Chapter 2.
Preconditions of Direct Obligations

Chapter 2 will introduce the concept of direct obligations more closely and shed light on its preconditions under international law.

The term 'direct obligations' means that international law provides for a directly applicable obligation to investors as non-state actors (I.). Some critics raise fundamental objections against the possibility of creating such direct obligations.[1] However, it will be shown that there is nothing in international law that prevents imposing such obligations onto the investors. First, international law allows for conferring the necessary international subjectivity to investors as a particular group of non-state actors (II.). Imposing such obligations does not violate the principle of *pacta tertiis nec nocent nec prosunt* (III.). Notwithstanding, only very few such obligations exist in international law as of today (IV.). Most consider international investment law to be no different in this regard. In contrast to this book's hypothesis, it is usually perceived to be an asymmetrical branch of international law that accords rights without obligations to investors (V.). The Chapter concludes: direct obligations have few preconditions but also few role-models (VI.).

I. Direct applicability

Part I searches for international obligations that are *directly applicable* to foreign investors. Similar to directly applicable international rights, these are international obligations that do not require a state to implement or transform them into domestic law to have effect. These 'direct obligations' address not the state but the investors and directly demand them to act or abstain from acting.[2]

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1 See for example Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 35–41.

2 On this notion of directly applicable rights see Markos Karavias, *Corporate Obligations Under International Law* (Oxford University Press 2014) 11–12; Karsten Nowrot, 'How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?' (2014) 15(3/4) Journal of World Invest-

Herein, direct obligations depart from the so-called mediatisation of obligations. In this concept, only states have international obligations. These include duties to prescribe and enforce domestic law. Consequently, states have to adopt or transform these duties' requirements into their domestic legal systems. It is only these domestic obligations that directly apply to non-state actors.[3]

For example: Art 6 (1) ICCPR[4] enshrines the right to life. Mediatisation of obligations means that only the state parties are bound by this obligation. They have to adopt respective legislation in their domestic legal systems to make it applicable to private actors. For example, they may enact domestic criminal law to protect the life of individuals against criminal behaviour of other individuals. Then, it is only domestic criminal law which binds those individuals – not the ICCPR. In contrast, if Art 6 (1) ICCPR was a direct obligation, individuals would be subject to it as a matter of international law, independent of domestic criminal law.

Clearly, direct obligations represent a much more immediate international norm for addressing private actors' behavior. Foregoing the mediatisation by the state may be important in cases when a state is unwilling or unable to enact and enforce domestic law.[5] And directly applicable obligations may constitute grounds for bringing about an international responsibility of foreign investors. Such an active addressing of private actors may correspond with their increasing role in a globalised economy and be desirable even when states are willing and able to enact and enforce domestic law.

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ment & Trade 612, 636; Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 496–501; see also Jacob K Cogan, 'The Regulatory Turn in International Law' (2011) 52(2) Harvard International Law Journal 321, 346–348 who coins these legal norms as 'unmediated law'.

3 In the purest form suggested by Lassa F Oppenheim, *International Law: A Treatise* (2nd edn, Longmans, Green and Co. 1912) 362–365; on states' obligation to protect see Peters (n 2) 67–71; on how IIAs incorporate international obligations of states to prescribe and enforce domestic law to protect the public interest, see Nowrot, 'Include' (n 2) 638.

4 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

5 Peters (n 2) 76–78 flagging out the closing of 'regulatory gaps'.

II. International subjectivity

The most fundamental objection against direct obligations lies in the alleged lack of international legal subjectivity of foreign investors. Indeed, such argumentation featured for example in the *Urbaser v Argentina* ICSID proceedings.[6] However, this line of argument is without merit.

The terms 'international subjectivity' or 'international personality', used interchangeably here, have no authoritative definition in international law[7] and continue to remain controversial.[8] This study understands international subjectivity as the capacity of an entity to have rights and obligations under international law – quite similar to how subjectivity is understood in many domestic jurisdictions.[9] Which rights and obligations the respective entity with an acknowledged international legal subjectivity enjoys, if any, is an altogether different and separate question.[10]

In the most traditional understanding, suggested for example by legal positivism in the early 20th century, only states could enjoy international subjectivity.[11] However, throughout the past hundred years, states have accepted the international subjectivity of non-state actors. This is particularly true for individuals, following the recognition of human rights by the

6 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016) paras 1193–1194.

7 Peters (n 2) 35; Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2010) 9.

8 See for example Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 50; Barnali Choudhury and Martin Petrin, *Corporate Duties to the Public* (Cambridge University Press 2019) 209–210 and the notion of 'subjects as prisoners of doctrine' by Clapham (n 1) 59–63.

9 See the reference and comparison to domestic legal concepts of subjectivity by Portmann (n 7) 7–8.

10 This distinction between subjectivity and the content of rights and obligations is for example affirmed by Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111(3) Yale Law Journal 443, 475–476; Christian Walter, 'Subjects of International Law' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (May 2007) paras 21–22; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 121; see also *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178 in which the ICJ observed that the 'subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights'.

11 That was for example the position by Oppenheim (n 3) 19; Dionisio Anzilotti, *Cours de droit international: 1 Introduction, théories générales* (Sirey 1929) 134; see also the critical remarks by Portmann (n 7) 42–79.

international community.[12] Indeed, as will be laid out in more detail at a later stage, many consider that states have granted investors individual rights in IIAs, and that they have implicitly accorded them the necessary international personality too.

Not to be confused with this presented understanding of international legal subjectivity are other definitions of the concept that this study does not adopt – but with which it does not conflict either. For example, some understand international legal subjectivity as presupposing a certain minimum corpus of rights such as the capacity to conclude international treaties.[13] Others require the relevant actor to have 'a certain freedom of action on the international level and […] engage in international transactions beyond a framework rigidly fixed once and for all in their constitutive instrument.'[14] Some also require that the entity has the right to create, amend and terminate international law so as to acknowledge that it enjoys subjectivity.[15]

12 Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, Oxford University Press 2014) 112–116; on individual rights beyond human rights see for example *LaGrand Case (Germany v USA)* (Judgment) [2001] ICJ Rep 466, para 77; *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12, para 40; on multinational corporations see Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (5th edn, Cambridge University Press 2021) 80–86.

13 Manuel Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations' (1970) 44 British Yearbook of International Law 111, 139; cf Peters (n 2) 37.

14 Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law' (1999) 281 Recueil des Cours 9, 160. See also the indications of international legal personality that point to state-like entities by Bin Cheng, 'Introduction to Subjects of International Law' in Mohammed Bedjaoui (ed), *International Law: Achievements and Prospects* (UNESCO, Nijhoff 1991) 38.

15 Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 57; also at least discussed as a potential consequence of invoking international subjectivity on the example of corporations by José E Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9(1) Santa Clara Journal of International Law 1, 23–26, 31–35; see also the overview by Andrea Bianchi, 'The Fight for Inclusion: Non-State Actors and International Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011) 49–52.

Yet, these approaches figure in a different scholarly context.[16] Largely, they address the role private organisations play in the setting of international standards or the deliberating of new international rules. They revolve around the problem that non-state actors may relativise states' sovereign norm-setting authority. The present study has no say in these matters. As will be laid out in more detail, this book engages with states' own initiative to impose obligations on investors. The presented alternative definitions of subjectivity do not challenge states' capacity to do so.[17]

In line with this observation, the Tribunal in *Urbaser v Argentina* explicitly affirmed investors' international subjectivity. It held that

> [a] simple look at the MFN Clause of Article VII of the BIT shows that Contracting States accepted at least one hypothesis where investors are entitled to invoke rights resulting from international law […]. If the BIT therefore is not based on a corporation's incapacity of holding rights under international law, it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations.[18]

Even more broadly, it found that to perceive international law as governing inter-state relations only had 'its importance in the past'[19] but 'has lost its impact'[20]. Recently, the UNCITRAL Tribunal in *Aven v Costa Rica* has explicitly affirmed this finding, citing the *Urbaser* award.[21]

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16 The importance of the context when discussing international legal personality becomes clear reading the five different definitory categories of international personality discerned by Portmann (n 7) 13–14.

17 Hence, conceptually, this study claims that investors may enjoy derivative, partial and relative subjectivity similar to how the ICJ accepted international organisations' subjectivity in *Reparation for Injuries* (n 10) 178 and affirmed the individual character of consular rights in *LaGrand* (n 12) para 77; *Avena* (n 12) para 40. On the implicit granting of subjectivity see Walter (n 10) paras 23–26; supported is the partial subjectivity of the investor for example by Tillmann R Braun, *Ausprägungen der Globalisierung: Der Investor als partielles Subjekt im Internationalen Investitionsrecht: Qualität und Grenzen dieser Wirkungseinheit* (Nomos 2012) 162; for a contrary, too narrow position see Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press 2012) 197. cf the discussion of legal subjectivity of multinational enterprises by Clapham (n 1) 79–80.

18 *Urbaser v Argentina*, Award (n 6) para 1194.

19 ibid.

20 ibid.

21 *David Aven et al. v The Republic of Costa Rica*, Case No. UNCT/15/3, Final Award (UNCITRAL, 18 September 2018) para 738.

III. Non-application of the pacta tertiis principle

However, in contrast to the granting of individual *rights* to foreign investors, the imposing of direct *obligations* may encounter additional concerns. Some argue that states cannot unilaterally impose direct obligations on investors without their consent due to the principle of *pacta tertiis nec nocent nec prosunt*. In this view, because foreign investors are no party to IIAs, they cannot be bound by a direct obligation enshrined in the IIA.[22]

The *pacta tertiis* principle forms one of the elementary rules on the making of international law and is a general principle of law. It stipulates that states cannot be bound by an international treaty without their consent.[23] This follows from the more general principle that all sources of international law go back to the positive sovereign consent of a state to be bound, as reflected in the PCIJ's *Lotus* judgment.[24] The reasons why international law cannot bind a state without its consent are enshrined in the principles of sovereignty and sovereign equality (Art 2 (1) UN-Charter). These give every state freedom on how to arrange its internal and external affairs.

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22 This position is taken for example by Todd Weiler, 'Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order' (2004) 27(2) Boston College International and Comparative Law Review 429, 448; Jarrod Hepburn and Vuyelwa Kuuya, 'Corporate Social Responsibility and Investment Treaties' in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew P Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 598; also implicated by James Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24(3) Arbitration International 351, 364; similarly Martin Jarrett, *Contributory Fault and Investor Misconduct in Investment Arbitration* (Cambridge University Press 2019) 112–113 for what this book understands to be indirect obligations which will be analysed in Part II below.

23 Art 34 VCLT; recognised in *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) [1926] PCIJ Rep Series A No 7, 29; *Case of the Free Zones of Upper Savoy and the District of Gex (Switzerland v France)* (Judgment) [1932] PCIJ Rep Series A/B No 46, 55–56; *Anglo-Iranian Oil Co. Case (United Kingdom v Iran)* (Preliminary Objection) [1952] ICJ Rep 93, 109; for an in depth-analysis of the principle and its expressions in international law see Christine Chinkin, *Third Parties in International Law* (Clarendon Press 1993); on possible exceptions applicable to states see Christian Tomuschat, 'Obligations Arising for States Without or Against Their Will' (1993) 241 Recueil des Cours 195; Herbert L Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 226; Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108(1) American Journal of International Law 1.

24 *The Case of the S.S. 'Lotus' (France v Turkey)* (Judgment) [1927] PCIJ Rep Series A No 10, 18.

Similarly, because all states are sovereign, no state can impose a legal norm against the will of another state: *Par in parem non habet imperium*.[25]

But to apply the *pacta tertiis* principle to the relation between states and foreign investors would be misleading. This confusion likely follows from investment arbitration's historical origins in international commercial arbitration. In many domestic legal systems' private law, the *pacta tertiis* rule applies to legal relations between private actors. There, it means that they cannot be bound by a contract with another private actor without their consent. The justification for this domestic *pacta tertiis* rule lies in the private actor's private autonomy and freedom of contract.[26] One cannot simply transfer such domestic legal principles to the international level.

Rather, in international law, foreign investors exist as international subjects only to the extent that states have granted them this status in a certain IIA. In consequence, states have generally wide discretion as to the rights and obligations they wish to attach to this status,[27] safe of course for conflicting rules such as international human rights obligations which will be dealt with at a later point. In granting rights and imposing obligations, they simply exert sovereign powers through international law. There is no difference between a state creating a domestic obligation as a matter of public law and prescribing an international obligation jointly with another state in an international treaty.[28] Precisely this argument was decisive for the International Military Tribunal to justify that states can impose

25 Crawford, *Principles* (n 10) 448–449; on the origins and meaning of this notion see Yoram Dinstein, 'Par in Parem Non Habet Imperium' (1966) 1(3) Israel Law Review 407.

26 See for example the brief theoretical contextualisation by Hector L Macqueen and Stephen Bogle, 'Private Autonomy and the Protection of the Weaker Party: Historical' in Stefan Vogenauer (ed), *General Principles of Law: European and Comparative Perspectives* (Bloomsbury Publishing 2017) 274–276.

27 See Chinkin (n 23) 120–122 who rightly observes that '[i]ndividuals as third parties to treaties are not in the same position as third party States or organizations' (121). She argues that states can provide rights and impose obligations on individuals as well as revoke and modify treaties which have accorded individual rights without these individuals having any say under the international law of treaties.

28 cf John H Knox, 'Horizontal Human Rights Law' (2008) 102(1) American Journal of International Law 1, 29 on how international human rights obligations directly applicable to private actors are to be construed.

directly applicable international criminal obligations on private actors.[29] The same holds true for IIAs.[30]

IV. Direct obligations as the exception in international law

While general international law does not hinder states from creating directly applicable obligations, states have only done so to a very limited extent. To determine if this is the case, the traditional methods to identify the content of the sources of international law apply: foremost, treaty interpretation and identification of customary international law.

Direct obligations are most well-established in international criminal law. In 1948, the International Military Tribunal famously confirmed that natural persons are subject to directly applicable obligations.[31] However,

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29 'The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any of them might have done singly […]. With regard to the constitution of the Court, all that the defendants are entitled to ask is to receive a fair trail on the facts and law.', International Military Tribunal, *The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v Hermann Wilhelm Göring and Others* (Proceedings) (1948) XXII Trial of the Major War Criminals Before the International Military Tribunal, 461.

30 Supported for example by Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 359; Karsten Nowrot, 'Obligations of Investors' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos 2015) para 13; Peter Muchlinski, 'Negotiating New Generation International Investment Agreements: New Sustainable Development Oriented Initiatives' 59; Jose D Amado, Jackson S Kern and Martin D Rodriguez, *Arbitrating the Conduct of International Investors* (Cambridge University Press 2018) 90; but see Alvarez (n 15) 23–24 who warns against accepting international subjectivity of corporations as that would possibly require applying the *pacta tertiis* rule in the relation of states to corporations. However, Alvarez uses a more material definition of international subjectivity that presupposes equal rights and obligations of subjects, a concept that is not followed here, see above Chapter 2.I.

31 '[E]nough has been said to show that individuals can be punished for violations of International Law. Crimes against International Law are committed by men not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced.', *The United States of America and Others v Hermann Wilhelm Göring and Others*, Proceedings (n 29) 466; later confirmed by International Military Tribunal for the Far East, *The United States of America, the Republic of China, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, the Commonwealth*

such obligations prohibit only the gravest forms of atrocities and also do not address corporations.[32] Furthermore, while *ius cogens* is broadly accepted to directly bind non-state actors,[33] it only covers the most elemental norms such as the prohibition of torture. The same is true for international humanitarian law. Because it only applies in situations of armed conflict, it is too narrow in scope to comprehensively cover foreign investment activity – even if some argue that norms on non-international armed conflicts directly apply to non-state actors.[34]

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of Australia, Canada, the Republic of France, the Kingdom of the Netherlands, New Zealand, India, and the Commonwealth of the Philippines Against Araki, Sadao and Others (Judgment) (4 November 1948) printed in Bert V Röling and Christiaan F Rüter (eds), *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946–12 November 1948* (University Press Amsterdam 1977) 27–28; ILC 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal' [1950] Yearbook of the International Law Commission, vol II 374–378 subsequently acknowledged by UNGA 'Formulation of the Nuremberg Principles' UN Doc A/RES/488 (V) (12 December 1950); see also Art 25 para 1 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute); *Prosecutor v Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94–1-AR72 (ICTY, 2 October 1995) paras 128–137; *Prosecutor v Duško Tadić* (Judgment) IT-94–1-T (ICTY, 7 May 1997) paras 661–669.

32 There have been early indications in favour of international corporate punishment, see *The United States of America and Others v Hermann Wilhelm Göring and Others*, Proceedings (n 29) 501–517 which declared the Leadership Corps of the Nazi Party, the Gestapo, the Sicherheitsdienst des Reichsführers and the Schutzstaffel to be criminal groups and organisations; and see the investigation of businesses' criminal wrongdoings by *United States v Alfried Felix Alwyn Krupp von Bohlen und Halbach and Others ('The Krupp Case')* (1948) IX Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No 10 (US Military Tribunal III) 1327–1448 and *United States v Karl Krauch and Others ('The Farben Case')* (1948) VIII Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No 10 (US Military Tribunal VI) 1132. However, different traditions in civil and common law jurisdictions prevented that such obligations came to be established, see Karavias (n 2) 59–67, 89–115.

33 Supported for example by UN Human Rights Council 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' UN Doc A/HRC/19/69 (22 February 2012), para 106; Peters (n 2) 101. But see the opposite view for example by *Kiobel and Others v Royal Dutch Petroleum Co. and Others* (2010) 621 F.3d 111 (US Court of Appeals for the Second Circuit) 148.

34 A prominent example is Common Art 3 of the Geneva Conventions, for example as enshrined in the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August

Although international human rights have a comprehensive scope, the prevailing view is that non-state actors do not have directly applicable binding human rights obligations.[35] This view, with relation to corporations, is confirmed in the 2011 UN Guiding Principles on Business and Human Rights. Their First Pillar elaborates on the legally binding international human rights duties of states. The Second Pillar lists the non-binding responsibilities of companies, stating that corporations only 'should'[36] comply with international human rights. Some attempt to give these rules a stronger normative effect. For example, the UN Office of the High Commissioner for Human Rights in the FAQs on the Guiding Principles observes that while the Principles were not a legal instrument, they were not voluntary but would reflect 'a minimum expectation of all companies'.[37] However, legally speaking, this statement is not very helpful because it blurs the doctrinal analysis. As a matter of international law, the norms enshrined in the Guiding Principles remain non-binding and voluntary in the sense that companies are free to choose if they comply with the moral expectations expressed therein.

1949, entered into force 21 October 1950) 75 UNTS 31 (GC I); see International Committee of the Red Cross, *Commentary on the First Geneva Convention* (1952) 51 with further references.

35 Peters (n 2) 67–68, 71; Tomuschat, *Human* (n 12) 129–135; Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (Cambridge University Press 2021) 17–28; Xuan Shao, 'Environmental and Human Rights Counterclaims in International Investment Arbtiration: at the Crossroads of Domestic and International Law' (2021) 24(1) Journal of International Economic Law 157, 161–162; for an opposite view see Jordan J Paust, 'Human Rights Responsibilities of Private Corporations' (2002) 35(3) Vanderbilt Journal of Transnational Law 801, 810; Weiler (n 22) 440–444; Choudhury and Petrin (n 8), 231; for a more careful position which considers it at least possible to interpret human rights to bind non-state actors 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 105, 110.

36 See Principle 11 in UN Human Rights Council 'Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc HRC/RES/17/4 (2011); John G Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton 2013) 90–93.

37 Office of the UN High Commissioner for Human Rights 'Frequently Asked Questions About the Guiding Principles on Business and Human Rights' HR/PUB/14/3 (2014), 9.

Even where human rights treaties such as the AfrCHPR[38] contain language indicative of international duties,[39] most reject that these norms are directly applicable to non-state actors.[40] Other branches, such as international labour law, are subject to similar discussions. Where the wording of a treaty appears to directly address non-state actors, such a direct application is nevertheless generally equally rejected.[41]

In contrast to these international treaties, it is more generally accepted that UN Security Council resolutions issued under Chapter VII of the UN

38 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (Banjul Charter).

39 It covers an entire chapter on human rights duties; for a comparative analysis of the institutional and procedural features of the three regional human rights treaties see Patrick Abel, 'Menschenrechtsschutz durch Individualbeschwerdeverfahren: Ein regionaler Vergleich aus historischer, normativer und faktischer Perspektive' (2013) 51(3) Archiv des Völkerrechts 369, 369–392.

40 cf Kofi Quashigah, 'Scope of Individual Duties in the African Charter' in Manisuli Ssenyonjo (ed), *The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers 2012) 123–127, 129–133 who on the one hand rather clearly describes the existence of international duties but on the other hand considers that they are enforceable through the state's legislation, which is indicative of a more sceptical understanding of their direct applicability; Karavias (n 2) 24–25 is cautious as to the binding character due to the generic formulation of the provisions. Direct applicability is rejected for example by Tomuschat, *Human* (n 12) 130.

41 A good example for a treaty that contains wording which seems to indicate directly applicable obligations is the ILO Convention (No 98) Concerning the Application of the Principles of the Right to Organise and To Bargain Collectively (adopted 1 July 1949, entered into force 19 July 1951) 96 UNTS 257 (ILO Convention Collective Bargaining). Its Art 1 (1) states: 'Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.' Other treaties with similar language are Art III (1) International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 June 1975) 973 UNTS 3 (IMO Convention on Civil Liability for Oil Pollution Damage); Art 4 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste and their Disposal (adopted 10 December 1999) (Basel Protocol); Art II (1) Vienna Convention on Civil Liability for Nuclear Damage (adopted 21 May 1963, entered into force 12 November 1977) 1063 UNTS 265 (Vienna Convention on Civil Liability for Nuclear Damage); Art 3 (1) Convention on Third Party Liability in the Field of Nuclear Energy (adopted 29 July 1960, entered into force 1 April 1968) 956 UNTS 251 (OECD Convention on Third Party Liability in the Field of Nuclear Energy); on these treaties and the question of direct applicability see generally Ratner (n 10) 479–481 with a position favouring direct applicability; more cautiously Peters (n 2) 157–161.

Charter[42] provide for obligations directly applicable to non-state actors. For example, UN Security Council Resolution 1474 (2003) 'stresses the obligation of all States and other actors' to comply with an arms embargo that applied to Somalia.[43] What is more, a particular category of UN Security Council resolutions set the so-called targeted sanctions, especially with the aim of combatting terrorism. They target specific individuals and companies and sometimes issue concrete prohibitions for these private actors, for example asset freezes and travel bans.[44]

This overview shows that in international law, obligations directly applicable to non-state actors are the exception.

V. Investment law's asymmetry

1. The traditional focus on investor rights

The traditional perspective on international investment law is no different from that of general international law. States created IIAs to provide international protection to investors, leaving no room for investor obligations. For that reason, scholars have characterised investment law as being asymmetrical:[45] Only host states have obligations towards foreign investors, not vice versa.

In this concept, the asymmetry dissolves in the interplay of international and domestic law. It is the host state's domestic law which establishes the legal framework within which foreign investors carry out their investment.[46] Therein, states impose obligations on foreign investors to protect

42 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

43 UNSC 'The Situation in Somalia' UN Doc S/RES/1474 (2003) (8 April 2003), para 1.

44 On targeted sanctions see only Thomas J Biersteker, Sue E Eckert and Marcos Tourinho (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (Cambridge University Press 2016).

45 Used for example by *Hesham Talaat M. Al-Warraq v The Republic of Indonesia*, Final Award (UNCITRAL, 15 December 2014) para 659; Patrick Dumberry and Gabrielle Dumas-Aubin, 'How to Impose Human Rights Obligations on Corporations Under Investment Treaties?' (2011–2012) 4 Yearbook on International Investment Law and Policy, 2–3.

46 In the 2018 IISD Expert Meeting on Investor Obligations in Trade and Investment Agreements, participants even considered the fact that investors must observe domestic law in the host state 'too obvious to be included in a trade or

the public interest – just as they do for any other private actors. IIAs serve to discipline how the states regulate investors.

2. Recent integration of CSR norms

Shifting the focus away from the actions of the host state, recently concluded IIAs began to incorporate non-binding international CSR norms.[47]

Some of these IIAs legally bind the state parties to encourage foreign investors to voluntarily comply with such CSR norms. Here, a binding obligation of states is coupled with the voluntary policy approach towards foreign investors. States must adopt or endeavour to adopt respective internal policies. Thus, these provisions do not require states to adopt binding regulation towards foreign investors.[48] To give one example, Art 22.3 CETA[49] stipulates:

> Cooperation and promotion of trade supporting sustainable development [enshrines that] […] each Party shall strive to promote trade and economic flows and practices that contribute to enhancing decent work and environmental protection, including by: […] (b) encouraging the development and use of voluntary best practices of corporate social responsibility by enterprises, such as those in the OECD Guide-

investment treaty', 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) 3.

47 On this general trend see for example Mary E Footer, 'Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment' (2009) 18(1) Michigan State Journal of International Law 33, 57–63; Nowrot, 'Include' (n 2) 639; Nowrot, 'Obligations' (n 30) paras 34–48; on the trend in EU IIAs see Stefanie Schacherer, *Sustainable Development in EU Foreign Investment Law* (Brill 2021) 270–276; specifically on the trend to introduce CSR norms on climate protection see Wendy Miles and Merryl Lawry-White, 'Arbitral Institutions and the Enforcement of Climate Change Obligations for the Benefit of All Stakeholders: The Role of ICSID' (2019) 34(1) ICSID Review 1, 13–14.

48 Jarrod Hepburn and Vuyelwa Kuuya, 'Corporate Social Responsibility and Investment Treaties' in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew P Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 599–605.

49 Comprehensive Economic and Trade Agreement (adopted 30 October 2016) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3593/download› accessed 7 December 2021 (CETA).

> lines for Multinational Enterprises, to strengthen coherence between economic, social and environmental objectives […].

Other IIAs directly address foreign investors with hortatory language, calling upon them to conform with international CSR standards. Again, this method retains the voluntary approach and does not create any legal obligations for foreign investors. However, by not addressing the states as intermediaries, it is a step more direct in interacting with foreign investors than the method mentioned above. A good example is Art 10.30 of the Pacific Alliance Additional Protocol which in paragraph 2 appeals to foreign investors directly by stating:

> […] Las Partes recuerdan a esas empresas la importancia de incorporar dichos estándares de responsabilidad social corporativa en sus políticas internas, incluyendo entre otros, estándares en materia de derechos humanos, derechos laborales, medio ambiente, lucha contra la corrupción, intereses de los consumidores, ciencia y tecnología, competencia y fiscalidad.[50]

To be sure, notwithstanding the lack of legally binding effect, including provisions related to CSR into IIAs may have an important practical effect. Such IIA norms reflect the fact that moral expectations towards foreign investors have changed. They provide a point of reference that the public may use to exert pressure on misbehaving foreign investors. What is more, the inclusion of CSR-provisions changes the matters dealt with in an IIA: They expand and generalise its scope beyond the focus on the investor's economic activity.[51] It is also notable that, quite often, it has been the developed countries such as the USA, Canada and the EU that

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50 Art 10.30 Additional Protocol to the Framework Agreement of the Pacific Alliance (adopted 10 February 2014, entered into force 1 May 2016) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2940/download› accessed 7 December 2021 (Framework Agreement Pacific Alliance): '[…] The Parties remind the corporations of the importance of these corporate social responsibility standards in their internal policies, including inter alia standards on human rights, labour standards, the environment, corruption, consumers' interests, science and technology, anti-trust and taxation.' (courtesy translation only).

51 cf the general observation of international investment law's generalisation by Peter-Tobias Stoll and Till P Holterhus, 'The "Generalization" of International Investment Law in Constitutional Perspective' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press 2016).

have supported the inclusion of CSR norms – even though, at least in the IIAs concluded with developing countries, they might still have a stronger interest to protect the rights of their investors.[52]

At the same time though, due to their non-binding character, the inclusion of CSR norms into IIAs necessarily fails to meet the regulatory problems discussed in Chapter 1. The legal asymmetry in receiving binding international rights without corresponding obligations is unchanged. They remain non-enforceable as a matter of law.[53] For these reasons, scholars have criticised the integration of CSR-norms as unsuitable for changing the behaviour of investors.[54] In this vein, already in 2003, the UN High Commissioner for Human Rights demanded a greater balance in IIAs that should include CSR 'both on a voluntary basis and through the recognition of investors' direct accountability for their actions with regard to human rights.'[55]

Therefore, including CSR norms into IIAs is only of limited relevance for the present study into direct obligations, simply because they lack legally binding effect. Nevertheless, it can be said that they broaden the scope of IIAs and introduce a new perspective on foreign investments which was alien to IIAs before. This modest change of perception is useful to keep in mind and, indeed, foreshadows the important interplay between 'soft' and 'hard' law that this study will address at a later stage.[56]

VI. Interim conclusion: Few preconditions, few role-models

General international law does not hinder states from imposing direct obligations.[57] To that end, states can grant investors the necessary international subjectivity, and investors cannot invoke the principle of *pacta tertiis* against their creation. However, in other branches of international

52 Hepburn and Kuuya, 'Corporate' (n 48) 607.
53 Too broad Eva van der Zee, 'Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law' (2013) 33(1) Legal Issues of Economic Integration 33, 52.
54 Dumberry and Dumas-Aubin (n 45) 5.
55 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, 4.
56 See below Chapter 3.III and Chapter 7.II.3.
57 Supported for example by Monnheimer (n 35) 12.

law, such directly applicable obligations exist only exceptionally, most prominently in international criminal law. The same is true for investment law. As asymmetrical instruments IIAs traditionally focused on providing rights to investors against host states without corresponding international obligations. There is a recent trend of integrating non-binding CSR norms into IIAs. Yet, it does not overcome the field's described *legal* asymmetry.