context relates to the well-known fact that China has emerged more recently as one of the dominant players in today's international economic system and its legal order. The transformation of China's role in international economic governance from previously being primarily a mere rule-taker, vividly illustrated for example in the process leading to China's accession to the WTO in 2001, to becoming an increasingly influential – and innovative – rule-maker in many areas of international economic law has already been rightly emphasized and quite comprehensively analyzed in the literature.[132] This currently ever more powerful status in international economic governance puts China in an almost unique position to provide a strong – and potentially decisive – additional regulatory impetus, and thus to play an important exemplary role, in the ongoing global efforts and processes of progressively reforming the international legal framework on the protection of foreign investments with a view to fostering its contribution to sustainable development and the promotion and protection of other global public interest concerns. It is well-known that as far as introducing and promoting innovations in global economic governance are concerned, the

131 Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Third Revised Draft of 17 August 2021, available on the internet under: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session7/Pages/Session7.aspx> (accessed 20 October 2021).

132 From the almost countless contributions dealing with these issues see for example *Wang*, Journal of International Economic Law 23 (2020), 583 *et seq.*; *Shaffer/Gao*, Journal of International Economic Law 23 (2020), 607 *et seq.*; *Paradise*, Journal of Chinese Political Science 21 (2016), 149 *et seq.*, each with numerous further references.

policy approaches adopted by individual economically powerful states can make a real difference.[133] This finding undoubtedly also holds true for China and its potential future role with regard to promoting the issue of investors' obligations in investment treaty-making processes.

Moreover, such a policy shift on the side of China might not only be considered as beneficial from the perspective of fostering the incorporation of broader public interest concerns into investment agreements. Rather, one could argue that there are something like legitimate expectations on China by larger segments of the international community taking into account this country's position as well as the one held by Chinese investors in the global economy. It is well-known that in the previous decade China has transformed from one of the world's largest recipient of foreign direct investments, a development that started already in the 1980s, to becoming now also one of the central capital exporting countries.[134] This process is vividly illustrated by China having acquired the top position as the largest investor in the world in 2020 with outward foreign direct investments reaching $ 133 billion.[135] With Chinese companies thus currently undertaking investments all around the world to an unprecedented extent, and bearing in mind the potential challenges generally arising in connection with such foreign investments for the effective protection and promotion of global public interest concerns, it could reasonably be argued that China – in particular in light of its now undeniable position as a rule-maker and rule-shaper in international economic governance – can be legitimately expected to also contribute to the legal facilitation of more socially responsible investments and investors' behavior in a more active and pronounced manner; especially also as far as this country's approach to investment treaty-making is concerned.

### III. Addressing Political and Social Concerns vis-à-vis Chinese Investors

However, even if one is not entirely willing to fully subscribe in the present context to the proverb "with great power comes great responsibility", an additional third and final consideration – admittedly somewhat closely linked to the last-mentioned aspect – relates to the skepticism vis-à-vis some Chinese investors and their activities that is currently gaining ground in some countries all over the world, among them industrialized as well as developing countries alike. The political and social concerns about the business transactions of foreign investors more recently arising among recipient countries in many parts of the world and the resulting perceived need to, among others, introduce and reinforce national security-related screening mechanisms for foreign investments[136] seem to apply currently first and foremost also to the activities of Chinese state-owned and private enterprises.[137] The reasons are rather complex and include China's growing economic power and the increased relevance of China and its

133 Generally on this finding with regard to the international economic legal order see, e.g., *Klabbers*, International Law, 316 ("Sometimes the influence can stem from single states.").

134 On this transformation see for example *Shaffer/Gao*, Journal of International Economic Law 23 (2020), 607 (625 *et seq.*); *Cai*, The Rise of China and International Law, 132 *et seq.*; *Don Harpaz*, Journal of Chinese Political Science 21 (2016), 123 (132 *et seq.*).

135 UNCTAD, World Investment Report 2021, Investing in Sustainable Recovery, 2021, 7.

136 See thereto, e.g., UNCTAD, National Security-Related Screening Mechanisms for Foreign Investment – An Analysis of Recent Policy Developments, Investment Policy Monitor, Special Issue, December 2019; UNCTAD, World Investment Report 2021, Investing in Sustainable Recovery, 2021, 109 *et seq.*

137 On this perception see also for example *Don Harpaz*, Journal of Chinese Political Science 21 (2016), 123 (141) ("Developed and developing countries alike are concerned about China's growing outward FDI, some are worried about the state-owned nature of China's outward investors, others about losing control of their natural resources."); *Shaffer/Gao*, Journal of International Economic Law 23 (2020), 607 (626).

investors in these markets and subsequent protectionist calls, but also the general skepticism that the investment protection regime faces due to the already mentioned concerns of leading to potential restrictions in the legislative freedom in particular, to protect social, environmental and cultural interests.

Although caution is most certainly always warranted when making historical comparisons, it could nevertheless be argued that in light of these findings, China finds itself currently in a somewhat similar situation like the United States in the 1960s and 1970s. During these decades, the undertaking of foreign investments on a large scale by US-based multinational enterprises[138] and the subsequent behavior of some of these foreign investors in the respective host countries gave rise to increasing political and social concerns in numerous countries; and not always entirely without justification. This applied first and foremost to many developing countries in Latin America, Africa as well as Asia;[139] and it is surely also not to be forgotten that these concerns were one of the central reasons why also China itself "was once hostile to foreign investment".[140] However, it also – temporarily – held true for a considerable number of countries in Western European.[141]

And it were precisely these political and social concerns about the investment activities of US-based companies that decisively contributed to the decision on the side of numerous developing countries to launch the idea of an international legal instrument aimed at regulating and controlling the behavior of in particular multinational enterprises in the beginning of the 1970s on the global plane, intended to form a central component of the New International Economic Order whose establishment these states, supported by the socialist countries, were advocating for.[142] This project found its most prominent manifestation in the negotiations on the adoption of a "Code of Conduct on Transnational Corporations" under the auspices of the United Nations that started in the middle of the 1970s and saw the publication of three draft versions in June 1982, February 1988 as well as June 1990.[143] In the same way as many other elements of

138 For a respective statistical overview covering the 1950s until the beginning of the 1970s see United Nations Department of Economic and Social Affairs, The Impact of Multinational Corporations on Development and on International Relations, 1974, 141 *et seq.* See also, e.g., *Bergsten/Horst/Moran*, American Multinationals, 3 *et seq.*; *Tolentino*, Multinational Corporations, 65 *et seq.*; *Vernon*, Sovereignty at Bay – The Multinational Spread of U.S. Enterprises, 1971.

139 From the numerous literature on this issue see for example *Penrose*, in: Dunning (ed.), The Multinational Enterprise, 221 *et seq.*; *Campos*, Philippine Yearbook of International Law 4 (1975), 105 *et seq.*; *Rotstein*, in: Hahlo/Smith/Wright (eds.), Nationalism and the Multinational Enterprise, 184 *et seq.*; *Kurth*, in: Said/Simmons (eds.), New Sovereigns, 139 *et seq.*; *Negandhi/Baliga*, Quest for Survival and Growth, 13 *et seq.*; *Gordon*, in: Simmonds (ed.), Legal Problems, 21 *et seq.*; *Schreuer*, in: Reinisch (ed.), Österreichisches Handbuch des Völkerrechts, Vol. I, 612; *Perrone*, Investment Treaties and the Legal Imagination, 81 *et seq.*; *Müller*, in: Said/Simmons (eds.), New Sovereigns, 55 *et seq.*; *Cohen/Frieden*, in: Reubens (ed.), Challenge of the New International Economic Order, 147 *et seq.*; as well as the perception expressed by *Seidl-Hohenveldern*, Year Book of World Affairs 29 (1975), 301 (302) ("It is, if anything, an understatement to say that recently multinational enterprises have had a bad press. They have been accused of almost any crime under the sun – of undermining the world's currency system, of corrupting the governments of host States and of fomenting civil war or even international hostilities.").

140 *Cai*, The Rise of China and International Law, 132.

141 See for example the quite influential work by *Servan-Schreiber*, Le Défi Américain, 1967. Generally thereto also, e.g., *Eells*, Global Corporations, 38 *et seq.*; *Hellmann*, Weltunternehmen nur amerikanisch?, 1 *et seq.*; *Feld*, Transnational Business Collaboration, 112 *et seq.*

142 On the idea of regulating and controlling multinational enterprises as a central element of the project of a New International Economic Order see, e.g., *White*, International and Comparative Law Quarterly 24 (1975), 542 (544 *et seq.*); *Magallona*, Philippine Law Journal 53 (1978), 267 *et seq.*; *Tesner*, The United Nations and Business, 18 *et seq.*; *Raman*, Syracuse Journal of International Law and Commerce 6 (1978/79), 17 *et seq.*; *Heinz*, in: Wolfrum/Philipp (eds.), United Nations, Vol. 2, 749 (756).

143 For the third and final draft of this instrument see Draft Code of Conduct on Transnational Corporations, UN Doc. E/1990/94 of 12 June 1990. Generally on this project, the respective negotiations and its ultimate abandonment see, e.g., *Sauvant*, Journal of World Investment and Trade 16 (2015), 11 *et seq.*; *Spröte*, German Yearbook of International Law 33 (1990), 331 (332 *et seq.*); *Ijalaye*, RdC 171 (1981), 9 (48 *et seq.*); *Dell*, United Nations and International Business, 55 *et seq.*; *Fatouros*, in: Horn (ed.), Legal Problems, 103 *et seq.*; *Acquaah*, International Regulation, 108 *et seq.*; *Sen*, Multinational Corporations, 16 *et seq.*

the envisioned New International Economic Order, however, this project – ultimately formally abandoned only in the beginning of the 1990s – faced from the very beginning onwards quite strong resistance by the United States and a number of other Western countries who were more or less fundamentally opposed to stipulating international obligations with regard to multinational corporations and other foreign investors.[144] This rather uncompromising attitude displayed by the United States and other Western countries in the 1970s resulted, in principle hardly surprising, in considerable disappointment and frustration among many developing countries all over the world as well as – at least temporarily – heightened distrust and suspicion vis-à-vis foreign investments, in particular also as far as US-based companies and their investments were concerned. And although the perception of the potential benefits of foreign investments for host states and the role of international investment agreements in this regard has changed considerably in the second half of the 1980s,[145] it is well-known that the negative image in particular of US-based companies and their foreign investments, that emerged in particular in the 1960s and 1970s, is even as of today occasionally resurfacing in the eyes, minds and words of some governments of some countries, especially in the realm of the so-called Global South.

China, being potentially faced with comparable challenges in the future, and in a way also "inheriting" the previously accumulated doubts on foreign investments due to the just mentioned developments, has the chance to largely avoid or at least mitigate such consequences and perceptions in connection with the investment activities of its state-owned and private enterprises. It might choose to adopt an approach on investment policy that could very well be labeled "wiser", compared to the one taken recourse to by the United States when confronted with the issue of investors' responsibilities in the 1970s. It might seriously consider the idea of making use of its increasingly prominent role as a rule-maker in international economic governance by also occupying from now on an even more important exemplary role in the ongoing global efforts and processes of progressively reforming the international legal framework on the protection of foreign investments on the basis of, among others, promoting also the issue of investors' obligations in its investment treaty-making processes.

Moreover, and viewed from a more overarching perspective, one could also draw attention to the argument that a country like China whose investment policy initiatives currently focus, among others, on fostering the concept of investment facilitation[146] might also consider effectively addressing, on the basis of innovative regulatory approaches like stipulating investors' obligations, existing and emerging obstacles and barriers for foreign investors that result from political and social concerns vis-à-vis (certain) investment activities on the side of the host states and their populations.

In light of these findings, it becomes apparent that a more active and progressive policy approach towards the concept of investors' responsibilities and their implementation in practice is in fact also in China's own interest. After all, adopting such an approach has first and foremost also clearly the potential to further enhance the status and reputation of Chinese companies as responsible foreign investors and – consequently – to eliminate, or at least reduce, the political and social concerns currently existing or potentially emerging in the future in a number of recipient countries.

144 Generally thereto for example *Weiß*, German Yearbook of International Law 46 (2003), 171 (177 *et seq.*), with additional references.

145 On this observation see also, e.g., *Vernon*, In the Hurricane's Eye, 5 *et seq.*, 30 *et seq.*; *Schreuer*, in: Reinisch (ed.), Österreichisches Handbuch des Völkerrechts, Vol. I, 612.

146 See thereto, e.g., *Wang*, Journal of International Economic Law 23 (2020), 583 (591 *et seq.*); *Cai*, The Rise of China and International Law, 136.

## 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.[147] 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 investment law is a task that obviously requires the active participation of, and an at least in principle constructive and positive attitude displayed by, as many governmental and non-governmental actors in the international economic system as possible, most certainly including the influential rule-makers in current international economic governance. It is thus to be hoped for that also the People's Republic of China is soon joining the ranks.

147 On this perception see also, e.g., *de Nanteuil*, International Investment Law, 392 ("It is undoubtedly on the question of investors' obligations that international law is likely to evolve in the years to come.").

# References


Abel, Patrick, Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration, Brill Open Law 2018, 1–30.

Acquaah, Kwamena, International Regulation of Transnational Corporations – The New Reality, New York/Westport/London 1986.

Alschner, Wolfgang/Tuerk, Elisabeth, The Role of International Investment Agreements in Fostering Sustainable Development, in: Baetens, Freya (ed.), Investment Law within International Law – Integrationist Perspectives, Cambridge 2013, 217–231.

Alston, Philip, The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?, in: Alston, Philip (ed.), Non-State Actors and Human Rights, Oxford/New York 2005, 3–36.

d'Aspremont, Jean (ed.), Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law, London/New York 2011.

Barnes, Mihaela-Maria, The 'Social License to Operate': An Emerging Concept in the Practice of International Investment Tribunals, Journal of International Dispute Settlement 10 (2019), 328–360.

Bath, Vivienne, The South and Alternative Models of Trade and Investment Regulation: Chinese Investment and Approaches to International Investment Agreements, in: Morosini, Fabio/Sanchez Badin, Michelle Ratton (eds.), Reconceptualizing International Investment Law from the Global South, Cambridge 2018, 47–94.

Bazrafkan, Azernoosh/Herwig, Alexia, Risk, Responsibility, and Fairness in International Investment Law, in: Ambrus, Mónika/Rayfuse, Rosemary/Werner, Wouter (eds.), Risk and the Regulation of Uncertainty in International Law, Oxford 2017, 237–256.

Bergsten, C. Fred/Horst, Thomas/Moran, Theodore H., American Multinationals and American Interests, Washington, D.C. 1978.

Bialek, Julia, Evaluating the Zero Draft on a UN Treaty on Business and Human Rights: What Does it Regulate and how Likely is its Adoption by States?, Goettingen Journal of International Law 9 (2019), 501–536.

Bilchitz, David, The Necessity for a Business and Human Rights Treaty, Business and Human Rights Journal 1 (2016), 203–227.

Birchall, David, Between Apology and Utopia: The Indeterminacies of the Zero Draft Treaty on Business and Human Rights, Suffok Transnational Law Review 42 (2019), 289–325.

Boor, Felix/Nowrot, Karsten, Die Konkretisierung völkervertragsrechtlicher Investitionsschutzstandards: „Schlossallee" oder „Badstraße" auf dem Weg zu mehr Rechtssicherheit?, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 91–105.

Broude, Tomer/Haftel, Yoram Z./Thompson, Alexander, Who Cares about Regulatory Space in BITs? A Comparative International Approach, in: Roberts, Anthea/Stephan, Paul B./Verdier, Pierre-Hugues/Versteeg, Mila (eds.), Comparative International Law, Oxford 2018, 527–545.

Brower, Charles N./Ahmad, Jawad, The State's Corruption Defence, Presecutorial Efforts, and Anti-Corruption Norms in Investment Treaty Arbitration, in: Yannaca-Small, Katia (ed.), Arbitration under International Investment Agreements – A Guide to the Key Issues, 2nd edition, Oxford 2018, 455–481.

Butler, Nicolette/Subedi, Surya, The Future of International Investment Regulation: Towards a World Investment Organisation?, Netherlands International Law Review 64 (2017), 43–72.

Cai, Congyan, The Rise of China and International Law, Oxford 2019.

Campos, M., Multinational Corporations and the Philippines as a Host Country: A Legal Assessment, Philippines Yearbook of International Law 4 (1975), 105–130.

Cantú Rivera, Humberto, Negotiating a Treaty on Business and Human Rights: The Early Stages, University of New South Wales Law Journal 40 (2017), 1200–1222.

Carlos, Ann M./Nicholas, Stephen, "Giants of an Earlier Capitalism": The Chartered Trading Companies as Modern Multinationals, Business History Review 62 (1988), 398–419.

Catá Backer, Larry, Principled Pragmatism in the Elaboration of a Comprehensive Treaty on Business and Human Rights, in: Deva, Surya/Bilchitz, David (eds.), Building a Treaty on Business and Human Rights – Context and Contours, Cambridge 2017, 105–130.

Chaisse, Julien/Kirkwood, Jamieson, Chinese Puzzle: Anatomy of the (Invisible) Belt and Road Investment Treaty, Journal of International Economic Law 23 (2020), 245–269.

Chalamish, Efraim, The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?, Brooklyn Journal of International Law 34 (2009), 303–354.

Choudhury, Barnali, Investor Obligations for Human Rights, ICSID Review – Foreign Investment Law Journal 35 (2020), 82–104.

– Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements, University of Pennsylvania Journal of International Law 38 (2017), 425–481.

Clapham, Andrew, Human Rights Obligations of Non-State Actors, Oxford 2006.
Clodfelter, Mark A./Tsutieva, Diana, Counterclaims in Investment Treaty Arbitration, in: Yannaca-Small, Katia (ed.), Arbitration under International Investment Agreements – A Guide to the Key Issues, 2nd edition, Oxford 2018, 417–454.
Cohen, Robert/Frieden, Jeffry, The Impact of Multinational Corporations on Developing Nations, in: Reubens, Edwin P. (ed.), The Challenge of the New International Economic Order, Boulder 1981, 147–177.
Collins, David, An Introduction to International Investment Law, Cambridge 2017.
Cordonier Segger, Marie-Claire/Gehring, Markus W./Newcombe, Andrew (eds.), Sustainable Development in World Investment Law, Alphen aan den Rijn 2011.
Crawford, James, Brownlie's Principles of Public International Law, 9th edition, Oxford 2019.
Crow, Kevin/Lorenzino Escobar, Lina, International Corporate Obligations, Human Rights, and the Urbaser Standard: Breaking New Ground?, Boston University International Law Journal 36 (2018), 87–118.
Dahm, Georg/Delbrück, Jost/Wolfrum, Rüdiger, Völkerrecht, Volume I/2, 2nd edition, Berlin 2002.
Davis, Jeffrey, Justice Across Borders – The Struggle for Human Rights in U.S. Courts, Cambridge 2008.
De Brabandere, Eric, Human Rights and International Investment Law, in: Krajewski, Markus/Hoffmann, Rhea Tamara (eds.), Research Handbook on Foreign Direct Investment, Cheltenham 2019, 619–645.
De Schutter, Olivier, Sovereignty-plus in the Era of Interdependence: Toward an International Convention on Combating Human Rights Violations by Transnational Corporations, in: Bekker, Pieter H.F./Dolzer, Rudolf/Waibel, Michael (eds.), Making Transnational Law Work in the Global Economy – Essays in Honour of Detlev Vagts, Cambridge 2010, 245–284.
Dell, Sidney, The United Nations and International Business, Durham/London 1990.
Deva, Surya, Scope of the Proposed Business and Human Rights Treaty – Navigating through Normativity, Law and Politics, in: Deva, Surya/Bilchitz, David (eds.), Building a Treaty on Business and Human Rights – Context and Contours, Cambridge 2017, 154–182.
Diel-Gligor, Katharina/Hennecke, Rudolf, Investment in Accordance with the Law, in: Bungenberg, Marc/Griebel, Jörn/Hobe, Stephan/Reinisch, August (eds.), International Investment Law, Baden-Baden 2015, 566–576.
Dimopoulos, Angelos, Standards of Responsible Investment and International Investment Law, in: Delimatsis, Panagiotis (ed.), The Law, Economics and Politics of International Standardisation, Cambridge 2015, 338–364.
Dörr, Oliver, Unternehmensverantwortung im Völkerrecht, Berichte der Deutschen Gesellschaft für Internationales Recht 50 (2020), 133–164.
Dörr, Oliver/Schmalenbach, Kirsten (eds.), Vienna Convention on the Law of Treaties, A Commentary, 2nd edition, Heidelberg 2018.
Dolzer, Rudolf/Schreuer, Christoph, Principles of International Investment Law, 2nd edition, Oxford 2012.
Don Harpaz, Marcia, China's Coherence in International Economic Governance, Journal of Chinese Political Science 21 (2016), 123–147.
Douglas, Zachary, The Plea of Illegality in Investment Treaty Arbitration, ICSID Review – Foreign Investment Law Journal 29 (2014), 155–186.
– The International Law of Investment Claims, Cambridge 2009.
Dubava, Ilze, The Future of International Investment Protection Law: The Promotion of Sustainable (Economic) Development as a Public Good, in: Cremona, Marise/Hilpold, Peter/Lavranos, Nikolaos et. al. (eds.), Reflections on the Constitutionalisation of International Economic Law – Liber Amicorum for Ernst-Ulrich Petersmann, Leiden 2014, 389–402.
Duggal, Kabir A.N./van de Ven, Laurens H., The 2019 Netherlands Model BIT: Riding the New Investment Treaty Waves, Arbitration International 35 (2019), 347–374.
Echandi, Roberto, Bilateral Investment Treaties and Investment Provisions in Preferential Trade Agreements, in: Yannaca-Small, Katia (ed.), Arbitration under International Investment Agreements – A Guide to the Key Issues, 2nd edition, Oxford 2018, 3–30.
Eells, Richard, Global Corporations – The Emerging System of World Economic Power, 2nd edition, New York/London 1976.
Ejims, Okechukwu, The 2016 Morocco-Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?, ICSID Review – Foreign Investment Law Journal 34 (2019), 62–84.
Fatouros, Arghyrios A., The UN Code of Conduct on Transnational Corporations: A Critical Discussion of the First Drafting Phase, in: Horn, Norbert (ed.), Legal Problems of Codes of Conduct for Multinational Enterprises, Antwerpen/Boston/London 1980, 103–125.
Feld, Werner J., Transnational Business Collaboration Among Common Market Countries – Its Implications for Political Integration, New York/Washington/London 1970.

Felz, Daniel, Das Alien Tort Statute – Rechtsprechung, dogmatische Entwicklung und deutsche Interessen, Berlin 2017.

Fouret, Julien/Gerbay, Rémy/Alvarez, Gloria M. (eds.), The ICSID Convention, Regulations and Rules – A Practical Commentary, Cheltenham 2019.

Ford, Jolyon/Methven O'Brien, Claire, Empty Rituals or Workable Models? Towards a Business and Human Rights Treaty, University of New South Wales Law Journal 40 (2017), 1223–1248.

Forere, Malebakeng Agnes, The New South African Protection of Investment Act – Striking a Balance between Attraction of FDI and Redressing the Apartheid Legacies, in: Morosini, Fabio/Sanchez Badin, Michelle Ratton (eds.), Reconceptualizing International Investment Law from the Global South, Cambridge 2018, 251–283.

Francioni, Francesco, Access to Justice, Denial of Justice, and International Investment Law, in: Dupuy, Pierre-Marie/Francioni, Francesco/Petersmann, Ernst-Ulrich (eds.), Human Rights in International Investment Law and Arbitration, Oxford/New York 2009, 63–81.

Gabriel, Vivian, The New Brazilian Cooperation and Facilitation Investment Agreement: An Analysis of the Conflict Resolution Mechanism in Light of the Theory of the Shadow of the Law, Conflict Resolution Quarterly 34 (2016), 141–161.

García-Bolívar, Omar E., Sovereignty v. Investment Protection: Back to Calvo?, ICSID Review – Foreign Investment Law Journal 24 (2009), 464–488.

Gardiner, Richard K., The Vienna Convention Rules on Treaty Interpretation, in: Hollis, Duncan B. (ed.), The Oxford Guide to Treaties, 2nd edition, Oxford 2020, 459–488.

– Treaty Interpretation, 2nd edition, Oxford/New York 2015.

Gazzini, Tarcisio, The 2016 Morocco-Nigeria BIT: An Important Contribution to the Reform of Investment Treaties, Investment Treaty News, Volume 8, Issue 3, September 2017, 3–4.

– Interpretation of International Investment Treaties, Oxford/Portland 2016.

Gordon, Michael W., The Impact of the Multinational Corporation in the Third World, in: Simmonds, Kenneth R. (ed.), Legal Problems of Multinational Corporations, London 1977, 21–42.

Griebel, Jörn, Umweltschutz und andere besondere staatliche Gemeinwohlinteressen im europäischen Investitionsschutz – die Diskussion um ein right to regulate, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 106–114.

Hanessian, Grant/Duggal, Kabir, The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?, ICSID Review – Foreign Investment Law Journal 32 (2017), 216–226.

Hang, Sharon, Investing in Human Rights: Using Bilateral Investment Treaties to Hold Multinational Corporations Liable for Labor Rights Violations, Fordham International Law Journal 37 (2014), 1215–1264.

Heinemann, Andreas, Business Enterprises in Public International Law: The Case for an International Code on Corporate Responsibility, in: Fastenrath, Ulrich/Geiger, Rudolf/Khan, Daniel-Erasmus/Paulus, Andreas/Schorlemer, Sabine von/Vedder, Christoph (eds.), From Bilateralism to Community Interest – Essays in Honour of Judge Bruno Simma, Oxford/New York 2011, 718–735.

Heinz, Ursula E., International Economic Order, in: Wolfrum, Rüdiger/Philipp, Christiane (eds.), United Nations: Law, Policies and Practice, Volume 2, Dordrecht/London/Boston 1995, 749–759.

Hellmann, Rainer, Weltunternehmen nur amerikanisch? Das Ungleichgewicht der Investitionen zwischen Amerika und Europa, Baden-Baden 1970.

Henriksen, Anders, International Law, 3rd edition, Oxford 2021.

Hepburn, Jarrod/Kuuya, Vuyelwa, Corporate Social Responsibility and Investment Treaties, in: Cordonier Segger, Marie-Claire/Gehring, Markus W./Newcombe, Andrew (eds.), Sustainable Development in World Investment Law, Alphen aan den Rijn et al. 2011, 589–609.

Higgins, Rosalyn/Webb, Philippa/Akande, Dapo/Sivakumaran, Sandesh/Sloan, James, Oppenheim's International Law, United Nations, Volume II, Oxford 2017.

Hilpold, Peter, Maßnahmen zur effektiven Durchsetzung von Menschen- und Arbeitsrechten – Völkerrechtliche Anforderungen, Berichte der Deutschen Gesellschaft für Internationales Recht 50 (2020), 185–228.

Hoffmann, Anne K., Counterclaims in Investment Arbitration, ICSID Review – Foreign Investment Law Journal 28 (2013), 438–453.

Huarte Melgar, Beatriz/Nowrot, Karsten/Wang, Yuan, The 2011 Update of the OECD Guidelines for Multinational Enterprises: Balanced Outcome or an Opportunity Missed?, Halle/Saale 2011.

Ijalaye, David Adedayo, Indigenization Measures and Multinational Corporations in Africa, Recueil des Cours 171 (1981), 9–79.

Jacob, Marc, International Investment Agreements and Human Rights, INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development 03/2010.

Joseph, Sarah, Corporations and Transnational Human Rights Litigation, Oxford/Portland 2004.

Karavias, Markos, Corporate Obligations under International Law, Oxford 2013.

Kaushal, Asha, Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime, Harvard International Law Journal 50 (2009), 491–534.

Klabbers, Jan, International Law, 3rd edition, Cambridge 2021.

– (I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors, in: Petman, Jarna/Klabbers, Jan (eds.), Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniemi, Leiden/Boston 2003, 351–369.

Koebele, Michael, Corporate Responsibility under the Alien Tort Claims Act, Leiden 2009.

Kokkini-Iatridou, D./Waart, P.J.I.M. de, Foreign Investments in Developing Countries – Legal Personality of Multinationals in International Law, Netherlands Yearbook of International Law 14 (1983), 87–131.

Krajewski, Markus, Wirtschaftsvölkerrecht, 5th edition, Heidelberg 2021.

– A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application, Business and Human Rights Journal 5 (2020), 105–129.

– Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice, April 2018, available under: <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3133529> (accessed 20 October 2021).

– Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model Clauses for a UN Treaty on Transnational Corporations, other Businesses and Human Rights, Brussels 2017.

Kulick, Andreas, Global Public Interest in International Investment Law, Cambridge 2012.

Kurth, James R., The Multinational Corporation, U.S. Foreign Policy, and the Less Developed Countries, in: Said, Abdul A./Simmons, Luiz R. (eds.), The New Sovereigns – Multinational Corporations as World Powers, Englewood Cliffs 1975, 139–153.

Laborde, Gustavo, The Case for Host State Claims in Investment Arbitration, Journal of International Dispute Settlement 1 (2010), 97–122.

Lam, Joanna/Guo, Rui, Investor Obligations in Special Economic Zones: Legal Status, Typology, and Functional Analysis, Journal of International Economic Law 24 (2021), 321–340.

Lavranos, Nikos, The Changing Ecosystem of Dutch BITs, Arbitration International 36 (2020), 441–457.

Lee, Jaemin, Taming Investor-State Arbitration?, in: Chaisse, Julien/Lin, Tsai-Yu (eds.), International Economic Law and Governance – Essays in Honour of Mitsuo Matsushita, Oxford 2016, 131–152.

Litvin, Daniel, Empires of Profit – Commerce, Conquest and Corporate Responsibility, New York/London 2003.

López Latorre, Andrés Felipe, In Defence of Direct Obligations for Businesses under International Human Rights Law, Business and Human Rights Journal 5 (2020), 56–83.

Lorz, Ralph Alexander/Busch, Manuel, Investment in Accordance with the Law – Specifically Corruption, in: Bungenberg, Marc/Griebel, Jörn/Hobe, Stephan/Reinisch, August (eds.), International Investment Law, Baden-Baden 2015, 577–589.

Magallona, Merlin M., The New International Economic Order and the Politics of Multinational Corporations, Philippine Law Journal 53 (1978), 267–286.

Malik, Mahnaz, The IISD Model International Agreement on Investment for Sustainable Development, in: Cordonier Segger, Marie-Claire/Gehring, Markus W./Newcombe, Andrew (eds.), Sustainable Development in World Investment Law, Alphen aan den Rijn et al. 2011, 565–584.

Mann, Howard, Reconceptualizing International Investment Law: Its Role in Sustainable Development, Lewis and Clark Law Review 17 (2013), 521–544.

– International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, International Institute for Sustainable Development, February 2008, available at: <www.iisd.org/pdf/2008/iia_business_human_rights.pdf> (accessed 20 October 2021).

Marcoux, Jean-Michel, Informal Instruments to Impose Human Rights Obligations on Foreign Investors: An Emerging Practice of Legality?, Leiden Journal of International Law 34 (2021), 109–126.

Marcoux, Jean-Michel/Bjorklund, Andrea K., Foreign Investors' Responsibilities and Contributory Fault in Investment Arbitration, International and Comparative Law Quarterly 69 (2020), 877–905.

Markiewicz, Graham, The Logical Next Step: Motivations on the Formation of a Business and Human Rights Treaty, Minnesota Journal of International Law 26 (2017), 63–80.

Mbengue, Makane M./Schacherer, Stefanie, Africa and the Rethinking of International Investment Law: About the Elaboration of the Pan-African Investment Code, in: Roberts, Anthea/Stephan, Paul B./Verdier, Pierre-Hugues/Versteeg, Mila (eds.), Comparative International Law, Oxford 2018, 547–569.

McConnell, Lee, Assessing the Feasibility of a Business and Human Rights Treaty, International and Comparative Law Quarterly 66 (2017), 143–180.

McLachlan, Campbell/Shore, Laurence/Weiniger, Matthew, International Investment Arbitration – Substantive Principles, 2nd edition, Oxford 2017.

Metcalf, Thomas R., Ideologies of the Raj, Cambridge 1994.

Meyer, Timothy/Park, Tae Jung, Renegotiating International Investment Law, Journal of International Economic Law 21 (2018), 655–679.

Miles, Kate, Reconceptualising International Investment Law: Bringing the Public Interest into Private Business, in: Lewis, Meredith K./Frankel, Susy (eds.), International Economic Law and National Autonomy, Cambridge 2010, 295–319.

Monebhurrun, Nitish, Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model, Journal of International Dispute Settlement 8 (2017), 79–100.

Morgera, Elisa, Corporate Environmental Accountability in International Law, 2nd edition, Oxford 2020.

Morosini, Fabio/Sanchez Badin, Michelle Ratton, Reconceptualizing International Investment Law from the Global South: An Introduction, in: Morosini, Fabio/Sanchez Badin, Michelle Ratton (eds.), Reconceptualizing International Investment Law from the Global South, Cambridge 2018, 1–46.

Mouyal, Lone W., International Investment Law and the Right to Regulate: A Human Rights Perspective, London 2016.

Muchlinski, Peter, Multinational Enterprises and the Law, 3rd edition, Oxford 2021.

– The Impact of a Business and Human Rights Treaty on Investment Law and Arbitration, in: Deva, Surya/Bilchitz, David (eds.), Building a Treaty on Business and Human Rights – Context and Contours, Cambridge 2017, 346–374.

– Regulating Multinationals: Foreign Investment, Development, and the Balance of Corporate and Home Country Rights and Responsibilities in a Globalizing World, in: Alvarez, José E./Sauvant, Karl P. (eds.), The Evolving International Investment Regime, Oxford 2011, 30–59.

– Multinational Enterprises as Actors in International Law: Creating "Soft Law" Obligations and "Hard Law" Rights, in: Noortman, Math/Ryngaert, Cedric (eds.), Non-State Actor Dynamics in International Law — From Law-Takers to Law-Makers, Farnham 2010, 9–39.

– Corporate Social Responsibility, in: Muchlinski, Peter/Ortino, Federico/Schreuer, Christoph (eds.), International Investment Law, Oxford/New York 2008, 637–687.

– Policy Issues, in: Muchlinski, Peter/Ortino, Federico/Schreuer, Christoph (eds.), International Investment Law, Oxford/New York 2008, 3–48.

– 'Caveat Investor'? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard, International and Comparative Law Quarterly 55 (2006), 527–557.

Müller, Ronald, The Multinational Corporation and the Exercise of Power: Latin America, in: Said, Abdul A./Simmons, Luiz R. (eds.), The New Sovereigns – Multinational Corporations as World Powers, Englewood Cliffs 1975, 55–67.

Muniz, Joaquim/Duggal, Kabir A.N./Peretti, Luis A.S., The New Brazilian BIT on Cooperation and Facilitation of Investments: A New Approach in Times of Change, ICSID Review – Foreign Investment Law Journal 32 (2017), 404–417.

de Nanteuil, Arnaud, International Investment Law, Cheltenham/Northampton 2020.

Nedumpara, James J., India's Trade and Investment Agreements – Striking a Balance between Investor Protection Rights and Development Concerns, in: Morosini, Fabio/Sanchez Badin, Michelle Ratton (eds.), Reconceptualizing International Investment Law from the Global South, Cambridge 2018, 188–217.

Negandhi, Anant R./Baliga, B. R., Quest for Survival and Growth – A Comparative Study of American, European, and Japanese Multinationals, New York/London/Sydney 1979.

Noortmann, Math/Reinisch, August/Ryngaert, Cedric (eds.), Non-State Actors in International Law, Oxford/Portland 2015.

Nowrot, Karsten, Internationale Unternehmensverantwortung, in: Tietje, Christian/Nowrot, Karsten (eds.), Internationales Wirtschaftsrecht, 3rd edition, Berlin/Boston 2022, 906–937.

– Vertragskonkurrenz zwischen Menschenrechtsverträgen und Wirtschaftsabkommen in der internationalen Rechtsordnung: Überlegungen zu einem aktuellen völkervertragsrechtlichen Hierarchisierungskonzept, Hamburg 2020.

– Wirtschaft und Menschenrechte: Aktuelle Entwicklungen und prinzipielle Überlegungen, in: Krajewski, Markus (ed.), Staatliche Schutzpflichten und unternehmerische Verantwortung für Menschenrechte in globalen Lieferketten, Erlangen 2018, 3–41.

– Global Public Authority in Today's International Economic Legal Order: Towards Substantive and Institutional Convergence à la *Pacem in Terris*?, in: Justenhoven, Heinz-Gerhard/O'Connell, Mary Ellen (eds.), Peace Through Law – Reflections on *Pacem in Terris* from Philosophy, Law, Theology, and Political Science, Baden-Baden 2016, 187–214.

– Termination and Renegotiation of International Investment Agreements, in: Hindelang, Steffen/Krajewski, Markus (eds.), Shifting Paradigms in International Investment Law, Oxford 2016, 227–265.

– Obligations of Investors, in: Bungenberg, Marc/Griebel, Jörn/Hobe, Stephan/Reinisch, August (eds.), International Investment Law, Baden-Baden 2015, 1154–1185.

– How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?, Journal of World Investment and Trade 15 (2014), 612–644.

– Ein notwendiger “Blick über den Tellerrand”: Zur Ausstrahlungswirkung der Menschenrechte im internationalen Investitionsrecht, Halle/Saale 2012.

– Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future?, Indiana Journal of Global Legal Studies 18 (2011), 803–842.

– International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism, Halle/Saale 2010.

– Normative Ordnungsstruktur und private Wirkungsmacht, Berlin 2006.

– Reconceptualising International Legal Personality of Influential Non-State Actors: Towards a Rebuttable Presumption of Normative Responsibilities, Philippine Law Journal 80 (2006), 563–586.

– The New Governance Structure of the Global Compact – Transforming a “Learning Network” into a Federalized and Parliamentarized Transnational Regulatory Regime, Halle/Saale 2005.

– Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law, Indiana Journal of Global Legal Studies 6 (1999), 579–645.

Nowrot, Karsten/Sipiorski, Emily, Stipulating Investors’ Obligations in Investment Agreements as a Suitable Regulatory Approach to Prevent and Remedy Anti-Competitive Behaviour?, in: Fach Gómez, Katia/Gougourinis, Anastasios/Titi, Catharine (eds.), International Investment Law and Competition Law, Cham 2020, 135–156.

Papalia, Giorgia, Doing Business Right: The Case for a Business and Human Rights Treaty, Perth International Law Journal 3 (2018), 96–113.

Paradise, James F., The Role of “Parallel Institutions” in China’s Growing Participation in Global Economic Governance, Journal of Chinese Political Science 21 (2016), 149–175.

Penrose, Edith, The State and Multinational Enterprises in Less-Developed Countries, in: Dunning, John H. (ed.), The Multinational Enterprise, Thetford 1971, 221–239.

Perrone, Nicolas M., Investment Treaties and the Legal Imagination, Oxford 2021.

Peters, Anne, Beyond Human Rights – The Legal Status of the Individual in International Law, Cambridge 2016.

Puig, Sergio/Shaffer, Gregory, Imperfect Alternatives: Institutional Choice and the Reform of Investment Law, American Journal of International Law 112 (2018), 361–409.

Radi, Yannick, Rules and Practices of International Investment Law and Arbitration, Cambridge 2020.

Raman, K. Venkata, Transnational Corporations, International Law and the New International Economic Order, Syracuse Journal of International Law and Commerce 6 (1978/79), 17–76.

Ranjan, Prabhash/Anand, Pushkar, The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction, Northwestern Journal of International Law & Business 38 (2017), 1–54.

Rasche, Andreas/Kell, Georg (eds.), The United Nations Global Compact, Cambridge 2010.

Reinisch, August, Internationales Investitionsschutzrecht, in: Tietje, Christian/Nowrot, Karsten (eds.), Internationales Wirtschaftsrecht, 3rd edition, Berlin/Boston 2022, 454–494.

– Advanced Introduction to International Investment Law, Cheltenham/Northampton 2020.

– Investors, in: Noortmann, Math/Reinisch, August/Ryngaert, Cedric (eds.), Non-State Actors in International Law, Oxford/Portland 2015, 253–271.

– Austria, in: Brown, Chester (ed.), Commentaries on Selected Model Investment Treaties, Oxford 2013, 15–51.

Roberts, Anthea, Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration, American Journal of International Law 112 (2018), 410–432.

Rotstein, Abraham, The Multinational Corporation in the Political Economy – A Matter of National Survival, in: Hahlo, H. R./Smith, J. Graham/Wright, Richard W. (eds.), Nationalism and the Multinational Enterprise – Legal, Economic and Managerial Aspects, Dobbs Ferry 1973, 184–192.

Ruggie, John, Just Business – Multinational Corporations and Human Rights, New York 2013.

Salacuse, Jeswald W., The Law of Investment Treaties, 3rd edition, Oxford 2021.

– The Three Laws of International Investment, Oxford 2013.

– Towards a New Treaty Framework for Direct Foreign Investment, Journal of Air Law and Commerce 50 (1985), 969–1010.

Sanchez Badin, Michelle Ratton/Morosini, Fabio, Navigating between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs), in: Morosini, Fabio/Sanchez Badin, Michelle Ratton (eds.), Reconceptualizing International Investment Law from the Global South, Cambridge 2018, 218–250.

Santacroce, Fabio Giuseppe, The Applicability of Human Rights Law in International Investment Disputes, ICSID Review – Foreign Investment Law Journal 34 (2019), 136–155.

Sauvant, Karl P., The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned, Journal of World Investment and Trade 16 (2015), 11–87.

Schreuer, Christoph, Das Internationale Investitionsrecht, in: Reinisch, August (ed.), Österreichisches Handbuch des Völkerrechts, Volume I, 6th edition, Wien 2021, 612–625.

Schreuer, Christoph/Malintoppi, Loretta/Reinisch, August/Sinclair, Anthony, The ICSID Convention – A Commentary, 2nd edition, Cambridge 2009.

Seidl-Hohenveldern, Ignaz, Multinational Enterprises and the International Law of the Future, The Year Book of World Affairs 29 (1975), 301–312.

Sen, S. C., Multinational Corporations in the Developing Countries, Calcutta 1978.

Servan-Schreiber, Jean-Jacques, Le Défi Américain, Paris 1967.

Shaffer, Gregory/Gao, Henry, A New Chinese Economic Order?, Journal of International Economic Law 23 (2020), 607–635.

Shao, Xuan, Environmental and Human Rights Counterclaims in International Investment Arbitration: At the Crossroads of Domestic and International Law, Journal of International Economic Law 24 (2021), 157–179.

Sheffer, Megan W., Bilateral Investment Treaties: A Friend or a Foe to Human Rights?, Denver Journal of International Law and Policy 39 (2011), 483–521.

Simons, Penelope, The Value-Added of a Treaty to Regulate Transnational Corporations and Other Business Enterprises, in: Deva, Surya/Bilchitz, David (eds.), Building a Treaty on Business and Human Rights – Context and Contours, Cambridge 2017, 48–78.

Sipiorski, Emily, Good Faith in International Investment Arbitration, Oxford 2019.

Sornarajah, Muthucumaraswamy, The International Law on Foreign Investment, 5th edition, Cambridge 2021.

– Resistance and Change in the International Law on Foreign Investment, Cambridge 2015.

Spears, Suzanne A., The Quest for Policy Space in a New Generation of International Investment Agreements, Journal of International Economic Law 13 (2010), 1037–1075.

Spiermann, Ole, Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties, Arbitration International 20 (2004), 179–211.

Spröte, Wolfgang, Negotiations on a United Nations Code of Conduct on Transnational Corporations, German Yearbook of International Law 33 (1990), 331–348.

Tamada, Dai, Investors' Responsibility towards Host-States? Regulation of Corruption in Investor-State Arbitration, in: Gal-Or, Noemi/Ryngaert, Cedric/Noortmann, Math (eds.), Responsibilities of the Non-State Actor in Armed Conflict and the Market Place, Leiden/Boston 2015, 203–216.

Tams, Christian J./Tietje, Christian (eds.), Documents in International Economic Law, Oxford 2012.

Tesner, Sandrine, The United Nations and Business – A Partnership Recovered, New York 2000.

Thielbörger, Pierre/Ackermann, Tobias, A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in the Loop?, Indiana Journal of Global Legal Studies 24 (2017), 43–79.

Tietje, Christian, The Future of International Investment Protection: Stress in the System?, ICSID Review – Foreign Investment Law Journal 24 (2009), 457–463.

– The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States, Halle/Saale 2008.

– The Law Governing the Settlement of International Investment Disputes – Structures and Recent Developments, in: Tietje, Christian (ed.), International Investment Protection and Arbitration – Theoretical and Practical Perspectives, Berlin 2008, 17–33.

Tietje, Christian/Crow, Kevin, The Reform of Investment Protection Rules in CETA, TTIP, and Other Recent EU FTAs: Convincing?, in: Griller, Stefan/Obwexer, Walter/Vranes, Erich (eds.), Mega-Regional Trade Agreements: CETA, TTIP, and TiSA, Oxford 2017, 87–110.

Tietje, Christian/Klimke, Romy, Internationaler Investitionsrechtsschutz, in: Ehlers, Dirk/Schoch, Friedrich (eds.), Rechtsschutz im Öffentlichen Recht, München 2021, 85–120.

Tietje, Christian/Nowrot, Karsten/Wackernagel, Clemens, Once and Forever? The Legal Effects of a Denunciation of ICSID, Halle/Saale 2008.

Tietje, Christian/Sipiorski, Emily, The Evolution of Investment Protection based on Public International Law Treaties: Lessons to be Learned, in: Bjorklund, Andrea K./Reinisch, August (eds.), International Investment Law and Soft Law, Cheltenham 2012, 192–237.

Titi, Aikaterini, The Right to Regulate in International Investment Law, Baden-Baden 2014.

Tolentino, Paz Estrella, Multinational Corporations – Emergence and Evolution, London/New York 2000.

Toral, Mehmet/Schultz, Thomas, The State, the Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations, in: Waibel, Michael/Kaushal, Asha/Chung, Kyo-Hwa Liz/ Balchin, Claire (eds.), The Backlash Against Investment Arbitration – Perceptions and Reality, Austin/Boston/Chicago *et al.* 2010, 577–602.

Ünekbas, Selcukhan, Scaling the Great Wall: The EU-China Comprehensive Agreement on Investment and Market Access, Journal of World Investment and Trade 22 (2021), 347–387.

VanDuzer, J. Anthony/Simons, Penelope/Mayeda, Graham G., Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries, 2012, available under: <www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf> (accessed 20 October 2021).

Van Harten, Gus, Investment Treaty Arbitration and Public Law, Oxford/New York 2007.

Vazquez, Carlos M., Direct vs. Indirect Obligations of Corporations under International Law, Columbia Journal of Transnational Law 43 (2005), 927–959.

Vernon, Raymond, In the Hurricane's Eye – The Troubled Prospects of Multinational Enterprises, Cambridge/London 2000.

– Sovereignty at Bay – The Multinational Spread of U.S. Enterprises, New York/London 1971.

Waibel, Michael, Investment Arbitration: Jurisdiction and Admissibility, in: Bungenberg, Marc/Griebel, Jörn/Hobe, Stephan/Reinisch, August (eds.), International Investment Law, Baden-Baden 2015, 1212–1287.

Waibel, Michael/Kaushal, Asha/Chung, Kyo-Hwa Liz/Balchin, Claire (eds.), The Backlash Against Investment Arbitration – Perceptions and Reality, Austin/Boston/Chicago et al. 2010.

Wallace, Cynthia D., The Multinational Enterprise and Legal Control – Host State Sovereignty in an Era of Economic Globalization, The Hague/ London/New York 2002.

Wang, Heng, Selective Reshaping: China's Paradigm Shift in International Economic Governance, Journal of International Economic Law 23 (2020), 583–606.

Weidmann, Karen, Der Beitrag der OECD-Leitsätze für multinationale Unternehmen zum Schutz der Menschenrechte, Berlin 2014.

Weiler, Todd, Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order, Boston College International and Comparative Law Review 27 (2004), 429–450.

Weilert, Katarina, Taming the Untamable? Transnational Corporations in United Nations Law and Practice, Max Planck Yearbook of United Nations Law 14 (2010), 445–506.

Weiss, Wolfgang, Shift in Paradigm: From the New International Economic Order to the World Trade Organization – Germany's Contribution to the Development of International Economic Law, German Yearbook of International Law 46 (2003), 171–225.

White, Robin C.A., A New International Economic Order, International and Comparative Law Quarterly 24 (1975), 542–552.

Yan, Yueming, Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance, Journal of International Economic Law 23 (2020), 989–1013.

Zerk, Jennifer A., Multinationals and Corporate Social Responsibility – Limits and Opportunities in International Law, Cambridge 2006.

Zheng, Yawen, China's New Foreign Investment Law and Its Contribution Towards the Country's Development Goals, Journal of World Investment and Trade 22 (2021), 388–428.

Zugliani, Niccolò, Human Rights in International Investment Law: The 2016 Morocco-Nigeria Bilateral Investment Treaty, International and Comparative Law Quarterly 68 (2019), 761–770.

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