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# Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses

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## Abstract

The article explores the utility of corporate social responsibility (CSR) clauses in international investment agreements to achieve responsible investor conduct on human rights and environmental protection. It provides an empirical overview of the content of such CSR clauses and offers a critical analysis on how and why these clauses, regardless of their formulation, have not yet led to effective investor accountability in relation to human rights or environmental issues. Building on the weaknesses identified, it proposes to design new clauses on "investor human rights and environmental obligations" that incorporate established international standards of responsible conduct, such as the OECD Guidelines and the UNGPs; directly address investors as duty-bearers; explicitly recognise affected communities as beneficiaries of the investor obligations; and clarify the central question of access to remedy by providing for clear mechanisms of foreign investor liability in both the domestic courts of the home state and of the host state, separated from any counterclaim a host state may raise in an arbitration proceeding.

## Keywords

Access to Remedy, Corporate Social Responsibility, Environmental Protection, Human Rights, Investor Accountability, Investor Obligations, Investor Liability, UNGPs

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## 1. Introduction

International investment agreements (IIAs) increasingly contain clauses that encourage foreign investors to adopt a responsible business conduct on human rights and environmental protection. These clauses have been adopted recently, among others, to rebalance asymmetries of rights and obligations in international investment law that is traditionally concerned with rights of investors.[1] Despite this trend, investment treaties remain unbalanced instruments. With respect to human rights in particular, a recent report by the United Nations Working Group on Business and Human Rights highlights that the 'tokenistic' insertion of human rights provisions in IIAs does not alleviate the asymmetries, but rather "exacerbates the existing asymmetry between rights and obligations of investors".[2]

Using empirical, doctrinal and case law analysis, this article evaluates the content and uses of corporate social responsibility clauses in existing IIAs to assess whether they are, in their current formulations, capable of contributing to investor accountability for human rights and environmental harms. Building on the body of literature on investor responsibilities and obligations in international investment law,[3] this article uses the Electronic Database of Investment Treaties[4] and the International Investment Agreements Navigator[5] to empirically evidence the trend of including clauses that address the conduct of investors vis-à-vis human rights and environmental protection.[6] It compares the content of these clauses, discuss their shortcomings, and suggest avenues for making them more effective in practice. Geographically,

[1] See Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG on business and human rights), International Investment Agreements (IIAs) and Human Rights: Report on human rights-compatible international investment agreements, 27 July 2021 A/76/238 para 41.

[2] Ibid para 25.

[3] Jarrod Hepburn and Vuyelwa Kuuya, 'Corporate Social Responsibility in Investment Treaties', in Cordonier et al. (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 589-609; Yulia Levashova, 'The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law' (2018) 14(2) Utrecht Law Review 40–55; Jean-Michel Marcoux, 'Transnational Public Policy as an International Practice in Investment Arbitration' (2019)10 (3), Journal of International Dispute Settlement 496–515; Markus Krajewski, 'A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application' (2020) 5(1) Business and Human Rights Journal 105-129; Martin Jarrett, Sergio Puig and Steven Ratner, 'Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals' (2021) Journal of International Dispute Settlement.

[4] Word Trade Institute in cooperation with the World Bank, Electronic Database of Investment Treaties, https://edit.wti.org/document/investment-treaty/search

[5] United Nations Conference on Trade and Development (UNCTAD), International Investment Agreement Navigator, https://investmentpolicy.unctad.org/international-investment-agreements

[6] In this article, we use the terms investor responsibilities or obligations in relation to human rights and environmental protection. We do not address the responsibility or obligations of investors in the field of anti-corruption. On this question, see Yan Yueming, 'Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance' (2020) 23 (4) Journal of International Economic Law, 989–1013; Mbiyavanga, Stefan, 'Combatting Corruption through International Investment Treaty Law' (2017) 1 (2) Journal of Anti-Corruption Law 132-150.

it also shows that several African countries, Brazil and India in particular have been more progressive to push this agenda forward.

The article then turns to the question of enforcement of investor responsibilities and obligations in international investment agreements.[7] It discusses how and why clauses addressing the conduct of investors, regardless of their formulation, have not yet led to effective investor accountability in relation to human rights or environmental issues. The ineffectiveness of existing clauses reflects the underlying power relations between States in international investment law-making. Although these relations of power cannot be changed, this article nevertheless builds on the weaknesses identified and proposes the essential characteristics of new clauses for achieving investor accountability for human rights and environmental harms for future negotiations. Those agreements should include clear provisions on investor human rights and environmental *obligations* that can lead to investor accountability and liability through effective mechanisms of access to remedy.

## 2. Asymmetry of Rights and Obligations in International Investment Agreements

IIAs typically protect investors domiciled in their home states against non-commercial risks in the investment-receiving states, the so-called host state. They are generally known as international investment protection agreements, ignoring the question of foreign investor obligations. The asymmetry between host states' obligations, investor rights and investor obligations in bilateral investment treaties and investment chapters of comprehensive economic agreements has been the subject of much criticism in the body of literature in law and economic development.[8] In the past decade, this criticism has triggered efforts to balance rights and obligations in new generation of international investment agreements to ensure more

[7] See in particular Jarrett, Puig and Ratner (n 3), for the question of enforcement.

[8] E.g. in chronological order since 2017: Nitish Monebhurrun, 'The (Mis)Use of Development in International Investment Law: Understanding the Jurist's Limits to Work with Development Issues' (2017) 10 (2) Law and Development Review 451-476; Manjiao Chi, 'Addressing Sustainable Development Concerns through IIAs: A Preliminary Assessment of Chinese IIAs' in Chaisse (ed), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (Oxford University Press 2019) 100–115; Antonius R. Hippolyte, 'Foreign Investment Law and Developing Countries' in Krajewski and Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar 2019) 72-125; Lise Johnson, 'FDI, International Investment Agreements and the Sustainable Development Goals' in Krajewski and Hoffmann (n 8) 126-148; Stefanie Schacherer and Rhea Tamara Hoffmann, 'International Investment Law and Sustainable Development' in Krajewski and Hoffmann (n 8) 563-595; Alessandra Arcuri and Federica Violi, 'Human Rights and Investor-State Dispute Settlement: Changing (Almost) Everything, so that Everything Stays the Same' (2019) 3 Diritti umani e diritto internazionale 579-596; A Yilmaz Vastardis, 'From Risk to Rights: Reorienting the Paradigms at the Heart of Corporate Legal Form and Investment Treaty Standards in Foreign Investment Governance' in Ho and Sattorova (Eds), *Investors' International Law* (Hart Publishing 2021) 132-177; UNWG on business and human rights (n 1).

sustainable foreign investments. This trend has been identified particularly with respect to labour rights, [9] human rights, [10] the environment[11] and anti-corruption.[12] In relation to human rights, the need to introduce clear investor responsibilities in treaties are not merely a matter of preference for states, but it should be viewed as part of their duty to protect against adverse human rights impacts of businesses, as enshrined in international human rights law and the United Nations Guiding Principles on Business and Human Rights (UNGPs).[13]

It is in this broader context that corporate social responsibility clauses and chapters on investor obligations have been designed and are increasingly included in international investment agreements. As discussed below, it remains questionable whether these clauses create human rights or environmental obligations for foreign investors in international law and, if yes, how they would be enforced in practice. So far, the balancing of rights and obligations has indeed gone more in the direction of imposing additional obligations on host states, not directly on investors, particularly regarding labour and environmental issues. A very common provision in this respect, is the host state obligation not to lower or not to fail to effectively enforce domestic labour laws[14] and environmental laws to encourage investment. The rationale behind these clauses is not to encourage foreign investors to respect labour or environmental

[9] Ronald Brown, 'Promoting Labour Rights in the Global Economy: Could the United States' New Model Trade and Investment Frameworks Advance International Labour Standards in Bangladesh?' (2016) 155 (3) International Labour Review, 383–406; Valentina Cagnin, 'Investor-State Dispute Settlement (ISDS) from a Labour Law Perspective' (2017) 8(3) European Labour Law Journal 217–231; Henner Gött and Till Patrik Holterhus, 'Mainstreaming Investment-Labour Linkage through "Mega-Regional" Trade Agreements' in Gött (ed.), *Labour Standards in International Economic Law* (Springer Cham 2018) 233–271; Zheng Lizhen, 'Rethinking the Role of Labour Provisions under Asian International Investment Regime: A Possible Linkage with FTAAP' in. J Nakagawa (ed.), *Asian Perspectives on International Investment Law* (Routledge 2020) 114-145; International Labour Organization 'Labour Provisions in G7 Trade Agreements: A Comparative Perspective (ILO 2019); International Labour Organization, 'Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements' (ILO 2017).

[10] B Choudhury, 'The Role of Soft Law Corporate Responsibilities in Defining Investor Obligations in International Investment Agreements' in Jean Ho and Mavluda Sattorova *Investors' International Law* (Hart 2021) 151-168; Eric De Brabandere, 'Human Rights and International Investment Law' in Krajewski and Hoffmann (n 8) 619–645; Ursula Kriebaum, 'Human Rights and International Investment Law' in Radi (ed.) *Research Handbook on Human Rights and Investment* (Edward Elgar 2018) 13–40; Markus Krajewski, 'Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice' in Sachs et al. (eds.) *Yearbook on International Investment Law & Policy 2017* (Oxford University Press 2019) 177-193.

[11] Robert-Cuendet, 'Protection of the Environment and International Investment Law'. Krajewski and Hoffmann (n 8) 596-618; Pereira de Andrade and Monebhurrun 'Mapping Investors' Environmental Commitments and Obligations' in Ho and Sattorova (n 10) 263-290.

[12] Yueming (n 6); Mbiyavanga (n 3).

[13] See UN Human Rights Committee (HRC), General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13 (General Comment 31), para 8; UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, para 14.

[14] See e.g. Art. 22.2 Brazil-India BIT (2020). See Gött and Holterhus (n 9) 245; International Labour Organization 2019 (n 9), for comments and other examples.

rights, as it is the case of certain corporate social responsibility clauses, but to prevent states from gaining an economic advantage by derogating or failing to enforce labour and environmental standards.

The question of investor obligations to respect laws of a host state is not new in international investment law.[15] However, it is only in the last decade that states are directly addressing the conduct of foreign investors with respect to human rights and the environment in their international investment agreements. The following section provides empirical evidence of this trend. It compares and explains the scope of investor responsibilities and obligations that can vary greatly.

## 3. Overview of Investor 'Responsibilities' and 'Obligations'

### 3.1. *Investor 'Responsibilities' or 'Obligations'?*

As a matter of international law, corporate actors are not traditional recipient of obligations. With respect to human rights particularly, business and human rights scholars have been discussing the extent to which international human rights treaties can legally bind business enterprises, in particular when they operate abroad. The compromise found in the UNGPs has been to differentiate between state *obligations* to protect human rights and corporate *responsibilities* to respect human rights.[16] In his 2010 report to the UN HRC, John Ruggie clarified that "[T]he term "responsibility" to respect, rather than "duty", is meant to indicate that respecting rights is not an obligation that current international human rights law generally imposes directly on companies, although elements may be reflected in domestic laws."[17]

Even before the UNGPs made such distinction, the difference of terminology between responsibilities and obligations was apparent in IIAs, in which most of the clauses that address the human rights and environmental conduct of foreign investors are found under corporate social responsibility clauses. For example, Canada concluded with Peru and Colombia the first

[15] See e.g. Art. 9 Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference of 1981.

[16] For an overview of the discussion: Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or not Law?' in Deva and Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 138-161; John Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', in Deva and Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar 2020) 63–86 ; Nicolas Bueno and Christine Kaufmann, 'Guiding Principles on Business and Human Rights', in Binder and Nowak (eds) *Elgar Encyclopedia of Human Rights* (Edward Elgar 2021).

[17] Human Rights Council (HRC) (2010) 'Business and Human Rights: Further Steps towards the Operationalisation of the "Protect, Respect, and Remedy" Framework', A/HRC/14/27, para 55.

two comprehensive economic agreements containing a specific clause entitled 'Corporate Social Responsibility' providing:

> Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported by the Parties … The Parties remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies.[18]

By contrast, some states more explicitly refer to investor *obligations*. In this respect, the Economic Community of West African States (ECOWAS) adopted the ECOWAS Supplementary Act on Investment to promote investment that supports sustainable development of the region.[19] The Act contains a specific chapter entitled "Obligations and Duties of Investors and Investments".[20] As explained in more detail below, this Chapter describes pre and post-establishment human rights and environmental obligations.[21] It also obliges foreign investors to 'comply with and maintain nationally and internationally accepted standards of corporate governance'[22] and describe how investor shall 'be subject to civil actions for liability in the judicial process of their host States'[23] in case of significant damage in the host State.

Despite this terminological uncertainty between investor responsibilities and obligations, scholars generally speak of investor obligations in international investment agreements.[24] They divide them into two types. The first type is technically addressed to the state and expects it to encourage that investors adopt a specific responsible conduct when they operate in the territory of the contracting party, as in the example above. Some authors describe these as indirect investor obligations.[25] The second type is drafted in a manner that directly addresses foreign investors. In this article, we will use the distinction between direct and indirect requirements for investors using either responsibilities or obligations as reflected in

[18] Art. 810 Canada-Peru FTA (2008); Art. 816 Canada-Colombia FTA (2008).
[19] Art. 3 ECOWAS Supplementary Act on Investment.
[20] Art. 11 to 18 ECOWAS Supplementary Act on Investment.
[21] Art. 12 and 14 ECOWAS Supplementary Act on Investment.
[22] Art. 15 ECOWAS Supplementary Act on Investment.
[23] Art. 17 ECOWAS Supplementary Act on Investment.
[24] Hepburn and Kuuya (n 3) 609; Levashova (n 3) 44 ; Gött and Holterhus (n 5) 256 ; Karsten Nowrot and Emily Sipiorski, 'Stipulating Investors' Obligations in Investment Agreements as a Suitable Regulatory Approach to Prevent and Remedy Anti-Competitive Behaviour?' In: K. Fach Gómez et al. (eds). *International Investment Law and Competition Law*, (Springer International: Cham 2020), 139.
[25] Yulia Levashova, (n 3) 44 & Henner Gött and Till Patrik Holterhus, (n 9) 256

each investment treaty. For greater coherence in future agreements, we suggest retitling traditional corporate social responsibility clauses into investor human rights and environmental obligations clauses. We bear in mind that merely labelling a clause 'investor obligations' will not automatically render the contents of the clause enforceable obligations in the true sense. For that to be achieved, the contents of the clause should also stipulate clear investor obligations on human rights and the environment, as presented below.[26] Such a shift could be crucial step, alongside domestic legislations on human rights due diligence and a potential business and human rights treaty, towards transforming the UNGPs 'responsibility to respect' into an internationally recognised 'duty to respect', thus address absence of international human rights obligations on companies noted by John Ruggie in his 2010 report.

### 3.2. *Empirical Evidence of Investor Indirect Responsibilities and Obligations*

The data provided in this section has been obtained by using the Electronic Database of Investment Treaties and the International Investment Agreements Navigator. The data covers investors' responsibilities and obligations found in the corporate social responsibility clauses and in investor obligations sections in IIAs. It excludes any reference to corporate social responsibility in the preamble of these agreements. Table I contains the legal references to investor direct and indirect responsibility clauses.

Only a minority of IIAs contain clauses on investor responsibility. Among the 65 international investment agreements that contain a clause addressing the conduct of investors, 43 contain indirect responsibilities for investors, which means that the clause is addressed to the state that is expected to encourage responsible business conduct. Among them, 32 investment treaties containing indirect investor responsibilities do not refer to any specific internationally recognized standard of corporate social responsibility. They reflect the weakest type of clauses addressing the conduct of an investor. Canada alone is part of 15 of investment agreements containing such kind of clause, as reproduced above.[27]

11 indirect investor responsibility clauses refer at least to one international standard of responsible conduct. All of them mention at least the OECD Guidelines for Multinational Enterprises. This is the case, for example, of Article 146 in the investment chapter of the free trade agreement concluded between Canada, Mexico and the United States.[28] It is also the case

[26] See section 4.2 below.
[27] See e.g Art. 810 Canada-Peru FTA (2008) above Section 3.1 above.
[28] Art. 146 US-Mexico-Canada FTA (2018): The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal

of recent investment treaties concluded by Chile and Colombia that are both OECD Members. In this category, the European Union concluded 6 agreements indirectly addressing the conduct of investors in a clause entitled "Investment Promoting Sustainable Development".[29] The clause usually only requires the Parties to make "special efforts to promote corporate social responsibility practices which are adopted on a voluntary basis." These clauses mention international standards, such as the OECD Guidelines for Multinational Enterprises, the United Nations Global Compact or the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the UNGPs.[30] Although now obsolete, the EU suggested to include such a clause in the TTIP.[31]

Geographically, corporate social responsibility clauses containing this type of indirect investor responsibilities have been adopted mainly in Canadian, European, Argentinian and Australian agreements and therefore high or upper middle-income countries. Generally, these clauses are drafted using a very weak terminology in terms of state responsibilities to promote responsible investor conduct. They urge states to 'encourage' investors to 'voluntary' incorporate standards or to make 'special efforts' to promote corporate social responsibility. These clauses have therefore been described as hortatory[32] and it is unlikely that they will lead to any meaningful balancing of rights and obligations in international investment law, or any form of enforcement as presented below.

### 3.3. *Empirical Evidence of Direct Investor Responsibilities and Obligations*

23 agreements contain clauses directly addressed to investors.[33] However, the content of these clauses also varies from vague encouragements of responsible behaviour to more specific obligations. They can be divided into three categories. In the first category, 8 agreements merely stipulate that investors must apply or make efforts to voluntarily incorporate internationally recognized standards of corporate social responsibility. There is generally no reference to any international standard of responsible business conduct. [34] The Indian practice

policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, which may include the OECD Guidelines for Multinational Enterprises. These standards, guidelines, and principles may address areas such as labor, environment, gender equality, human rights, indigenous and aboriginal peoples' rights, and corruption.

[29] Including in the China-EU CAI (2021) that has not yet been adopted but concluded in principles.

[30] See e.g. Art. 12.11 para 4 EU-Singapore FTA (2018).

[31] EU Proposal for Art. 20.2 and 3 TTIP.

[32] Henner Gött and Till Patrik Holterhus, (n 9) 254.

[33] Note that the Brazil-Chile FTA (2018) contain both indirect responsibilities.

[34] The only exception is the agreement between the European Union and the CARIFORUM States that explicitly requires that investors act in accordance with core labour standards as required by the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work of 1998.

reflects this first category. For example, the Indian-Taiwan BIT (2018) contains a specific chapter called "Investor Obligations". In this chapter, a clause called "Corporate Social Responsibility" reads as follows:

> Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. In addition, investors have the express obligation to comply with domestic laws, in particular in the field of anti-corruption and taxation.[35]

The reference to an express obligation to comply with domestic laws in the field of anti-corruption and taxation[36] also clearly contrasts with the weaker formulation for investors to endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in other fields, such as human rights or the environment.

The second category of clauses directly addressed to investors is made of 13 investment agreements adopted by Brazil. In this category, the scope of obligations or responsibility is more specific, but there is usually no reference to any international standard of conduct,[37] rather the clause refers to voluntary principles and standards set out in the BIT itself, and there exists no enforcement mechanism, apart from consultations among the parties to the treaty. In the two first agreements concluded with Mozambique and Angola in 2015, the Brazilian agreements contained an annex on corporate social responsibility setting a long list of investor responsibilities and obligations. This list has been reproduced in a clause on Corporate Social Responsibility in a section on investor obligations in all agreements adopted by Brazil since then, including the one concluded with India in 2020. For more clarity, the provision in the Brazil-India BIT of 2020 is reproduced here:

> "**Corporate Social Responsibility**
> 12.1 Investors and their investments shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article and internal policies, such as statements of principle that have been endorsed or are supported by the Parties.

[35] Art. 12 India-Taiwan BIT (2018).
[36] Art. 11 India-Taiwan BIT (2018).
[37] With the exception of the Brazil-Chile BIT (2015), Brazil-Ethiopia BIT (2018) and the Brazil-United Arab Emirates BIT (2019), referring to the OECD Guidelines for Multinational Enterprises.

12.2 The investors and their investments shall endeavour to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State:
a) contribute to the economic, social and environmental progress, aiming at achieving sustainable development;
b) respect the internationally recognized human rights of those involved in the companies' activities;
c) encourage local capacity building through close cooperation with the local community;
d) encourage the creation of human capital, especially by creating employment opportunities and offering professional training to workers;
e) refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives, or other issues;
f) support and advocate for good corporate governance principles, and develop and apply good corporate governance practices, including anti-corruption measures;
g) develop and implement effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the societies in which their operations are conducted;
h) promote the knowledge of and the adherence, by workers, to the corporate policy, through appropriate dissemination of this policy, including professional training programs;
i) refrain from discriminatory or disciplinary action against employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or corporate policy;
j) encourage, whenever possible, business associates, including service providers and outsources, to apply the principles of business conduct consistent with the principles provided for in this Article; and
k) refrain from any undue interference in local political activities."[38]

Despite the relatively stronger language used in this clause, compared to previous examples, the investor is not required to adhere to a specific international standard of responsible business conduct. It shall merely endeavour to do respect the internationally recognized human rights of those involved in the companies' activities, without reference to how this should be achieved.

The third category of clauses includes the ECOWAS Supplementary Act on Investment of 2008 referred above and the Morocco-Nigeria BIT (2016) as well as series of "new-generation" model BITs that states use during their negotiations and that formulate direct human rights obligations on investors.[39] These agreements and model agreements contain specific direct

[38] Art. 12 Brazil-India (2020).
[39] Naomi Briercliffe, Olga Owczarek *Human-rights-based Claims by States and "New-Generation" International Investment Agreements*, in Kluwer Arbitration Blog, August 1, 2018, http://arbitrationblog.kluwerarbitration.com/2018/08/01/human-rights-based-claims-by-states-and-new-generation-international-investment-agreements/, last access 1st September 2021

investor obligations, mention at least one internationally applicable standard and stipulate means to enforce the obligations contained in the clause.

The SADC Model BIT Template of 2012 establishes that investors must conduct a social and environmental impact assessment prior to their establishment in the host state. In the post-establishment phase, investors have an explicit duty to respect human rights and they shall act in accordance with the core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work.[40] It also states that investors should not be complicit in breaches of human rights by others.[41] Finally, investors shall be subject to civil actions for liability in the judicial process of their home state for the acts, decisions or omissions leading to significant damage, personal injuries or loss of life in the host state.[42]

Like in the ECOWAS Supplementary Act on Investment of 2008 presented above[43], the Morocco-Nigeria BIT of 2016 first requires investors to conduct an environmental and social impact assessment prior to the establishment. In the post-establishment phase, investors have the obligation to respect human rights in the host state and act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work of 1998.[44] It also contains an obligation to maintain the global environmental management standard ISO 14001 or an equivalent standard and provisions on investor liability.[45]

The Draft Pan-African Investment Code of 2016 contains a Chapter 4 on Investor Obligations that requires investors to adhere to socio-political obligations, including labour rights. In addition to a general provision on corporate social responsibility,[46] the treaty outlines obligations as to the use of natural resources.[47] Article 24 on business ethics and human rights sets out principles, such as support and respect the protection of internationally recognized human rights, that should govern the conduct of investors.[48]

Most recently, the Dutch Model BIT of 2019 introduced a new set of clauses focusing on responsibilities of investors containing a mix of mandatory and voluntary standards.[49] The

[40] Art. 15 para 1 and 2 South African Development Community (SADC) Model BIT Template (2012).
[41] Art. 15 para 1 South African Development Community (SADC) Model BIT Template (2012).
[42] Art. 17 South African Development Community (SADC) Model BIT Template (2012).
[43] See section 3.1 above.
[44] Tarcisio Gazzini, 'The 2016 Morocco-Nigeria BIT: An important contribution to the reform of investment treaties'. (2017) 8(3) Investment Treaty News 3–4.
[45] See Sc 5 below.
[46] Art. 22 Draft Pan African Investment Code (2016)
[47] Art. 23 Draft Pan African Investment Code (2016)
[48] Art. 24 Draft Pan African Investment Code (2016)
[49] Despite its promising provisions, this model has not yet been adopted in practice.

corporate social responsibility clause directly requires investors to comply with domestic laws on human rights, environmental protection and labour laws.[50] It then indirectly encourages investors to voluntarily incorporate international standards of CSR, including the OECD Guidelines for Multinational Enterprises and the UNGPs into their internal policy.[51] It is the only model agreement reaffirming the importance of conducting due diligence to identify, prevent, mitigate and account for the environmental and social risks and impacts of an investment.[52] Despite the voluntary nature of incorporating international standards of corporate social responsibility, this model BIT contains provisions on access to remedy[53] and investor liability.[54] According to this provision, investors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state. Finally, under Article 23 investor accountability can also be partially achieved through reduction of damages due to investor non-compliance with the UNGPs and the OECD Guidelines. Given the excessive amounts that are awarded as damages in investment arbitration,[55] the effectiveness of this provision would depend on how seriously tribunals would take this clause into account in evaluating damages. Reduction of damages could act as a powerful incentive for investors to avoid human rights and environmental harm, if tribunals match the amounts reduced with the severity of the harm caused by the investor's conduct.

[**Table I: Empirical Overview of Investor Responsibilities and Obligations in IIAs]**

| | | Indirect responsibilities /obligations | Direct responsibilities/ obligations | Standard of conduct |
|---|---|---|---|---|
| 1 | Colombia-Spain BIT (2021) | Art. 17 | | OECD Guidelines for Multinational Enterprises |
| 2 | China-EU CAI (2021) | Sc. IV, Art. 2 | | UN Global Compact<br>UNGPs<br>ILO MNE Tripartite Declaration<br>OECD Guidelines for Multinational Enterprises |
| 3 | EU-UK TCA (2020) | Art. 406 | | OECD Guidelines for Multinational Enterprises<br>ILO MNE Tripartite Declaration<br>UN Global Compact<br>UNGPs |
| 4 | Indonesia-Republic of Korea CEPA (2020) | Art. 7.18 | | |

[50] Art. 7(1) Dutch Model BIT (2019).
[51] Article 7(2) Dutch Model BIT (2019).
[52] Article 7(3) Dutch Model BIT (2019).. It should be noted that this model BIT will probably not be used since the investment treaties are now within EU competencies.
[53] Article 5(3) Dutch Model BIT (2019)..
[54] Article 7(4) Dutch Model BIT (2019)., see sc. 5 below for an analysis on access to remedy.
[55] See George Kahale III, *Rethinking ISDS*, (2018) 44 Brook. J. Int'l L. 11, 40-43.

| | | | | |
|---|---|---|---|---|
| 5 | Japan-UK CEPA (2020) | Art. 16.5 | | |
| 6 | Brazil-India (2020) | | Art. 12 | |
| 7 | Brazil-Ecuador BIT (2019) | | Art. 14 | |
| 8 | India-Kyrgyzstan BIT (2019) | | Art. 12 | |
| 9 | Brazil-Morocco BIT (2019) | | Art. 13 | |
| 10 | Australia-Hong Kong BIT (2019) | Art. 16 | | |
| 11 | Brazil-United Arab Emirates BIT (2019) | | Art. 15 | OECD Guidelines for Multinational Enterprises |
| 12 | Australia-Indonesia CEPA (2019) | Art. 14.17 | | |
| 13 | India-Taiwan BIT (2018) | | Art. 12 | |
| 14 | Brazil-Guyana BIT (2018) | | Art. 15 | |
| 15 | Argentina-Japan BIT (2018) | Art. 17 | | |
| 16 | US-Mexico-Canada FTA (2018) | Art. 14.17 | | OECD Guidelines for Multinational Enterprises |
| 17 | Brazil-Chile FTA (2018) | Art. 8.15.1 | Art. 8.15.2 | OECD Guidelines for Multinational Enterprises |
| 18 | EU-Singapore FTA (2018) | Art. 12.11. | | OECD Guidelines for Multinational Enterprises<br>UN Global Compact<br>ILO MNE Tripartite Declaration |
| 19 | Belarus-India BIT (2018) | | Art. 12 | |
| 20 | EU-Japan Economic Partnership Agreement (2018) | Art. 16.5 | | OECD Guidelines for Multinational Enterprise<br>ILO MNE Tripartite Declaration |
| 21 | Brazil-Suriname BIT (2018) | | Art. 15 | |
| 22 | Argentina-United Arab Emirates BIT (2018) | Art. 17 | | OECD Guidelines for Multinational Enterprises |
| 23 | Brazil-Ethiopia BIT (2018) | | Art. 14 | OECD Guidelines for Multinational Enterprises |
| 24 | CPTPP (consolidated TPP) (2018) | Art. 9.17 | | |
| 25 | Canada-Kosovo BIT (2018) | Art. 16 | | |
| 26 | Australia-Peru FTA (2018) | Art. 8.17 | | |
| 27 | Singapore-Sri Lanka FTA (2018) | Art. 10.9 | | |
| 28 | Serbia-Turkey BIT (2018) | Art. 11 | | |
| 29 | Armenia-EU CEPA (2017) | Art. 276 | | OECD Guidelines for Multinational Enterprises;<br>UN Global Compact<br>ILO MNE Tripartite Declaration<br>ISO 26000 |
| 30 | Ethiopia-Qatar BIT (2017) | | Art. 14 | |
| 31 | Argentina-Chile FTA (2017) | Art. 12.8 | | |

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| 32 | Costa Rica-United Arab Emirates BIT (2017) | Art. 11 | | |
| 33 | PACER Plus (2017) | Art. 9.5 | | |
| 34 | Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017) | | Art. 14 | |
| 35 | Morocco-Nigeria BIT (2016) | | Art. 15, 18 and 24 | ILO MNE Tripartite Declaration |
| 36 | EU-Vietnam FTA (2016) | Art. 13.10.2 (e) | | |
| 37 | Chile-Hong Kong SAR Investment Agreement (2016) | Art. 17 | | |
| 38 | Canada-EU CETA (2016) | Art. 22.3 | | OECD Guidelines for Multinational Enterprises |
| 39 | Argentina-Qatar BIT (2016) | | Art. 12 | |
| 40 | Nigeria-Singapore BIT (2016) | Art. 11 | | |
| 41 | Canada-Mongolia BIT (2016) | Art. 14 | | |
| 42 | Iran-Slovakia BIT (2016) | | Art. 10.3 | |
| 43 | Trans-Pacific Partnership (TPP) | Art. 917 | | |
| 44 | Canada-Guinea BIT (2015) | Art. 16 | | |
| 45 | Burkina Faso-Canada BIT (2015) | Art. 16 | | |
| 46 | Brazil-Chile BIT (2015) | | Art. 15 | OECD Guidelines for Multinational Enterprises |
| 47 | Brazil-Colombia BIT (2015) | Art. 13 | | |
| 48 | Brazil-Malawi (2015) | | Art. 9 | |
| 49 | Brazil-Mexico (2015) | | Art. 13 | |
| 50 | Angola-Brazil CFIA (2015) | | Art. 10, Annex | |
| 51 | Brazil-Mozambique CFIA (2015) | | Art. 10, Annex | - |
| 52 | Canada-Côte d'Ivoire BIT (2014) | Art. 15.3 | | |
| 53 | Canada-Mali BIT (2014) | Art. 15.3 | | |
| 54 | Canada-Serbia BIT (2014) | Art. 16 | | |
| 55 | Colombia-France BIT (2014) | Art. 11 | | OECD Guidelines for Multinational Enterprises |
| 56 | Canada-Nigeria BIT (2014) | Art. 16 | | |
| 57 | Cameroon-Canada BIT (2014) | Art. 15.2 | | |
| 58 | Canada-Honduras FTA (2013) | Art. 1016 | | |
| 59 | Colombia-Panama FTA (2013) | Art. 1415 | | |
| 60 | Benin-Canada BIT (2013) | Art. 16 | | |
| 61 | Canada-Panama FTA | Art. 917 | | |

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| 62 | ECOWAS Supplementary Act on Investments (2008) | | Art. 12, 14, 15, 16, 18 | ILO Declaration on Fundamental Principles and Rights of Work, 1998. |
| 63 | CARIFORUM-EC EPA (2008) | | Art. 72 | |
| 64 | Canada-Colombia FTA (2008) | Art. 816 | | |
| 65 | Canada-Peru FTA (2008) | Art. 810 | | |

## 4. The Shortcomings of Corporate Social Responsibility Clauses

In the remainder of this article, we show that in their current formulation, most clauses expressing indirect or direct investor responsibilities or obligations in investment treaties cannot be enforced in any meaningful way to prevent investor harms on human rights and environment and achieve investor accountability. With a few exceptions,[56] investment treaty clauses on investor responsibility are formulated as voluntary standards of responsible conduct. Being embedded in a legally binding investment treaty alone does not transform these into more effective, binding and enforceable standards of investor accountability.[57] Besides the hortatory language of these clauses, the limits of these clauses can also be attributed to the soft law nature of the standards they incorporate, the lack of clear duty bearers, rights-holders and enforcement mechanisms.

From an international human rights perspective, states are currently not meeting their duty to protect under the first pillar of the UNGPs by incorporating these provisions into their investment treaties.[58] The state duty to protect is a standard of conduct, and as such each state can determine what steps it must take to fulfil its duty to protect.[59] This, however, does not mean that states can meet their obligations, if they choose to take inadequate steps to protect against adverse business impacts. In the investment treaty context, the positive duty applies to both home states and host states.[60] As investment treaties form a crucial aspect of the business

[56] Exceptions include ECOWAS Supplementary Act on Investment (2008); Nigeria-Morocco BIT (2016); Dutch Model BIT (2019).

[57] See E Van der Zee, 'Incorporating the OECD Guidelines in International Agreements: Turning a Soft Law Obligation into Hard Law' (2013) 40(1) Legal Issues of Economic Integration 51-52 arguing that incorporating OECD Guidelines in IIAs is a way to harden soft law and make them more effective; see also arguing similarly M E Footer 'BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment' 18(1) Michigan State Journal of International Law (2009) 61-62.

[58] UNWG on business and human rights (n 1) para 41.

[59] UN Human Rights Committee (HRC), General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13 (General Comment 31) para 13; 'Towards operationalizing the "protect, respect and remedy" framework' A/HRC/11/13 para 14.

[60] On home state positive duties see, De Schutter, O., (2011) 'Report of the Special Rapporteur on the Right to Food,' U.N. Doc. A/HRC/19/59/Add.5. p.5-7; D Davitti, *Investment and Human Rights in Armed Conflict:*

regulatory framework, the positive duty to protect human rights is applicable when states enter into treaties which regulate cross border investment by businesses with potential impacts on human rights of local populations. The analysis below shows that most investor responsibility clauses to date have failed to provide an adequate response to tackling investor irresponsibility, thus failing the state duty to protect.

### 4.1. *The Soft Law Nature of CSR Standards*

It is well established that CSR standards are non-binding, aspirational and they generally do not focus directly on business responsibilities for human rights and environmental impacts.[61] Muchlinski explains that 'social responsibility may take both an economic, social, and ethical dimension in that business enterprises are expected to conduct their economic affairs in good faith and in accordance with proper standards of economic activity, while also observing fundamental principles of good social and ethical conduct.'[62] As such they carry 'only the moral persuasive force of a "soft law" instrument.'[63]

Despite its proponents' claims to the benefits of corporate social responsibility standards for the society,[64] empirical studies increasingly show that many commitments have thus far been ineffective in improving the conduct of businesses with respect to human rights.[65] Without adequately translating into tangible protection and improvement of the rights of communities and workers,[66] CSR discourse has bolstered its own relevance by entrenching itself 'through international institutions, ranking agencies, bureaucratic posts, professional roles in corporations and the NGO industry, academic programs, academic journals, codes of conduct, policies and pieces of legislation.'[67] In fact, studies looking at the use of CSR to improve

*Charting an Elusive Intersection* (Hart Publishing 2019) pp.205-211; T Van Ho, 'Obligations of International Assistance and Cooperation in the Context of Investment Law' in Erdem Turkelli, Gibney, Krajewski and Vandenhole *Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2021) pp. 325- 338.

[61] S B Banerjee, 'Corporate Social Responsibility: The Good, the Bad and the Ugly' (2008) 34(1) Critical Sociology 60; A Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability', (2015) 14 (2) Journal of Human Rights, 237-259.

[62] Peter Muchlinski, 'Corporate Social Responsibility', Peter Muchlinski and Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford : Oxford University Press; 2008) 645.

[63] Ibid. 653

[64] Micheal Hopkins, *Corporate Social Responsibility and International Development: Is Business the Solution?*. (Sterling, VA: Earthscan. 2007) 14; B Gifford, A Kestler, S Anand, 'Building local legitimacy into corporate social responsibility: Gold mining firms in developing nations' (2010) 45(3) Journal of World Business 304-311; Maria Livanos Cattaui,. 'The Global Compact—Business and the UN', (2001) 1 International Herald Tribune, 1–14.

[65] Genevieve LeBaron, Remi Edwards, Tom Hunt, Charline Sempéré & Penelope Kyritsis 'The Ineffectiveness of CSR: Understanding Garment Company Commitments to Living Wages in Global Supply Chains', (2021) New Political Economy; Luis Eslava, 'Corporate Social Responsibility & Development: A Knot of Disempowerment' (2008) 2 (2) Sortuz: Oñati Journal of Emergent Socio-Legal Studies 44

[66] G LeBaron et al, (n 65)

[67] Luis Eslava (n 61) ; See also S B Banerjee (n61), 59.

working conditions in supply chains found that these efforts have diluted and distorted the meaning of rights and created a 'façade of social and environmental compliance' without leading to meaningful improvements for communities and workers.[68]

An argument often raised in support of CSR initiatives is that in the absence of legally binding standards, they can offer an acceptable compromise for the dominant stakeholders, businesses and states, and sometimes they are viewed a stepping-stone towards more robust legal standards.[69] More generally, it is argued that soft law standards can act as a precursor to binding standards and influence the development of the latter.[70] While this can sometimes be true with respect to soft law standards, in the area of CSR there has not been satisfactory progress despite decades of focus on voluntary efforts.

As shown in the empirical overview above, a majority of investor responsibility or obligation clauses do not refer to any particular international instrument of responsible business conduct. Some merely refer to "internationally recognised" standards.[71] An investor can demonstrate its efforts to engage in responsible conduct by relying on any so called 'international standard', regardless of whether the standards relied on are adequate or not. It is preferable for treaties to incorporate more advanced standards such as the OECD Guidelines which also incorporate elements from Pillars 2 and 3 of the UNGPs and contain standards on labour rights and environmental protection.

Yet, the incorporation of a more established set of soft law standards alone does not alleviate the concerns on the utility of these clauses, as these standards too do not impose clearly articulated duties on foreign investors.[72] On the UNGPs, Ratner explains that the UNGPs attracted significant multi-stakeholder support, particularly from businesses, due to their softness in three dimensions, "their lack of legal bindingness, their imprecise provisions on key

[68] G Le Baron et al, (n 65); T Clarke and M Boersma, 'The Governance of Global Value Chains: Unresolved Human Rights, Environmental and Ethical Dilemmas in the Apple Supply Chain' (2017) 143 Journal of Business Ethics 126; J Esbenshade, 'A review of private regulation: Codes and Monitoring in the Apparel Industry' (2012) 6 (7) Sociology Compass 541-566.

[69] Kishanthi Parella, 'Hard and Soft Law Preferences in Business and Human Rights', (2020) 114 American Journal of International Law Unbound 169.

[70] D Shelton, 'Normative Hierarchy in International Law'. (2006) 100(2) American Journal of International Law 321

[71] See e.g. Brazil- UEA BIT (2019).

[72] A C Cutler and D Lark, 'The Hidden Costs of Law in the Governance of Global Supply Chains: the Turn to Arbitration' (2020) Review of International Political Economy 15-16 argue that "it is questionable whether the encouragement of reference to already existing international standards, such as those found in the UN, ILO or OECD will bring any added value within IIAs to existing mechanisms of international law. Instead, there should be concern as to whether making stronger reference to the standards mentioned above may serve to strengthen and legitimize the voluntary character of existing CSR regimes, while displacing the possibility for more meaningful alternatives."

issues, and their absence of any true control mechanism."[73] It is argued here that incorporating these standards in an investment treaty alone does not render them binding nor transform them into an effective instrument to lead to investor accountability.[74] Set against the normative strength of basic investment treaty standards protecting investors,[75] standards of responsible business conduct remain normatively weak[76] and do not stand a chance in achieving a balance between investor rights and responsibilities on human rights and environmental protection.[77] In order to improve the normative strength of investor obligations within IIAs, future treaties should not only refer to the more advanced standards of corporate responsibility, but also explicitly require investors to comply with relevant international human rights and environmental standards, carry out human rights and environmental due diligence on an ongoing basis, and remediate harms caused or contributed to by the investment activity.

### 4.2.*Hortatory Treaty Language*

The limitations of CSR clauses are not merely due to the voluntary nature of the standards that are incorporated in IIAs. Such standards are made even less effective by the adoption of hortatory language in these clauses. Dinah Shelton explains that treaty provisions drafted in hortatory or promotional language constitute *soft law*, despite appearing in legally binding treaty texts and being considered legal norms.[78] Further, Chinkin notes that "if a treaty [provision] is to be regarded as "hard", it must be precisely worded and specify the exact obligations undertaken or the rights granted. Where a treaty provides only for the gradual acquiring of standards or for general goals and programmed action it is itself soft for what is apparently a treaty may be devoid of legal content."[79] The mere incorporation of standards of

[73] On the UNGPs see S R Ratner, 'Introduction to the Symposium on Soft and Hard law on Business and Human Rights' (2020) American Journal of International Law Unbound 165 ; Abbott Kenneth W., and Duncan Snidal. 'Hard and Soft Law in International Governance.' (2000) 54 (3) International Organization 421–456

[74] See also, Y Zhu, 'Corporate Social Responsibility and International Investment Law: Tension and Reconciliation' Nordic Journal of Commercial Law 2017/1 91-119; For a contrary view: Barnali Choudhury, 'Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements', (2017) 38 University of Pennsylvania Journal of International Law argues legalising business responsibility to respect via IIAs can bring meaningful change. In her view, adopting a 'best efforts' language in imposing HR obligations in treaties on investors would be a good compromise.

[75] A C Cutler and D Lark (n 72) 13 argues that investment treaties "strengthen a foreign investor's capacity to extract value through hard rights of protection".

[76] Luis Eslava (n 65) 44 argues that the "claims made for the beneficial outcomes of CSR are mostly illusory."

[77] An argument to the contrary on the uses of CSR provisions as a means for balancing investment treaties see E Van der Zee, (n 57) 34

[78] D Shelton (n 70) 319; Christine Chinkin 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 International & Comparative Law Quarterly 865; See also Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 (3) The American Journal of International Law 414.

[79] C Chinkin, (n 78) 851

responsible conduct into investment treaties alone will not improve the effectiveness of these standards when the relevant treaty provisions are formulated in 'best efforts' language.

As the overview of investor responsibilities and obligations above demonstrates,[80] most investor responsibility clauses in investment treaties merely requires states to 'encourage' investors to 'voluntarily' incorporate standards of responsible conduct or they address the investors that 'shall endeavour' to adopt a certain conduct. Chinkin explains that for a standard to be considered hard law, 'it must be possible both to determine breach and the legal outcome of any claim of breach.'[81] The use of best efforts language for the adoption of soft law standards renders it difficult to measure what duties investors have and what constitutes breach of an investor responsibility clause in an investment treaty.

It has been suggested in the literature that despite the hortatory language, these clauses can play an important role in the process of investor-state dispute resolution as tribunals would have to take investor responsibilities into account when interpreting substantive rights of investors.[82] In the following sections, we discuss the additional challenges to operationalising these investor responsibility clauses, besides the hortatory language, and demonstrate how the arbitral case law thus far does not show progress in this area.

### 4.3.*Unclear Duty Bearers*

Another challenge to the implementation of investor responsibility clauses concerns the lack of clarity on who bears responsibility and who the beneficiaries are ought to be. In indirect responsibility clauses, it is unclear which state, home state or host state or both, bears the responsibility to encourage investors to adopt responsible conduct. Typically, these clauses expect parties to encourage investors within their territory or subject to their jurisdiction.[83] Is the host state expected to encourage the foreign investors operating within its territory to abide by the standards? Or is it the home state that is expected to encourage its own investors to adopt standards of responsible business conduct when they operate overseas? If a foreign investor is operating in the host state via a locally established subsidiary, are the parties expected to encourage the parent company or the subsidiary to be in charge of adopting corporate social responsibility policies?

[80] Section 3 above
[81] Chinkin (n78) 859
[82] P Ranjan, 'Investor Obligations in Investment Treaties: Missing Text or a Matter of Application?' In Jean Ho and Mavluda Sattorova *Investors' International Law* (Hart Publishing 2021) 141; B Choudhury, 'Balancing Soft and Hard Law' (2018) 67 (4) International and Comparative Law Quarterly 974-979
[83] See e.g. Australia- Hong Kong BIT (2019)

What if the 'protected investor' under the treaty is neither the parent company nor the host state subsidiary, but a third holding company within the investment structure of the business with no genuine business activities? It is common for investors to shop for treaty protection by incorporating a holding company in a third country with a favourable investment treaty with the host state.[84] For instance, in the case of *Exxon Mobil v Venezuela*, the investment treaty claim was brought under the Netherlands-Venezuela BIT, as Exxon Mobil relied on a shell corporation established in the Netherlands to mount the claim, despite Exxon Mobil being a company headquartered in the US.[85] Had that treaty contained a corporate social responsibility clause, would we expect the Netherlands to encourage a shell company incorporated in its territory to adopt standards of responsible conduct when operating in Venezuela? It is not clear from which state one can expect compliance with an indirect investor responsibility clause. It may as well be that both the home state and the host state are expected to 'encourage' the same investors. As discussed below in section 4.5, this lack of clarity on duty bearers can become problematic if host states or *amici* attempt to rely on investor responsibilities in a dispute in order to support a defence or a counterclaim.

Direct responsibilities or obligations place an expectation on investors to strive for responsible behaviour. As such, they provide more clarity on who bears responsibilities and obligations compared to indirect responsibility clauses. We suggest therefore to design clauses directly imposing obligations on investors in future agreements. Yet, current direct investor responsibility clauses remain difficult to utilise to achieve responsible investor conduct and investor accountability for the other reasons discussed within this section: the soft law substantive content, hortatory language used, undefined beneficiaries and lack of enforcement opportunities for affected communities.

### 4.4. *Unclear Beneficiaries*

As for beneficiaries, investor responsibility clauses lack clarity as well. Investors are the direct beneficiaries of substantive rights contained in investment treaties, benefiting from international protection enforceable via arbitral tribunals or courts. Neither investors nor the state parties can be considered beneficiaries. With respect to the host state as a beneficiary, it would be inappropriate to force affected communities to solely rely on the host state's discretion to enforce an investor responsibility clause without giving the communities a direct opportunity

[84] A Yilmaz Vastardis, *Nationality of Corporate Investors Under International Investment Law* (Hart Publishing 2020).
[85] *Mobil and others v. Venezuela*, Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, 2007

to contest investor behaviour and enforce such clauses. It may be that the host state became complicit in developing the conditions under which the communities were harmed by investor activity.[86]

Investor responsibility clauses are meant to benefit host state communities who are affected by the investment. Yet, communities, as the real beneficiaries of investor responsibility clauses, have no means of relying on these clauses. Communities are neither parties to the investment treaty, nor do investment treaties explicitly recognise them as direct beneficiaries as they do investors. In order to correct this, we suggest that investor responsibility clauses should explicitly recognise affected communities as beneficiaries and be complemented by a mechanism of liability that gives direct access for affected communities to hold investors accountable before domestic courts of host and home states, separate from any defence or counterclaim a host state may raise. The analysis thus far shows that investor responsibility clauses are emerging in investment treaty practice, but they have no beneficiaries who can meaningfully rely on these clauses.

### 4.5. *Absence of Enforcement Possibilities and Mechanisms*

With very few exceptions, the data on the investor responsibility clauses shows an inability to enforce these clauses both due to the content of the clauses and also due to the lack of any formal mechanism of enforcement in the treaty. Besides these issues of content, compliance with such clauses is completely up to treaty parties and investors without any appropriate mechanisms in the treaties for affected communities to hold states or investors accountable if they fail to abide by the responsibility clause.[87]

#### 4.5.1. Consultative Committees under the Treaty

Investor responsibility clauses are often excluded from the formal dispute settlement mechanisms of IIAs and they may be brought within a consultative process established under the treaty. For instance, the Peru-Canada FTA, in Article 817, establishes a Committee on Investment consisting of state party representatives who promote cooperation on issues such as CSR. Some treaties, such as the CETA, establishes specialised committees on sustainability issues which are tasked with collaboration on issues of corporate responsible conduct with

[86] Art. 15(1) of the SADC Model BIT of 2012 recognises that there might be complicity between investors and other stakeholders in the Host state including public authorities or during civil strife.
[87] Ying Zhu, 'Corporate Social Responsibility and International Investment Law: Tension and Reconciliation', 2017 (1) Nordic Journal of Commercial Law 115

participation from civil society.[88] Even treaties containing direct responsibilities or obligations, such as in Brazilian agreements, a claim based on the CSR clause cannot not be submitted to arbitration.[89]

In the case of specialised committees, we can see the promotional language of the original investor responsibility clause being supplemented by another promotional provision to cooperate with no effective mechanisms for communities affected by the conduct of an investor to seek investor accountability. These consultative processes for sustainability and labour issues have not proven themselves to be effective means to increase standards in the area of labour rights thus far, even where treaties incorporate concrete and more robust international labour standards.[90] It is questionable whether these committees can act as an effective means of enforcing existing CSR clauses to achieve responsible investor conduct.

#### 4.5.2. Reliance on Investor Responsibility Clauses in Investment Arbitration

It has been pointed out in the literature that investor responsibility clauses can be operationalised within the investment arbitration process. Arbitral tribunals can be expected to take these responsibility clauses into account when interpreting substantive treaty standards.[91] These standards can be relied on by the host state as part of its defence against liability or as part of a counterclaim.[92] There are distinct challenges arising from the formulation of these clauses that they are unlikely to be successfully invoked as part of a defence or a counterclaim.

For indirect investor responsibility clauses that address the host state, it is unlikely that the host state can rely on the investor's lack of compliance with responsible business standards of conduct as a defence, as the responsibility to 'encourage' may be falling on the host state. If, however, it is accepted that the responsibility falls on the home state, the host state still cannot rely on the investor responsibility clause as a defence in an investment treaty claim, as the investor itself has no direct responsibilities or obligations and the home state is not a party to the dispute. The same limitations apply in the case of counterclaims. Even where the applicable treaty permits counterclaims, it is unlikely that an indirect investor liability clause can be one

[88] Chapter 22 CETA (2016).
[89] See e.g. Article 23 of the Brazil-Colombia BIT (2015).
[90] Billy Mejo Araujo, 'Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality' (2018) *International and Comparative Law Quarterly* 67; Jessica C. Lawrence, 'The EU in the Mirror of NPE: Normative Power Europe in the EU's New Generation Trade and Investment Agreements,' in Csongor István Nagy, *World Trade and Local Public Interest: Trade Liberalization and National Regulatory Sovereignty* (Springer 2020)
[91] P Ranjan (n 82) ; Choudhury (n 10), Jarrett, Puig and Ratner (n 3), 4, using the term of indirect methods of addressing investor obligations.
[92] Markus Krajewski, 'Nightmare or Noble Dream', (n 3) 121

of the grounds for advancing such a claim for the same reasons relating to duty bearers and beneficiaries of these clauses.

The host state could technically initiate a state-state dispute under the treaty to seek responsibility of the home state for not having encouraged its investor to follow standards of responsible conduct. However, many investment treaties explicitly exclude investor responsibility clauses from dispute resolution process and bring these issues within the scope of consultation provisions.[93] Even if it were possible to rely on an investor responsibility clause in a state-state dispute, the vagueness and the voluntary nature of the standard would unlikely result in state responsibility. International responsibility of a state arises from an internationally wrongful act in breach of an international obligation of the state.[94] Investor responsibility clauses in investment treaties do not impose sufficiently clear obligations on states. Nor is there clarity on what may constitute their breach. Finally, Jarrett, Puig and Ratner also explore direct actions by the host state against the investor in arbitration proceedings.[95] Here again, for such a process to work the clause addressing the conduct of investors should address them directly, as suggested above, and set clear obligations.

While host states may rely on investor responsibility clauses as part of their defence,[96] especially where these clauses directly address the investor, arbitral case law thus far does not support the usefulness of such clauses as a means for alleviating the asymmetrical nature of international investment law. *Bear Creek v Peru* award provides a robust illustration of this problem.[97] The dispute arose from the cancellation of the claimant's mining rights over the Santa Ana Project located close to several indigenous territories in Peru. Concerns over the project's impact on indigenous rights and the environment led to serious community opposition to the project.[98] The applicable investment treaty to the investor's claim, Peru-Canada FTA, contained an indirect investor responsibility clause as reproduced above.[99]

[93] Colombia-EU-Peru FTA, (2012) Art 285(5).
[94] See ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001) Articles 1 and 2.
[95] Jarrett, Puig and Ratner (n 3), 12.
[96] Peter Muchlinski (n 62) 683 envisages the hypothetical possibility of host states relying on CSR clauses as part of their defence in an IIA dispute.
[97] Up to date, this is the only publicly available award applying a treaty containing a CSR clause and raising issues of investor responsibility. There are other settled or pending disputes where similar issues are raised and these include *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41 and *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, both under Canada -Colombia FTA containing a CSR clause in Article 816. In the Eco Oro award, the CSR clause played no role in the tribunal's analysis despite the centrality of environmental and human rights protection to the substance of the dispute.
[98] *Bear Creek Mining Corporation v. Republic of Peru*, (Award) 30 November 2017, ICSID Case No. ARB/14/21 paras 152-216.
[99] See section 3.1 above.

A crucial aspect of the dispute between Bear Creek and Peru concerned the opposition of the indigenous communities to the mining project due to its impacts on human rights, indigenous peoples' rights and the environment.[100] In the case, the question posed was whether Bear Creek obtained a 'social license to operate' from the indigenous communities which were directly and indirectly affected by mining activity. The issue of social license was considered[101] as part of the tribunal's analysis on whether Peru indirectly expropriated Bear Creek's investment,[102] in the assessment of contributory fault and damages.[103] The parties and *amicus* presented extensive arguments over whether the investor obtained a social license to operate and whether any consequences can be drawn from the lack of a social license. While Peru's arguments relating to the investor's conduct in its relationships with the indigenous communities primarily relied on Peruvian law and the ILO Convention 169 on Indigenous and Tribal Peoples, Peru also referred to international standards of corporate social responsibility to set a benchmark for investor relationships with local communities.[104] Only in one instance in its pleadings did Peru refer to the investor responsibility clause in the applicable treaty to support its argument: 'The Free Trade Agreement between Canada and Perú ("FTA") itself recognizes the importance of corporate social responsibility. In Article 810 of the FTA "[t]he Parties . . . remind those enterprises of the importance of incorporating [internationally recognized standards of corporate social responsibility] in their internal policies." Bear Creek cannot be permitted to claim the protection of the FTA while also claiming that such standards of corporate social responsibility do not apply to it.'[105]

The *amicus* brief also referred to Article 810 as setting a standard for investor's responsibilities vis-à-vis local communities and argued that international standards on business responsibilities towards communities, such as the UNGPs should inform the tribunal's interpretation of the fair and equitable and the expropriation standards.[106] Bear Creek disputed the *amicus*' interpretation of Article 810 in their response arguing that "this provision states only that Peru and Canada 'should encourage' business enterprises operating in their respective

[100] Bear Creek v Peru Award paras 152-216.
[101] Peru also argued that the tribunal lacked jurisdiction and objected to the admissibility of the claim for Claimant's alleged lack of social license, but the tribunal did not consider this issue relevant to the question of admissibility and jurisdiction see Bear Creek Award paras 334-35.
[102] Bear Creek v Peru Award paras 375-77.
[103] Ibid para 569 and 600; See also the dissenting opinion of Professor Philippe Sands objecting to the tribunal's approach on damages and contributory fault.
[104] See Bear Creek v Peru, Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction (6 October 2015) paras. 66-71.
[105] Bear Creek v Peru, Respondent's Second Post Hearing Brief (15 February 2017) Para 5.
[106] Bear Creek v Peru, Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment -Puno and Mr Carlos Lopez PhD (Non-Disputing Parties) 11 and 16.

territories 'to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies'[107], in effect arguing that this clause does not oblige the investor to take any steps. In response, Peru argued that the state must ensure companies do obtain free and informed consent, but it is the duty of the company to take necessary steps to obtain that social license to operate. [108]

The tribunal considered the impact of the investor's lack of social license as part of the merits of the claim and the assessment of damages. Peru argued that the cancellation of the mining rights did not constitute indirect expropriation since it was justified as a rational policy choice and addressed a legitimate public welfare objective in response to the investor's failure to comply with social responsibility standards and obtain a social license.[109] Article 810 did not play a central role in Peru's argument but it seems to have supplemented the overall framework Peru relied on to demonstrate the responsibility standards applicable to the investor.

The tribunal's analysis on indirect expropriation and the social license of the investor focused on whether community opposition to the project and the events surrounding this opposition 'was caused by or can be attributed to' Bear Creek.[110] The tribunal held no such causal link existed in this case since the respondent was aware of the issues and did not object to or supported Bear Creek's social responsibility programs.[111] The objective of safeguarding environmental and social conditions were not found to justify the Peru's cancellation of the mining license.

On the question of whether the damages should be reduced further due to the contributory fault of the investor, the tribunal made two observations that are relevant to the discussion of investor obligations in IIAs. First, rejecting the reduction of damages on this ground, the tribunal stated that private companies cannot fail to comply with ILO Convention 169 as the Convention imposes obligations only on states.[112] Though the tribunal went on to explain that the Convention does not impose an obligation of result and that the Claimant did engage in appropriate consultations. Second, the tribunal emphasised that the indigenous communities are not parties to the arbitration and that the tribunal can only take into

[107] Bear Creek v Peru, Bear Creek's Reply to the Amicus Curiae Submission of DHUMA and Dr. Lopez, 18 August 2016 para 18 FN 36.
[108] Bear Creek Award para 258.
[109] Bear Creek Award para 362 -363, 367.
[110] Bear Creek Award para 401.
[111] Bear Creek Award para 411 -412.
[112] Bear Creek Award para 664.

consideration the conduct of the investor and the host state.[113] On the issue of damages, one of the arbitrators partially disagreed with the majority's conclusions in a dissenting opinion holding that the damages should be reduced further due to the investor's fault in contributing to the unrest.[114] The dissenting opinion held that the investor's failure to obtain social license and its failure to follow the domestic and international standards on the rights of indigenous peoples had a material contribution on the social unrest and the eventual collapse of the project.[115] Despite acknowledging the investor's fault in the development of the community unrest, the dissenting opinion did not rely on Article 810 of the FTA in analysing the investor's responsibility to obtain social license.

The tribunal's analysis and findings in this award on the question of investor's social responsibility demonstrates well the obsoleteness of investor responsibility clauses as a means for establishing a balanced system of foreign investment governance. Despite the centrality of the investors social license to operate in the dispute at every stage of the analysis, jurisdiction, admissibility, merits and damages assessment, at no point the tribunal engaged with Article 810 of the treaty. The presence of Article 810 did not make any meaningful contribution to Peru's defence and nor did it provide any avenues for indigenous communities to seek investor accountability, as the real beneficiaries of the corporate social responsibility clause.

If investor responsibility clauses are to be enforceable through a counter-claim or a defence, the treaty should establish clear links between investor obligations and substantive protections that investors are entitled to under the treaty. It is hoped that investment treaty tribunals will interpret substantive protections such as FET in harmony with such investor responsibility clauses.[116] While in a small number of instances, tribunals have taken investors' irresponsible conduct towards communities and the environment into account when analysing substantive standards of protection[117] or when assessing damages,[118] these instances are certainly rare. It is desirable for the treaty to provide clarity on whether investor conduct relating to human rights should be taken into account by tribunals where appropriate, either as part of a host state's defence or as basis of a counterclaim.[119] For instance, ECOWAS Supplementary Act on Investment, in Article 18 links the provisions on investor liability to the enforcement

[113] Bear Creek Award, para 666.
[114] Bear Creek Award, Phillipe Sands Dissenting Opinion para.4
[115] Bear Creek Award Dissenting opinion paras. 6, 11-14
[116] Levashova (n 3) 51
[117] Discussed by Levashova (n 3) 51-52
[118] See Philippe Sands Dissenting Opinion in Bear Creek v Peru.
[119] B Choudhury, 'Investor Obligations for Human Rights' (2020) 35(1-2) ICSID Review 92

and interpretation of substantive protections afforded to the investor under the treaty, as well as acknowledging the right of the host state to initiate counter-claims for investor's breach of its responsibilities under the Act. On calculation of damages, the Netherlands Model BIT, in Article 23, expects tribunals to reduce damages for investors' failure to comply with the UNGPs and OECD Guidelines.

## 5. Investor Accountability and the Central Question of Access to Remedy

The analysis thus far showed that the question of access to remedy for affected communities has not sufficiently been addressed in investor responsibility clauses despite this being a central element of investor accountability. In this section, we turn to discussing avenues through which affected communities should be able to directly enforce investor responsibility clauses and obtain access to remedy for harms inflicted by investor activity.

For investor responsibility clauses to be effective, they must impose clear obligations directly addressed to investors[120] and most importantly, clearly identify host state communities as rights-holders.[121] As the real beneficiaries of investor responsibility clauses, it is essential to ensure that local communities are not invisible within the international investment system and that they are sufficiently empowered to seek accountability.[122] Local communities should have rights recognised within the investment treaty independent from any defences and counterclaims that may be available to host states. Jarrett, Puig and Ratner suggest expanding possibilities for direct actions by individuals in arbitration proceedings.[123] We suggest investigating, in particular, the role of domestic courts to achieve investor accountability. In order to do this, investor obligations clauses must be accompanied with appropriate remedy mechanisms that local communities can resort to.

Ideally, clauses addressing the conduct of investors within an investment treaty should acknowledge local communities' right to bring a claim against an investor for failure to respect human rights and environmental obligations before the local courts of the host and or of the home states. The treaty should place an obligation on host and home states to ensure their domestic laws enable such investor liability claims. Such an obligation placed on the parties to

[120] See section 4.3 above.
[121] See section 4.4 above.
[122] Nicolas Perrone, 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime" (2019) 113 American Journal of International Law Unbound 16
[123] Jarrett, Puig and Ratner (n 3), 21.

the treaty can help overcome barriers to claims brought against parent companies of investors in their home state.[124] Inclusion of a remedy clause in treaties will not only enable states to meet their duty to protect under Pillar I of the UNGPs, but also contribute to the realization of Pillar III of the UNGPs on access to remedy.

### 5.1.*Access to Remedy and Investor Liability in Home State Courts*

There are a few examples of investor *liability* clauses including references to investor liability in home state courts. The most prominent examples of this approach are found in the Nigeria-Morocco BIT (2016),[125] the ECOWAS Supplementary Act of Investments,[126] the SADC Model BIT Template[127] and the Netherlands Model BIT.[128] Article 20 of the Nigeria-Morocco BIT opens up the possibility for host state communities to bring civil liability suits in the home state of the investor for investors' acts or decisions which gave rise to significant damage, personal injuries or loss of life in the host state. This clause is not explicitly linked to investor obligations stipulated under Article 18 of the same treaty establishing investor obligations for human rights, labour and environmental standards. Yet, it may be possible for communities to bring claims where investors' failure to comply with Article 18 gave rise to the types of injuries stipulated in Article 20.

The shortcomings and promises of the Nigeria-Morocco BIT's approach to investor responsibility has been assessed in the literature and will not be repeated here.[129] An additional challenge to making effective use of such BIT provisions is the absence of so called mandatory human rights and environmental due diligence legislation in home states with clauses establishing the liability of companies in the home states for the harm caused in the host

[124] See on this A Yilmaz Vastardis and R Chambers, 'Overcoming the corporate veil challenge: Could investment law inspire the proposed business and human rights treaty?' (2018) 67 (2) International and Comparative Law Quarterly 389–423; Y Levashova, (n 3) 948 argues that investment treaty clauses allowing enforcement of obligations through domestic courts may not be effective due to lack of enforcement mechanisms in home states. She refers to the small success rate of such claims against MNCs in home states. This is why the authors here suggest that the investment treaty imposes direct obligations on host and home states to enable such claims within their domestic systems.
[125] Nigeria-Morocco BIT (2016), Art. 20.
[126] ECOWAS Supplementary Act of Investments (2008), Art. 29.
[127] SADC Model BIT Template (2012), Art. 17.
[128] Netherlands Model BIT (2019), Art. 7(4).
[129] Krajewski (n 3), Levashova (n 3), Okechukwi Ejims, 'The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?' 2019 34 (1) ICSID Review - Foreign Investment Law Journal 62–84

states.[130] Article 29 of the ECOWAS Supplementary Act of Investments goes a step further by requiring States to adjust their legal framework accordingly:

> 'Home States shall ensure that their legal systems … allow for … the bringing of court actions on their merits before domestic courts relating to the civil liability of investors for damages resulting from alleged acts or decisions made by investors in relation to their investments in the territory of other Member States.

With the exception of the French Law on Corporate Duty of Vigilance,[131] recent mandatory due diligence laws adopted in Germany, Norway or Switzerland do not contain a mechanism of legal liability for companies operating abroad.[132] The state obligation to adjust its legal framework in order to enable investor liability in home states might be difficult to enforce through arbitration, which would require a State-State dispute. We argue that, in monist countries at least, the type of investor liability clause reproduced above has a self-executing character and therefore should be enforced directly before domestic courts as part of domestic law.

The absence of civil liability provisions in these mandatory due diligence laws contrasts with the recently released Proposal for a Directive on Corporate Sustainability Due Diligence by the European Commission.[133] The proposal provides for due diligence obligations and for civil liability of companies even where the law applicable to such claims is not the law of a Member State. Article 22 on civil liability requires that member states ensure that companies are liable for damages if they fail to comply with their due diligence obligations. This means that national courts of EU home states will have to provide for a direct access to individuals in a third host state who are affected by the company's operations.

In order to achieve regulatory alignment in fulfilling their duties to protect, states should adjust both their investment treaty practice and domestic laws. This requires inclusion of both strong investor liability provisions in their investment treaties, establishing local communities'

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[130] See Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability', (2020) 69(4) International and Comparative Law Quarterly 789-818; Nicolas Bueno. 'Mandatory Human Rights Due Diligence Legislation', (2019) New York: The Business and Human Rights Teaching Forum.

[131] *See* Loi 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of Mar. 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies],

[132] M Krajewski, K Tonstad And F Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) Business and Human Rights Journal 1-9. Nicolas Bueno and Christine Kaufmann, 'The Swiss Human Rights Due Diligence Legislation: Between Law and Politics' (2021) 6(3) Business and Human Rights Journal 542-549.

[133] European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23.2.2022 COM (2022) 71 final, 2022/0051 (COD)

right to bring civil claims against investors in home states and adoption of mandatory human rights and environmental due diligence laws containing legal liability provisions, as proposed by the EU Commission.[134]

### 5.2. *Strengthening Access to Remedy and Investor Liability in Host State Courts*

The debate on the responsible conduct of investors in international investment law usually omits to address the question of the legal liability of an investor, including a parent company, in host state courts. This is particularly problematic as this may tend to delocalize justice outside the country where the harm occurs. Mandatory due diligence laws have also been criticised on this ground.[135] This continues, despite a trend of domestic investment codes and sectorial laws such as mining or timber laws in host countries that incorporate human rights obligations of investors. In the area of mining, these laws constitute what is currently called the 'fourth generation of mines codes'[136] with provisions obliging investors to respect environmental, labour, development and human rights of local communities.[137]

Concrete examples of investor obligations in domestic laws are found in the Congolese Investment Code obliging the investor to comply with the regulations on the protection of the environment and nature conservation[138] or in the Congolese Mining Code requiring any investor to submit a plan explaining how the project will contribute to community development.[139] Similarly, Article 94 of Senegalese Mining Code provides that 'any holder of a mining title has the obligation to respect and protect the human rights in areas affected by mining operations, in accordance with legislation national and international conventions'. The same law provides for the withdrawal of the mining title and criminal sanctions in case of child labour and the breach of hygiene, health and labour obligations of the investor.[140]

Some BITs referring to the investor obligation to respect domestic law more specifically refer to the respect of human rights. For example, Article 12.1 of the Indian Model BIT states that '[i]nvestors and their Investments shall be subject to and comply with the law of the Host States. This includes, but is not limited to, […] (v) Law relating to human rights.' Similarly,

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[134] See Bueno and Bright (n 130) 818.
[135] Caroline Omari Lichuma, '(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains' (2021) 81(2) Heidelberg Journal of International Law 497-532.
[136] Hany Besada & Philip Martin, "Mining Codes in Africa: Emergence of a 'Fourth' Generation?" (2015) 28 (2) Cambridge Journal of International Affairs 263-282.
[137] Markus Krajewski,(n 3) 119.
[138] Congolese Investment Code (2002), Art. 8.
[139] Congolese Mining Code (2018), Art. 69(g).
[140] Senegalese Mining Code (2016), Art. 133.

Article 7(1) of the Dutch Model BIT (2019) holds that '[i]nvestors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labour. The obligations of investors to comply with the domestic law of the host state strengthens the investor 'obligations and could turn a violation of domestic law into an issue subject to a potential investor-state dispute',[141] particularly through the mechanism of counterclaims. This would be inasmuch the case when a clause to comply with domestic laws in an international investment treaty directly refer to human rights or the environment.

Such obligation to comply with domestic laws, however, should also be clearly linked to a provision on investor liability in the host state courts. The reference to investor liability in the host state is particularly important as local communities could attempt to directly bring a claim against the investor's parent company in host state courts for human rights and environmental harms. This goes beyond the possibility of counterclaims by host states before arbitral tribunals. So far, the only example of such clause is found in the ECOWAS Supplementary Act on Investments, which provides that:

> Investors shall be subject to civil actions for liability in the judicial process of their host State for acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host State.[142]

The possibility of suing a foreign investor in host state courts based on an international investment treaty has not yet been given enough attention in the literature. Though communities can pursue claims against the local subsidiary of foreign investors under relevant domestic laws, investment treaty provisions on investor obligations have the additional value of establishing investor liability for failing to comply with international human rights and environmental standards. Additionally, by imposing direct investor obligations that must be adhered to by both the subsidiary and the parent company, investment agreements can address the corporate veil challenge that in general constitutes an obstacle for access to appropriate remedies.[143] There may be obstacles to pursue investor liability in host state courts, just as there are obstacles to

[141] Markus Krajewski, (n 3) 119
[142] Art. 17 ECOWAS Supplementary Acts on Investment (2008)
[143] A Yilmaz Vastardis and R Chambers, "Overcoming the Corporate Veil Challenge: Could Investment Law Inspire The Proposed Business And Human Rights Treaty?" (2018) 67 International and Comparative Law Quarterly 389

pursuing investor liability in home state courts. As such, potential obstacles should not be an excuse to reject the possibility of judging the conduct of a foreign investor in host state courts.

It is suggested that IIAs should better govern the question of foreign investor liability in host state courts, at least for human rights and environmental violations causing significant damage, personal injuries or loss of life in the host State. Ideally, the choice should be offered to the victims to choose either the host state or the home state courts to make a foreign investor liable. Currently, the absence of investor liability provisions generally in international investment agreements result in the practical impossibility of establishing the liability of investors for human rights or environmental violations at all. We suggest that clarifying the conditions of liability for foreign investors would be the strongest way to balance rights and obligations of foreign investors in international investment law.

## 6. Conclusion

There is a trend to include and design so-called corporate responsibility clauses in international investment agreements. This article compared the content of 65 such clauses. It concludes that almost all of them, regardless of whether they formulate direct or indirect responsibilities or obligations, will have no practical impact. In order to ensure that they can be of any use, we suggest designing new clauses according to the following.

These clauses should be redrafted as "investor human rights and environmental obligations"; incorporate established international standards of responsible conduct, such as the OECD Guidelines and the UNGPs; refrain from using best-efforts language; directly address investors as duty-bearers; explicitly recognise affected communities as beneficiaries of the investor obligations; and provide for clear mechanisms of enforcement for communities in domestic courts.

With respect to mechanisms of enforcement, instead of relegating issues of investor human rights and environmental obligations to weak consultations, these clauses should clarify issues of foreign investor liability in the domestic courts of the home state and of the host state. Liability in home states and host states should be separated from a counterclaim a host state may raise. Foreign investor liability in the domestic court of the home state should require home states to adjust their domestic laws by adopting mandatory human rights and environmental due diligence laws containing legal liability provisions. Finally, investor liability provision should not be a form of delocalizing justice away from the domestic courts of the host states and,

ideally, the choice of domestic courts to hold a foreign investor liable for a harm should be given to those who are negatively impacted by the conduct of the foreign investor.

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