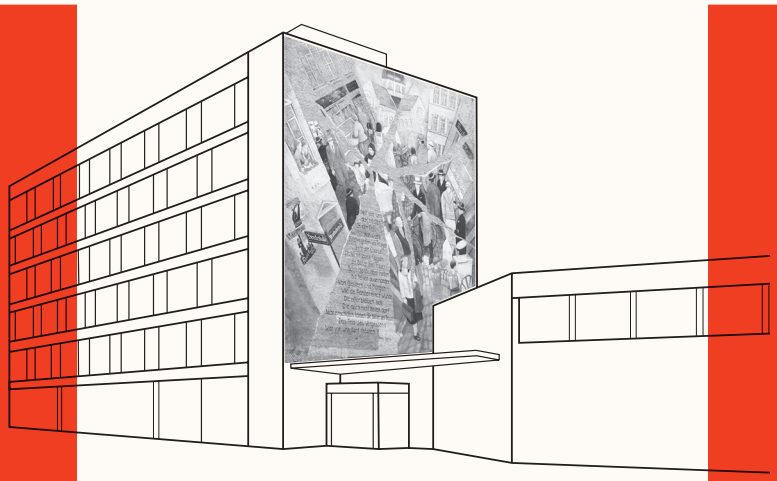

Karsten Nowrot

Fostering the Status of Asia's Sovereign Wealth Funds as Responsible Foreign Investors – The Progressive Development of International Legal Personality as a 'Silver Bullet'?

Rechtswissenschaftliche
Beiträge der
Hamburger Sozialökonomie

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Contents

A. Introduction*

Sovereign Wealth Funds (SWFs)[1] have more recently, in particular in the last two decades, emerged as major actors in the international economic system.[2] Although there is as of now still no universally agreed definition of the admittedly also rather heterogeneous class of entities commonly referred to as SWFs,[3] for the purposes of the present contribution – and generally in line with definitions proposed by international organizations and bodies like the International Monetary Fund (IMF),[4] the United Nations Conference on Trade and Development (UNCTAD),[5] the former International Working Group of Sovereign Wealth Funds (IWGSWF) and current International Forum of Sovereign Wealth Funds (IFSWF),[6] the Organization for Economic Co-operation and Development (OECD),[7] the European Commission of the

* The contribution is based on a presentation given by the author at the 9th Biennial Conference of the Asian Society of International Law "Reconstructing the Bandung Spirit for Asia to Lead in the New Era of International Law" in Bandung/Indonesia on 8 August 2023.

1 The term "sovereign wealth funds" was apparently first coined by *Andrew Rozanov* only in 2005, see *Rozanov*, Central Banking Journal 15 (No. 4, 2005), 52 *et seq.* See thereto also, e.g., *Wang*, in: Lim (ed.), Alternative Visions of the International Law on Foreign Investment, 405 (414); *Hild*, Sovereign Wealth Funds, 20; *Gelpern*, Asian Journal of International Law 1 (2011), 289 (291); *Bassan*, in: Bassan (ed.), Research Handbook on Sovereign Wealth Funds and International Investment Law, 41 (42); *Thomale*, Wake Forest Law Review 52 (2017), 981; *Bean*, Michigan State Journal of International Law 18 (2009), 65 (72); *Clark/Dixon/Monk*, Sovereign Wealth Funds, 13.

2 On this perception see also already for example *Catá Backer*, Georgetown Journal of International Law 41 (2010), 425 (498) ("Sovereign wealth funds have become powerful players in the global economy."); *Wang*, in: Lim (ed.), Alternative Visions of the International Law on Foreign Investment, 405 (415); *Sejko*, Vanderbilt Journal of Transnational Law 56 (2023), 853 (855) ("Sovereign wealth funds (SWFs) and state-owned enterprises (SOEs) have established remarkable positions in FDI flows."); *van der Zee*, International and Comparative Corporate Law Journal 12 (2017), 35; *Nakatani*, International Review of Law 2015:swf.7, 1 (2); *Chaisse*, International Review of Law 2015:swf.9, 1 (2); *Cummine*, in: Bohoslavsky/Cernic (eds.), Making Sovereign Financing and Human Rights Work, 163.

3 On this finding see also for example *Hsu*, International Review of Law 2017:swf.6, 1 (2); *Shemirani*, Sovereign Wealth Funds and International Political Economy, 1; *Tietje*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1802 (1803); *Gramlich*, European Yearbook of International Economic Law 2 (2011), 43 (45); *de Bellis*, Asian Journal of International Law 1 (2011), 349 (352); *Wiater*, Archiv des Völkerrechts 55 (2017), 148 (149 and 152); *Gilligan/O'Brien/Bowman*, Centre for International Finance and Regulation Working Paper No. 021/2014, 4; *Keller*, Georgetown Journal of Law & Public Policy 7 (2009), 333 (336); *Stückelberger/Rossouw/Geerts/Chavaz/Xinwa*, Sovereign Wealth Funds, 18; *Mak/Law*, The King's Student Law Review 12 (2022), 58 (61); *Castelli/Scacciavillani*, in: Bassan (ed.), Research Handbook on Sovereign Wealth Funds and International Investment Law, 9 (10).

4 See, e.g., IMF, Sovereign Wealth Funds – A Work Agenda, 29 February 2008, p. 26, available on the internet under: <https://www.imf.org/en/Publications/Policy-Papers/Issues/2016/12/31/Sovereign-Wealth-Funds-A-Work-Agenda-PP4234> (accessed 16 August 2023) ("SWFs are special purpose public investment funds, or arrangements. These funds are owned or controlled by the government, and hold, manage, or administer assets primarily for medium- to long-term macroeconomic and financial objectives. The funds are commonly established out of official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity exports. These funds employ a set of investment strategies which include investments in foreign financial assets.").

5 See for example UNCTAD, World Investment Report 2011, Non-Equity Modes of International Production and Development, 2011, 14 ("Sovereign wealth funds (SWFs) are special-purpose investment funds or arrangements that are owned by government.").

6 See, e.g., IWGSWF, Sovereign Wealth Funds – Generally Accepted Principles and Practices, "Santiago Principles", October 2008, Appendix I, para. 2, available on the internet under: <https://www.ifswf.org/santiago-principles> (accessed 16 August 2023) ("SWFs are defined as special purpose investment funds or arrangements, owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies which include investing in foreign financial assets. The SWFs are commonly established out of balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity exports.").

7 See for example OECD, International Investment of Sovereign Wealth Funds: Are New Rules Needed?, OECD Investment Newsletter, October 2007, Issue 5, 4 ("Sovereign wealth funds (SWFs) – government-owned investment vehicles that are funded by foreign exchange assets - have existed for several decades.").

European Union (EU),[8] the European Central Bank of the EU,[9] as well as scholars of law, social science and economics[10] – they can be broadly defined as government-sponsored investment entities that invest public capital in domestic as well as in particular also in foreign financial assets. While for example at the end of 2009, it was estimated that more than 80 SWFs with a total of roughly USD 5.9 trillion in assets under management existed, as of July 2023, this number rose to 175 SWFs from 98 countries with a total of approximately USD 12 trillion in assets under management.[11]

Although most certainly not confined to Asia but rather by now truly global in scope,[12] this type of institutional investors can nevertheless in many ways also be regarded as a particularly Asian phenomenon. Not only was the first modern SWF created in Asia, with the predecessor of the current Kuwait Investment Authority, the Kuwait Investment Board, having been founded already in February 1953 and entrusted with the mandate to invest the country's surplus oil revenues.[13] Rather, also a quite notable majority of the world's largest SWFs are currently based in Asia. In order to illustrate this perception, let it suffice here to draw attention to the fact that among the twenty largest SWFs, sixteen of these investment entities are at present from Asian countries.[14]

8 European Commission, A Common European Approach to Sovereign Wealth Funds, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2008) 115 final of 27 February 2008, 2 ("Sovereign Wealth Funds (SWFs) are generally defined as state-owned investment vehicles, which manage a diversified portfolio of domestic and international financial assets. Their origin dates back to the 1950s, when some major commodity exporting countries, particularly oil-rich countries, were looking for a way to invest funds originated by foreign exchange assets.").

9 See, e.g., European Central Bank, The Impact of Sovereign Wealth Funds on Global Financial Markets, Occasional Paper Series No. 91, July 2008, 6, available on the internet under: <https://www.ecb.europa.eu/pub/pdf/scpops/ecbocp91.pdf> (accessed 16 August 2023) ("Although there exists no commonly accepted definition of SWFs, three elements can be identified that are common to such funds: First, SWFs are state-owned. Second, SWFs have no or only very limited explicit liabilities and, third, SWFs are managed separately from official foreign exchange reserves. In addition, most SWFs share certain characteristics that originate in the specific nature of SWFs. For example, the lack of explicit liabilities (or the stretched-out maturity of liabilities) favours the pursuit of long-term investment strategies, as implemented by most SWFs. In this respect, sovereign wealth funds differ from sovereign pension funds that operate subject to explicit liabilities and a continuous stream of fixed payments, making sovereign wealth funds more similar to private mutual funds. Second, the absence of explicit liabilities also has a bearing on the willingness to take risk, as standard portfolio theory predicts a higher share of fixed income securities for funds that are subject to recurring payments. Finally, most sovereign wealth funds appear to have substantial exposure to foreign investments or are even entirely invested in foreign assets.").

10 From the numerous scholarly contributions discussing related definitions of SWFs see for example *Bassan*, in: Bassan (ed.), Research Handbook on Sovereign Wealth Funds and International Investment Law, 41 *et seq.*; *Bassan*, The Law of Sovereign Wealth Funds, 17 *et seq.*; *Bassan*, European Business Law Review 21 (2010), 165 (170 *et seq.*); *Hild*, Sovereign Wealth Funds, 20 *et seq.*; *Lippincott*, Chicago Journal of International Law 13 (2013), 649 (655 *et seq.*); *Preisser*, Sovereign Wealth Funds, 13 *et seq.*; *Audy Martinek*, Research in Globalization 3 (2021), 1 (2 *et seq.*).

11 See thereto the regularly updated information available on the internet under: <https://globalswf.com/> (accessed 16 August 2023).

12 *Gelpern*, Asian Journal of International Law 1 (2011), 289 (290) ("The funds come from all continents, from all along the national income spectrum, and are sponsored by all manner of governments.").

13 For further details on the history and current status of the Kuwait Investment Authority see the information available on the internet under: <https://www.kia.gov.kw/> (accessed 16 August 2023); as well as for example *Bazoobandi*, The Political Economy of the Gulf Sovereign Wealth Funds, 33 *et seq.* On the characterization of the current Kuwait Investment Authority as the world's oldest SWF see also, e.g., *Hild*, Sovereign Wealth Funds, 8; *Gelpern*, Asian Journal of International Law 1 (2011), 289 (291 and 297); *Hsu*, Journal of World Investment and Trade 10 (2009), 793; *Kong*, University of Pennsylvania Journal of International Law 44 (2023), 313 (321); *de Bellis*, Asian Journal of International Law 1 (2011), 349 (352); *Balding*, Sovereign Wealth Funds, 4.

14 See thereto for example the information available on the internet under: <https://www.swfinstitute.org/fund-rankings/sovereign-wealth-fund> (accessed 16 August 2023). See more generally on this perception also already for example *Tietje*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1802 (1806) ("In addition to pure economic figures, the geographical location of SWFs is important. In terms of assets, more than three quarters of SWFs are located in Asia and the Middle East."); *Catá Backer*, in: Bassan (ed.), Research Handbook on Sovereign Wealth Funds and International Investment Law, 57 (86) ("Asia represents, like the Middle East, the second great power base

Last, but surely not least, the political concerns about the foreign investment activities of SWFs that have more recently arisen 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[15] at the domestic level in countries like for example Australia, Canada, India, Japan, South Africa, the United Kingdom and the United States[16] as well as respective regulatory instruments at the supranational level like Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union[17] seem to apply currently first and foremost also to the activities of SWFs from Asia.[18] The underlying reasons and perceptions that form the basis of these political concerns have for example been succinctly and vividly described by *Christian Tietje* in the subsequent sentences: "The following issues are the basis for concern over the 'danger' of SWFs, and thus the necessity for restricting their investment possibilities in certain jurisdictions or at least the call for comprehensive domestic, regional and/or international regulation of SWFs. First, it is argued that SWFs are owned by (foreign) governments and that this implies political, namely national security risks in case of investment within another jurisdiction, e.g. with regard to crucial infrastructure such as energy supply. In addition, the political ownership of SWFs is seen critically because it might cause what has been called 'cross border nationalization', *i.e.* the renationalization of industry, which has previously been privatized. Second, the lack of transparency concerning SWFs and their operation causes tensions. It is unclear to some extent, regarding at least certain SWFs, what their governance structure and investment strategy exactly is. Third, there is suspicion that SWFs pursue non-commercial interests, *i.e.* act in the political interest of their home country and not based on purely commercial consideration. An example of this could be long-term land lease in Africa in order to secure natural resource supply for the entire Chinese economy."[19] And indeed, it has already frequently been emphasized that it is in particular this last-mentioned

of SWF home states.").

15 See generally thereto for example the analyses provided by UNCTAD, The Evolution of FDI Screening Mechanisms – Key Trends and Features, Investment Policy Monitor, Issue 25, February 2023; UNCTAD, National Security-Related Screening Mechanisms for Foreign Investments – An Analysis of Recent Policy Developments, Investment Policy Monitor, Special Issue, December 2019; as well as, e.g., *Voon/Merriman*, Journal of World Investment & Trade 24 (2023), 75 *et seq.*; *Gordon/Pohl*, in: Bassan (ed.), Research Handbook on Sovereign Wealth Funds and International Investment Law, 124 (135 *et seq.*).

16 For further details see, e.g., UNCTAD, The Evolution of FDI Screening Mechanisms – Key Trends and Features, Investment Policy Monitor, Issue 25, February 2023; UNCTAD, World Investment Report 2023: Investing in Sustainable Energy for All, 2023, 63 *et seq.*; *Voon/Merriman*, Journal of World Investment & Trade 24 (2023), 75 (80 *et seq.*).

17 OJ EU No. L 79/1 of 23 March 2019, with subsequent amendments. Specifically on the EU approach to investment screening in general and this EU regulation in particular see also, e.g., *Velten*, Screening Foreign Direct Investment in the EU, 11 *et seq.*

18 See thereto also, e.g., *Epstein/Rose*, University of Chicago Law Review 76 (2009), 111 (112); *Bean*, Michigan State Journal of International Law 18 (2009), 65 (68 and 103 *et seq.*); *Sandor*, Georgetown Journal of International Law 46 (2015), 947 (948 and 954 *et seq.*); *Li*, Asian Journal of International Law 1 (2011), 403 (405) ("Opposition was particularly focused against investments by SWFs headquartered in the Middle East or East Asia.").

19 *Tietje*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1802 (1806-1807), with additional references. See thereto also, e.g., European Commission, A Common European Approach to Sovereign Wealth Funds, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2008) 115 final of 27 February 2008, 4. From the numerous literature on these political concerns related to the activities of SWFs see also for example *Wong*, Brooklyn Journal of International Law 34 (2009), 1081 (1090 *et seq.*); *Gilson/Milhaupt*, Stanford Law Review 60 (2008), 1345 *et seq.*; *Cooke*, Columbia Business Law Review 2009, 728 (736 *et seq.*); *Hild*, Sovereign Wealth Funds, 61 *et seq.*; *Sandor*, Georgetown Journal of International Law 46 (2015), 947 (954 *et seq.*); *Bean*, Michigan State Journal of International Law 18 (2009), 65 *et seq.*; *Taylor*, in: Giovanoli/Devos (eds.), International Monetary and Financial Law, 262 (268); *Preisser*, Sovereign Wealth Funds, 53 *et seq.*; *Mak/Law*, The King's Student Law Review 12 (2022), 58 *et seq.*; *Keller*, Georgetown Journal of Law & Public Policy 7 (2009), 333 (339 *et seq.*); *Martini*, Die Öffentliche Verwaltung 2008, 314 (315 *et seq.*); *Heinemann*, ‚Ökonomischer Patriotismus' in Zeiten regionaler und internationaler Integration, 96 *et seq.*; *Epstein/Rose*, University of Chicago Law Review 76 (2009), 111 (112 *et seq.*).

issue and debate on political concerns as well as related perspectives that feature very prominently on the current research agenda concerning Asian and certain other SWFs.[20]

Against this background, the present contribution intends to identify and assess linkages between these political concerns on the one hand and another important research perspective in connection with Asia's SWFs that concerns the question how to foster their global status as what might be termed 'responsible foreign investors' on the other hand; a potential connection and interrelationship that has until now not gained something even close to comparable prominence in the international legal literature.[21] In this regard, the present contribution and its research focus are primarily guided by the perception that, and try to analyze in further details whether as well as – affirmatively – why, a progressive development of the concept of international legal personality that, among others, also covers public actors such as SWFs – traditionally being considered from the perspective of public international law merely as domestic entities or organs of the state in question – can be regarded as a suitable approach to enhance the status and perception of Asia's SWFs as responsible foreign investors.

20 On this perception see for example *Cummine*, in: Bohoslavsky/Cernic (eds.), Making Sovereign Financing and Human Rights Work, 163 (166); *Cummine*, Citizens' Wealth, 3; *Clark/Knight*, Asian Journal of International Law 1 (2011), 321 (322); *Karametaxas*, in: Adinolfi/Baetens/Caiado/Lupone/Micara (eds.), International Economic Law, 271 (272).

21 See, however, on this connection also already for example *Yin*, International Review of Law 2017:9, 1 (13).

B. SWFs and the Promotion of International Community Interests: An Ambivalent Relationship

It has already rightly been emphasized by scholars in recent years that the increasingly important role played by SWFs as economic and potentially also political actors in the international economic system results in chances for, but in particular also risks to, the promotion and protection of international community interests such as the realization of sustainable development, the protection of human rights, the environment and public health as well as the promotion and enforcement of core labour and social standards;[22] community interests, also known as global public goods, whose realization is increasingly regarded as constituting the central underlying aim of the current global legal order.[23]

On the one hand, these entities, because of their notable potential influence on the respective host countries as well as in particular also on the companies in which the SWFs decide to invest – or from which they decide to disinvest – their considerable financial resources, have clearly the potential to effectively contribute, in the course of their economic and political activities, to the promotion and protection of the above mentioned and other international community interests.[24] The well-documented and already much-analyzed investment – and

22 On this perception see, e.g., *Munari*, in: Bassan (ed.), Research Handbook on Sovereign Wealth Funds and International Investment Law, 332 (369-370); *Yin*, International Review of Law 2017:9, 1 (12); *van der Zee*, International and Comparative Corporate Law Journal 12 (2017), 35 (50 *et seq.*).

23 Generally thereto see for example Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, para. 76 („the realization of the common interest of all States in the proper application of the principle of the common heritage of mankind"); International Court of Justice, *Case Concerning the Gabčíkovo-Nagymaros Project*, (Hungary v. Slovak Republic), Separate Opinion of Vice-President *Weeramantry*, ICJ-Reports 1997, 88 (118) („We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. […] International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole."); *Wellens*, in: Komori/Wellens (eds.), Public Interest Rules of International Law, 15 („Indeed, rules protecting public interests of the international community occupy a prominent place in modern international law."); *Simma*, Recueil des Cours 250 (1994), 217 (235 *et seq.*); *Delbrück*, in: Götz/Selmer/Wolfrum (eds.), Liber amicorum Günther Jaenicke, 17 *et seq.*; *Benvenisti/Nolte* (eds.), Community Interests Across International Law, 3 *et seq.*; for earlier perceptions in this regard see also already, e.g., International Court of Justice, *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide*, (Advisory Opinion), Dissenting Opinion of Judge *Alvarez*, ICJ-Reports 1951, 49 (51); *Jessup*, A Modern Law of Nations, 133 ("there is growing acknowledgment of a basic community interest which contrasts with the traditional strict bilateralism of law"); *Schwarzenberger*, International Law, Vol. 1, 17 ("community law which aims higher than at the regulation of relations between subjects of international law on the basis either of power or of reciprocity of interests").

24 On this perception see also already UNCTAD, World Investment Report 2023: Investing in Sustainable Energy for All, 2023, 98 ("Institutional investors, such as public pension funds (PPFs) and sovereign wealth funds (SWFs), are in a pivotal position to effect change on sustainability-related challenges, and to finance investment in sustainable energy. The capital-intensive and long-term nature of renewables investment corresponds to the maturity profiles of pension fund liabilities and is a good match for sovereign demand for infrastructure investment."); *id.*, 119 ("As part of efforts to mainstream climate issues in their sustainability strategies, PPFs and SWFs have been directing more of their assets towards the energy transition. Renewable energy has become an attractive infrastructure subsegment for these institutional investors, offering the stable, inflation-hedging qualities of infrastructure while supporting net-zero objectives. With a long-term investment horizon, SWFs and PPFs are uniquely positioned for investing in infrastructure and energy, including the renewable energy sector, and have become important investors in the sectors."); *van der Zee*, International and Comparative Corporate Law Journal 12 (2017), 35 (51) ("Therefore, SWFs seem to have a lot of power to change the behavior of companies by incorporating environmental and human rights considerations into their investment policy. For that reason, it could be argued that SWFs are in a unique position to promote human rights and impede environmental damage in other countries."); *Yin*, International Review of Law 2017:9, 1 (12) ("Although compared to the total global financial assets, SWFs may constitute a relatively small proportion, they are large enough that they can influence corporate governance practices and exert a stabilising effect on the financial market. In fact, these large institutional investors can not only stimulate local and global economic growth and development; they also have

disinvestment – policies and activities of SWFs like the Norwegian Government Pension Fund Global[25] as well as the New Zealand Superannuation Fund[26] provide quite vivid examples in this regard. On the other hand, however, SWFs, due to their increasingly influential position in the international economic system, unfortunately also obviously have the potential to frustrate the universal promotion and protection of global public interest concerns like sustainable development, human rights, environmental protection as well as internationally recognized labour and social standards either directly through their own activities in connection with the undertaking of foreign direct investments or indirectly for example by way of supporting foreign state actors, predominantly in oppressive regimes, in their respective actions and in particular also by investing in companies that do not adequately pay attention to sustainability issues when conducting business and/or disregard internationally recognized environmental, labour and social standards as well as, among others, engage in human rights abuses through their commercial practices.[27]

In light of this seemingly quite ambivalent potential of SWFs and their activities regarding the promotion and protection of global public interest concerns, the question arises whether these actors, in addition to their *de facto* significance in the international economic system, are also in a normative sense integrated into the international legal order. In particular, it seems worth enquiring in this context whether SWFs are addresses of obligations under public international law to contribute to, *inter alia*, the promotion of sustainable development as well as the protection of human rights and the environment; international legal obligations that extend beyond the societal expectations enshrined in soft law instruments[28] like the 2008 so-called

the potential to positively impact human rights and environmental situations in host countries through investment activities such as responsible investment."); as well as, e.g., *Richardson*, Global Journal of Comparative Law 1 (2012), 125 (158 *et seq.*); *Ghahramani*, in: Bassan (ed.), Research Handbook on Sovereign Wealth Funds and International Investment Law, 321 *et seq.*; *Keenan/Ochoa*, Georgetown Journal of International Law 40 (2009), 1151 *et seq.*; *Munari*, in: Bassan (ed.), Research Handbook on Sovereign Wealth Funds and International Investment Law, 332 (338 *et seq.*); *Catá Backer*, Wake Forest Law Review 52 (2017), 735 *et seq.*; *Gilligan/O'Brien/Bowman*, Centre for International Finance and Regulation Working Paper No. 021/2014, 7 *et seq.*; *Richardson/Lee*, in: Bassan (ed.), Research Handbook on Sovereign Wealth Funds and International Investment Law, 388 (393 *et seq.*); *Karametaxas*, in: Adinolfi/Baetens/Caiado/Lupone/Micara (eds.), International Economic Law, 271 (278). On the positive potential of SWFs in this regard see also more recently for example OECD, The Role of Sovereign and Strategic Investment Funds in the Low-carbon Transition, 2020, 13 *et seq.*; United Nations/UNCTAD, Sustainability Integration by Public Pension and Sovereign Wealth Funds 2022, 2023, 7 *et seq.*

25 For additional and regularly updated information on the Norwegian Government Pension Fund Global see <https://www.nbim.no/> (accessed 16 August 2023). Specifically on the responsible investment policies and activities of this SWF see the information on the internet under: <https://www.nbim.no/en/responsible-investment/> (accessed 16 August 2023); as well as for example Norges Bank Investment Management, Responsible Investment – Government Pension Fund Global 2022, 2023, 7 *et seq.* From the numerous scholarly contributions on the activities of the Norwegian Government Pension Fund Global see, e.g., *Chesterman*, American University International Law Review 23 (2008), 577 (582 *et seq.*); *Catá Backer*, Georgetown Journal of International Law 41 (2010), 425 (450 *et seq.*); *Gelpern*, Asian Journal of International Law 1 (2011), 289 (301 *et seq.*); *Follesdal*, in: Bohoslavsky/Cernic (eds.), Making Sovereign Financing and Human Rights Work, 323 *et seq.*; *Hachigian*, Business and Politics 17 (2015), 603 *et seq.*; *Shemirani*, Sovereign Wealth Funds and International Political Economy, 39 *et seq.*

26 Further information on the New Zealand Superannuation Fund are available on the internet under: <https://nzsuperfund.nz/> (accessed 16 August 2023). See also, e.g., *Cummine*, in: Bohoslavsky/Cernic (eds.), Making Sovereign Financing and Human Rights Work, 163 (172 *et seq.*); *Yin*, International Review of Law 2017:9, 1 (20 *et seq.*); *Richardson*, Nordic Journal of Commercial Law 2011, No. 2, 1 (16 *et seq.*).

27 On this negative potential of SWFs as far as the realization of global community interests is concerned see also, e.g., *van der Zee*, International and Comparative Corporate Law Journal 12 (2017), 35 (50 *et seq.*); *Cummine*, in: Bohoslavsky/Cernic (eds.), Making Sovereign Financing and Human Rights Work, 163 (166 *et seq.*); *Yin*, International Review of Law 2017:9, 1 (12); *Volk*, Studentische Zeitschrift für Rechtswissenschaft – Wissenschaft Online 2017, 299 (316 *et seq.*); *Demeyere*, in: Nystuen/Follesdal/Mestad (eds.), Human Rights, Corporate Complicity and Disinvestment, 183 *et seq.*

28 Generally on the characteristics and normative as well as practical relevance of soft law instruments in the international system see for example *Thürer*, Soft Law, paras. 1 *et seq.*, in: Peters (ed.), Max Planck Encyclopedia of Public International Law, erhältlich im Internet unter: <www.mpepil.com/> (accessed 16 August 2023); *Chinkin*, International and

"Santiago Principles" on SWFs as developed by the former International Working Group of Sovereign Wealth Funds (IWGSWF) and current International Forum of Sovereign Wealth Funds (IFSWF)[29] and the 2006 UN Principles for Responsible Investment as adopted by the PRI Association and supported by the United Nations.[30]

The need for, and potential advantages of, imposing respective global public interest obligations on SWFs have occasionally already been outlined and emphasized by international scholars.[31] In fact, for example *Muthucumaraswamy Sornarajah* has more recently painted a rather bleak picture of the status and effects of SWFs in the absence of such an international legal framework applicable to these actors: "The impact of sovereign wealth funds […] is unclear. There have been soft-law principles known as the Santiago Principles on Sovereign Wealth Funds. Their requirements of transparency and management standards are not stringent. There is no provision on accountability for any misconduct in foreign states. These wealth funds will be left unregulated in a manner similar to multinational corporations which also function in an unregulated setting. The immense resources of some sovereign wealth funds will pose problems both for developing as well as developed states. If multinational corporations were seen as oppressors with rights without responsibilities, there is now a new addition to that category of entities."[32]

Comparative Law Quarterly 38 (1989), 850 *et seq.*; *Nowrot*, in: Tietje/Nowrot (eds.), Internationales Wirtschaftsrecht, 68 (115 *et seq.*), each with numerous further references.

29 IWGSWF, Sovereign Wealth Funds – Generally Accepted Principles and Practices, "Santiago Principles", October 2008, available on the internet under: <https://www.ifswf.org/santiago-principles> (accessed 16 August 2023). For additional information on the structure and activities of the IFSWF see also: <https://www.ifswf.org/> (accessed 16 August 2023). For an analysis of the work of the IFSWF including the 2008 Santiago Principles see, e.g., *Park/Estrada*, Asian Journal of International Law 1 (2011), 383 *et seq.*; *Wang*, in: Lim (ed.), Alternative Visions of the International Law on Foreign Investment, 405 (417 *et seq.*); *Wong*, Brooklyn Journal of International Law 34 (2009), 1081 (1103 *et seq.*); *de Bellis*, Asian Journal of International Law 1 (2011), 349 (358 *et seq.*); *Preisser*, Sovereign Wealth Funds, 228 *et seq.*; *Hild*, Sovereign Wealth Funds, 173 *et seq.*; *Hsu*, in: Bassan (ed.), Research Handbook on Sovereign Wealth Funds and International Investment Law, 99 *et seq.*

30 PRI Assocation, Principles for Responsible Investment, 2006, available on the internet under: <https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment> (accessed 16 August 2023). For further information on the PRI Association including its collaboration with the United Nations see: <https://www.unpri.org/> (accessed 16 August 2023). Specifically on the relevance of these principles in connection with the investment activities of SWFs see for example *Cummine*, in: Bohoslavsky/Cernic (eds.), Making Sovereign Financing and Human Rights Work, 163 (172 *et seq.*); *Karametaxas*, in: Adinolfi/Baetens/Caiado/Lupone/Micara (eds.), International Economic Law, 271 (280).

31 See, e.g., *Cummine*, in: Bohoslavsky/Cernic (eds.), Making Sovereign Financing and Human Rights Work, 163 (166 *et seq.*); *Volk*, Studentische Zeitschrift für Rechtswissenschaft – Wissenschaft Online 2017, 299 (324); *Demeyere*, in: Nystuen/Follesdal/Mestad (eds.), Human Rights, Corporate Complicity and Disinvestment, 183 *et seq.*; *Karametaxas*, in: Adinolfi/Baetens/Caiado/Lupone/Micara (eds.), International Economic Law, 271 (286).

32 *Sornarajah*, The International Law on Foreign Investment, 91.

C. Community Interest Obligations of SWFs under Public International Law: Current Developments in Investment Treaty-Making Practice

In order to assess these questions and to provide possible answers to them, it is submitted here that the realm of international investment law serves as a suitable reference field and starting point. As elaborated on in further details in the following sections of this contribution, this finding applies in particular to the growing and quite notable trend in investment treaty-making practice to address the issue of investors' obligations as a rather new regulatory approach aimed at incorporating broader public interest concerns into international investment agreements; transboundary treaty regimes that not infrequently also directly apply to the economic activities of SWFs.

I. A Merger of Investors' Rights and Obligations as a Notable Regulatory Element of the Current Reform Processes in International Investment 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.[33] Essentially, this general rise of international investment law, especially in the form of treaty law,[34] 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 older bilateral investment treaties.[35] 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

33 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'.").

34 On the various different sources of international investment law see, e.g., *Dolzer/Kriebaum/Schreuer*, Principles of International Investment Law, 15 *et seq.*; *Reinisch*, in: Tietje/Nowrot (eds.), Internationales Wirtschaftsrecht, 454 (457 *et seq.*); *Salacuse*, The Law of Investment Treaties, 52 *et seq.*

35 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*.

law", particularly on the basis of access to effective international legal remedies.[36]

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.[37] 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[38] that increasingly finds its manifestation in treaty practice[39] is first and foremost characterized, and indeed largely dominated, by intensified efforts in all parts of the world to progressively develop the international legal basis of investment protection with a view to fostering its contribution to the realization of sustainable development objectives[40]

36 *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 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.").

37 On this perception see, e.g., UNCTAD, World Investment Report 2023: Investing in Sustainable Energy for All, 2023, 75 ("Other notable developments continued the trend towards reforming the international investment regime and highlighted the growing need for its adaptation to meet emerging global objectives and challenges. These include greater attention to investment facilitation and climate change."); *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.").

38 Generally on this perception see also, e.g., UNCTAD, World Investment Report 2023: Investing in Sustainable Energy for All, 2023, 73 ("new-generation IIAs"); 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.*).

39 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.*).

40 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.*; *Kulick*, Global Public Interest in International Investment Law, 11 *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/

and, albeit closely related, by various efforts of states to regain some of their "policy space" vis-à-vis foreign investors.[41] In light of the sometimes rather negatively perceived effects of the hitherto established international investment protection framework,[42] there is growing recognition among 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.[43] 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,[44] also a broader discussion on possible "counterweights" to investors' rights[45] is gaining momentum in recent years.

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.*; see in this regard also, e.g., UN GA Res. 74/199, Promoting Investments for Sustainable Development, UN Doc. A/RES/74/199 of 13 January 2020.

41 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.

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

43 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 16 August 2023); 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").

44 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.*

45 See also for example *Kessedjian*, Journal of World Investment and Trade 22 (2021), 645 ("Rebalancing Investors' Rights and Obligations"); *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; *Subedi*, International Investment Law, 281; *Bueno/Vastardis/Djeuga*, Journal of World Investment and Trade 24 (2023), 179 (182) ("efforts to balance rights and obligations in new generation of international investment agreements to ensure

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.[46] 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, these 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.[47] This is already indicated by the fact that most of the currently more than 2.830 bilateral investment treaties[48] 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.[49]

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.[50] 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,[51] that "the prosperity of the natives must

more sustainable foreign investments").

46 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."); *Low*, Journal of International Economic Law 26 (2023), 66 (76); *Lam/Guo*, Journal of International Economic Law 24 (2021), 321 (324); *Bueno/Vastardis/Djeuga*, Journal of World Investment and Trade 24 (2023), 179 (182 *et seq.*); as well as the contributions in *Ho/Sattorova* (eds.), Investors' International Law, 2021.

47 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.*

48 UNCTAD, World Investment Report 2023: Investing in Sustainable Energy for All, 2023, 71.

49 See also, e.g., *Dolzer/Kriebaum/Schreuer*, Principles of International Investment Law, 33 ("BITs give guarantees to investors but do not normally address obligations of investors, […]."); *Marcoux/Bjorklund*, International and Comparative Law Quarterly 69 (2020), 877 (894) ("the overwhelming majority of international investment agreements do not include direct obligations for foreign investors"); *Low*, Journal of International Economic Law 26 (2023), 66 (76) ("Most BITs at present contain very limited if any provisions in this regard."); *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); *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.").

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

51 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

be previously secured, before any profit from them whatsoever is attempted".[52]

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.[53] 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 such as, for example, the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, 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 June 2023,[54] the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy as adopted by the ILO Governing Body on 17 November 1977 and most recently amended in November 2022,[55] the United Nations Global Compact, founded in 1999 at the initiative of the then UN Secretary-General *Kofi Annan*,[56] 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.[57]

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[58] – 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

Enterprise, 15; *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 246; *Nowrot*, Normative Ordnungsstruktur und private Wirkungsmacht, 106 *et seq.*, with further references.

52 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.").

53 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.*).

54 Reprinted in: I.L.M. 15 (1976), 969 *et seq.*; for the text of the updated 2023 OECD Guidelines as well as accompanying documents see OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, 2023, available on the internet at: <https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en> (accessed 16 August 2023). On the origins of the OECD Guidelines, their content as well as more recent review processes see *Huarte Melgar/Nowrot/Wang*, The 2011 Update of the OECD Guidelines for Multinational Enterprises, 5 *et seq.*; *Weidmann*, Der Beitrag der OECD-Leitsätze für multinationale Unternehmen zum Schutz der Menschenrechte, 172 *et seq.*, with numerous further references.

55 Reprinted in: I.L.M. 17 (1978), 422 *et seq.*; the current version of the ILO Tripartite Declaration of November 2022 is available on the internet under: <https://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm> (accessed 16 August 2023). Generally thereto see, e.g., *Weilert*, Max Planck Yearbook of United Nations Law 14 (2010), 445 (464 *et seq.*).

56 Additional information on the United Nations Global Compact are available under: <www.unglobalcompact.org/> (accessed 16 August 2023). 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.

57 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.

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

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.[59]

II. Identifying and Systemizing Provisions on 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 2.830 bilateral investment treaties together with roughly 435 other international agreements that provide for investment provisions[60] 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 in the broader sense, namely direct obligations of conduct (1.), indirect obligations of conduct (2.) as well as provisions signaling a commitment to corporate social responsibility by the contracting parties (3.).[61]

1. 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.[62] 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

59 On 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, see for example *Hellwig/Nowrot*, Towards Investors' Responsibilities in International Investment Agreements, 9 *et seq.*, with additional references.

60 UNCTAD, World Investment Report 2023: Investing in Sustainable Energy for All, 2023, 71.

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

62 On this concept of direct obligations of investors see also, e.g., *Nowrot*, Corporate Legal and Social Responsibility as an Issue of International Investment Agreements, 12; *Abel*, International Investor Obligations, 37 *et seq.*

of the Community" as well as "see to the protection of the environment".[63] 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".[64]

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.[65] 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 14 of the Ethiopia-Qatar investment agreement signed on 14 November 2017,[66] 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,[67] in Article 11 of the bilateral investment treaty concluded between Argentina and Qatar on 6 November 2016[68] as well as in Article 11 (a) of the Brazil-India investment agreement signed on 25 January 2020.[69]

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[70] stipulates in its Chapter III

63 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.*

64 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.*

65 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 16 August 2023).

66 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4923/ethiopia---qatar-bit-2017-> (accessed 16 August 2023).

67 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 16 August 2023).

68 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 16 August 2023).

69 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 16 August 2023).

70 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 16 August 2023).

("Obligations and Duties of Investors and Investments") a quite notable number of direct obligations of conduct. Among them are the requirement of foreign investors "to strive through their management policies and practices, to contribute to the development objectives of the host States and the local levels of government" under Article 11 (3), the duty to conduct environmental and social impact assessments of planned investments (Article 12), the obligation to refrain from involvement in corrupt practices in accordance with Article 13 as well as the normative expectation to establish and maintain "liaison processes" with local communities under Article 15 (3). In addition, Article 14 (2) of the ECOWAS Supplementary Act stipulates that foreign investors "shall uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental or social obligations, to which the host State and/or home State are Parties". This provision is supplemented and concretized by Article 14 (3), foreseeing that foreign investors shall not "by complicity with, or in assistance with others, including public authorities, violate human rights 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 and most recently amended in June 2022[71].

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.[72] Article 14 of this investment treaty requires foreign investor, in the respective pre-establishment phase, to conduct environmental as well as social impact assessments of their potential investments and, in this regard, to apply the precautionary principle to their environmental assessment screening processes. 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).

Moreover, and more recently, the African Continental Free Trade Area (AfCFTA) Draft Protocol on Investment, adopted by the African Union at the 36th ordinary session of the Assembly of Heads of State and Government on 19 February 2023, stipulates in its Chapter 5

71 ILO Declaration on Fundamental Principles and Rights at Work of 18 June 1998 in its current version of 11 June 2022, available on the internet under: <https://www.ilo.org/declaration/lang--en/index.htm> (accessed 16 August 2023).

72 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 16 August 2023). 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.*).

("Investor Obligations") a considerable number of in part quite detailed direct obligations of conduct for foreign investors.[73] Article 33 of this protocol requires investors and their investments to "comply with high standards of business ethics, investment-related human rights and labour standards" and, in this regard, to – among others – "support and respect the protection of internationally recognised human rights" (lit. a), to "ensure that they are not complicit in human rights abuses" (lit. b), to "comply with the International Labour Organisation (ILO) standards, including the ILO Declaration on Fundamental Principles and Rights at Work, and domestic labour legislations" (lit. c), as well as to "eliminate discrimination in respect of employment and occupation" (lit. e). Article 34 (1) stipulates that investors and their investments "shall, in carrying out their business activities, respect and protect the environment" and, in order to fulfill this obligation, shall "carry out an environmental impact assessment, in accordance with the best international standards and practices and as required by domestic law" (lit. c) and shall "apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to the investment, or precluding the investment if necessary" (lit. d). Article 34 (2) prescribes that they "shall not exploit or use natural resources to the detriment of the rights and interests of the Host State and local communities". In accordance with Article 35 (1), foreign investors and their investments "shall respect the rights and dignity of indigenous peoples and local communities in accordance with relevant domestic laws and regulations, international law, norms and best practices, including the right of indigenous peoples, and local communities where applicable, to free, prior and informed consent and to participate in the benefit of the investment". In addition, Article 36 requires foreign investors and their investments to "refrain from any interference in the internal affairs of State Parties and in their intergovernmental relations, in particular to influence the appointment of persons to public office, finance political parties or undermine the political stability or security of the Host State or to influence public opinion in a manner contrary to this Article". Furthermore, to mention but one additional example, Article 37 (1) and (2) stipulate direct obligations of investors aimed at preventing and combatting corruption.

In addition, 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".[74] 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 Article 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

73 The text of the Draft AfCFTA Protocol on Investment of January 2023 is available on the internet under: <https://au-afcfta.org/2023/05/the-afcfta-investment-protocol-a-potential-game-changer-for-the-african-continent/> (accessed 16 August 2023). See thereto also, e.g., *Ayele/Belete/te Velde*, Overseas Development Institute Policy Brief, April 2023, 5 *et seq.*

74 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 16 August 2023).

2019.[75] Furthermore, the bilateral investment treaty concluded by Indonesia and Switzerland on 24 May 2022 stipulates in its Article 14 direct obligations of investors aimed at preventing and combatting corruption.[76] In addition, a number of countries like for example Ghana and Botswana[77] as well as more recently India,[78] Colombia,[79] the Belgium-Luxembourg Economic Union[80] and six economies of the Western Balkan region[81] as well as international organizations like SADC[82] and the African Union[83] have included respective provisions on investors' obligations in their model bilateral investment treaties and related guiding instruments.

In the realm of civil society and its increasing occupation with the issues of investors' obligations, it is in particular the alternative approach taken recourse to in the "Model International Agreement on Investment for Sustainable Development", published by the International Institute for Sustainable Development (IISD) already in April 2005[84] that has received quite positive responses.[85] This applies in particular also to its rather 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.

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

75 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 16 August 2023).

76 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5012/indonesia---switzerland-bit-2022-> (accessed 16 August 2023).

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

78 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 16 August 2023); 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.*

79 2017 Colombia Model BIT, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements> (accessed 16 August 2023).

80 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 16 August 2023). See thereto also *Krajewski*, Business and Human Rights Journal 5 (2020), 105 (116).

81 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 16 August 2023). See thereto also UNCTAD, World Investment Report 2021, Investing in Sustainable Recovery, 2021, 127-128.

82 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 16 August 2023).

83 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.

84 The text of the IISD Model Agreement is for example available under: <http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> (accessed 16 August 2023); see also, e.g., *Malik*, in: Cordonier Segger/Gehring/Newcombe (eds.), Sustainable Development in World Investment Law, 565 *et seq.*

85 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.*).

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.[86]

2. The (More) Common: Establishing Indirect Obligations of Conduct for Foreign Investors

The second regulatory technique taken recourse to in the present context concerns the stipulation of what might be characterized as indirect obligations of conduct for foreign investors. This category refers to provisions in international investment treaties that do not stipulate obligations directly addressed to foreign 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 actors.[87]

For example, Article 72 of the Economic Partnership Agreement between the CARIFORUM States and the European Union and its member States, titled "behaviour of investors", foresees that the parties "shall cooperate and take, within their own respective territories, such measures as may be necessary, inter alia, through domestic legislation, to ensure that" investors comprehensively abstain from engaging in corruptive business practices (lit. a), act in accordance with core labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights at Work (lit b), do not "manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements" signed and ratified by the parties (lit. c) as well as "establish and maintain, where appropriate, local community liaison processes" (lit. d).[88] Furthermore, the Investment Agreement for the 2007 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

86 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 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; *Erol*, Erasmus Law Review 15 (2022), 12 *et seq.*; *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.*).

87 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.*).

88 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.

Bahrain of 23 June 2022 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".[89]

3. 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.[90]

Thereby, a number of agreements emphasize the importance of these issues in their preambles.[91] Among them 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.[92] In addition, the bilateral investment agreement signed by Hungary and San Marino on 21 September 2022 emphasizes in its preamble, *inter alia*, that the contracting parties seek "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".[93] Moreover, the

89 Agreement between Japan and the Kingdom of Bahrain for the Reciprocal Promotion and Protection of Investment of 23 June 2022, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5020/bahrain---japan-bit-2022-> (accessed 16 August 2023). See also, e.g., Article 9 of the 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 16 August 2023); 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 16 August 2023); 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 16 August 2023). 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.

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

91 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.*

92 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 16 August 2023).

93 The text of the agreement is available under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5054/hungary---san-marino-bit-2022-> (accessed 16 August 2023).

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".[94]

In addition, the bilateral investment treaty between Austria and Kosovo of 22 January 2010 expresses in its preamble 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".[95] 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".[96]

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".[97] 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".[98]

Other bilateral investment treaties and free trade agreements even stipulate specific provisions asking the parties to encourage 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. The Parties should remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal

94 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 16 August 2023).

95 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 16 August 2023). See also, e.g., *Reinisch*, in: Brown (ed.), Commentaries on Selected Model Investment Treaties, 15 (21).

96 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 16 August 2023).

97 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 16 August 2023).

98 The text of the agreement is available under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3633> (accessed 16 August 2023).

policies."[99]

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".[100] 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).[101] 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,[102] 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".[103]

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,[104] in Article 13 of the bilateral investment agreement between Indonesia and Switzerland of 24 May 2022,[105] in Article 8.17 of the investment chapter of the free trade agreement between Singapore and the Pacific Alliance States (Chile, Colombia, Mexico and Peru) of 26 January 2022,[106] in Article 14.17 of the Agreement between the United States of

99 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 16 August 2023).

100 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 16 August 2023).

101 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 16 August 2023).

102 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.

103 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 16 August 2023).

104 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 16 August 2023).

105 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5012/indonesia---switzerland-bit-2022-> (accessed 16 August 2023).

106 The text of the investment chapter of this agreement is available on the internet under: <https://investmentpolicy.unctad.

America, the United Mexican States, and Canada (USMCA) of 30 November 2018,[107] in Article 12 of the Brazil-India investment agreement signed on 25 January 2020, in Article 16 of the bilateral investment treaty between the Hong Kong Special Administrative Region of the People's Republic of China and the Republic of Chile of 18 November 2016,[108] in Article 17 of the bilateral investment treaty between Argentina and Japan of 1 December 2018,[109] in Article 816 in the investment chapter of the free trade agreement between Canada and Colombia that entered into force on 15 August 2011,[110] in Article 16 of the Australia-Hong Kong bilateral investment treaty of 26 March 2019,[111] in Article 7 of the new Dutch Model BIT published by the Dutch government on 22 March 2019,[112] in Article 16 of the new Canadian Model BIT as published on 12 May 2021,[113] 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,[114] in Article 14 of the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol of 7 April 2017,[115] in Article 15 of the investment cooperation and facilitation agreement signed between Brazil and Suriname on 2 May 2018,[116] in Article 13 of the Hong Kong-Mexico bilateral investment treaty that entered into force on 16 June 2021,[117] in Article 14 of the respective international investment treaty concluded by Ethiopia and Brazil on 11 April 2018[118] and in Article 14.17 of the Australia-Indonesia Comprehensive

org/international-investment-agreements/treaties/treaties-with-investment-provisions/4994/pacific-alliance---singapore-fta-2022-> (accessed 16 August 2023).

107 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 16 August 2023).

108 The text of the agreement is available under: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3717> (accessed 16 August 2023).

109 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 16 August 2023).

110 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 16 August 2023).

111 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 16 August 2023).

112 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 16 August 2023). 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.*; *De Brabandere*, ICSID Review – Foreign Investment Law Journal 36 (2021), 319 *et seq.*

113 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 16 August 2023).

114 For the text of this bilateral investment treaty see: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3706> (accessed 16 August 2023).

115 The text of the protocol is available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3772> (accessed 16 August 2023).

116 The text of the agreement is available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3815> (accessed 16 August 2023). 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.*

117 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 16 August 2023).

118 For the text of this investment treaty see: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3816> (accessed 16 August 2023).

Economic Partnership Agreement of 4 March 2019.[119]

Furthermore, in a Joint Declaration concerning Guidelines to Investors attached to the Association Agreement between Chile and the European Union as well as its Member States of 18 November 2002, the contracting parties "remind their multinational enterprises of their recommendation to observe the OECD Guidelines for Multinational Enterprises, wherever they operate".[120] Article 23.10 of the EU-Chile Advanced Framework Agreement, on which a political consensus was reached by the parties on 9 December 2022 and that is intended to replace the 2002 Association Agreement, stipulates in its first paragraph that "each Party shall encourage covered investments to incorporate into their internal policies internationally recognised principles and guidelines of Corporate Social Responsibility / Responsible Business Conduct such as the OECD Guidelines for MNEs, the ILO Declaration for MNEs, and the UN Guiding Principles on Business and Human Right". Moreover, Article 23.10 (2) states that the "Parties reaffirm the importance of investors conducting a due diligence process to identify, prevent, mitigate, and account for the environmental and social risks and impacts of its investment".[121]

In addition, 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".[122] Furthermore, Article 14.19 of the investment chapter included in the free trade agreement signed on 28 February 2022 between the United Kingdom and New Zealand that entered into force on 31 May 2023 stipulates that the "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 those internationally recognised standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights".[123] 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".[124]

119 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 16 August 2023).

120 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 16 August 2023).

121 The text of the investment chapter of the EU-Chile Advanced Framework Agreement is available on the internet under: <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en> (accessed 16 August 2023).

122 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 16 August 2023).

123 The text of the investment chapter of this agreement is available under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/5007/new-zealand---united-kingdom-fta-2022-> (accessed 16 August 2023).

124 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.

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.[125] 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.

III. In or Out? It Depends …: SWFs and the Scope of Application of International Investment Treaties

The analysis undertaken in the previous sections of this contribution indicates the existence of a certain and growing trend in the more recent practice of investment treaty-making to also stipulate provisions addressing the issue of investors' obligations as one of the more novel regulatory approaches aimed at incorporating broader public interest concerns into international investment agreements.[126] These tendencies, however, are obviously only of practical relevance for the investment activities of SWFs if the respective economic transactions undertaken by these specific actors are also covered by the scope of application of this type of treaties.[127]

Whether this is the case, essentially depends, in addition to the overarching requirement that the home state of the SWF at issue and the host state of this SWF's investment are at all contracting parties to a respective international investment agreement that applies *ratione temporis*, always on the individual circumstances of a specific case, including the specific regulatory content of the investment treaty at issue.[128] That said, some more general findings can nevertheless be made in this regard, in particular as far as two central prerequisites for the overall applicability of investment agreements – namely the issues of covered "investments" as well as of covered "investors" – are concerned that also seem to be of notable relevance when addressing the issue of SWFs and the scope of application of international investment treaties.

As far as the scope of application *ratione materiae* is concerned, the question arises – and needs to be dealt with – whether the business transactions typically undertaken by SWFs do

125 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 for example *Bueno/Vastardis/Djeuga*, Journal of World Investment and Trade 24 (2023), 179 (197 *et seq.*); *Marcoux*, Leiden Journal of International Law 34 (2021), 109 (116 *et seq.*).

126 See in particular *supra* under C.II.

127 Generally on the applicability of bilateral investment treaties and other international investment agreements to the investment activities of SWFs see also already for example *Bassan*, The Law of Sovereign Wealth Funds, 116 *et seq.*; *Tietje*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1802 (1812 *et seq.*); *Burgstaller*, in: Brown/Miles (eds.), Evolution in Investment Treaty Law and Arbitration, 163 *et seq.*; *Sornarajah*, Asian Journal of International Law 1 (2011), 267 (278 *et seq.*); *Whitsitt/Weiler*, in: Bassan (ed.), Research Handbook on Sovereign Wealth Funds and International Investment Law, 273 (290 *et seq.*); *Audit*, Journal of World Investment and Trade 10 (2009), 617 (625 *et seq.*); *Annacker*, Chinese Journal of International Law 10 (2011), 531 *et seq.*

128 *Tietje*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1802 (1812).

in general, taking into account the dominant approach adopted in investment treaties, qualify as covered "investments" in the realm of international investment agreements. In this regard, it seems worth recalling that, taking recourse to the well-known distinction between foreign direct investments as characterized, among others, by an element of control of the operation of the targeted company on the one hand and foreign portfolio investments lacking such an element of personal management on the other hand,[129] until now only a comparatively small, albeit apparently increasing, proportion of the investment activities undertaken by SWFs involves the form of foreign direct investments.[130] Rather, these entities mostly continue to operate in the realm of portfolio investments.[131]

However, this dominant investment strategy pursued by SWFs should not – prematurely – give rise to the conclusion that their economic transactions are largely excluded from the material scope of application of investment treaties. Admittedly, a number of these agreements exist that explicitly exclude portfolio investments from their scope of application.[132] Article 1 of the African Continental Free Trade Area (AfCFTA) Draft Protocol on Investment, adopted by the African Union at the 36th ordinary session of the Assembly of Heads of State and Government on 19 February 2023, provides a recent example in this regard, stipulating in its relevant parts that "[f]or greater certainty, investment does not include: […] b. portfolio investments, that is, investment that does not give the investor the possibility to exercise effective management or influence in the management of the enterprise". Nevertheless, the probably clear majority of contemporary investment agreements adopts either a rather broad assess-based definition of covered investments including a non-exhaustive list of examples or stipulate a – usually quite comprehensive – closed-list definition of respective investments, with both approaches normally covering foreign direct investments as well as portfolio investments.[133] In light of these findings it seems more than reasonable to conclude that – at least as far as the overwhelming majority of current investment treaties is concerned – the respective economic transactions typically undertaken by SWFs qualify as covered "investments".[134]

The second central prerequisite worth discussing in the present context relates to the scope of application *ratione personae*. In this regard, the question needs to be addressed whether SWFs typically qualify as covered "investors" for the purpose of applying international investment agreement. Apparently, until now comparatively few investment treaties include provisions explicitly characterizing SWFs as covered investors. A respective example is provided

129 Generally on this distinction see, e.g., *Dolzer/Kriebaum/Schreuer*, Principles of International Investment Law, 83; *Reinisch*, in: Tietje/Nowrot (eds.), Internationales Wirtschaftsrecht, 454 (465). See also for example European Court of Justice, Opinion 2/15 (Free Trade Agreement with Singapore) of the Court of 16 May 2017, paras. 80 *et seq.*

130 See thereto, as well as on an apparently evolving trend in the activities of SWFs aimed at engaging in foreign direct investment, for example UNCTAD, World Investment Report 2012, Towards a New Generation of Investment Policies, 2012, 13 *et seq.*; *Bassan*, European Business Law Review 21 (2010), 165 (166 *et seq.*); *Barbieri*, in: Sacerdoti/Acconci/Valenti/De Luca (eds.), General Interests of Host States in International Investment Law, 130 (138); *Karametaxas*, in: Adinolfi/Baetens/Caiado/Lupone/Micara (eds.), International Economic Law, 271 (279).

131 On this finding see also, e.g., *Tietje*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1802 (1812); UNCTAD, World Investment Report 2012, Towards a New Generation of Investment Policies, 2012, 13; *Barbieri*, in: Sacerdoti/Acconci/Valenti/De Luca (eds.), General Interests of Host States in International Investment Law, 130 (138); *Munari*, in: Bassan (ed.), Research Handbook on Sovereign Wealth Funds and International Investment Law, 332 (336).

132 On this exclusionary regulatory approach see also for example UNCTAD, Identifying Core Elements in Investment Agreements in the APEC Region, 2008, 12.

133 For a more comprehensive analysis of these dominant regulatory approaches towards covered investment in contemporary investment treaty practice see, e.g., *Bischoff/Happ*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 495 (500 *et seq.*); *Sabahi/Rubins/Wallace*, Investor-State Arbitration, 339 *et seq.*, each with numerous additional references.

134 On this perception see also for example *Tietje*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1802 (1812-1813).

by the bilateral investment agreement concluded between Indonesia and Saudi Arabia on 15 September 2003, stipulating in its Article 1 (3) lit. a (iii) that the term "investor" in respect of Saudi Arabia means "the Government of the Kingdom of Saudi Arabia and its financial institutions and authorities such as the Saudi Arabian Monetary Agency, public funds and other similar governmental institutions existing in Saudi Arabia".[135] Another example is the bilateral investment agreement concluded by Moldova and Qatar on 10 December 2012, stating in its Article 1 (1) (c) that the term "investor" "include[s] governments, official agencies, authorities, sovereign funds, trusts, and organizations established or organized in accordance with the respective state legislation of the Contracting Parties or of a third party in which the investor referred to above exercise effective control".[136]

In light of this finding and in order to assess this issue in the – quite frequent – absence of respective explicit stipulations in investment treaties, a useful starting point seems to be the commonly shared perception that there are at present basically three different categories of SWFs as far as their legal structure and form is concerned.[137] Thereby, a number of SWFs – and this constitutes the first regulatory approach in this regard – are constituted by a pool of assets without a separate legal personality under domestic law and are thus not legally separated from the state itself.[138]

Although international investment law is traditionally primarily concerned with investment activities of private foreign investors,[139] certain investment agreements also explicitly qualify the contracting parties, and thus investor states, as well as their organs and subdivisions for coverage as "investors". For example, Article 9.1 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,[140] defines "investor of a Party" as "a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party". In addition, Article 1 of the bilateral investment treaty concluded between Rwanda and the United States on 19 February 2008 defines the term "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party".[141] Art. 1 (1) (c) of the bilateral

135 Agreement between the Government of the Kingdom of Saudi Arabia and the Government of the Republic of Indonesia concerning the Promotion and Reciprocal Protection of Investments of 15 September 2003, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1997/indonesia---saudi-arabia-bit-2003-> (accessed 16 August 2023).

136 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2548/moldova-republic-of---qatar-bit-2012-> (accessed 16 August 2023).

137 See thereto already IWGSWF, Sovereign Wealth Funds – Generally Accepted Principles and Practices, "Santiago Principles", October 2008, p. 11, available on the internet under: <https://www.ifswf.org/santiago-principles> (accessed 16 August 2023); *Hammer/Kunzel/Petrova*, IMF Working Paper, WP/08/254, November 2008, 5; *van der Zee*, European Company Law 9 (2012), 141 (143); *Al-Hassan/Papaioannou/Skancke/Sung*, IMF Working Paper, WP/13/231, November 2013, 9.

138 See thereto as well as for respective examples IWGSWF, Sovereign Wealth Funds – Generally Accepted Principles and Practices, "Santiago Principles", October 2008, p. 11, available on the internet under: <https://www.ifswf.org/santiago-principles> (accessed 16 August 2023); *van der Zee*, International and Comparative Corporate Law Journal 12 (2017), 35 (44); *Vellano/Viterbo*, in: Bassan (ed.), Research Handbook on Sovereign Wealth Funds and International Investment Law, 371 (375).

139 On this perception see also, e.g., *Radi*, Rules and Practices of International Investment Law, 418; *Dolzer/Kriebaum/Schreuer*, Principles of International Investment Law, 58.

140 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 16 August 2023).

141 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2870/rwanda---united-states-of-america-bit-2008-> (accessed

investment treaty concluded between Qatar and Singapore on 17 October 2017 qualifies as an "investor of a Contracting Party" also "the Government and Governmental agencies of a Contracting Party".[142] Moreover, the bilateral investment treaty concluded between Germany and the United Arab Emirates on 21 June 1997 stipulates in its Article 1 (2) (b) (cc) that the term "investor" shall mean in respect of the United Arab Emirates "the Government of the State of the UAE acting either directly or indirectly through their local and federal financial institutions as well as development funds, agencies or other similar government institutions having their seats in the UAE".[143]

Despite the fact that investor states and their organs are rightly held to have for example no access as claimants to the international investor-state arbitration mechanism under the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention),[144] this first type of SWFs, being devoid of an independent legal personality, or – more precisely – their states from which they are not legally separated, can in principle undoubtedly be regarded as covered investors under the above mentioned as well as other similar investment treaties.[145]

The majority of current SWFs, however, tends to follow two different approaches as far as their legal frameworks are concerned. They are either established in the form of state entities with separate legal personality and thus as juridical persons under domestic public law or – apparently more frequently – as companies with independent legal personality recognized as well as governed by domestic company law and thus – considering that they are owned and controlled by the state in question – take in fact the form of a state-owned enterprise.[146]

Several investment agreements expressly include in their scope of application *ratione personae* respective state entities as well as state-owned enterprises and thus also those SWFs that have been established in one of these forms.[147] For example, Article 4 (d) of the ASEAN Comprehensive Investment Agreement of 26 February 2009 defines "investors" as "a natural person of a Member State or a juridical person of a Member State" and the subsequent lit. e of this provision qualifies a "juridical person" as "any legal entity duly constituted or otherwise organised under the applicable law of a Member State, whether for profit or otherwise, and whether privately-owned or governmentally-owned".[148] Article 1 (a) (i) of the Canada-Thai-

16 August 2023).

142 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4894/singapore---qatar-bit-2017-> (accessed 16 August 2023).

143 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1775/germany---united-arab-emirates-bit-1997-> (accessed 16 August 2023).

144 See, e.g., *Ceskolovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999, para. 16 ("The language of Article 25(1) of the Convention makes clear that the Centre does not have jurisdiction over disputes between two or more Contracting States."); *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000, para. 74; *Beijing Urban Construction v. Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction of 31 May 2017, para. 31; *Annacker*, Chinese Journal of International Law 10 (2011), 531 (553 *et seq.*); *Schreuer*, in: Schill/Malintoppi/Reinisch/Schreuer/Sinclair (eds.), Schreuer's Commentary on the ICSID Convention, Vol. I, Article 25, para. 574.

145 See thereto also for example *Annacker*, Chinese Journal of International Law 10 (2011), 531 *et seq.*; *Tietje*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1802 (1814).

146 See thereto as well as for respective examples IWGSWF, Sovereign Wealth Funds – Generally Accepted Principles and Practices, "Santiago Principles", October 2008, p. 11, available on the internet under: <https://www.ifswf.org/santiago-principles> (accessed 16 August 2023); *van der Zee*, International and Comparative Corporate Law Journal 12 (2017), 35 (43-44).

147 On this finding see also already for example *Annacker*, Chinese Journal of International Law 10 (2011), 531 (537 *et seq.*); *Collins*, International Investment Law, 87; *Skovgaard Poulsen*, ICSID Review – Foreign Investment Law Journal 31 (2016), 12 (14 *et seq.*).

148 The ASEAN Comprehensive Investment Agreement of 26 February 2009 is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3273/

land bilateral investment treaty of 17 January 1997 defines an "enterprise" and thus a potential investor as "any entity constituted or organized under applicable law, whether or not for profit, whether privately-owned or governmentally-owned or controlled".[149] Furthermore, to mention only one additional example, the bilateral investment agreement concluded between Bahrain and Japan on 23 June 2022 qualifies the term "enterprise" as "any legal person or any other entity duly constituted or organized under the applicable laws and regulations, whether or not for profit, and whether private or government owned or controlled".[150]

Nevertheless, it has been rightly emphasized that even those – comparatively numerous – investment treaties that do not explicitly refer to state entities as well as state-owned enterprises, but rather define "investors" broadly for example as "legal persons" or "juridical entities" should – in the absence of explicit stipulations to the contrary[151] – be interpreted as also including the respective state-owned actors and thus these legally independent categories of SWFs.[152] Moreover, it should be noted that respective SWFs also potentially enjoy standing as claimants in international investor-state arbitration proceedings under the ICSID Convention,[153] at least as long as they are not "acting as an agent for the government or is discharging an essentially governmental function",[154] an exclusionary factor that will hardly ever apply to the investment activities of SWFs in practice.[155]

In sum, the analysis undertaken in this chapter has revealed and confirmed that the investment activities of SWFs are not infrequently also covered by the scope of application of international investment agreements. This applies in particular to those SWFs that are endowed with an independent legal personality as juridical persons under domestic public law or domestic company law of the state in question and thus constitute legally separate state entities or state-owned enterprises.

asean-comprehensive-investment-agreement-2009-> (accessed 16 August 2023).

149 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/804/canada---thailand-bit-1997-> (accessed 16 August 2023).

150 Agreement between Japan and the Kingdom of Bahrain for the Reciprocal Promotion and Protection of Investment of 23 June 2022, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5020/bahrain---japan-bit-2022-> (accessed 16 August 2023).

151 Investment agreements that explicitly exclude state-owned entities from their definition of investors are apparently quite rare in practice. For a respective example see Article 1 (d) (i) of the Panama-UK bilateral investment agreement of 7 October 1983, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2738/panama---united-kingdom-bit-1983-> (accessed 16 August 2023).

152 On this perception see for example *Annacker*, Chinese Journal of International Law 10 (2011), 531 (539 *et seq.*); *Hsu*, Wake Forest Law Review 52 (2017), 837 (841 *et seq.*); *Konrad*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 545 (547 *et seq.*). See generally, and thus unrelated to the specific case of SWFs, in this connection also *McLaughlin*, ICSID Review – Foreign Investment Law Journal 34 (2019), 595 (610 *et seq.*); as well as for example the respective findings by the arbitral tribunal in *Stadtwerke München GmbH et al. v. Spain*, ICSID Case No. ARB/15/1, Award of 2 December 2019, para. 134.

153 See thereto also, e.g., *Annacker*, Chinese Journal of International Law 10 (2011), 531 (550 *et seq.*); *Tietje*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1802 (1813 *et seq.*); *Sejko*, Vanderbilt Journal of Transnational Law 56 (2023), 853 (858 *et seq.*).

154 *Broches*, Recueil des Cours 136 (1972), 331 (354-355). See also, e.g., *Ceskolovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999, para. 17; *Beijing Urban Construction v. Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction of 31 May 2017, paras. 31 *et seq.*; *Masdar Solar et al. v. Spain*, ICSID Case No. ARB/14/1, Award of 16 May 2018, para. 170; *Schreuer*, in: Schill/Malintoppi/Reinisch/Schreuer/Sinclair (eds.), Schreuer's Commentary on the ICSID Convention, Vol. I, Article 25, paras. 575 *et seq.*; *Sejko*, Vanderbilt Journal of Transnational Law 56 (2023), 853 (858 *et seq.*).

155 *Tietje*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1802 (1814).

D. Towards a Progressive Development of International Legal Personality: SWFs as Subjects of International Law

As analyzed and demonstrated in the previous sections of this contribution, there is not only a growing trend in the more recent practice of investment treaty-making to also stipulate provisions addressing the issue of investors' obligations as one of the more novel regulatory approaches aimed at incorporating broader public interest concerns into international investment agreements.[156] Rather, these investment treaties are not infrequently also directly applicable to SWFs and their investment activities.[157] Consequently, and in other words, in case an international investment agreement stipulates direct obligations of conduct for covered foreign investors, these normative responsibilities are also addressed to SWFs and their respective economic transactions. This finding seems to be particularly important as far as the recognition of global public interest obligations under international law of those SWFs is concerned, that are established as juridical persons with an independent legal personality under domestic public law or domestic company law of the state in question and thus constitute legally separate state entities or state-owned enterprises, taking into account the already frequently analyzed and emphasized challenges arising in connection with attempts to attribute the investment activities of these types of SWFs to their home states under the customary international law regime of state responsibility.[158]

Moreover, and more generally, in light of this finding the question arises whether not only their home states but also such SWFs with independent legal personality under domestic law can potentially be qualified as legally separate subjects of international law. According to the traditional and currently still predominant – albeit increasingly also critically perceived[159] – view among international legal scholars, not all of the various different entities participating in contemporary international relations can be regarded as international legal persons, even if they may have some degree of influence on the international society or are, like SWFs,[160] frequently considered from an economic perspective as major actors in the international (economic) system. According to this view, *de facto* participation is not equivalent to acting on the international scene in a legally relevant way, and thus does not convey the status of a subject of international law.[161] Rather, international legal personality requires, first and foremost,[162] some form of community acceptance through the granting by states of rights and/or obligations under international law to the actor in question.[163] Thereby, contrary to a perception that

156 See in particular *supra* under C.II.

157 See *supra* under C.III.

158 For a more detailed evaluation of this issue see for example *Sornarajah*, Asian Journal of International Law 1 (2011), 267 (283); *Yin*, International Review of Law 2017:9, 1 (26); *Volk*, Studentische Zeitschrift für Rechtswissenschaft – Wissenschaft Online 2017, 299 (320 *et seq.*).

159 Generally on this perception see also, e.g, *Bianchi*, in: Fastenrath *et al.* (eds.), Essays in Honour of Judge Bruno Simma, 39 (56) ("a widespread sentiment exists, among international lawyers, that the traditional subjects doctrine is no longer able to provide a satisfactory account of the social realities underlying international law"); *Klabbers*, International Law, 73 ("a topic of great controversy"). For respective critical perspectives in this regard see for example *Higgins*, Problems and Process, 49 *et seq.*; *Clapham*, Human Rights Obligations of Non-State Actors, 59 *et seq.*; *Nowrot*, Philippine Law Journal 80 (2006), 563 (568 *et seq.*).

160 On this perception of SWFs see already *supra* under A.

161 See, e.g., *Shaw*, International Law, 180; *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/1, 21 *et seq.*; *Verdross/Simma*, Völkerrecht, § 446.

162 On the discussion about additional prerequisites of international legal personality being suggested in the legal literature see, e.g., *Portmann*, Legal Personality in International Law, 7 *et seq.*; *Nijman*, The Concept of International Legal Personality, 29 *et seq.*; *Nowrot*, Normative Ordnungsstruktur und private Wirkungsmacht, 524 *et seq.*, each with additional references.

163 On this perception see for example *Jennings/Watts*, Oppenheim's International Law, Vol. I, Introduction and Part 1, 16;

dominated international legal scholarship well into the first half of the 20th century,[164] it is now overwhelmingly recognized that there are in general no systematic reasons why actors other than states may not participate in the international legal system as normative recognized entities, and thus no *numerus clausus* of potential subjects of international exists. Rather, modern public international law constitutes also in this regard an increasingly encompassing, open and thus inclusive system.[165]

Applying this doctrinal concept of international legal personality to the present case of SWFs, we have to admit and realize that at least those types of SWFs that are constituted as separate juridical persons under domestic public law or domestic company law – and being not infrequently covered investors under international investment treaties – are not only granted international legal entitlements under these agreements in the form of stipulated protection standards[166] but have also become addressees of international obligations as increasingly included in respective investment agreements. Against this background, it could very well be said that they have received the necessary community acceptance through the granting, by the contracting state parties, of rights and obligations under international law. Admittedly, in particular legally separate public actors at the sub-state level like, in the present case, SWFs that are constituted as state entities and thus juridical persons under domestic public law have traditionally not been considered as independent subjects of international law.[167] Nevertheless, already in light of the necessarily open and dynamic character of the international legal order as well as the circle of its legally relevant actors, as famously stressed by the International Court of Justice in its advisory opinion on the question of "Reparation for Injuries Suffered in the Service of the United Nations" in 1949,[168] it seems quite plausible and warranted, as well as arguably even essential taking into account the ambivalent potential of SWFs and their activities regarding the promotion and protection of global public interest concerns,[169] to advocate for, and accept, another step in the progressive development of the concept of international legal personality that now also includes certain legally separate public actors like SWFs.

And indeed, if viewed from a more overarching perspective, such a progressive development of international legal personality that encompasses also legally independent state entities like certain SWFs also further confirms the for quite valid reasons increasingly voiced perception that states are, contrary to the previously dominant view,[170] often no longer acting as solid units in international relations.[171] Moreover, albeit closely related, the approach argued

Klabbers, International Law, 74 *et seq.*; *Shaw*, International Law, 180; *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/1, 21 *et seq.*; *Nowrot*, in: Tietje/Nowrot (eds.), Internationales Wirtschaftsrecht, 906 (912 *et seq.*).

164 See for example *Oppenheim*, International Law, Vol. I, 1st edition, 1905, 18 („States solely and exclusively are the subjects of International Law.").

165 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), with additional references.

166 See thereto already *supra* under C.I.

167 See, consequently, for the view that SWFs cannot be qualified as subjects of international law, albeit without any reference to the legal status enjoyed by SWFs under certain international investment agreements, for example *Hobe*, Einführung in das Völkerrecht, 46; *Volk*, Studentische Zeitschrift für Rechtswissenschaft – Wissenschaft Online 2017, 299 (303).

168 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations* (United Nations), Advisory Opinion of 11 April 1949, ICJ Reports 1949, 174 (178) ("The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, […].").

169 See thereto already *supra* under B.

170 On the previous understanding of foreign policy as an exclusive prerogative of the government as the head of the executive branch see, e.g., *Cottier/Hertig*, Max Planck Yearbook of United Nations Law 7 (2003), 261 (265 *et seq.*); *Tietje*, Internationalisiertes Verwaltungshandeln, 182 *et seq.*

171 See thereto already for example *Slaughter*, A New World Order, 12 *et seq.*; *Slaughter*, in: Held/Koenig-Archibugi (eds.), Global Governance and Public Accountability, 35 *et seq.*; *Nowrot*, in: Fenwick/Van Uytsel/Wrbka (eds.), Networked

for in this contribution also finds itself in conformity with other recent attempts in the international scholarly literature that aim at enlarging the concept of international legal personality by including other governmental actors like – beyond the level of individual states – the intergovernmental network of the Group of Twenty (G-20)[172] or – with regard to the sub-state level – in particular cities;[173] other attempts that are – basically in the same way as the present contribution – also first and foremost aimed at accommodating these actors in the system of public international law as well as, in this regard, also aimed at identifying and substantiating the existence of international legal obligations addressed to the entities in question to promote and protect global community interests.

Governance, Transnational Business and the Law, 231 (233).

172 See in particular *Tietje*, Berichte der Deutschen Gesellschaft für Völkerrecht 45 (2012), 243 (262 *et seq.*).

173 See for example *Klabbers*, International Law, 74 ("in particular cities are starting to play a role in global politics, and thus sooner or later need to be accommodated in the system of international law"); as well as the considerably more detailed analyses by *Aust*, European Journal of International Law 26 (2015), 255 *et seq.*; *Aust*, Das Recht der globalen Stadt, 141 *et seq.*, with numerous additional references.

E. Conclusion

The present contribution has started with the perception that SWFs have in particular more recently emerged as major actors in the international economic system. As subsequently indicated, this increasingly influential position results in chances for, but in particular also risks to, the promotion and protection of international community interests such as the realization of sustainable development, the protection of human rights, the environment and public health as well as the promotion and enforcement of core labour and social standards. Against this background, the present contribution has made an attempt to illustrate that, based on current trends in global investment treaty-making practice, a progressive development of the concept of international legal personality that includes SWFs that are constituted as state entities or state-owned enterprises is plausible and justified.

Moreover, the approach advocated here is arguably ultimately also in the best interest of the respective home states of SWFs. A partially enlarged understanding of the ordering idea of subjects of international law that also encompasses SWFs is not only considerably more in conformity with the evolving image of an international legal community which has as its central purpose the normative civilization of international relations and the promotion as well as protection of global community interests as a task to be fulfilled by all influential actors in the international system. Rather adopting this approach has first and foremost also the potential to further enhance the status and reputation of Asia's SWFs as responsible foreign investors and – as a likely consequence – to eliminate, or at least reduce, the above-mentioned political concerns[174] currently existing in a number of recipient countries.[175]

174 See *supra* under A.

175 Generally on this perception see also for example already *Yin*, International Review of Law 2017:9, 1 (13).

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