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Investor Obligations: Transformative and Regressive Impacts of the Business and Human Rights Framework

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Abstract

The business and human rights (BHR) framework has regularly been considered the superior legal regime of corporate accountability for business-related human rights abuses, which must be both protected from and incorporated into investment treaties. However, investment treaties have surpassed the BHR framework in an important respect: certain investment treaties impose strict international legal obligations, including human rights-related obligations, directly on investors, thereby going beyond the normatively ambiguous corporate responsibility to respect. Investment treaty reform initiatives, including those seeking to align investment treaties with the BHR agenda, should, therefore, take care to avoid inadvertently undoing this advance towards investors' legal accountability.

Keywords: business responsibilities; corporate obligations; foreign investors; investment treaties; investment treaty reform

I. Introduction

Business and human rights (BHR) scholars and practitioners have recently taken significant interest in investment treaties,[1] regularly seeing them as a threat to the BHR project and the enjoyment of human rights more broadly.[2] A flagship initiative in this respect has been the

[1] 'Investment treaties' are also referred to synonymously as 'international investment agreements'.

[2] See, e.g., Barnali Choudhury, 'Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements' (2017) 38:2 *University of Pennsylvania Journal of International Law* 425; Ludovica Chiussi, 'The Role of International Investment Law in the Business and Human Rights Legal Process' (2019) 21:1 *International Community Law Review* 35; Surya Deva and David Birchall, *Research Handbook on Human Rights and Business* (Cheltenham: Edward Elgar, 2020); Surya Deva, 'International Investment Agreements and Human Rights: Assessing the Role of the UN's Business and Human Rights Regulatory Initiatives' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds.), *Handbook of International Investment Law and Policy* (Singapore: Springer Singapore, 2021); Silvia Steininger, 'The Role of Human Rights in Investment Law and Arbitration: State Obligations, Corporate Responsibility and Community Empowerment' in Ilias Bantekas and Michael Ashley Stein (eds.), *The Cambridge Companion to Business and Human Rights Law* (Cambridge: Cambridge University Press, 2021). However, the relationship between international investment law and human rights has been discussed for much longer. See, e.g., Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009).

United Nations Working Group on Business and Human Rights (UN Working Group)[3] process that resulted in its 2021 report on 'Human rights-compatible international investment agreements' (the 'WG Report').[4] Provisions on the relationship between investment treaties and human rights have also appeared in subsequent drafts of the BHR treaty,[5] and commitments relating to investment treaties have been a regular component of national action plans on BHR.[6] The interplay between investment treaties and BHR was also examined in 2020-21 under the auspices of the Organization for Economic Cooperation and Development (OECD) through a public consultation[7] and a working paper entitled 'Business Responsibilities and Investment Treaties' (the 'OECD Report').[8]

Investment treaties[9] have been the subject of major criticism in the last 15 years or so,[10] and concerns regarding their negative impact on the enjoyment of human rights in the state in which the foreign investment was made (the 'host state') have been central to this critique.[11] The BHR field has amplified rather than launched this controversy; however, it has made an important contribution to the critique by presenting the BHR framework with its three-pillar structure of the 'state duty to protect', the 'corporate responsibility to respect' and 'access to remedy'—epitomized at the international level in the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs)[12]—as the superior legal regime of business accountability for adverse human rights impacts, which must be protected from and preferably incorporated into investment treaties.[13] On one hand, investment treaties would be identified as posing a significant risk to human rights and business accountability projects, in particular by limiting states' ability to regulate in the public interest, including for the protection of human rights.[14] On the other hand, these

[3] Human Rights Council, 'Human rights and transnational corporations and other business enterprises', A/HRC/Res/17/4 (6 July 2011).

[4] Human Rights Council, 'Human rights-compatible international investment agreements. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises', A/76/238 (27 July 2021) ('WG Report').

[5] Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', A/HRC/RES/26/9 (14 July 2014); Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 'Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises', Zero draft (16 July 2018) art 13(6) and (7); Revised draft (16 July 2019) art 12(6); Second revised draft (6 August 2020) art 14(5); Third revised draft (17 August 2021) art 14(5); Updated Draft Legally Binding Instrument (July 2023) art 14(5). See also Deva (2021), note 2, 1749–1756.

[6] Deva (2021), note 2, 1743–8.

[7] OECD, 'Public consultation on business responsibilities and investment treaties', *OECD* (May 2021), (https://www.oecd.org/investment/public-consultation-on-business-responsibilities-and-investment-treaties.htm (accessed 19 June 2022).

[8] David Gaukrodger, 'Business responsibilities and investment treaties', OECD Working Papers on International Investment, No. 2021/02, https://doi.org/10.1787/4a6f4f17-en (accessed 19 June 2022).

[9] This article adopts the definition of investment treaties proposed by Bonnitcha et al as 'treaties between two or more states that have the protection of foreign investment as the primary, or only, subject matter'. Jonathan Bonnitcha, Lauge Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford: Oxford University Press, 2017) 3. This definition covers bilateral investment treaties (BITs), regional investment treaties and investment chapters and protocols in free trade agreements.

[10] See Section III.

[11] See Section III.

[12] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011) ('UNGPs').

[13] See, e.g., WG Report, note 4; Barnali Choudhury, 'Investor Obligations for Human Rights' (2020) 35 *ICSID Review* 82, esp 82–87; Deva (2021), note 2; Gaukrodger (2021), note 8, 9.

[14] See WG Report, note 4, paras 18–27 and the sources cited therein.

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treaties would be seen as a potential vehicle for enhancing the effects of the UNGPs by imposing human rights demands on (certain) business enterprises in a formal source of international law (rather than a soft law instrument), while the strong enforcement system of investment arbitration might possibly provide human rights victims with effective remedies.[15]

In international human rights law, the idea of imposing human rights obligations directly on business enterprises has been very controversial, and no such legally binding international regulation of business conduct has been possible to date.[16] The BHR framework has circumvented the controversy by employing a conceptual and terminological distinction between the legally binding 'obligations' or 'duties' of states and the legally non-binding 'responsibilities' of business. This normative structure has facilitated the UNGPs' adoption, broad acceptance, and some truly transformative impacts in relation to corporate accountability for business-related human rights abuses at national and EU levels;[17] however, as a consequence, the BHR framework involves no strict international legal obligations of business enterprises at the international level.[18]

In contrast, some recent investment treaties, including treaties already in force, have imposed direct international legal obligations on investors[19] ('investor obligations'), including human rights-related obligations.[20] This article explores this practice, the understanding and appreciation of which has been limited in the literature.[21] While initially introduced as part of endogenous reform efforts within the investment regime,[22] investment treaty provisions on investor obligations demonstrate both the legal possibility of imposing direct international legal obligations on business corporations and the actual imposition of such obligations on defined investors, including direct human rights obligations—something that has so far been denied in international human rights law.

Investment treaties certainly do not and cannot comprehensively regulate business conduct at the international level, not least because of the fragmented nature of the investment treaty regime, which consists of a grid of thousands of bilateral and some regional treaties[23] covering only defined business enterprises ('investors' and 'investments' under the treaties).[24] However, the imposition of investor obligations—which are generative of rights opposable against investors under international law and the

[15] Choudhury (2017), note 2, 481; see also, e.g., Working Group Report, Human Rights Council (2014), note 4 (summary); Gaukrodger (2021), note 8, 9; Choudhury (2020), note 13.

[16] Nigel Rodley, 'Non-State Actors and Human Rights,' in Scott Sheeran and Nigel Rodley (eds.), *Routledge Handbook of International Human Rights Law* (London: Taylor and Francis, 2014); Eric De Brabandere, 'Human Rights Obligations and Transnational Corporations: The Limits of Direct Corporate Responsibility' (2010) 4 *Human Rights & International Legal Discourse* 66; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) 195–237. For discussion, see notes 187–190 and the accompanying text.

[17] See Section II.

[18] See Sections II and V.

[19] Every investment treaty contains a definition of an 'investor', which delimits the personal scope of the treaty.

[20] See Section IV.

[21] Ibid. For an earlier consideration of treaty practice on investor obligations on which the present article builds, see Klara Polackova Van der Ploeg, 'Protection of Regulatory Autonomy and Investor Obligations: Latest Trends in Investment Treaty Design.' (2018) 51:1 *International Lawyer* 109.

[22] See Sections IV and V.

[23] See UNCTAD Investment Policy Hub, 'International Investment Agreements Navigator', https://investmentpolicy.unctad.org/international-investment-agreements (accessed 19 March 2023) and the Electronic Database of Investment Treaties (EDIT), 'Home', https://edit.wti.org/ (accessed 19 March 2023).

[24] In investment treaties with an enterprise-based definition of investment, such as the 2016 Morocco-Nigeria BIT, the term 'investment' refers to a corporation—a legal person—not a thing (*res*), as Krajewski suggests in Markus Krajewski, 'A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application' (2020) 5 *Business and Human Rights Journal* 105, 114.

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violation of which triggers investors' international responsibility[25]—provides distinct opportunities for legally binding regulation of adverse investor conduct, including business conduct detrimental to human rights.

In the efforts to align investment treaties with the BHR agenda of human rights protection and accountability for business-related human rights abuses, care should therefore be taken to avoid undoing—perhaps inadvertently—the normative advances already made in the investment treaty regime towards corporate accountability. In particular, the incorporation within investment treaties of the BHR notion of corporate or business 'responsibilities' would involve introducing an element of normative ambiguity into a body of law that has previously involved unequivocal direct international legal obligations of certain business enterprises. Scholars, advocates and policymakers should therefore pause before promoting or facilitating such incorporation, as this may undermine the progress towards corporate accountability and human rights protection produced as part of the ongoing investment treaty reforms.[26]

This article elaborates on the above argument in four steps. First, it outlines the main features of the BHR framework and briefly discusses its transformative impacts on foreign investors' accountability for their conduct in the host state (Section II). Second, the article explores the concerns that investment treaties enable conduct detrimental to the enjoyment of human rights, as expressed in the UN Working Group's and OECD's reports (Section III). The discussion then proceeds to analyse the phenomenon of direct investor obligations under investment treaties to demonstrate that despite the continuing widespread impression to the contrary, certain investment treaties have imposed strict international legal obligations on investors, including some explicitly human rights and environmental obligations (Section IV). The final section considers the significance of the treaty practice on investor obligations for the protection of human rights in the context of foreign investments and the ongoing efforts to transplant the BHR framework into investment treaties, cautioning against the potentially significant negative impacts of such incorporation (Section V).

II. The BHR Framework and its Transformative Impacts

The BHR framework, initially introduced in the 2008 'Protect, Respect and Remedy Framework'[27] and subsequently embodied at the international level in the UNGPs, has had a profound effect on the law, as it has provided a normative frame of reference and vocabulary to demand accountability from business corporations (in the language of the UNGPs, 'business enterprises') for business-related human rights abuses businesses that goes beyond the positive obligation of states to protect against corporate abuse.[28] Central to this framework has been the conceptual and terminological distinction between the state 'duty' to 'protect' and the business or corporate 'responsibility' to 'respect' human rights. As the idea of direct, legally binding corporate human rights obligations has been highly contentious in international human rights law,[29] thereby stalling normative

[25] See Section IV.C.

[26] See Section V.

[27] Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie', A/HRC/8/5 (7 April 2008).

[28] See, e.g., Human Rights Council, 'Improving accountability and access to remedy for victims of business-related human rights abuse: Report of the United Nations High Commissioner for Human Rights', A/HRC/32/19 (10 May 2016); Office of the United Nations High Commissioner for Human Rights, 'Accountability and Remedy Project I: Enhancing effectiveness of judicial mechanisms in cases of business-related human rights abuse', A/HRC/32/19 (10 May 2016).

[29] See Rodley (2014), note 16, and notes 187–190 and the accompanying text.

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developments towards corporate accountability for human rights abuses, the UNGPs circumvented the issue by distinguishing between the restated, legally binding 'obligations' or 'duties' of states and the newly articulated 'responsibilities' of business enterprises. The corporate 'responsibility' to respect human rights was defined as a 'global standard of expected conduct'[30] and its precise normative character was deliberately left ambiguous:[31] while 'responsibility' involves an external normative demand vis-à-vis businesses that goes beyond a mere suggestion for voluntary action, the UNGPs also make it clear that 'responsibility' does not entail a strict international legal obligation, unlike the state's duty to 'protect'.

Also thanks to this normative design, the BHR framework succeeded where previous, normatively more ambitious and unequivocal international human rights projects have failed.[32] Significantly, the framework has generated certain foundational and transformative propositions that have grounded claims of legal accountability for corporate human rights abuses and have facilitated the development of law to substantiate such accountability, including the following: (1) Every business can detrimentally impact the enjoyment of all internationally recognized human rights and must be held accountable for its adverse human rights impacts. (2) There are external normative requirements on business conduct, which go beyond voluntary actions of corporate social responsibility. (3) Victims of business-related human rights abuses are entitled to have access to remedy in relation to the harm suffered. (4) Business activities need to be assessed in their totality, and the analysis cannot be constrained by traditional principles of corporate law on the corporate veil, separate legal personality and limited liability of a corporation.

The transformative force of the BHR framework has manifested in law at both domestic and international levels. Legislation imposing human rights-related obligations on business enterprises has been adopted—or is in the process of being adopted—in countries around the world, including the UK, France, Australia, the Netherlands, Germany, Switzerland and Norway,[33] and in the European Union.[34] International organizations, including the OECD[35] and the International Finance Corporation (IFC),[36] have incorporated UNGPs into their

[30] UNGPs, note 12, commentary to Principle 11.

[31] See, e.g., Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) 138–161.

[32] See, e.g., UN Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', E/CN/Sub.2/2003/12 (26 August 2003).

[33] See, e.g., Modern Slavery Act 2015 (UK); Code de commerce 2017, arts L225-102-4 and 5 (Duty of Vigilance Act) (France); Modern Slavery Act 2018 (Australia), see also the rationale for adoption: Australian House of Representatives, 'Modern Slavery Bill 2018: Explanatory Memorandum' (Parliament of Australia, 2018) 20, 38; Wet Zorgplicht Kinderarbeid 2019 (Child Labour Due Diligence Law) (Netherlands) Lieferkettensorgfaltspflichtengesetz 2019 (Act on Corporate Due Diligence Obligations in Supply Chains) (Germany); Code des obligations 2021, art 964 (amendment on conflict minerals and child labour due diligence law) (Switzerland); Åpenhetsloven 2021 (Transparency Act) (Norway).

[34] See, e.g., Non-Financial Disclosure Directive 2014/95/EU; Conflict Minerals Regulation 2017/821; Taxonomy Regulation 2020/852; and the forthcoming Human Rights Due Diligence Directive—see European Commission, 'Proposal for a Directive on Corporate Sustainability Due Diligence and Annex', https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en (accessed 22 March 2022).

[35] OECD, OECD Guidelines for Multinational Enterprises: 2011 Edition (Paris: OECD, 2011).

[36] IFC, Guidance Notes to Performance Standards on Environmental and Social Sustainability: 2012 Edition' (Washington: IFC: 2012).

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policies and guidelines, as have major business corporations and industry organizations.[37] The draft BHR treaty[38] builds on the UNGPs by incorporating their concepts, such as human rights and due diligence (even if it departs from the UNGPs in other important respects).

The BHR framework has also had transformative impacts through cases brought by victims of corporate misconduct against business corporations in a range of domestic jurisdictions, with human rights considerations either becoming an explicit part of the court's reasoning or entering the proceedings through parties' or amici submissions.[39] The *Vedanta*, *Okpabi* and the *Milieudefensie (Shell Nigeria)* cases particularly stand out in terms of shifting legal boundaries.[40] By establishing that a parent company may owe a duty of care to persons injured by operations of its subsidiary and therefore may be liable for such injuries, these cases exemplify indentations into traditional legal doctrines at the core of corporate activity—in particular, the principles of separate legal personality and limited liability—in a context in which these doctrines had previously been largely unassailable.[41] Similar cases are pending elsewhere.[42] The linking of human rights with the environment and climate change[43] has expanded the BHR notions of business accountability, including legal liability, to wider contexts.[44] Given the contemporary preeminence of the human rights-based approach to global issues,[45] the transformative force of the BHR framework may be expected to expand to additional issue areas as well.

These legal developments are significant for foreign investors: as business enterprises, they face the normative demands of the BHR framework and the changes in the law it has

[37] See, e.g., René Wolfsteller and Yingru Li, 'Business and Human Rights Regulation After the UN Guiding Principles: Accountability, Governance, Effectiveness' (2022) 23 *Human Rights Review* 1, fn 12; Alvise Favotto and Kelly Kollman, 'When Rights Enter the CSR Field: British Firms' Engagement with Human Rights and the UN Guiding Principles' (2022) 23 *Human Rights Review* 21.

[38] Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Zero draft (2018), note 5; Revised draft (2019), note 5; Second revised draft (2020), note 5; Third revised draft (2012), note 5.

[39] See, e.g., *Dominic Liswaniso Lungowe and ors v Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (TCC); [2017] EWCA Civ 1528; [2019] UKSC 20 ('Vedanta'); Okpabi and ors v Royal Dutch Shell Plc and Anor [2017] EWHC 89 (TCC); [2018] EWCA Civ 191; [2021] UKSC 3 ('Okpabi'), esp para 73; *Vereniging Milieudefensie v Royal Dutch Shell Plc and Shell Nigeria*, Hague Court of Appeal, ECLI:NL:GHDHA:2021:134 (Judgment of 29 January 2021) ('Milieudefensie (Shell Nigeria)'); *Vereniging Milieudefensie v Royal Dutch Shell Plc, Hague District Court*, C/09/571932 (Judgment of 26 May 2021) ('Milieudefensie (Shell climate change)'); *Choc v Hudbay Minerals Inc*, [2013] ONSC 1414, paras 34 and 36; *Das v George Weston Limited*, [2017] ONSC 4129, para 133; Araya v Nevsun Resources Ltd, [2016] BCSC 1856, para 64; *Nevsun Resources Ltd v Araya*, 2020 SCC 5. For additional examples, see Debevoise and Plimpton LLP, *UN Guiding Principles on Business and Human Rights at 10* (New York and London: Debevoise and Plimpton LLP, 2021).

[40] *Vedanta*, note 39; *Okpabi*, note 39; *Milieudefensie (Shell Nigeria)*, note 39.

[41] See, e.g., Barnali Choudhury and Martin Petrin, *Corporate Duties to the Public* (Cambridge: Cambridge University Press, 2019) 95–105; Claire Bright et al, 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?' (2020) 22 *Business and Politics* 667.

[42] See, e.g., *Lliuya v RWE Ag*, Case No. 2 O 285/15 Essen Regional Court; *Notre Affaire à Tous and Others v Total SA*, Nanterre District Court, complaint of 28 January 2020; *Metz v Wintershall*, Regional Court of Kassel, complaint of 4 October 2021; *Deutsche Umwelthilfe v BMW*, Regional Court of Munich, Complaint of 20 September 2021.

[43] See, e.g., UN Framework Convention on Climate Change, 'Paris Agreement', FCCC/CP/2015/10/Add.1 (12 December 2015), preamble; Human Rights Council, 'The human right to a clean, healthy and sustainable environment', A/HRC/RES/48/13 (8 October 2021); UN General Assembly, 'Res. 76/300: The human right to a clean, healthy and sustainable environment', A/76/L.75 (26 July 2022).

[44] For example, in the Royal Dutch Shell climate change case, the court was prepared to treat the Shell global group as a single entity for the purposes of its emission reduction obligation. *Milieudefensie (Shell climate change)* (2021), note 39, para 4.4.23.

[45] See, e.g., UN Sustainable Development Group, 'Principle One: Human Rights-Based Approach', https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach (accessed 28 June 2022) (see esp para 67, which specifically refers to the UNGPs).

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facilitated. The BHR framework has also exercised a degree of influence on investment treaty reform processes, even if investment treaties have so far typically utilized the concept of corporate social responsibility, and in this sense may be more closely linked to instruments such as the OECD Guidelines for Multinational Enterprises[46] and the UN Global Compact.[47] In addition to the demands to make human rights an essential concern in the establishment and operation of foreign investments and for legal accountability to ensue from investor misconduct, the BHR framework may particularly be traced in the calls for victims of investor misconduct to be brought within the investment law framework[48] and for home states to play their part in facilitating good and responsible investment.[49] A specific attempt at incorporating the BHR framework within an investment treaty has apparently also been made through a new model bilateral investment treaty (BIT) prepared for the Gambia, entitled the 'Sustainable Investment Facilitation & Cooperation Agreement' (SIFCA),[50] although the actual text of the instrument has not been made publicly available.[51]

III. Investment Treaties as a Risk to Human Rights Protection and the BHR Project

Many BHR scholars and practitioners have perceived investment treaties as a significant risk to human rights and business accountability projects, in particular, because of (1) their actual or potential detrimental effects on states' ability to regulate in the public interest and (2) the imbalance between the rights and obligations of states and foreign investors.[52] The UNGPs themselves demand that states 'maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives ..., for instance through investment treaties or contracts'.[53] The official commentary to the UNGPs caution that investment treaties 'affect domestic policy space of States' and 'the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so'.[54] The WG Report (which was prepared as an elaboration of the implications for states of UNGP principle 9) concluded that 'investment treaties constrain the regulatory ability of States to robustly discharge their international human rights obligations';[55] through their 'imbalance' and 'inconsistency' contribute to 'irresponsibility on the part of investors';[56] and 'undermine affected communities' quest to hold investors accountable for human rights abuses and environmental pollution.'[57]

[46] OECD (2011), note 35.

[47] UN Global Compact, 'The Ten Principles of the UN Global Compact', https://www.unglobalcompact.org/what-is-gc/mission/principles (accessed 10 October 2022).

[48] See, e.g., WG Report, note 4, paras 3 and 8; Steininger (2021), note 2, 422.

[49] See, e.g., Peter Muchlinski, 'The Impact of a Business and Human Rights Treaty on Investment Law and Arbitration' in David Bilchitz and Surya Deva (eds.), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge: Cambridge University Press, 2017).

[50] See Robert Houston et al, 'Notes From Practice: Announcing The SIFCA Framework', *Kluwer Arbitration Blog* (26 November 2021), http://arbitrationblog.kluwerarbitration.com/2021/11/26/notes-from-practice-announcing-the-sifca-framework-is-the-confluence-of-investment-protection-with-business-and-human-rights-the-future-of-investment-treaties/ (accessed 10 October 2022).

[51] Information as of 22 August 2022 (on file with author).

[52] See WG Report, note 4, paras 18–27 and sources cited therein.

[53] UNGPs, note 12, Principle 9.

[54] Ibid, commentary to principle 9.

[55] WG Report, note 4, para 74; see also ibid, paras 21, 23, 36, 42, 62.

[56] Ibid, 2 and para 74. The WG Report outlines the concerns regarding investment treaties under the headings of: (i) regulatory constraints; (ii) investors' rights without obligations; and (iii) privileged access to remedy for investors. Ibid, paras 15–27.

[57] Ibid, para 3.

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Modern investment treaties have existed since the late 1950s[58] but have attracted more widespread attention and controversy only with the boom of investor–state arbitrations in the late 1990s and 2000s.[59] Arbitral tribunals have found states around the world to have violated their obligations under investment treaties and have ordered vast sums of compensation to be paid to investors,[60] often for taking general, non-discriminatory, good faith measures in the public interest, such as for the protection of health, environment, human and workers' rights, or in situations of economic crises.[61] Even those cases that host states have successfully defended have presented significant costs to public budgets and have exemplified the tension between the protection of private property and the host states' ability to regulate.[62]

Many states, stakeholders and commentators have consequently grown concerned about expansive interpretations of investment treaties by arbitral tribunals[63] and have started viewing investment treaties as conferring unduly privileged, overly broad legal protections to investors and investments.[64] In addition to critics portraying investment treaties as illegitimate regulatory straightjackets and calling for the reassertion of states' 'right to regulate', the normative asymmetry built into the treaties' normative design—the wide-ranging rights for foreign investors and obligations for host states—and arbitral tribunals' expansive interpretation of this asymmetry[65] has become increasingly criticized as well.

[58] 1959 Germany–Pakistan BIT was the first bilateral investment treaty (BIT) concluded.

[59] Bonnitcha et al (2017), note 9, 1. See also Michael Waibel et al (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Alphen aan den Rijn and Philadelphia: Kluwer, 2010).

[60] Jonathan Bonnitcha et al, 'Damages and ISDS Reform: Between Procedure and Substance' (2023) 14:2 *Journal of International Dispute Settlement* 1; Rachel Wellhausen, 'Recent Trends in Investor–State Dispute Settlement' (2016) 7:1 *Journal of International Dispute Settlement* 117; Vera Weghmann and David Hall, 'The Unsustainable Political Economy of Investor–State Dispute Settlement Mechanisms' (2021) 87:3 *International Review of Administrative Sciences* 1.

[61] See examples in Choudhury (2020), note 13, 86.

[62] For a particularly poignant critique, see Daria Davitti et al, 'COVID-19 and the Precarity of International Investment Law', *Medium* (6 May 2020), https://medium.com/iel-collective/covid19-and-the-precarity-of-international-investment-law-c9fc254b3878 (accessed 28 June 2022).

[63] Expansive interpretations have not been limited to substantive standards of protection. The current forceful enforcement mechanism of investor-state arbitration also had been far from a foregone conclusion: investors' ability to unilaterally initiate arbitral proceedings against host states under investment treaties was only established by arbitral tribunals interpreting the treaties' dispute settlement provisions as entailing the host state's standing offer to arbitrate with the investor, which the investor could accept through a notice of arbitration. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case no ARB/87/3, Award of 27 June 1990; Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds.), *Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: Oxford University Press, 2014).

[64] See, e.g., WG Report, note 4, para 3; Waibel et al (2010), note 59; Suzanne Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 *Journal of International Economic Law* 1037; Jean Kalicki and Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Leiden: Brill Nijhoff, 2015); UNCTAD, 'World Investment Forum 2014: Investing in Sustainable Development. IIA Conference – 16 October 2014. Technical Summary, Prepared by the UNCTAD Secretariat', https://worldinvestmentforum.unctad.org/wp-content/uploads/2014/11/Summary_UNCTAD-secretariat_IIA_WIF-2014.pdf (accessed 28 June 2022); OECD, 'Investment Treaties: The Quest for Balance—Summary' (14 March 2016), https://www.oecd.org/daf/inv/investment-policy/OECD-investment-treaties-2016-summary.pdf (accessed 28 June 2022).

[65] For example, arbitral tribunals have taken only limited regard of investors' own conduct when assessing their claims against host states, while allowing investor-state claims to be brought even by minority shareholders. See, e.g., Stephan Schill, 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law' (2006) 3 *Transnational Dispute Management*; Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29 *European Journal of International Law* 507.

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This asymmetry may have initially reflected an understanding of investment treaties as instruments aimed exclusively at comprehensive protection against expropriation and other governmental interference with foreign investments.[66] However, the design has become progressively more controversial, as significant negative effects of investor conduct on local populations and the environment have become more publicly known, and visions of how investment treaties should operate and what kinds of foreign investments they should protect have developed away from the initial singular conceptualization.[67]

Because of the growing criticism of investment treaties and arbitration, reform initiatives have been ongoing since the mid-2010s both within individual states and under the auspices of international organizations with the aim to 're-balance' the investment treaty system,[68] including the allocation of rights and obligations among states and investors. While critiques from within international investment law have primarily involved fairness-based arguments, with the imbalance in the rights and obligations of states and investors fundamentally presented as unfairness that undermines the legitimacy of the investment treaty system,[69] BHR critiques have highlighted investment treaties' failure to adequately constrain corporate conduct detrimental to human rights.[70] The WG Report outright accused investment treaties of 'facilitat[ing]' and 'incentivizing' irresponsible conduct by investors.[71]

Commentators within both the BHR and investment law fields have proposed various solutions to the existing design and observed overreach of investment treaties, each approaching the matter from its distinct vantage point and value structure: while international investment lawyers have primarily sought to reconcile investor protection with human rights by including human rights among the considerations relevant for the determination of the substantive scope of standards of protection and

[66] See, e.g., Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2022) 6–8.

[67] Anne van Aaken, 'Investment Law in the Twenty-First Century: Things Will Have to Change in Order to Remain the Same' (2023) 26 *Journal of International Economic Law* 166; Bonnitcha et al (2017), note 9, 233–244, 257–260.

[68] See, e.g., UNCTAD, *Investment Policy Framework for Sustainable Development* (New York: UNCTAD, 2015); UNCTAD, *UNCTAD's Reform Package for the International Investment Regime* (New York: UNCTAD, 2018); UNCTAD, *International investment agreements: Reform Accelerator* (New York: UNCTAD, 2020); UN Commission on International Trade Law (UNCITRAL),'Working Group III: Investor-State Dispute Settlement Reform', https://uncitral.un.org/en/working_groups/3/investor-state (accessed 24 May 2023); Mohammad Hamdy, 'Redesign as Reform: A Critique of the Design of Bilateral Investment Treaties' (2019) 51 *Georgetown Journal of International Law* 255, 267–270.

[69] See, e.g., Patrick Dumberry and Gabrielle Dumas-Aubin, 'How to Impose Human Rights Obligations under Investment Treaties? Pragmatic Guidelines for the Amendment of BITs' (2011) 4 *Yearbook on International Investment Law and Policy* 569; Choudhury (2020), note 13, 103; Stephan Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 *Virginia Journal of International Law* 57; David Schneiderman, 'International Investment Law's Unending Legitimation Project' (2017) 49 *Loyola University Chicago Law Journal* 229; Jane Kelsey, 'The Crisis of Legitimacy in International Investment Agreements and Investor-State Dispute Settlement' in Richard Ekins and Graham Gee (eds.), *Judicial Power and the Left* (London: Policy Exchange, 2017) 97; Daniel Behn, Ole Kristian Fauchald and Malcolm Langford, 'Introduction: The Legitimacy Crisis and the Empirical Turn' in Daniel Behn, Malcolm Langford and Ole Kristian Fauchald (eds.), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge: Cambridge University Press, 2022).

[70] See, e.g., Deva (2021), note 2; Nicolas Bueno, Anil Yilmaz Vastardis and Isidore Ngueuleu Djeuga, 'Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses' (2023) 24 *The Journal of World Investment & Trade* 179.

[71] WG Report, note 4, paras 3 and 74.

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access to and assessment of claims in investor–state arbitration,[72] BHR contributions have predominantly focused on mitigation of risks posed by investment treaties to human rights.[73] The WG Report posited that investment treaties 'ought to be compatible with States' duty to respect, protect and fulfil human rights under international law',[74] and outlined a series of recommendations for states, investors, adjudicators of investment-related disputes and civil society organizations.[75] The UN Working Group emphasized that states have a 'duty to regulate' investor conduct for the protection of human rights, including through investment treaties,[76] thereby contrasting and complementing a leading international investment law notion of a host state's 'right to regulate'.[77]

BHR's growing engagement with investment treaties is unsurprising. Despite their different histories, terminologies and normative features, investment treaties and the BHR framework share a paradigmatic preoccupation with an identical factual scenario. Although the BHR framework principally extends to all business enterprises and their conduct, its distinct matter of concern involves a foreign investment situation: the (mis) conduct of a subsidiary of a foreign company engaging in business activities in another state, characteristically in the Global South. A typical investment treaty then covers precisely the situation of an investor (a foreign parent company) making and operating an investment in a host state through a locally incorporated subsidiary (even though every investment treaty contains its own definitions of protected 'investor' and protected 'investment' and any legal analysis must always be carried out on the terms of the specific treaty). This essential overlap arguably explains the increased sensitivity to the interplay—and tension—between the BHR framework and investment treaties: while the BHR framework focuses on investor conduct and any adverse, human rights-related impacts of this conduct in the host state, investment treaties have conventionally been preoccupied with the protection of investors against negative interference with their investment by the host state, and investor (mis)conduct has until recently been of only peripheral concern.

[72] See, e.g., Dupuy et al (2009), note 2; Ursula Kriebaum, 'Human Rights and International Investment Law' in Yannick Radi (ed.), *Research Handbook on Human Rights and Investment* (Cheltenham: Edward Elgar, 2018); EU Petersmann and Vivian Kube, 'Human Rights Law in International Investment Arbitration' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds.), *General Principles of Law and International Investment Arbitration* (Leiden: Brill Nijhoff, 2018); Kabir Duggal and Nicholas Diamond, 'Human Rights and Investor–State Dispute Settlement Reform: Fitting a Square Peg into a Round Hole?' (2021) 12 *Journal of International Dispute Settlement* 291.

[73] See, e.g., WG Report, note 4; Choudhury (2020), note 13; Markus Krajewski, 'Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model Clauses for a UN Treaty on Transnational Corporations, Other Businesses and Human Rights' (Brussels: CIDSE, 2017) 11; Surya Deva, 'International Investment Agreements and Human Rights: Assessing the Role of the UN's Business and Human Rights Regulatory Initiatives' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds.), *Handbook of International Investment Law and Policy* (Singapore: Springer, 2021) 1734.

[74] WG Report, note 4, para 11.

[75] Ibid, paras 76–79.

[76] Ibid, paras 22, 26 and 57.

[77] The notion of a 'duty to regulate' ensues from states' international human rights obligation to protect persons within their territory and/or jurisdiction from human rights abuses by third parties, including business enterprises. The 'right to regulate' in the context of international investment law involves host states' sovereign competence to regulate in the public interest: this 'right' has been juxtaposed with the 'rights' of investors under investment treaties. See UN Committee on Economic, Social and Cultural Rights (UNCESCR), 'Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights', UN Doc E/C.12/2011/1 (20 May 2011), para 5; UNCESCR, 'General Comment No. 24', UN Doc E/C.12/GC/24 (10 August 2017), para 14; Vera Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs, (2017) 50 *Vanderbilt Journal of Transnational Law* 50 355.

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IV. Investor Obligations under Investment Treaties

In the text of older, first- and second-generation treaties,[78] investor conduct featured only to a limited extent in so-called legality and denial of benefits clauses.[79] Given the historic origins of international investment law in the international law on the protection of nationals abroad and the preoccupations of Western capital-exporting states after World War II to ensure appropriate legal guarantees for their companies' foreign operations,[80] the focus on host state's conduct and the standards for such conduct (i.e., standards of protection, such as fair and equitable treatment, protection against unlawful expropriation, and full protection and security) was unsurprising. Regulation of investor conduct was not a part of the investment treaty programs, and business associations in fact worked hard to prevent the introduction of corporate international legal obligations across different post-WWII lawmaking processes.[81]

In arbitral practice, some investment arbitration tribunals have considered investor conduct when assessing the claims before them even in the absence of any specific treaty language. For example, in cases in which the investor contributed to the investment treaty breach by the host state, failed to mitigate losses incurred, or engaged in unlawful conduct that the tribunals viewed as contravening international public policy, such arbitral tribunals have drawn negative implications for their own jurisdiction, admissibility of investor claims, assessment of merits (considering investor conduct in delimiting the scope of investment protections or as a defense) and/or determination of quantum.[82] However, many other tribunals have considered harmful and illegal investor conduct irrelevant from the perspective of the applicable treaties and the standards of protection they afforded to the investor and the investment.[83] Investment treaties would typically not provide a cause of action for claims against the investor for harm caused by the operation of an investment in the host state or for conduct generally considered illegal, such as corruption or non-compliance with environmental and labour standards—providing the host state with no opportunity to challenge the investor (mis)conduct and seek remedy in the context of international investor–state arbitration proceedings, not even through a counterclaim—a procedural option marked by peril.[84]

[78] First generation investment treaties provided for basic investor protections and a state-state dispute settlement. Second generation investment treaties have typically involved extensive investor protections, both investor-state and state-state dispute settlement, and preambular language highlighting the objective of promotion of investments and the need for investors to enjoy protection from host state interference. See Krista Nadakavukaren Schefer, *International Investment Law: Texts, Cases and Materials*, 3rd edn. (Cheltenham: Edward Elgar, 2020) 35–36.

[79] The term 'legality clause' refers to a definition of an 'investment' or a scope of application provision that limits the subject matter scope of an investment treaty to those investments that were made in accordance with the law of the host state (for example, 2004 Azerbaijan-Greece BIT, art 1.1; Oman-Switzerland BIT, art 2). Occasionally, this requirement could extend beyond the establishment to the operation of the investment (for example, 1998 Canada-Costa Rica BIT art I(g)). Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 *Fordham International Law Journal* 1473. Denial of benefits clauses provide for a right of the host state to deny the protection of the investment treaty to certain categories of investors, such as those that have no substantial activity in the home state; however, the host state must actively exercise this right (for example, 2002 Austria-Guatemala BIT, art 10).

[80] See, e.g., Dolzer et al (2022), note 66, 1–10.

[81] Nicolás Perrone, 'Bridging the Gap between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment' (2022) 7 *Business and Human Rights Journal* 375, 378–391.

[82] For example, see Jorge Viñuales, 'Investor Diligence in Investment Arbitration: Sources and Arguments' (2017) 32 *ICSID Review – Foreign Investment Law Journal* 346; Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (London: Bloomsbury, 2018) 155–156.

[83] See Sattorova (2018), note 82, 156–157.

[84] For the latest consideration of the law, see Mees Brenninkmeijer and Fabien Gélinas, 'Counterclaims in Investment Arbitration: Towards an Integrated Approach' (2023) *ICSID Review* 567.

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States' experience of investor–state arbitration and dissatisfaction with the application of second-generation investment treaties by arbitral tribunals has led to states terminating and renegotiating their investment treaties[85] and the advent of what the United Nations Conference on Trade and Development (UNCTAD) called the 'era of re-orientation' of investment treaties.[86] Investment treaty reform initiatives have introduced a range of treaty design strategies to safeguard host states' regulatory space, limit investor rights and bring considerations of investor conduct firmly within the investment treaty regime.[87] One such strategy—included in the UNCTAD 2015 reform package[88] as well as advocated in scholarship[89] and by vocal non-governmental organizations such as the International Institute for Sustainable Development (IISD)[90]—has been to include clauses on investor conduct within investment treaties, including provisions imposing international legal obligations directly on investors.[91]

The topic of investor obligations has recently attracted considerable attention in the literature, including the pages of this journal.[92] However, explorations of this topic, including the considerations of investment treaty reform proposals relating to the regulation of investor conduct, have been complicated by definitional diversity and inconsistencies, with authors and stakeholders attributing the term 'investor obligations' different meanings and normative qualities. For example, both UNCTAD and some commentators sometimes employ the expression 'investor obligations' interchangeably with 'investor responsibilities' or 'corporate social responsibility' (CSR), while other times they use the three terms to refer to distinct concepts.[93] Similarly, the term 'investor obligations' has often referred only to legal norms addressed to investors (rather than

[85] Malcolm Langford, Daniel Behn and Ole Kristian Fauchald, 'Backlash and State Strategies in International Investment Law' in Tanja Aalberts and Thomas Gammeltoft-Hansen (eds.), *The Changing Practices of International Law* (Cambridge: Cambridge University Press, 2018) 70–102.

[86] See, e.g., UNCTAD (2018), note 68, 14.

[87] See, e.g., UNCTAD documents listed in note 68; WG Report, note 3, paras 28–51, 52–78.

[88] UNCTAD (2015), note 68, 85, 109–111.

[89] Choudhury (2017), note 2; Choudhury (2020), note 13.

[90] IISD, 'Harnessing Investment for Sustainable Development: Inclusion of investor obligations and corporate accountability provisions in trade and investment agreements', https://www.iisd.org/system/files/meterial/harnessing-investment-sustainable-development.pdf (accessed 10 October 2022). Provisions on investor obligations appeared already in the 2005 IISD Model BIT. IISD has worked closely with UNCTAD and advised many African governments on investment treaties, exercising significant influence.

[91] The WG Report, note 4, also mentions the imposition of obligations on investors as a way for states to implement their duty to regulate (para 26) and a key element of a 'desirable' reform agenda (paras 63–66).

[92] E.g., Krajewski (2020); Perrone (2022), note 81; Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: Cambridge University Press 2016) 339–346; Choudhury (2020), note 13; Barnali Choudhury, 'Human Rights Provisions in International Investment Treaties and Investor-State Contracts', UCL Working Paper Series (2020), https://papers.ssrn.com/abstract=3643407 (accessed 19 August 2022); Yueming Yan, 'Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance' (2020) 23 *Journal of International Economic Law* 989; Nathalie Bernasconi-Osterwalder, 'Inclusion of Investor Obligations and Corporate Accountability Provisions in Investment Agreements' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds.), *Handbook of International Investment Law and Policy* (Singapore: Springer Singapore 2021); Nicholas Diamond and Kabir Duggal, 'Adding New Ingredients to an Old Recipe: Do ISDS Reforms and New Investment Treaties Support Human Rights?' (2021) 53 *Case Western Reserve Journal of International Law* 117, 129–133; Prabhash Ranjan, 'Investor Obligations in Investment Treaties: Missing Text or a Matter of Application?' in Jean Ho and Mavluda Sattorova (eds.), *Investors' International Law* (London: Bloomsbury 2021); see also chapters by Ranjan, Pereira de Andrade and Monebhurrun and Choudhury in ibid; Abdurrahman Erol, 'A Noble Effort or Window Dressing? Computational Analysis of Human Rights-Related Investor Obligations in International Investment Agreements' (2022) 15 *Erasmus Law Review* 12; Bueno et al (2023), note 70.

[93] See, e.g., UNCTAD (2014 and 2016), note 64; UNCTAD (2015), note 68, 19, 30, 77–78; Deva (2021), note 2; International Institute for Sustainable Development and Friedrich Ebert Stiftung, *Integrating Investor Obligations and*

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states), while some authors have used it loosely to include provisions explicitly addressed to states and preambular provisions.[94]

The terminological inconsistencies and differences have obscured the investment treaty developments relating to the regulation of investor conduct, as they conflate normatively discrete phenomena that have distinct conceptual histories and legal implications.[95] In international law, an 'obligation' refers to a strict, legally binding duty, while corporate 'responsibility' in the sense of a primary rule, as used in the BHR framework (rather than in the sense of the legal consequences flowing from violations of international law as in the law of international responsibility), has signified an absence of a legally binding character. The term 'corporate social responsibility' then typically refers to actions voluntarily undertaken by companies for public benefit.[96]

In particular, confusion seems to persist regarding the practice of using investment treaties to impose strict international legal obligations directly on investors ('investor obligations' as used in this article)—that is, of legally binding, obligatory as opposed to optional requirements, created through an investment treaty and addressed and applied to investors directly rather than to a state. Authors and stakeholders regularly do not account for the full extent of the contemporary practice,[97] fail to appreciate their legal implications, question their international legal character,[98] or, conversely, declare as legally binding on investors treaty provisions that are clearly addressed to states or are mere preambular declarations or soft-law provisions, thereby further confounding the matter.[99] Indeed, the WG Report and important scholarly writings published in this journal have discussed the topic in a manner that might create the impression that there are currently no investor obligations in existing investment treaties.[100]

However, contrary to some pervasive assertions that investment treaties prescribe only rights and no direct obligations for foreign investors,[101] at least three dozen investment

Corporate Accountability Provisions in Trade and Investment Agreements: Report of the Expert Meeting Held in Versoix, Switzerland, January 11–12, 2018 (Geneva: IISD and Friedrich Ebert Stiftung, 2018) 18.

[94] Choudhury (2020), note 13, esp 88–92; Erol (2022), note 92.

[95] Florian Wettstein, *Business and Human Rights: Ethical, Legal and Managerial Perspectives* (Cambridge: Cambridge University Press, 2022) 2–5.

[96] See, e.g., Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14 *Journal of Human Rights* 237.

[97] E.g., WG Report, note 4, paras 41–47 and 63–66; Gaukrodger (2021), note 8, 100–109; Krajewski (2020), note 92, esp 114; Steininger (2021), note 2, 419; Choudhury (2020), note 13; Diamond and Duggal (2021), note 92, 129–33; Peters (2016), note 92, 339–46; Isabella Seif, 'Business and Human Rights in International Investment Law: Empirical Evidence' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds.), *Handbook of International Investment Law and Policy* (Singapore; Springer Singapore, 2020).

[98] E.g., Krajewski (2020), note 92; OECD, 'OECD Public Consultation – Jan–Feb 2020: Business Responsibilities and Investment Treaties, Compilation of Comments Received', 25 (Muchlinski), 77–78 (Paparinskis), https://www.oecd.org/investment/OECD-Investment-treaties-Public-consultation-2020.pdf (accessed 27 June 2022).

[99] E.g., Choudhury (2020), note 13, 88–92; Ranjan (2021), note 92; Yannick Radi, *Rules and Practices of International Investment Law and Arbitration* (Cambridge: Cambridge University Press, 2020) 226–230; WG Report, note 4, para 24 (with respect to the draft European Union–China Comprehensive Agreement on Investment); van Aaken (2023), note 67, 173 (with respect to 2021 Canada Model BIT art 16).

[100] WG Report, note 4, paras 63–66; Krajewski (2020), note 92, 106 (asserting 'lack of investor obligations in international investment law'); Perrone (2022), note 81, 375–377 (describing 'lack' and 'inexistence' of investor obligations' and asserting that 'investors have responsibilities under international law, not fully fledged obligations').

[101] WG Report, note 4, e.g. paras 7, 17, 41 and 47; Pablo Agustín and Escobar Ullauri, 'Reconciling the Rights of Multinational Companies under IIAs with the Tort Liability Caused by Their Subsidiaries', *Investment Treaty News* (19 December 2020), https://www.iisd.org/itn/en/2020/12/19/reconciling-the-rights-of-multinationals-companies-under-iias-with-the-tort-liability-caused-by-their-subsidiaries-pablo-agustin-escobar-ullauri/ (accessed 22 July

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treaties, including investment treaties already in force, have imposed international legal obligations directly on foreign investors and their local corporate vehicles ('investments'),[102] including specific labour and human rights obligations,[103] as the subsequent sections demonstrate.

A. Treaty practice[104]

The investment treaty concluded among the members of the Economic Community of West African States (ECOWAS), the 2008 ECOWAS Supplementary Act on Investments,[105] provides some of the most developed elaboration of investor obligations among the publicly available investment treaties in force,[106] and may therefore serve as a useful example of the use and potentially broad array of investor obligations in investment treaties. In its third chapter, entitled 'Obligations and Duties of Investors and Investments', the treaty imposes obligations on 'Investors' and 'Investments' (defined, e.g., as a 'company' or 'a corporate entity constituted or organized under the applicable law of any ECOWAS Member State'). In addition to obligations relating to compliance with the host state's law and reporting obligations (art 11), the ECOWAS Supplementary Act articulates extensive obligations for investors before and after investing. Pre-establishment, 'Investors and Investments shall conduct environmental and social impact assessment' (art 12(1)) and 'shall apply the precautionary principle to their environmental and social impact assessment' (art 12(3)). Post-establishment, Investors and Investments must comply with extensive social impact, labor and human rights obligations (art 14), as well as corporate governance requirements (art 15). For example, 'Investors shall uphold human rights in the workplace and the community in which they are located ... shall not undertake or cause to be undertaken acts that breach such human rights ... shall not manage or operate their investments in a manner that circumvents human rights obligations ...' (art 14(2)). 'Investors and Investments shall act in accordance with fundamental labour standards as stipulated in the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights of Work, 1998' (art 14(3)), and throughout the lifespan of the investment, 'shall ... refrain from involving themselves' or 'be complicit in' corruption (art 13). The ECOWAS Supplementary Act also imposes liability for significant damage, personal injury or death for which victims may sue in the host state's courts (art 17). In December 2019, an updated ECOWAS investment treaty entered into force—the ECOWAS Common Investment Code.[107] The Code further expanded the subject matter scope of investor obligations to include

2022); Nicolás Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules* (Oxford: Oxford University Press, 2021).

[102] See note 24. Note that both Erol (2022), note 92, and Bueno et al (2023), note 70, adopted broader definitions of 'investor obligations/responsibilities' than the present article, and therefore their overall 'count' is higher than that in this article.

[103] See Section IV.A.

[104] See also Van der Ploeg (2018), note 21, 114–117.

[105] 2008 ECOWAS Supplementary Act on Investments (in force). The Act is an annex and integral part the 1993 Revised ECOWAS Treaty.

[106] This article works with instruments published in the UNCTAD and EDIT databases, note 23, as of 19 May 2023. On the problem of 'missing' investment treaties, see Rodrigo Polanco Lazo et al, 'Missing Investment Treaties' (2018) 21 *Journal of International Economic Law* 703.

[107] 2018 ECOWAS Common Investment Code (in force). The Code is also an annex and integral part the 1993 Revised ECOWAS Treaty.

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environmental obligations and the transfer of environmentally sound management practices, sociopolitical obligations and consumer protection.[108]

Africa has been the most progressive region in terms of the incorporation of investor obligations into regional and bilateral investment treaties.[109] The Morocco-Nigeria BIT and the Democratic Republic of the Congo-Rwanda BIT also contain numerous, even if less detailed, provisions imposing obligations to comply with the host state's law, refrain from corruption, and submit reports regarding their operations,[110] as do several African model BITs.[111] The final draft of the African Continental Free Trade Area (AfCFTA) Investment Protocol goes beyond the existing instruments in the region by incorporating additional types of investor obligations, such as those relating to indigenous peoples and local communities.[112]

Despite the observable geographical imbalance, other investment treaties have also prescribed investor obligations, even if more limited. These treaties demand that investors (i) comply with the host state's law (for example, the Organization of Islamic Conference (OIC) Investment Agreement and the China-Namibia BIT),[113] at times specifically referring to labour and human rights laws (for example, Turkey-Ghana BIT and Ethiopia-Qatar BIT);[114] (ii) refrain from corruption and complicity in corruption (for example, the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol and the Indonesia-Switzerland BIT);[115] (iii) report a variety of information regarding their operations (for example, the Singapore-Myanmar BIT and many Azerbaijan BITs);[116] and (iv) seek implementation of internationally recognized CSR standards, including those relating to human rights and the environment (for example, some of the recent Indian BITs and the Uruguay-Turkey BIT).[117]

[108] Ibid, arts 15(5) and (6), 27(1), 29, 30(3) and (4), 31(3), 32, and 33(7).

[109] The activities of the legal profession are also notable: the 2022 Model Bilateral Investment Treaty for African States published by the African Arbitration Academy provides for a broad range of investor obligations. See Francis Ojok, 'The African Arbitration Academy's Model Bilateral Investment Treaty for African States', *Kluwer Arbitration Blog* (26 January 2023), https://arbitrationblog.kluwerarbitration.com/2023/01/26/the-african-arbitration-academys-model-bilateral-investment-treaty-for-african-states/ (accessed 17 June 2023). Copy of the model text on file with author.

[110] 2016 Morocco–Nigeria BIT, arts 14, 17(2) and (3), 18, 19(1)(a) and (b), 20, 21(1); 2021 Democratic Republic of the Congo–Rwanda BIT, Ch III.

[111] 2012 Southern African Development Community (SADC) Model BIT, arts 10–19; 2016 East African Community (EAC) Model BIT, arts 10–12, 14; 2016 Pan–African Investment Code, Ch 4; 2019 Morocco Model BIT, arts 18–20; and apparently also the 2016 Nigeria Model BIT (as presented by Ms. Sadiku from the Nigerian Investment Promotion Commission (NIPC) at the UNOC–UNCTAD Expert Meeting on Corruption and International Investments, 18 May 2021—this document is not available in the UNCTAD and EDIT databases and the author has been unable to obtain a copy of the document). See also 2008 Ghana Model BIT, art 12.

[112] AfCFTA Investment Protocol, Final Draft (2023), art 35. However, an important caveat applies: these groups need to be recognized in the host state's law. Ibid, art 3(6)

[113] 1981 OIC Investment Agreement (in force), art 9; 2005 China–Namibia BIT, art 10; 2007 Common Market for Eastern and Southern Africa (COMESA) Investment Agreement, art 13. See also 2006 SADC Protocol, art 10 (in force); 2013 Amended Arab Investment Agreement, art 13 (in force).

[114] 2016 Turkey–Ghana BIT, art 13(1); 2017 Ethiopia–Qatar BIT, art 14.

[115] 2017 Intra–MERCOSUR Cooperation and Facilitation Investment Protocol (in force), art 14.1; 2017 Argentine–Chile FTA, art 8.15; 2022 Indonesia–Switzerland BIT, art 13.

[116] E.g., Azerbaijan's BITs with Croatia (2007, in force) art 3, Syria (2009, in force) art 3, Serbia (2011, in force) art 3, Czech Republic (2011, in force) art 3, Albania (2012, in force) art 3, San Marino (2015, in force) art 3; 2018 Singapore–Myanmar BIT, art 28.

[117] E.g., 2018 India–Belarus BIT, art 12; 2019 India–Kyrgyzstan BIT, art 12; 2022 Uruguay–Turkey BIT, art 13.

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In addition, many recent model bilateral investment treaties (model BITs) incorporate one or more provisions prescribing (an) investor obligation(s). Of the 16 publicly known model BITs adopted between 2015 and 2021, more than half contain one or more provisions prescribing (an) investor obligation(s),[118] including compliance with the host state law,[119] anticorruption,[120] reporting,[121] and liability for injury.[122]

B. The legally binding nature of investor obligations

The investment treaty provisions mentioned in the previous section are all explicitly addressed to 'investors' and/or 'investments' (the term 'investment' refers to the local corporate vehicle)[123] and are expressed in the language of a legal obligation.[124] The provisions that an investor 'shall' or 'shall not' engage in a particular conduct are clearly distinguishable from hortatory or aspirational provisions ('should'),[125] and state-addressed provisions requiring states to take certain measures vis-à-vis investors.[126] In treaty-making and international diplomacy more broadly, 'shall' formulations have consistently been used—and understood—to express the imposition of a legal obligation, and the formulations thus clearly express the state parties' intention to create international legal obligations for foreign investors operating within their territories.[127] This intention has also been confirmed in statements of state representatives in international fora[128] or the text of the treaties themselves: both the ECOWAS Common Investment Code and the AfCFTA

[118] 2015 India Model BIT, art 11; 2016 Azerbaijan Model BIT, art 3(1); 2016 Nigeria Model BIT; 2017 Colombia Model BIT, art on Investor's Social Responsibility, para 2; 2019 Netherlands Model BIT, art 7(1) and (4); 2019 Morocco Model BIT, arts 18–20; 2019 Belgium–Luxembourg Economic Union Model BIT, art 18(1); in contrast to 2016 Russian Federation Model BIT; 2016 Turkey Model BIT; 2016 Czech Republic Model BIT; 2016 and 2019 Slovakia Model BITs). 2015 Brazil Model BIT and 2021 Canada Model BIT are ambiguous.

[119] E.g., 2015 India Model BIT, art 11(iv); 2019 Netherlands Model BIT, art 7(1); 2019 Belgium–Luxembourg Economic Union Model BIT, art 18(1); 2019 Morocco Model BIT, art 18(1).

[120] E.g., 2019 Morocco Model BIT, art 19(1).

[121] E.g., 2015 India Model BIT, art 11(iv); art 21; 2016 Azerbaijan Model BIT, art 3(1); 2019 Morocco Model BIT, art 18.3.

[122] E.g., 2019 Netherlands Model BIT, art 7(4).

[123] See note 24.

[124] Anthony Aust, *Modern Treaty Law and Practice*, 2nd edn. (Cambridge: Cambridge University Press, 2007) 33. For example, UNCTAD (2015), note 68, 77, also lists COMESA Investment Agreement art 13 as an example of a legally binding investor obligation.

[125] E.g., 2015 Slovakia–Iran BIT, art 10(3); 2016 Argentina–Qatar BIT, art 12.

[126] E.g., 2016 Nigeria–Singapore BIT, art 11; 2019 Netherlands Model BIT, art 7(2); 2021 Colombia–Spain BIT, art 17. In contrast, *David R. Aven and Others v Republic of Costa Rica*, ICSID case no UNCT/15/3, Award of 18 September 2018 ('*Aven*'), provides an interesting example of an arbitral tribunal expressing—obiter—its readiness to derive investor obligations from a subparagraph clarifying the scope of the performance requirements permissible under the investment treaty (DR–CAFTA art 10.9.3c) and from a right to regulate provision (DR–CAFTA art 10.11), i.e., from treaty provisions, which would normally be understood as limitations on investor rights, rather than provisions creating investor obligations (paras 732–743).

[127] The treaty templates recently used by several Latin American states and India unfortunately involve contradictory language, according to which investors and investments '*shall* endeavour to *voluntarily incorporate*' internationally recognized standards of corporate responsibility …' or '*shall* use their best efforts to comply with the following *voluntary* principles and standards for responsible corporate conduct' (emphases added). Such drafting unhelpfully confuses the legal implications of the provisions. See e.g., 2016 Brazil–Peru ETEA, art 2.13; 2019 Brazil–Morocco BIT, art 13; 2018 India–Taiwan BIT, art 12; 2019 India–Kyrgyzstan BIT, art 12.

[128] E.g., Sadiku Yewande, Executive Secretary/CEO of the Nigeria Investment Promotion Commission discussing the Nigeria Model BIT at the UNOC–UNCTAD Expert Meeting on Corruption and International Investment.19 May 2021.

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Investment Protocol explicitly state that they set out the rights and obligations of both states and investors.[129]

In *Al-Warraq v Indonesia*,[130] an investment arbitration tribunal was called to interpret and apply precisely this kind of investment treaty provision when dealing with art 9 of the OIC Investment Agreement[131] According to the treaty text, '[t]he *investor shall be bound* by the laws and regulations in force in the host state and *shall refrain* from all acts that may disturb public order or morals or that may be prejudicial to the public interest and refrain from exercising restrictive practices and from trying to achieve gains through unlawful means'.[132] The *Al-Warraq* arbitral tribunal had no doubt that the 'shall' provision imposed a direct obligation on the investor,[133] '[bound] an investor to observe certain norms of conduct'[134] and 'prevent[ed] the investor from taking any actions that would disrupt the public interest ... [and] from "trying to achieve gains through unlawful means".'[135] The tribunal reasoned that the provision 'impose[d] a positive obligation on investors to respect the law of the Host State, and public order and morals, ... rais[ing] this obligation from the plane of domestic law (and jurisdiction of domestic tribunals) to a treaty obligation binding on the investor in an investor state arbitration'.[136] Having established on the facts that the investor engaged in acts of fraud, the tribunal concluded that 'the Claimant ha[d] breached art 9 of the OIC Investment Agreement by failing to uphold the Indonesian laws and regulations and in acting in a manner prejudicial to the public interest',[137] thereby

[129] 2018 ECOWAS Common Investment Code art 3 ('(1) This Code applies to the rights and obligations of Member States and investors. ... (3) This Code does not create retroactive obligations for Member States and investors.'); AfCFTA Investment Protocol, note 112, art 3(1) (art 3 Scope of Application: 'This Protocol sets out the rights and obligations for State Parties, investors and investments.').

[130] *Hesham Talaat M Al-Warraq v The Republic of Indonesia* ('Al-Warraq'), ad hoc UNCITRAL, Final Award of 15 December 2014.

[131] 1981 OIC Investment Agreement.

[132] Ibid, art 9 (emphases added). The OIC Agreement definition of 'investor' covers both physical and legal persons.

[133] Literature on investor obligations has failed to consider the *Al-Warraq* case, as did the WG Report, note 4, and Gaukrodger (2021), note 8. Other cases—*Urbaser* and sometimes *Aven*, *Burlington*, *Perenco* and *Bear Creek*—are normally discussed in relation to the topic of investor obligations. However, none of these cases dealt with the issue of investor obligations prescribed in the text of an investment treaty. *Urbaser* stands for the *obiter* proposition that an investor might owe negative international obligations under international human rights law (that is, without an investment treaty creating a specific obligation itself) and positive human rights obligations under domestic law, and that these obligations might be actionable in the context of investor–state arbitration. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID case no ARB/07/26, Award of 8 December 2016 ('*Urbaser*'), paras 1193–1210. On *Aven*, see note 126. *Burlington* and *Perenco* involved no allegation of a breach of an international legal obligation: the counterclaims were based on domestic law causes of action. *Burlington Resources Inc. v Republic of Ecuador*, ICSID case no ARB/08/5 Decision on Ecuador's Counterclaims of 7 February 2017; *Perenco Ecuador Ltd. v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID case no ARB/08/6, Interim Decision on the Environmental Counterclaim of 11 August 2015 and Award of 27 September 2019. The *Bear Creek* case involved a claim of contributory fault by the investor (which Peru was found not to have proven) and a proposition by the dissenting arbitrator that International Labour Organization (ILO) Indigenous and Tribal People Convention produced legal effects for investors, i.e. again not a situation of an investor obligation as defined in this article. *Bear Creek Mining Corporation v Republic of Peru*, ICSID case no ARB/14/21, Award of 30 November 2017, Partly Dissenting Opinion of Professor Philip Sands QC, paras 10–2. This article therefore discusses the *Al-Warraq* case at some length to (i) show how an investment treaty provision imposing a direct obligation on investors was applied in arbitral proceedings; and (ii) bring the case within the investor obligations debate.

[134] *Al-Warraq* (2014), Final Award, note 130, para 631.

[135] Ibid, para 632.

[136] Ibid, para 663.

[137] Ibid, para 647, see also para 645.

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finding a violation by the investor of its international legal obligations under this treaty provision.

The vast majority of investment arbitration tribunals have favoured the interpretative approach to investment treaties adopted by the *Al-Warraq* tribunal, which places a key emphasis on the 'ordinary meaning' element of art 31(1) of the Vienna Convention on the Law of Treaties (VCLT).[138] It may be expected that other investment tribunals and investment treaty interpreters will interpret and apply treaty provisions on investor obligations analogously to *Al-Warraq* as imposing direct international legal obligations on investors. After all, it was precisely this interpretative approach that had translated into investment tribunals' broad interpretations of standards of treatment and their unwillingness to read into investment treaties non-economic considerations, such as human and labour rights and environmental protection, unless such limitations were explicitly mentioned in the treaty text.

The proposition that investment treaties impose strict international legal obligations on investors has certainly been controversial. Public international lawyers often protest that such investor obligations would be at odds with some key characteristics of international law, given its conventional conceptualization as an inter-state legal order and its consequent doctrines of subjects, treaty law and international responsibility.[139] Some commentators have considered that investor obligations would bring an unwelcome expansion of the personal scope of international law.[140] Investment law practitioners most frequently argue that no legally binding obligations can arise without the investors' consent to such obligations.[141] Still, for others, treaty provisions need to be clearer, more precise and more comprehensive to qualify as international legal obligations.[142]

However, these objections are misplaced, even if direct investor obligations might seem to challenge some leading tenets of treaty law and international law more broadly.[143] International law has already changed in its personal scope and imposes obligations on collective entities other than states and their international organizations in a range of areas, including the law of international peace and security, international humanitarian law, the law of the sea and international aviation law.[144] International investment law is not unique in this respect. Treaty law does not prevent corporations or other nonstate entities from becoming addressees of treaty obligations in the absence of their consent, as the *pacta tertiis*

[138] 1969 Vienna Convention on the Law of Treaties. According to VCLT art 31(1): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

[139] Markos Karavias, *Corporate Obligations under International Law* (Oxford: Oxford University Press, 2013). These objections often make their way to other bodies of literature as well. See Barnali Choudhury, 'The Role of Soft Law Corporate Responsibilities in Defining Investor Obligations in International Investment Agreements' in Jean Ho and Mavluda Sattorova (eds.), *Investors' International Law* (London: Bloomsbury 2021).

[140] E.g., OECD (2020), note 98, 77 (Paparinskis).

[141] E.g., World Arbitration Update, 'Incorporating Obligations on Investors in BITs', conference panel organized in Washington DC/online on 15 October 2021; Naomi Briercliffe and Olga Owczarek, 'Human-Rights-Based Claims by States and "New-Generation" International Investment Agreements', *Kluwer Arbitration Blog* (31 July 2018), https://arbitrationblog.kluwerarbitration.com/2018/08/01/human-rights-based-claims-by-states-and-new-generation-international-investment-agreements/ (accessed 18 June 2023), fn 19 and the accompanying text.

[142] Krajewski (2020), note 92, 128; Perrone (2022), note 81, 375.

[143] Klara Polackova Van der Ploeg, 'Treaty Obligations of Collective Non-State Entities: The Case of the Deep Seabed Regime' in James Summers and Alex Gough (eds.), *Non-State Actors and International Obligations: Creation, Evolution and Enforcement* (Leiden: Brill Nijhoff, 2018) 15–38 (using the example of 'prospectors' and 'contractors' operating in the deep seabed under the United Nations Convention on the Law of the Sea).

[144] Klara Polackova Van der Ploeg, 'The Functional Threshold: Direct International Legal Regulation of Collective Nonstate Entities and the Law of International Peace and Security' (2020) 53:1 *NYU Journal of International Law and Politics*, 71, 73–75.

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rule, codified in art 34 of the VCLT,[145] only applies to states. Rather, it is within states' sovereign prerogative to use their treaties to impose obligations on corporations and other nonstate entities (as long as the international law on the jurisdiction of states is observed), and the legal validity of such obligations is not dependent on the consent of each investor. The proposition that investor consent is required conflates the fundamental distinction between the creation of international legal obligations (which falls within states' lawmaking prerogatives and does not require investor consent) and the resolution of disputes relating to those obligations (for which the consents of both the state and investor(s) involved are required in contemporary international law). Finally, scepticism about investor obligations goes too far when it asserts that there are no investment treaty provisions sufficiently specific to create an international legal obligation for investors.

In international law, the determination of whether a norm is legally binding is based on considerations of both form and content.[146] Any rule must be expressed in a recognized source of international law and must clearly articulate the intention of the states to create an international legal obligation. In the case of investor obligations under an investment treaty, no issue of form arises. In terms of content, brevity has traditionally been a leading characteristic of investment treaties. The entire edifice of investment treaty protection has been built on brief formulations such as that the host state 'shall provide fair and equitable treatment',[147] which have left the particulars of the obligations to interpretation. Investors and states have disagreed on the precise scope of standards of protection, and this manner of treaty drafting arguably simultaneously provides too little guidance for the obligation-holder and too much leeway for an adjudicator. However, the legally binding character of such treaty clauses has never been challenged, and it is difficult to understand why different validity thresholds should apply to investor obligations.

Objections to the existence of investor obligations based on the wording (content) of the respective rule may arise from confusion regarding the different types of investor obligations appearing in investment treaties.[148] Investment treaties impose obligations on investors of both conduct and result.[149] Provisions according to which an investor 'shall endeavor' to take certain action are examples of the former, while the prohibition against corruption is an example of the latter. Obligations of conduct are still legally binding as a matter of international law, and the investor is not at liberty to ignore them (unlike in cases of 'should' clauses, which merely recommend acting in a certain manner). To remain compliant, the investor must, in good faith, take reasonable steps towards the stated objective. Similarly, a treaty provision requiring the investor to comply with the host state's domestic law creates an obligation under international law—just as an umbrella clause creates an international legal obligation for the host state to comply with its domestic law undertaking. The determination of the content of the investor obligation by reference to

[145] 1969 Vienna Convention on the Law of Treaties, note 136, art 34.

[146] See, e.g., the discussion in Emily Crawford, *Non-Binding Norms in International Humanitarian Law: Efficacy, Legitimacy, and Legality* (Oxford: Oxford University Press 2021) Chapter 2.

[147] See, e.g., 1980 Sri Lanka–United Kingdom BIT (in force), art 2(2).

[148] For example, Krajewski (2020), note 92, 116–120; Steininger (2021), note 2, 418–419. Certain domestic legal orders may contain doctrines on the direct applicability or effect of treaties, under which the content of an international legal norm must fulfil certain criteria to apply directly within the domestic sphere; however, this is not a requirement of international law.

[149] Constantin Economides, 'Content of the Obligation: Obligations of Means and Obligations of Result' in James Crawford et al (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010); Rüdiger Wolfrum, 'Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations' in Mahnoush Arsanjani et al (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Leiden: Brill Nijhoff, 2010).

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the host state's domestic law does not deprive the obligation of its legally binding character under international law.[150]

C. Legal consequences of investor obligations

The imposition of investor obligations through investment treaties removes from arbitral tribunals much of the discretion to consider or disregard investor conduct when assessing investment claims. It may also be expected to inspire more restrained arbitral interpretations of standards of investment protection by bringing within the treaty text considerations other than merely the property interests of the investor. More fundamentally, the international legal nature of investor obligations means that investor conduct becomes regulated at the level of international law (even if it will also simultaneously be regulated by commercial, administrative and other domestic law). Consequently, if an investor fails to comply with its treaty obligation(s), the basic principle applies that a violation of international law entails international responsibility,[151] and the breach will trigger the investor's international responsibility.

Some investment treaties with investor obligations specify (some) legal consequences of their breach—such as that the legal consequences of a breach should be dealt with pursuant to the host state's domestic law;[152] or that a breach will remove the investor's access to investor–state arbitration.[153] However, the general content and implementation of investor international responsibility are unclear, given the limited experience of enforcing investor obligations to date (the *Al-Warraq* case provides the only publicly known award in which an arbitral tribunal actually applied an investment treaty provision creating an investor obligation),[154] and the limited practice relating to the international responsibility of corporations and other collective non-state entities in other areas of international law.[155]

In the context of state responsibility, James Crawford explained that responsibility involves substantive and procedural corollaries.[156] Although the law of state responsibility clearly cannot apply to non-state entities en bloc, some of the corollaries arguably also pertain to the non-state context: 'cessation' and 'reparation' as substantive corollaries, and 'claim' as the procedural corollary.[157] While substantive corollaries specify the content of international responsibility and the secondary obligations that arise by virtue of that responsibility, the procedural corollary enables the implementation of international

[150] Investment treaty provisions requiring the investor to comply with the host state's domestic law are a specimen of so-called referral (*renvoi*) clauses, which determine the content of a treaty obligation by a reference to a law other than the treaty itself. See *Case Concerning Pulp Mills on the River Uruguay Case (Argentina v Uruguay) (Judgment)* [2010] ICJ Reports 14, paras 53–56. Referral clauses are legally distinct from legality clauses that limit the subject matter scope of the investment treaty (see note 79).

[151] James Crawford & Simon Olleson, 'The Nature and Forms of International Responsibility,' in Malcolm Evans, (ed.), *International Law*, (Oxford: Oxford University Press, 2010) 441; James Crawford et al (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), especially chapters by Cahin and Lindblom; Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443–546; Markos Karavias, *Corporate Obligations under International Law* (Oxford: Oxford University Press, 2013) 66; Roland Portmann, *Legal Personality in International Law* (Cambridge: Cambridge University Press, 2010) 276–277.

[152] See 1980 Unified Agreement for the Investment of Arab Capital in the Arab States, art 14(2); 2013 Amended Arab Investment Agreement, art 13(2).

[153] 2017 Colombia Model BIT art on Investor's Social Responsibility, para 2; 2019 Morocco Model BIT, art 19.4,

[154] See note 133.

[155] Klara Polackova Van der Ploeg, 'Collective Non-State Entities in International Law', PhD thesis, Graduate Institute of International and Development Studies (2018) 277–280.

[156] James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013) 94–95.

[157] Ibid.

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responsibility—by way of a claim by an injured party.[158] Unless the relevant investment treaty specifies the legal consequences of a breach of an investor obligation, i.e., unless the *lex specialis* principle were to apply,[159] this general structure would generate (i) secondary obligations for the investor to cease any continuing wrongful conduct and to make reparation for any injury caused, and (ii) a procedural avenue to invoke the investor's international responsibility by making a claim against it for a breach of its international obligation, including through any available dispute settlement procedure(s) (the investment treaty provision creating the investor obligation would provide the legal basis for such claim).

The *Al-Warraq* case supports this basic structure.[160] Having noted that art 9 of the OIC Investment Agreement did not specify the legal consequences of the investor's breach,[161] the tribunal considered that, first, art 9 provided a legal basis for a (counter)claim against the investor[162] (in Crawford's terms, there was an institutionalized dispute settlement mechanism to raise a claim as the procedural corollary of international responsibility), and, second, compensation was available for the violation[163] (in Crawford's terms, there was a substantive corollary of reparation[164]). The tribunal ultimately decided that the counterclaim had to fail on the merits because Indonesia did not substantiate the counterclaim, having conflated the actions of the claimant investor with those of other individuals who were not parties to the arbitration.[165] However, the tribunal had no doubt that art 9 could have supported the host state's counterclaim against the investor had it been appropriately presented.[166]

In addition to the above elements, the *Al-Warraq* tribunal also considered the breach of art 9 to have implications for the investor's ability to bring its own successful claim in arbitration. Although the arbitral tribunal found a violation of the fair and equitable treatment standard by the host state, the art 9 violation rendered the investor's claim inadmissible by virtue of the 'clean hands' doctrine,[167] preventing the investor from seeking reparation from the host state for that violation. That said, it is unclear whether the tribunal viewed the application of the 'clean hands' doctrine and the consequent inadmissibility of investor claims as a general legal consequence flowing from the breach of the investor obligation, or whether its application was fact-specific (the case centred on a bank bailout which took place because of the investor's fraudulent conduct).[168]

Another important and often underappreciated benefit of treaty-based investor obligations is that ensuing investment arbitration proceedings can, in principle, reach

[158] Ibid, 95.

[159] See ibid, 103–104.

[160] *Al-Warraq* (2014), Final Award, note 131.

[161] *Al-Warraq*, ad hoc UNCITRAL, Award of 21 June 2012 (on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims), para 97.

[162] *Al-Warraq* (2014), Final Award, note 131, 663, 667.

[163] Ibid, 668.

[164] There did not seem to be a continuing breach involved on the facts, and so cessation would not apply as a secondary obligation.

[165] Ibid, paras 669–672.

[166] The tribunal was satisfied that it had jurisdiction to hear the counterclaim by virtue of OIC Investment Agreement art 17, whose broadly worded clause 'envisag[ed] claims by the State party'. Ibid, para 660. According to the tribunal, OIC Investment Agreement art 17 even went as far as to 'contemplate that a State Party initiates arbitration as a Claimant against an investor'. Ibid.

[167] Ibid, paras 645–648 and 654. However, only a majority of the tribunal believed that the 'clean hands' doctrine applied and rendered the investor's fair and equitable treatment claim inadmissible. To the extent that the 'clean hands' doctrine covered situations of illegality, it only applied to illegality in relation to the acquisition, not the operation of the investment. Ibid, note 217 in the Final Award.

[168] Ibid, para 667.

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not only the local operating entity (the foreign investor's subsidiary incorporated in the host state) but also the parent company of the investor. Underfunding of local subsidiaries and the lack of host state courts' jurisdiction over the parent, together with the principles of separate legal personality and limited liability, have long been identified as major barriers in holding businesses accountable for the adverse impacts of their operations on people and the environment in the host state.[169] If a parent company were a party to investment arbitration proceedings, as parent companies regularly have been, it would open the door for the host state to counterclaim for investment treaty violations by the parent (the investor), thus providing an avenue for a potentially effective procedure for remedy by the host state.[170]

That said, given that host states are currently generally unable to bring direct claims against investors in investment arbitration on the basis of an investment treaty alone,[171] the enforcement of investor obligations certainly cannot compare with the potency of investment arbitration in the implementation of the host state's responsibility for violations of investor rights.[172] Still, despite their essential limitations, the possibility of using counterclaims is not trivial, and the *Al-Warraq* case illustrates the potential of investor obligations as the basis for host-state reparation claims against the investor in investor–state arbitration. Despite their limited use to date, counterclaims are bound to gain significance as a procedural mechanism and enforcement tool as they become increasingly mainstream[173] and host states gain experience in how to present and sufficiently develop the cause of action.[174]

Investment arbitration is also not the only way in which an investor obligation might be enforced. Depending on the national constitutional framework, investor obligations may also be enforced by domestic courts, which have served as important enforcers of international law,[175] and through nonjudicial means.[176] As a practical matter, questions of implementation, compliance, enforcement, and effectiveness are crucial. However, these

[169] See, e.g., Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, *The Third Pillar. Access to Judicial Remedies for Human Rights Violations by Transnational Business* (Washington, Los Angeles, and Brussels: ICAR, CORE and ECCJ, 2013).

[170] The increasing occurrence of requirements of substantive business operations for a business enterprise to qualify as an 'investor' under an investment treaty limits its ability to reap benefits of investment treaty protection while avoiding applicable investor obligations through corporate structuring.

[171] *Urbaser* (2016), note 133; *Aven* (2018), note 126; *Al-Warraq* (2014), Final Award, note 131.

[172] See, e.g., Anna De Luca and Crina Baltag, 'Counterclaims in Investment Arbitration: Reflections on UNCITRAL WG III Reform', *Kluwer Arbitration Blog* (5 November 2021), http://arbitrationblog.kluwerarbitration.com/2021/11/05/counterclaims-in-investment-arbitration-reflections-on-uncitral-wg-iii-reform/ (accessed 14 September 2022).

[173] Even if the treaty's dispute settlement clause is broad enough to accommodate both investors and the host state as claimants, these clauses have been understood as supplying the host state's but not the investor's consent with the dispute settlement procedure (while the consent of both is required for arbitral jurisdiction to arise). See Dolzer et al (2022), note 66, 360.

[174] However, the strength of investment arbitration as an institutionalized enforcement mechanism of host state investment protection obligations is comparatively unusual in the context of international law, which has generally weaker institutionalized enforcement than domestic law. See, e.g., Paul Stephan, 'Enforcement of International Law' in Francesco Parisi (ed.), *The Oxford Handbook of Law and Economics: Volume 3: Public Law and Legal Institutions* (Oxford: Oxford University Press, 2017).

[175] See, e.g., Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 133; Robert Jennings, 'The Judicial Enforcement of International Obligations' (1987) 47 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 3.

[176] These enforcement avenues, of course, raise a host of legal issues, which cannot be explored here. See, e.g., Michael Van Alstine, 'The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions' in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge: Cambridge University Press, 2009).

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may only arise if there is a legal obligation to begin with, and the present article focuses precisely on this preceding question.[177] In the end, any enforcement can only be as effective and established as the underlying obligation involved.[178]

V. Investor Obligations and the Potentially Regressive Impact of the BHR Framework

Only a small group of existing investment treaties currently impose investor obligations.[179] However, the existing practice on investor obligations is not negligible and demonstrates both the legal possibility and the existence of legally binding, direct regulation of investor conduct through investment treaties.[180] It is inaccurate as a matter of positive law to suggest—as much of the existing commentary does—that there are either no or only a few discreet investment treaties that contain investor obligations (even if there may be uncertainty as to their precise content).[181] Section IV provided a range of examples that disprove the pervasive assertions that investment treaties either cannot or do not impose direct investor obligations in the strict sense of the term.[182] Additionally, the widespread appearance of investor obligations in the latest model BITs[183] arguably signals an understanding of the best practice and suggests a growing interest among states in using investment treaties to regulate investor conduct.

The key reasons for the confusion regarding the use of investment treaties to impose investor obligations (and thus to regulate investor conduct in a legally binding manner) are likely to be twofold. First, there is the relative difficulty of comprehensively and accurately analysing the investment treaty system, given the absence of an official investment treaty collection[184] and the limitations of available search engines and computational models.[185] A laborious manual examination of treaty texts is still required for a precise analysis. Second, some commentators have amalgamated the legally different ways in which investor conduct has been or may be brought within investment treaties,[186] thereby obscuring the imposition of investor obligations as a distinct and existing practice.

The human rights movement had long sought to introduce direct, legally binding regulation of corporate human rights-related conduct into international law.[187] However,

[177] In international law (just as in domestic law), the existence of an obligation and the question of the obligation's enforcement are conceptually distinct, and any potential enforcement issues thus have no bearing on the legal validity of the obligation and the automatic attachment of international responsibility to a breach of such an obligation. See, e.g., Malcolm Shaw, *International Law* (Cambridge: Cambridge University Press, 2014) 9; Rüdiger Wolfrum, 'International Law', *Max Planck Encyclopedia of Public International Law* (on-line version, 2006), para 20; Clapham (2006), note 29, 31.

[178] See Ioana Cismas and Sarah Macrory, 'The Business and Human Rights Regime under International Law: Remedy without Law?' in Summers and Gough (2018), note 143.

[179] See note 102 and the accompanying text. The contemporary investment treaty universe, however, mostly consists of first- and second-generation treaties: the occurrence of investor obligations should rather be assessed with reference to third-generation treaties.

[180] On the normative character of practice in international law, see Klara Polackova Van der Ploeg, 'International Law Through Time: On Change and Facticity of International Law' in Klara Polackova Van der Ploeg, Luca Pasquet and León Castellanos-Jankiewicz (eds.), *International Law and Time: Narratives and Techniques* (Cham: Springer International Publishing, 2022) 318–320.

[181] See notes 97–100 and the accompanying text.

[182] See notes 139–150 and the accompanying text.

[183] See notes 118–122 and the accompanying text.

[184] See note 106.

[185] Studies by Erol (2022), note 92, and Bueno et al (2023), note 70, both reveal notable omissions when compared with the treaties referred in Section IV.A.

[186] See notes 93–94 and the accompanying text.

[187] For an overview of these efforts, see Deva (2021), note 2, 1737–1741.

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these efforts have been unsuccessful because of the opposition, primarily among Western states and by business corporations themselves, to the imposition of direct international legal obligations on the latter.[188] This opposition has been bolstered by notions of human rights as a concept relating to the relationship between the government and the governed,[189] and by various assertions of legal impossibility under international law to impose direct obligations on corporations.[190] As mentioned, because of how controversial the idea of direct, legally binding corporate human rights obligations had proved to be, the UNGPs did not seek to impose such obligations, resulting in the BHR framework being built on a conceptual and terminological distinction between legally binding, merely restated 'obligations' or 'duties' of states, and new legally non-binding 'responsibilities' of business enterprises that do not have the same legally binding character.[191]

In contrast to international human rights law, the creation of direct international obligations for investors through investment treaties has not met the same sustained resistance among states,[192] even if the practice is more prevalent in some regions than others.[193] States have primarily introduced investor obligations as a way of reforming investment treaties (although the 1981 OIC Investment Agreement, which was the basis of the *Al-Warraq* case, notably predates the experience of investment arbitrations of the 1990s and the consequent debates on the legitimacy of investment treaties and investor–state dispute settlement). Treaty provisions creating investor obligations address many of the concerns expressed in the critiques of investment treaties, even if they certainly cannot resolve some of the more fundamental objections to the investment treaty regime as such.[194] By formally bringing investor conduct within the core of treaty relationships, investor obligations contribute to the rebalancing of the rights and obligations of states and investors and thus go some way towards correcting the normative asymmetry of the older treaties. The risk of an investment arbitration tribunal upholding a host-state counterclaim and awarding compensation against the investor on account of the investor's violation of its treaty obligations disincentivizes abusive and extortionary uses of investment arbitration by investors.[195] Treaty provisions creating human rights-related investor obligations specify the conduct required of investors in relation to human rights while providing a legal basis for demanding compliance, including through institutional mechanisms as these may be available. Such treaty provisions clarify that human rights considerations and responsible business conduct are essential components of foreign

[188] Clapham (2006), note 29; Deva (2021), note 2, 1737–1741; Sarah Joseph and Joanna Kyriakakis, 'From Soft Law to Hard Law in Business and Human Rights and the Challenge of Corporate Power' (2023) 36:2 *Leiden Journal of International Law* 1, 4-7; Perrone (2022), note 81, 375–96, 378–95. At this point, the ongoing negotiations of the BHR treaty are also highly unlikely to produce direct human rights obligations on businesses. Third Revised Draft (2021), note 5.

[189] See, e.g., Rodley (2014), note 16, 526–527.

[190] Markos Karavias, *Corporate Obligations Under International Law* (Oxford: Oxford University Press, 2013).

[191] See Section II.

[192] Anecdotally, arguments of the legal impossibility of investor obligations on account of the nature of international law as a legal order have been used by states opposing such obligations for policy reasons. However, concerns about international legal subjectivity of corporations, the debate on the nature of human rights and other similar issues have not stunned legal practice, which has largely taken place isolate from the international human rights law debates on corporate human rights obligations.

[193] See Section IV.A.

[194] See, e.g., Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013); Mohammad Hamdy, 'Redesign as Reform: A Critique of the Design of Bilateral Investment Treaties' (2019) 51 *Georgetown Journal of International Law* 255, 281–284.

[195] See note 174 and the accompanying text.

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investment and could also facilitate access to justice for victims of investor misconduct. These effects correspond to the investment treaty reform goals proposed in the WG Report.[196]

Despite their flaws,[197] investment treaties have been seen as involving not only risks but also a degree of potential for the realization of the BHR project.[198] Various stakeholders have called for the incorporation of the BHR framework within investment treaties to ensure that the treaties do not undermine human rights and instead promote responsible investor conduct and business accountability for corporate human rights abuses.[199] Commentators have similarly sought to align investment treaties with human rights by conceptually joining investment treaties with the BHR framework.[200] In these efforts, the BHR framework has characteristically been considered superior to investment treaties, despite the ambiguity surrounding the normative character of the demands that it places on business enterprises. However, by creating direct, legally binding investor obligations, investment treaties have arguably normatively surpassed the BHR framework in an important respect, and efforts to incorporate the BHR framework within the investment treaty regime may in fact be counterproductive to the aims of the BHR project of human rights protection and accountability in the business context.

Investment treaty-based investor obligations are certainly not a panacea for regulating and holding business corporations legally responsible for their misconduct, including their adverse impacts on the enjoyment of human rights and the environment. Aside from necessarily being a complement to, and not a substitute for, regulation under domestic law, the fragmented reality of several thousand bilateral and regional treaties covering only certain defined business corporations precludes comprehensive regulation. Design innovations in new treaties also cannot easily reform or undo the thousands of second-generation investment treaties.[201]

Still, investor obligations have distinct benefits over non-binding and domestic law-based regulation of investor conduct. A legal norm certainly has multiple dimensions that impact its efficacy, of which the norm's legally binding nature is only one;[202] formally nonbinding norms may also generate legal effects. However, the legally binding quality is essential[203]—as illustrated by the difficulty in creating direct corporate obligations in international human rights law and the observed challenges with the implementation of BHR due diligence in corporate practice[204]—in that, a (binding) rule communicates that adherence is a matter of obligation and not of benevolence. As the literature on 'focal points' explains,[205] international legal rules retain their distinct regulatory quality even if sanctions

[196] WG Report, note 4, e.g., summary at 2 and paras 7, 8 and 49.

[197] See Section III.

[198] See, e.g., WG Report, note 4 (summary); Choudhury 2017, note 2.

[199] See, e.g., Gaukrodger (2021), note 8, 9.

[200] See Choudhury (2017), note 2; Choudhury (2020), note 13.

[201] See note 71.

[202] For example, the literature on soft law versus hard law (which does not need to be recounted here) focuses—in addition to the normative form ('obligation')—on substantive content ('precision') and the availability and nature of any enforcement mechanism ('delegation'). Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421.

[203] Many academic commentators are much more comfortable with relativizing legal normativity than practicing lawyers, and the binary distinction between binding and non-binding continues to be essential to legal practice.

[204] See, e.g., Sarah Joseph and Joanna Kyriakakis (2023), note 187, 7–8.

[205] See, Richard McAdams, 'Focal Point Theory of Expressive Law' (2000) 86 *Virginia Law Review* 1649; Richard McAdams and Janice Nadler, 'Testing the Focal Point Theory of Legal Compliance: Expressive Influence in an Experimental Hawk/Dove Game' (2005) 2 *Journal of Empirical Legal Studies* 87; David Carter, Rachel Wellhausen and Paul Huth, 'International Law, Territorial Disputes, and Foreign Direct Investment' (2019) 63 *International Studies*

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or institutionalized enforcement mechanisms may be limited (as may be the case with investor obligations) or even absent. Investment treaty rules that create investor obligations thus embody values, commitments and demands regarding what investor conduct is (un)acceptable in ways that legally non-binding norms do not.

While host states also regulate investors in their domestic law, investor obligations under investment treaties and under domestic law are not equivalent. Owing to the generally high bar for treaty amendments, international rules are better insulated from domestic politics. Domestic law generally cannot provide a cause of action for claims (and counterclaims) against investors in a treaty-based investment arbitration, while a domestic court will not have jurisdiction over a foreign parent company even if the host state were to enact laws to regulate its conduct.[206] Depending on the applicable constitutional framework, international rules may also apply domestically without the need for domestic legislative enactments and may thus make up for domestic law's nonalignment with international standards caused, for example, by domestic capacity constraints.

Triggering international responsibility in the event of a breach distinguishes treaty-based investor obligations from other investment treaty provisions on investor conduct.[207] In principle, all treaty rules on investor conduct attribute a degree of international legal relevance to investor (mis)conduct, and by providing avenues for denying or reducing the benefits of investment treaty protection,[208] they set a valuable limit on what types of investments will enjoy protection under an investment treaty. However, only a breach of an investor obligation will generate an obligation under international law for the investor to cease wrongful conduct and make reparation for injury caused by the breach and will provide a basis for an international claim against the investor,[209] thereby establishing a clear link between corporate misconduct and the corporate bottom line of net income (profit).

While well-intentioned, the calls to incorporate the BHR framework within investment treaties[210] imply introducing an element of normative ambiguity into a body of law that nowadays contains unequivocal direct international legal obligations of certain business enterprises ('investors' and 'investments').[211] In particular, the transplantation of the concept of 'corporate responsibility' threatens to undo what is arguably a normative advance made towards business accountability, including for adverse human rights impacts, in the foreign-investment setting: the use of investment treaties to impose international obligations directly on investors, including some explicitly human rights

Quarterly 58; Kish Parella, 'International Law in the Boardroom' (2023) 108 *Cornell Law Review* 839. For application to international investment law, see Lauge Skovgaard Poulsen, 'Beyond Credible Commitments: (Investment) Treaties as Focal Points Research Note' (2020) 64 *International Studies Quarterly* 26. The empirical observations made in this body of literature parallel the conceptual distinction between the existence of an obligation and its enforcement, and the key point of modern analytic jurisprudence that legal quality is independent of the existence of a (threat of) sanction. See Scott Shapiro, *Legality* (Cambridge: Harvard University Press, 2011), Chapter 2.

[206] See Bruno Simma and Andreas Müller, 'Exercise and Limits of Jurisdiction' in James Crawford and Martti Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) for the law on jurisdiction of states.

[207] See note 79 and the accompanying text. In recent investment treaties, such provisions would include legality clauses that cover not only the establishment but also the operation of an investment (e.g., 2015 India Model BIT art 1.4; 2016 Nigeria-Morocco BIT art 1.3), exclusion from protection clauses (e.g., 2018 Singapore-EU Investment Protection Agreement art 2.1) and exclusion from access to investor-state dispute settlement clauses (2016 Canada-EU Comprehensive Economic and Trade Agreement (CETA) art 8.18.3; 2015 India Model BIT art 13.4).

[208] See Andrew Newcombe, 'Investor Misconduct: Jurisdiction, Admissibility or Merits?' in Chester Brown and Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011).

[209] See notes 156–159 and the accompanying text.

[210] See notes 199–200 and the accompanying text.

[211] See Section IV.B.

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obligations. As mentioned, the conceptual and terminological distinction between legally binding 'obligations' or 'duties' of states and legally non-binding 'responsibilities' of business has been a significant factor in the broad acceptance of the UNGPs and the subsequent transformative success of the BHR framework in advancing human rights protection in the business context.[212] However, in the context of international investment law, the incorporation of the BHR notion of 'corporate responsibility' rather threatens to generate important regressive impacts.

Given the dominant approach of investment arbitration tribunals to the interpretation of investment treaties,[213] the terminological distinction between the 'obligations' of states and 'responsibilities' of investors will lead arbitral tribunals and other authoritative interpreters to interpret the term 'responsibilities' as signaling the absence of a strict international legal obligation. The use of the term 'investor responsibilities' for the direct international legal obligations of investors (and the use of the expression 'investor responsibilities' as the umbrella term for all the normative demands that investment treaties may place on investors)[214] will impede the application and enforcement of existing investor obligations by bringing into question their legally binding character. It will also hinder the imposition of investor obligations in future investment treaties either by reinforcing the impression that investment treaties have not imposed (and perhaps even may not impose) international legal obligations directly on investors or by obscuring the distinct legal characteristics of investor obligations. Considering their potential to enhance investor accountability in the foreign investment context by creating formal legal obligations, including human rights-related obligations, the conflation of investor obligations with other treaty provisions on investor conduct arguably runs counter to the BHR project's goals of protecting human rights in the business context and ensuring corporate human rights accountability.

The influence and regressive impact of the BHR framework have arguably already manifested in what seems like a shifting attitude of UNCTAD towards investor obligations in the context of its investment treaty reform initiative. For example, in its earlier documents, UNCTAD listed investor obligations as one of the reform elements.[215] In later papers, which prominently refer to the UNGPs and 'the wide recognition of investors' responsibility to respect human rights',[216] the UNCTAD Secretariat primarily refers to 'investor responsibilities'.[217] With the exception of clauses on compliance with domestic laws, consideration is only given to provisions that would either be addressed to the treaty parties, rather than to investors, or that would contain 'should' rather than 'shall' language.[218]

States and other stakeholders may certainly consider it undesirable to make investor obligations a part of investment treaty reform. For example, there may be legitimate arguments in favour of using domestic law rather than investment treaties to regulate investor conduct—such as that domestic standards may enjoy greater local legitimacy; that governmental agencies may find national laws more straightforward to implement and monitor; and that domestic law creates a level playing field for all investors—domestic and foreign.[219] There may also be well-founded concerns that investment arbitration tribunals are not an appropriate forum for interpreting and applying human rights law.

[212] See Section II.
[213] See note 138 and the accompanying text.
[214] The OECD Report has set an ill-advised trajectory in this respect. See Gaukrodger (2021), note 8.
[215] UNCTAD (2015), note 68, 19, 30, 77–78.
[216] UNCTAD (2018), note 68, 15, 65.
[217] Ibid, 65.
[218] Ibid, 65–67.
[219] See, e.g., OECD (2021), note 7, 101 (Güven and Coleman).

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Some states will also continue to oppose the imposition of direct international legal obligations on their corporations as a matter of principle; however, the political economy of foreign investment has arguably changed over time, and the historical, political and economic contexts reflected in older-generation treaties no longer apply or do not apply in the same way. The division of states between capital-exporting and capital-importing is no longer clear-cut, and previously predominantly capital-exporting Western states that had shaped the investment treaty regime have also become prominent capital importers.[220] Additionally, the experience of investor–state arbitration has politicized investment treaties domestically and has fueled legitimacy challenges to the investment treaty regime.[221] The idea of which types of foreign investments should enjoy special international protections has changed,[222] and states have been looking for new ways to design their investment treaties.[223] These factors produce political dynamics and preferences different from those of the late 1950s and 1960s, when modern investment treaties emerged, or of the 1990s, when second-generation treaties proliferated, making the older-generation treaties—and the absence of investor obligations in them—an ill-advised benchmark for future developments.[224]

The point here is not to argue that every future investment treaty should or will include investor obligations. Rather, this article seeks to foster an understanding within the BHR field that investor obligations (direct international legal obligations of investors under investment treaties) exist as a matter of positive (existing) international law and possess distinct legal characteristics that may be of value to the aims of the BHR project. When seeking to align investment treaties with this project, scholars, advocates and policymakers should, therefore, take care to avoid inadvertently undoing this advance towards legal responsibility of (certain) business enterprises for adverse human rights impacts.

VI. Conclusion: Staying Truthful to Normative Plurality

The BHR framework has been transformative in facilitating legal developments towards corporate accountability for business-related human rights abuses around the world.[225] However, as members of the BHR movement seek to align investment treaties with the BHR agenda, care needs to be taken to avoid undoing what is arguably an advance towards legal accountability of business enterprises made in the investment treaty practice of imposing direct international legal obligations on investors. While the BHR framework may be a superior regime of corporate accountability in other respects, certain investment treaties have normatively surpassed it by regulating investor conduct in a manner formally binding under international law.[226] How BHR scholarship has related to this investment treaty practice—either by denying its existence or its full extent or by amalgamating legally different normative phenomena[227]—has hindered the recognition of treaty-based investor

[220] UNCTAD, *World Investment Report 2023: International Investment Trends* (Geneva: UNCTAD, 2023) 7 and 17.

[221] See, e.g., Bonnitcha et al (2017), note 9, 202–204, 226–231.

[222] For example, the EAC Model BIT specifically spells out this rationale, stating that the objective of its investor obligations provisions is, inter alia, to 'enhance contribution of Investments to inclusive growth and sustainable development of the Host State.' 2016 EAC Model BIT, commentary on arts 10 and 11.

[223] See, e.g., Anthea Roberts, 'Investment Treaties: The Reform Matrix' (2018) 112 *AJIL Unbound* 191.

[224] Anil Yilmaz Vastardis, 'Corporate Investors' Nationality and Reforming Investment Treaties: Can Older-Generation Treaties Undermine Substantive Reforms?', *IISD Investment Treaty News* (19 December 2020), https://www.iisd.org/itn/en/2020/12/19/corporate-investors-nationality-and-reforming-investment-treaties-can-older-generation-treaties-undermine-substantive-reforms-anil-yilmaz-vastardis/ (accessed 25 May 2023).

[225] See Section II.

[226] See Section IV and V.

[227] See notes 97–101.

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obligations as an existing, available and distinct tool for the regulation of corporate conduct. Commentators' resistance to acknowledging treaty-based investor obligations has been curiously at odds with the clear intention of some states to use their treaties to regulate investor conduct in a legally binding manner, as is their sovereign prerogative. It also seems regrettable, given the past and ongoing efforts within international human rights law to impose direct corporate human rights obligations, because investment treaties with investor obligations demonstrate the possibility of directly using international law to regulate corporate conduct, including human rights-related conduct, in a legally binding manner, thus providing an example of a legal structure that could be replicated elsewhere.

A major strength of the BHR framework has been its commitment to normative plurality, which is reflected in the foundational premise that the realization of the BHR agenda requires a 'smart mix of measures'.[228] This feature has arguably been pivotal for the framework's success, as it enabled the BHR movement to draw on and mobilize a variety of normative sources to support its endeavors. The BHR literature and wider discourse should maintain this normative plurality, which stands at the core of their project, in the context of investment treaties as well. Treaty-based investor obligations should be appreciated as a possible means to improve business conduct and to facilitate corporate accountability, and therefore as a potentially valuable component of the BHR 'smart mix'. Accordingly, the BHR field and investment treaty reform proposals should pause before inadvertently undoing this advance towards the legal accountability of investors by putting in question the legally binding character of investor obligations. This is all the more so, given that investment treaties apply to the BHR's paradigmatic case of foreign subsidiary operations and can therefore further the central interest of the BHR in ensuring parent company liability for human rights-related injuries.

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[228] UNGPs, note 12, commentary to Principle 3; Gaukrodger (2021), note 8, 9.

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