Chapter 1.
Introduction: The Need for International Investor Obligations

> Investors' rights are instrumental rights. In other words, investors' rights are defined in order to meet some wider goal such as sustainable human development, economic growth, stability, indeed the promotion and protection of human rights. The conditional nature of investors' rights suggests that they should be balanced with corresponding checks, balances and obligations – towards individuals, the State or the environment. […]
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> [A]s investors' rights are strengthened through investment agreements, so too should their obligations, including towards individuals and communities.[1]

More than fifteen years later, this 2003 call by the UN High Commissioner for Human Rights remains topical. In the last few decades, international investment law has provided foreign investors with potent international rights, enforceable against states before international investment tribunals. It is widely believed that, similarly to other non-state actors, foreign investors do not face any corresponding international obligations. This book shall demonstrate otherwise. Its main hypothesis is that international investment law *is already subject to dynamics* aiming to introduce international investor obligations and giving rise to international responsibility of foreign investors.

I. Interactions between foreign investment and the public interest

Reflecting on the international obligations of foreign investors is even more relevant today than it was in 2003. Save for natural catastrophes such as the Covid-19-pandemic, the continuously globalising world economy

1 UN Commission on Human Rights 'Human Rights, Trade and Investment, Report of the High Commissioner for Human Rights' UN Doc E/CN.4/Sub.2/2003/9 (2 July 2003) ‹http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/Sub.2/2003/9&Lang=E› accessed 7 December 2021, paras 37, 59.

has led to an ever-increasing volume of foreign investment – defined as an economic activity of a natural or private legal person committing resources across national borders for a specific purpose to earn a profit.[2] The 2020 UNCTAD World Investment Report stipulated the volume of foreign direct investment to amount to USD 1.54 trillion in 2019.[3] Even though the Covid-19-pandemic strongly reduced global foreign direct investment flows by a third to USD 1 trillion in 2020,[4] the volume remains impressive and may recover after the pandemic ends. Given this high economic relevance, foreign investment often has broad social, economic and environmental implications. These are particularly relevant for the states which welcome the investment, the so-called host states.

In the last few years, discussions on the effects of investment law vis-à-vis the public interest have been particularly heated. Notwithstanding, there is no uniform definition of the term 'public interest'. In democracies, it is for the elected state organs to decide what is in the public interest through constitutionally determined processes. Just as most states do, this book will consider certain non-rival and non-exclusive public goods to constitute essential parts of the public interest. These include, for example, a clean environment, the rule of law and a strong economy. In addition to public goods, safeguarding the interests of individuals forms a part of the public interest as well. Protecting the individual is not only relevant for each and every citizen but it also characterises a society which guarantees liberty, equality and dignity as objective values. These different facets of the public interest are interrelated, an insight that brought about the notion of sustainable development.[5]

Legal norms intended to protect the public interest reflect this understanding. On the international level, states have undertaken plenty of obligations which address non-rival, non-exclusive public goods by, for example, signing and ratifying international treaties on environmental protection. Other obligations protect individuals such as international human rights and labour standards which, as shown, also contribute to the public

2 Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, Oxford University Press 2021) 30.

3 UNCTAD, *World Investment Report: International Production Beyond the Pandemic* (United Nations Publications 2020) 11.

4 UNCTAD, *World Investment Report: Investing in Sustainable Recovery* (United Nations Publications 2021) 2.

5 On the concept of sustainable development see UNGA 'Transforming Our World: The 2030 Agenda for Sustainable Development' UN A/RES/70/1 (21 October 2015).

interest as understood here. Investment law can interact with these norms in different ways.

On the one hand, one may say that protecting foreign investors can substantially contribute to the public interest. Indeed, foreign investors provide employment. They transfer technology to countries. They build infrastructure and pay taxes. All this can ultimately improve the life of people and help states foster their development in manifold ways, including the protection of human rights, workers' rights and the environment.[6] International law confirms this finding: for example, the International Covenant on Economic, Social and Cultural Rights obliges state parties to realise the embodied international human rights to the maximum of their available resources.[7] Investors may increase these resources. In the same vein, the UN Sustainable Development Goals for 2030 specifically mention the importance of encouraging foreign direct investment to reduce inequality within and among countries.[8] Indeed, a prospering economy qualifies as a public good in itself and foreign investment may have an active role in this regard. In other words, foreign investment can 'harness'[9] or contribute to public interest standards.

On the other hand, foreign investment may endanger and even harm the public interest. After all, investors are private actors who pursue economic profits. These private interests may collide with legal norms that protect public goods and individual rights.[10] Indeed, the UN High Com-

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6 On synergies between environmental protection and the promotion of foreign investment see Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012) 24–28, 41–58; more broadly on businesses' potentials for furthering human rights and development see John G Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton 2013) 201.

7 Art 2 (1) International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

8 UNGA 'Development Goals' (n 5) No 10.b.

9 On this key term and concept see Pierre-Marie Dupuy and Jorge E Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge University Press 2013).

10 The ambivalent relationship of foreign investment and environmental protection is pointed out for example by Viñuales (n 6) 24–25; for an economic perspective on the impact of multinational enterprises that foreign investors often form part of see Joseph E Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities' (2007–2008) 23(3) American University International Law Review 451, 474–475.

missioner for Human Rights' 2003 Report on Human Rights, Trade and Investment aimed at raising awareness of the different ways that foreign investment can interact with human rights. It also presented some problematic cases in which investment negatively affected local populations' rights.[11]

A good example illustrating the effect of investment on human rights is the case of the Three-Gorges-Dam in China. This extensive energy project was financed and realised with the support of international private and public investors.[12] While it contributes to the production of clean water energy in the spirit of sustainable development, it not only required local inhabitants to be relocated[13] but also damaged the ecosystem of the Yangtze River.[14]

Therefore, undoubtedly there exists a need for rules which will assure that foreign investments preponderantly further the public interest.[15]

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11 UNCommHR 'Human Rights, Trade and Investment Report' (n 1) paras 5–19; for a more recent critical account, see UNGA 'Human Rights-Compatible International Investment Agreements. Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (27 July 2021) UN Doc A/76/238, para 3 which states that 'attracting investment is not a sufficient condition for inclusive and sustainable development' and that 'international investment agreements – if not designed properly – […] can also exacerbate the existing imbalance between rights and obligations of investors and undermine affected communities' quest to hold investors accountable for human rights abuses and environmental pollution.'

12 See ‹http://projects.worldbank.org/P153473?lang=en› accessed 7 December 2021.

13 See for example Yan Tan, *Resettlement in the Three Gorges Project* (Hong Kong University Press 2008).

14 Shilun L Yang, Jianbo Zhang and Xin-Jian Xu, 'Influence of the Three Gorges Dam on Downstream Delivery of Sediment and Its Environmental Implications, Yangtze River' (2007) 34(10) Geophysical Research Letters 37.

15 cf the discussion on the relationship between international investment law and development, for example by UNCTAD 'Investment Policy Framework for Sustainable Development' UNCTAD/DIAE/PCB/2015/5 (2015) and the observation that there is an '[…] awareness that international investment law is related to, and relevant for, development' by Stephan W Schill, Christian J Tams and Rainer Hofmann, 'International Investment Law and Development: Friends or Foes?' in Christian J Tams, Rainer Hofmann and Stephan W Schill (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar Publishing 2015) 27.

II. The regulatory setting: Investment agreements and the right to regulate

Setting and implementing investment rules is a core task of the state (1.). Yet, due to the characteristics of investment law (2.), there have been extensive discussions on how the field overly limits host states' right to regulate (3.).

1. Regulating as a function of the state

The purpose of state regulation is to control and channel activities of private actors. It is the traditional task of the host state to balance foreign investors' private interests with the public interest. As part of its sovereignty, the state has the jurisdiction to prescribe and enforce domestic law on its territory in order to set boundaries and incentives for foreign investors. The domestic constitution of a state determines the rules and processes on how policy decisions to that end can be taken, including democratic mechanisms and the choice of a certain economic order. Many states do so successfully while having very different, sometimes completely opposing, regulatory approaches. Indeed, often international law even obliges states to make use of this sovereign right. Such duties may follow from customary international law as well as a myriad of international treaties for the protection of human rights, the environment, labour standards and the rule of law.

However, over the past few years, the capacity of host states to regulate in this manner has been subject to widespread concern due to the disciplining effect of investment law which sets certain boundaries on host states' actions towards foreign investors.

2. Foundations of international investment law

To better understand how investment law affects host states' right to regulate, a short overview of the foundations of international investment law is necessary.

Created in 1959 with the conclusion of the first international investment agreement (IIA) between Pakistan and Germany, investment law aims to protect foreign investors against adverse action by the host state. In IIAs, the state parties agree to reciprocally protect foreign investors that have the nationality of the other party. Most of these investor rights

protect foreign investors against host state interference taking place after the host state already admitted the investment to the country. Although each IIA requires a precise assessment of its specific terms,[16] in practice a canon of typical investor rights evolved. These include: the protection against expropriation, the right to fair and equitable treatment (FET), the right to full protection and security, the right to most-favoured nation (MFN) treatment and the right to national treatment.[17] Some more recent IIAs even contain (qualified) market access rights for investors.[18] These international investor rights build on the previously existing customary international law on the treatment of aliens that was, and continues to be, enforced between states through diplomatic protection. States created IIAs to depoliticise the matter by isolating foreign investment protection rules from other, more controversial, topics.[19]

These substantive rights were soon flanked by a particularly effective international enforcement system: international investment arbitration. Investment tribunals allow investors to sue the host state for violating an investor right without need for the home state to take action on their behalf. In earlier times, these arbitral proceedings stemmed from investment arbitration clauses contained in domestic investment contracts concluded between foreign investors and the host state (the so-called contract arbitration). Today, the dominant form of arbitration process is international treaty arbitration – it also constitutes the main focus of this book. In international treaty arbitration, it is only the states, and not the foreign investors, who agree on an investment arbitration clause in the above-mentioned IIAs. Based on this clause, investors can file investment arbitration claims against a respective host state based on the host state's consent to arbitrate embodied in the IIA. To that end, many IIAs build on

16 cf on the right to fair and equitable treatment with its particularly diverging expressions in different IIAs Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 132.

17 On this canon of investment rights see only ibid, 98–215. MFN obligations cause some uniformity of these rights – an effect that one may even describe as a certain multilateralisation of international investment law as observed by Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009).

18 See further Dolzer and Schreuer (n 16) 88–90.

19 Ibrahim F Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1(1) ICSID Review 1, 1–12, 24–25.

multilateral investment arbitration rules such as the ICSID Convention[20] or the UNCITRAL Model Arbitration Rules.[21]

In contrast to the international enforcement of the customary law of aliens through inter-state diplomatic protection, investors have full control over the investment arbitration proceedings independently from the state of their nationality, the home state. They can claim the violation of rights defined in the applicable IIA. If an award is rendered, investors have far-reaching possibilities to internationally enforce it against assets of the host state. Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[22] and the ICSID Convention, more than 150 states have undertaken the international obligation to recognise and enforce investment awards with only narrow exceptions. In most cases, the host state may only invoke its sovereign immunity to shield itself against such enforcement in a third country.[23]

The purpose of investment law is to provide independent legal protection to foreign investors. In adhering to this, states aim to attract foreign investment by providing more stable market conditions. After all, when in the host state, foreign investors face an unknown legal system. Investment law aims to reduce the investment risk that this exposure entails by providing an independent safeguard against disproportionate or arbitrary host state behaviour. The idea is that foreign investors can be incited to invest abroad if such international protection is available to them. And indeed, investment law has proven a success story – today we see more than 3000 IIAs and a proliferating number of investment arbitration proceedings. For a long time, there was a clear emphasis on IIAs between a developed and a developing country that focused on a unilateral flow of foreign investment from the former to the latter. This political constellation has changed recently: increasingly, states of a similar degree of development conclude

20 Convention on the Settlement of Investment Disputes between States and Nationals of other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention).

21 UNCITRAL 'Arbitration Rules (With New Article 1, Paragraph 4, as Adopted in 2013)' (16 December 2013) UN Doc A/RES/68/109.

22 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (NYC).

23 On immunity against the enforcement of arbitral awards in the broader investment arbitration context see August Reinisch, 'Enforcement of Investment Treaty Awards' in Catherine Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edn, Oxford University Press 2018) paras 29.44–29.63.

IIAs with one another, sometimes in plurilateral settings or in the context of broader agreements, most notably free trade agreements.[24]

3. The right to regulate debate

Despite this success, in the last years we have witnessed a public and scholarly 'backlash'[25] against international investment law as part of the so-called right to regulate debate. Critics argue that investment law favours investors' interests over the public interest represented by the host state. They contend that investor rights constitute international privileges that go much further than protecting against arbitrary host state measures. Effectively, such investor rights would comprehensively shield investors even against a host state which regulates legitimate questions of the public interest – exceedingly curtailing host states' right to regulate. Many critics further emphasise that investment tribunals interpret international investment law in an overly investor-friendly manner. Epistemological effects had contributed to this bias, with many international investment lawyers having a commercial arbitration-background.[26] In addition, some argue that states even pre-emptively abstain from public interest regulation

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24 John Anthony VanDuzer, 'Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?' in Steffen Hindelang and Markus Krajewski (eds), Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified (Oxford University Press 2016) 172–173.

25 Michael A Waibel (ed), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law & Business 2010); a comprehensive critique from a global justice-viewpoint presents Steven R Ratner, 'International Investment Law Through the Lens of Global Justice' (2017) 20(4) Journal of International Economic Law 747.

26 On this epistemological criticism see for example Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 152–184; Moshe Hirsch, 'Investment Tribunals and Human Rights Treaties: A Sociological Perspective' in Freya Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (Cambridge University Press 2013) 87–100; on how arbiters' different professional backgrounds influence the drawing of analogies and choice of legal paradigms as interpretive framework in international investment law see Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107(1) American Journal of International Law 45, 53–57.

because they fear investment arbitration claims for high amounts of compensation – the so-called chilling effect of investment law.[27]

Different conclusions have been drawn from these insights. Some states have decided to terminate their IIAs and to step away from the system of investment law altogether.[28] Other states, international organisations and NGOs have drafted new model IIAs that reconstruct their design aiming to strengthen and clarify the right of host states to regulate,[29] or change the institutional and procedural aspects of investment arbitration.[30] Yet others have proposed to reform investment law from within through a better, more balanced interpretation of IIAs. They call for the IIAs to be read in light of other international treaties that the state parties have concluded and which relate to the public interest, for example, international human rights treaties.[31]

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27 On the regulatory chill-effect see for example Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60(3) International & Comparative Law Quarterly 573, 580; Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown (ed), Evolution in Investment Treaty Law and Arbitration (Cambridge University Press 2011); Jonathan Bonnitcha, *Substantive Protection Under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2014) 113–133.

28 This is a policy that for example Ecuador, Venezuela and Bolivia adopted, see Karsten Nowrot, 'Termination and Renegotiation of International Investment Agreements' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press 2016) 233–265 with further analysis.

29 There is plenty of literature on the precarious right to regulate in international investment law and how to strengthen it, see for example the comprehensive analysis by Aikaterini Titi, *The Right to Regulate in International Investment Law* (Nomos 2014).

30 For an overview of reform proposals for investment arbitration, structured on the basis of constitutional principles that arbitration should live up to, see Stephan W Schill, 'Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) 20(3) Journal of International Economic Law 649; for an overview of the most recent ISDS reforms discussed by UNCTAD, ICSID and UNCITRAL, see José E Alvarez, 'ISDS Reform: The Long View' (2021) 36(2) ICSID Review 253.

31 Among others, Bruno Simma and Theodore Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 678–707; Simma (n 27) 581 propose such an interpretation applying Art 31 (3) (c) of the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

III. The need for international investor obligations?

Much of the scholarly and public attention to how investment law relates to the public interest has focused on this right to regulate debate. Yet, notwithstanding its importance, in many cases, reclaiming and strengthening the host state's right to regulate is not enough to assure that foreign investments serve the public interest. The reason is that, within the logic that underpins the right to regulate in investment law, the role of third-party rights and public goods remains passive: States can only bring forward the protection of the public interest as a *justification* against investment claims by investors. The right to regulate does not itself express any expectations towards the investors that they should actively align their activities with the public interest as a matter of international law. To that end, the right to regulate relies completely on the host state and its domestic legal system – the state must make use of it. However, in a globalised economy, the host state's ability to do so and regulate foreign investment effectively is often limited in practice.

On a more general level, this concern is subject of the call for corporations' international responsibility (1.). In this light, investment law seems to exacerbate the current lack of international obligations (2.) as can be demonstrated by a hypothetical (but not far-fetched) example (3.).

1. The discussion on the international responsibility of corporations

Private economic actors have become increasingly powerful and influential, especially when operating beyond national borders. There is plenty of academic writing exemplifying that, in many cases, domestic regulation cannot sufficiently address the regulatory challenges posed by globalised economic activity. In this broader picture, foreign investment is part and parcel of the changing role corporations and non-state actors play in international law.

Building on earlier debates,[32] recent years have witnessed intensive discussions, especially on the UN-level, concerning international responsibilities of corporations. In particular multinational enterprises that operate

32 The thinking about binding international standards for multinational enterprises and foreign investors has a long history that goes back to the 1920s and has its more direct origin in the 1970s, for an overview see Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, Oxford University Press 2007) 654–674.

across national borders often escape the territorial confines of domestic regulation. The economic power of major multinational enterprises often exceeds the net income growth of smaller states.[33] This economic weight equals power.[34] It is, therefore, self-evident that such private or non-state actors are increasingly regarded as highly important for states and the furthering of the public interest. In 2008, the UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, noted in this regard:

> The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.[35]

Entrusted in 2011 with discerning what international human rights obligations corporations have, if any, John Ruggie presented the UN Guiding Principles on Business and Human Rights which have been widely accepted, received and referenced.[36] These Principles concur with most

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33 See for example the economic assessment by Stiglitz (n 10) 476; see also Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, Oxford University Press 2014) 133 who observes that 'the economic power of a number of multinational corporations by far exceeds the economic capacities of many developing nations' and that '[a]s a result, the corporations are able to act largely without any governmental control by their host states'; but see the differentiated remarks on the relative bargaining power of states and multinational enterprises in different business sectors by Muchlinski (n 32) 104–107.

34 Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111(3) Yale Law Journal 443, 461–463.

35 UN Human Rights Council 'Protect, Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' UN Doc A/HRC/8/5 (7 April 2008), para 3; see further on the particular regulatory problems that multinational enterprises pose, juxtaposed to domestic companies, Stiglitz (n 10) 476–481.

36 On this wide-spread reception see for example Andreas Heinemann, 'Business Enterprises in Public International Law: The Case for an International Code on Corporate Responsibility' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University

scholars in considering only states to be bound by international human rights obligations. In contrast, corporations have a moral, non-binding 'responsibility' towards human rights. The prepondering opinion is similar concerning international obligations of corporations that relate to other facets of the public interest such as workers' rights and environmental protection.[37]

The emphasis on the moral responsibilities of corporations has led to a proliferating number of non-binding international CSR norms in the last years, created by states, international organisations and corporations themselves. They serve as guidelines for ethical business conduct and should be given practical effect through voluntary cooperation by companies and consumer pressure. They often build on the UN Guiding Principles on Business and Human Rights and other relevant documents and initiatives such as the UN Global Compact,[38] the OECD Guidelines for Multinational Enterprises[39] or the ILO Declaration on Fundamental Principles and Rights at Work.[40] They reflect the feeling that the setting of norms for private business conduct continues to be a pressing need. Despite the importance of such CSR norms,[41] critics contend that because of their voluntary character, in many situations, they fall short of providing effec-

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Press 2011) 726–727; Surya Deva and David Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017) 2.

37 On environmental law see for example Sandrine Maljean-Dubois and Vanessa Richard, 'The Applicability of International Environmental Law to Private Enterprises' in Pierre-Marie Dupuy and Jorge E Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge University Press 2013) 69–93; on labour standards see for example Katja Gehne, 'Soft Standards and Hard Consequences: Why Transnational Companies Commit to Respect International Labour and Social Standards, and How This Relates to Business and Regulation' in Henner Gött (ed), *Labour Standards in International Economic Law* (Springer International Publishing 2018) 308–315.

38 UN 'Global Compact' ‹www.unglobalcompact.org/what-is-gc/mission/principles› accessed 7 December 2021; see also UNGA 'Towards Global Partnerships: A Principle-Based Approach to Enhanced Cooperation Between the United Nations and All Relevant Partners' UN Doc A/RES/68/234 (20 December 2013).

39 OECD 'Guidelines for Multinational Enterprises' (2011) ‹http://dx.doi.org/10.1787/9789264115415-en› accessed 7 December 2021.

40 ILO 'Declaration on Fundamental Principles and Rights at Work' adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 37 ILM 1233 (18 June 1998).

41 Generally on the specific advantages of soft law governance approaches see Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) International Organization 421, 434–450.

tive and adequate human rights protection.[42] The attempt by a group of developing states at the UN Human Rights Council in the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights to discuss an international treaty that imposes legally binding international human rights obligations on corporations remains inconclusive so far.[43] The first 2017 proposal on Elements for the Draft of a binding human rights treaty called for such binding international obligations of corporations.[44] However, the four subsequently discussed treaty drafts did not adopt this feature and

42 See for example International Commission of Jurists, *Needs and Options for a New International Instrument in the Field of Business and Human Rights* (International Commission of Jurists 2014) 17 which considers that the non-binding Guiding Principles on Business and Human Rights are of limited value as an accountability tool because they 'do not create a material or procedural basis for a cause of action by individuals'; David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1(2) Business and Human Rights Journal 203, 205–219 who presents theoretical and practical arguments for binding international obligations of corporations; Barnali Choudhury and Martin Petrin, *Corporate Duties to the Public* (Cambridge University Press 2019) 1–36, 232–237 on the theoretical reasons to impose duties on corporations and why this should include human rights obligations; Jean Ho, 'The Creation of Elusive Investor Responsibility' (2019) 113 AJIL Unbound 10, 13–14 on voluntary compliance as the 'Achilles heel' of the CSR movement. Indeed, the observation that voluntary standards are not enough was the starting-point for expert discussions on international investor obligations by the IISD in 2018, see IISD, *Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements: Report of the Expert Meeting Held in Versoix, Switzerland, January 11–12, 2018* (2018) 1.

43 The Working Group was established by the UN Human Rights Council 'Elaboration of an Internationally Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' UN Doc A/HRC/RES/26/9 (14 July 2014). At the time of writing, it had seven sessions so far, the last discussing a third revised treaty draft on 25–29 October 2021, see ‹www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx› accessed 7 December 2021.

44 UN Human Rights Council 'Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (29 September 2017) ‹www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf› accessed 7 December 2021, 6 proposes 'Obligations of Transnational Corporations and Other Business Enterprises', inter alia to 'respect internationally recognized human rights, wherever they operate, and throughout their supply chains', to 'prevent human rights impacts of their activities' and to 'design, adopt and implement internal policies consistent with internationally recognized human rights standards'.

exclusively suggest new international obligations of states towards corporations.[45]

These discussions on corporate actions and international standards, in turn, form part of another, even more general debate: the changing role of non-state actors[46] in international law. In a globalised and further globalising world, non-state actors increasingly take over important (state) functions or impact people's lives in a way a state normally would. To mention but one example, one may refer to the broadening military role that rebel groups, insurgents and other private groups play in armed conflicts.[47] Or one could point to the significant number of international organisations

45 These four drafts refer to the 'responsibility' – or, in the most recent draft, the 'obligation' – of corporations only in their preambles. The draft treaty provisions address only the states. Therefore, the drafts seem to adopt the non-binding nature of the Second Pillar of the UN Guiding Principles on Business and Human Rights. See UN Human Rights Council 'Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (16 July 2018) ‹www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf› accessed 7 December 2021; UN Human Rights Council 'Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (16 July 2019) ‹www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf› accessed 7 December 2021; UN Human Rights Council 'Second Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (6 August 2020) ‹www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf› accessed 7 December 2021; UN Human Rights Council 'Third Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (17 August 2021) ‹www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf› accessed 7 December 2021. For an analysis of how these drafts developed, see 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 110–112.

46 The term 'non-state actors' is understood as covering all persons other than the state. Thus, it is broader in scope than the term 'individual' as used in this book because non-state actors for example also include international organisations.

47 On the increasing legal importance of the individual in modern international humanitarian law that mirrors the increasing military relevance of non-state actors and armed groups see Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011) 181–196, 208–228.

that make international rules and exert public authority in many different matters, such as environmental protection, regulation of the seas, public health and so on.[48]

Throughout the 20th century, writers have reflected on how international law can adequately grasp the diversification of international actors and the way they interact with or even relativise state sovereignty.[49] International obligations have always formed a focal point in these discussions and continue to do so today. There is the claim that non-state actors should face international legal restraints similar to states if they take over state-like functions or powers[50] – or that international individual rights and accountability should generally go hand-in-hand.[51] There is also a more specific call for international obligations of non-state actors for those situations in which states fail to live up to their international duties. States may be unwilling to confront non-state actors for a variety of reasons. Or they may be unable to enforce their domestic law against them due to a lack of resources and institutions or due to dependencies on the

48 See Matthias Ruffert and Christian Walter, *Institutionalised International Law* (Nomos 2015) paras 61–114 who identify an 'institutionalised' international law in this increasing role of international organisation with functionally constitutional elements.

49 For a discussion of various concepts of international personality that try to grasp this increasing diversification see Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2010) 42–242.

50 The literature is extensive on this matter. For the present introductory purpose, it may suffice to point to a few prominent voices, for example Hersch Lauterpacht who forcefully advocated the individual subjectivity of natural persons in international law, see Hersch Lauterpacht, *International Law and Human Rights* (Garland Publishing, Inc. 1973) 27–72; for a more cautious position see Tomuschat (n 33) 133; for a stance that international law is purely about the relation between states see Dionisio Anzilotti, *Cours de droit international: 1 Introduction, théories générales* (Sirey 1929) 134.

51 For example Ernst-Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law* (Bloomsbury Publishing 2017) 341–358 who argues in favour of an international cosmopolitan and republican form of international multilevel constitutionalism which includes an international accountability of diverse actors including citizens and multinational enterprises. John Ruggie in his mandate as Special Representative of the UN Secretary-General followed an approach of 'principled pragmatism', focusing on a reachable, politically authoritative set of norms instead of a legally binding instrument, see Ruggie (n 6) 42–46.

non-state actor.[52] Moreover, third states – in our context capital-exporting countries – may encounter legal and political barriers when regulating the extraterritorial conduct of non-state actors.[53]

2. International investor rights without obligations?

These general concerns against private actors and corporations also apply to foreign investors. Often, they form part of multinational enterprises or other forms of joint transnational business activities. Many foreign investors engage in activities that support the state in its public functions or even take over such functions following privatisation. Where foreign investors assume a critical role in a host state's economy, for example in infrastructure projects, the state may find itself, to a certain extent, dependent on the investor. What is more, countries may struggle with poor state organisation, corruption or other inabilities to properly enforce domestic laws against foreign investors.

In this scenario, investment law seems to exacerbate the general lack of international obligations of non-state actors: It provides international rights to investors without imposing international obligations. And, as seen, investor rights call into question the host state's right to regulate foreign investors' behaviour under domestic law. In the worst case, investment law shields investors against host states' domestic regulation in a globalised setting, in which even unhindered domestic regulatory capacity may not be enough.[54] In this broad perspective, to reassert host states' right to regulate may be important and necessary but insufficient to reach the

52 IISD, *A Sustainability Toolkit for Trade Negotiators: Trade and Investment as Vehicles for Achieving the 2030 Sustainable Development Agenda* (2017) 5.3.1 mentioning more cautiously the case that 'domestic laws are not complete'.

53 For an analysis that connects the related business and human rights-debate with international investment law see George K Foster, 'Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties' (2013) 17(2) Lewis & Clark Law Review 361, 393–398; on the most prominent case of domestic law with extraterritorial reach, the US Alien Torts Act, see for example Anja Seibert-Fohr, 'Transnational Labour Litigation: The Ups and Downs Under the Alien Tort Statute' in Henner Gött (ed), *Labour Standards in International Economic Law* (Springer International Publishing 2018).

54 That international investment law may exacerbate the challenge to regulate multinational corporations is emphasised for example by UNHRC 'Protect, Respect and Remedy' (n 35) paras 12–13.

goal of assuring that foreign investment serves the public interest. This points to the need for the development of international obligations of foreign investors.[55]

3. A practical example

Due to the demand for high-end technological knowledge and the promise of potential high returns, foreign investors often engage in commercial exploitation of natural resources in the mining sectors of developing countries. One can picture a situation in which foreign investors do not import the high production standards from their home state but instead heavily pollute the groundwater at the production site, using cheaper technology to maximise profits. This pollution endangers the local population's health.

In this scenario, it appears that, just like any corporation, foreign investors do not have any binding international obligation to respect the population's health nor to protect the environment. Legally binding standards can only follow from the host state's national law. However, the host state may be unwilling to act against the investors because it prioritises furthering its economic development. It may be unable to do so because it heavily depends on the tax payments of the economically powerful investors. Or it suffers from an insufficient domestic administrative and judicial system. In addition, investment law may even protect the investors against any measures of the host state. The investors could sue the host state before an investment tribunal if the state chooses to protect the environment or the local population. The procedural risk of potentially high amounts of damages may deter the host state from taking any action in the first place. Therefore, in this constellation, it seems that investment law would exacerbate the lack of legally binding international obligations of corporations.

55 Indeed, the debate on obligations of foreign investors has a long history reaching back into the 18th century, see Karsten Nowrot, 'Obligations of Investors' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos 2015) para 3.

IV. Exploring investor obligations in investment law

How does investment law grasp, if at all, the need for international investor obligations? Does it in some way reflect the changing and sometimes precarious position of states vis-à-vis potent foreign investors, and the increasing role of non-state actors in general international law? In general terms: could investment law, as a field, center not only around the protection of foreign investors but also contribute to the creation of some form of binding international responsibility? And what would this mean for the role and purpose of investment law within general international law?

This book aims to answer these questions. It will show that already today, investment law increasingly addresses the investors' misconduct towards the public interest independently of the states' national law and its enforcement on the domestic level. Investment law is generating new forms of international standards that foreign investors must observe regarding international human rights, workers' rights, the environment and the rule of law, to name the most relevant examples. As this book shall elaborate in detail, it is remarkable that these norms are of legally binding effect – while at times drawing and building on legally non-binding CSR standards.

To shed light on these dynamics, this book is divided into three Parts. Parts I and II distinguish between two different categories of investor obligations. The first will study 'direct international investor obligations' which constitute binding international standards directly applicable to foreign investors. Such direct obligations may, for example, require the investor to conduct an environmental impact assessment – and to pay compensation to the host state in case of non-compliance.

Part II introduces 'indirect international investor obligations' as a new term. These are standards of conduct for investors which deprive investors of substantive or procedural investment protection in case of non-compliance. Consequently, states cannot directly demand investors to comply with these indirect obligations and claim compensation in case of a breach. Rather, indirect obligations are implied in investor rights. These obligations are already established, to a substantial extent, in arbitral jurisprudence, even though tribunals do not yet identify them as a structural phenomenon. For example, an indirect obligation may also call upon the foreign investor to conduct an environmental impact assessment, as discussed above for direct obligations. Yet, here the consequence of a breach

is different: for example, investors may be deprived of the possibility to invoke an investor right against the host state before an investment tribunal.

Lastly, Part III will outline the common implications of both categories of such investor obligations. There, it shall be submitted that while they contribute to rebalancing investment law as a field, they also offer a potentially new function of IIAs – as an international regulatory instrument capable of steering investors' behaviour. In the broader picture, investor obligations give rise to a new form of individual international responsibility prompting reflection on general international law as a whole.