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Civil liability in the EU Corporate Sustainability Due Diligence Directive: A 'Brussels Effect' on International Investment Law?

Nicolas Bueno and Isidore Ngueuleu

1 Introduction

Until very recently in international investment law, "the conduct of an investor, would not normally constitute the basis of an international investment dispute."[1] Historically, international investment law had, and still has, the primary aim to protect foreign investors and promote investment flows across countries, and not to protect third parties or the environment potentially impacted by foreign investors. From a hard law perspective, it is only in the last decade that states have started addressing directly the conduct of foreign investors in order to rebalance asymmetries of investor rights and obligations in international investment agreements ("IIAs").[2] A manner to do so has been the adoption of corporate social responsibility ("CSR") clauses in their IIAs.[3] These clauses typically encourage (directly or indirectly) foreign investors to adopt responsible business conduct. However, the vagueness of these clauses has hardly led to direct

[1] Jean-Michel Marcoux, International Investment Law and Globalization: Foreign Investment, Responsibilities and Intergovernmental Organizations (Routledge, 2019), 38.

[2] See "Human rights-compatible international investment agreements," United Nations General Assembly, July 27, 2021, para. 41, available online at https://www.ohchr.org/en/documents/reports/a76238-report-human-rights-compatible-international-investment-agreements-iias (United Nations Working Group ("unwg") on business and human rights).

[3] Nicolas Bueno, Anil Yilmaz Vastardis, and Isidore Ngueuleu Djeuga, "Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses," The Journal of World Investment & Trade 24, no. 2 (August 2023): 179–216, https://doi.org/10.1163/22119000-12340278; Jarrod Hepburn and Vuyelwa Kuuya, "Corporate Social Responsibility in Investment Treaties," in Sustainable Development in World Investment Law, eds. Marie-Claire Cordonier Segger, Markus Gehring, and Andrew Newcombe (Alphen aan den Rijn: Kluwer Law International, 2011), 589–609.

investors' accountability through adjudication.[4] Beyond these CSR clauses, certain countries, particularly in the African continent, have adopted more direct investor liability clauses. These clauses are rather isolated so far. They aim to ensure that foreign investors can be sued in the domestic courts of the home or sometimes host states in case of harm. This paper outlines how they are formulated and what is their impact.

But how will IIAs look like now that the EU Corporate Sustainability Due Diligence Directive ("CSDDD") has entered into force?[5] The recently adopted directive requires companies to establish due diligence procedures to address adverse impacts on human rights and the environment along their value chains.[6] Besides its public enforcement mechanism, a central element of the CSDDD is its civil liability provision. Accordingly, companies can be made civilly liability for the damage caused as a result of their failure to conduct due diligence as required by the directive. Now that large companies based in the EU must respect human rights and the environment and can be liable, the EU has an incentive to expect the same from large foreign investors, for example from the US, China or India. Will therefore the EU negotiate due diligence obligations and reproduce its civil liability provision for foreign investors that want to invest in the EU in its future IIAs?

This article is structured as follows: Section 2 first explains the civil liability provision in the CSDDD by outlining its scope and conditions; Section 3 provides an overview of emerging investor obligations with respect to human rights and the environment through CSR clauses in IIAs, but also shows that these clauses usually cannot be enforced through civil liability; Section 4 points to specific civil liability clauses already existing in IIAs, mainly in intra-African ones, which are good examples of how civil liability provisions could be designed in future IIAs; and Section 5 concludes that there is momentum to include civil liability provisions in IIAs based on the CSDDD and suggests ways to do so for policy actors.

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[4] E.g. in chronological order, Yulia Levashova, "The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law," Utrecht Law Review 14, no. 2 (July 2018): 40–55; Markus Krajewski, "A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty- Making and Treaty-Application," Business and Human Rights Journal 5, no. 1 (January 2020): 105–29; Martin Jarett, Sergio Puig, and Steven Ratner, "Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals," Journal of International Dispute Settlement 14, no. 2 (June 2023): 259–80; UNWG on business and human rights, supra note 2; Bueno, Yilmaz Vastardis, and Ngueuleu Djeuga, "Investor Human Rights and Environmental Obligations," supra note 3, at 201.

[5] Directive (EU) 2024/ 1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/ 1937 and Regulation (EU) 2023/ 2859 oj l, 2024/ 1760.

[6] Nicolas Bueno, Nadia Bernaz, Garbrielle Holly and Olga Martin-Ortega, 'The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise', in Business and Human Rights Journal (2024) doi: https://doi.org/10.1017/bhj.2024.10.

2 Civil Liability in Mandatory Due Diligence Legislation

2.1 Mandatory Human Rights and Environmental Due Diligence

International investment law, while increasingly engaging with investor obligations with respect to human rights and the environment,[7] has developed in isolation to the debate on mandatory human rights and environmental due diligence by scholars in business and human rights. This is quite surprising because both international investment law and business and human rights mainly deal with transnational companies operating abroad. The purposes of these fields of law, however, has mainly remained different: one aimed at increasing investments flows for economic development, while the other at putting the human and its fundamental rights beyond productive activities.

Scholars in business and human rights have written extensively on the adoption of domestic laws aimed at implementing the concept of corporate due diligence in Principle 17 of the United Nations Guiding Principles on Business and Human Rights ("UNGPs"). Moving from an international soft law approach to a domestic hard law one, these laws are traditionally defined as mandatory due diligence legislation.[8] They represent a complementary path to the longstanding process towards an international hard law approach with a UN Treaty on business and human rights.

The last five years have witnessed the adoption of so called "mandatory due diligence laws" across European States, such as France (2017), Norway (2021), and Germany (2021), with many more discussing the adoption of such laws. So far, these laws seem to seduce European countries with a system of civil law while common law countries try to resolve the situation through progressive case-law, which has not been successful so far. An important milestone in this regard, has been the willingness of EU Member States to harmonize the question at the EU level with the adoption of the EU Directive 2024/1760 on Corporate Sustainability Due Diligence and its Article 29 on civil liability. Mandatory human rights and

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[7] With recent exceptions, such as Barnali Choudhury, "Investor Obligations for Human Rights," ICSID Review – Foreign Investment Law Journal 35, no. 1–2 (July 2020): 82–104; Krajewski "A Nightmare or a Noble Dream?," supra note 4; UNWG on business and human rights, supra note 2; Bueno, Yilmaz Vastardis, and Ngueuleu Djeuga, "Investor Human Rights and Environmental Obligations," supra note 3; Surya Deva and Tara Van Ho, "Addressing (In)Equality in Redress: Human Rights-Led Reform of the Investor-State Dispute Settlement Mechanism," The Journal of World Investment & Trade 24, no. 3 (June 2023): 398–436, https://doi.org/10.1163/22119000-12340292.

[8] Claire Bright and Nicolas Bueno, "Mandatory Human Rights Due Diligence," in Teaching Business and Human Rights, ed. Anthony Ewing (Edward Elgar, 2023), 144–59, https://doi.org/10.4337/9781802201130.00022. See also Markus Krajewski, Kristel Tonstad, and Franziska Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?," Business and Human Rights Journal 6, no. 3 (October 2021): 550–58.

environmental due diligence laws are usually built around three main elements: the personal scope of the application of the law describing the companies subject to it; the due diligence obligations as such, usually based on the UNGPs; and enforcement mechanisms of the due diligence obligations. With respect to enforcement, these laws distinguish between public enforcement and questions of parent company liability and lead company liability for a harm caused in the value chain. The EU Directive on corporate sustainability due diligence represents a significant step forward globally, given its binding character, its geographical scope and the economic significance of activities covered and the various monitoring, enforcement and remediation mechanisms currently envisaged.

2.2 Personal Scope of Due Diligence Laws: "Companies" and "Investors"

Due to the fact that international investment law and business and human rights grew in isolation, there is a general lack of clarity and a confusion in the use of the terms "investors," "companies," or "business enterprises," especially when they operate abroad in the form of a transnational corporation or of a multinational enterprise.

In business and human rights, the UNGPs uses the terms of "business enterprise," "transnational corporations," and "companies." Mandatory human rights legislation usually speaks about "companies." For instance, Article 1 of the CSDDD applies to "companies" and their own operations, the operations of their subsidiaries, and the operations carried out by their business partners in the chains of activities of those companies. This includes parent companies and lead companies operating in value chains, for example with foreign suppliers. Article 3 further defines the notion of "company" as commercial legal person and specifies a long list of financial undertakings.

Article 2 clarifies that it is not the type of company that is important, but its size. Accordingly, only very large companies (1000 employees/EUR 450 mil turnover) are covered by the Directive. Similarly, the Directive applies to very large companies established in a third country when they generate annual net turnover inside the EU above EUR 450 mil. The obligations set out in the directive would apply to approximately 5,500 companies established in the EU.

In IIAs, an investor is defined quite differently, and there are no thresholds regarding the size to be covered as a foreign investor by an investment agreement. Investors can be a private or public natural (individual) or legal (company/business) person of a certain nationality that

carries out business activities in a specific country in order to realize future benefits.[9] What is important is that they have the nationality of one of the contracting parties and that they make an investment.[10] The definition of an investment is also proper to each IIA and has been the subject of arbitral decisions, but generally means every kind of asset that an investor owns or controls, such as another enterprise, shares, concessions or property rights acquired for a certain duration, for the expectation of gain or profit and the assumption of an economic risk.[11]

For example, the definition of an investor contained in the investment chapter in the EU-Canada Comprehensive and Economic Trade Agreement ("CETA") is as follows: "investor means … a natural person or an enterprise of a Party [to the agreement], other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party."

Generally, IIAs only cover so called *direct* investments, defined as assets owned or controlled by an investor during a certain period and with the expectation of achieving a profit.[12] A typical example of a foreign direct investor in international investment law is a parent company owning a foreign subsidiary or a part of it. This definition aims to exclude mere *portfolio* investments of investors, such as the investments made by pension funds or banks. In short, "investors" in an IIA would generally qualify as a "company" under the EU Directive, which would only oblige those that qualify as very large.

2.3 Due Diligence Obligations and Access to Remedy through Civil Liability

Mandatory due diligence legislation, as the name reveals, aims to oblige covered companies to conduct human rights and environmental due diligence. Concretely in the CSDDD, very large companies must take specific actions. They must integrate due diligence into their policies; identify actual or potential adverse impacts; prevent and mitigate potential adverse impacts; bring actual adverse impacts to an end, minimize their extent and remediate; establish and

[9] OECD, International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives (OECD Publishing, 2008).
[10] Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, Principles of International Investment Law (Oxford: Oxford University Press, 2022).
[11] See e.g. Art. 8.1 of the European Union's Comprehensive and Economic Trade Agreement; Salini et al v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 152 (July 23, 2001), 42 I.L.M. 609 (2003). See also Alex Grabowski, "The Definition of Investment under the ICSID Convention: A Defense of Salini," Chicago Journal of International Law 15, no. 1 (June 2014): 289–308 for the debate on the criteria for qualifying as investment.
[12] E.g. Arnaud de Nanteuil, International Investment Law (Elgar Edward, 2020), 140.

maintain a notification and complaints procedure; monitor the effectiveness of their due diligence policy and measures; and publicly communicate on due diligence.[13]

The Directive is a response to the fact that "many EU companies continue to base their due diligence efforts mainly or exclusively on social audits and third-party certifications. European buyers typically incorporate their sustainability expectations in supplier codes of conduct and contracts, then police compliance through audits."[14] By clarifying due diligence requirements, the CSDDD brings a level playing field for companies operating in the EU market.[15]

However, due diligence obligations would remain in vain without enforcement mechanisms. This is why most mandatory due diligence laws contain either public enforcement or civil liability provisions. So far, only the French *loi de vigilance* and the EU CSDDD contain a specific civil liability provision in the case of a human rights or environmental harm caused by a covered company.[16] A similar Swiss proposal containing a civil liability provision failed to pass a popular vote.[17]

In the CSDDD, a company would engage its civil liability for damage if it failed to comply with its due diligence obligation, which caused the damage. As in the French *loi de vigilance*, this expresses a fault liability in which the claimant will have to prove the damage, the breach of the due diligence obligation and the causation between the breach and the damage. The text of Article 29(1) CSDDD, is reproduced for more clarity:

> Member States shall ensure that a company can be held liable for damage caused to a natural or legal person, provided that:
> (a) the company intentionally or negligently failed to comply with the obligations laid down in Articles 10 and 11, when the right, prohibition or obligation listed in the Annex to this Directive is aimed at protecting the natural or legal person; and

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[13] Art. 5 CSDDD. See Nicolas Bueno, Nadia Bernaz, Garbrielle Holly and Olga Martin-Ortega, "The EU Directive on Corporate Sustainability Due Diligence (CSDDD)" supra note 6; see also Florian Favreau and Stéphane Brabant, "Chronique de management public: Directive sur le devoir de vigilance: quels contrôles des pratiques managériales?," Politiques & management public 39, no. 1 (March 2022): 124.

[14] "From Policing to Partnership: Designing an EU Due Diligence Duty that Delivers Better Outcomes," Shift, May 11, 2023, https://shiftproject.org/wp-content/uploads/2023/05/Policing-to-Partnership-May-2023.pdf.

[15] William Yonge, "European Commission's Controversial Proposal for a Directive on Corporate Sustainability Due Diligence," The Secured Lender 78, no. 6 (September 2022): 34–7.

[16] Nicolas Bueno and Claire Bright, "Implementing Human Rights Due Diligence through Corporate Civil Liability," International & Comparative Law Quarterly 69, no. 4 (September 2020): 806, https://doi.org/10.1017/S0020589320000305.

[17] Nicolas Bueno and Christine Kaufmann, "The Swiss Due Diligence Legislation: Between Law and Politics," Business and Human Rights Journal 6, no. 3 (September 2021): 542–49, https://doi.org/10.1017/bhj.2021.42.

(b) as a result of the failure referred to in point (a), damage to the natural or legal person's legal interests that are protected under national law was caused

A company cannot be held liable if the damage was caused only by its business partners in its chain of activities.

The recitals of the EU Directive explain that it is a question of ensuring that victims of adverse impacts have effective access to justice and compensation. Member States should be required to lay down rules governing the civil liability of companies for damage, even where the law applicable to such claims is not the law of a Member State, as could be for instance be the case in accordance with international private law rules when the damage occurs in a third country.[18] This means that national courts of EU home states should provide direct access to affected individuals of third countries. The directive specifies rules of private international law in EU law by lifting the rule of a tort claim to apply the law of the country where the damage occurred.[19] Therefore, Member States should ensure that the national law implementing the civil liability regime on the basis of article 29 becomes an overriding mandatory application. The Directive additionally addresses several barriers to justice for victims of adverse impacts, including difficulties in accessing evidence, the limited duration of limitation periods, the absence of adequate mechanisms for representative actions, and the prohibitive costs of civil liability proceedings.

In short, the CSDDD covers large companies based in the EU that also operate as foreign investors abroad under an IIA. These investors will therefore be subject to civil liability in their chains of activities. As a result, we argue that the EU has a good reason to include investor liability clauses and due diligence obligations in its future investments agreements and request the same from foreign investors investing in the EU. We conclude that there is now momentum for the EU to reform and introduce investors liability provisions in its future international investment agreements, which potentially could set the tone for more binding investor human rights and environmental due diligence obligations and liability. The next two sections explain how to build liability clauses in IIAs based on the civil liability provision in the CSDDD.

3 Emerging Investor Obligations without Liability

[18] Id. at para. 61. See also Nicolas Bueno and Franziska Oehm, "Conditions of Corporate Civil Liability in the Corporate Sustainability Due Diligence Directive: Restrictive, but Clear?," VerfBlog, 2024/5/28, doi: 10.59704/a194da1bde472095.

[19] Id. at Article 29(7).

Recently, corporate social responsibility ("CSR") clauses in some IIAs have addressed the conduct of foreign investors with respect to human rights and the environment in their operation in the host states. As a result, they have turned investors from mere rights holders in IIAs to human rights and environmental duty bearers.[20] Ideally, these clauses "could contribute to the rebalancing of international investment law and to the implementation of the UNGPs. In addition, they could go beyond the mere corporate responsibility to respect human rights and establish binding legal obligations for businesses to do so."[21]

In practice, one can still deplore the general terminology of these clauses and that they are still attached to the idea that corporate actors in international law can only have non-binding responsibilities, in comparison to binding obligations for states. These CSR clauses on human rights and the environment contrast, for example, with express investor obligations to comply with domestic laws in the field of anti-corruption and taxation.[22] More importantly, they cannot be enforceable through mechanisms of arbitration due to the lack of standing of affected individuals in investment arbitration, which requires questioning their usefulness and purpose.[23]

3.1 Content of CSR Clauses in IIAs

As reported elsewhere,[24] the formulation of CSR clauses in IIAs varies greatly. Most IIAs, including those adopted by the European Union, contain very vague and indirect responsibilities for investors. A typical CSR clause by the EU reads as follows:

> The Parties should make special efforts to promote corporate social responsibility practices which are adopted on a voluntary basis. In this regard, each Party shall refer to relevant internationally accepted principles, standards or guidelines to which it has agreed or acceded, such as the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises, the UN Global Compact, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[25]

A few other IIAs address investors more directly, in particular those adopted by Brazil and India. A typical corporate clause in an Indian IIA reads as follows:

> Investors and their investments shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and

[20] Bueno, Yilmaz Vastardis, and Ngueuleu Djeuga, "Investor Human Rights and Environmental Obligations," supra note 3, at 184–97.
[21] Krajewski, "A Nightmare or a Noble Dream?," supra note 4, at 114–16.
[22] E.g. Article 11 of the 2018 Bilateral Investment Agreement Between the Taipei Economic and Cultural Center in India and the India Taipei Association in Taipei ("India-Taiwan BIT (2018)").
[23] See generally Bueno, Yilmaz Vastardis, and Ngueuleu Djeuga, "Investor Human Rights and Environmental Obligations," supra note 3.
[24] Id. at 198–205.
[25] Article 12.11 of the EU-Singapore Free Trade Agreement, Investment Protection Agreement and Digital Trade Agreement ("EU-Singapore FTA 2018").

> the local community, through the adoption of a high degree of socially responsible practices.[26]

This type of CSR clause directly addressing investors, and not only indirectly through the State, is also found in several IIAs adopted on the African continent. The Morocco–Nigeria BIT 2016 contains such direct investor obligations to respect human rights; although later treaties signed by Morocco and Nigeria did not pursue the idea of direct investor obligations further.[27]

Some IIAs also require an impact assessment with respect to the environment prior to making an investment, as a form of investor obligation. The agreement in principle on the modernization of the Energy Charter Treaty, for example, contains a provision on environmental impact assessment of energy investment projects.[28] Along the same lines, the Draft Pan-African Investment Code requires that States and investors shall carry out environmental impact assessment in relation to investments,[29] yet the consequences of not respecting this requirement remains unclear.

Some intra-African investment agreements and model agreements are clearer. For example, the SADC Model BIT Template of 2012 establishes that investors must have an explicit duty to respect human rights and that they shall act in accordance with the core labor standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.[30] It also states that investors should not be complicit in breaches of human rights by others.[31] The Chapter 4 of the Draft Pan-African Investment Code focuses entirely on investors' obligations, including to adhere to corporate social responsibility standards[32] and to comply with business ethics and human rights.[33]

3.2 Absence of Enforcement and Access to Remedy

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[26] India-Taiwan BIT (2018), supra note 28, at Article 12.
[27] Article 18(3)–(4) of the Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria ("Morocco–Nigeria BIT 2016"); see also Krajewski, "A Nightmare or a Noble Dream?," supra note 4; Choudhury "Investor Obligations for Human Rights," supra note 7, at 140.
[28] Johannes Tropper and Kilian Wagner, "The European Union Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?," The Journal of World Investment & Trade 23, no. 5–6 (December 2022): 813–48, https://doi.org/10.1163/22119000-12340271.
[29] Article 37 of the Draft Pan-African Investment Code (2016), African Union Commission – Economic Affairs Department, December 2016, text available online at https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf.
[30] Article 15, paras. 1 and 2 of the South African Development Community ("SADC") Model Bilateral Investment Treaty Template (July 2012), text available online at https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf.
[31] Id. at Article 15, para 1.
[32] Draft Pan-African Investment Code, supra note 35, at Article 22.
[33] Id. at Article 24.

The question of legal liability and access to remedy for the real beneficiaries of these clauses, being those impacted in their human rights and affected by environmental damage, has not sufficiently been addressed in these emerging clauses. In their current formulation, most CSR clauses have not and cannot be enforced in any meaningful way to prevent investor harms on human rights and environment to achieve investor accountability.[34]

With a few exceptions,[35] investment treaty clauses on investor responsibility are formulated as soft law standards of responsible conduct. Being embedded in a legally binding investment treaty alone does not transform such standards into binding and enforceable obligations, nor to a more effective soft law solution to achieve investor accountability.[36] As analyzed elsewhere,[37] the limits of these clauses can also be attributed to their hortatory language, the lack of clear duty bearers and rights-holders, and, particularly, the absence of enforcement mechanisms.

The rhetoric of CSR clauses could at best limit access to investor-state disputes, reduce damages or be used in counterclaims. Jarett, Puig and Ratner also explore direct actions by the host state against the investor in an arbitration proceeding, such as counterclaims.[38] In practice, CSR clauses have not been used in investment arbitration proceedings. In *Bear Creek v Peru*, the arbitration proceedings discussed a CSR clause in the agreement between Peru and Canada in general terms without establishing any concrete legal content.[39]

Many investment treaties that contain a CSR clause also explicitly exclude investor responsibility clauses from dispute resolution process, and bring these issues within the scope of consultation provisions.[40] Finally, 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 be unlikely to result in state responsibility. International responsibility of a state arises from an

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[34] Bueno, Yilmaz Vastardis, and Ngueuleu Djeuga, "Investor Human Rights and Environmental Obligations," supra note 3, at 204.

[35] Exceptions include the Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (Economic Community of West African States) ("ECOWAS Supplementary Act on Investment (2008)"); Morocco–Nigeria BIT 2016, supra note 33.

[36] See Eva van der Zee, "Incorporating the OECD Guidelines in International Agreements: Turning a Soft Law Obligation into Hard Law," Legal Issues of Economic Integration 40, no. 1 (February 2013): 51–2 (arguing that incorporating OECD Guidelines in IIAs is a way to harden soft law and make them more effective); see also arguing similarly, Mary E. Footer "BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment," Michigan State Journal of International Law 18, no. 1 (January 2009): 61–2.

[37] Bueno, Yilmaz Vastardis, and Ngueuleu Djeuga, "Investor Human Rights and Environmental Obligations," supra note 3, at 201.

[38] Jarett, Puig, and Ratner, "Towards Greater Investor Accountability," supra note 4, at 12.

[39] Bear Creek Mining Corporation v. Republic of Perú, ICSID Case No. ARB/14/21, Respondent's Second Post Hearing Brief (February 15, 2017), para. 5.

[40] Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ L 354, December 21, 2012, 3–2607 ("Colombia-EU-Peru FTA (2012)"), Article 285(5).

internationally wrongful act in breach of an international obligation of the state.[41] Investor obligation clauses in investment treaties do not impose sufficiently clear obligations on states. Nor is there clarity on what may constitute their breach. In order to be enforceable, a clause addressing the conduct of investors should address them directly and set clear obligations, which is not the case thus far.

4 African IIAs with Investor Liability Clauses

4.1 The Africanization of Investment Law

Over the past years, there is consistent literature affirming that African states have been transforming international investment law ("IIL") through treaty reforms and the enactment of domestic laws. The reforms result in new investments agreements that contain provisions allowing to better align economic interest with the promotion of sustainable development. Pioneers of this academic trend, such as Mbengue[42] and others have called it the "Africanization" of international investment law.[43] The Africanization movement considers that foreign investments should not only be "responsible" and respect human rights or the environment, but also make a "positive impact" on the economic, social and environmental development of the country. The preamble and Article 5 of the Pan-African Investment Code

[41] See the International Law Commission ("ILC")'s Articles on Responsibility of States for Internationally Wrongful Acts (2001) (as adopted by the United Nations), Articles 1 and 2 (text available online at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf).

[42] Makane Moïse Mbengue and Stephanie Schacherer, "The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime," The Journal of World Investment & Trade 18, no. 3 (January 2017): 414; Makane Moïse Mbengue and Stefanie Schacherer, "Africa and the Rethinking of International Investment Law: About the Elaboration of the Pan-African Investment Code," in Comparative International Law, eds. Antea Roberts et al. (Oxford: Oxford University Press, 2018), 547–69; Makane Moïse Mbengue, "Africa's Voice in the Formation, Shaping and Redesign of International Investment Law," ICSID Review – Foreign Investment Law Journal 34, no. 2 (December 2019): 455–81; Yenkong Ngangjoh-Hodu, Moïse Makane Mbengue, and Parveen Morris, African Perspectives in International Investment Law (Manchester: Manchester University Press, 2021); Makane Moïse Mbengue, "Facilitating investment for sustainable development: it matters for Africa," Columbia FDI Perspectives, no. 222, (March 2018); Makane Moïse Mbengue, "Les obligations des investisseurs," in L'entreprise multinationale et le droit international, eds. Laurence Dubin et al. (Paris: Pedone, 2017), 295–337.

[43] See Olabisi D. Akinkugbe, "Reverse Contributors? African State Parties, ICSID and the Development of International Investment Law," ICSID Review – Foreign Investment Law Journal 34, no. 2 (December 2019): 434–54; Gudrun Zagel, "International Investment Agreements (IIAs) and Sustainable Development: Are the African Approaches a Possible Way out of the Global IIA Crisis?," AfronomicsLaw, October 31, 2019, https://www.afronomicslaw.org/2019/10/31/international-investment-agreements-iias-and-sustainable-development-are-the-african-reform-approaches-a-possible-way-out-of-the-global-iia-crisis; Meg Kinnear and Paul Jean Le Cannu, "Concluding Remarks: ICSID and African States Leading International Investment Law Reform," ICSID Review – Foreign Investment Law Journal 34, no. 2 (December 2019): 542; Ndanga Kamau, "Investment Law and Treaty Reform in Africa: Fragments and Fragmentation," African Journal of International Economic Law 1, (Fall 2020): 201; Emmanuel T. Laryea and Oladapo O. Fabusuyi, "Africanisation of international investment law for sustainable development: challenges," Journal of International Trade Law and Policy 20, no. 1 (March 2021): 42–64.

("PAIC"), for example, under the initiative of the African Union, expressly refers to the right of the African Union member states to regulate all investment-related aspects in accordance with their laws and regulations to promote sustainable development objectives beyond merely giving the state a right to regulate,[44] particularly on questions regarding human rights and the environment.[45]

4.2 In Search of Alternatives to Investor-State Dispute Settlement

With regard to dispute resolution, there is a general perception that investment arbitration permits greater protection for investors than for the host state, but there is still no common ground among African states to either maintain or abolish investor-state dispute settlement mechanisms ("ISDS") in IIAs.

Domestic investment law reforms may be considered a good indicator of the Africanization of investment law. There is a relatively novel, but fragmented, trend of empowering domestic jurisdictions to play a larger role in regulating and resolving investment disputes. It is true that the vast majority of investment treaties neither require nor waive the exhaustion of administrative or judicial remedies before the initiation of proceedings,[46] but of all the countries that have amended their domestic investment laws in the last five years, including Algeria,[47] Angola,[48] Namibia,[49] South Africa,[50] and Tunisia,[51] only Burkina Faso, Côte d'Ivoire and Egypt have either maintained international arbitration or did not include domestic courts in their dispute settlement mechanisms. South Africa, for example, has terminated many of its BITs and enacted the Protection of Investment Act of 2015, which excludes the possibility of investor-state arbitration.[52]

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[44] Talkmore Chidede, "The Right to Regulate in Africa's International Investment Law Regime," Oregon Review of International Law 20, no. 437 (June 2019): 443.
[45] Kamau, "Investment Law and Treaty Reform in Africa," supra note 50, at 213.
[46] Kristen Boon, "Theorizing Responsibility in the Investor State Dispute Resolution System," St. John's Law Review 95, no. 2 (Fall 2021): 269.
[47] Id. Article 24 Algerian investment Law 22–18, of 24th July 2022, provides for domestic dispute resolution before domestic courts, unless a treaty provides for arbitration or conciliation.
[48] Article 15 of Lei n. 10/18 – Aprova a Lei do Investimento Privado, que estabelece os princípios e as bases gerais do investimento privado na República de Angola ("Angola's private investment law of 2018") guarantees access to domestic courts and all forms of alternative dispute resolution.
[49] The Namibia Investment Promotion Act (2016) restricts disputes resolutions before domestic courts.
[50] Section 13(5) of the South African Protection of Investment Act 22 of 2015 provides that foreign investors may have recourse to mediation and domestic courts and tribunals. Once they have exhausted local remedies, the state may consent to state-state arbitration with the home state of the investor.
[51] The Tunisian investment law prefers disputes to be resolved by domestic courts.
[52] Tafadzwa Pasipanodya and Javier García Olmed, "21st century investment protection: Africa's innovations in investment law reform," International Bar Association, November 24, 2021, https://www.ibanet.org/africas-innovations-in-investment-law-reform.

There is also a clear rejection of the International Investor–State dispute system ("ISDS") across the African continent, both in regional investments codes and in bilateral agreements or models signed between and by African countries. The arbitration approach is replaced with a range of domestic and regional alternatives, including the use of local courts and regional tribunals.[53] More concretely, investment treaties, such as the SADC Model BIT,[54] recommend the exhaustion of local remedies before initiating arbitration. Similarly, the investment agreement adopted by the Common Market for Eastern and Southern Africa ("COMESA")[55] provides for an exhaustion of local remedies mechanism through mediation prior to any international arbitration.

4.3 Investor Liability Clauses in the Home and Host States

It is well established that investment arbitration tribunals do not provide any direct access to victims of human rights harms to seek investor accountability through IIAs. While their views can be considered through state counterclaims or amicus brief, arbitration does not consider them as direct rights holders and beneficiaries.

Beyond departing from Investor State Dispute Settlement, some IIAs, and particularly in the African continent, also expressively aim to give more power to domestic courts through investor liability clauses. Beyond mere CSR clauses, a few IIAs contain explicit investor liability clauses in the home state. In doing so, they aim to address the corporate veil challenge that in general constitutes an obstacle to appropriate remedies.[56] Other investor liability clauses address the role of domestic court in host state directly. The following paragraphs give an overview of investor liability clauses in the host state or in the home state.

Examples of an investor liability provision in the domestic court of the home state, that is, the state where the investor comes from, are found in the Morocco–Nigeria BIT 2016,[57] the ECOWAS Supplementary Act of Investments,[58] the SADC Model BIT Template,[59] as well as the

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[53] Mmiselo Freedom Qumba, "Assessing African Regional Investment Instruments and Investor–State Dispute Settlement," International & Comparative Law Quarterly 70, no. 1 (December 2020): 197–232.
[54] SADC Model BIT, supra note 36, at Articles 28 and 29.
[55] Revised Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area (CCIA), Articles 34–46, text available online at https://www.comesa.int/wp-content/uploads/2020/10/English-Revised-Investment-agreement-for-the-CCIA-28.09.17-FINAL-after-Adoption-for-signing.pdf.
[56] Anil Yilmaz Vastardis and Rachel Chambers, "Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?," International and Comparative Law Quarterly 67, no. 2 (April 2018): 389.
[57] Morocco–Nigeria BIT 2016, supra note 33, at Article 20.
[58] ECOWAS Supplementary Act of Investments (2008), supra note 41, at Article 29.
[59] SADC Model BIT, supra note 36, at Article 17.

Netherlands Model BIT.[60] 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.

These clauses of investor liability in the home state reflect the idea of the civil liability provision of Article 29 CSDDD. However, they raise delicate questions in the absence of mandatory due diligence legislation in the home state. For instance, it is questionable if, for example, an individual in Morocco affected by the conduct of a Nigerian subsidiary could sue the parent company in Nigeria on the mere basis of this provision in the IIA. In practice, these clauses have not been used yet. An argument could be that in monist countries at least, this type of investor liability clause has a self-executing character and therefore should be enforced directly before domestic courts as part of domestic law.[61]

To avoid this problem and to be effective, these clauses should require the adoption by the home state of mandatory due diligence legislation, as presented above. Further, this legislation should provide for the civil liability of companies in the home states for the harm caused in the host states as is the case in the CSDDD.[62] Article 29 of the ECOWAS Supplementary Act of Investments goes a step further in this direction 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.

By contrast, the possibility of suing a foreign investor directly in host state courts based on an international investment treaty has not yet been given enough attention in the literature. The question of corruption and lack of independence in the judicial system in the host states often serves as an excuse to reject host state courts. To avoid delocalizing justice outside the country, some IIAs nevertheless refer to investors' liability in the domestic courts where the investment is made for human rights harms, including the possibility of directly bringing a claim against

[60] Netherland model Investment Agreement, March 22, 2019 ("Netherlands Model BIT (2019)") (text available online at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download), Article 7(4).
[61] Bueno, Yilmaz Vastardis, and Ngueuleu Djeuga, "Investor Human Rights and Environmental Obligations," supra note 3, at 20.
[62] Bueno and Bright, "Implementing Human Rights," supra note 21, at 789–818.

the investor's parent company. 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.[63]

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 results 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 the rights and obligations of foreign investors in international investment law. As we conclude in the next section, the EU could be a game changer in this respect.

Apparently, the Netherlands has not waited for the adoption of EU Directive to do so. It has recently "started negotiations with Tanzania, Burkina Faso, Uganda and Nigeria on the basis of a new progressive Dutch Model BIT that *inter alia* rebalances rights between investors and states and contains provisions on sustainable development."[64] Article 7(4) of the Dutch Model BIT (2019) holds that "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."

5 Conclusion: Towards Due Diligence and Investor Liability Clauses in IIAs?

Although the formulation of CSR clauses in IIAs goes in the right direction, there is little hope that these clauses will improve access to remedies to individuals affected by the conduct of foreign investors in practice. In contrast, there is more hope that this will be the case through clearer human rights and environment obligations coupled with investor liability provisions in

[63] ECOWAS Supplementary Acts on Investment (2008), supra note 41, at Article 17.
[64] Kamau, "Investment Law and Treaty Reform in Africa," supra note 50, at 215.

IIAs. This paper aims to support the trend towards more binding investor obligations and suggests that the adoption of the CSDDD gives momentum to do so.

The CSDDD will cover many companies based in the EU that also operate as foreign investors abroad under an IIA. These investors will therefore be subject to due diligence obligations and civil liability in case of damage they cause abroad in their value chain. It is in this process of their due diligence that companies will have to identify, prevent and mitigate human rights and environmental adverse impacts. Existing corporate social responsibility clauses and impact assessment in IIAs could therefore easily be extended become investor mandatory due diligence clauses in future IIAs.

With respect to liability provisions, this paper has shown that some intra-African IIAs already contain investor liability provisions in the case of a harm in domestic courts of the home state, at least. Now that the EU has adopted the CSDDD, there is therefore momentum for the EU and its member states to formulate and request from its partners similar investor liability clauses in future investment agreements. These clauses should clarify the conditions of liability for investors in domestic courts. Ideally, these clauses should not be limited to very large and large investors, as in the CSDDD, but to all investors as a condition for being protected under an IIA.

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