Introduction

(i) Background and Research Question

International investment activity is inherently controversial in the sense that it can be both beneficial and detrimental to its principal actors. Private persons who invest in a foreign (host) state expect to gain profits but may instead experience property losses and become involved in long-lasting investment disputes. The local population and host states may, on the one hand, benefit from job creation, infrastructure development, technology and knowledge transfer, but on the other hand, they may suffer from environmental damage, depletion of natural resources, human rights violations, or the destruction of socially critical facilities. However, despite its controversial nature, commercial activity abroad has now become indispensable. Moreover, its nature is likely to become even more sophisticated due to the increased number of cross-border transactions, rapid technological advances, and the more complex organisational structure of commercial entities. Consequently, the international community has no other choice but to modernise existing legal instruments that regulate foreign investment activity in host states, namely IIAs, in order to address the challenges that have become evident over the years of the existence and application of these legal instruments, while also considering the new demands placed on IIL by the changing world.

One such challenge involves regulating the foreign investors' activity through specific provisions of IIAs that establish direct obligations for private persons. Traditionally, IIAs focused on protecting investments and creating favourable conditions for foreign investors. Therefore, they mainly comprised host states' obligations towards foreign investors, without imposing corresponding duties on the investors themselves. In addition, those IIAs contained limited or no provisions regarding investors' conduct, responsibility, or their impact on local communities. As a result, numerous cases of investor misconduct have come to light, revealing the lack of international regulation and the inadequacy of relevant legislation at the domestic level. Furthermore, since each country makes its own policy choices as regards regulating the commercial activity of foreign nationals within its territory, the applicable legal rules and regulations vary from country to country, enabling investors to shape the regulatory environment in which they conduct their business by picking up those "regulatory cir-

cumstances that allow them to pursue maximum profits with a minimum of restrictions on their international freedom of action".[1]

In the meantime, the general regulatory climate has changed, with an increasing number of states committing themselves to the principles of sustainable development. Additionally, numerous initiatives aimed at fostering greater cooperation on environmental, labour, and anti-corruption issues have been launched at the international level, urging states to develop appropriate international legal instruments and review their domestic regulations in relevant areas. However, truly comprehensive international legal instruments that address concerns arising from global commercial activity are very limited, especially when it comes to outlining the specific duties and responsibilities of private actors operating their businesses internationally. What is even more important is that the existing international initiatives generally are not open to individuals who actually experience detrimental effects from the commercial activities of foreign investors.

Given the hardships associated with developing and reaching a mutual approval on relevant rules at the international level, states are taking unilateral steps to regulate globally active business enterprises, thereby attempting to limit their adverse impacts on individuals, local communities and the environment. Generally, this is achieved through the adoption of mandatory domestic laws with the purpose to regulate the conduct of business enterprises, which in essence constitutes the due diligence obligation.[2] Traditional due diligence usually involves measures taken by a company to identify potential risks to its activity. The notion of due diligence, as applied to responsible business conduct, has largely been developed by the OECD: it is built on the familiar concept, but its focus has shifted to encompass the impact of the company's activity on constituencies outside this company.[3] It means that the risks identified in a due diligence process under this framework should cover adverse impacts related to a broad spectrum of issues, such as human rights, employment, the environment, corruption and bribery, as well as consumer interests.[4] It is mostly in

[1] Enneking, Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability, 19.
[2] See further section 1.1.2 below.
[3] Gaukrodger, Business Responsibilities and Investment Treaties, 44.
[4] Ibid.

these areas where states are trying to "harden" due diligence obligations through enacting mandatory domestic laws.

This new reality is perceived differently by the business community. On the one hand, some relatively recent studies on business views regarding the current legal landscape, particularly the implementation of mandatory human rights due diligence legislation, have revealed that the majority of respondents "viewed existing laws as not being effective, efficient and coherent" due to the fact that due diligence expectations were fragmented across different "issues, sectors or commodities", thus creating "legal uncertainty for businesses having to comply with different standards".[5] On the other hand, there appears to be minimal opposition to the very idea of introducing new regulations in this area. As has been evidenced by the same studies, the majority of respondents generally supported the introduction of new laws, anticipating several potential benefits. These include creating a level playing field and improving legal certainty; establishing a non-negotiable standard that can contribute to altering harmful practices of an entity; the advantage of having a single harmonised standard (which is particularly pertinent for the European Union); and addressing systemic issues that individual companies cannot resolve alone through the adoption of a collective standard.[6]

Thus, according to the above findings, businesses are largely dissatisfied with current legislation, especially with respect to business and human rights issues. At the same time, business representatives also acknowledge the potential of new regulations to address existing regulatory gaps. Although the above studies cover only selected regions and may not represent the overwhelming majority of corporations doing business internationally, they do suggest that it is possible to shift the corporate focus away from attempting to circumvent due diligence legislation towards adopting novel business practices in line with these new developments. The same shift is also feasible at the international level, where IIAs can serve as instruments allowing to balance the interests of all relevant stakeholders for their mutual benefit. In other words, IIAs can provide a clear and concise standard of conduct enabling businesses to make in-

[5] Smit *et al*., Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies, 264.
[6] Ibid, 265–267.

formed decisions and assess any related risks without incurring additional legal costs while at the same time benefitting from legal certainty.

Against this background, this thesis analyses to what extent existing IIAs impose obligations on foreign investors and how these obligations are shaped through the relationships between foreign investors, host states, and local communities. Specifically, the primary objective of this research is to determine whether the inclusion of investors' obligations in IIAs is an effective legal mechanism to ensure that foreign investors behave in a more responsible manner in relation to host states and local communities. Ultimately, the research aims to answer a fundamental question as to whether new IIAs contribute to making the current international investment law regime fairer and more balanced. Here, it is important to note that the term 'balance' has almost become a commonplace in debates surrounding new developments in IIL and the necessity to reform IIAs. For the purposes of this thesis, 'balance' is understood from two angles: (i) from the standpoint of foreign investors, balance entails their role not only as right holders, but also as duty bearers who take responsibility for their own commercial activities and any negative effects these activities may generate; (ii) from the broader perspective of IIL, balance is viewed in terms of whether IIAs themselves have become more inclusive. In other words, whether these agreements give due consideration to all parties involved in or somehow affected by foreign investment.

Considering the above overarching research question, the following steps have been identified as an appropriate direction for designing the outline of this thesis:

A. To trace the development of the international investment law regime with a particular focus on the changing attitudes towards the regulation of foreign investment and the possibility to impose direct obligations on private persons in accordance with the norms of international law (Chapter 1). It is a crucial and logical step for any research to understand the historical perspective of the phenomenon under consideration in order to be able to evaluate its current implications, to identify any research gaps, and to make predictions for the future development of the regime. By undertaking this historical overview in Chapter 1, the thesis aims to establish a solid foundation for the subsequent analysis and examination of the research question.

B. To analyse the existing provisions of IIAs that establish obligations for foreign investors and to assess their language (Chapter 2). As manifested in this thesis, there are already various solutions available to make IIAs more balanced, as this concept is understood here. Thus, some model investment agreements or IIAs, which are not currently in force, incorporate rather innovative clauses imposing direct obligations on foreign investors. Moreover, legal scholars propose rather effective wordings to this end. It is therefore essential to collect the relevant data to provide an overview of what has been achieved so far in terms of regulating the foreign investors' conduct in host states.

C. To analyse whether there exist sufficient legal avenues to bring foreign investors to liability under the currently applicable procedural provisions of IIAs (Chapter 3). Any regulation is incomplete if it does not provide for enforcement mechanisms that can be implemented if violations of the established norms are found. For these reasons, the role of IIAs as a major instrument governing foreign investment (along with the applicable arbitration rules, if the latter are invoked in connection with an investment-related dispute) should be assessed in this context in order to get a complete picture of how foreign investors can be held accountable and by whom.

D. To study the extent, to which local stakeholders are represented in IIL (Chapter 4). This thesis relies on the presumption that any efforts to balance IIL would be incomplete without duly considering the rights and interests of a significant group of persons, who are also affected by foreign investment, namely local stakeholders, as this concept is understood in this thesis. A number of specific mechanisms for engaging local stakeholders into participation in the processes related to foreign investment have already been developed and partially implemented. However, to make them more meaningful, it seems desirable to include appropriate clauses into international legal instruments.

(ii) Research Methodology

Doctrinal legal research is the most traditional and frequently applied method of legal research, which relies predominantly on statutes and judicial acts to comprehend and interpret a legal text and which aims at systematisation and

clarification of legal provisions pertaining to a specific topic,[7] as determined by the research question. Since the core question of this thesis can largely be addressed through conducting library legal research and computer legal research of authoritative texts, a substantial part of the analysis has been carried out within the doctrinal legal research approach. Doctrinal legal research is understood in this thesis as an overarching method, accommodating within its realm analytical, historical and comparative methods of legal research.[8] Therefore, this approach, in particular, provides a means of (i) gathering historical and current data on host states' attitude to regulating foreign investment within their territories and on dealing with violations committed by foreign investors; (ii) carrying out a systematic overview of the rules in IIAs that govern foreign investor obligations; (iii) evaluating whether existing rules effectively achieve their regulatory objectives, that is whether they actually oblige foreign investors to perform or refrain from performing certain actions and whether they actually address any identified instances of foreign investor misconduct.

Since law is perceived here as a social phenomenon, it is placed in a broader social context. The legal issues discussed in this thesis should be viewed not only from a purely legal perspective, but also from a wider perspective offered by other non-legal contexts, such as political science, philosophy, psychology, and sociology. However, due to the feasibility of this research, methods commonly employed in other non-legal disciplines are used only to a limited extent and the related arguments are primarily put forward for future multidisciplinary research. Such research is needed, for example, to delve deeper into the possible causes of tension between local communities and foreign investors and to propose solutions that would be mutually acceptable. Moreover, some categories presented in this thesis, such as balance and justice, responsibility of private persons, the protection of human rights, and relationships between different actors within society are rooted in philosophical conceptions and are often viewed from the perspective of the law-morality dichotomy. In fact, as one of the legal scholars observed, no matter what legal research method is applied, issues of law-morality relations will inevitably be raised, requiring the researcher to engage in philosophical discussion.[9] This philosophical discourse

[7] McConville/Chui, Research Methods for Law, 4; Bhat, Idea and Methods of Legal Research, 143; Hutchinson and Duncan, Defining and Describing What We Do: Doctrinal Legal Research, 85.
[8] Bhat, Idea and Methods of Legal Research, 151.
[9] Bhat, Idea and Methods of Legal Research, 239.

becomes especially relevant given the uncertainties as to the future development of IIL and arbitration practice, in particular as regards the issue central to this research, namely the obligations of foreign investors. Consequently, this thesis endeavours to contemplate the substance of this category and its place within the IIL theory.

(iii) Contribution of this Research

This thesis centres on the field of IIL, which has attracted and is still attracting significant attention from scholars. Numerous contributions have also covered issues specifically examined in this study, such as the necessity of imposing certain obligations on foreign investors. Various propositions have been put forth as regards the wordings of such investor obligations. At the same time, it needs to be noted that these proposals, no matter how successful they may be, largely remain theoretical speculations. One may only guess how they will work in practice, unless they are more widely accepted or become a mainstream approach. This thesis therefore emphasises the importance of practical implementation of what has already been developed in legal scholarship as it is the only way to make a scholarly discussion more targeted and to gain a better and deeper understanding of the legal implications and challenges such practical implementation involves.

Furthermore, the approaches presented in legal scholarship are not consistent in understanding the nature of investors' obligations and often fail to distinguish between imposing 'obligations' and making recommendations in terms of meeting corporate social responsibility standards. This study attempts to add clarity to ongoing discussions regarding the feasibility of incorporating direct obligations of foreign investors into international investment treaties by classifying the already existing obligations and trying to elucidate the rationale behind their incorporation. In addition, this study aims to conceptualise investors' obligations and IIL in general within a broader context, arguing that it currently excludes a large group of actors impacted by foreign investment, namely local stakeholders, who actually should be empowered to more actively participate in the IIL system. This study is not meant to give an exhaustive answer or provide a comprehensive solution to all the challenges that may arise in connection with imposing international obligations on private persons. The latter

seems hardly possible given that, although this topic is not entirely novel, it is still necessary to get further input from arbitral tribunals and society at large in order to be able to evaluate the impact of these new provisions.

This study aims to address legal scholars, legal practitioners and policymakers, especially those who are engaged in negotiating and drafting international investment treaties. It focuses on the perspective of imposing international law obligations on private persons, but views it in the broader context of the responsibility and accountability of foreign investors for their activity in host states. At the same time, it also relevant for businesses having an interest in establishing long-term relationships with the communities in which they operate, relying on the legal framework regulating foreign investment and being able to evaluate an investment regime applied by particular states and to assess potential risks and benefits associated with investing in such states, including the relevant compliance costs.

Chapter 1 Background: Overarching Considerations on Relations between Host States and Foreign Investors

The current international investment law regime is often characterised as "protecting private property against political risk",[10] offering "investor protection at the international level",[11] or protecting "investors' interests too readily at the expense of other significant social values".[12] These and similar statements suggest that the current regime is viewed as favouring private investors to the detriment of sovereign states, an issue which has given rise to a wide range of criticism regarding the fundamental approach taken by the current investment law regime.[13] In response to this criticism, states have started to revise their approach to and strategies in drafting IIAs thus paving the way for a major shift or transition in the international investment law regime. This chapter outlines the relations between foreign investors and host states in the historical perspective and describes the current efforts of states to regulate foreign investors' activities in the public interests. It also provides an overview of the existing initiatives designed to regulate the activities of corporate investors at the international level.

1.1 Regulating Foreign Investors: Historical Overview and Current State of Affairs

1.1.1 Preliminary Remarks on the Need to Regulate Foreign Investors

According to the 2023 UNCTAD World Investment Report, global FDI flows in 2022 amounted to USD 1.3 trillion,[14] which makes foreign investment a significant component of the world economy and one of the major drivers of development in general. The reason for this lies in the extensive and far-reaching implications of FDI affecting not only the states' economic situation, but also various aspects of society and the lives of individuals. Those consequences of

[10] Hindelang/Krajewski, Towards a More Comprehensive Approach in International Investment Law, 4.
[11] UNCTAD, World Investment Report 2003, 93.
[12] Muchlinski, Holistic Approaches to Development and International Investment Law, 181.
[13] The scholarship criticising different aspects of the international investment law regime is abundant. See, for example, generally: Hindelang/Krajewski, Towards a More Comprehensive Approach in IIL, 5; Pauwelyn, Rational Design or Accidental Evolution? The Emergence of International Investment Law; van Harten, Investment Treaty Arbitration and Public Law; Ratner, International Investment Law Through the Lens of Global Justice. For a summary of main arguments made, in particular, against ISDS, see also UNCTAD, World Investment Report 2015, 147.
[14] UNCTAD, World Investment Report 2023, iii.

foreign investors' activities and their overall contribution to the economy of a host state, in the territory of which such investment activity is carried out, can be twofold. On the one hand, countries benefit from technology transfer, the formation of human capital, better integration into the international trade system, and the creation of a more competitive business environment, which, in turns, contributes to economic growth and improved living conditions for local communities, as well as promotes sustainable development in the host state.[15] It is still possible for the host countries to enjoy those benefits, even though it has been acknowledged that advantages offered by foreign investment in terms of "technology transfer, managerial best practice, skills development, research, as well as building beneficial linkages to the national economy needed to be purposefully built into the regulatory regime" of the host state and support national development strategies and objectives.[16]

On the other hand, FDI can also produce negative effects on the economies of host states and the well-being of local communities. Potential drawbacks may include a deterioration of the balance of payments due to the repatriation of profits, the harmful environmental impact resulting from foreign investment, infringing upon rules and regulations that protect human rights and other wrongdoings of foreign investors within the territory of the host states, for example circumvention of anticorruption and competition legislation, and, last but not the least, states' increasing dependence on multinational corporations that may be perceived as a loss of state sovereignty.[17] These eventual negative consequences of foreign investors' activity give rise to concerns both at domestic and international levels, and some specific examples, which have been extensively described and analysed in the scholarly literature,[18] demonstrate that these concerns are not fully unfounded.

In addition, the legitimacy of those concerns and the urgent need to address them are evidenced by a number of lawsuits filed against companies operating outside the territories of their home states, *inter alia*, in developing countries. The issues being complained of include, among other things, allegations of en-

[15] OECD, Foreign Direct Investment for Development, 5. See also Foster, Investors, States, and Stakeholders, 364; Gaukrodger, Business Responsibilities and Investment Treaties, 13.
[16] Carim, International Investment Agreements and Africa's Structural Transformation, 52-53.
[17] OECD, Foreign Direct Investment for Development, 6.
[18] See, for example, Jonge, Transnational Corporations and International Law, 76–85; Beisinghoff, Corporations and Human Rights, 31–37; Miles, The Origins of International Investment Law, 135–150.