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“Investor duty” related provisions in International Investment Agreements from 2017 to 2022

An Empirical Analysis

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1 Introduction

In the last fifty years, the promotion and protection of foreign investments have been the main vectors of economic cooperation between States.[1] This system, built around thousands of investment treaties, was thought as a mean of promoting growth and development.[2] States would commit to protecting international investments in exchange for foreign investors engaging in their economy.

The international investment framework is a sui generis system in international law that revolves around international investment agreements ('IIAs'). IIAs are treaties promoting international investments by guaranteeing certain standards of treatment for foreign investors.[3] Among other perks, foreign investors can expect to be treated fairly and equitably by their host State, to benefit from the advantages given to national investors in the treatment of their investment or to be protected against expropriation.[4] Additionally, they benefit from a unique right under international law: direct access to international arbitration to seek compensation for Host States violations.[5]

The extensive nature of these rights has led to increased scrutiny of civil society and non-governmental organisations on the international investment law system.[6] Notably, growing concerns have arisen about the potential negative impact of foreign investments on human rights and the environment.[7] Investment liberalisation can promote growth, technology transfers, and improved living standards.[8] Nonetheless, this phenomenon can also lead to dire externalities such as lowering of labour conditions, environmental harms, or human rights violations for local populations.[9]

Concerns over the investment system have then only been amplified by various controversies regarding investors' impact on human rights and the environment in their Host State, such as

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[1] Ortino, Federico. "The Social Dimension of International Investment Agreements: Drafting a New BIT/MIT Model? " Forum Du Droit International, Vol. 7, No. 4, December 2005, pp. 243-250.

[2] Ibid.

[3] Dolzer, Rudolf and Christoph Schreuer. "The Sources of International Investment Law", in Principles of International Investment Law, 2nd Edition, Oxford, 15 November 2012, pp. 12-25.

[4] Ibid.

[5] Ibid.

[6] Monebhurrun, Nitish. "Mapping the Duty of Private Companies in International Investment Law" in, Brazilian Journal of International Law, Volume 14, Issue 2, October, 2017, pp. 50-73.

[7] Murphy, Patrick E., and Bodo B. Schlegelmilch. "Corporate social responsibility and corporate social irresponsibility: Introduction to a special topic section", in Journal of Business Research, Vol. 3, 2013.

[8] Ibid.

[9] Ibid.

the Rana Plaza tragedy or the Chevron v. Ecuador judiciary saga.[10] Such cases proved that the activities of transnational companies, and thus international investors, can cause considerable damages to the Host State, its populations, and its environment.

Though, while many investment agreements mention sustainable development within their preamble, their focus often remains economic, with social and environmental reflections taking a backseat.[11] Investment treaties were thought as tools to protect foreign investors from undue host States' interventions.[12] They rarely include other considerations. Therefore, international arbitration tribunals have been reluctant to interpret such agreements in conjunction with sustainable development principles.[13] This has participated in international investment law developing itself as a self-sufficient regime in which human rights and international environmental law have a limited impact.[14]

Moreover, while investors benefit from extensive rights under the investment system, they rarely have duties toward their Host State and its population.[15] This absence of investor's duties results in a tangible asymmetry.[16] While investors have direct access to international arbitration to claim their rights, there is no corresponding mechanism in place for holding investors accountable of human rights violations or environmental harm. This lack of investors' obligations undermines the ability to ensure rights are upheld for the benefit of Host States and their populations.[17]

In recent years, such asymmetry between investors' rights and duties has been vigorously challenged and accused of promoting unsustainable and opportunistic investments.[18] In response, a growing consensus has emerged: investors should be accountable for the negative externalities they create in Host States.[19] Corporate responsibility is now a worldwide expectation. [20]

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[10] Monebhurrun, *supra* note 6.

[11] Nanteuil (De), Arnaud. "Interactions: Investment Law, Human Rights and Environmental Law", in International Investment Law, Edward Elgar Publishing, 2020, pp. 372-397.

[12] Dubin, Laurence. "Responsabilité Sociale des Entreprises et droit des investissements, les prémisses d'une rencontre" in, Revue Générale de Droit International Public, Volume 4, 2018, pp. 42-56.

[13] Ibid.

[14] Brabandere (De), Eric. "Human rights and international investment law", in Research Handbook on Foreign Direct Investment, Edward Elgar Publishing, 2020, pp. 619-645.

[15] Levashova, Yulia. "The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law", in Utrecht Law Review, Volume 14, No 2, 2018, pp. 40-55.

[16] Ibid.

[17] Monebhurrun, *supra* note 6.

[18] Ibid.

[19] Nanteuil (De), *supra* note 12.

[20] Ibid.

Thus, numerous claims have been made to "rebalance" investment agreements. For instance, the United Nation Commission on International Trade Law ('UNCTAD') has called for a "new generation" of investment agreements in parallel of its ongoing Investor-State arbitration efforts.[21] According to the UNCTAD, such "new generation" of investment agreements should be more "business responsible"[22] and promote investors accountability through the inclusion of clauses relating to investor obligations and responsibilities.[23]

Some States have already answered the call and started to include "investor duty" related provisions within their investment agreements.[24] Such provisions include moral or legal obligations for investors and requires them to abide by certain standards. "Investor duty" related provisions can be direct or indirect.[25] Indirect "investor duty" related provisions include all articles which refer to another international instrument which itself provides for investors' duty. As such, indirect provisions do not, in themselves, contain moral or legal obligations. They only call for the respect of another instrument which itself provides for investors' duties or obligations. In contrast, direct "investor duty" related provisions are clauses that provide for investors' obligations directly within the substantive articles of the investment agreement. As such, they provide defined standards by which investors should abide.

One can thus wonder if, overall, States are effectively willing to include "investor duty" related provisions within new investment agreements and whether these provisions do promote investors' accountability. While previous academic research has discussed the overall existence of "investor duty" related provisions and its rationale, [26] no articles have yet led an empirical and systemic study regarding the presence of such provisions within investment agreements.

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[21] United Nations Conference on Trade and Development, International Investment Agreements Reform Accelerator (Vienna, United Nations: 2020), available at: https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf

[22] Throughout the thesis, the term "business responsible investment agreements", "business responsible investment treaties", or "business responsible treaties" will be used to refer to investment agreement that contain provision related to direct or indirect investor duties.

[23] Ibid.

[24] Dubin, Laurence. "Les clauses RSE dans les traités d'investissement", Bilaterals.org, 21 December 2018. https://www.bilaterals.org/?les-clauses-rse-dans-les-traites-d

[25] Ibid.

[26] See notably Monebhurrun, supra note 6 ; Dubin, supra note 24 ; Ortino, supra note 1 ; Dumberry, Patrick, and Gabrielle Dumas-Aubin. "How to Impose Human Rights Obligations on Corporations under Investment Treaties?", in, Karl P. Sauvant, Yearbook on International Investment Law and Policy (2011-2012), Oxford, 2012, p. 569-600 ; Levashova, Yulia. "The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law", in Utrecht Law Review, Volume 14, No 2, 2018, pp. 40-55.

Empirical data is however essential to evaluate accurately whether States are actually promoting "investor duty" related provisions, and which States are paving the way toward more balanced investment agreements. Such empirical analysis allows an objective and precise study of investment agreements, which builds evidence on States' practice. [27]

As such, this thesis aims at answering whether treaties concluded in the last five years include "investor duty" related provisions that promote investors' accountability. Such analysis will be conducted using empirical analysis.

It investigates 103 IIAs which were concluded between 2017 and 2022 and published on the UNCTAD's International Investment Agreements Navigator[28]. The analysis was led using MAXQDA, a software for empirical analysis which allows users to create a coding system for textual corpus and create statistics based on these codes. The IIAs included in the study were treaties which contain related to investment treatment and promotion, such as bilateral investment treaties, agreements on cooperation, and facilitation of investments, as well as free-trade agreements and comprehensive economic partnerships which include a dedicated investment chapter. Out of these 103 IIAs, 51 were in force as of February 2023. A major limitation encountered during the study was the substantial number of IIAs concluded between 2017 and 2022 which were not publicly available. Overall, 93 treaties could not be included in the analysis since they were never published.

Using a mix of quantitative and qualitative analysis, this thesis analyses whether States are, in fact, concluding business responsible treaties. Firstly, using quantitative analysis, it investigates the occurrence of « investor duty » related provisions within investment treaties concluded and published in the last five years. It uses statistical methods to expose whether, in general, States are willing to conclude more business responsible IIAs. Additionally, it provides insight into which States, specifically, are willing to conclude such agreements (2.1). Secondly, building on quantitative and qualitative analysis, it describes the different types of "investor duty" related provisions that exist within investment treaties. An examination of such provisions is conducted to determine their potential to enhance accountability among investors (2.2). Finally, the conclusion will focus on recommendations for more "balanced" IIAs (3).

[27] Shaffer, Gregory and Tom Ginsburg. "The Empirical Turn in International Legal Scholarship", in The American Journal of International Law , Vol. 106, No. 1, January 2012, pp. 1-46.

[28] UNCTAD's International Investment Agreements Navigator: https://investmentpolicy.unctad.org/international-investment-agreements

2 "Investor Duty" related provisions in International Investment Agreements from 2017 to 2022, an empirical analysis

While the United Nations Conference on Trade and Development ('UNCTAD') calls for a "new generation" of investment agreements[29], this chapter analyzes the trends in investors' direct and indirect obligations in IIAs. It uses quantitative analysis, and particularly statistical methods, to expose whether States are willing to conclude more business responsible Investment Agreements.

The first part of the study focuses on the overall presence of "Investor Duty" related provisions in Investment Agreements (2.1.). It investigates whether States are willing to include "investor duty" related provisions[30] in their investment agreements, if there has been any change in their inclusion over time, and whether there are any regional variations. The second part of the study delves further into the examination of these provisions and analyzes their typology and the impact they have on investor accountability (2.2.).

2.1 Overall presence of "investor duty" related provisions in International Investment Agreements from 2017 to 2022

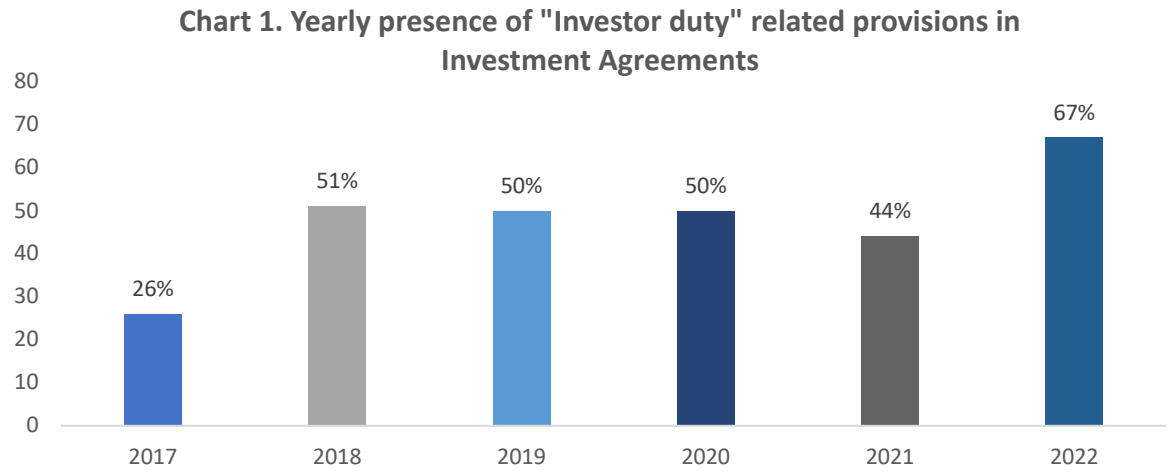
The first part of this section investigates the results and discusses the presence of "investor duty" related articles among IIAs provisions. It uses quantitative and qualitative analysis to investigate the presence of "Investor Obligation" related provisions per year (2.1.1.) and per region (2.1.2).

2.1.1 Yearly presence of "investor Duty" related provisions in International Investment Agreements from 2017 to 2022

While there has been increasing attention on the role of IIAs in promoting responsible investment practices in the last five years, only half of the treaties studied contained at least one "investor duty" related provision (46%).

[29] United Nations Conference on Trade and Development, International Investment Agreements Reform Accelerator (Vienna, United Nations: 2020), available at: https://unctad.org/system/files/official-document/diaepcbinf2020d8en.pdf

However, there was a notable trend towards the inclusion of more "investor duty" related articles in IIAs over this period. In 2017, only 26% of IIAs signed included provisions that referred to investor obligations. In 2018, 2019 and 2020, at least half of the IIAs signed globally included the same type of provision. The percentage of treaties containing "investor duty" related provisions then dropped to 44% in 2021, but only to raise again the following year. In 2022, most of the investment treaties signed contained at least one "investor duty" related article within their provisions.



This number indicates a relative normalization of "investor duty" related provisions in new investment treaties. It reflects current trends in the field and the notable increase in provisions unrelated to investor protection in investment agreements[31]. Many IIAs now include articles or even entire chapters dedicated to sustainable development, human rights, environmental protection, and labor rights.[32] As such, States seem to progressively recognize the importance of promoting responsible investments.[33] These new practices mirror the changing social demands and background that now surrounds investment treaty negotiation. It shows as well as a will to attract investments that have a long-term positive impact on the Home States.[34] Responsible business conduct and sustainable development are therefore increasingly part of States' preoccupations when drafting investment agreements.[35]

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[31] Organisation for Economic Co-operation and Development, Background note on potential avenues for future policies: The future of investment treaties, 6th Annual Conference on Investment Treaties (Paris, OCDE: 2021), available at: https://www.oecd.org/daf/inv/investment-policy/Note-on-possible-directions-for-the-future-of-investment-treaties.pdf

[32] Organisation for Economic Co-operation and Development, OECD Working Papers on International Investment: Business responsibilities and investment treaties (Paris, OCDE: 2021), available at: https://www.oecd-ilibrary.org/docserver/4a6f4f17-en.pdf?expires=1665913470&id=id&accname=guest&checksum=487D46EB5762C480C77253A1371E674D

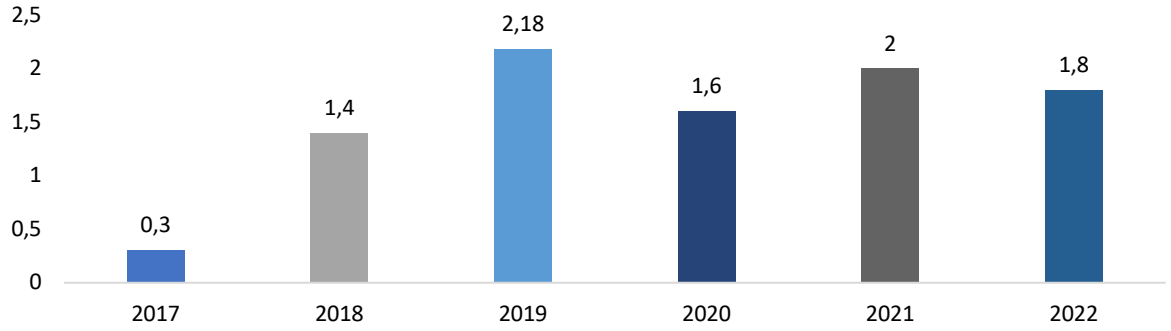
[33] Ibid.

[34] Background note on potential avenues for future policies: The future of investment treaties, *supra* note 5.

[35] Ibid.

Additionally, the results of the study show that the average number of "investor duty" related provisions in IIAs has increased. While in 2017, the average number of "investor duty" related provision was 0.3 per investment agreement, it is up to 1.8 provisions in 2022. The most notable year was 2019 as, during that year, the average number of "investor duty" related provisions per treaty was up to 2.18.

Chart 2. Average number of "investor duty" related provisions in IIAs per year



Therefore, States seem to not only be willing to insert reference to investor obligations inside of their investment agreement, but as well to progressively insert different types of provisions that reflect several types of obligations. For instance, when looking at IIAs concluded by Indonesia, one can observe that the Comprehensive Economic Partnership between the Republic of Indonesia and the EFTA States[36] signed in 2018 contains only one "investor duty" related provision referring to corporate social responsibility. In comparison, the Agreement between the Federal Council of Switzerland and the Government of the Indonesian Republic[37] signed in 2022 contains three different provisions referring to "investor duty". One provision refers to Corporate Social Responsibility[38], another one to transparency[39], and the last one to corruption[40].

Despite this increase, the overall average of 1.4 provisions per treaty from 2017 to 2022 indicates that the inclusion of provisions related to investor obligations or responsible business conduct remains relatively low.

[36] Comprehensive Economic Partnership between the Republic of Indonesia and the EFTA States (signed 16 December 2018, entered into force 1 November 2021) ('Indonesia-EFTA CEPA').

[37] Agreement between the Federal Council of Switzerland and the Government of the Indonesian Republic (signed 24 May 2022, not yet entered into force) ('Indonesia-Switzerland BIT').

[38] Article 13, Indonesia-Switzerland BIT.

[39] Article 40, Ibid.

[40] Article 14, Ibid.

2.1.2 Regional trends in "investor duty" related provisions in International Investment Agreements from 2017 to 2022

Overall, the study results show that there is a trend toward including more "investor duty" related provisions. However, upon closer examination, it becomes apparent that there are significant differences among regions in the prevalence of "investor duty" related provisions in investment agreements.

2.1.2.1 South America

Investment agreements concluded by South American countries[41] had the highest percentage of "investor duty" related provisions of all the treaties analyzed. The sample data included 30 agreements to which at least one party was a State located in South America.

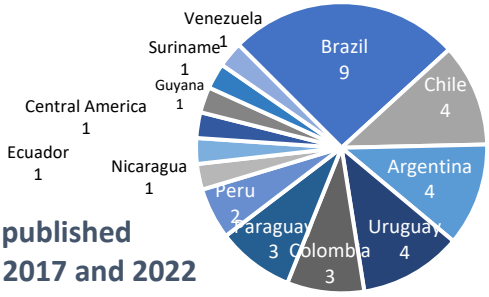


Chart 3. Number of IIAs concluded and published by South American countries between 2017 and 2022

77% of them contained at least one "investor duty" related provision. Namely, 23 out of the 30 treaties concluded by South American States included an "investor duty" related provision. On average, each of the treaties that contained some mention of investor duty contained at least three provisions referring to investors' obligations.

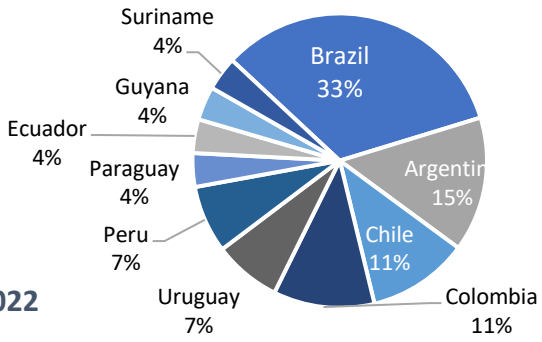


Chart 4. Number of IIAs including at least one "investor duty" related provision per South American country between 2017 and 2022

[41] Investment agreements concluded by South American Countries are here defined as IIAs, Free Trade Agreements, Comprehensive Economic Partnership Agreement, or Cooperation and Investment Facilitation Agreement in which one of the party at least is a countries located in Central or Latin America. Investment Agreements concluded by South American States included in the study were treaties concluded by following countries: Argentina, Brazil, Chile, Colombia, Central America, Ecuador, Guyana, Nicaragua, Paraguay, Peru, Uruguay, and Suriname.

The inclusion of "investor duty" related provisions in South American investment agreements aligns with the current trends in the region. After applying the Calvo Doctrine[42] for over a hundred years, South American States progressively opened to international investment treaties and recourse to arbitration for foreign investors in the 1990s. However, the increasing arbitration claims of the 2000s led to a reassessment of South American States' international investment policies.[43] Consequently, some States decided to show their discontent with the international investment law system.[44] It is notably the case of Bolivia, Ecuador, or Venezuela, who withdrew from the ICSID Convention. Other South American countries chose a less radical approach and are currently reforming their investment treaties to create more balanced agreements.[45] The inclusion of "investor duty" related provisions is part of this movement.

All the agreements signed by Argentina[46] or Colombia[47], contained as well at least one "investor duty" related provision. For instance, Article 8.17 of the Free Trade Agreement between Argentina and Chile states that "The Parties reaffirm their commitment to internationally recognized standards, guidelines and principles of corporate social responsibility".

Brazil showed a similar commitment to include reference to "investor duty" related provisions in its agreements. All its IIAs concluded from 2017 to 2022 included a corporate social responsibility provision. This commitment reflects the country's policy, a policy that goes against the

[42] The Calvo Doctrine is legal doctrine applied by South American States from 1850 to 1950s. The Calvo doctrine can be summarized around three key elements: national treatment of foreigners, exclusive recourse to national jurisdiction for investors and exclusion of diplomatic protection. See Shan, Wenhua. "From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law", in Northwestern Journal of International Law & Business, Volume 27, Issue 3, 2007, pp. 631.

[43] Lusa Bordin. Fernando. "Reasserting Control through Withdrawal from Investment Agreements: What Role for the Law of Treaties?" in Andreas Kulick, Reassertion of Control over the Investment Treaty Regime, Cambridge University Press, 2016, pp. 209-29.

[44] Notably Bolivia, Ecuador or Venezuela, please see Fernando Lusa Bordin, *supra* note 42.

[45] Valentini, Mara. "New Trends in International Investment Law Treaty Practice: where does Latin America stand?", Sequência (Florianópolis), Issue 79 (2018): pp. 1-18.

[46] Namely : the Free Trade Agreement between Argentina and Chile (signed 2 February 2017, entered into force 1 May 2019) ('Argentina-Chile FTA'), the Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investments (signed 1 December 2018, not yet entered into force) ('Argentina-Japan BIT'), and the Agreement between the Argentine Republic and United Arab Emirates for the Promotion and Protection of Investments (signed 16 April 2018, not yet entered into force) ('Argentina-United Arab Emirates BIT').

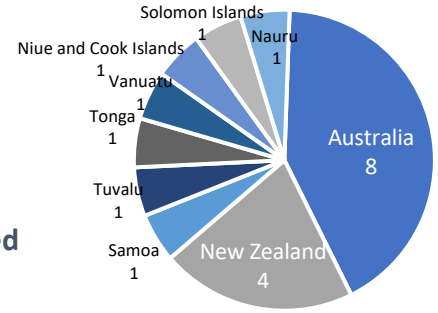
[47] Namely: the Agreement between the Republic of Colombia and the Kingdom of Spain for the Promotion and Protection of Investments (signed 16 September 2021, not yet entered into force) ('Colombia-Spain BIT') and the Bilateral Agreement for the Promotion and Protection of Investments between the Governement of the Republic of Colombia and the Government of the United Arab Emirates (signed 12 November 2021, not yet entered into force) ('Colombia-United Arab Emirates BIT').

mainstream trends existing within International Investment Law[48]. Brazil has a particular type of investment agreement: the Cooperation and Investment Facilitation Agreement (ACFI). This type of investment treaty differs from traditional investment agreements in several ways, including the inclusion of corporate social responsibility provisions and the lack of arbitration provisions.

2.1.2.2 Oceania

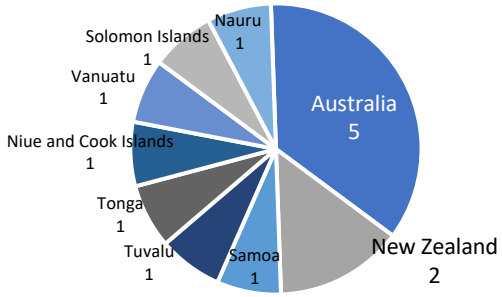
Oceanic States had similar commitments toward "investor duty" related provisions. The sample data included 9 treaties to which at least one of the parties was a State located in Oceania.

Chart 5. Number of IIAs concluded and published by Oceanic countries between 2017 and 2022



When looking at the nine investment instruments signed by countries located in Oceania[49], 77% of them contained a provision referring to some type of investor obligation. Namely, 7 of the 9 treaties signed by oceanic States included an "investor duty" related provision. On average, these treaties contained 4 provisions referring to investors' obligations.

Chart 6. Number of IIAs including at least one "investor duty" related provision per Oceanic country between 2017 and 2022



[48] Ratton Sanchez Badin, Michelle and Fabio Morosini. "Navigating between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs)", in, Fabio Morosini and Michelle Ratton Sanchez Badin, *Reconceptualizing International Investment Law from the Global South*, Cambridge, Cambridge University Press, 2017, pp. 188-217.

[49] Investment agreements concluded by Oceanic States are here defined as IIAs, Free Trade Agreements, Comprehensive Economic Partnership Agreement, or Cooperation and Investment Facilitation Agreement in which one of the party at least is a countries located in Oceania. Investment Agreements concluded by Oceanic States included in the study were treaties concluded by following countries: Australia, Nauru, Niue and Cook Islands, Kiribati, New Zealand, Solomon Islands, Samoa, Tuvalu, Tonga and Vanuatu.

Interestingly, Australia was part of five of the six instruments containing "investor duty" related provisions.[50] This result matches the new country investment policy introduced in the 2010s and its will to renew its old investment agreements network.[51] Until now, Australia has terminated five of its "old-generation" treaties and three of the treaties signed by Australia between 2017 and 2022 replaced older investment agreements[52]. All of them contained "investor duty" related provisions. The two other agreements signed by Australia were plurilateral agreements[53] and contained as well "investor duty" related provisions.

2.1.2.3 North America

Results showed a high level of engagement among North American States[54], namely Canada, Mexico, and the United States of America ('USA'). The sample data included 4 treaties to which at least one of the parties was a State located in North America.

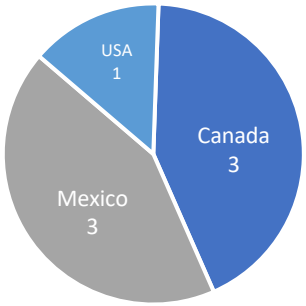


Chart 7. Number of IIAs concluded and published by North American countries between 2017 and 2022

75% of the investment agreements signed by North American States between 2017 and 2022 contained at least one provision referring to investor obligations. For instance, the United

[50] Namely : the Pacific Agreement on Closer Economic Relations Plus (signed 14 June 2017, entered into force 13 December 2012) ('PACER+ Agreement') ; the Peru Australia Free Trade Agreement (signed 12 February 2018, entered into force 11 February 2020) ('Peru-Australia FTA') ; the Indonesia-Australia Comprehensive Economic Partnership Agreement (signed 4 March 2019, entered into force 5 July 2020) ('Indonesia-Australia CEPA') ; the Investment Agreement between the Government of Australia and the Government of Hong Kong Special Administrative Region of the People's Republic of China (signed 6 March 2019, entered into force 17 January 2020) ('Australia-Hong Kong BIT') ; Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018) ('CPTPP').

[51] Trackman, Leon. "Australia's Rejection of Investor–State Arbitration: A Sign of Global Change", in, Leon Trackman and Nicola Ranieri, *Regionalism in International Investment Law*, Oxford, Oxford University Press, 2013, pp. 344-375.

[52] The Peru-Australia FTA, Indonesia-Australia CEPA and the Australia-Hong Kong BIT.

[53] The PACER+ Agreement and the CPTPP.

[54] Investment agreements concluded by North American Countries are here defined as IIAs, Free Trade Agreements, Comprehensive Economic Partnership Agreement, or Cooperation and Investment Facilitation Agreement in which one of the party at least is a countries located in North America. Investment Agreements concluded by North American States included in the study were treaties concluded by following countries: Canada, Mexico and North America.

States-Mexico-Canada Agreement[55], signed between the 3 countries of the region in 2018, contains such provision.

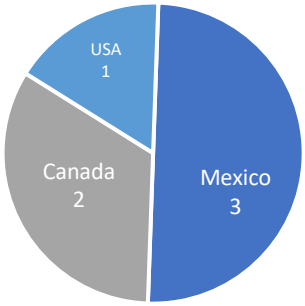


Chart 8. Number of IIAs including at least one "investor duty" related provision per North American country between 2017 and 2022

However, the average number of "investor duty" related provisions per instrument is quite low, with an average of one provision per treaty. Moreover, one can note that while the Canadian Government made the "progressive and inclusive" trade and investment agenda the linchpin of its trade policy[56], the only BIT Canada signed during the 2017-2022 period did not contain any reference to corporate social responsibility or to any type of investor duty.[57]

2.1.2.4 Europe

Agreements signed by European States[58] were among the less doted in reference to investor obligations. The sample data included 43 treaties to which at least one of the parties was located in Europe.

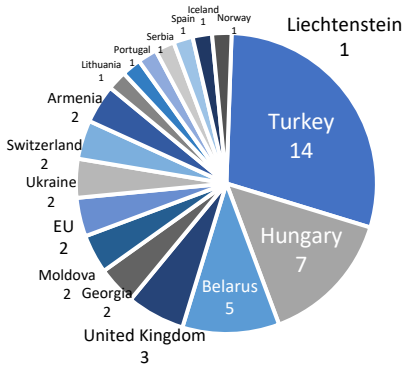


Chart 9. Number of IIAs concluded and published by European countries between 2017 and 2022

[55] Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, entered into force 1 July 2020) ('USMCA').

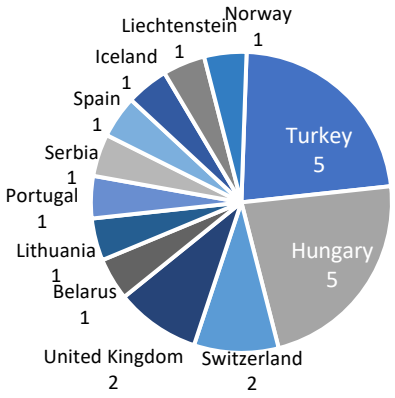
[56] Bernasconi-Osterwalder, Nathalie. "A Progressive Investment Agenda for Canada: Going beyond nice words, on International Institute for Sustainable Development", August 9, 2018. Available at : https://www.iisd.org/articles/policy-analysis/progressive-investment-agenda-canada-going-beyond-nice-words

[57] Agreement between the Government of Canada and the Government of the Republic of Moldova or the Promotion and Protection of Investments (signed 12 June 2016, entered into force 23 August 2019) ('Canada-Moldova BIT').

[58] Investment agreements concluded by European States are here defined as IIAs, Free Trade Agreements, Comprehensive Economic Partnership Agreement, or Cooperation and Investment Facilitation Agreement in which

Only 42% of the 43 agreements signed by European countries effectively included a reference to some "Investor duty" related provision. Overall, there was an average of one "investor duty" related provision within each investment instrument.

Chart 10. Number of IIAs including at least one "investor duty" related provision per European country between 2017 and 2022



There was however a gap between agreements signed by the European Union (EU) or its member States and other European Nations. Overall, 75% of the agreement signed by the EU or its member States contained at least one provision regarding investor duty. This number seems in adequation with the investment policy of the EU and its will to encourage investment that supports sustainable development, respect for human rights, and environmental standards.[59] It appears as well to be in the line with EU's position regarding the International Investment System reform: maintaining the current system while improving some of its features.[60]

For other European States, the results were less salient. Only 36% of the agreements signed by European Countries that are not member of the European Union included at least one reference to investor duty. On average, agreements signed by European countries counted only 1 reference to investor duty.

one of the party at least is a countries located in Europe or is the European Union. Investment Agreements concluded by European States included in the study were treaties concluded by following countries: Armenia, Belarus, Georgia, Hungary, Lithuania, Moldova, Portugal, Serbia, Spain, Switzerland, Turkey, Ukraine, Norway, United Kingdom, as well as treaties concluded by the European Union and its Member States.

[59] European Parliament, EU international investment policy: Looking ahead, February 2022, available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729276/EPRS_BRI(2022)729276_EN.pdf

[60] Roberts, Anthea. " The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds ". EJIL: Talk!, 15 juin 2017, https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-ar-bitration-loyalists-reformists-revolutionaries-and-undecideds/.

2.1.2.5 Africa

African states showed results similar to those of European States in terms of the prevalence of "investor duty" related provisions. The sample data included 26 treaties to which at least one of the parties was located in Africa.

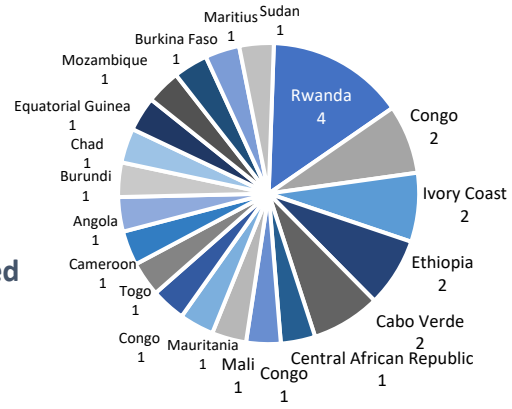


Chart 11. Number of IIAs concluded and published per African country between 2017 and 2022

Overall, 38% of the treaties concluded by African States contained at least one provision related to investor duty. In average, each of these treaties contained two "investor duty" related clause.

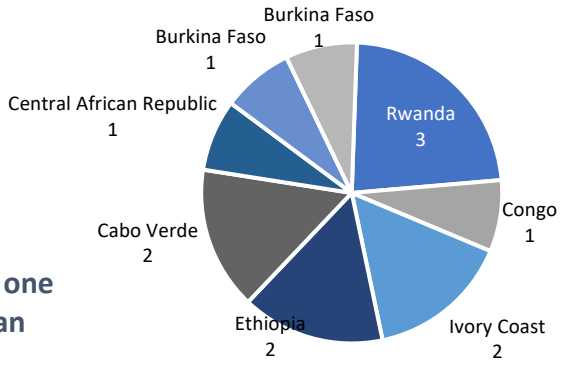


Chart 12. Number of IIAs including at least one "investor duty" related provision per African country between 2017 and 2022

Two treaties, both signed by Rwanda, stand out from the other instruments among all other treaties: the Agreement between the Government of the Democratic Republic of Congo and the Government of the Republic of Rwanda on the Promotion and Protection of Investments[61] and the Agreement between the Government of the Central African Republic and the Government of the Republic of Rwanda on the Promotion and Protection of Investments[62]. These instruments contained respectively 13 and 16 different provisions regarding investor obligations. These provisions referred to different thematic such as corporate responsibility, Human Rights,

[61] Agreement between the Government of the Democratic Republic of Congo and the Government of the Republic of Rwanda on the Promotion and Protection of Investments (Signed 26 June 2021, not yet entered in force) ('Rwanda-Congo BIT').

[62] Agreement between the Government of the Central African Republic and the Government of the Republic of Rwanda on the Promotion and Protection of Investments (Signed 15 October 2019, not yet entered in force) ('Rwanda-Central African Republic BIT').

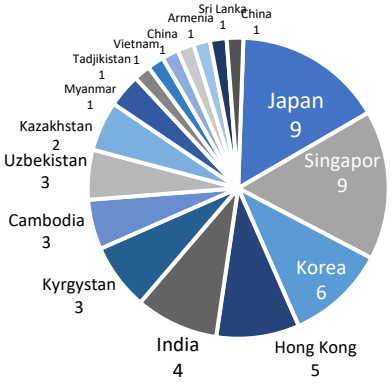
environmental protection, transparency or compliance with domestic law. For instance, the Rwanda-Central African Republic BIT provides:

> "*Investors and their Investments must not offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State […] in order to achieve any favour in relation to a proposed investment or any other rights in relation to an Investment.*"[63]

2.1.2.6 Asia

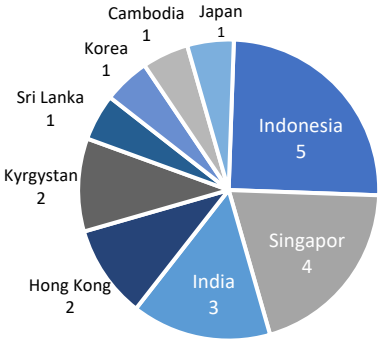
When looking at Asian States results, the prevalence of investor obligation was lower. The sample data included 61 treaties to which at least one of the parties was located in Asia.

Chart 13. Number of IIAs concluded and published per Asian country between 2017 and 2022



While these countries were the most prolific in signing agreements between 2017 to 2022, only 36% of these agreements contained some "investor duty" related provisions. On average, agreements which had investor related provisions had two occurrences of "investor duty" provisions.

Chart 14. Number of IIAs including at least one "investor duty" related provision per Asian country between 2017 and 2022



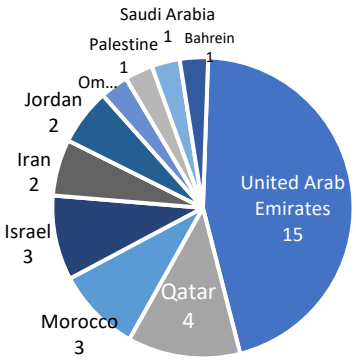
[63] Article 13, Ibid.

Two countries appeared to be above average in the region. On one hand, 85% of the agreements signed by Indonesia contained an "investor duty" related provision. This result coincides with Indonesia's will to modernize its IIAs and include provisions that promote a more equitable balance between the objectives of foreign investors and those of Host States.[64] On the other hand, 75% of India's Investment Agreements included some reference to investor obligation in line with the country Model BIT[65].

2.1.2.7 Middle East and North Africa

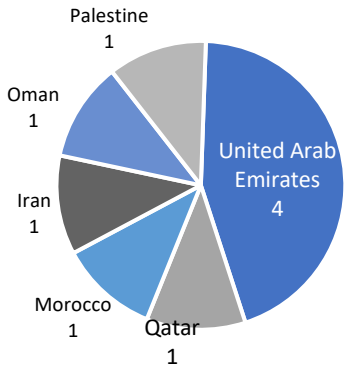
States located in Middle East or in North Africa ('MENA') were the most reluctant to include "investor duty" related provisions within their investment agreements. The sample data included 31 treaties to which at least one of the parties was located in MENA.

Chart 15. Number of IIAs concluded and published per MENA country between 2017 and 2022



Overall, only 21% of the treaties they concluded between 2017 and 2022 included some mention of investor duty. They had an average number of three provisions relating to investor duty in their text. This high occurrence of "investor duty" related provisions can be explained by the fact that most of the treaties that included "investor duty" related provisions were concluded

Chart 16. Number of IIAs including at least one "investor duty" related provision per MENA country between 2017 and 2022



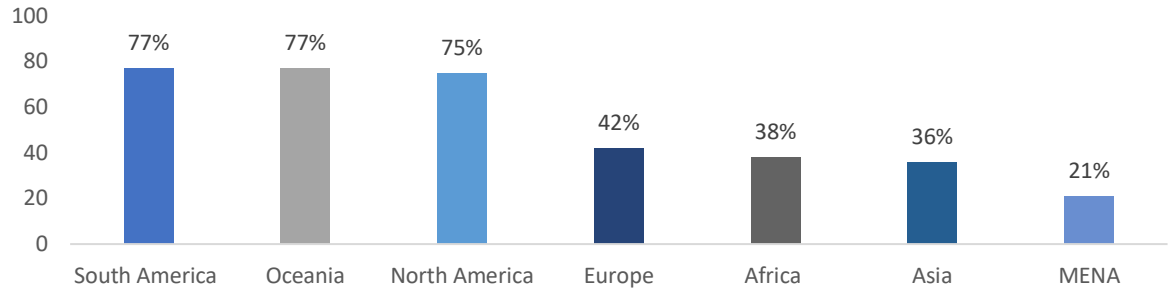
[64] United Nation Commission on International Trade Law - Working Group III: Investor-State Dispute Settlement Reform, Possible reform of Investor-State dispute settlement (ISDS) - Comments by the Government of Indonesia, 9 November 2018. Available at https://documents-dds-ny.un.org/doc/UNDOC/LTD/V18/075/93/PDF/V1807593.pdf?OpenElement

[65] India Model Investment Agreement, 2015.

with South American countries. Therefore, while few treaties incorporated some sort of investor duty, they were quite detailed provisions, in conformity with the South American practice.

To summarize, the quantitative analysis of International Investment Agreements signed between 2017 and 2022 showed that certain regions seem to be more inclined to include provisions related to investor duties in their investment agreements. Notably, South and North American States, as well as Oceanic States had a systemic inclusion of "Investor Duty" related provisions. In contrast, the inclusion of such clause was rarer among African, Asian and MENA States IIAs.

Chart 17. Overall presence of "Investor duty" related provisions per region



However, the impact of "investor duty" related provisions is contingent upon the specific nature of the obligations they encompass. A typological examination of these provisions will therefore be led to determine what specific duties each provision yields (2.2).

2.2 Typology of the Different "Investor Duty" Related Provisions in International Investment Agreements from 2017 to 2022

After analyzing the general trends in "investor duty" related provisions, this section elaborates on the nature of the "investor duty" related provisions. Using a mixed method of quantitative and qualitative analysis, it investigates the wording of these clauses and the implication they have on Investor duties.

Two types of clauses can be distinguished among "investor duty" related provisions[66]: provisions indirectly referring to investor obligation (2) and provisions directly referring to investor obligation (1).

2.2.1 Provisions Indirectly Referring to "Investor Duty" in International Investment Agreements: Corporate Social Responsibility Provisions

Indirect "investor duty" related provisions are clauses that do not explicitly provide for investors' obligations but incorporate reference to Corporate Social Responsibility instruments. As such, these provisions are indirect mechanisms. They regulate the behavior of investors by referring to other instruments which themselves contain "investor duty" provisions without explicitly setting norms by which investors should abide.[67]

Reference to Corporate Social Responsibility instruments is common among the IIAs sample studied (2.2.1.1.). The wording of these clauses may vary (b) but they have a similar impact on investors' accountability under International Law (2.2.1.2.).

2.2.1.1 Overall Presence of Corporate Social Responsibility Provisions

The concept of Corporate Social Responsibility can be traced back to the early history of capitalism in the nineteenth century. Though, it fully emerged during the 1950s in the United States of America. In his 1953 landmark manual "The Social Responsibilities of the Businessman", Bowen described Corporate Social Responsibility as "*the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society."*[68] Corporate social responsibility can be

[66] The distinction between direct and indirect "investor duty" related provisions is based on the work of other authors. Please see: Dubin, *supra* note 24 or Monebhurrun, *supra* note 6.

[67] Dubin, Laurence, *supra* note 24.

[68] Bowen, Howard R. "The Social Responsibilies of the Businessman", University of Iowa Press, 2013.

defined as the practices and rules that corporations, particularly multinational enterprises, follow voluntarily in order limit the negative social and environmental externalities their activities could produce.[69] These norms can regroup rules regarding the respect of Human Rights, labour conditions, environmental norms, or anti-corruption norms.

While CRS norms have traditionally been understood as a purely internal and corporation-driven initiative, a "legalization" of Corporate Social Responsibility emerged in International Law through Corporate Social Responsibility instruments ('CSR Instruments').[70] This "legalization" refers to the progressive standardization of Corporate Social Responsibility through soft-law instruments at international level.

Over the years, various CRS instruments have gained international recognition. In 1976, the Organization for Economic Cooperation and Development ('OECD') published the first international Guidelines on Corporate Social Responsibility: the OCDE Guidelines for Multinational Enterprises ('OECD Guidelines')[71]. In 1999, the United Nations published the Global Compact[72], a set of 9 principles related to human rights, labour rights and environmental standards. Four years later, the United Nations complemented them with the Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.[73] Most recently, the Human Rights Council of the United Nations unanimously endorsed the Guiding Principles for Business and Human rights.[74]

As the results of the quantitative analysis showed, reference to international CSR instruments is now an increasingly prevalent trend in IIAs. On the 103 IIAs from 2017 to 2022 studied, 45 of them included a CSR provision. Overall, CSR provisions were present in 44% of Investment Agreements studied. Moreover, CSR provisions were the most prevalent form of "investor duty" related provisions in the Investment Agreements studied. Of all the treaties examined, 95% included a CSR clause, whereas only 46% included a direct reference to the investor's obligations.

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[69] Dubin, Laurence. "Responsabilité Sociale des Entreprises et droit des investissements, les prémisses d'une rencontre" in, Revue Générale de Droit International Public, Volume 4, 2018.

[70] Peels, Rafael, Elizabeth Echeverria M., Jonas Aissi, and Anselm Schneider. Corporate Social Responsibility in International Trade and Investment Agreements: Implications for states, business and workers, International Labour Organisation, ILO Research Paper No. 12, 2013.

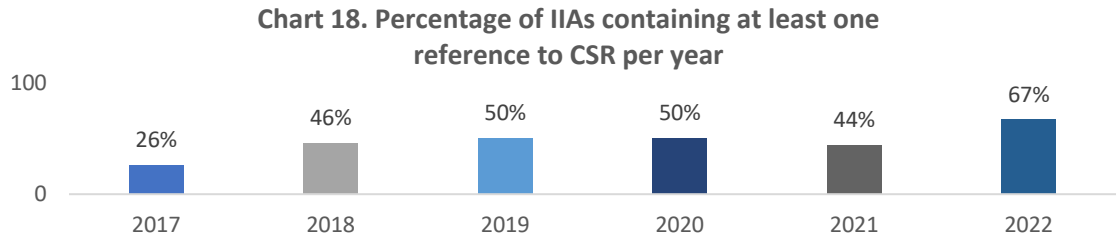
[71] Organisation for Economic Co-operation and Development, Guidelines for Multinational Enterprises, 1974.

[72] United Nations, UN Global Compact, 1999.

[73] United Nation, Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 2003.

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

Results per year showed an overall upward trend in the last five years. In 2017, only a quarter of the agreements analyzed contained a CSR provision. There was then a consistent increase in the presence of CSR provisions between 2017 and 2020, with a steady increase from 26% to 50%.



The variations in Corporate Social Responsibility (CSR) provisions between regions were significant, with some regions having systemic incorporation of CSR provisions while others had non-consistent or almost non-existent implementation. 75% of the agreements concluded by States from North America and Oceania mentioned Corporate Social Responsibility.

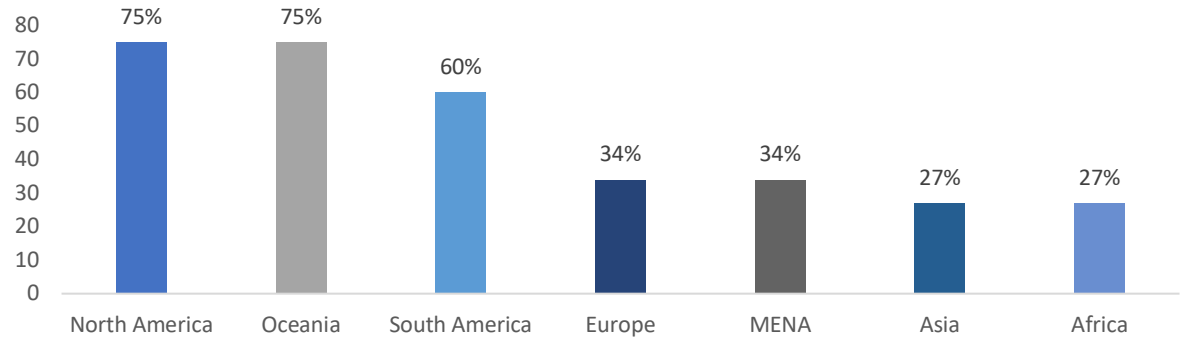
South America came third in terms of proportion with 60% of the agreements concluded by States from the region containing a CSR provision. In agreements concluded by the European States, the rate dropped to 34%. Results showed differences between Member-States of the EU and other European States: EU Member States were almost 3 times more likely to sign investment agreements containing CSR provisions.

Results in the MENA region were even lower: only 27% of the agreements studied contained a CSR provision. No state pattern could be deducted from the results. CSR provision prevalence among African States was similar to the rate observed in the MENA region (27%). This low rate could be explained by a relative lack of awareness of Corporate Social Responsibility among African State's officials as well as a predominant culture of corporate sponsorship rather than CSR in the region[75]. Asian States came last with only 25% of their agreements containing CSR provisions. The results among countries were quite heterogenous, mirroring the variation in CSR culture among Asian States[76].

[75] Barry, Philippe. "Promoting CSR in Africa – A sustainable development opportunity", Private Sector and Development, Issue n°21, June 2015.

[76] Chapple, Wendy and Jeremy Moon, "Corporate Social Responsibility (CSR) in Asia", International Centre for Corporate Social Responsibility, Business & Society, Vol. 44, No. 4, December 2005, pp.415-441.

Chart 19. Percentage of IIAs containing at least one reference to CSR per region



Additionally, the wording of CSR provisions varied greatly among IIAs (2.2.1.2).

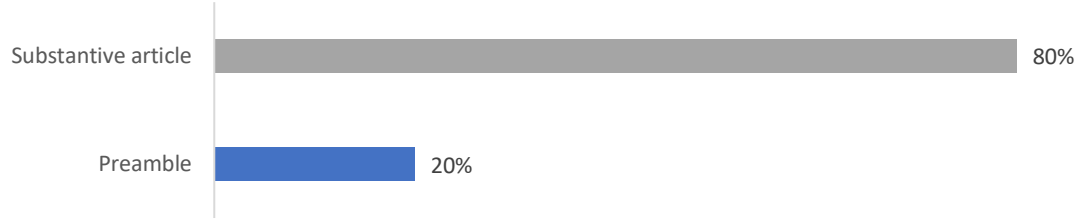
2.2.1.2 Placement and wording of Corporate Social Responsibility provisions

While some of the CRS provisions found in treaties studied were included in the preamble of the IIA (2.2.1.2.1), almost of all these clauses were articles included among the treaties' substantive provisions (2.2.1.2.2).

2.2.1.2.1 Preamble of treaties referring to Corporate Social Responsibility

Some agreements contained a reference to Corporate Social Responsibility within their preamble. Of the 45 agreements that contained a mention of Corporate Social Responsibility, 20% of them had a mention of Corporate Social Responsibility within their preamble.[77]

Chart 20. Placement of CSR provisions in IIAs containing such provision



[77] Namely the Belarus-Hungary BIT, the Cabo Verde – Hungary BIT, the Ethiopia-Qatar BIT, the Hungary-Kyrgystan BIT, the Hungary-Iran BIT, the Hungary-United Arab Emirates BIT, the Indonesia-EFTA CEPA, the Lithuania-Turkey BIT, the Oman-Hungary BIT.

The exact wording of these preamble CRS provisions varies among treaties. Some refer to internationally recognized standards of corporate social responsibility without explicitly citing them, other preambles provide examples of the CRS instruments that should be promoted. For instance, the Agreement between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments[78] states that the States party to the agreement are:

> *"Seeking to ensure that investment is consistent with the protection of health, safety and the environment, […] and internationally recognised standards of corporate social responsibility*."[79]

The general spirit of these clauses is consistent with the softness of Corporate Social Responsibility. States are "*seeking to ensure that investment is consistent with […] corporate social responsibility*"[80], "*desiring to promote […] corporate social responsibilities"*[81]*, or "acknowledging the importance of […] corporate social responsibility*."[82] In this sense, CSR provisions present in the preamble of IIAs only reaffirm the role of the State in promoting corporate social responsibility.[83] They promote investors' duties as depending on domestic law of the Home and the Host States. They do not directly address corporations and do not transform the duties of investors into enforceable legal obligations.

However, preambles have an interpretative value. Pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties, treaties should be interpreted in light of their context, object, and purpose. As the preamble of a treaty shows the intention of the treaty parties, it can be considered as part of the treaty context and a mean to interpret the treaty.[84] Investment tribunals have generally followed such approach.[85] A reference to corporate social responsibility could

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[78] Agreement between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments (signed 14 February 2019, entered in force on the 28 September 2019) ('Belarus-Hungary BIT').

[79] Preamble of the Belarus-Hungary BIT, emphasis added.

[80] Ibid.

[81] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Qatar for the Promotion and Reciprocal Protection of Investments (signed 14 November 2019, not yet in force) ('Ethiopia-Qatar BIT')

[82] Preamble of the Indonesia-EFTA CEPA.

[83] Dubin, Laurence. "Corporate Social Responsibility Clauses in Investment Treaties" Investment Treaty News, December 21, 2018. https://www.iisd.org/itn/en/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/

[84] Dumberry, Patrick, and Gabrielle Dumas-Aubin. "How to Impose Human Rights Obligations on Corporations under Investment Treaties?", in, Karl P. Sauvant, Yearbook on International Investment Law and Policy (2011-2012), Oxford, 2012, p. 569-600.

[85] Example of Arbitral who used preamble to interpret substantive provisions include: Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL Arbitration, Final Award, §551 ; Alemanni v. Argentina, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, §304.

therefore help investment tribunals interpreting substantive provisions of the investment agreement. As such, it promotes investor duties within the investment agreement.

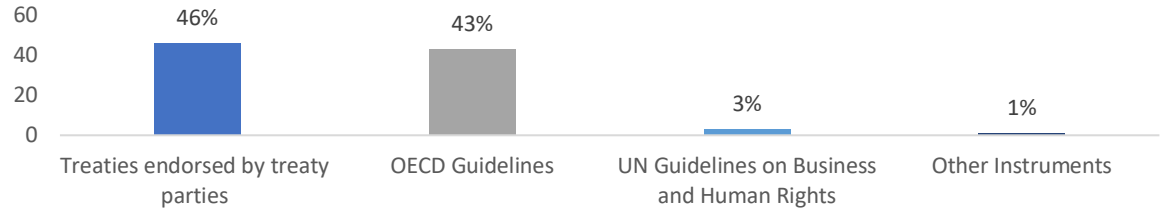
However, it is important to note that the provisions related to "investor duty" included in the preamble of investment agreements may not possess the same level of significance and enforceability as those included within the substantive provisions of the agreement.[86] They can serve to interpret other treaty provisions but cannot, in themselves, set obligations.[87] Their impact on investor duty is therefore theoretically extremely limited compared to substantive provisions (2).

2.2.1.2.2 Substantive provisions referring to Corporate Social Responsibility

Most of the treaties referring to Corporate Social Responsibility contained at least one article within their substantive provisions which referred to corporate social responsibility (80%).

These substantive provisions were quite diverse. Half of them referred to CSR instruments endorsed or supported by Treaty Parties (2.2.1.2.2.1), some to the OECD Guidelines (2.2.1.2.2.2), or the UN Guidelines on Business and Human Rights (2.2.1.2.2.3). Only one treaty referred to another instrument (2.2.1.2.2.4).

Chart 21. International CSR instruments mentionned among IIAs containing CSR provisions



2.2.1.2.2.1 Provision referring to Corporate Social Responsibility norms endorsed or supported by the treaty parties

The most popular type of provision related to Corporate Social Responsibility refers to CSR instruments that the State party to the Treaty is already endorsing or supporting. It was overall present in 46% of the agreements that had a substantive provision referring to Corporate Social Responsibility.

[86] Dumberry and Dumas-Aubin, *supra* note 85.

[87] Ibid.

This clause may refer solely refer to "instruments that are endorsed or recognized by the Party"[88], explicitly list some of the supported instruments[89], or outline the themes that the supported instruments may address[90].

These provisions are therefore, for the most part, extremely vague. As well, they are mostly redacted in soft terms (81% of them). States "*reaffirm the importance of encouraging corporations to apply CRS standards*"[91] or "*may encourage enterprises [..] to apply CSR norms*"[92]. Only three treaties had binding provisions imposing that the contracting party should positively act to encourage enterprises to incorporate CRS standards (19%).[93]

However, the relatively soft set of these norms is bearing on the contracting State Parties and not on investors as they are indirect provisions. Investors do not, namely, have an obligation under the treaty or international law to apply the Guidelines under the treaty but under the domestic law of the State Party in which they operate. Most of these provisions thus act then as a mere repetition of the endorsement that States have already made under International Law and does not bind them to lead positive action to submit corporation operating on their territory to apply CRS standards.

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[88] See Article 17 of the Agreement between the Argentina-Japan BIT that states: "The Contracting Parties reaffirms the importance that each of them encourages enterprises operating within its Area or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Contracting Party."

[89] See Article 14.19 of the Chapter 19 of the Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand (signed 28 February 2022, not yet entered in force) ('UK-New Zealand FTA') which states "The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights."

[90] See Article 11 the Agreement between the Republic of Turkey and the Government of the Republic of Serbia concerning the reciprocal promotion and protection (signed 30 February 2018, not yet entered in force) ('Serbia-Turkey BIT') : Each Contracting Party should encourage legal persons operating within the territory of its State or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labor, the environment, human rights, community relations, and anti-corruption.

[91] See Article 14.19 of the UK-New Zealand FTA.

[92] See Article 13 of the Agreement between the Government of the Hong Special Administrative Region of the People Republic of China and the Government of the Mexican United States for the Promotion and Protection of Investments (signed 23 January 2020, entered into force 16 June 2021) (Hong Kong – Mexico BIT).

[93] See Article 11 of the Serbia-Turkey BIT (cited at note 52) and Article 8.17 of Chapter 8 of the Peru-Australia FTA.

While CSR standards are already voluntarily applied by corporations, these norms are framed in a "double soft-law manner"[94], that is to say that CSR provisions within investment agreements are soft-law norms that refer to other soft-law terms contained in International CSR instruments. States can, if they wish, encourage investors to, if they decide to, apply CSR standards. This formulation typically stands out from the wording of other investment protection standards that strictly bind the States to protect investors and their investments. The sole impact of these standards might be to show the interest of the contracting Parties in CSR standards and potentially influence the interpretation of other provisions found in the IIAs.[95]

2.2.1.2.2.2 Provision referring to the OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises are a set of standards developed to provide "*voluntary principles and standards for responsible business conduct*".[96] This soft law instrument covers a wide range of issues, from competition issues to environmental footprint passing by labor standards, anti-corruption practices or consumer protection.

The OECD Guidelines emerge today as a global consensus of the standards corporate responsibility norms which should be followed by Multinational companies. They notably provide that investors should "*contribute to economic, environmental and social progress with a view to achieving sustainable development*", "*respect the internationally recognised human rights of those affected by their activities*", or "*carry out risk-based due diligence*".

Overall, 17 of the 103 treaties published between 2017 and 2022 made an explicit reference to the OECD Guidelines.[97] Namely, more than a third of treaties that had a provision referring to Corporate Social Responsibility explicitly cited to the OECD Guidelines (43%). Additionally, some treaties made an implicit reference to the OECD Standards. 6 treaties indeed refer to generally "internationally recognized standards of corporate social responsibility" without naming a particular instrument.[98] As the OECD Guidelines are considered as the international reference in terms of Corporate Social Responsibility, one can surely assume that "*internationally recognized standards of corporate social responsibility*" do include these norms.

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[94] Prislan, Vid, and Ruben Zandvliet, "Labor Provisions in International Investment Agreements: Prospects for Sustainable Development.", in, Andrea Bjorklund, *Yearbook of International Investment Law and Policy 2012-2013*, 2014, p. 357-414.

[95] Ibid.

[96] OECD Guidelines for Multinational Enterprises, *supra* note 71.

[97] Namely: Brazil-Ecuador ACFI, Brazil-Morocco ACFI, Brazil-Ethiopia ACFI, Brazil-Guyana ACFI, Brazil-India ACFI, Brazil-Suriname ACFI, Brazil-United Arab Emirates ACFI, and Mercosur Agreement.

[98] See for instance Article 11 of the Agreement between the Republic of Lithuania and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investment (concluded 28 August 2018, not yet entered into force) ('Lithuania-Turkey BIT').

The provisions referring to the OECD Guidelines are mainly framed as an obligation for the States to encourage investors to voluntarily incorporate the OCDE Guidelines". For instance, the Portugal - Ivory Coast BIT[99] states:

> *"Each Party shall encourage investors operating in their territory or subject to their jurisdiction to voluntarily incorporate in their activities internationally recognized corporate social responsibility standards, such as the OECD (Organisation for Economic Co-operation and Development) Guidelines for Multinational Enterprises."*[100]

As such, these provisions merely ensure that the Guidelines are incorporated into domestic law for investors to be bound by the Guidelines indirectly. They are, as the provisions referring to instruments supported by the party, "double soft-law" provisions.[101]

2.2.1.2.2.1 Reference to the United Nations Guidelines on Business and Human Rights

The United Nations Guidelines on Business and Human Rights ('UN Guidelines on Business and Human Rights') appear today as an emerging consensus of the standards of corporate responsibility norms which should be followed by corporations. They were unanimously endorsed by the Human Rights Council in 2011.

The UN Guidelines on Business and Human Rights are a set of principles for States and companies to prevent, address and repair human rights violations of corporations in their operations and supply chains. The instrument aimed at providing "*voluntary principles and standards for responsible business conduct*" and cover a wide range of issues, from competition issues to environmental footprint passing by labour standards or anti-corruption practices. These guidelines encourage multinational companies to respect existing Human Rights instruments and norms. States are still the primary and sole bearers of Human Rights obligations under International Law.

For foreign investors, the duty derived from the UN Guiding Principles on Business and Human Rights is to respect human rights, and "*avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur*"[102]. They

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[99] Agreement between the Portuguese Republic and the Ivory Coast Republic on the Promotion and Protection of Investment (concluded 13 June 2019, not yet entered into force) ('Portugal - Ivory Coast BIT')

[100] Article 17 of the Portugal – Ivory Coast BIT.

[101] Prislan, Vid, and Ruben Zandvliet, *supra* note 95.

[102] Ibid.

should, additionally, set appropriate policies and notably human rights due diligence to "*identify, prevent, mitigate and account for how they address their impacts on human rights*"[103].

Only two of the IIAs analyzed during the study explicitly had an indirect reference to the Guiding Principles on Business and Human Rights.[104] Namely, only 3% of IIAs studied referred to the Guidelines. For instance, the Investment Chapter of the United Kingdom – Australia Free Trade Agreement[105] states:

> *"Each Party reaffirms the importance of encouraging investors operating within its territory or subject to its jurisdiction voluntarily to incorporate into their internal policies those internationally recognized standards […], such as the OECD Guidelines for Multinational Enterprises done at Paris on 21 June 1976 and the United Nations Guiding Principles on Business and Human Rights done at Geneva on 16 June 2011."*[106]

Once again, the provisions referring to the Guiding Principles on Business and Human Rights did not directly impose a duty on the investor but merely affirms that State parties should incorporate the Guiding Principles on Business and Human Rights. They are, as the other indirect norms previously studied, "double soft-norms"[107].

However, as the UN Guiding Principles on Business and Human Rights have been unanimously endorsed by the Human Rights Council, one can assume that the 6 treaties referring to "*internationally recognized standards of corporate social responsibility*" do include an implicit reference to this instrument. When taking this "implicit" reference into account, 9% of the IIAs studied explicitly referred to the UN Guidelines on Business and Human Rights.

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[103] Ibid.

[104] Namely: the UK-Australia FTA and the UK-New Zealand FTA.

[105] Free Trade Agreement between the United Kindgom of Great Britain and Northern Ireland and Australia (signed 17 December 2021, not yet entered into force) ('United Kingdom – Australia FTA').

[106] Ibid, Article 13 [emphasis added].

[107] Prislan, Vid, and Ruben Zandvliet, *supra* note 95.

2.2.1.2.2.1 Reference to Other Instruments

Almost none of the instruments explicitly referred to instruments beyond the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.

One single Instrument referred to the UN Global Compact in its preamble: the Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States of 2018[108] which states that both States acknowledge:

> *"the importance of good corporate governance and corporate social responsibility for sustainable development, and affirming their aim to encourage enterprises to observe internationally recognized guidelines and principles in this respect, such as […] the UN Global Compact"*

The UN Global Compact is an international initiative launched by the United Nations aiming to address corporate social and environmental impact. It provides 9 principles regarding human rights, labour rights and environmental standards. Private corporations can adhere to the Global Compact. Once they are party to the initiative, they should "*support and respect the protection of internationally proclaimed human rights*" as well as to "*make sure their own corporations are not complicit in human rights abuses*".

In the Indonesia-EFTA CPA, the lexical field present within the provision can again be characterized as one of "double-softness", indicating a lack of strict or legally binding language. States are "*affirming their aim to encourage enterprises to respect*"[109] the standards cited but do not pledge that they will do so. This lack of palpable commitment is common to all the CSR provisions within investment agreements (2.2.1.3.).

[108] Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States (signed the 16 December 2018, not yet entered into force) ('Indonesia - EFTA CPA').

[109] Ibid.

2.2.1.3 Investors' accountability under Corporate Social Responsibility provisions

Building on the established typology of indirect "investor duty" provisions, this section uses qualitative analysis to investigate the potential impact that indirect provisions might have on investors' accountability under International Law.

The qualitative study of CSR provisions shows that these clauses are characterized by "double-softness" and fail to impose obligations on investors (2.2.2.1). While no arbitral tribunal has yet had to rule on indirect "investor duty" provisions, the review of arbitral jurisprudence suggests that these clauses would have a very limited impact in case of litigation (2.2.2.2).

2.2.1.3.1 The double-softness of CSR Provisions

The qualitative study of CSR provisions showed that these clauses do not impose any obligation on Investors (2.2.1.3.1) and have very limited effect on State's commitment towards Corporate Social Responsibility (2.2.2.3.2.)

2.2.1.3.1.1 Absence of investor obligations under CSR provisions

Overall, the qualitative study of the indirect "investor duty" provisions in investment treaties showed that this type of provision did not impose any binding obligation on investors. When CSR is mentioned in the preamble of an investment treaty, it can only be used as a means of interpreting other provisions, rather than as a substantive requirement. When CSR is included as a substantive provision, it is typically in the form of a "double soft-law" mechanism, which merely binds States to make their best efforts to encourage companies to follow CSR instruments.

While CSR provisions within investment agreements could have hardened the standards contained in diverse CSR instruments, the current provisions fail to establish a direct link between the actions of the investor and the CSR clause. As such, CSR provisions do not transform any CSR soft-law obligation into "hard law" under the investment treaty or not create any investors' obligation under the investment agreement.[110] They merely underline existing non-binding behavioral standards. Therefore, CSR provisions are of very limited value compared to other protection norms contained in Investment treaties that strictly bind the State, such as articles referring to fair and equitable treatment or expropriation.

The inclusion of CSR provisions serves a primary symbolic purpose in emphasizing the significance of CSR instruments. CSR provisions foster the use of CSR standards following a "top-

[110] Dubin, *supra* note 45.

down approach"[111], leading to a cultural shift towards Corporate Social Responsibility among international investors. It signals that corporations are now expected to abide by CSR standards wherever they operate and mitigate efficiently their negative social and environmental impact in the countries where they perform their activities.[112] Furthermore, the emphasis on Corporate Social Responsibility highlights the expectation that multinationals should not benefit from gaps in human rights and environmental obligations.[113]

2.2.1.3.1.2 Lack of effective States' commitment toward Corporate Social Responsibility implementation

As shown by the qualitative study of CSR provisions' wording, the primary impact of such clause is to reinforce the role of states in implementing corporate social responsibility guidelines. As such, CSR provisions reaffirm the role of the State as the primary duty-bearers regarding human rights and environmental protection obligations under International Law.[114] They are anchored in a Westphalian conception of international law where treaties are concluded between sovereigns. As private individuals, investors should not possess any direct obligations toward other the Host State's population.[115] While international investment law has led to many novel developments in international law, CSR provisions do not exhibit the same level of innovation.

Moreover, considering the wording of most CSR provisions, the State's obligation toward CSR implementation is weak.[116] In most of the IIAs studied, the effective implementation or encouragement of CSR standards is not binding on States Party. The States merely *"reaffirm the importance of encouraging investors operating within its territory or subject to its jurisdiction voluntarily to incorporate into their internal policies those internationally recognized standards[117] or "may encourage enterprises [..] to apply CSR norms*"[118]. However, for CSR provisions to effectively impact corporations operating within a state's jurisdiction, the state must

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[111] Seif, Isabella. "Business and Human Rights in International Investment Law: Empirical Evidence" in Julien Chaisse, Leïla Choukroune, and Sufian Jusoh, Handbook of International Investment Law and Policy, Springer Singapore, 2021, pp. 1759-1782.

[112] Levashova, Yulia. "The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law", in Utrecht Law Review, Volume 14, No 2, 2018, pp. 40-55.

[113] Ibid.

[114] Seif, *supra* note 111.

[115] Ibid.

[116] Ibid.

[117] United Kingdom–Australia FTA, Article 13.

[118] Hong Kong–Mexico BIT, Article 13.

have implemented policies and mechanisms that support the implementation of CSR standards. No such obligations exist within CSR provisions.[119]

Furthermore, even if States lead their best efforts to encourage the respect of CSR standards by investors, domestic law may not be the most effective mean to achieve this goal.[120] While international corporations possess the economic capacity to implement CSR standards, developing countries often lack resources to control their effective implementation. [121] In some cases, countries may even adopt low standards for labor and environmental protection in order to attract foreign investment and create a competitive advantage for businesses operating within their territory.[122] Additionally, some states may be complicit in human rights or environmental violations and have thus little incentive to prosecute investors through domestic legal mechanisms.[123] Hardening soft law obligations contained in CSR instruments and raising their violation as treaty's violation might have been a much more effective, notably in case of dispute (2.2.1.3.2).

2.2.1.3.2 The limited effect of CSR provisions in "rebalancing" investment arbitration outcomes

While no arbitral tribunal has yet to formally rule on the impact of Corporate Social Responsibility (CSR) provisions on investment arbitration, the examination of dispute settlement provisions and previous arbitral decisions allows us to suggest the potential impact outcomes of such clauses in arbitral litigation.

It appears unlikely that non-compliance to a CSR clause could be raised during an arbitration proceeding (2.2.2.3.2.1.). Nevertheless, CSR provisions might be used by Arbitral Tribunal to interpret other provisions (2.2.2.3.2.1).

2.2.1.3.2.1 The difficult invocability of CSR provisions

The typology of CSR provisions showed that indirect reference to "investor duty" was, at best, binding the States party to the investment treaty to make their best efforts to support CSR standards dissemination. For such a clause to "rebalance" investors' rights under the treaty, there

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[119] Levashova, *supra* note 112.

[120] Yannaca-Small, Katia. "Corporate Social Responsibility and the International Investment Law Regime: Not Business as Usual", in University of St. Thomas Law Journal, Volume 17, No 2, 2020, p. 402-221.

[121] Dumberry and Dumas-Aubin, *supra* note 85.

[122] Ibid.

[123] Ibid.

should be a possibility for at least one of the parties to raise the CSR provision during arbitration proceedings.

Pursuant to article 28 of the Vienna Convention of the Law of Treaties[124] which reflects the customary principle of the relative effect of treaties, IIAs only create obligations between treaty parties and per exception, some rights for third parties' beneficiaries. The only actors that could address of non-compliance with CSR provisions within investment agreements are the contracting states through inter-state dispute settlement mechanisms and the investor through international arbitration. However, neither party has a strong incentive to do so.

All the treaties studied included a provision for inter-state dispute settlement. Through this mechanism, State parties can defer their disputes regarding the interpretation or the application of the treaty to a designated tribunal. Most treaties provided that this tribunal should be arbitral. For instance, the Argentina-Japan BIT stated:

> *"Any dispute between the Contracting Parties as to the interpretation and application of this Agreement, not satisfactorily adjusted by diplomacy, shall be referred for decision to an arbitration board at the request of either Contracting Party."*[125]

However, if a State is not effectively implementing its CSR obligations, investors from the other contracting party may benefit from less restrictive legal requirements. As a result, it is highly unlikely that a state would use the inter-state dispute settlement mechanism to raise such a claim.

Additionally, almost all of the treaties including a CSR provision included an investor-State dispute settlement mechanism (ISDS) provision.[126] However, not all ISDS articles included CSR provisions as part of the tribunal's competence.[127]

One treaty excluded explicitly the CSR provision from the ISDS mechanism.[128] In such case, the CSR provision is purely excluded from any claim under ISDS as it would fall outside of the tribunal jurisdiction ratione materiae.

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[124] Article 28, Vienna Convention on the Law of Treaties. United Nations. 1969. "Vienna Convention on the Law of Treaties." Treaty Series 1155 (May): 331.

[125] Article 24, Argentina-Japan BIT.

[126] Only one treaty, the Australia-United Kingdom FTA, did not contain an arbitration provision.

[127] See for instance Article Colombia-Spain BIT.

[128] See Article 19, Colombia-Spain BIT which states: "This Section shall apply to any dispute relating to alleged breaches by a Contracting Party of the obligations contained in this Agreement […], except for article […] 17 (Corporate Social Responsibility)"

Three treaties[129] excluded implicitly the CSR provision from the ISDS by providing a list of provisions that could be raised under the arbitral tribunal's competence. For instance, the Sri Lanka-Singapore Free Trade Agreement provided that the ISDS shall apply to a defined list of articles such as the minimum standard of treatment article, expropriation article or the national treatment article.[130] The CSR provisions did not appear in the said list and where therefore excluded.

Additionally, 80% of the treaties including a CSR provision required that claims raised in front of the arbitral tribunal should be alleged violations that cause a loss or damage to the investor.[131] For instance, the Hong-Kong Mexico BIT provides :

> "*An investor of a Contracting Party may submit to arbitration a claim if […] the investor has incurred loss or damage by reason of, or arising out of, that breach."*

Such limited dispute settlement provision would only allow investors to raise claims in case of arbitration proceedings. As such, the only person which could raise the violation of the CSR provision is the investor if the non-compliance to the CSR clause has caused a loss or damage to the investment. The *Peter A. Allard v. The Government of Barbados* arbitration exemplifies a parallel hypothesis: the investor claimed that the state had failed to respect its international obligation to protect the environment, which in turn had a detrimental effect on the investors' ecotourism facility.[132] A similar claim could be raised on the basis CSR clause if the failure of the Host State to effectively implement CSR measures creates damage for the foreign investor. This could be the case if the deficiency of the State creates a disadvantage to the investor in comparison to domestic or other foreign investors from different countries. Such failure to comply with the CSR provision may constitute a violation of the most-favored nation clause or the national treatment clause outlined in the investment agreement. This scenario may arise when the investor is bound by its home state to adhere to strict CSR measures, while the host state fails to implement similar measures for corporations operating within its territory. Arbitral tribunals appear however hesitant to recognize such far-fetched approach.[133]

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[129] The Sri Lanka-Singapor FTA, the Indonesia-Australia FTA, and the India-Korea FTA.

[130] Sri Lanka-Singapor Free Trade Agreement (signed 23 January 2019, entered into force 1 May 2018) (Sri Lanka-Singapore FTA).

[131] See for instance Article 11 of the Serbia-Turkey BIT or Article 8.17 of Chapter 8 of the Peru-Australia Free Trade Agreement.

[132] Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06.

[133] Award, Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06, 27 June 2016, para. 239-252.

Three treaties[134] included a wide ISDS provision providing that all disputes regarding the investment could be submitted to arbitration. Following this wording, the CSR provisions could be raised by the investor if there is a link between its investment and the States' obligation toward CSR. However, overall, investor claims based on CSR provisions may currently be considered hardly actionable.

2.2.1.3.2.2 The Limited Effect of CSR Provisions In "Rebalancing" Investment Arbitration Outcomes

As CSR provisions' violation could difficulty be raised, the primary purpose of CSR provisions might be interpretative. Indeed, CSR provisions affirm the will of contracting parties to promote CSR standards for investors operating within their jurisdiction.

Pursuant to Article 31 of the Vienna Convention on the Law of Treaties, treaties' interpretation must give full effect to all clauses contained within its text.[135] Thus, arbitrators should not interpret investment treaties in a manner that would render ineffective or superfluous CSR provisions. CSR provisions could thus be utilized by arbitral tribunals to interpret other provisions of the investment agreements, particularly standards relating to the standards of treatment and protection of investors.[136]

Moreover, investment tribunals have, in the past, been favorable to considering investors' behavior when interpreting standards of investors' treatment.[137] For instance, when ruling upon legitimate expectations of investors under the Fair and Equitable Treatment, tribunals have considered that to benefit from such protection, investors should lead thorough due diligence exercise. Such due diligence should prove that they behaved as "reasonable"[138], "careful"[139] or "experimented"[140] investors could have acted. Indeed, in the words of the Tribunal in Antaris v. Czech Republic "*the investment protection regime was never intended to promote and*

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[134] Namely the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the ECOWAS Common Investment Code, and the India-Kyrgystan BIT.

[135] Article 31, *supra* note 109.

[136] Monebhurrun, *supra* note 6.

[137] Cutler, Claire and David Lark. "Incorporating corporate social responsibility within investment treaty law and arbitral practice: Progress or fantasy remedy?", Investment Treaty News, 19 December 2020. Available at: https://www.iisd.org/itn/en/2020/12/19/incorporating-corporate-social-responsibility-within-investment-treaty-law-and-arbitral-practice-progress-or-fantasy-remedy-claire-cutler-david-lark/

[138] Isolux Netherlands, BV c. Royaume d'Espagne, SCC Case N°V2013/153, Award, 17 July 2017, para. 781.

[139] Belenergia S.A. v. Italian Republic, ICSID Case N°ARB/15/40, Sentence, 28 August 2019, para. 584.

[140] Stadtwerke Munchen GmbH et autres c. Royaume d'Espagne, ICSID Case N°ARB/15/1, Award, 2 December 2019, para. 264.

safeguard those who […]"pile in" to take advantage of laws which they must know may be in a state of flux caused essentially by investors of that type."[141]

However, the notion of due diligence is not limited to legitimate expectations. The concept is well-developed in international CSR instruments. For instance, the UN Guiding Principles on Business and Human Rights state that "*In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence.*"[142] Furthermore, it appears that social and environmental due diligence might, in the future, be part of BIT provisions. For example, the Dutch 2019 Model BIT's preamble reaffirms "*the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment.*"[143]

Therefore, if arbitral tribunals wish to give full effect to the interpretative potential of CSR provisions, they could use due diligence to counter-balance investors' protection.[144] CSR standards would serve as a mean to interpret and construe other provisions raised by the investor, such fair and equitable treatment or expropriation clauses.[145]

Nonetheless, such use of CSR provisions in investment arbitration appears might appear weak. While corporations benefit from a "*consolidated legal bulwar*k"[146] to protect their activities from States' interference, CSR provisions do not provide States with similar arms. Due diligence can mitigate Investors' protection, but it could difficulty provide reparations for Human Rights or environmental harms. Additionally, the vagueness of most CSR provisions referring to "internationally recognized standards of corporate social responsibility" might complicate the interpretation task of arbitrators and lead to conflicting solutions among different tribunals seized of the same clause.

Accordingly, one can conclude that indirect obligations under investment agreements are weak, in promoting the accountability of foreign investors under international investment law. They reaffirm obligations that States have already endorsed at the international level and do not

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[141] Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, CPA Case n°2014-01, Award, 2 May 2018, para. 435.

[142] United Nations, Guiding Principle 17, UN Guiding Principles on Business and Human Rights, HR/PUB/11/04, 2011.

[143] Netherlands Model Investment Agreement, 2019.

[144] Levashova, Yulia. "Imposing Conditions on Investor Protection: A Role of Investor's Due Diligence", Kluwer Arbitration Blog, 20 June 2019. Available at : http://arbitrationblog.kluwerarbitration.com/2019/06/20/imposing-conditions-on-investor-protection-a-role-of-investors-due-diligence/

[145] Ibid.

[146] Monebhurrun, *supra* note 6.

harden soft-law obligations contained in CSR instruments for investors. Nonetheless, CSR provisions could have two positive implications for investors' accountability under International Investment Law. Firstly, they promote a culture of Corporate Social Responsibility among investors, fostering respect of human rights, labour rights and environmental standards. Secondly, they can serve as arguments for a more balanced interpretation of protection standards during investment arbitrations.

The contribution of indirect "investor duty" related provisions to corporate accountability under International Investment law is thus quite modest. That's why some Investment Agreements take a more immediate approach (2.2.2).

2.2.2 Provisions directly referring to "Investor Duty" in International Investment Agreements: Investors' obligations

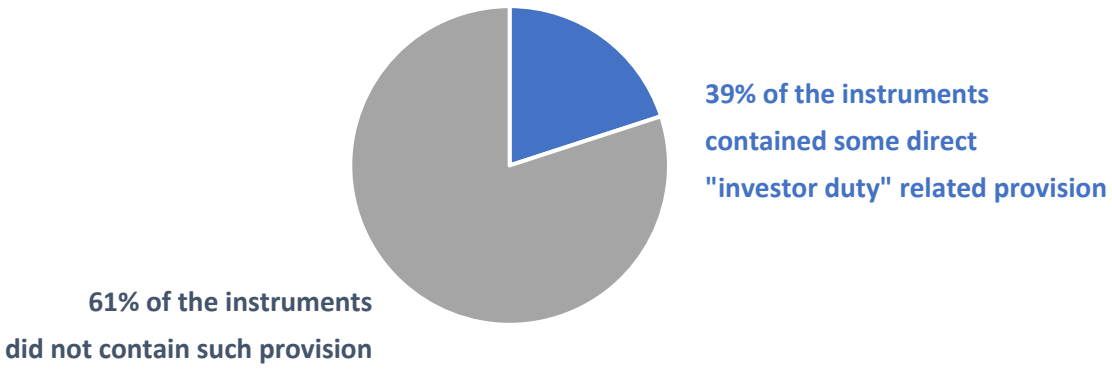
Direct "investor duty" related provisions are clauses that provide for investors' obligations directly within the substantive articles of the investment agreement. As such, they hold investors responsible for ensuring that their investment is made and managed in compliance with defined standards.

Less than half of the treaties studied contained a direct reference to investors' obligations (2.2.2.1). They cover various thematic, notably compliance with domestic law, transparency, respect for Human Rights and the environment, or anti-corruption practices (2.2.2.2). The effectiveness of these provisions on investors' accountability is variable (2.2.2.3).

2.2.2.1 Overall presence of direct reference to "Investor Duty"

Upon examination, 40 of the investment agreements studied directly referred to some type of investor duties. These provisions were present in 39% of investment agreements studied. On all the treaties that contained "investor duty" related provisions, most of them contained a direct mention of investor obligation (85%).

Chart 22. Direct "investor duty" mention among IIAs between 2017 and 2022



An analysis of treaties per region reveals divergent results when compared to the results obtained regarding CSR provisions. Treaties concluded by South American States were most likely to include direct references to investor duty, with 50% of the 30 treaties studied containing such a provision.

The prevalence of direct mention of investor duty then dropped to 33% for States from the MENA, European, and North American regions. Notably, in treaties signed by States from the MENA region, direct mention of investor duty was more common than the indirect mention of investor duty. Overall, there were 10 treaties that directly mentioned investor duty compared to 8 indirect "investor duty" provisions.

Among European States, the number of treaties that contained direct references to investor duty was almost similar to the number of treaties containing indirect "investor duty" related provisions. Overall, 33% of European treaties included direct mention of investor duty. Disparities among EU-member States and non-EU States were somewhat similar in direct and indirect provisions relating to "investor duty", with EU-member States being 3.4 times more likely to sign treaties containing direct "investor duty" provisions.[147]

African treaties containing a reference to direct investor duty made up 31% of the African treaties studied, while those containing Corporate Social Responsibility provisions accounted for 27% of the same sample. African treaties with explicit references to investor duty outnumber those with Corporate Social Responsibility provisions. This prevalence could be explained by the diffusion of the Pan-African Investment Code among African countries' delegations, as the model treaty, which was elaborated by the African Union, contains a specific chapter on investors' obligations.[148]

In contrast, while the North American region had a systemic practice of CSR provisions, only 1 of the 4 treaties concluded by the North American States contained a direct mention of investor duty.[149] Thus, only 25% of North American treaties contained a direct reference to investor duty. Among Asian States, only 21% of the agreements contained a mention of direct investor duty, a number that is similar to the number of treaties containing CSR provisions (24%). The region was therefore the less doted overall in “investor duty” related provisions.

Finally, while the Oceanic Region was one of the regions with the most prevalent practice of CSR provisions, it came last regarding direct mention of investor duty, with none of the treaties concluded by States of the region containing direct mention of investor duty.

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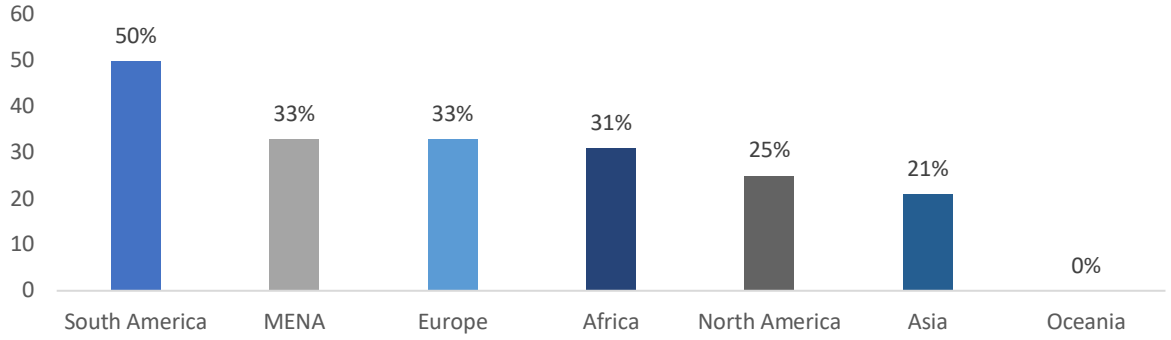
[147] As indicated in the 2.1.2.4 Section, EU members States were 3 times more likely than other European States to include “indirect mention” of investor duty in their investment agreements.

[148] African Union Commission, Economic Affairs Department, Draft Pan-African Investment Code, 2016. Please see: Mbengue, Makane Moïse, Schacherer, Stefanie. “The ‘Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime”, in Journal of World Investment & Trade, 2017, Vol. 18, No. 3, pp. 414-448.

[149] Agreement between the Government of Special Administrative Region of the People Republic of China and the United Mexican States (signed 23 January 2020, entered in force 16 June 2021) (‘Hong Kong-Mexico BIT’).

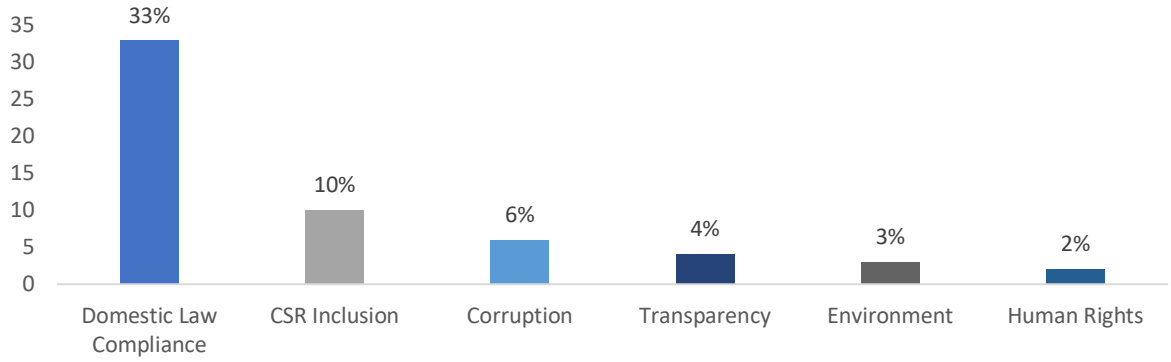
Chart 23. Presence of direct "Investor duty" related provisions in IIAs among regions



2.2.2.2 Wording and subject of direct reference to "investor duty"

Direct mention of investor duty covered diverse subject regarding the responsibility of investors, including the obligation to respect domestic law (2.2.2.2.1), the incorporation of CSR instruments as substantive provisions (2.2.2.2.2), and the inclusion of obligations related to corruption (2.2.2.2.3), transparency (2.2.2.2.4), the environment (2.2.2.2.5), and human rights (2.2.2.2.6).

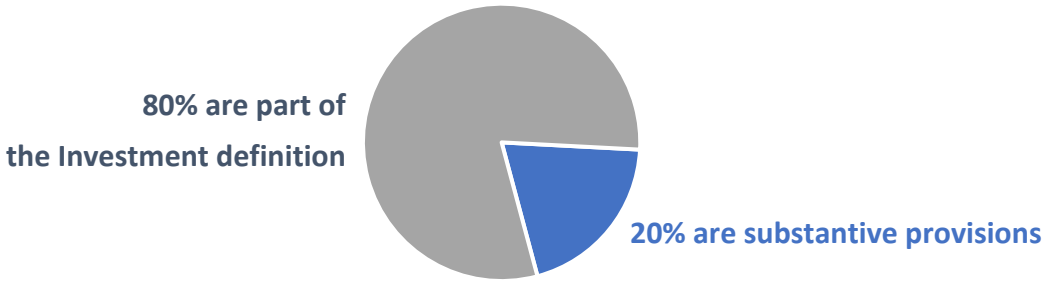
Chart 24. Presence of the difference Direct "Investor duty" related provisions in IIAs



2.2.2.2.1 Domestic law compliance

33% of the treaties studied mentioned explicitly that investors should, to some extent, comply with the law of the Host State. Namely, 35 treaties contained a provision referring to domestic law compliance. 80% of references to domestic law compliance were included in the investment definition while only 20% of the treaty referring to domestic law compliance had a distinct substantive provision requiring investors to comply with domestic law.

Chart 25. Type of domestic law compliance provisions



28 treaties included domestic law compliance in their investment definition. Thus, 24% of the IIAs studied treated domestic law compliance as one of the conditions of application of the treaty. For instance, the Agreement of Reciprocal Promotion and Protection of Investments between the Government of Hungary and the Government of the Islamic Republic of Iran[150] provided that:

> "*The term "investment" refers to every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter*."[151]

However, the vast majority of them only considered that investment should only be "made"[152], "established"[153], or "acquired"[154] in accordance with the laws and regulations of the host States (92%). Namely, only one IIA required investors to comply with domestic law after the initial investment acquisition: the Belarus-India BIT. This agreement provided that investment should be "*constituted, organized, and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made*."[155]

[150] Agreement between the Government of Hungary and the Government of the Islamic Republic of Iran for Reciprocal Promotion and Protection of Investments (signed 4 December 2017, entered in force 23 March 2022) ('Hungary-Iran BIT').

[151] Article 1, Hungary-Iran BIT.

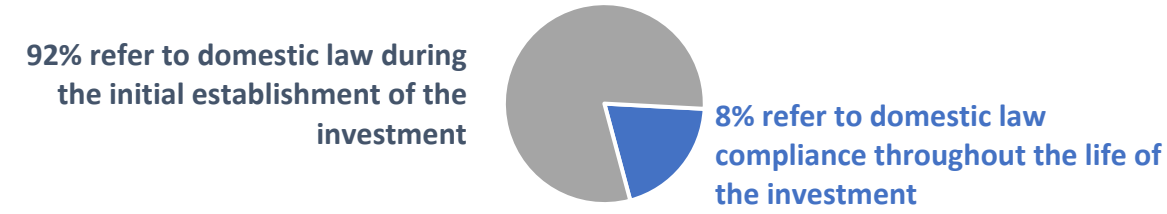
[152] Article 1, Argentina-Japan BIT.

[153] Article 1, Argentina-United Arab Emirates BIT.

[154] Article 1, Lithuania-Turkey BIT.

[155] Article 1 of the Belarus-India BIT.

Chart 26. Investment definition referring to domestic law compliance



Twelve agreements included a provision stating explicitly that investors should comply with the domestic law, in total or in part, of the Host State. Namely, 13% of the agreements studied contained distinct substantial provisions referring to domestic law compliance. Overall, 17 different articles were analysed. All these provisions were drafted in a binding manner.

Eleven of the provisions covered the entire legal framework of the Host State.[156] For instance, the Belarus-India BIT stated:

> "*Investors and their investments shall comply with all laws of a Party concerning the establishment, acquisition, management, operation and disposition of investments".*[157]

However, six provisions[158] were only referring to defined areas of law, such as the "*labor and environment laws and regulations of the host contracting party with respect to management and operation of an investment*"[159] or the "*applicable tax laws and international standards relating to ensuring tax benefits*".[160]

[156] These provisions were present in the Belarus-India BIT, the Brazil-India ICFT, the India-Kyrgystan BIT, the Mercosur Agreement, the Argentina-Chile BIT, the Brazil-Suriname ICFT, the Brazil-UAE ICFT, the Congo-Rwanda BIT, the Ethiopia-Qatar BIT, the PACER Agreement and the Rwanda-Central Africa Republic.

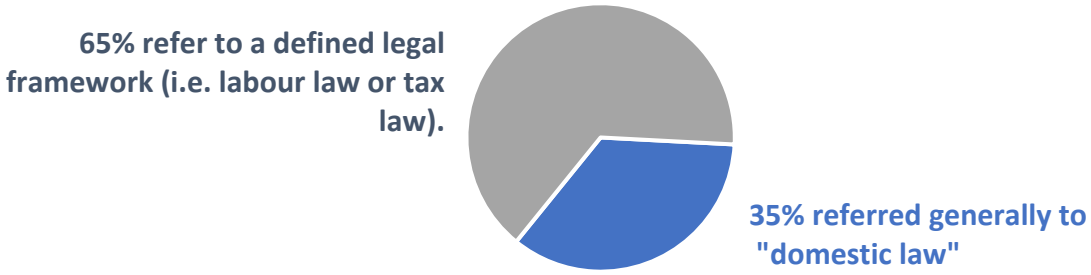
[157] Article 11 of the Belarus-India BIT.

[158] These provisions were included in the Belarus-India BIT, the Brazil-India ICFT, the ECOWAS Investment Code, the India-Kyrgystan BIT, and the Mercosur Agreement.

[159] Article 14 of the Ethiopia-Qatar BIT.

[160] Article 44 of the Economic Community of West African States' Common Investment Code ('ECOWIC').

Chart 27. Substantive provisions referring to domestic law compliance



2.2.2.2.2 Direct incorporation of the Corporate Social Responsibility standards as "investor duty" under the investment treaty

While most treaties refer to the CSR norms as a State Duty, ten of the treaties studied required Investors to endeavor to voluntarily incorporate CSR standards in their practice and internal policy.[161] These provisions were present in 10% of all treaties concluded during the same period and in 20% of the investment agreements containing some "investor duty" related provision.

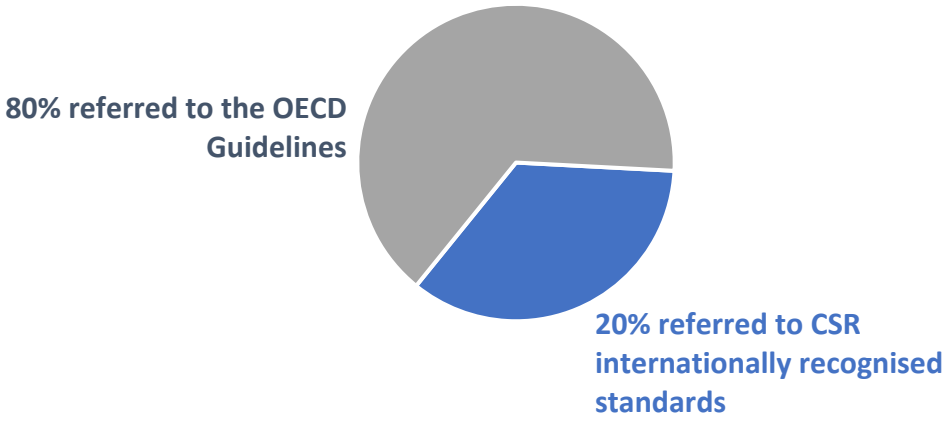
Two treaties referred to CRS instruments and provide that investor "*shall endeavor to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies*"[162].

The eight other treaties reproduced the exact wording of the OECD Guidelines inside of their articles but phrased them as an obligation for the investor. For instance, most of the Brazilian BIT contains an article declaring that "*The investors and their investments shall endeavour to comply with the following voluntary principles and standards for a responsible business conduct*" and then lists the standards set by the OECD Guidelines.

[161] These provisions were included in the Belarus-India BIT, the India-Kyrgyzstan BIT, the Brazil-Morrocca ICFT, the Brazil-Chile ICFT, the Brazil-Ethiopia ICFT, the Brazil-Guyana ICFT, the Brazil-India ICFT, the Brazil-Suirname ICFT, the Brazil-UAE ICFT, and the Mercosur Agreement.

[162] Namely the Belarus-India BIT and the India-Kyrgyzstan BIT.

Chart 28. Direct reference to investors' duty



The direct inclusion of corporate social responsibility (CSR) provisions in investment agreements go further than indirect provisions and their reaffirmation of States' duty to promote CSR instruments. Such provisions hardens, to a certain extent, investors' duties to implement CSR instruments.

However, such provision is not set in pure binding terms. Investors "shall endeavour" to comply with the voluntary principles. They are only bound to undertake their best efforts in complying with the standards set by CSR instruments. As such, the direct incorporation of CSR standards only transforms the voluntary nature of CSR implementation. Though, these provisions preserve in part the voluntary nature of CSR standards. Following the wording of these provisions, investors are required to actively work towards compliance with CSR instruments. They are not required to comply with them.

2.2.2.2.3 Provisions referring to direct obligations of investors regarding corruption

Seven agreements contained an obligation for investors to not participate in corruption.[163] They represented 6% of the investment agreements studied. All these provisions provided the definition of corruption set by the relevant international agreements and then declared that investors should refrain from taking part in such activities.

Provisions referring to the direct obligation of investors regarding corruption provide a clear definition of the act to then elevate corruption as a violation of the treaty. They are set in mandatory terms, declaring that investors "shall not" take part in corruption. Such wording differs from direct incorporation of CSR provisions where investors shall only "endeavour" to comply

[163] Namely the Belarus-India BIT, the Brazil-Chile ICFT, the Brazil-Ethiopia ICFT, the Brazil-Guyana ICFT, the Brazil-Suriname ICFT, the Brazil-UAE ICFT, and the Vietnam-UE FTA.

with CSR standards. As such, direct obligations regarding corruption set corruption as a treaty violation. Whether they explicitly provide for the treaty's protection denial or not, these provisions will most likely bar access to arbitration for investors complicit in corruption.[164]

2.2.2.2.4 Provisions referring to direct obligations of investors regarding transparency

Seven agreements provided an obligation of investors toward transparency.[165] They represented 7% of the treaties studied. Such provisions stated that investors should provide information on their activities when they are requested to do so by their Host State. For instance, the Bilateral Investment Agreement between Kyrgyzstan and India[166] provides:

> "*An investor shall provide such information as the Parties may require concerning the investment in question and the corporate history and practices of the investor, for purposes of decision making in relation to that investment or solely for statistical purposes*."

While transparency provisions in investment usually bind the State, such obligations are directed at the investor. They bind the investor to provide information regarding its investment and the corporate practices if required by the Home State. As such, transparency provisions can foster good governance of foreign investments and prevent corrupt practices.

2.2.2.2.5 Provisions referring to direct obligations of investors regarding the environment

Three treaties referred to investors' obligation toward the environment.[167] They represented 3% of the IIAs studied. The first one is the Congo - Rwanda BIT which contains two articles regarding environmental concerns. Indeed, the BIT states that investors should, pursuant to their Host State legislation, maintain processes of good management of the environment as defined in international instruments regarding environmental protection.[168] Moreover, a second article provides for a responsibility of the investors to protect the environment and to take reasonable measures to repair the harm caused to the environment during its activities.[169]

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[164] Yueming, Yan. "Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance", Journal of International Investment Law, Volume 23, Issue 4, December 2020, pp. 989-1013.

[165] Namely the Belarus-India BIT, the Brazil-India ICFT, the Brazil-Suriname ICFT, the Brazil-UAE ICFT, the Congo-Rwanda BIT, the India-Kyrgyzstan BIT and the Rwanda-Central African Republic BIT.

[166] Bilateral Investment Treaty between the Government of the Kyrgyz Republic and the Government of the Republic of India (Signed 14 June 2016, not yet entered into force) ('Kyrgyzstan-India BIT').

[167] Namely the Rwanda–Central African Republic BIT, the Congo-Rwanda BIT and the ECOWAS Investment Code.

[168] Congo – Rwanda BIT, Article 16.

[169] Congo – Rwanda BIT, Article 15.

The same article appears in the Rwanda–Central African Republic BIT which states that:

> *"Investors and their Investments must protect the environment during their business activity and where their business activity does cause damage to the environment; take reasonable steps to restore it as far as possible, and to ensure fair compensation is paid to those impacted by that environmental damage."*[170]

The last one is the ECOWAS Plurilateral Treaty which provides in its article 27 that investors shall undertake pre-investment and environmental and social impact, and more importantly states that:

> "*Investors doing business in the ECOWAS territory shall […] perform the restoration, using appropriate technologies, for any damage caused to the natural environment and to pay adequate compensation to all affected interested persons."*

These three investment treaties set binding international obligations for investors to respect the environment during their activities. They provide as well for an obligation to repair any damage done to the environment by investors. As such, these provisions invest investors with a horizontal obligation regarding the environment under international law that does not currently exist within CSR instruments.

2.2.2.2.6 Provisions referring to direct obligations of investors regarding human rights

Two treaties incorporated Human Rights obligations for investors: the Central African Republic-Rwanda BIT and the Congo–Rwanda BIT. They represented 2% of the treaties studied. Both adopted a similar provision which provides that investors should support the protection of Human Rights as well as not be complicit in Human Rights violations. Both agreements contained the same provisions stating that:

> *"lnvestors and their Investments must:*
> *(a) Support and respect the protection of internationally proclaimed human rights;*
> *(b) Ensure that they are not complicit in human rights abuses;*
> *(c) Uphold the freedom of association and the effective recognition of the right to collective bargaining;*
> *(d) Eliminate all forms of forced and compulsory labour, including the effective abolition of child labour;*
> *(e) Eliminate discrimination in respect of employment and occupation"*[171]

[170] Rwanda – Central African Republic BIT, Article 16.

[171] Congo - Rwanda BIT Article 13 ; Rwanda – Central African Republic BIT

Two observations can be made regarding these provisions. Firstly, inserting such human rights obligations for investors into IIAs allows to strengthen soft law instruments' obligations, such as the UN Guiding Principles on Business and Human Rights. [172] However, these measures go further than CSR instruments. Investors are not only required to respect human rights but also to ensure the protection of human rights within their enterprises by promoting the right to freedom of association and eliminating forced and compulsory labor. As such, they create an enforceable responsibility for investors regarding human rights.

[172] Choudhury, Barnali. "Investors' Obligation for Human Rights", in ICSID Review - Foreign Investment Law Journal, Vol. 35, Issue 1-2, 2020, pp. 82-104.

2.2.2.3 Impact of direct "investor duty" related provisions on investors' accountability

While "direct investor" duty related provisions create investors' obligation under international law (2.2.2.3.1.), their enforceability is extremely limited (2.2.2.3.2).

2.2.2.3.1 The creation of investors' obligation under international law

As the qualitative study of direct investors' obligations in investment treaties has shown, the main type of direct "investor duty" related provisions observed in IIAs from 2017 to 2022 with compliance to the Host State's legislation. This obligation was present in 33% of the IIAs studied. Other provisions referring to direct investors' obligations were less common. They were present in 2 to 10% of treaties studied and revolved around 4 main topics: corporate social responsibility, corruption, human rights, and the environment.

Direct "investor duty" related provisions were mostly framed in mandatory terms, binding investors to respect the obligations they set forth. As such, the majority of direct "investor duty" related provisions differed from CSR provisions in their wording. They did not only provide for "best-efforts" practices among investors but set obligations by which investor "shall" abide. As encouraging investors to comply with CSR instruments has not proven to be an efficient remedy in rebalancing investment agreements[173], direct "investor duty" related provisions provide for a more radical approach.[174]

Indeed, direct "investor duty" related provisions seek to promote investors' accountability under the international investment law system. They contradict the first objective of International Investment Law: the protection of the investor.[175] They set expectations that investors should act in a diligent manner and respect paramount obligations regarding sustainable development.

Direct investors' obligations have two primary effects. Firstly, direct "investor duty" related obligations ensure respect of the domestic legal standards where many social and environmental corporate obligations are nested.[176] Secondly, they reconcile international investment law with other areas of international law that are often considered as distinct and unrelated legal framework, such as human rights law.[177] While international investment law has often been criticized

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[173] Simons, Penelope. "Corporate Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary Self-Regulation Regimes", in Industrial Relations, Vol. 59, N°1, pp.101-141.

[174] Dumberry and Dumas-Aubin, *supra* note 85.

[175] Dubin, *supra* note 45.

[176] Shao, Xuan. "Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law", in Journal of International Economic Law, Vol. 24, N°1, pp. 157-179.

[177] Dumberry and Dumas-Aubin, *supra* note 85.

for operating in isolation from sustainable development preoccupations, direct "investor duty" related provisions re-embed international investment law within sustainable development.[178]

Thus, the inclusion of direct obligations for investors allows States to promote investors' accountability. These provisions create clear obligations for investors, filling the current gap that exists in international law regarding the responsibilities of international corporations. As such, direct investor duty represents a first step in rebalancing IIAs.[179] They seek to realign international investment law with current societal expectations and reflect a will to link foreign investment and the population of States in which they operate.[180]

The inclusion of direct obligations of investors in Investment treaties might become an unexpected medium to hold international corporations accountable for their violations of domestic law, human rights, environmental or labor standards. However, to have a real impact on investor's accountability, such obligation should be enforceable (2.2.2.3.2.).[181]

2.2.2.3.2 The Limited Enforceability of Direct Investors' Obligation

As none of the IIAs provided for specific mechanisms to enforce direct investors' obligations, the effectivity of direct "investor duty" related provisions depends on the dispute settlement mechanism included in investment agreements.[182] Most of the treaties included recourse to domestic tribunals or institutions (2.2.2.3.2.1), or to international arbitration (2.2.2.3.2.2.).

2.2.2.3.2.1 Investors' accountability in treaties providing recourse to domestic tribunals or institutions

Of the 40 investment treaties that included "investor duty" provisions, 28 of them contained a dispute settlement provision that enabled recourse to domestic tribunals or institutions. Overall, 70% of the agreements that established direct investors' duties also included references to domestic tribunals or institutions within their dispute settlement provisions.

40% of these provisions were dispute settlement mechanisms that provided investors with the choice to submit their disputes with Host States to domestic Courts or international arbitration. For instance, the Ethiopia-Qatar BIT provides:

> *"[T]he investor concerned may submit at his preference the dispute settlement to:*

[178] Choudhury, *supra* note. 168.
[179] Choudhury, *supra* note. 168.
[180] Choudhury, *supra* note. 168.
[181] Dubin, Laurence, *supra* note 42.
[182] Levashova, *supra* note 97.

a) the competent court of the host Contracting Party for decision; or
b) the International Center for the Settlement of Investment disputes […]"[183]

If the investor were to choose the Host State's Courts, the question arises whether the respondent state would be able to raise the investors' obligations contained within the investment agreement.[184] This question can only be answered in concreto, depending on the treaties' provisions and the domestic legal system.[185] However, one can assume that provisions regarding compliance with domestic law would fall within domestic courts' jurisdiction.

An alternative approach found in 11 treaties, representing 30% of those including "investor duty" related provisions, was the creation of National Focal Points to support the implementation of the investment agreements and prevent disputes related to investments. These treaties were all Brazilian agreements that included a provision incorporating OECD Guidelines as investor direct duty under the agreement. For instance, the Agreement on Cooperation and Facilitation of Investment between the Federal Republic of Brazil and the Co-operative Republic of Guyana provides:

"*Each Party shall designate and notify each other an Agency or Authority to act as a National Focal Point, or Ombudsperson, whose main responsibility shall be to support investors from the other Party in its territory and also be charged with the administration and monitoring the implementation of this Agreement."*

Despite the inclusion of National Focal Points in certain investment treaties, none of these agreements mandate that the mission of these entities include monitoring investors' compliance with the OECD Guidelines. This lack of provision for a mechanism to hold investors accountable for implementing these guidelines effectively renders their inclusion in the agreements largely symbolic. Although the incorporation of the OECD Guidelines in these investment treaties may have been motivated by a desire to promote accountability among investors, without legal enforcement mechanisms, the actual impact on investor behavior is likely to be limited.

Finally, one treaty explicitly provided a dispute settlement mechanism regarding investors' accountability in front of domestic tribunals: the Congo-Rwanda BIT. In an article titled "Responsibility of Investors"[186], the BIT provided a comprehensive system regarding investors' accountability and the enforcement of investors' obligations.

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[183] Article 16, Ethiopia-Qatar BIT.

[184] Kaufmann-Kohler, Gabrielle, and Michele Potesta. "*The Interplay Between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework*", in European Yearbook of International Economic Law - Special Issue: Investor State Dispute Settlement and National Courts, Springer, 2020, pp. 31-96.

[185] Ibid.

[186] Article 19 of the Congo-Rwanda BIT.

Firstly, it provides that the Host State, represented by its institutions, can engage in proceedings in front of the domestic courts of the Host State if the investors violated the obligations set by the agreements.[187] Consequently, States may seek compensation for damages incurred as a result of investors' non-compliance with the obligations established within the agreement. Although arbitration proceedings typically require the explicit consent of investors, the inclusion of such provisions would permit a state to initiate a claim without the need for investors' consent. Secondly, the agreement provides that Host State, represented by its institutions, can act in front of the Investors' Home State Courts if the investor has violated its obligations under the investment agreement.[188] This provision is supported by the obligation for Home State to ensure that their legal framework does not forbid or undermine such actions in front of their tribunals.[189]

As such, the Congo-Rwanda BIT constitutes a noteworthy example of a comprehensive system for investor accountability. Through various procedural provisions, it enforces investors' obligations through access to the Home States and Host States' jurisdiction and provides for counterclaims in case of investors' violation. Additionally, this treaty effectively links the concept of investors' responsibility with that of investment arbitration by including provisions within the same article addressing "Responsibility of the Investor" that permit the raising of investors' obligations as counterclaims in the event of arbitral proceedings between the investor and the home state. This serves to strengthen the effectiveness of the legal framework by providing a cohesive and integrated system for addressing investors' accountability.[190] The impact of such a clause should be further examined (2.2.3.2.2.).

2.2.2.3.2.2 Investors' accountability in treaties containing recourse to international arbitration

Except for Brazilian treaties, the 29 other agreements which contained "investor duty" related provisions included an Investor-State Arbitration clause. Namely, 70% of treaties containing a direct "investor duty" related provision provided for arbitration in the event of disputes between an investor and its host state. Thus, arbitration was the most prevalent dispute settlement mechanism among treaties that included direct "investor duty" related provisions.

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[187] As described in section 2.2.2.2, the treaty provides for direct investor obligation regarding domestic law compliance, corruption, transparency, human rights, and the environment.

[188] Article 19(1) of the Congo-Rwanda BIT.

[189] Ibid.

[190] Ibid.

For direct investors' duties to effectively "re-balance" international investment law, they must have a tangible impact on international arbitration. The impact of these provisions can occur at different stages of the arbitral proceedings, depending on the specific wording of the provisions and the dispute settlement clause. Some provisions conditioned the admissibility of the investors' claim, while others impacted the merit phase of the arbitration proceedings.

Firstly, direct "investor duties" related provisions may influence the admissibility of the investors' claim. The notion of admissibility refers to "*whether the claim, as presented, can or should be resolved by an international tribunal, which otherwise has found jurisdiction*"[191]. A claim may be deemed inadmissible when, despite the tribunal's competence, the claim raised by the investor lacks certain essential characteristics to be examined by the investment tribunal. As established by arbitral practice, these essential characteristics may directly stem from direct "investor duty" related provisions regarding compliance with domestic law or anti-corruption measures.

Indeed, many arbitral tribunals have deemed claims inadmissible based on the treaty's mention of investors' obligation to respect the host State's legislation.[192] For instance, arbitral tribunals have in the past interpreted provisions which define investment as "made" in accordance with the laws and regulations of the host States as barring claims from investors which did not comply with the host state legislation when making their initial investment.[193] Though, most tribunals require that the violation of host state law be serious and compromise a significant interest of the host state for a claim to be deemed inadmissible based on domestic law compliance provisions.[194] Tribunals have tended to rule more harshly on allegations of corruption. Claims arising from corrupt investors have consistently been deemed inadmissible as a matter of public policy. [195] Therefore, the inclusion of corruption provisions in investment agreements may encourage the inadmissibility of uncompliant investors' claims and provide arbitral tribunals with a solid legal basis to support their decisions. However, they do not strengthen investors' accountability as they do not create any path for States to raise investors' violations. They only

[191] Veijo Heiskanen, "*Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration"*, Issue 29, No. 1, ICSID Review (2014), pp. 231-246.

[192] Yotova, Rumiana. "Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and Their Property?", Paper No. 43/2018, Legal Studies Research Paper Series, University of Cambridge, June 2018.

[193] See for instance: Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on jurisdiction, para. 84 ; Desert Line Projects LLC v. Republic of Yemen, ICSID Case No. ARB/05/17, Award, para. 104-05 ; or Inceysa Vallisoletana, S.L. v. Republic of El Sal., ICSID Case No. ARB/03/26, Award, para. 335.

[194] As set by the Kim v. Uzbekistan Arbitral Tribunal: Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction, para. 404.

[195] See for instance: World Duty Free v. Kenya, ICSID Case No. Arb/00/7, Award, para. 179.

bar investors' access to arbitration without providing effective remedies to the investors' violation of domestic law or corruptive practices. Their impact is therefore limited.

Secondly, direct "investor duty" related provisions might impact the merit phase of arbitration proceedings. Depending on the language of the dispute resolution clause, respondent states may have the opportunity to raise counterclaims against the investors during the arbitral process. Such counterclaims refer to the submission, by the defendant state, of its own claim against the claimant during an investment arbitration. This can be seen as a tool to hold the investors accountable and enforce their obligations.[196] For instance, such counterclaims can be raised in case of violation of the Host States' domestic law when the treaty contains a substantive provision pertaining to the respect of the domestic legal framework. Similarly, it could be used for substantive provisions referring to investors' obligations regarding corruption, the environment, or human rights.

Despite some inconsistencies among arbitral decisions, two fundamental requirements have been established for an investment tribunal to consider counterclaims: competence and connexity.[197]

On one hand, for counterclaims to be considered by the arbitral tribunal, they must fall within the tribunal's competence. Arbitral tribunals have generally held that limited dispute settlement clauses, which limit claims to defined breaches of IIA's articles or violations causing damages to the investors, would not permit the presentation of counterclaims.[198] In contrast, "unlimited" clauses referring to "any disputes" between the investor and its host state would allow for the raising of counterclaims.[199]
Therefore, for states to raise counterclaims based on the obligations they set for investors, the dispute settlement clause must permit claims to be based on direct "investor duty" related provisions. Overall, more than half of the dispute settlement provisions present in investment agreements that contained some form of direct investors' obligations contained limited dispute settlement provisions. Specifically, out of the 28 agreements containing arbitration provisions, 16 treaties would not allow states to raise arbitration provisions.

In contrast, 11 treaties included an unlimited arbitration provision which would allow states to argue counterclaims as falling within the tribunal's jurisdiction. These represented 36% of the

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[196] Trinel, Paul E. "Counterclaims and legitimacy in investment treaty arbitration", in Arbitration International, Volume 38, Issue 1-2, March-June 2022, Pages 59–81.

[197] Ibid.

[198] See for instance: Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award, para 401.

[199] Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, para. 871-76.

treaties that included some direct "investor duty" related provisions and allowed recourse to arbitration. Additionally, one treaty explicitly provided that states could raise counterclaims: the Congo-Rwanda BIT. As such, direct investor duty-related provisions would allow the submission of states' counterclaims in only 42% of the investment agreements containing such provisions.

On the other hand, one must note that arbitral tribunals require a counterclaim to be connected to the investor's claim in order to be admissible. Arbitral tribunals have had conflicting views on the nature of the connexity.[200] Some tribunals took a factual approach and considered that the counterclaim should be based on the same "factual environment"[201], that is to say the same investment.[202] Other tribunals considered that the counterclaim should be based on the same legal instrument.[203] However, if legal connexity is required, direct investor duty related provisions would have a significant impact on the admissibility of counterclaims. Indeed, legal connexity is impossible to establish without investors' obligation if the investors' claim is based on the BIT.[204] As such, direct investor obligation provides States' counterclaims with the necessary connexity with investors' principal claims and would allow States' to raise such claims.

Thus, a direct reference to investors' obligations within IIAs might contribute to the successful submission of counterclaims during investment arbitral proceedings. While arbitral tribunals have been reluctant to engage with counterclaims[205], the presence of a direct duty on the part of investors presents an opportunity for states to advocate for their admission. Through the presentation of counterclaims, Responding States would have the opportunity to present additional claims which can shed a light on investors' actions. Their presentation is fundamental to the principles of fairness and equality of arms between defendant and claimant.[206]

However, as the quantitative study showed, only 40 treaties of the 103 agreements studied contained some type of investors' duty while 42% of them contain dispute settlement provisions

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[200] Trinel, *supra* note 181.

[201] Ibid.

[202] Saluka v Czech Republic, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, para. 61-76.

[203] Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, para 693-695.

[204] Bubrowski, Helene. "*Balancing IIA Arbitration through the Use of Counterclaims*", in Armand de Mestral and Céline Lévesque, Improving International Investment Agreements, Taylor and Francis 2013, pp. 212-230.

[205] To this day, only 2 arbitral tribunals upheld their jurisdiction on counterclaims raised by Respondent States. See: De Luca, Anna, and Crina Baltag. "Counterclaims in Investment Arbitration: Reflections on UNCITRAL WG III Reform", Kluwer Arbitration Blog, 5 November 2021. http://arbitrationblog.kluwerarbitration.com/2021/11/05/counterclaims-in-investment-arbitration-reflections-on-uncitral-wg-iii-reform/

[206] Trinel, *supra* note 192.

that could allow for counterclaims to be raised by the defendant State. Therefore, only 16% of treaties had enforceable investor duties.

The inclusion of investor duties as substantial provisions within investment agreements is a positive step, but they cannot effectively rebalance the power dynamics of these agreements if they cannot be enforced against investors. To create truly binding and enforceable obligations effective procedural mechanisms must also be in place for States' and local communities to raise their claims against investors and obtain reparation.

3 Conclusion

While there has been increasing attention and critics on the «imbalance» of International Investment Agreements (IIAs), the empirical analysis of treaties concluded in the last 5 years showed that there is a notable trend toward the inclusion of more "investor duty" related provisions among IIAs.

However, such a trend is not absolute. Less than half of the treaties studied IIAs contained provisions related to "investor duties" (46%). As well, noticeable gaps exist among regions in terms of "investor duty" inclusion in IIAs. Notably, states in South and North America, as well as Oceanic states, consistently included such provisions in their agreements. On the other hand, the inclusion of such clauses was less common among IIAs from African, Asian, and MENA states.

Two main types of "investors duty" related provisions could be distinguished among the investment treaties studied: indirect provisions referring to Corporate Social Responsibility and direct reference to investor duty. CSR provisions were the main type of "investor duty" related provision found in investment treaties studied. 44% of the investment agreements contained such provision. CSR provisions were preponderant among treaties signed by North and South American States, as well as Oceanic States. Such provisions referred to International CSR instruments which, themselves did not contain any binding obligations for investors. As such, CSR provisions are characterized by their double softness and do not impose any obligations on investors. Additionally, a review of existing arbitration jurisprudence suggests that such clauses would have a mere interpretative potential in case of litigation. Thus, while indirect "investor duty" provisions show that a trend exists toward the mainstreaming of CSR norms, they do not establish investor accountability. On the contrary, the preeminence of CSR provisions within "Investor duty" related provisions shows that States prefer considering investor duties as a purely voluntary mechanism that should be encouraged by both the Host and the Home States.

Direct "investors duty" was rarer among the investment agreements studied. Only 39% of them included a provision which included, directly within the investment treaty's text, a reference to investor duty. As such, they clash with the primary objective of Investment treaties, that is to say the protection of the investor, and reflect a wider movement towards reform in international investment law.[207] Most direct "investor duty" related provisions referred to domestic law compliance. However, some notable provisions regarding human rights, the environment, or

[207] Dubin, Laurence, *supra* note 24.

corruption could be found in a few treaties. While direct "investor duty" provisions effectively create meaningful investors' obligations, these obligations are mostly non-enforceable. Indeed, only one treaty provided for an effective and comprehensive system for triggering investor's responsibility in front of the Host and Home States Courts. It was the only treaty that truly matched the investor obligation with a procedural tool to enforce them and provide reparation for investors' violations. Other treaties mainly provided for investors' claims to be submitted to arbitration and had limited dispute settlement provisions. As such, direct investor obligation could have a limited impact on arbitral proceedings, notably on the admissibility of the investors' claim or on the admissibility of States' counterclaims.

As states continue to deliberate the appropriate form for the reform of Investor-State Dispute Settlement (ISDS), empirical evidence highlights three main deficiencies regarding "investor duty" related provisions, namely the "double softness" of CSR provisions, the scarcity of direct investors' obligations and the absence of effective procedural mechanisms to enforce investors' accountability. Such empirical evidence should be used to push toward a more systemic reform of ISDS that would effectively address investors' accountability under the international investment regime. The integration of direct investor obligation within investment agreements falls outside of the Working Group III's scope of work. As such, there needs to be a States' will to include such obligation within their investment agreement policy. Nonetheless, some procedural changes are part of the Working Group's mandate. For instance, the possible integration of counterclaims within the ISDS reform has been discussed previously by States during its working sessions.[208] However, no formal decision has yet been made regarding its integration within the final ISDS reform toolbox.[209]

Introducing "investor duty" related provisions is a crucial first step towards building a culture of accountability within international investment law. However, without direct investor obligations and effective procedural means to enforce these obligations, "investor duty" related provisions have limited practical value.[210]

Therefore, three steps should be taken for "investor duty" related provisions to play a role in "rebalancing" investment agreements. Firstly, indirect "investor duty" provisions should harden the CSR norms they refer to: States should be bound to support CSR implementation among their investors and investors should be obliged to make their best efforts to abide by CSR standards. Secondly, investment agreements should include a substantive obligation for investors.

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[208] United Nations Commission on International Trade Law Working Group III, Possible reform of investor-State dispute settlement (ISDS) Draft provisions on procedural reform Note by the Secretariat, A/CN.9/WG.III/WP.219, Forty-third session Vienna, 5–16 September 2022.
[209] Ibid.
[210] Cutler, Claire and David Lark, *supra* note 137.

Such obligations should focus on relevant themes, including the requirement to comply with domestic law throughout the investment lifecycle and the prohibition of engaging in corrupt practices. Finally, IIAs should include effective procedural tools to implement investors' obligations and hold them accountable for their violations. Such procedural tools could provide for access to the Host State or Home State Courts for victims of investors' violation or the acceptance of counterclaims during investment arbitration.[211] Otherwise, even if the inclusion of "investor duty" related provisions becomes systemic, such provisions will be symbolic, lacking any substantive effect.

[211] Jarrett, Matin, Sergio Puig and Steven R. Ratner. "New Options for Investor Accountability in ISDS", EJIL Talk! – Blog of the European Journal of International Law, 22 December 2022. Available at: https://www.ejiltalk.org/new-options-for-investor-accountability-in-isds/

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