2

The Foreign Investor as a Good Citizen: Investor Obligations to do Good

MavludaSattorova

# I. Background

In 2011, workers and local communities in the Zhanaozen district of the Mangistau Region in Kazakhstan expressed their dissatisfaction over being excluded from the economic benefits generated by oil revenues from foreign investor-led projects operating in the region. The local workers demanded amendments to the collective bargaining agreement, calling for a pay increase and equal rights with foreign workers.[[1]](#footnote-1) Buoyed by the tacit support of the host government, the oil companies were uncompromising and claimed that the disputed take-home pay was already above average.[[2]](#footnote-2) The protests subsequently escalated into violent clashes and led to the declaration of a state of emergency.[[3]](#footnote-3) This had a disruptive effect not only on the foreign investment projects in the region but also on the political stability in Kazakhstan as a whole. From Zhanaozen in Kazakhstan, to Las Bambas in Peru[[4]](#footnote-4) and Oromiya in Ethiopia,[[5]](#footnote-5) growing instances of bottom-up resistance to investment projects are increasingly calling into question the adequacy of the international legal framework governing foreign investment, and in particular, the role of international investment agreements in fostering more inclusive and sustainable relationships between investors and host communities.

 Elsewhere, a growing discontent over the socio-economic effects of increasingly globalised trade and investment have been linked to major political upheavals, such as the 2016 UK referendum to leave the EU and the Trump presidency in the US. While defending the case for liberalised trade and free enterprise as a vehicle for generating new growth and opportunities, political leaders are increasingly cognisant of the need to address the concerns of those who feel excluded from the benefits of a globalised international economic order.[[6]](#footnote-6) There is a growing acknowledgment that the rules governing international trade and enterprise should become ‘more attuned to questions of distribution, more sensitive to other regulatory concerns, and more responsive to the broader public’.[[7]](#footnote-7)

 While international trade experts have long acknowledged that international trade redistributes wealth, favouring some over others,[[8]](#footnote-8) such recognition of the unfair distributional effects of investment – and the need for a more inclusive rules framework – is by and large missing in the major discussions of international investment law and its ongoing reform. Although it is relatively uncontested that foreign investment can have a negative impact on the environment and human rights in host states,[[9]](#footnote-9) the idea that investment treaties can be redesigned to maximise the positive contribution that investors can bring to societies, or ‘doing good’ for the communities that host them,[[10]](#footnote-10) is yet to receive sufficient attention in investment treaty scholarship and policy. This chapter shows that, despite the recent reform efforts, most of the new generation treaties do not contain provisions to address the distributive consequences of foreign investment.[[11]](#footnote-11) Neither does the practice of investment arbitration seem prepared to embrace interpretative approaches promoting a more inclusive and sustainable allocation of benefits and responsibilities of investor-led projects.

 The overarching aim of this chapter is to provide novel insights into the hitherto underexplored question of how contemporary international investment law can be redesigned to enable and maximise the positive contribution of foreign investment for the host state. Section II will reveal how traditional narratives constrain regulatory imagination by consistently framing investment protection as a matter of international concern, leaving the wider socio-economic impacts of investment to national policymaking. Contemporary reforms of international investment law continue to downplay the importance of holding corporations responsible towards local communities, with the newly emerging drafting templates featuring limited provisions on investor obligations. Drawing on emerging empirical data and analysis of the recent trends in investment treaty practice and jurisprudence, section III will examine what needs to change to bridge the existing gap in international investment law. It will expose some of the deeply embedded biases favouring state-centric interpretations of international investment law which enable foreign investors to enjoy extensive privileges and escape liabilities. What hinders the emergence of new visions of the relationship between foreign investors and society? Section IV will seek to answer this question by zooming in on the already entrenched ideas that policymakers are sceptical towards innovation in treaty drafting, and that provisions on investor obligations would be staunchly opposed by industry actors. Turning to the post-colonial history of the international economic order and the more recent developments in business practices, section IV will argue that, despite a degree of resistance, profound changes in the legal mechanisms governing conduct of foreign investors remain possible.

# II. Why the Need for Investor Obligations to ‘Do Good’?

Investment treaties have long been conceptualised as a means of creating a level playing field and removing the barriers to cross-border flows of capital, technology and know-how. Foreign investors were portrayed as essentially disadvantaged due to their foreign nationality,[[12]](#footnote-12) and any obligations imposed upon them vis-à-vis host states were presented as inefficiencies and thus barriers to investment flows.[[13]](#footnote-13) Far from acknowledging that liberalised investment creates winners and losers, the traditional narratives of international investment law have depicted investors as ‘victims of opportunistic politicians’ deserving special protection.[[14]](#footnote-14) As a consequence, the investment treaty regime has been functioning on a ‘one-way street’ system, where investors enjoy a wide array of legal privileges, with no counterbalancing obligations to foster and safeguard responsible business conduct. Furthermore, not only do the bulk of investment treaties feature no express provisions to regulate investor behaviour, but they also limit the capacity of host states to ensure that foreign investments are carried out in a manner that benefits the society.[[15]](#footnote-15)

 The asymmetry of the investment treaty regime – its traditional preoccupation with guaranteeing investor rights but not responsibilities – has long been strongly criticised. Equally vociferous and prolific are the existing critiques of the inhibiting effect of investment treaty law on host states’ capacity to regulate in the wider public interest. Yet this focus on the host state’s right to regulate and the asymmetry in rights and obligations between states and investors somewhat obscures another major problem of the contemporary investment treaty regime: a tendency to view investments as a relational process exclusively between two actors – host states and foreign investors – thus rendering other stakeholders, including local communities, effectively invisible.[[16]](#footnote-16) For decades, concerns about the implications of international investment law on host states were met with a promise of more policy space, and greater freedom to regulate.[[17]](#footnote-17) Yet the language of the ‘right to regulate’ conveniently shifts the obligation to take care of community interests from investors onto host states. As Schneiderman and Perrone observe, the focus on the sovereign right to regulate ‘Elides the fundamental question of what sort of regulatory imagination remains possible under regimes fashioned by a dominant political frame that aspires to unfettered economic freedom’.[[18]](#footnote-18)

 Crucially, bringing the need for socially inclusive development under the all-encompassing rubric of the ‘right to regulate’ creates an illusion of choice and a freedom to act on the part of the host state as a bearer of such a right. The contemporary normative justifications of international investment law frame investment protection and promotion as matters of international concern, while leaving the distributional effects of investments to domestic policymaking.[[19]](#footnote-19) Yet these justifications are not borne out by the evidence of how structural forces shape the global economic order. Foreign investors are able to choose where to invest and how to structure their investments across borders. As host states compete over inward foreign investment, there is a danger they will engage in ‘the race to the bottom’ by relaxing, or refraining from regulatory policies on key social and environmental issues.[[20]](#footnote-20) Recent empirical studies reveal instances when, driven by the fear of displeasing the prospective investor and losing their investment, senior government officials desisted from the inclusion of public policy-friendly provisions in laws and investment agreements.[[21]](#footnote-21) Just as is the case in international trade, structural forces empower capital against host governments in international investment governance.[[22]](#footnote-22) To quote Shaffer:

Capital plays governments off each other, threatening to invest abroad if taxes on capital are not reduced and if subsidies are not increased. Capital’s increased leverage threatens to erode governments' ability to fund social protection and educational and employment policies.[[23]](#footnote-23)

The connection between foreign investment and social outcomes is fraught with controversy, and so are the societal costs and benefits of international investment law.

 ‘The new trade establishment mantra is that trade must be made more inclusive.’[[24]](#footnote-24) While international trade experts are increasingly cognisant of the idea that international trade agreements will only be sustainable if states commit to distribute economic gains broadly,[[25]](#footnote-25) such understanding is still largely missing in international investment law. Investment treaty law, even in its most progressive reform templates, has never expressly concerned itself with domestic social policy and has never acknowledged the existence of winners-losers. Historically, international investment law was preoccupied with safeguarding and maximising investors’ wealth, not the well-being of the host state’s native population.[[26]](#footnote-26) Investment treaty protections have empowered capital, whilst also – crucially – delimiting host governments’ capacity to rebalance the relationship between foreign investors and local communities. Social inclusion is yet to become the regime’s new mantra. From its inception, investment law scholarship relegated local communities to a periphery, only as purported beneficiaries that investment treaties were expected to generate and as a source of risk against which investors had to be protected.[[27]](#footnote-27) As Cotula and Perrone observe in their contribution to this volume, ‘some investment lawyers may be unaccustomed to the notion of communities in the context of legal scholarship’, despite the term having been defined in a number of international treaties and covenants.[[28]](#footnote-28)

 Nonetheless, just as is the case with trade, it must be acknowledged that the protection and promotion of investment is not an end in itself, but rather a means to achieve certain ends.[[29]](#footnote-29) To the extent that investment treaties can catalyse cross-border economic activity, increasing the pay of low income workers or increasing the tax revenue that can be used to redistribute wealth, they could help foster more socially inclusive economic development.[[30]](#footnote-30) This chapter will critically evaluate the role of international investment agreements in allocating economic and social benefits of foreign investment in host states. In doing so, this contribution complements Cotula and Perrone’s chapter on local communities and Ranjan’s chapter on recent trends in investment treaty practice. The core idea this chapter seeks to explore is how the contemporary international investment framework can be redesigned to move away from its sole focus on investor protection towards a system that compensates, rewards and empowers a much broader range of stakeholders.

# III. Foreign Investor as a Good Citizen: What Needs to Change in Investment Treaty Law?

## A. Not Enough: Investment Treaty Reform and the (Misplaced) Focus on Negative Effects of Investor Conduct

The importance of addressing the negative impacts of foreign investment on host states has long been acknowledged. It is uncontested that local communities frequently bear the brunt of the negative effects of foreign investment through physical and economic displacement from land and resources; the degradation of the environment or cultural sites; violence, intimidation, the repression of protests, or inappropriate detentions or arrests.[[31]](#footnote-31) Some investors, for instance, have been known to exploit local labour and natural resources, driving out local businesses, and abusing their market power to extract excess profits.[[32]](#footnote-32) As a recent UNCTAD report highlighted, ‘Although (foreign) investment can create positive conditions for improving peoples’ lives, it can also carry the risk of negatively impacting on the environment, peoples’ health and the enjoyment of their human rights’.[[33]](#footnote-33)

 Since the beginning of the new century, the environmental and social responsibilities of corporations have received much attention in the field of business and human rights, culminating in the endorsement by the United Nations in June 2011 of the Guiding Principles on Business and Human Rights (UNGPs)[[34]](#footnote-34) and the launch of such initiatives as the UN Principles for Responsible Investment.[[35]](#footnote-35) Despite the significant shifts in legal and policy discourse, the need to address distributive consequences of foreign investment has yet to receive full attention in international investment law, which is the principal forum for enforcing the rights (and obligations) of foreign investors. Investment treaties should incorporate not only express provisions to prevent detrimental impacts of investment, but also concrete provisions to boost the positive contribution to host states.

 It is almost confounding that at a time when many of the long-criticised aspects of investment treaties and investor-state arbitration are being addressed through systemic treaty reform, the newly emerging treaty models, by and large, still fail to take a strong and effective stance on investor responsibilities towards host states. First, while the bulk of the existing investment treaty stock features no express provisions on investor responsibilities, there is a growing number of treaties which recognise the relevance of investor conduct. Yet this latter category of treaties seeks to address issues arising from investors’ (mis)conduct primarily by (1) stipulating host state obligations to fight bribery and corruption, and (2) safeguarding host state rights to protect the environment, human rights and labour standards. For instance, the CARIFORUM–EU Economic Partnership Agreement[[36]](#footnote-36) requires that the contracting state parties cooperate and take any necessary domestic measures to ensure that investors are forbidden from and held liable for bribing public officials. The onus of this obligation is on contracting states, not investors. Other emerging approaches are exemplified by Article 8.18.3 of the EU–Canada Comprehensive Economic and Trade Agreement (CETA),[[37]](#footnote-37) which forecloses an investor’s access to investor-state arbitration in cases where its investment agreement was tainted by illegality. Yet the significant shortcoming of this drafting solution is that its scope is limited to the initial period of making investment and does not impose a continuous obligation to act in good faith and refrain from unlawful conduct in *operating* the investment. As the empirical studies reveal, national actors are concerned about the broader influence foreign investors may exercise during the life of an investment project.[[38]](#footnote-38) Investment treaties should provide for investor conduct throughout all stages of investment, not only the entry or dispute settlement stages.

 It is also noteworthy that, in contrast with the recently emerged investment treaty templates of developed economies, at least some effort to address investor responsibilities can be found in investment treaties signed between developing states, such as the Slovakia–Iran IIA[[39]](#footnote-39) and the Nigeria–Morocco IIA[[40]](#footnote-40), as well as the SADC agreement.[[41]](#footnote-41) Even if such formulations are at times not specific, but general and somewhat vague or imprecise in nature, as Ranjan observes in his contribution to this volume, the inclusion of these obligations in South-South IIAs is a significant innovation especially in view of the overwhelming silence on investor obligations in the bulk of investment treaties.[[42]](#footnote-42) The majority of (old and new) investment treaties involving major economic powers such as the US, the EU, Japan and China continue to fall short of providing a meaningful mechanism to address the impact of investor conduct on host states and their communities. As one of the world’s largest exporters and importers of foreign direct investment, the EU exercises considerable leverage[[43]](#footnote-43) in the ongoing reform process, but its most recent treaties, as well as negotiating objectives for new mega-regional agreements, do not contain effective and comprehensively framed investor obligations.[[44]](#footnote-44)

 The insufficiency of the emerging approaches to incorporating investor obligations in treaties is not limited to the piecemeal nature of the recent reform efforts. Rather, the principal shortcoming of the emerging solutions is that they are rooted in the idea that ultimately, it is the host states, not the corporate actors, that should bear the primary responsibility for controlling the effects of business activities in host states. This core idea lies beneath much of the traditional investment law policy and scholarship and appears to hold sway over what some present as progressive reform efforts. Another critical flaw of the recent reform efforts is that they do not go far enough and tend to focus primarily on preventing investor misconduct. Investment treaties can and should be redesigned not only to avoid detrimental impacts of investment (‘doing no harm’) but also to maximise the positive contribution that investors can bring to societies (‘doing good’).[[45]](#footnote-45) This is particularly important if the international investment regime is to fulfil its promise to foster sustainable development goals. A stronger and more principled approach to foreign investment’s contribution to socially inclusive development is necessary at a time when the future of international economic law is being questioned in the face of heightened concerns over the ‘denationalization of clusters of political, economic, and social activities that undermine the ability of the sovereign state to control activities on its territory’.[[46]](#footnote-46) The recent backlash against the investment treaty regime is effectively a manifestation of broader concerns about globalisation, in particular its impact on economic dislocation, jobs and livelihoods[[47]](#footnote-47)– something which investment treaties continue to remain silent on.

## B. Misplaced Focus on the State as a Sole Bearer of Obligations towards Host Communities

Just as is the case with investment treaty practice, large swathes of investment arbitration practice and scholarship reveal a deeply embedded predisposition towards the idea that it is the host state, and not foreign investors, that should act as the principal bearer of obligations to foster inclusive and sustainable operation of foreign investment in their territory. Consider, for instance, the emerging investment arbitration jurisprudence on social license to operate as a quasi-legal vehicle designed to ensure more equitable participation of local communities in sharing the benefits of foreign investor-led projects. The case of *Bear Creek Mining v Peru* has amply illustrated the pitfalls of the normative idea whereby social and economic inclusion are seen to be outside the remit of investment treaties. The outcome of the case and reasoning of the tribunal expose two principal vehicles commonly deployed by arbitral tribunals in putting that normative idea into practice: the notion that the host state are solely responsible: (1) to design and put in place comprehensive and effective national laws on inclusive and sustainable operation of investment projects; and (2) to utilise approval mechanisms and other screening processes to foresee, forestall and otherwise address any issues that might arise in the case of investor non-compliance with national and international rules governing the process of sharing the benefits of the project with local communities.

 The dispute in *Bear Creek* concerned a Canadian investor’s operation in Peru, including the Santa Ana silver mining project and the associated legal and contractual rights. From the outset, the investor’s projected mining operations in Santa Ana met with strong opposition among the local population.[[48]](#footnote-48) The project was expected to affect the territory traditionally occupied by the Aymara people, a group of interconnected indigenous communities.[[49]](#footnote-49) These communities voiced significant concerns over the project’s environmental impacts on the natural resources pertaining to their lands, as well as their concerns over the economic benefits of the project. While the numerous indigenous communities covered by the project’s mapped area felt entitled to ‘participate in the benefits of the investor’s activities in the area’, the investor’s social support commitments were not extended to all concerned groups. The investor was made aware of these grievances as early as 2008, and by 2011 the members of the excluded communities manifested their opposition to the project by rejecting it at a public hearing. This was followed by a series of protests demanding the cancellation of the mining concessions.[[50]](#footnote-50) The protests culminated in the blockades of major roads and violent clashes with police, with the Government having to deploy armed forces to contain the social unrest.[[51]](#footnote-51) To resolve the protests, the Government announced a number of measures, including a decree revoking legal instruments constituting the basis of the investor’s mining rights.[[52]](#footnote-52) The investor disputed this decision and claimed that the revocation of its mining rights constituted, among other things, an unlawful expropriation and a breach of fair and equitable treatment.

 The investor relied on the fact that at the time of acquiring its mining rights, ‘there was no provision of Peruvian law providing any standard by which either the State or local communities could grant “social license” with respect to a mining project’.[[53]](#footnote-53) A similar emphasis on the content of national laws is clearly discernible in the majority’s reasoning. Instead of examining whether the investor had sought a meaningful engagement with local communities, the majority merely questioned what actions *were legally required* of the investor in seeking to obtain a social licence, and whether the investor took those actions.[[54]](#footnote-54) The tribunal did not question whether the investor took sufficient steps to obtain social licence from the local communities. Rather, it asked whether the investor ‘took the *appropriate and necessary* steps to engage all of the relevant and likely to be affected local communities’.[[55]](#footnote-55) The tribunal acknowledged that, on the evidence, support for the project came from communities that were receiving some form of benefits such as jobs and direct payments for land use, and that social acceptance was missing among the communities that ‘were either not receiving benefits, were uninformed, or both’.[[56]](#footnote-56) The tribunal expressly recognised that some communities, including those likely to face the project’s negative effects on water and other natural resources, were not brought into the process and offered work or other forms of recompense.[[57]](#footnote-57)

 However, despite acknowledging the investor’s failure to take ‘real and sufficient steps’[[58]](#footnote-58) to engage with all affected local communities, the tribunal denied the existence of a causal link between such failure on the part of the investor and the subsequent social unrest and the revocation of its mining rights.[[59]](#footnote-59) The tribunal instead noted that the investor’s local outreach efforts were approved, supported and endorsed by the host government and that no objections had been raised by the authorities.[[60]](#footnote-60) Thus, the majority’s reasoning implies that it is the responsibility of the host state to provide and enforce the law requiring that investors meaningfully and effectively engage with local communities. Rather than holding the investor to account for not having gone far enough to secure a social licence,[[61]](#footnote-61) the tribunal preferred to find the host state singularly responsible for the consequences of the local community opposition to the project. The majority’s award also places a particular emphasis on the host state’s role by questioning what the state authorities’ responsibilities were in relation to securing a social licence.[[62]](#footnote-62)

 The majority of the tribunal in *Bear Creek* is not alone in endorsing the view that it is the host states, and not the investors, that bear ultimate responsibility for ensuring that investment projects are sustainable and designed so as to maximise their benefits for local community. A recently published treatise on arbitrating mining disputes provides a stark example of contemporary conceptions about investor socio-economic responsibilities. So glaring is the authors’ disavowal of corporate obligations towards local communities that the relevant passage warrants quoting in full:

Mining companies should strive to build realistic expectations on the part of local communities. Owners and operators or mining projects located in underserved areas should be mindful of undertaking social welfare functions that are traditionally better handled by host governments themselves. As the price of minerals and metals continued to rise over the past few years, local stakeholders developed a growing appetite for the benefits associated with mining projects, especially so in emerging economies where national and local governments have struggled to develop the necessary means to meet the needs of their citizens. In some cases, the sustained profits generated by the mining sector have fuelled local expectations (whether at the governmental or communal level) that mining and metal companies undertake community development and social and logistic infrastructure projects. These expectations also encompass preferred hiring and local procurement policies and redirection of governmental mining profits back into the production area.[[63]](#footnote-63)

The authors conclude that ‘The mining company should not be made to shoulder the burden of expansive social programs or infrastructure investments’.[[64]](#footnote-64) A similar dismissal of the need to engage with local communities can be found in an argument which regards social licence as an anathema to the rule of law:

Thinking of social licence to operate as a new quasi-legal requirement on companies, though, carries with it some extremely dangerous underlying assumptions. These become apparent as soon as one thinks again of what it measures: the risks of legal changes adverse to a business's operations and of extra-legal disruptions of business activities. To say that businesses … should be subjected to a shifting social licence to operate is to say that businesses should face risks of legal changes that damage their business interests and of extra-legal disruption of their business activities by those opposed to them. To put it bluntly, any overly enthusiastic embrace of social licence to operate in its mistakenly transformed senses is actually a rejection of the rule of law.[[65]](#footnote-65)

 Investment arbitration case law and large swathes of academic literature on the subject expose a startling absence of binding international norms directing investors to engage with local communities that do not fall under the definition of indigenous people but are nevertheless affected by foreign investment projects, and are excluded from their economic benefits. International investment law is not alone in its state-centric vision of the relationship between foreign investors and local communities. This vision is clearly discernible in other areas of international law governing the relationship between populations and foreign corporations. The idea of empowering peoples, rather than states, was at the heart of calls for the recognition of developing nations’ sovereignty over natural resources in the early years of decolonisation.[[66]](#footnote-66) However, the language of granting the right to permanent sovereignty over resources to the peoples was seen by some states as dangerous and detrimental to the contractual entitlements of foreign companies.[[67]](#footnote-67) It is owing to this opposition from major capital-exporting states that the principal international covenants on human rights acknowledge peoples’ rights over natural resources in a limited form: as a right the exercise of which should not prejudice investment protection.[[68]](#footnote-68)

 Governments are indeed primary bearers of the obligation to protect their populations and to facilitate inclusive and sustainable development. Yet holding national lawmakers singularly responsible for the outcomes enabled by international rules and processes is likely to create problems for both investors and local communities and, in the long run, for the future of the international economic order. As Rodrik has argued, globalisation benefits countries with strong existing institutions while hindering the ability of nations to build institutions to address both regulatory and redistributive issues.[[69]](#footnote-69) Unlike their developed counterparts, developing states frequently lack the economic and institutional capacity to design and implement comprehensive and sophisticated national laws and implementation mechanisms. The fallacy of the prevailing narratives of international investment law is that they often assume parity between developed and developing states. Such narratives disregard the structural factors that impede on the ability of developing states to design and maintain effective laws and institutions to implement them.[[70]](#footnote-70)

 The problem of capacity is further exacerbated by corporations that seek to unduly influence national legislators and policy-makers. The emerging qualitative data suggests that foreign investors wield considerable influence over national lawmaking in host states at times. Empirical case studies[[71]](#footnote-71) supply some stark examples. In one recent study, a cross-section of the interviewed government officials recounted the efforts by foreign corporations to influence the extent and rigour of public health, planning and environmental laws.[[72]](#footnote-72) Echoing other empirical studies published to date, interviews with government officials in developing states reveal that, when designing and implementing national regulations, host governments may find themselves facing pressure from foreign investors.[[73]](#footnote-73) Driven by the fear of displeasing the prospective investor or losing the existing investment, government officials may stall the adoption of national laws that had been designed to achieve important public policy objectives.[[74]](#footnote-74)

 The emphasis on the state as a sole bearer of obligations towards those who are often left behind by globalised trade and investment is also at odds with the growing acknowledgment that investment treaty law, and in particular its investor-state arbitration mechanism, tends to diminish, rather than enhance, the host government’s ability to harness its national laws and regulations to achieve certain economic and public policy objectives. Indeed, one of the major criticisms of the investment treaty regime has been levelled at its proclivity to ‘operate with a default bias against change in the regulatory system of the host state which is fundamentally misaligned with the dynamic and unpredictable policy challenges that states face’.[[75]](#footnote-75) The constraining effect of investment treaties on national legislative and regulatory powers has been widely recognised to the extent that one of the major strands of the ongoing investment treaty reform process – including in developed states – has been to introduce safeguards for host governments to legislate and regulate in the wider public interest. Yet such safeguards alone will not redress the systemic factors that presently delimit the capacity of developing states to legislate and regulate in the interest of their populations. Equally, imposing monetary responsibility on developing states for failing to implement international conventions or otherwise legislate in the interests of local communities is likely to divert the already limited financial resources, while depriving investors of an incentive to maximise the societal benefits of their projects.

## C. Misplaced Faith in Arbitral Tribunals as Principal Agents of Change

The criticisms of the international investment regime’s asymmetry in providing investors with rights but no responsibilities have been dismissed by some authors as conceptually ‘rather simplistic and not always accurate’.[[76]](#footnote-76) This is because the national laws of host states and investor-state contracts can impose obligations on investors. Consequently, it is argued, incorporating enforceable investor obligations into treaty texts is unnecessary, and all that is needed is ‘a change of mindset’ whereby ‘reliance on investment treaties is … preserved but as part of a wider array of sources of foreign investment regulation; and one in which these different sources, including treaties, are interpreted in a more balanced manner’.[[77]](#footnote-77) Such a change of mindset would be reflected, among other things, in greater attention paid by tribunals to whether the investor exercised due diligence in making and operating its investment in the territory of the host state.[[78]](#footnote-78)

 Although these arguments could indeed prove useful in addressing the consequences of investor misconduct in some cases, they are primarily aimed at deterring negative effects of investor behaviour rather than encouraging socially inclusive investments. The overall long-term effectiveness of such solutions is also likely to be limited due to the lack of binding precedent and the already notorious problems of inconsistency in arbitral jurisprudence. Furthermore, even a cursory overview of investment arbitration practices reveals the reluctance of arbitral tribunals to change their mindset and to use the legal mechanisms at their disposal to interpret investment treaties as vehicles that should benefit host states.[[79]](#footnote-79) Indeed, as shown by Ranjan in his contribution to this volume analysing recent investment arbitration jurisprudence, domestic law could be relied upon by tribunals as a gateway to impose obligations on foreign investors but the trend is far from being uniformly endorsed.

 The majority’s award in *Bear Creek* neatly exposes the fallacy of placing faith in the arbitral practice as a vehicle for addressing the investment treaty regime’s social deficits. The issue of contributory fault was central to the majority’s decision to find Peru responsible for social unrest. In its defence, the Government of Peru argued that the social unrest was a direct consequence of the investor’s failure to address grievances of the affected communities,[[80]](#footnote-80) and that its contributory fault should be taken into account by the tribunal in determining the party’s liabilities. Despite having concluded that the investor had indeed failed to effectively engage with all the concerned communities, the tribunal nevertheless (rather inexplicably) concluded that Peru did not discharge its burden of proof in showing that the local communities’ opposition and the ensuing project’s collapse had been caused by the investor’s acts and omissions.[[81]](#footnote-81) As noted by the dissenting arbitrator, this finding was at odds with the totality of evidence heard by the tribunal as well as the majority’s acknowledgement that the investor ‘did not do all it could have done to engage with all the affected communities’.[[82]](#footnote-82) In the view of the dissenting arbitrator, the investor’s contribution to the events culminating in the protests was significant and warranted the reduction of the amount of damages due.[[83]](#footnote-83) The very fact that the dissenting opinion diverged from the award on the issue of contributory fault – as well as the lack of consensus in arbitral jurisprudence in this area –demonstrate that it is too early to place faith in arbitral tribunals as agents of change. Various interpretative possibilities may indeed be available to arbitral panels, but they do not display a sufficient degree of readiness to embrace a new mindset.

 The expectation that investment tribunals would forsake their traditional emphasis on investment protection in favour of promoting responsible investor conduct is also belied by the evidence of arbitrators’ inclination to favour legal texts and formalistic reasoning rather than advocating a more balanced interpretation of the totality of legal norms applicable to the dispute. Again, the majority’s award in *Bear Creek* is a prime example. The majority had the opportunity to harness the ILO Convention insofar as it safeguards the rights of indigenous communities to ‘participate in the use, management and conservation of resources pertaining to their lands’ and to ‘participate in the benefits of such activities’, including ‘fair compensation for any damages which they may sustain as a result’.[[84]](#footnote-84) However, the arbitrators opted for a narrower interpretation of the relevant rules. The tribunal’s reasoning appears to be based on the understanding of social license to operate solely as an instrument to ensure social acceptability of investment, not as a benefit-sharing arrangement. This, in turn, points to the importance of rethinking the objectives of investment treaty law and creating space for norms incentivising investments that bring benefits to local populations.

 The outcomes of other cases involving a disagreement between foreign investors and local communities[[85]](#footnote-85) also strongly suggest that the substantive and procedural norms governing investment arbitration cases do not seem to provide sufficient incentives for arbitral tribunals to embrace a change of mindset, whereby the importance of foreign investment would be seen through its social outcomes and its capacity to promote socially inclusive development in host communities. The usefulness of jurisprudential solutions may also be limited for resource-poor developing states which lack sufficient economic and legal capacity to successfully defend themselves in investor-state arbitration cases. Unlike the cash-strapped developing country governments, large corporations are shown to be more influential in shaping the content and direction of jurisprudential development of international investment norms.[[86]](#footnote-86) Echoing Cotula and Perrone’s argument in chapter three, relying on other legal regimes, both domestic and international, could only partly rebalance these asymmetric relations between investors and local communities. These factors make a strong case for amending investment treaties.

## D. Outdated Emphasis on Investors’ Lack of International Legal Personality

Those who oppose the inclusion of investor obligations in treaties argue that unlike the host state, which can be held to international responsibility, investors cannot be considered to have violated international law. This, it has been argued, stems from the fact that private investors do not have a requisite international legal personality so as to be held responsible for an international wrong.[[87]](#footnote-87) Such arguments yet again demonstrate a structural imbalance at the very core of international investment law and certain strands of investment law scholarship: the investor is seen as deserving and indeed needing an international legal standing so to benefit from extensive treaty privileges and protections vis-à-vis host states, but when the issue of investor responsibilities comes to the fore, investors are seen as (conveniently) lacking an international legal personality.

 This tension is discernible in the reasoning of arbitral tribunals, the majority award in *Bear Creek* again providing a pertinent example. Whilst recognising that ‘social support is fundamental to the successful execution of a mining project’,[[88]](#footnote-88) the investor claimed that ‘a private company cannot “fail to comply” with ILO Convention 169 because it imposes no direct obligations on them’.[[89]](#footnote-89) By contrast, the dissenting opinion stresses that while the state may indeed be in charge of adopting and enforcing domestic laws to ensure outcomes compliant with the ILO Convention, it is not the function of the host government ‘to hold an investor’s hand and deliver “social license” out of those processes’.[[90]](#footnote-90)

 Using the lack of legal personality as a counter-argument against placing investors under an obligation to conduct their business in a socially inclusive manner may indeed be plausible as a matter of formal legal reasoning. However, such arguments are much less convincing from a wider international investment policy perspective. If national laws fail to retool foreign investment as a mechanism for socio-economic inclusion and international investment agreements similarly remain silent, the lacuna in national law and international legal instruments can ultimately lead host populations to take matters into their own hands,[[91]](#footnote-91) whilst also fuelling the ongoing dissatisfaction with and backlash against the rules and structures of the international economic order.

# IV. Countering the Scepticism of the Dominant Frames: Historical Antecedents of Foreign Investor Obligations towards Local Communities

## A. Incremental Changes in Investment Treaty Drafting

Even at the more optimistic end of the spectrum, scholars of international investment law argue that the prospect of express recognition of investor obligations, including obligations towards local communities, in the texts of new and revised investment treaty instruments remains low.[[92]](#footnote-92) It is often argued that the incorporation of sustainable development objectives can redress the existing asymmetry of investment treaties. Yet in those rare instances where an investment treaty features an express reference to sustainable development objectives in its preamble, the usefulness of such provisions is circumscribed by their narrow wording and the often missing acknowledgement of the socio-economic needs of local populations. By way of example, the preamble of the US–Rwanda IIA[[93]](#footnote-93) stipulates that its stated objectives of economic cooperation and the stimulation of private investment should be achieved in a manner consistent with the protection of health, safety and the environment as well as the promotion of internationally recognised labour rights.

 Some investment treaties go further and enshrine states’ commitment not to derogate from the existing commitments to the detriment of local communities. For instance, the labour clause in the US–Uruguay IIA[[94]](#footnote-94) stipulates that

the parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labour laws. Accordingly, each party shall strive to ensure that it does not waive, or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labour rights … as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.[[95]](#footnote-95)

However, preambular references, or even the more substantive non-derogation commitments, do not go far enough to address the existing asymmetry of the investment treaty regime and to operationalise it as a vehicle for socially inclusive business practices. A more fundamental rethinking of investment treaty objectives is warranted.

 A potentially significant source of inspiration for investor obligations towards local communities could be found in the industrial policies of both developed and developing states. Industrial policy can be defined as

any type of intervention or government policy that attempts to improve the business environment or to alter the structure of economic activity towards sectors, technologies or tasks that are expected to offer better prospects for economic growth or societal welfare than would occur in the absence of such intervention.[[96]](#footnote-96)

Such interventions can take the shape of, among others, subsidies, job creation targets and training requirements, all geared towards generating economic growth, creating employment and addressing socio-economic inequality within the state.[[97]](#footnote-97)

 Contemporary industrial policies are redolent of their historical antecedents in the 1960s and 1970s.[[98]](#footnote-98) As a matter of national policy, during the 1970s a number of developing states resorted to the so-called ‘host country operational measures’ – a vast array of measures covering all aspects of investment (from ownership and control, to hiring of personnel, procurement of inputs, and sales conditions).[[99]](#footnote-99) Also known as performance requirements, these measures are usually conceived as a means to influence the location and character of foreign investment and, importantly, to increase the benefits of investment for socio-economic development as well as other for non-economic interests within a host state.[[100]](#footnote-100) While recognising that the contribution of foreign investors was not always fully consistent with the needs of host states, developing country governments harnessed performance requirements to modify the behaviour of foreign investors. For instance, local content requirements were deployed to encourage industrialisation or to expand local employment; technology transfer obligations harnessed to develop and diffuse industrial skills; and local training requirements were utilised to foster the creation of skilled cadre at the managerial and professional levels.[[101]](#footnote-101)

 Although some of these requirements still feature in carefully negotiated investor-state contracts, the bulk of investment treaties in force today either remain silent on the status of such measures or expressly prohibit them, thus effectively preventing host governments from being able to influence and capture some of the positive spillovers that foreign investment can potentially generate in their territories.[[102]](#footnote-102) The gradual move away from performance requirements was prompted by anti-interventionist sentiment underpinning much of the Washington Consensus prescriptions for economic liberalisation and deregulation in the 1980s and 1990s.[[103]](#footnote-103) There is, nonetheless, a growing number of voices which recognise that, unless equipped with such tools, host states – whether developing or developed – may be unable to ensure that foreign investments generate benefits for a broad range of domestic constituents.[[104]](#footnote-104) This understanding is reflected in some of the more recent investment treaty models which carve out some space for performance requirements pertaining to the important strands of contemporary industrial strategies.[[105]](#footnote-105) This is, however, yet another example of investment treaties remaining silent on direct investor obligations and instead merely providing the state with some regulatory space to do so.

 Industrial policies serve as a useful example of how governments, both in developed and developing states, can embrace significant shifts in their relationships with foreign investors. Since governments are increasingly cognisant of the need to harness investment for the benefits of local communities, what is needed is an overhaul of the existing conception of investment treaty objectives. But is such a rethinking of investment treaty objectives possible? What currently hinders the emergence of new visions of the relationship between foreign investors and the local communities is an entrenched belief in (1) the scepticism towards innovations on the part of policymakers, and (2) resistance from the business community. Yet, as this section will argue, evidence from both past regulatory experiments and more recent developments in business practices suggests that, despite a degree of resistance, even fundamental changes in legal mechanisms aimed at retooling investment for social inclusion can be operationalised by governments, business actors and other stakeholders.

## B. Drawing Inspiration from the Past: NIEO and Foreign Investor Obligations

Some argue against substantive investor obligations out of the fear of loading too much onto investment treaties and undermining their original mission to protect and promote foreign investment.[[106]](#footnote-106) Others contend that such a reform of investment treaties might not be possible due to ‘a lack of political will, scepticism towards respective innovations and probably a so far quite successful resistance from the side of the business community’.[[107]](#footnote-107) Yet the idea of harnessing investments for the benefit of host states in a meaningful way is not entirely new. Regulatory, fiscal and contractual experiments of the NIEO period provide the most pertinent examples. It was during the 1960s and 1970s when traditional concession contracts – a primary instrument governing the relationship between foreign corporations and host governments in the natural resources sector – were profoundly transformed. This transformation was prompted by dissatisfaction on the part of host governments with the terms and structure of early concession contracts through which major US and European corporations had monopolised the exploration and development of natural resources in the countries of the Global South in the first half of the twentieth century.[[108]](#footnote-108) The old concession contracts granted investors extensive privileges: a large concession area; long duration without the possibility of revision; exclusive rights of foreign concession-holder to manage and control all aspects of exploration and development; their right to extracted resources; exemption from all taxes and duties; and modest royalties payable to the government.[[109]](#footnote-109) In the words of Asante, under the old concession contracts, ‘what purported to be a royalty … was a provision for the payment of a minute percentage, say 3 to 5 percent of the declared profits of the companies’.[[110]](#footnote-110) The inequities of then-existing patterns of investor-state relations were so obvious that in a seldom historical moment of unanimity, scholars from both developed and developing world converged in acknowledging the impropriety of legal arrangements that had long supported the old concession regimes.[[111]](#footnote-111)

 Although foreign companies had exercised inordinate control over national economies across the Global South (the concessions contracts elevated companies to ‘a virtual assumption of sovereignty by transnational corporations over the host state’s natural resources’[[112]](#footnote-112)), significant strides were made by developing states in their efforts to eliminate the legal, fiscal and financial vestiges of the old economic order. To achieve a meaningful restructuring of relationships between corporations and developing states, a number of governments turned to renegotiating their relationships with foreign investors by altering or replacing the original concession agreements with new legal arrangements featuring considerably different profit sharing, new royalties and taxes and greater participation by the state in management and control of the corporations’ operations.[[113]](#footnote-113) Increasingly, revised investor-state contracts came to feature obligations by a concession-holder to train and employ local personnel with a view to benefit the local society and the economy.[[114]](#footnote-114) Other countries went even further and replaced the concession model with production-sharing agreements – an entirely new legal instrument defining the relationship between the government and foreign investors. Not only did production-sharing agreements recentre the state as the owner of natural resources, both in situ and at any phase of exploration and development, but they also attached strong importance to fiscal benefits and to the training and employment of local personnel.[[115]](#footnote-115) In a similar vein, joint ventures and service contracts proliferated from the Middle East to Latin America, heralding a new form of relationship between foreign investors and host states. Unlike the old concession contracts, these arrangements did not confer title to resources on the foreign company; rather, the latter’s role was changed to that of a contractor or a business partner performing certain tasks for a fee or consideration in kind.[[116]](#footnote-116)

 The profound shift from a regime where foreign companies exercised de facto control over the territory and resources of entire states, to a framework subjecting foreign companies to fiscal, technological and economic obligations, all geared towards the economic development of host states, alludes to the possibility of a similar transformation of the prevailing international rules governing foreign investor obligations. Of course, the historical experiments of the NIEO period have not been uniformly successful, and some legal and political developments heralded during the time failed to achieve their full potential. As captured by a contemporary commentator, ‘the formidable difficulties encountered in restructuring the relations between host governments and transnational corporations with respect to the critical areas of control and financial benefits have sometimes engendered despair bordering on cynicism’. [[117]](#footnote-117) Yet, ‘the recognition of these sober realities in no way detracts from the value of a continuing and sustained process of revising the legal arrangements with transnational corporations in order to redress the imbalance in the old pattern of relations’.[[118]](#footnote-118)

 Most importantly, resistance from the business community and policymakers in capital-exporting states did not deter the lasting changes the NIEO precipitated in the legal frameworks governing the relationships between foreign investors, states and host states. A wave of renegotiations of agreements between host governments and foreign corporations did not result in an exodus of the latter from resource-rich developing countries.[[119]](#footnote-119) Rather, foreign investors adapted to their new historical realities. It must be admitted that this adaption process also spawned the network of international investment instruments that effectively recaptured the developing states’ ability to renegotiate and recalibrate their contractual relations with foreign investors. Besides, contractual arrangements ushered in during the decolonisation period did not typically provide a legal basis for investor responsibility that individuals and local communities could rely on.[[120]](#footnote-120) Notwithstanding, the NIEO-era experiments demonstrate both the possibility of transformation and the eventual acceptance by business actors of their changed realities.

## C. Echoes of the NIEO Reforms in Contemporary Business Practices

The argument that the introduction of positive investor obligations is a pipe dream and would be impossible due to resistance from the business community is also belied by evidence of the evolving patterns of foreign investor engagement with local communities. Those who oppose the inclusion of express investor obligations in treaty texts ignore the fact that the exclusion of local communities from the benefits of foreign investor-led projects tend to foment not only a dissatisfaction with the regime at a global level but also a resentment against concrete investment projects on the ground. This, in turn, can destabilise and undermine the commercial success of investment projects. Investors may expect the host states to take care of distributive issues and to address socio-economic concerns on the ground, but when the states fail to do so successfully, it is the foreign investor who is exposed to instability, loss of profits, and potentially the need to leave the project as it becomes no longer feasible in the face of local backlash and opposition.[[121]](#footnote-121) Traditional investment treaties contain protections allowing investors to recoup losses when their projects fail due to local community opposition. However, investment treaties do not facilitate the creation of peaceful and stable legal and political environment for the projects to succeed in the long-term.

 There is also growing recognition among some in the business community that a successful investment project necessitates the inclusion of local communities in sharing the benefits of the investment. A failure to obtain such license often results in a subsequent frustration of the project due to local community opposition. In many cases investors may frame local community opposition as yet another form of rent-seeking.[[122]](#footnote-122) However, according to emerging case studies, there is growing awareness in the business sector that the local community should be regarded as an actor in its own right. When host governments fail to regulate investment so as to harness its benefits for the society, local communities tend to take matters into their own hands. Foreign investors recognise the need to secure not only a political licence, but also a social licence – even in cases where no express provisions to this effect are contained in legal instruments governing such investments.[[123]](#footnote-123)

 To obtain a social licence to operate, foreign investors have increasingly been deploying contractual arrangements in their negotiations with local communities. For example, it has been reported that there is ‘strong current interest in Impact Benefit Agreements or Community Development Agreements between mining companies and communities’.[[124]](#footnote-124) The idea of benefit-sharing underpinning these agreements is not exclusive to the natural resources sector and is gaining momentum as an important way to maximise the benefits of foreign investment projects for the local communities. Importantly, benefit-sharing arrangements are increasingly negotiated directly between communities and foreign investors.[[125]](#footnote-125) Such agreements are not without considerable flaws – including the asymmetry of bargaining powers between corporations and local communities,[[126]](#footnote-126) and the fact that the concept of benefit-sharing is still understood narrowly as a distribution of financial benefits.[[127]](#footnote-127) However, an uptake in the use of arrangements of this kind exemplifies the burgeoning acceptance by industry actors of the need to engage with the communities that host them. Just like the companies which had to concede to renegotiated terms in the NIEO-inspired revision of agreements in the natural resources sector, contemporary foreign investors are increasingly cognisant of the need to exercise socio-cultural due diligence[[128]](#footnote-128) and undertake specific commitments on sharing the benefits of their projects with the local communities.

# V. Conclusion

Societal opposition to the investment law regime does not stem from hostility to the concept of foreign investment or to the objective of establishing international rules to govern foreign investment per se, but rather from concerns about the non-participatory manner in which the global economy’s rules are being written and about restrictions on governments’ ability to address the pernicious effects of globalization.[[129]](#footnote-129)

These concerns cannot be addressed by merely reforming procedural norms and safeguarding the host state’s right to regulate. It is vital that a diverse range of stakeholders within host states, especially those left behind by the processes of globalisation, are not only protected against the adverse impacts of foreign investment but are also included in sharing the benefits of foreign investor-led projects. To this end, international investment agreements should start incorporating concrete investor obligations to foster inclusive and sustainable development. Failing to do so is likely to undermine the long-term prospects of individual investment projects, create potential for conflict and instability, and continue to fuel concerns over the already eroding legitimacy of the international investment regime.

 Despite significant advances of the recent reform efforts in acknowledging various asymmetries underpinning the investment treaty regime, the scope and promise of such reforms is open to question. There is still a considerable degree of reluctance to acknowledge social deficits of the existing investment treaty framework and in particular, its failure to expressly address the importance of fostering a socially inclusive development in host states. The investment establishment is yet to acknowledge that investments must be made more inclusive. Fundamentally, however, as the distributive implications of corporate business activities are increasingly raising concerns for stakeholders in both developed and developing states, a profound rethinking of investment treaty objectives is warranted in order to address the existing asymmetries and social deficits. As this chapter has demonstrated, investors can and should be placed under an obligation to do good for the societies that host them. Historical precedents of investor obligations can be found in the regulatory, fiscal and contractual arrangements of the NIEO era as well as national industrial policies proliferating across developed and developing economies. While outcomes of the ongoing efforts to rein in corporate actors so far may engender scepticism, cynicism and a degree of despair, governments in both developed and developing states have at various stages in the recent past been able to abandon and renegotiate what was at the time regarded as outdated agreements with foreign investors. To overcome the reluctance to make investor obligations part and parcel of new investment treaties, it is vital to not only address the lack of political will, but also the presently fragmented research agenda whereby discussions on corporate responsibilities towards local communities are held in discrete fora by disparate epistemic communities.

1. P Salmon, ‘Repression Intensifies Against Kazakh Oil Workers’ Uprising’ (2011) 19 *Journal of Contemporary Central and Eastern Europe* 507. [↑](#footnote-ref-1)
2. D Satpayev and T Umbertaliyeva, ‘The Protests in Zhanaozen and the Kazakh Oil Sector: Conflicting Interests in a Rentier State’ (2015) 6 *Journal of Eurasian Studies* 122. [↑](#footnote-ref-2)
3. ibid. [↑](#footnote-ref-3)
4. WV Diaz, ‘Violence, Power and Mining in Peru: How has Las Bambas Worsened Repression?’ (Open Democracy, 7December 2017), available at www.opendemocracy.net/en/las-bambas-mine-peru. [↑](#footnote-ref-4)
5. A Maasho, ‘Ethiopian Protesters Attack Factories in Africa’s Rising Economic Star’ (Reuters, 7 October 2016), available at <www.reuters.com/article/us-ethiopia-unrest/ethiopian-protesters-attack-factories-in-africas-rising-economic-star-idUSKCN1270MX. [↑](#footnote-ref-5)
6. See T May, ‘PM Speech on the State of Politics’, (Prime Minister’s Office, 17 July 2019), available at www.gov.uk/government/speeches/pm-speech-on-the-state-of-politics. [↑](#footnote-ref-6)
7. HG Cohen, ‘What Is International Trade Law For?’ (2018) Institute for International Law and Justice Working Paper 2018/6 (MegaReg Series)5, available at www.iilj.org/wp-content/uploads/2018/12/Cohen-IILJ\_2018\_6-Megareg.pdf. [↑](#footnote-ref-7)
8. G Shaffer, ‘Retooling Trade Agreements for Social Inclusion’ (2019) 2019 *University of Illinois Law Review* 1. [↑](#footnote-ref-8)
9. See for example, K Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013). [↑](#footnote-ref-9)
10. UNCTAD, ‘World Investment Report 2015: Reforming International Investment Governance’ (United Nations Publication, 2015) 126. [↑](#footnote-ref-10)
11. P Ranjan offers a detailed analysis of investor obligations in the investment treaty landscape in ch 5 of this volume. [↑](#footnote-ref-11)
12. See A Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press, 2012) 248. [↑](#footnote-ref-12)
13. B Legum, ‘Understanding Performance Requirement Prohibitions in Investment Treaties’ in AW Rovine (ed), *Contemporary Issues in International Arbitration and Mediation* (Brill, 2007) 53, 55–56. [↑](#footnote-ref-13)
14. M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2004) 78. [↑](#footnote-ref-14)
15. N Perrone, ‘Taking Local Expectations Seriously: A Fresh Start for Foreign Investment Governance?’ in JD Haskell and A Rasulov (eds), *European Yearbook of International Economic Law: New Voices and New Perspectives in International Economic Law* (Springer, 2020) 113. [↑](#footnote-ref-15)
16. This theme will be explored further by Cotula and Perrone in ch 3 of this volume. See also NM Perrone, ‘The “Invisible” Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime’ (2019) 113 *American Journal of International Law Unbound* 16. [↑](#footnote-ref-16)
17. Cohen, ‘What Is International Trade Law For?’ (2018) 7. [↑](#footnote-ref-17)
18. NM Perrone and D Schneiderman, ‘A Critique of International Economic Law: Depoliticization, Inequality, Precarity’ in E Christodoulidis, R Dukes and M Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar, 2019). [↑](#footnote-ref-18)
19. A similar observation is made in the international trade context by Cohen (n 7). [↑](#footnote-ref-19)
20. E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (Columbia University, 2018) 78. [↑](#footnote-ref-20)
21. As one interviewee put it, ‘foreign investors are … known for their lobbying and otherwise influencing the government to get the outcome they want, for instance a hands-off regulation of a relevant industry’. See M Sattorova, ‘[Investor Responsibilities from a Host State Perspective: Qualitative Data and Proposals for Treaty Reform](https://www.cambridge.org/core/journals/american-journal-of-international-law/article/investor-responsibilities-from-a-host-state-perspective-qualitative-data-and-proposals-for-treaty-reform/5CF0CC99B0F64512A0CB899DBD6463FB)’ (2019) 113 *American Journal of International Law Unbound* 22, 23. [↑](#footnote-ref-21)
22. Shaffer, ‘Retooling Trade Agreements’ (2019) 3. [↑](#footnote-ref-22)
23. ibid. [↑](#footnote-ref-23)
24. ibid 2. [↑](#footnote-ref-24)
25. ibid 25. [↑](#footnote-ref-25)
26. KN Schefer, ‘The Law of Investment Protection and Poverty Reduction’ in SW Schill, CJ Tams and R Hofmann (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar, 2015) 380. [↑](#footnote-ref-26)
27. GS Akpan, ‘Host State Legal and Policy Responses to Resource Control Claims by Host Communities: Implications for Investment in the Natural Resources Sector’ in E Bastida, ‎TW Waelde and ‎J Warden-Fernández (eds), *International and Comparative Mineral Law and Policy* (Kluwer Law International, 2005) 284; see also GS Akpan, ‘Host Community Hostility to Mining Projects: A New Generation of Risk?’ in the same volume, 312. [↑](#footnote-ref-27)
28. Ch 3 (Cotula and Perrone) of this volume. [↑](#footnote-ref-28)
29. See Shaffer (n 8) highlighting the broader objectives of the WTO Agreement, the principal aim of which is ‘raising standards of living, ensuring full employment, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development’. [↑](#footnote-ref-29)
30. L Sachs and L Johnson, ‘Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions an Exacerbate Domestic Disparities’ (2019) Columbia Center on Sustainable Investment Working Paper 4/2019,2, available at ccsi.columbia.edu/files/2017/11/ISDS-and-Intra-national-inequality.pdf. [↑](#footnote-ref-30)
31. See further: KY Cordes, L Johnson and S Szoke-Burke, ‘At the Intersection of Land Grievances and Legal Liability: The Need to Reconsider Contract Rights and Expectations at the Supranational Level’ (2017) 49 *Loyola University Chicago Law Journal* 515, 524–25. [↑](#footnote-ref-31)
32. Aisbett and others, *Rethinking International Investment Governance* (2018) 38. [↑](#footnote-ref-32)
33. UNCTAD, ‘World Investment Report 2015’ (2015) 126. [↑](#footnote-ref-33)
34. United Nations Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations’ “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31. [↑](#footnote-ref-34)
35. See ‘Why and How Investors Should Act on Human Rights’, (United Nations Principles for Responsible Investment, 22 October 2020), available at www.unpri.org/human-rights-and-labour-standards/why-and-how-investors-should-act-on-human-rights/6636.article. [↑](#footnote-ref-35)
36. Economic Partnership Agreement between the CARIFORUM States and the European Community (signed 15 October 2008, entry into force 1 January 2009), Art 72. [↑](#footnote-ref-36)
37. Signed 30 October 2016, provisional entry into force 21 September 2017. [↑](#footnote-ref-37)
38. See Sattorova, ‘Investor Responsibilities’ (2019) 23. [↑](#footnote-ref-38)
39. Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (signed 19 January 2016, entry into force 30 August 2017). [↑](#footnote-ref-39)
40. Signed 3 December 2016, not yet in force. [↑](#footnote-ref-40)
41. Treaty Establishing the Southern African Development Community (signed 17 August 1992, entry into force 30 September 1993). See also the Investment Agreement for the COMESA Common Investment Area (signed 23 May 2007, not yet in force), which to a certain extent seeks to address investment conduct. [↑](#footnote-ref-41)
42. Ch 5 (Ranjan) of this volume. [↑](#footnote-ref-42)
43. S Puig and G Shaffer, ‘Imperfect Alternatives: Institutional Choice and the Reform of Investment Law’ (2018) 112 *American Journal of International Law* 361, 367. [↑](#footnote-ref-43)
44. See ‘Commission Presents EU Proposal for Modernising Energy Charter Treaty’ (European Commission, 27 May 2020), available at trade.ec.europa.eu/doclib/press/index.cfm?id=2148. [↑](#footnote-ref-44)
45. UNCTAD (n 10) 126. [↑](#footnote-ref-45)
46. K Nowrot, ‘Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law’ (1999) 6 *Indiana Journal of Global Legal Studies* 579, 586. [↑](#footnote-ref-46)
47. D Caron and E Shirlow, ‘Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences’ inG Ulfstein and A Føllesdal (eds), *The Judicialization of International Law - A Mixed Blessing?* (Oxford University Press, forthcoming) 5–6. [↑](#footnote-ref-47)
48. *Bear Creek Mining v Peru*, ICSID Case No ARB/14/21, Award (30 November 2017), para 152. [↑](#footnote-ref-48)
49. See *Bear Creek Mining v Peru*, Award, paras 150–174; *Bear Creek Mining v Peru*, Dissenting Opinion of Phillipe Sands, paras 16–18. [↑](#footnote-ref-49)
50. ibid paras 172–201. [↑](#footnote-ref-50)
51. ibid paras 189–98. [↑](#footnote-ref-51)
52. ibid paras 201–02. [↑](#footnote-ref-52)
53. ibid para 238. [↑](#footnote-ref-53)
54. ibid para 402. [↑](#footnote-ref-54)
55. ibid para 406. [↑](#footnote-ref-55)
56. ibid para 407. [↑](#footnote-ref-56)
57. ibid para 406. [↑](#footnote-ref-57)
58. ibid para 19 (in the words of the arbitrator). [↑](#footnote-ref-58)
59. ibid para 411. [↑](#footnote-ref-59)
60. ibid para 412. [↑](#footnote-ref-60)
61. ibid paras 408, 412. [↑](#footnote-ref-61)
62. ibid 402. [↑](#footnote-ref-62)
63. HG Burnett and L-A Bret, *Arbitration of International Mining Disputes: Law and Practice* (Oxford University Press, 2017) 121. [↑](#footnote-ref-63)
64. ibid. [↑](#footnote-ref-64)
65. D Newman, ‘Be Careful What You Wish For: Why Some Versions of ‘Social Licence’ are Unlicensed and May be Anti-Social’ (Macdonald-Laurier Institute Commentary, 2014), available at www.macdonaldlaurier.ca/files/pdf/MLICommentaryNewmansociallicence1114webready.pdf. [↑](#footnote-ref-65)
66. J Gilbert, *Natural Resources and Human Rights: An Appraisal* (Oxford University Press, 2018) 17. [↑](#footnote-ref-66)
67. ibid 22. [↑](#footnote-ref-67)
68. ibid. [↑](#footnote-ref-68)
69. D Rodrik, ‘Globalization for Whom?’ (2002) 104 *Harvard Magazine* 29. [↑](#footnote-ref-69)
70. See further, MJ Trebilcock and RJ Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar, 2008). [↑](#footnote-ref-70)
71. See K Tienhaara, ‘Regulatory chill and the threat of arbitration: A view from political science’ in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 606; C Côté, ‘A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment’ (PhD thesis, London School of Economics 2014), available at etheses.lse.ac.uk/897/8/Cote\_A\_Chilling\_%20Effect.pdf. [↑](#footnote-ref-71)
72. Sattorova (n 21) 23. [↑](#footnote-ref-72)
73. ibid. [↑](#footnote-ref-73)
74. ibid. Having learnt about the government plans to introduce health warnings and smoking-free zones, the company condemned the proposed regulations as ‘seriously interfering with … commercial freedom’ and threatened to withdraw its investment. See further AB Gilmore, J Collin and M McKee, ‘British American Tobacco’s Erosion of Health Legislation in Uzbekistan’ (2006) 332 *British Medical Journal* 355; J Knight and S Chapman, ‘Asia is Now the Priority Target for the World Anti-Tobacco Movement: Attempts By the Tobacco Industry to Undermine the Asian Antismoking Movement’ (2004) 13 *Tobacco Control* 30. [↑](#footnote-ref-74)
75. J Paine, ‘On Investment Law and Questions of Change’ (2018) 19 *Journal of World Investment and Trade* 173, 186. [↑](#footnote-ref-75)
76. JE Viñuales, ‘Investor Diligence in Investment Arbitration: Sources and Arguments’(2017)32 *ICSID Review – Foreign Investment Law Journal* 346, 367. [↑](#footnote-ref-76)
77. ibid 367. [↑](#footnote-ref-77)
78. ibid. [↑](#footnote-ref-78)
79. Z Williams and J Bonnitcha, ‘Politically Motivated Conduct in Investment Treaty Arbitration’ (Investment Treaty News, 23 April 2019), available at www.iisd.org/itn/en/2019/04/23/politically-motivated-conduct-in-investment-treaty-arbitration-jonathan-bonnitcha-zoe-williams. [↑](#footnote-ref-79)
80. *Bear Creek Mining v Peru*, Award (n 48) para 560. [↑](#footnote-ref-80)
81. ibid paras 568–69. [↑](#footnote-ref-81)
82. ibid para 35. [↑](#footnote-ref-82)
83. ibid paras 38–39. [↑](#footnote-ref-83)
84. ibid para 9. [↑](#footnote-ref-84)
85. See Williams and Bonnitcha, ‘Politically Motivated Conduct’ (2019). [↑](#footnote-ref-85)
86. J Arato, ‘Corporations as Lawmakers’ (2015) 56 *Harvard International Law Journal* 301. [↑](#footnote-ref-86)
87. Under traditional international law, it is still questionable whether corporations can be held responsible for international law violations. See for example, I Brownlie, *Principles of Public International Law* (Oxford University Press, 2003) 65; P Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press, 2007) 515. This idea is also reflected in Ruggie’s Guiding Principles, see United Nations Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework’ (21 March 2011) UN Doc HR/PUB/11/04. [↑](#footnote-ref-87)
88. ibid para 242. [↑](#footnote-ref-88)
89. ibid para 241. [↑](#footnote-ref-89)
90. *Bear Creek Mining v Peru*,Partial Dissenting Opinion of Phillipe Sands (n 48) para 37. [↑](#footnote-ref-90)
91. See for example, Akpan, ‘Host Community Hostility to Mining Projects’ (2005) 312. [↑](#footnote-ref-91)
92. M Gehring and MCC Segger, ‘Overcoming Obstacles with Opportunities: Trade and Investment Agreements for Sustainable Development’ in SW Schill, CJ Tams and R Hofmann (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar, 2015) 109. [↑](#footnote-ref-92)
93. Signed 19 February 2008, entry into force 1 January 2012, preamble. [↑](#footnote-ref-93)
94. Signed 4 November 2005, entry into force 31 October 2006, Art 12(1). [↑](#footnote-ref-94)
95. For a discussion, see V Prislan and R Zandvliet, ‘Mainstreaming Sustainable Development into International Investment Agreements: What Role for Labor Provisions?’ in SW Schill, CJ Tams and R Hofmann (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar, 2015) 390. [↑](#footnote-ref-95)
96. K Warwick, *Beyond Industrial Policy: Emerging Issues and New Trends* (OECD Publishing, 2013) 15. [↑](#footnote-ref-96)
97. UNCTAD, ‘World Investment Report 2018: Investment and New Industrial Policies’ (United Nations Publication, 2015) 129. [↑](#footnote-ref-97)
98. See S Shadikhodjaev, *Industrial Policy and the World Trade Organization: Between Legal Constraints and Flexibilities* (Cambridge University Press, 2018) 11. [↑](#footnote-ref-98)
99. UNCTAD, ‘Host Country Operational Measures’7, UNCTAD/ITE/IIT/26, UN Sales No. E.01.II.D.18 (2001). [↑](#footnote-ref-99)
100. ibid 3. [↑](#footnote-ref-100)
101. ibid 5. [↑](#footnote-ref-101)
102. Aisbett and others (n 20) 58. [↑](#footnote-ref-102)
103. Shadikhodjaev, *Industrial Policy and the World Trade Organization* (2018) 11. [↑](#footnote-ref-103)
104. ibid 57–58. [↑](#footnote-ref-104)
105. See for example, recent Canadian IIAs that feature public policy exceptions from the prohibition of performance requirements. [↑](#footnote-ref-105)
106. Similar arguments have been driving much of international trade scholarship. For a critique, see Shaffer (n 8) 11. [↑](#footnote-ref-106)
107. Nowrot, ‘Legal Consequences of Globalization’ (1999) 631. [↑](#footnote-ref-107)
108. Z Gao, *International Petroleum Contracts: Current Trends and New Directions* (Martinus Nijhoff, 1994) 11. [↑](#footnote-ref-108)
109. ibid 13. [↑](#footnote-ref-109)
110. S Asante, ‘Restructuring Transnational Mineral Agreements’ (1979) 73 *American Journal of International Law* 335, 339. This description resonates startlingly with contemporary debates over the taxation of profits of multinational corporations. [↑](#footnote-ref-110)
111. Gao, *International Petroleum Contracts* (1994) 14. [↑](#footnote-ref-111)
112. Asante, ‘Restructuring’ (1979) 338. [↑](#footnote-ref-112)
113. Gao (n 108) 17. [↑](#footnote-ref-113)
114. See, for instance, ibid 55 (discussing changes introduced by Thailand into its petroleum concessions). [↑](#footnote-ref-114)
115. ibid 92, discussing Indonesian PSCs. [↑](#footnote-ref-115)
116. Asante (n 110) 359. [↑](#footnote-ref-116)
117. ibid 369. [↑](#footnote-ref-117)
118. ibid 370. [↑](#footnote-ref-118)
119. ibid. [↑](#footnote-ref-119)
120. J Gathii and IT Odumosu-Ayanu, ‘The Turn to Contractual Responsibility in the Global Extractive Industry’ (2016) 1 *Business and Human Rights Journal* 69, 85. [↑](#footnote-ref-120)
121. There are numerous instances of local community grievances escalating into protests and led to the termination of the project and investors’ exit from the country. See for example, D Kemp and JR Owen, ‘Community Relations and Mining: Core to Business But Not “Core Business”(2013) 38 *Resources Policy* 523; G Bridge, ‘Contested Terrain: Mining and the Environment’ (2004) 29 *Annual Review of Environment and Resources* 205; J Costanza, ‘Mining Conflict and the Politics Of Obtaining a Social License: Insight From Guatemala’ (2016) 79 *World Developmen*t 97; A Doolotkeldieva, ‘Regulating Corporate Social Responsibility (CSR) in the Large-Scale Mining Sector of Kyrgyzstan’ (OSCE Academy Policy Brief No 60, 2020), available at osce-academy.net/upload/file/PB\_60\_May.pdf. [↑](#footnote-ref-121)
122. J Heathershaw and A Doolotkeldieva, ‘State as Resource, Mediator and Performer: Understanding the Local and Global Politics of Gold Mining in Kyrgyzstan’ (2015) 34 *Central Asian Survey* 93. [↑](#footnote-ref-122)
123. RW Roeder, ‘Applying for the Social License to Operate by Corporate Social Responsibility Policies and Actions’ in RW Roeder (ed), *Foreign Mining Investment Law* (Springer, 2016) 145; also JR Owen and D Kemp, ‘Social licence and mining: A critical perspective’ (2013) 38 *Resources Policy* 29–35. [↑](#footnote-ref-123)
124. H Mann and others, ‘IISD Report: Model Mining Development Agreement – Transparency Template’ (The International Institute for Sustainable Development 2012) 3; see also L Cotula, *Investment Contracts and Sustainable Development: How to Make Contractors for Fairer and More Sustainable Natural Resource Investments* (International Institute for Environment and Development, 2010). [↑](#footnote-ref-124)
125. Gilbert, *Natural Resources and Human Rights* (2018) 82. [↑](#footnote-ref-125)
126. For a critique, see Gilbert (n 66) 83; also E Cameron and T Levitan, ‘Impact and Benefit Agreements and the Neoliberalization of Resource Governance and Indigenous-State Relations in Northern Canada’ (2014) 93 *Studies in Political Economy* 23. [↑](#footnote-ref-126)
127. Gilbert (n 66) 80. [↑](#footnote-ref-127)
128. J Clark, ‘Socio-cultural Due Diligence in the Mining Sector’ in E Bastida, TW Waelde and J Warden (eds), *International and Comparative Mineral Law and Policy* (Kluwer Law International, 2005) 331. [↑](#footnote-ref-128)
129. IMT Cate, ‘International Arbitration and the Ends of Appellate Review’ (2012) 44 *New York University Journal of International Law and Politics* 1109, 1111. [↑](#footnote-ref-129)