IUSS
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# SHAPING FOREIGN INVESTOR ACCOUNTABILITY: STATE CAPACITY, FDI DEPENDENCE AND THE RISE OF EXTRATERRITORIAL REGULATION

***A Comparative Study of Mongolia, Kazakhstan, and Botswana, with Home State Regulation from the UK, EU (France), China, and Canada.***

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## ABSTRACT

This thesis examines how foreign investor (corporate) accountability is shaped in resource rich, FDI dependent countries through the interaction of state and institutional capacity, dependence on foreign investment, and the evolving reach of extraterritorial laws by capital exporting home states. It argues also that the way states prioritize the three pillars of sustainable development plays an important role in shaping corporate conduct and enforcement outcomes.

Chapter 1 compares how host and home states interpret and balance the SDG economic, social and environmental pillars. It finds that investment dependent host states such as Mongolia, Kazakhstan and Botswana formally embrace the language of sustainable development but systematically prioritise economic growth, and that home states like the UK, the EU (France), China and Canada present more elaborate legal frameworks that purport to balance economic interests with social and environmental standards domestically, yet often apply these standards unevenly abroad. Chapter 2 explores how host state capacity affects regulating foreign investors and implementing these regulations. The findings show that where institutions lack certain capacity, the regulations and their implementations are inconsistent and weak, but when FDI dependence dominates, regulation further weakens. Chapter 3 traces how home state measures such as due diligence and reporting laws extend accountability across borders, yet they often reproduce global power asymmetries by centralizing norm setting and enforcement in home states while marginalizing host states and affected communities.

This thesis concludes that contemporary corporate accountability regimes generate accountability without reparation and reform without structural change. It contributes to the literature by demonstrating that effective corporate accountability requires not merely stronger domestic governance or expanded extraterritorial regulation, but a redistribution of regulatory power, binding investor obligation, and genuine inclusion of host states and affected communities in global governance frameworks.

**ABSTRACT (in Italian)**

La tesi esamina il modo in cui la responsabilità degli investitori stranieri (privati) è modellata nei paesi ricchi di risorse, attraverso l'interazione tra capacità statale e istituzionale, investimenti esteri e dipendenza dall'estrazione, nonché l'impatto in continua evoluzione delle leggi extraterritoriali da parte degli Stati esportatori di capitali. La tesi sostiene inoltre che il modo in cui gli Stati danno priorità ai tre pilastri dello sviluppo sostenibile svolge un ruolo fondamentale nel plasmare la condotta delle imprese e gli esiti dell'applicazione delle norme.

Il Capitolo 1 confronta il modo in cui Stati ospitanti e Stati di origine interpretano e bilanciano i tre pilastri degli SDG: economico, sociale e ambientale. Dall'analisi emerge che Stati ospitanti dipendenti dagli investimenti, come Mongolia, Kazakistan e Botswana, adottano formalmente il linguaggio dello sviluppo sostenibile, ma danno sistematicamente priorità alla crescita economica, mentre Stati di origine come il Regno Unito, l'Unione Europea (Francia), la Cina e il Canada bilanciano gli interessi economici con standard sociali o ambientali all'interno dei propri confini, applicandoli però in modo disomogeneo all'estero. Il Capitolo 2 analizza come la capacità dello Stato ospitante influisca sulla regolamentazione degli investitori stranieri e sull'attuazione di tali normative. I risultati mostrano che, laddove le istituzioni siano carenti di determinate capacità, le norme e la loro applicazione risultano incoerenti e deboli; inoltre, quando domina la dipendenza dagli IDE, la regolamentazione si indebolisce ulteriormente. Il Capitolo 3 ricostruisce il modo in cui le misure adottate dagli Stati di origine, quali le leggi sulla due diligence e sulla rendicontazione, estendano la responsabilità oltre i confini nazionali; tuttavia, esse spesso riproducono asimmetrie di potere globali, centralizzando la produzione delle norme e l'applicazione delle stesse negli Stati di origine, mentre marginalizzano gli Stati ospitanti e le comunità interessate.

La tesi conclude che i regimi contemporanei di responsabilità d'impresa producono responsabilità senza riparazione e riforme senza cambiamento strutturale. Contribuisce alla letteratura dimostrando che una responsabilità d'impresa efficace richiede non solo una governance interna più forte o un'estensione della regolamentazione extraterritoriale, ma anche una redistribuzione del potere regolatorio, obblighi vincolanti per gli investitori e una reale inclusione degli Stati ospitanti e delle comunità interessate nei quadri di governance globale.

## DECLARATIONS

I hereby certify that this Ph.D. dissertation, presented for examination at the IUSS Pavia, is solely my own work other than where I have clearly indicated that it is the work of others.



During the preparation of this work, I used Microsoft Copilot to reword and rephrase portions of the text in order to enhance readability and improve language clarity. Following the use of this tool, all content was carefully reviewed and edited, and I take full responsibility for the final version of the manuscript. The usage of Copilot was strictly limited to improving phrasing and readability, without influencing the substantive content, analysis, or arguments presented in this work.

The thesis has not been submitted for any other degree or qualification at any other academic institution.

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**TABLE OF CONTENTS**

## LIST OF TABLES

## LIST OF ABBREVIATIONS

ADR — Alternative Dispute Resolution
BITs — Bilateral Investment Treaties
BRI — Belt and Road Initiative
BTI — Bertelsmann Stiftung Transformation Index
CBCA — Canada Business Corporations Act
CPI — Corruption Perceptions Index
CSR — Corporate Social Responsibility
CSOs — Civil Society Organizations
CSDDD — Corporate Sustainability Due Diligence Directive (EU)
CSRD — Corporate Sustainability Reporting Directive (EU)
EIA — Environmental Impact Assessment
EMP — Environmental Management Plan
EPI — Environmental Performance Index
ESG — Environmental, Social, and Governance
ESRS — European Sustainability Reporting Standards
EU — European Union
FDI — Foreign Direct Investment
FH — Freedom House
FPIC — Free, Prior and Informed Consent
GDP — Gross Domestic Product
GEP — Group of Eminent Persons
GSoD — Global State of Democracy
IA — Impact Assessment
ICSID — International Centre for Settlement of Investment Disputes
ILO — International Labour Organization
IMF — International Monetary Fund
ISDS — Investor–State Dispute Settlement
MNCs — Multinational Corporations
NAP / NAPs — National Action Plan(s)
NGOs — Non-Governmental Organizations
NIEO — New International Economic Order
OECD — Organisation for Economic Co-operation and Development
OHCHR — Office of the High Commissioner for Human Rights
OPC — Open Public Consultation
RBC — Responsible Business Conduct
RoL — Rule of Law
SDGs — Sustainable Development Goals
SMEs — Small and Medium-sized Enterprises
SRSG — Special Representative of the Secretary-General
TRIMS — Trade-Related Investment Measures
TRIPS — Trade-Related Aspects of Intellectual Property Rights
TWAIL — Third World Approaches to International Law
UK — United Kingdom
UN — United Nations
UNCTAD — United Nations Conference on Trade and Development
UNGPs — United Nations Guiding Principles on Business and Human Rights
V-Dem — Varieties of Democracy
WGI — Worldwide Governance Indicators
WJP — World Justice Project
WTO — World Trade Organization

# INTRODUCTION

## Background and research question

Foreign investment is often promoted as a pathway to development, especially for resource rich countries seeking capital, technology, and infrastructure.[1] For many developing states, FDI is central to national development strategies, especially in extractive sectors such as mining, oil, and gas.[2] Yet decades of evidence show that foreign investors can also generate severe environmental harm, violate human rights, and undermine local livelihoods, often with limited accountability.[3] This persistent gap between the economic promise of foreign investment and its social and environmental costs raises a fundamental problem for international economic governance.

At the center of this problem lies a striking asymmetry: foreign investors enjoy strong legal protections under international investment law, while their obligations with respect to human rights and environmental protection remain largely voluntary and weakly enforced.[4] International investment treaties and dispute settlement mechanisms provide investors with extensive rights to protect their assets and expected profits, yet corresponding duties toward host states, local communities, and the environment are either absent or framed in non binding state. Despite sustained attention from scholars, policymakers, and international organizations, this imbalance is continuing to be resistant to reform.

This accountability gap is particularly seen in developing, resource rich countries. These countries often prioritise attracting foreign investment as a means of economic growth, employment creation, and revenue generation. As a result, foreign invested companies and their subsidiaries make up a large share of private investment in these countries. However, this reliance on foreign capital also creates structural vulnerabilities. Host states may hesitate to impose or enforce stringent environmental and human rights regulations for fear of

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[1] Yong Joon Nam Chu, *Competing for FDI through the Creation of Export Processing Zones: The Impact on Human Rights*, Global Law Working Paper No. 01/05 (New York University School of Law 2005).
[2] United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development* 13 (2015).
[3] For instance, see Lorenzo Cotula & Kyla Tienhaara, Reconfiguring Investment Contracts to Promote Sustainable Development, in *Rethinking International Investment Governance: Principles for the 21st Century* 281, 303 (Jonathan Bonnitcha et al. eds., Oxford Univ. Press 2017).
[4] Nicolas M. Perrone, Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment, 7 *Bus. & Hum. Rts. J.* 375 (2022).

deterring investment, or facing costly investor-state dispute settlements. In this context, regulatory frameworks may exist on paper but fail in practice when enforcement threatens economic priorities.

The challenge of foreign investor accountability cannot be understood solely through domestic governance failures. It must be situated within the broader international legal and economic framework that shapes host state commitments. International investment law has historically prioritised investor protection, reflecting the interests of capital exporting states and multinational enterprises. At the same time, international efforts to articulate corporate responsibility through corporate social responsibility initiatives, business and human rights frameworks, and sustainability commitments have largely relied on voluntary compliance rather than binding legal obligations. As a result, accountability mechanisms remain fragmented and uneven, particularly in contexts where host states face economic dependence and institutional constraints.

These dynamics intersect with the concept of sustainable development, which formally requires a balance between economic growth, social protection, and environmental preservation. While this balance is widely endorsed in international discourse,[5] it is far from clear that states interpret or implement it in a consistent manner. Resource dependent host states and capital exporting home states operate within very different economic and political contexts, which shape how they prioritise the three pillars of sustainable development. For host states reliant on extractive investment, economic imperatives may dominate regulatory decision making, while home states may promote social and environmental standards domestically without applying them with equal force to the overseas activities of their corporations.

A further layer of complexities arises from the question of state capacity. Although MNCs operate through subsidiaries subject to host state law, the effectiveness of domestic regulation depends on institutional strength, political will, and enforcement capability. Weak or constrained state capacity can limit the ability of host states to regulate corporate conduct, particularly in high risk sectors. At the same time, even where legal frameworks exist, economic dependence on foreign investment may undermine their application. This raises a critical analytical problem: whether accountability failures are primarily the result of limited

[5] World Commission on Environment and Development, *Our Common Future* (Oxford Univ. Press 1987) (commonly known as the Brundtland Report).

institutional capacity, economic dependence or the interaction between these two within a global investment regime that constrains regulatory space.

In response to these challenges, regulatory attention has increasingly shifted toward home states, where multinationals are domiciled. Home states have begun to adopt extraterritorial measures such as due diligence obligations, reporting requirements, and responsible business conduct frameworks intended to extend accountability across borders. While these initiatives are often presented as progressive solutions, their effectiveness and implications remain contested. It is unclear whether such measures genuinely improve accountability in host states.

Consequently, this thesis examines foreign investor accountability as a structural problem produced by the interaction of state capacity, economic dependence, divergent interpretations of sustainable development, and extraterritorial regulations. It addresses this problem through three interrelated questions:

(i) What are the divergent interpretations of the economic, social, and environmental pillars of sustainable development by host and home states that influence the framing of foreign investor accountability?

(ii) How do state capacity and economic dependence on FDI affect the enforcement of corporate accountability in resource rich developing countries?

(iii) To what extent do home state extraterritorial regulations contribute to improving foreign investor accountability, and do they address or reproduce existing global asymmetries in sustainable development governance?

**Literature overview and gap identification**

This thesis draws on and critically engages with five interconnected bodies of literature: (i) sustainable development and prioritisation of its pillars; (ii) state capacity and institutional governance; (iii) international investment law and investor protection; (iv) business and human rights and extraterritorial regulation; (v) critical and TWAIL-informed scholarship on global economic governance. Rather than treating these literatures as discrete explanatory frameworks, this review demonstrates that their fragmentation obscures the structural nature of foreign investor (corporate) accountability failures in resource rich host states.

(i) Sustainable development and prioritisation of its pillars

Sustainable development is widely framed as a balance between economic growth, social protection, and environmental preservation, most prominently reflected in the Brundtland Report and the UN SDGs.[6] However, critical scholarship challenges the assumption that this balance is either universally interpreted or practically attainable. Scholars such as Martti Koskenniemi and David Kennedy argue that what is presented as "global" or "universal" is often treated as self-evident, even though it is not. There is nothing naturally shared by all humanity; labeling interests or problems as common is a political claim, not an objective reality.[7]

Post-development scholars, including Arturo Escobar, further critique development as a continuation of modernization discourses that prioritize economic growth while marginalizing alternative development paths.[8] Recent critiques of the SDGs by Sultana and Arora-Jonsson highlight how global metrics and indicators often universalize Northern development models, limiting policy space in the Global South.[9]

(ii) State capacity and institutional governance

A substantial interdisciplinary literature explains regulatory failure through weak state capacity.[10] Scholars emphasize corruption, weak rule of law, limited regulatory quality, and lack of judicial independence as key factors undermining states' ability to regulate multinational corporate conduct. Classical accounts by Charles Tilly,[11] Theda Skocpol,[12] and

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[6] World Commission on Environment and Development, *Our Common Future* (Oxford Univ. Press 1987) (commonly known as the Brundtland Report).
United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, G.A. Res. 70/1, U.N. Doc. A/RES/70/1 (Oct. 21, 2015).
[7] David Kennedy & Martti Koskenniemi eds., *Of Law and the World: Critical Conversations on Power, History, and Political Economy* (Harvard Univ. Press 2023).
[8] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* 6, 24 (Princeton Univ. Press 1995).
[9] Seema Arora-Jonsson, *The Sustainable Development Goals: A Universalist Promise for the Future*, 146 Futures 103087 (2023), https://doi.org/10.1016/j.futures.2022.103087.
Farhana Sultana, *An(Other) Geographical Critique of Development and SDGs*, 8(2) Dialogues in Human Geography 186 (2018), https://doi.org/10.1177/2043820618780788.
[10] Olivier De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations* (Univ. Catholique de Louvain 2006).
John Ruggie (Special Representative of the Sec'y-Gen.), *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006).
John Ruggie (Special Representative of the Sec'y-Gen.), *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect, Remedy" Framework*, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010).
[11] Charles Tilly, *The Formation of National States in Western Europe* 40 (Princeton University Press 1975).
[12] Theda Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research," in *Bringing the State Back In* (Peter B. Evans, Dietrich Rueschemeyer & Theda Skocpol eds., Cambridge University Press 1985).

Michael Mann[13] conceptualize state capacity in terms of extractive, administrative, infrastructural, and coordinative power. Later work by Linda Weiss[14] and Margaret Levi[15] emphasizes the role of bureaucratic competence and state with society relations in shaping regulatory outcomes.

More recent scholarship distinguishes between state capacity as a systemic condition and institutional capacity as the functional ability of specific agencies. Hanson and Sigman critique "capacity for what?" and warn against treating capacity as an abstract attribute detached from regulatory purpose.[16] Englehart further distinguished between the normative duty of states to protect rights and their empirical capacity to do so,[17] while John Ruggie's concept of "weak governance zones" links corporate abuse to institutional fragility.[18]

A parallel methodological literature debates how state capacity should be measured. One approach treats state capacity as a unified concept, captured through a single composite index.[19] While this facilitates comparison, it often obscures variation across functions, failing to show how states may be strong in some areas but weak in others. An alternative approach conceptualises state capacity as multidimensional, with scholars measuring distinct capacities such as extractive, coercive, and administrative capacity separately, recognising that these may vary across policy areas, institutions, and historical contexts.[20] While this allows for greater analytical precision, it also risks overlooking how political and economic priorities shape whether existing capacity is actually mobilised in practice.[21] For example, Englehart

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[13] Michael Mann, *The Sources of Social Power: A History of Power from the Beginning to A.D. 1769* (Cambridge University Press 1986).
[14] Linda Weiss, *The Myth of the Powerless State* (Cornell University Press 1998).
[15] Margaret Levi, The State of the Study of the State, in Political Science: The State of the Discipline (Ira Katznelson & Helen V. Milner eds., 2002).
[16] Jonathan K. Hanson & Rachel Sigman, Leviathan's Latent Dimensions: Measuring State Capacity for Comparative Political Research, 83 J. Pol. 1497 (2021) (published online Aug. 9, 2021).
[17] Nathan A. Englehart, State Capacity, State Failure and Human Rights, 46 *J. Peace Res.* 163, 163–80 (2009).
[18] John Ruggie (Special Representative of the Sec'y-Gen.), *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006).
John Ruggie (Special Representative of the Sec'y-Gen.), *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect, Remedy" Framework*, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010).
[19] Luciana Cingolani, The State of State Capacity: A Review of Concepts, Evidence and Measures, (UNU-MERIT Working Paper Series on Institutions & Econ. Growth, 2013).
Elissa Berwick & Fotini Christia, State Capacity Redux: Integrating Classical and Experimental Contributions to an Enduring Debate, 21 Ann. Rev. Pol. Sci. 71 (2018).
[20] Joel Migdal, Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World (Princeton Univ. Press 1988).
Margaret Levi, Of Rule and Revenue (Univ. of Cal. Press 1988).
[21] Jessica Fortin-Rittenberger, Exploring the Relationship Between Infrastructural and Coercive State Capacity, 21 Democratization 1244 (2014).
Cullen S. Hendrix, Measuring State Capacity: Theoretical and Empirical Implications for the Study of Civil Conflict, 47 J. Peace Res. 273 (2010).

shows that higher state capacity is associated with stronger protection against abuse by non-state actors, while also highlighting that capacity alone does not guarantee effective enforcement.[22]

(iii) International investment law and investor protection

International investment law scholarship documents the extensive protections afforded to foreign investors through BITs and ISDS. Foundational critiques by Sornarajah[23] and Perrone[24] highlights the asymmetry between binding investor rights and the absence of enforceable investor obligations.

FDI focused literature highlights asymmetries in bargaining power between host states and multinational enterprises. Scholars such as Nicholas Perrone[25] and Lauge Poulsen[26] demonstrate how investment dependent states often accept restrictive treaties and regulatory concessions because they face limited information, strong pressure to attract investment, and unequal bargaining power. In these circumstances, weak regulation is often a deliberate choice shaped by economic constraints, rather than the result of institutional failure or policy mistakes.

TWAIL informed investment scholars, including Antony Anghie,[27] Chimni,[28] and James Gathii,[29] trace these asymmetries to colonial concession agreements and post-colonial legal continuities. Regulatory chill literature demonstrates how ISDS discourages environmental and human rights regulation,[30] while reform debates such as those surrounding investment

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[22] Nathan A. Englehart, State Capacity, State Failure and Human Rights, 46 *J. Peace Res.* 163 (2009).
[23] M. Sornarajah, Economic Neo-Liberalism and the International Law on Foreign Investment, in *The Third World and International Order: Law, Politics and Globalization* 173 (Antony Anghie, Bhupinder Chimni, Karin Mickelson & Obiora Okafor eds., Martinus Nijhoff Publ'rs 2003).
[24] Nicolas M. Perrone, Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment, 7 Bus. & Hum. Rts. J. 375, 375–96 (2022).
[25] Nicolas M. Perrone, Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment, 7 Bus. & Hum. Rts. J. 375, 375–96 (2022).
[26] Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* 71–109 (Cambridge Univ. Press 2015); Nicolás M. Perrone, Foreign Investment Law: A TWAIL View, in *TWAIL Handbook* 14 (Tony Anghie, Michael Fakhri, Vasuki Nesiah, Karin Mickelson & B.S. Chimni eds., Edward Elgar forthcoming).
[27] Antony Anghie, Rethinking International Law: A TWAIL Retrospective, 34 *Eur. J. Int'l L.* 7, 15 (2023), https://doi.org/10.1093/ejil/chad005.
Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 213–216 (Cambridge Univ. Press 2005).
[28] B.S. Chimni, International Institutions Today: An Imperial Global State in the Making, 15 *Eur. J. Int'l L.* 1, 6-11 (2004); B.S. Chimni, Third World Approaches to International Law: A Manifesto, 8 *Int'l Comm. L. Rev.* 3 (2006).
[29] James Thuo Gathii, TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography, 3 *Trade L. & Dev.* 26 (2011).
[30] Elizabeth Meager, COP26 Targets Pushed Back Under Threat of Being Sued, *Capital Monitor* (2022);
see also Tim Hagemann, The North–South Divide of Regulatory Chill: A Comparative Analysis of the Impact of Investor-State Dispute Settlement on Policy Makers in Developed and Developing Countries, 35 *New York International Law Review* 1 (2022).

courts and treaty modernization often focus on procedural adjustment rather than substantive redistribution of power.[31]

(iv) Business and human rights and extraterritorial regulation

The business and human rights literature expanded significantly following the adoption of the UNGPs. Scholars such as Ruggie frame corporate responsibility as a social expectation grounded in due diligence rather than binding obligation.[32] Critics including Surya Deva,[33] David Bilchitz,[34] Carlos López,[35] and Karin Buhmann[36] argue that this framework entrenches voluntarism, managerialism, and risk-based compliance.

Other scholars[37] state that corporate abuse within longer trajectories of colonial extraction, forced labour, and selective accountability. Access to remedy scholarship by Richard Meeran,[38] Tineke Lambooy,[39] and Sara Seck[40] documents how corporate veil doctrines, forum non conveniens, arbitration, and asset restructuring limit justice for affected communities.

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Gus Van Harten & Dayna Nadine Scott, Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada, 7 *Journal of International Dispute Settlement* 92 (2016).
Jane Kelsey, Regulatory Chill: Learnings from New Zealand's Plain Packaging Tobacco Law, 17 *QUT Law Review* 21 (2017).
Kyla Tienhaara, Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement, 7 *Transnational Environmental Law* 229 (2018).

[31] Working Group on Business and Human Rights et al., *Submission to* UNCITRAL Working Group III *on Investor-State Dispute Settlement Reform* (2020).

[32] John Ruggie, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. E/CN.4/2006/97 (2006).
John Ruggie, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect, Remedy" Framework*, Report to the Human Rights Council, UN Doc. A/HRC/14/27 (2010).

[33] Surya Deva, Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 78 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

[34] David Bilchitz, A Chasm Between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 107 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

[35] Carlos López, The 'Ruggie Process': From Legal Obligations to Corporate Social Responsibility?, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 58 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

[36] Karin Buhmann, Navigating from 'Train Wreck' to Being 'Welcomed': Negotiation Strategies and Argumentative Patterns in the Development of the UN Framework, in Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? 29 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

[37] Elisa Giuliani, *Business and Human Rights, History, Law and Policy: Bridging the Accountability Gap* (Book Review), 2 *Bus. & Hum. Rts. J.* 379, 379–80 (2017).

[38] Richard Meeran, Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 379 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

[39] Tineke Lambooy, Aikaterini Argyrou & Mary Varner, An Analysis and Practical Application of the Guiding Principles on Providing Remedies with Special Reference to Case Studies Related to Oil Companies, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 214 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

[40] Sara L. Seck, Home State Responsibility and Local Communities: The Case of Global Mining, 11 Yale Hum. Rts. & Dev. L.J. 177 (2008).

Recent scholarship examines the rise of extraterritorial regulation through due diligence laws, reporting requirements, and national action plans. Proponents view these initiatives as closing governance gaps, while critics including Surya Deva,[41] Bright and Macchi[42] questioned their effectiveness and distributive consequences. TWAIL-informed critics argue that extraterritorial regimes often centralize norm-setting and enforcement in Global North states, excluding host states and affected communities. Weber highlights how EU norms are exported through market power rather than democratic inclusion.[43] This raises concerns about regulatory displacement, procedural injustice, and epistemic inequality.

(v) Critical and TWAIL-informed scholarship on global economic governance

Postcolonial and TWAIL scholars including Anghie,[44] Chimni,[45] Mutua,[46] Rajagopal,[47] Eslava and Pahuja[48] provide a unifying analytical lens for these debates. They argue that international law is historically constituted through colonial encounters and continues to reproduce global hierarchies through development discourse, investment law, and human rights governance. Together, these perspectives challenge reformist narratives that promise accountability without leaving underlying structural inequality.

**Identifying the gap**

What is largely missing from existing scholarship is an integrated explanation of how different regulatory approaches interact to produce corporate accountability failures across jurisdictions. Most studies examine host state governance, international investment law, business and human rights frameworks, or home state regulation in isolation. As a result, the literature lacks a relational framework that connects host state capacity constraints, economic

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[41] Surya Deva, *Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?*, 7 Bus. & Hum. Rts. J. (2023), https://doi.org/10.1017/bhj.2023.2.

[42] Chiara Macchi & Claire Bright, Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation, in *Legal Sources in Business and Human Rights* (Martijn Scheltema, Liesbeth Enneking, Cees van Dam & Juan José Álvarez Rubio eds., Brill forthcoming 2020).

[43] Anne-Marie Weber, *Expanding the Toolbox of Sustainable Business Law: The Transnational Impacts of the EU Corporate Sustainability Due Diligence Directive (CSDDD)*, 42 Pace Envtl. L. Rev. 155 (2024).

[44] Antony Anghie, Rethinking International Law: A TWAIL Retrospective, 34 *Eur. J. Int'l L.* 7, 13 (2023), https://doi.org/10.1093/ejil/chad005.

[45] B.S. Chimni, International Institutions Today: An Imperial Global State in the Making, 15 *Eur. J. Int'l L.* 1, 2-6 (2004). B.S. Chimni, Third World Approaches to International Law: A Manifesto, 8 *Int'l Comm. L. Rev.* 3 (2006).

[46] Makau Mutua, Savages, Victims, and Saviors: The Metaphor of Human Rights, 42 *Harv. Int'l L.J.* 201 (2001); Makau Mutua, *Human Rights Standards: Hegemony, Law, and Politics* 179-180 (State Univ. of N.Y. Press 2016); Makau Mutua, *Human Rights: A Political and Cultural Critique* (Univ. of Pa. Press 2002).

[47] B. Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* 79-94, 289-296 (Cambridge Univ. Press 2003).

[48] Luis Eslava & Sundhya Pahuja, The State and International Law: A Reading from the Global South, *Humanity: An Int'l J. Hum. Rts., Humanitarianism & Dev.* (forthcoming), https://ssrn.com/abstract=3161211.

dependence on extractive industries, asymmetries in investment law, and the rise of extraterritorial regulation within a single analytical structure. This fragmentation leads accountability failures to be understood as problems of weak regulation or poor implementation within individual states, rather than as the predictable outcome of a global legal and economic system that concentrates power with investors while shifting responsibility onto states and affected communities.

This thesis addresses this gap through a structured comparative design that examines corporate accountability across both host states (Mongolia, Kazakhstan, and Botswana) and home states [the EU (France), the United Kingdom, Canada, and China]. By analyzing jurisdictions with varying levels of institutional capacity, economic dependence, and regulatory approach, the thesis demonstrates how accountability failures persist across contexts and regulatory sites despite significant variation in domestic governance and legal frameworks. Integrating comparative empirical analysis with doctrinal and critical perspectives, it shows why accountability reforms repeatedly fail despite legal innovation, and why meaningful foreign investor (corporate) accountability requires not merely additional regulation, but a redistribution of regulatory authority, participation, and responsibility across host states, home states, and affected communities.

**Contribution and originality of the thesis**

This research contributes to the literature on corporate accountability, international investment law, and business and human rights by reframing how accountability failures in resource rich host states are understood.

First, the thesis develops an integrated analytical approach that links state capacity, economic dependence on FDI, and extraterritorial regulation within a single explanatory framework. It demonstrates that these dimensions are mutually constitutive. By showing how weak institutional capacity and reliance on extractive FDI constrain host states regulatory autonomy, while simultaneously enabling home states to extend extraterritorial authority, the thesis moves beyond either host state weakness or home state regulatory tools as standalone explanations of corporate accountability. It reframes enforcement failures not as isolated governance deficits, but as outcomes of a structurally imbalanced investment regime that redistributes regulatory power to home states and foreign investors, rather than strengthening it locally.

Second, the thesis provides comparative empirical evidence drawn from three FDI dependent but different host states: Mongolia, Kazakhstan, and Botswana; and five major home states: the EU/ France, the United Kingdom, China, and Canada. These host states are deliberately selected as "unusual suspects": countries that are often not studied at large, and portrayed as relatively stable or successful within their regions, yet remain structurally constrained in regulating foreign investors.

Through systemic analysis, the thesis demonstrates a consistent enforcement bias: where dependence on extractive FDI is high, economic priorities systematically override human rights and environmental protections in practices, regardless of formal legal commitments. At the same time, home state regulatory initiatives show selective reach and limited responsiveness to host state context and affected communities. This comparison across host and home states fills an empirical gap in the literature, which often focuses either on Global South governance failure or on Global North regulatory innovation, but rarely analyzes how these dynamics interact across jurisdictions.

Third, the thesis develops normative reconceptualization of accountability. Rather than treating accountability as a matter of procedural responsibility allocated separately to states and corporations, the thesis conceptualizes accountability as shared power. It exposes the limitations of prevailing frameworks such as UNGPs. By situating extraterritorial regulation within longer histories of legal and economic dominance, the thesis challenges the assumption that regulatory expansion by home states are progressive.

Fourth, this thesis systematically bridges international investment law and business and human rights: two fields of scholarship that largely evolve in parallel. Investment law scholarship has traditionally prioritized investor protection, treaty design, and dispute settlement, treating human rights and environmental concerns as external policy constraints or soft law. Conversely, BHR scholarship has focused on corporate conduct and due diligence while often externalizing the role of investment treaties, arbitration in constraining regulatory space. By analysing treaty commitments, domestic legal frameworks, governance indicators and extraterritorial regulations together, this thesis demonstrates that corporate accountability failures in resource rich host states cannot be understood without examining the legal architecture that insulates foreign investment from effective regulation. In doing so, it opens a dialogue between these literatures and provides a framework that other researchers can use to study similar accountability problems in different regions.

Finally, although the thesis relies on documentary (primary legal sources) and secondary sources rather than original fieldwork, its originality does not lie in uncovering new empirical events but in the way it systematically connects and reframes existing materials. It constructs a structured comparative framework across under-studied host states and key home state regimes, applies a consistent analytical lens to legal texts, governance indicators and case material, and uses TWAIL-informed critique to read investment law and extraterritorial regulation together. This combination of cases, methods and critical perspective has not previously been applied to the problem of foreign investor accountability in the specific host states, and it generates conceptual and empirical insights that are not accessible through single country studies, doctrinal analysis alone, or business and human rights scholarship that abstracts from investment law.

**Conceptual framework**

In line with common usage in international investment law, this thesis uses "foreign investor" to refer to natural or legal persons that make or control investments in a state other than their own, and that qualify for protection under investment treaties or domestic investment laws.[49] In practice, the analysis focuses on corporate investors and corporate groups engaged in one sector projects in Mongolia, Kazakhstan and Botswana, including parent companies headquartered in capital exporting states and their local subsidiaries. Financial actors (multinational development banks "MDBs"), minority portfolio investors fall outside the main scope of the study. This is not because they are irrelevant, MDBs in particular have played a significant role in shaping host state legal frameworks, but because they operate through distinct financing instruments, accountability mechanisms and mandate structures that would require a separate analytical framework. Including them systematically would broaden the project beyond what is feasible in a single thesis and risk diluting the focus on how corporate foreign investors and their home and host states allocate rights and responsibilities.

In this thesis, a "foreign investor accountability failure" refers to situations in which foreign invested projects cause or contribute to serious human rights violations or significant environmental harm, and affected individuals or communities lack effective avenues for prevention, participation, remedy and reparation, despite the existence of formal legal or

[49] Columbia Ctr. on Sustainable Inv., *Primer on International Investment Treaties and Investor–State Dispute Settlement* 1 (Dec. 2021); UNCTAD, Scope and Definition, UNCTAD Series on Issues in International Investment Agreements II 1–2 (UN 2011).

policy commitments. The benchmark is not an abstract ideal, but a set of concrete obligations and standards drawn from international human rights and environmental law and, where relevant, minority rights instruments. These include, in particular, core UN human rights treaties and their interpretive practice, which require states to prevent, investigate and remedy abuses within their jurisdiction or control; international environmental agreements and principles concerning prevention, precaution and the duty not to cause transboundary harm; and other evolving norms.[50] In addition to binding obligations, the analysis also takes into account widely recognised soft law standards on corporate conduct, including the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises. These instruments do not themselves create hard obligations for corporations, but they articulate expectations regarding human rights due diligence, environmental and social risk management, transparency and access to remedy that are increasingly used to evaluate corporate behaviour and to inform legislative and judicial developments. An accountability failure, in this sense, encompasses not only the absence of formal rules, but also situations where legal and policy frameworks exist on paper yet are not implemented in a way that affords affected communities respects their rights, as well as instances where states and investors consistently fall short of the due diligence and responsibility standards articulated in these soft law frameworks.

The thesis uses the language of foreign investment in general and its empirical focus is on FDI in one sector dependent host states. In Mongolia, Kazakhstan and Botswana, this dependence is especially visible in large scale projects in the extractive industries, which therefore provide the primary empirical lens through which the thesis examines how foreign investor accountability is structured and contested. The mechanisms traced here, whereby fiscal and growth dependence on foreign capital, combined with limited institutional capacity, narrows host state regulatory space and creates incentives to privilege investor interests over social and environmental protections, are not unique to the extractive sector, even if they are particularly stark in that context. The conclusions should therefore be read as most immediately applicable to resource rich, FDI dependent economies, with extractive sector projects offering a clear illustration of the dynamics at stake.

[50] the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966), as interpreted by their respective treaty bodies; the Convention on the Rights of the Child (1989); the Convention on the Elimination of All Forms of Discrimination against Women (1979); and relevant regional human rights instruments. Environmental obligations arise, inter alia, from the Stockholm Declaration (1972) and Rio Declaration (1992), including principles of prevention, precaution, and sustainable development; the United Nations Framework Convention on Climate Change (1992) and the Paris Agreement (2015); the Convention on Biological Diversity (1992); and customary international law principles such as the duty to prevent transboundary environmental harm and so on.

In this thesis, “host states” are the jurisdictions in which projects are physically located and where environmental and human rights impacts are primarily experienced. “Home states” are the jurisdictions from which capital and corporate control originate or the companies have legal seats and in which key investment, corporate and extraterritorial regulatory decisions are made. This functional distinction is not meant to suggest that home states necessarily exhibit higher standards of human rights or environmental protection. Rather, the terminology is used to track the different legal positions states occupy in transnational investment relations and the ways in which regulatory authority and responsibility are distributed between them. Although the thesis uses the host and home terminology for clarity, it does not assume a neat dichotomy between weak, dependent host states and strong, rights respecting home states. Rather, it examines how these roles are constructed and negotiated within a transnational legal and economic architecture, and how both kinds of states participate in sustaining or challenging accountability gaps. While the host and home distinction remains useful for clarifying the different legal positions states occupy in investment relations, it cannot fully capture the role of multilateral development banks, complex corporate structures or states that are simultaneously major capital exporters and resource-dependent investment recipients; these limitations are acknowledged throughout and suggest pathways for future research.

**Chapter I** is about laying the theoretical and conceptual foundation of the first question. Different understandings of the sustainable development context, particularly in terms of how states prioritize or balance its three pillars, are deeply connected to how they regulate corporate behaviour regarding human rights and the environment. Prioritizing economic interests can diminish a host state’s willingness or capacity to regulate corporate activities. Foreign investors routinely express concern over state economic intervention and tend to overlook the social and environmental costs of their operations. Even where domestic laws formally apply, host states often hesitate to enforce them adequately, fearing that strong regulatory pressure may deter foreign investment. This creates a structural tension between economic development strategies and the need for robust environmental and human rights protections. The sustainable development paradigm demands an equilibrium among these three pillars, yet states interpret and implement this balance differently depending on their political, economic, and developmental priorities. This raises a core question: do foreign investment dependent countries and major investor countries pursue sustainable development as a genuinely integrated framework, or do they selectively privilege particular pillars.

Exploring this divergence is essential for understanding why regulatory gaps persist in contexts shaped by unequal global capital flows.

**Chapter II** builds on the conceptual foundations established in Chapter I. Given that most foreign investors operate through subsidiaries established within host jurisdictions, they remain formally bound by host states laws. However, the real-world effectiveness of those legal mechanisms in safeguarding human rights and environmental protections remains contested. Enforcement gaps, institutional weaknesses, and political reluctance to regulate investors undermine the protective capacity of host states. These dynamics raise two central questions (i) whether host states possess sufficient capacity to regulate corporate misconduct affecting human rights and the environment; and (ii) whether differing interpretations of sustainable development, particularly the prioritization of economic growth driven by FDI dependence shape their ability to regulate foreign investors effectively.

The chapter demonstrates how the combination of limited capacity and economic dependency creates systemic regulatory gaps even in countries that perform well on governance metrics. Through the cases of Mongolia, Kazakhstan, and Botswana, it evaluates how legal, institutional, and economic configurations collectively enable or constrain the ability of host states to regulate foreign investors.

**Chapter III** builds on the earlier analysis by how home states have responded to the regulatory constraints faced by host states through the development of legal frameworks with extraterritorial implications. Although these approaches are often presented as progressive interventions, this chapter examines whether such frameworks genuinely advance sustainable development and strengthen accountability for corporate misconduct abroad, or whether they reproduce historical patterns of legal and economic dominance. This chapter questions whether these extraterritorial regulatory efforts represent meaningful steps toward equitable corporate accountability or whether they consolidate home states by embedding new forms of legal hierarchy. It situates contemporary home state regulations within the longer history of international investment law, drawing on postcolonial theory, TWAIL, and critical legal scholarship to show that foundational legal concepts were developed to legitimize colonial hierarchies and continue marginalize third countries by imposing standards they did not participate in shaping. TWAIL scholars demonstrate that international investment law and institutions extend this legacy by prioritizing investor protection. This also shapes domestic legal systems where the development discourse, human rights framework, and global

governance are mostly based on northern models. Persistent accountability failures evident in many cases underscore how corporations leverage transnational legal tools to evade liability, reinforcing a global order that systematically privileges foreign capital over affected communities.

Building on these insights, chapter III traces the evolution of international investment law to show how institutions originally designed to safeguard colonial commercial interests now protect foreign investors from domestic regulation. It then analyzes the key extraterritorial initiates from home states as the UK, the EU/France, China, and Canada, evaluating their design, enforcement mechanisms, and normative reach. The final section argues that although the spread of accountability norms may appear to signal progress, these initiatives risk becoming vehicles for a renewed form of colonialism. In order not to do so, this will require not only legal reform but a restructuring of global order to empower those perspectives that have been consistently marginalized.

**Methodological approach**

This thesis adopts a comparative, doctrinal and socio-legal methodology, grounded in critical international law and political economy. It treats foreign investor accountability as a structurally produced outcome of interactions between legal norms, institutional capacity and FDI driven political economy, rather than as a series of isolated governance failures. Conceptually, the thesis draws on Third World Approaches to International Law (TWAIL), postcolonial theory and business and human rights scholarship to examine how international investment law, sustainable development discourse and extraterritorial regulation allocate rights and responsibilities between investors, home states, host states and affected communities.In line with standard practice in legal scholarship, the core materials analysed are primary legal sources (constitutions, legislation, treaties, case law and regulatory instruments), which are treated as the central empirical basis for the argument rather than as mere background to secondary commentary.

Methodologically, the research employs a structured comparative case study design combining doctrinal analysis, qualitative policy analysis and quantitative governance indicators. The core analytical move is to apply a consistent set of questions across all cases: how are the three pillars of sustainable development interpreted in law and policy; how are state and institutional capacity configured; how do FDI and one sector dependence shape regulatory choices; and how do home state extraterritorial measures reallocate regulatory

power. This design allows systematic comparison across jurisdictions while keeping the focus on the structural production of accountability gaps.

*Case selection and comparative logic*

The study adopts a most different system design[51] for the host states. Mongolia, Kazakhstan and Botswana differ significantly in geographic location, political systems and legal traditions, yet they share two core features: a high dependence on foreign investment in one sector and a recurring pattern of regulatory deference toward foreign investors. Bringing these three countries into the same frame makes it possible to trace how comparable accountability problems emerge in very different domestic settings when they are subject to similar global economic and legal pressures.

On the home state side, the thesis examines the European Union/France, the United Kingdom, Canada and China. These actors are major sources of capital for the selected host states and embody distinct regulatory traditions and approaches to extraterritorial oversight. Analysing host and home states together allows the thesis to treat accountability as a transnational field structured by both inward and outward regulatory trajectories.

The selection of Mongolia, Kazakhstan and Botswana as host states was also shaped by pragmatic considerations. The initial research design considered a broader set of potential host states in Africa and Asia, but many of these candidates presented serious constraints in terms of access to primary legal materials and systematically documented case evidence. Mongolia, Kazakhstan and Botswana emerged as cases where primary sources as domestic legislation, policy documents and secondary analyses were relatively accessible to support the structured comparative approach adopted in the thesis. It then became apparent, through the process of case mapping, that all three are not only highly dependent on FDI but also markedly dependent on investment in the extractive sector. The sectoral focus on extractive sector FDI is therefore both a reflection of their economic profiles and a consequence of a design that prioritised depth of legal and policy analysis over a larger country sample.

*Data sources*

The research relies exclusively on documentary and secondary sources. Primary legal materials include national constitutions, framework environmental and human rights laws, mining and investment legislation, bilateral investment treaties and key trade and investment

[51] Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law 253 (Oxford Univ. Press 2014).

agreements. These are complemented by policy and strategy documents (development plans, national action plans on business and human rights, climate and mining strategies) and by home state extraterritorial instruments such as due diligence and reporting laws. Quantitative data on governance and institutional capacity are drawn from composite indicators including the Worldwide Governance Indicators, V-Dem, the Corruption Perceptions Index, Freedom House and the World Justice Project Rule of Law Index, while FDI and commodity-dependence data come from UNCTAD, the World Bank, the IMF and national statistical offices. The analysis also makes targeted use of reported investment disputes and litigation involving foreign investors in the selected host states, as well as NGO and international organisation reports documenting environmental and human rights harms.

*Analytical techniques*

The thesis combines several complementary methods. First, it conducts doctrinal analysis of domestic legal frameworks, bilateral investment treaties and extraterritorial instruments to identify the allocation of rights, obligations and enforcement mechanisms relevant to foreign investor accountability. Second, it uses qualitative content analysis of legislation and strategic documents to trace how the three pillars of sustainable development are conceptualised and hierarchised in host and home states. Third, it undertakes structured comparison of governance indicators and economic-dependence metrics, not to rank host states but to benchmark each country against global averages and identify patterns linking institutional capacity, FDI or one sector dependence and regulatory behaviour. Fourth, it applies critical legal analysis informed by TWAIL to selected treaty provisions, arbitral reasoning and extraterritorial regimes. Finally, the thesis systematically synthesises insights from international investment law, business and human rights scholarship and TWAIL in relation to under studied host states such as Mongolia, Kazakhstan and Botswana, a combination that has not been developed in existing work on foreign investor accountability.

*Chapter specific methodological focus*

Chapter I deploys comparative doctrinal and content analysis of constitutional, environmental, development and investment legislation, as well as strategic plans, to map how the economic, social and environmental pillars of sustainable development are articulated in law and policy in the three host states and four home state jurisdictions. Chapter II combines governance and economic indicators with analysis of legal and policy instruments and selected cases reported by international and civil society organisations of

documented environmental and human rights harm to test two hypotheses: that weak state and institutional capacity undermines host state regulation of foreign investors, and that FDI and one (extractive) sector dependence incentivise prioritisation of economic growth over social and environmental protection. Chapter III situates contemporary home state extraterritorial initiatives within the historical evolution of international investment law and uses critical doctrinal analysis to evaluate whether these measures redistribute regulatory power or consolidate existing hierarchies.

*Limitations and reflexivity*

While the findings of this thesis are, within their terms, robust, they are also bound by clear limitations. The analysis is confined to three host states and a defined set of home states and regulatory instruments, and it relies primarily on legal documentary sources and secondary data rather than original fieldwork or interviews. This design necessarily constrains the thesis's ability to capture the lived experience of affected communities, the internal politics of state and corporate decision-making, and the full trajectory of individual disputes through litigation or administrative processes over time. In addition, the use of international governance indices and other composite indicators introduces methodological and normative biases that are themselves subject to critique; these tools are therefore treated as indicative rather than determinative and are read alongside qualitative legal and policy analysis. Within these parameters, the project aims not at exhaustive empirical coverage, but at clarifying the structural conditions under which foreign investor accountability is produced. Future research could extend the comparative range of host states, incorporate sustained engagement with affected communities, and track how specific companies navigate the interaction between host state law, home state extraterritorial measures and investment treaty obligations in concrete disputes.

**Coherence across the three chapters**

Although each chapter constitutes an independent analytical unit, together they form a single, coherent argument: foreign investor accountability cannot be understood or improved through isolated domestic reforms or extraterritorial regulations. It must be analysed as a structural product of: (i) how states conceptualise sustainable development (Chapter I); (ii) how institutional and economic constraints shape real enforcement capacity (Chapter II); and (iii)

how international and extraterritorial legal regimes reproduce or challenge historical power asymmetries (Chapter III).

Only by examining these dimensions together does the accountability gap become visible as a systemic failure of global investment governance.

## CHAPTER I: DIVERGENT PERSPECTIVES: ANALYZING THE VARYING UNDERSTANDING OF SUSTAINABLE DEVELOPMENT PILLARS AMONG INVESTMENT RECEIVING AND PROVIDING NATIONS

### Introduction

Different understanding of the sustainable development context, particularly in terms of prioritization or balancing three pillars, may be intricately linked to the regulation of corporate behavior concerning human rights and the environment. For instance, prioritizing economic interest might not necessarily foster willingness for host states to regulate corporate misconduct. As mentioned by Perrone,[52] foreign investors express concerns about government economic intervention and may choose to overlook the costs and risks associated with their activities. Although domestic laws may technically apply to their projects, host states might be less stringent in enforcing regulations, aiming to attract foreign investment and potentially encountering challenges in effectively regulating these investors.

The sustainable development context necessitates a careful balance among its three pillars. However, countries around the world may exhibit diverse understanding of this context due to their varying prioritization of interests related to the three pillars of the SDGs. Are the FDI dependent and investing countries both aim to balance the economic, social and environmental interests based on the common or shared understanding of sustainable development goals or they prioritize social, economic or environmental interests, if so which one?

Methodologically, this chapter uses comparative doctrinal and content analysis of constitutional, environmental, development and investment legislation, as well as key strategic plans, to map how the economic, social and environmental pillars of sustainable development are articulated in law and policy in Mongolia, Kazakhstan and Botswana and in the EU/France, the United Kingdom, Canada and China. It applies a common set of questions

[52] Nicolas M. Perrone, *Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment*, 7 *Bus. & Hum. Rts. J.* 375 (2022).

to these texts in order to identify how each jurisdiction interprets and hierarchises the three pillars and how these understandings underpin their approach to foreign investment.

To determine how the pillars are prioritised or balanced, the analysis examines: (i) constitutional provisions; (ii) legislation and policy frameworks relating to mining, foreign investment, the environment, corporate responsibility and human rights, and for home states, policy frameworks governing the overseas activities of their corporations; (iii) international investment treaties; and (iv) international reports documenting environmental and human rights violations and corporate accountability issues involving corporations from the EU/France, the UK, Canada and China in the three host states. The first three categories capture the de jure implications of sustainable development commitments, while the reports provide indicative evidence of the de facto situation. The aim is to identify convergences and divergences in how investment-receiving and investment-providing countries understand sustainable development and to show how these different configurations of the three pillars shape the regulatory space available for governing foreign investment.

### 1.1. Diverse perspectives of host states

#### 1.1.1. Background

This section provides background on the selected investment-receiving countries: Mongolia, Kazakhstan, and Botswana. Investors in these countries predominantly come from the European Union, France, the United Kingdom, Canada, and China. I will discuss the countries' dependence on commodities using statistics from the UNCTAD report,[53] followed by the rationale for choosing these countries and an analysis of their regulatory framework.

As defined by the UNCTAD,[54] commodity dependence means that the countries with commodity export earnings account for more than 60 percent of total merchandise exports value. Generally, a correlation exists between gross national income (GMI) per capita and commodity dependence: the higher the GNI per capita, the lower the level of commodity dependence. The World Bank[55] annually classifies countries into four income groups based on GNI per capita. Between 2018-2019, low-income countries generally derived an average

[53] United Nations Conference on Trade and Development (UNCTAD), *The State of Commodity Dependence* 2023. https://unctad.org/publication/state-commodity-dependence-2023

[54] *ibid.*
(noting that the analysis focuses on 191 member states with trade data available during the period of analysis, excluding Monaco, San Marino, the Holy See, and merging data for Liechtenstein with Switzerland).

[55] World Bank, *New Country Classifications by Income Level: 2019-2020*, https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups

of 87.6 percent of merchandise export revenues from the commodity sector; lower middle-income countries, 43.1 percent; and upper middle-income and high-income countries, 29 and 27.1 per cent, respectively.

Mongolia, Kazakhstan, and Botswana are countries heavily dependent on commodities, primarily relying on the mining and energy sectors,[56] which attract substantial foreign investment. These countries are not "*usual suspects*" when discussing foreign investor responsibilities, and there is limited research on this topic.

**(i) Mongolia**

Mongolia is a landlocked country bordering Russia and China. It has only 3.4 million citizens but it is the 10th largest country in the world. Following the independence from Manchuria in 1911, Mongolia stepped into the socialist regime and held it until 1990. In 1992, the country enacted its first democratic constitution,[57] marking 30 years of democracy.

Historically, Mongolia's economy was centered on nomadic animal husbandry. During the socialist regime, it underwent collectivization and industrialization,[58] which led to infrastructure and industrial development, including the establishment of the first Mongolian Russian Joint venture copper plant.[59] However, following the collapse of the Soviet Union, Mongolia transitioned into democratic regime which had a privatization period,[60] that lacked adequate analysis of its social impacts, leading to increased unemployment, inequality and poverty.[61]

From 1990 to 2001, approximately 3868 foreign investment companies from 70 countries registered in Mongolia.[62] The adoption of the first democratic Constitution in 1992 guaranteed freedom of religion and press, human rights and ownership of property which are the core basis of the foreign investment. Since then, Mongolia started to join various international organizations and began to start market based economic transition.[63]

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[56] United Nations Conference on Trade and Development (UNCTAD), *The State of Commodity Dependence* 2023. https://unctad.org/publication/state-commodity-dependence-2023
[57] Constitution of Mongolia (1992), https://legalinfo.mn/en/edtl/16532180497951
[58] Alan J.K. Sanders, *Mongolia: Politics, Economics, and Society* 87-88 (1987).
[59] *Socialist Construction under Tsedenbal, 1952-1984*, U.S. Library of Congress in [Unentugs Shagdarsuren]
[60] Richard Pomfret, *Transition and Democracy in Mongolia* (University of Adelaide, Australia 1999).
[61] The World Bank, *Mongolia-Privatization and System Transformation in an Isolated Economy*, Policy Research Working Paper, vol. 1, 50 (1992).
[62] Statistic Report, *State Statistical Office* (1990).
[63] The World Bank, *World Development Indicator*, Human Development Report (2004), UNDP.

As noted by UNCTAD,[64] Mongolia is dependent on one sector, particularly on extractive industry exports. Copper, coal, and petroleum are the three leading commodity exports and together they accounted for 73.7 percent of all allocated product exports in the year 2019-2021. Moreover, total natural resource rents as 16.8 percent of total GDP. There are 2730 mining licenses active as of October 2024 covering 4.4 percent of the country.[65] Foreign investment has a major contribution in the extractive industry of Mongolia. 56.8 percent of total foreign direct investment in 2024 is for the mining sector.[66]

In 2011, the economy of Mongolia was booming at the rate of 18 percent where the mining sector of Mongolia had reached its peak. Since then, the mining industry has received the major foreign direct investment which at that time the biggest copper mine was built.[67]

According to the 2022 statistical data[68]60.1 percent of the total investment was from foreign sources and the share of foreign investment is dominated in the GDP of Mongolia. 84.3 percent of these foreign sources constitute foreign direct investment, of which 58 percent was in the mining sector. As stated in the reports by the International Monetary Fund (IMF), the mining sector will grow strongly because of the improving operational capacity.[69]

The most invested countries are the Netherlands (7.1 trillion MNT), Singapore (679.1 billion MNT), China (609.1 billion MNT), the United Kingdom (539.7 billion MNT) and Canada (349.2 billion MNT) which followed by the United States, Luxembourg, Hong Kong, Japan, Belgium, Australia, Macao, South Korea, Russia, France, Czechia, and Germany.

**(ii) Kazakhstan**

Kazakhstan is a landlocked country and the largest economy in Central Asia which generates around 60 percent of the GDP in the region.[70] After the collapse of the Soviet Union,

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[64] UNCTAD*, State Commodity Dependenc*e, Report 2023, STATE OF COMMODITY DEPENDENCE 2023 - UNCTAD | PDF

[65] Statistics as of October 2024 by The Mineral Resources and Petroleum Authority of Mongolia https://mrpam.gov.mn/page/202

[66] National Statistics Office, as of 2024 https://1212.mn/mn/statistic/statcate/573075/table-view/DT_NSO_1500_005V3

[67] National Statistical Committee of Mongolia, *Foreign Direct Investment Data*, https://www.1212.mn/stat.aspx?LIST_ID=976_L09_1
This is the official website of the National Statistic Committee of Mongolia. Here, the most FDI receiving sector is the mining and construction and the least is the immovable property sector.

[68] *ibid.*

[69] IMF, *Mongolia: 2023 Article IV Consultation-Press Release; and Staff Report*, IMF Country Report No. 23/348 (Oct. 2023).

[70]Satubaldina, A., *Kazakhstan Has Attracted Over US$370 Billion in FDI Since Independence*, The Astana Times (2021), https://astanatimes.com/2021/12/kazakhstan-attracts-over-us370-billion-in-fdi-since-independence/.

Kazakhstan has faced multiple inflation challenges until 1995 and the circumstances have been advancing until the Russian-Ukrainian war in 2022.[71]

The country has been featured as an "economic miracle of Central Asia" due to the stable monetary framework, foreign currency regime and high economic growth.[72] In 1995, the country privatized around 9000 businesses[73] and the constitution has officially protected private property rights.[74] Since this time, Kazakhstan has been focusing on export driven growth,[75] attracting over 370 billion USD on FDI,[76] particularly in oil, which is the largest deposit in Central Asia. While this has been the major contributor that funded infrastructures and social services and reduced poverty,[77] it has led Kazakhstan to commodity dependence[78] which limited diversification.[79]

Numerous scholars and policymakers[80] have highlighted Kazakhstan's vulnerability to so-called "Dutch disease",[81] given its heavy reliance on resource-based exports and capital inflows. UNCTAD[82] classifies Central Asia as the region with the highest rate of commodity dependence, and Kazakhstan's commodity dependence index exceeded 85 percent in 2018-2019, meaning that primary commodities made up more than 85 percent of total merchandise export value. Within this, fuel and energy products alone accounted for over 60

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[71] World Bank, *GDP Per Capita Growth (Annual %) - Kazakhstan*, World Bank (2023), https://data.worldbank.org/indicator/NY.GDP.PCAP.KD.ZG?end=2022&locations=KZ&start=1991.
[72]EBRD, *Helping Kazakhstan Achieve its Destiny*, European Bank for Reconstruction and Development (2020), https://www.ebrd.com/news/speeches/helping-kazakhstan-achieve-its-destiny.html.
Pala, C., *The Kazakh Miracle*, Euromoney (2004), https://www.euromoney.com/article/b1320rsr42dd0d/the-kazakh-miracle.
Hug, A., *Responding to Retreating Rights in Kyrgyzstan, Tajikistan, and Kazakhstan*, The Foreign Policy Centre (2021), https://fpc.org.uk/responding-to-retreating-rights-in-kyrgyzstan-tajikistan-and-kazakhstan/.
[73] Oriental Express Caucasus and Asia, *Economy of Kazakhstan*, Oriental Express Caucasus and Asia (2023), https://www.orexca.com/kazakhstan/economy.htm.
[74] Hayward, D., *Kazakhstan - Context and Land Governance*, Land Portal (2022), https://landportal.org/book/narratives/2022/kazakhstan.
[75] OECD, *Insights on the Business Climate in Kazakhstan*, (2023), https://doi.org/10.1787/BD780306-EN.
[76] Satubaldina, A., *Kazakhstan Has Attracted Over US$370 Billion in FDI Since Independence*, The Astana Times (2021), https://astanatimes.com/2021/12/kazakhstan-attracts-over-us370-billion-in-fdi-since-independence/.
[77]Wołowska, A., *Kazakhstan: The Regional Success Story*, Centre for Eastern Studies (2024), at 45–56, http://pdc.ceu.hu/archive/00002230/01/kazakhstan.pdf.
[78]Akhmetov, A., *Testing the Presence of the Dutch Disease in Kazakhstan*, Munich Personal RePEc Archive (2017), https://mpra.ub.uni-muenchen.de/77936/.
[79] World Bank, *GDP Per Capita Growth (Annual %) - Kazakhstan*, World Bank (2023), https://data.worldbank.org/indicator/NY.GDP.PCAP.KD.ZG?end=2022&locations=KZ&start=1991.
[80]Samuele Bibi, Oil Revenues, FDI, and Balance of Payment Dynamics: The Case of Kazakhstan Between the Supercycle Commodity Boom and Financial Subordination, 90 Res. Pol. (2024).
Esanov, A., Economic Diversification: The Case for Kazakhstan, in Revenue Watch Institute (2015), http://www.imf.org/external/pubs/ft/scr/2010/cr10241.pdf.
Cappelli, F., Carnazza, G., & Vellucci, P., Crude Oil, International Trade, and Political Stability: Do Network Relations Matter?, 176 Energy Pol. (2023), https://doi.org/10.1016/J.ENPOL.2023.113479.
Sachs, J.D., & Warner, A.M., The Curse of Natural Resources, 45 Eur. Econ. Rev. 827 (2021), https://doi.org/10.1016/S0014-2921(01)00125-8.
[81] This means that increased exploitation of natural resources reduces the relevance of other sectors such as manufacturing.
[82] United Nations Conference on Trade and Development (UNCTAD), The State of Commodity Dependence 2023. https://unctad.org/publication/state-commodity-dependence-2023

percent of Kazakhstan's merchandise exports in the same period, underscoring the dominance of hydrocarbons in its export basket. In 2021, the mining and quarrying sector contributed around 17 percent of GDP, a different measure, showing the sector's weight in domestic production rather than in exports, and FDI inflows surged again in 2023, largely driven by extractive-industry projects. Recent data indicate that close to half of total FDI stock and flows are concentrated in oil and gas, with the Netherlands, the United States and Switzerland among the largest investor jurisdictions over the past decade.[83]

**(iii) Botswana**

Botswana is a landlocked country in Africa, gained independence from Great Britain in 1966. Initially considered as a poor nation, Botswana's economy transformed with the discovery of diamonds.[84] The diamond industry consists of around 50 percent of government income[85] and it comprises 80 percent of exports.[86] Botswana focuses on building capacity and negotiating FDI with multinational companies.[87]

Africa in general is a continent with a high commodity dependence ratio.[88] As stated by UNCTAD, between 2018-2019, Botswana relies on commodity exports with 93.6 percent of merchandise exports, with mining representing 91.5 percent.[89] Within mining, diamonds dominate.

The mining sector, especially diamond industry, is the biggest source of FDI.[90] FDI comes primarily from the Southern African Customs Union, The European Free Trade Association, Canada, and Zimbabwe.[91] Most of FDI has been from Europe, specifically from Luxembourg, and from South Africa.[92]

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[83] Qazaqstan Investment Corporation & Bakertilly, Обзор рынка прямых инвестиций в Казахстане 2022, https://qic.kz/upload/iblock/c8e/nbapfnt51f279c0xze55qi7903vsly8r.pdf.
[84] Patricia Lindelwa Makoni, *Foreign Direct Investment - The Case of Botswana*, 11 *ACTA UNIV. DANUBIUS* 4 (2015).
[85] Mahembe, E. & Odhiambo, N. M., *The Dynamics of Foreign Direct Investment in SADC Countries: Experiences from Five Middle-Income Economies*, 11 *Probs. & Persp. in Mgmt.* 35 (2013).
[86] Keith Jefferis, *Management of Botswana's Diamond Revenues*, IMF PFM Blog (July 8, 2024), https://blog-pfm.imf.org/en/pfmblog/2024/07/management-of-botswana-diamond-revenues.
[87] Criscuolo, A., *Briefing Note: Botswana*, (2008), http://www.sitesources.worldbank.org.
[88] UNCTAD, *The State of Commodity Dependence* 2023, https://unctad.org/publication/state-commodity-dependence-2023.
[89] *ibid.*
[90] OECD, *Investment Policy Reviews: Botswana* (2014), https://www.oecd-ilibrary.org/oecd-investment-policy-reviews-botswana-2014_5k43n1vmkbjb.pdf?itemId=%2Fcontent%2Fpublication%2F9789264203365-en&mimeType=pdf.
[91] *Botswana Investment Market Potential*, Stanbic Bank Trade Club, https://www.tradeclub.stanbicbank.com/portal/en/market-potential/botswana/investment.
[92] OECD, *Investment Policy Reviews: Botswana* (2014), https://www.oecd-ilibrary.org/oecd-investment-policy-reviews-botswana-2014_5k43n1vmkbjb.pdf?itemId=%2Fcontent%2Fpublication%2F9789264203365-en&mimeType=pdf.

### 1.1.2. Analysis on the legal framework of Mongolia, Kazakhstan and Botswana

In this part, I will analyze the legal framework of these countries, particularly: (i) constitution; (ii) legislations and policy framework related to mining, foreign investment, environment, corporate responsibility and human rights, (iii) international investment treaties; and (iv) international reports on environmental and human rights violations and corporate accountability by the corporations of the EU, France, the UK, Canada and China in these three countries.

#### (i) Mongolia

##### a. Constitution[93]

The Constitution was adopted in 1992. It recognizes numerous human rights, with Chapter 2 entirely dedicated to human rights and freedoms. For instance, Articles 16 to 19 guarantee fundamental rights such as the right to life, the right to a healthy and safe environment, the right to culture, freedom of thought, and the right to property. Article 19.1 emphasizes the State's responsibility to ensure these rights by creating economic, social, legal, and other guarantees, combating violations of human rights, and restoring infringed rights.

Under Article 6 of the Constitution, Mongolia establishes that the land, subsoil, forests, water, fauna, flora, and other natural resources are under the people's power and the State's protection. Except for land privately owned by Mongolian citizens, these natural resources are considered state public property. The State's policy for utilizing natural resources is guided by long-term development objectives and aims to secure the rights of current and future generations to live in a healthy and safe environment. Additionally, it seeks to ensure the equitable distribution of benefits derived from the exploitation of subsoil wealth by accumulating revenues into the National or Sovereign Wealth Fund.

Mongolian citizens are entitled to information about the environmental impact of land and subsoil exploitation, aligning with their right to a healthy and safe environment. The exploitation of strategically significant mineral deposits must adhere to the principle that natural resources are under the people's control. Furthermore, laws determine the legal framework to allocate the majority of benefits from these resources to the people, ensuring fair and equitable distribution.

[93] Constitution of Mongolia (1992), english version: https://legalinfo.mn/en/edtl/16532180497951

### b. Environment related regulatory framework

- The Law of Mongolia on Environmental Protection

This law was adopted on 30 March 1995 with recent amendments made on 30 August 2024. The purpose of this Law is to regulate relations between the State, citizens, business entities and organizations in order to guarantee the human right to live in a healthy and safe environment, an ecologically balanced social and economic development, the protection of the environment for present and future generations, the proper use of natural resources and the restoration of available resources.[94]

The State's environmental functions and principles under this Law is to ensure the human right to live in a healthy and safe environment, and shall prevent adverse environmental impacts and maintain ecological balance. The principles for implementing these duties are to ensure environmental balance by developing an ecologically oriented economy, to provide conditions for the proper and scientifically-sound use of natural resources.

This law guarantees the "polluter pays" principle where it defines the environmental damage as any action or inaction that results in illegal use and exploitation of natural resources or polluting, deteriorating, damaging the environment beyond established norms of environmental capacity and limit, causing loss of natural resources and ecosystem unbalance.[95] The compensation for environmental damage shall mean monetary expression of a compensation for damage, caused either by a citizen, business entity, organization or officer to the environment, calculated using the ecological and economic assessment methodology, to indemnify the damage caused and prevent any potential risks in the future.[96] Article 31 covers the responsibility of an enterprise in terms of environmental protection. These include complying with environmental laws and standards, to keep record on toxic substances, adverse impacts and wastes coming from the operation, have adequate amount of budget to prevent or diminish adverse effects, protect and restore natural resource; establish internal control unit in charge of the implementation of the environmental management plan; and eliminate the environmental damage caused by its operation, inform relevant authority and pay the compensation within fourteen days; and abstain from any activity that might cause damage to the environment. Furthermore, the companies are obliged to conduct an environmental impact assessment (EIA) and have an environmental management plan (EMP)

[94] Law of Mongolia on Environmental Protection art. 1 (1995).
[95] Law of Mongolia on Environmental Protection art. 3.2.11 (1995)
[96] Law of Mongolia on Environmental Protection art. 2 (1995).

which consists of an environmental protection plan and an environmental monitoring program.[97] The EIA should be presented to the affected local community in detail and in a timely manner,[98] however, the practical implications are in question.

One of the features of this law is that it opens an opportunity for local communities to organize joint management of natural resources which is aimed to have joint protection, appropriate use and restoration of the natural resources.[99] The joint management of natural resources shall ensure full engagement of other interested stakeholders in the partnership. However, the stakeholders do not include local communities, specifically independent nomadic herders' who are not joined to this partnership.[100]

The economic incentives for environmental protection are covered under this law which is one of the legal tools to make environmental protection efficient. The State rewards citizens or legal entities for the introduction of non-polluting and non-waste technology, innovative methods for environmental protection, utilization and restoration of natural resources, and reduction of adverse environmental impacts.[101] Moreover, the State grants with monetary incentive to the person, partnership or NGO who provides reliable and accurate information with respect to breach of environmental laws to relevant authorities.[102]

- Regulation No. 58 by the Government of Mongolia on Environmental Impact Assessment (EIA) and Ministerial Decree No. A-03 on Public Participation during the EIA

It was adopted on August 3, 2023 covering the specific regulation on different types of EIAs which are environmental strategic assessment (ESA), cumulative impact assessment, and environmental impact assessment (EIA). The EIA also covers some of the concepts of social impact assessment (SIA). Annex I mandates that ESAbe conducted by a professional team of experts. However, this does not include human rights specialists but environmental, social and health specialists. The experts are responsible for conducting the impact assessment on potential negative effects of human health on affected communities, environment and society. One of the general principles to conduct ESA is to prevent negative impact and risks on society and human health and to define possible options for increasing positive impact. This

[97] Law of Mongolia on Environmental Protection art. 10 and 14 (1995).
[98] Law of Mongolia on Environmental Protection art. 46 (1995).
[99] Law of Mongolia on Environmental Protection art. 45 (1995).
[100] Law of Mongolia on Environmental Protection art. 48 (1995).
[101] Law of Mongolia on Environmental Protection art. 54 (1995).
[102] *ibid.*

also includes provision on community engagement in conducting such processes. Annex II regulates general and detailed EIA, theSIA within the detailed EIA,and the development of environmental management plans (EMP). The EIA must examine project impacts on local communities, cultural heritage, and social aspects, incorporating community feedback and measures to mitigate negative effects. Specific plans such as displacement, social activity, public hearings, and complaint procedures must align with the EMP. Annex II also covers impact assessment requirements, particularly for mining activities, emphasizing biodiversity, health, safety, and human rights considerations. However, concerns arise over the lack of human rights expertise in assessments, unclear displacement criteria, and inadequate integration of nomadic herder communities' needs. Rights of local communities are notably absent, highlighting potential negligence.

The Law on Environmental Impact Assessment serves as the legal framework for community involvement, mandating discussions and feedback collection from affected communities.[103] In accordance with this, the Ministerial Decree No. A-03 was adopted in 2014 titled "Regulations on ensuring public participation in environmental impact assessment". This Regulation emphasizes the importance of information sharing and consultation between state authorities, project implementers, and affected communities.[104] Early engagement of the local communities are required to identify impacts. It defines "affected community" as a broad concept incorporating both directly and indirectly impacted populations, as well as local and related organizations operating in the project area.

Stakeholders, including NGOs and academia,[105] have raised concerns about the mixed integration of EIA and SIA, often neglecting community-specific issues disrupted by mining. The OHCHR's 2020 Universal Periodic Review[106] urged Mongolia to ensure participatory human rights and environmental assessments before granting mining licenses. Current gaps in assessment processes underscore the need for research into practical implementation and human rights integration, especially for nomadic herder communities.

There is a critical need for an analysis to determine whether the requirements for impact assessments, as stipulated by law, are effectively implemented in practice, or if they are merely a "box-ticking" exercise. While EIAs are legally required to be conducted by the

[103] Article 18 of the Law on Environmental Impact Assessment.
[104] Article 1.2 of the Ministerial Decree No. A-03 dated 2014
[105] T. Sternberg & A. Ahearn, *Mongolian Mining Engagement with SIA and ESG Initiatives*, 103 Env't Impact Assessment Rev. 2 (2023).
[106] UNHCR, *Compilation on Mongolia: Report of the Office of the United Nations High Commissioner for Human Rights*, U.N. Doc. G20/061/32 (2020), https://documents.un.org/doc/undoc/gen/g20/061/32/pdf/g2006132.pdf.

project implementer or EIA specialized company, it remains questionable whether these companies are allocating sufficient resources to ensure thorough and meaningful assessments. In some cases, companies have been reported to present their findings without engaging with the affected communities in a meaningful way. For example,[107] there was an incident where a company presented their points during a public consultation but refused to answer any questions from the community. After the community members expressed frustration and left the auditorium, the company continued its presentation in an empty room.

### c. Law of Mongolia on Investment

The Law of Mongolia on Investment Law was adopted in 2013. It aims to protect the rights and interests of investors operating within the territory of the country, to establish the guarantee of the investment environment, to promote investment, to stabilize the tax environment, to determine the authority of the state agency responsible for investment, and rights and duties of investors. One notable feature of this law is its inclusion of investor responsibilities, requiring them to conduct their business operations in compliance with Mongolian national legal framework. These include conducting activities that respect the interests of consumers, are friendly to the environment, and support human development.[108] Moreover, it requires investors to conduct environmental impact assessment in order to obtain certification for stabilization of the tax environment.[109] However, this law does not include specific regulations on foreign investor responsibility including human rights due diligence obligations.

### d. Mining related regulatory framework

- The Law of Mongolia on Minerals

The law was adopted in 2006 with amendments in 2024. It covers regulations related to exploration and mining of minerals, as well as the protection of exploration fields and mining areas. As stated in this law, the state administrative body is in charge of conducting research, assessment and providing recommendations regarding the impact of the mining industry on social and economic development of Mongolia. If investors want to apply for an exploration license, they have to include an environmental protection plan.[110] The exploration and mining

[107] T. Sternberg & A. Ahearn, *Mongolian Mining Engagement with SIA and ESG Initiatives*, 103 Env't Impact Assessment Rev. 2 (2023).
[108] Law of Mongolia on Investment art. 7 (2013).
[109] Law of Mongolia on Investment art. 16 and 17 (2013).
[110] Law of Mongolia on Minerals art. 18 (2006).

license holders shall comply with the laws and regulations on environmental protection and it cannot start their operations without obtaining written approval from the relevant environmental agency.[111] The exploration license holder has several obligations related to environmental protection such as preparing an environmental management plan; ensuring the level of environmental pollution; record of all adverse environmental impacts resulting from the activities and report to the designated authority; and deliver a fund as a deposit.[112] The applicants for the mining license shall have EMPand conduct EIA reports which include the identification of the possible adverse environmental impacts from proposed mining operations regarding public and health, and include preventative measures to minimize these impacts.[113] The EMPshould also cover the protection of groundwater, storage of toxic substances, rehabilitation measures and other related activities. Applicants for the mining license are also required to provide a deposit which can be used in the case when the mining license holder fails to fulfil its duties under the law. These EMP and EIAsshould be modified and sent for approval in order to request an extension of the license.[114] The licenses can be revoked or terminated on the grounds of failure to fulfil license holders' environmental protection plan.[115]

- The Law of Mongolia on Common Minerals

Mongolia has adopted another legislation related to mining activities which covers the prohibition of mineral exploration and mineral mining at headwaters of rivers, protected zones of water reservoirs and forest fund areas. Moreover, it regulates relations with regard to exploration and mining of common minerals and liabilities of license holders, rehabilitation of exploration fields and mining areas. One of the features of this law is that it requires license holders to carry out the activities ensuring the safety of citizens.[116]

- The Law of Mongolia on Prohibition of Mineral Exploration and Mineral Mining at Headwaters of Rivers, Protected Zones of Water Reservoirs and Forest Fund Areas

In 2009, Mongolia adopted another legislation related to mining activities which covers the prohibition of mineral exploration and mineral mining at headwaters of rivers, protected

[111] Law of Mongolia on Minerals art. 37 (2006).
[112] Law of Mongolia on Minerals art. 38 (2006).
[113] Law of Mongolia on Minerals art. 39 (2006).
[114] Law of Mongolia on Minerals art. 40 (2006).
[115] Law of Mongolia on Minerals art. 53 and 54 (2006).
[116] Law of Mongolia on Common Minerals art. 31 (2014).

zones of water reservoirs and forest fund areas. It mostly regulates the environmental rehabilitation activities.

- The Law of Mongolia on Petroleum

The law requires exploration license holders to conclude an agreement on voluntary provision of support to environmental protection and local development with a governor of soum or district where the exploitation license area is located.[117] Accordingly, the Government of Mongolia adopted the model community development agreement by Resolution 430 of 2015.

### e. Business and Human Rights related regulatory framework

In 2023, Mongolia adopted NAP for the protection of human rights in business activities, prevention of human rights violations, and restoration of violated rights (Regulation No.231 of Government of Mongolia). This plan has 6 chapters covering objectives of the plan, actions to ensure the role and duty of the state in protecting human rights, actions to ensure the responsibilities of business enterprises to respect human rights, actions to ensure and improve an access to effective remedy, enhance the legal framework for redress for human rights violations, financial resources for implementing the plan, monitoring, evaluation and revision of the plan. However, not up to date information on whether there will be draft text on mandatory corporate responsibility legislation.

In practice, numerous mining activities which do not receive funding from international financiers and do not sign on to voluntary standards, are not giving attention to the social and environmental impacts and aim for mineral profits.[118] This especially concerns Chinese invested companies in this sector. For instance, out of 248 foreign-invested companies holding 100 percent FDI in extractive licenses, 142 are Chinese investment companies. Similarly, among 91 joint ventures, 39 are enterprises partnered with Chinese companies.[119] Chinese funds do not require consideration or implementation of ESG principles and impact assessment.[120]

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[117] Law of Mongolia on Petroleum art. 11.2.17 (2014)
[118] T. Sternberg & A. Ahearn, *Mongolian Mining Engagement with SIA and ESG Initiatives*, 103 Env't Impact Assessment Rev. (2023).
[119] Gov't Implementing Agency, Minerals & Oil Dep't, *Mineral Resources Statistics 2024/10* (in Mongolian), https://mrpam.gov.mn/public/pages/202/2024.10.stat.report.mon_(1).pdf.
[120]Lei Ruan & Heng Liu, *Environmental, Social, Governance Activities and Firm Performance: Evidence from China*, 13 Sustainability 767 (2021), https://www.mdpi.com/2071-1050/13/2/767.

### f. International reports on foreign investor responsibility in Mongolia, including French, Chinese, and Canadian companies

Forum Asia[121] has documented violation of herder's right due to mining activities of the 4 provinces ("*aimag*" in Mongolian) in Gobi region in 2024. The report is primarily based on the interviews from the herder community. It tries to identify several issues such as shrinking pastureland, impact on income and individuals, deterioration in community's health, health problems in livestock, consequences of migration to cities, reduction in water resource, increase in dust and noise pollution, failure of uranium company to engage local community participation in EIA, lack of transparency, flawed engagement agreements. It also analyses national legal framework in a certain context, and they had an interview with a representative of french-invested uranium company, Badrakh Energy (Orano Mining).

Another research titled "the responsible mining report" conducted by the Australian Aid Program in 2015[122]. This research covers two sub-provinces ("*soum*" in Mongolian), one in Gobi region and another in Khangai region. The research question is on the interaction of herder's livelihood (specifically, gender roles) and large and small-scale mining activities. It focuses mostly on the positive and negative impact of mining activities with gender lense and its future implications. UNICEF[123] had a study on Mining related displacement and its impact on children in 2017.

Accountability Counsel working carefully on the human rights violations by mining impact in the Gobi region of Mongolia which has dedicated several projects to this.[124] In February 2019, Accountability Counsel published a report[125] assessing the first 18 months of agreement implementation of Rio Tinto (British-Australian company) and Turquoise Hill resources (Canadian company) which operates Oyu tolgoi copper mine, finding that significant work remained on key commitments. By May 2020, an updated analysis highlighted progress, with two-thirds of commitments completed or advancing, compared to the previous year's delays.

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[121] Forum Asia, *From Dreams to Dust: Examining the Impact of Mining on Herder Communities in Mongolia* (2023), https://forum-asia.org/wp-content/uploads/2023/04/From-Dreams-to-Dust_compressed.pdf.

[122] Cane, I., Schleger, A., Ali, S., Kemp, D., McIntyre, N., McKenna, P., Lechner, A., Dalaibuyan, B., Lahiri-Dutt, K., & Bulovic, N., *Responsible Mining in Mongolia: Enhancing Positive Engagement*, Sustainable Minerals Institute (2015), https://www.csrm.uq.edu.au/media/docs/1171/j003551-csrm-report-conceptweb-mr.pdf

[123] UNICEF, *Mining-Related In-Migration and the Impact on Children in Mongolia: Research Findings and Recommendations* (2017), https://www.unicef.org/mongolia/sites/unicef.org.mongolia/files/2019-11/Mining-related_in-migration_and_the_impact_on_children_Eng_smll.pdf.

[124] Mongolia: South Gobi Mining, Accountability Counsel, https://www.accountabilitycounsel.org/client-case/mongolia-south-gobi-mining/#overview

[125] Accountability Counsel, *From Paper to Progress: Tracking Agreements Between Nomadic Herders and Mongolia's Largest Copper Mine* (2019). https://scorecard-static.s3-us-west-1.amazonaws.com/media/public/ProgressReport2019_en.pdf

While this represents commendable progress, much of the completed work affects only a small number of herder households. The most critical commitments such as constructing wells, opening pastures, and connecting herders to markets remain in early stages or unstarted. Three years after the agreements, challenges persist in achieving the broader community benefits necessary to sustain herders' traditional livelihoods near the mine. Most recently in 2024, Accountability Counsel, Gobi Soil, OT Watch, CEE Bankwatch Network, and 33 other NGOs from around the world sent a joint statement to the IFC and EBRD condemning their proposed additional financing to the OT mine and demanding the lenders place conditionalities on the loans.

As mentioned above, out of 248 foreign-invested companies with full FDI ownership in extractive licenses, 142 are Chinese-owned. Among 91 joint ventures, 39 are partnerships involving Chinese companies. Chinese invested company PetroChina Dachin Tamsag is one of the biggest oil projects in the Matad soum of Dornod aimag.[126] It has been operating for over 10 years under the Product sharing agreement with the Government of Mongolia. There are a number of violations related to the activity such as lack of transparency, lack of environmental management plan, overlap with the herder community lands, creating illegal transportation roads.[127] Furthermore, in 2022, the government authority of Sukhbaatar aimag filed a claim for compensation for environmental damage and reimbursement of rehabilitation costs against this company. This claim followed an environmental assessment conducted by the Department of Environment and Tourism of Sukhbaatar aimag, which evaluated the land adjacent to the dam of the company's transportation road through the territory of Erdenetsagaan soum, with the findings issued by a licensed professional organization; the claim itself was formally filed by the Governor of Sukhbaatar aimag in February 2020 and is still continuing.

### g. International investment treaties

This section will oversee if Mongolia has made any attempts to include foreign investor obligations into existing international investment treaties in alignment with the human rights and environmental aspects, particularly climate change. Mongolia has 44 BITs and 3 agreements with investment related provisions.

[126] Aimag is province in Mongolian. Mongolia is divided into 21 aimag (provinces).
[127] Interview with Activist Adilbish G. and Attorney Boldkhuu U. Representing the Sukhbaatar Aimag State Authority, Zindaa.mn (Nov. 22, 2022), https://news.zindaa.mn/471d.

- Bilateral Investment Treaty (BIT) between Canada and Mongolia was concluded in 2017 which is the last BIT by Mongolia. It has numerous provisions in relation with voluntary corporate social responsibility;[128] health, safety, and environmental measures which do not encourage investment by relaxing domestic measures;[129] expert reports on the factual issues concerning environment, health and safety matters;[130] and limited the scope of indirect expropriation.[131]
- The Economic Partnership Agreement (EPA) between Japan and Mongolia included a provision on health, safety, and environmental measures and labour standards which requires parties to refrain from encouraging investment by relaxing their respective standards.[132]
- All the remaining 43 BITs and 3 Treaties with Investment provisions (TIPs) were concluded before 2010 which makes them old generation investment treaties.[133]

The Canada-Mongolia BIT, signed in 2016 and in force since 2017, is the only clear "new-generation" outlier in Mongolia's otherwise traditional treaty network. It incorporates several innovations: a corporate social responsibility clause that encourages enterprises to voluntarily integrate internationally recognised CSR standards on labour, environment, human rights, community relations and anti-corruption; a provision on health, safety and environmental measures in which the parties recognise the inappropriateness of encouraging investment by weakening domestic standards; and language facilitating expert reports on environmental, health and safety issues. The agreement also contains an annex on indirect expropriation that narrows the scope of compensable measures by clarifying that non-discriminatory regulations adopted for legitimate public welfare objectives, including the protection of health, safety and the environment, do not constitute indirect expropriation. These features indicate that Mongolia has begun to experiment with integrating sustainability and investor-responsibility language into some of its investment agreements, in line with broader trends in Canadian treaty practice. Yet the overall structure of protection remains largely intact. The Canada-Mongolia BIT still provides investors with broad FET protection, expansive definitions of "investment" and "investor," and direct access to investor-state arbitration, while the CSR clause is purely voluntary and the public welfare carve-outs are

[128] Article 14 of Canada-Mongolia BIT (2017)
[129] Article 15 of Canada-Mongolia BIT (2017)
[130] Article 33 of Canada-Mongolia BIT (2017)
[131] Annex B.10 of Canada-Mongolia BIT (2017)
[132] Article 10.17 of Japan-Mongolia EPA (2016)
[133] UNCTAD Investment Policy Hub: Mongolia, https://investmentpolicy.unctad.org/international-investment-agreements/countries/139/mongolia

framed in cautious, general terms. Moreover, this BIT sits within a network dominated by pre-2010 treaties that make little or no reference to human rights, environmental protection or investor obligations and that rely on open-textured standards of FET and expropriation.

**(ii) Kazakhstan**

**a. Constitution**

As stated in the Constitution of Kazakhstan,[134] the basic principle of a country's activities should be public harmony, political stability, and economic development for the benefit of the whole nation. The State shall endeavor to protect the environment for the benefit of human health and life. Parliament shall have the right to enact laws related to environmental protection. Articles 12 and 39 covers human rights and freedoms, and Article 83-1 includes the rights and duties of Human Rights Commissioner.

**b. Environmental Code No. 400-VI**

It regulates activities of individuals and legal entities that have or may have a negative impact on the environment, including extractive industry. It includes environmental issues such as air, water quality, waste management, biodiversity conservation and environmental impact assessment.[135]

Similarto Mongolian Law on Environmental Protection, this Code also includes the "polluter pays" principle. Article 127, for example, specifies that fees can be charged for negative impact on the environment. Under this provision, businesses can be charged a fee for emissions of pollutants into the atmospheric air, in particular methane. The rates of payment for the negative impact on the environment are established by the tax legislation of the Republic of Kazakhstan. In accordance with Article 186, businesses are required to monitor the quantity, quality of emissions and their changes. The results of this monitoring must be reported to the government.

There are two types of environmental permits, as (i) environmental impact permit; (ii) integrated environmental permit. These documents should include project documentation for the construction and/or operation of facilities, draft emission limits, a draft waste management programme, a draft programme of industrial environmental control and other

[134] Constitution of Kazakhstan (2022), english version: https://www.akorda.kz/en/constitution-of-the-republic-of-kazakhstan-50912
[135] *Mining 2024: Kazakhstan*, Chambers Practice Guides, https://practiceguides.chambers.com/practice-guides/mining-2024/kazakhstan

documents. Compared to Mongolia, however, exploration activities which have exploration licenses do not require environmental permits because it is considered as having a minimal negative impact on the environment.

Kazakhstan has prohibited extractive industry to operate in environmentally preserved zones which covers an area of 29.3 million hectares.

### c. Entrepreneur Code

The Entrepreneur Code of the Republic of Kazakhstan includes provisions on investment activities.[136] It is required by law to conclude an agreement on investment obligations between Kazakhstan and a legal entity.[137] Such agreement should be concluded exclusively for extractive activities and/or processing of solid minerals.

Chapter 6 of the Entrepreneur Code regulates social responsibility of entrepreneurship which is also applicable to the foreign investors. However, it is voluntary for companies to contribute to the development of social, environmental and other areas.

Chapter 7 of this Code covers the responsibility of the State to regulate business activities. The objective of such regulations should include ensuring the safety of goods, works and services produced and sold by business entities for life and health of people, protection of their legitimate interests, safety for the environment, national security of the country, and creating favourable conditions for business development that stimulates the growth of a country's economy. Article 85 includes the right of the state to conduct unscheduled inspections in the situations which demand the prosecutor on specific facts of causing or threat of harm to life, human health, the environment, rights and legitimate interests of individuals, legal entities and the state. Moreover, control shall be carried out in the field of environmental protection, reproduction and use of natural resources. These activities shall have risk assessment and management system[138]; checklists of mandatory requirements for the activities of subjects and objects of control and supervision where non-compliance will entail a threat to human life and health, environment.[139] Article 144 includes the criteria where investigation should be conducted based on the appeals of individuals and legal entities or state bodies on specific harms to life, human health, environment.

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[136] Entrepreneur Code of the Republic of Kazakhstan ch. 25 (2015).
[137] Entrepreneur Code of the Republic of Kazakhstan art. 295-3 (2015).
[138] Entrepreneur Code of the Republic of Kazakhstan art. 141 (2015).
[139] Entrepreneur Code of the Republic of Kazakhstan art. 143-144 (2015).

As stated in Article 281, the purpose of investment support by the State is to create a favorable investment climate for the economy and stimulation of investment in the creation of new, expansion and renovation of existing industries with the use of modern technologies, as well as environmental protection.

### d. The Code on Subsoil and Subsoil Use

The Code on Subsoil and Subsoil Use is the main legislation concerning mining activities in Kazakhstan. This law aims to ensure sustainable development of the mineral and raw material base of the country for the economic growth and welfare of society.[140]

The law has numerous articles on environmental protection and human health[141] of different projects such as uranium and hydrocarbons production.[142]

This law requires companies to establish conditions for facilitation of active involvement of the affected communities, local executive bodies, and environmental authorities in the environmental impact assessment. Subsoil users or companies which are requesting approval from environmental authorities are required to conduct public hearings which involve communities and provide information on date, time, location of the process. This process should include the remarks or objections of the public community and it should be recorded. However, there is no specific obligation to consider this document in the decision making process on designing and operating mining activities. Moreover, these hearings are not considered as consultations. However, environmental impact assessment and public hearings are not required for exploration activities. Also, social impact assessment is not required under this law.

One of the features of this law is that it is required to conclude community development agreements in cases where this activity will carry on near the townsites. Rental fees paid by license holders are directly allocated to the local budget. Moreover, Article 25 lists the areas where exploration and mining operations are prohibited, such as water fund lands, areas of groundwater of potable quality, lands designated for the needs of defence and national security, lands of townsites, roads, railways and airports.

Like Mongolia, the impact of mining projects have positive impacts on building infrastructure, creating jobs, and reforestation projects, there are also negative impacts such

[140] Code on Subsoil Use of the Republic of Kazakhstan art. 1 (2017).
[141] Code on Subsoil and Subsoil Use of the Republic of Kazakhstan arts. 26, 54, 154-155, 158-159, 121.10, 147.5 (2017).
[142] Code on Subsoil Use of the Republic of Kazakhstan arts. 153, 173 (2017).

as pollution, damage of natural resources, environmental degradation, human health and livelihoods of local communities.[143]

### e. Business and Human Rights related regulatory framework

The National Action Plan of Kazakhstan is still in the process of discussion.[144] There are no unified guidelines or regulations on environmental, social and governance (ESG) aspects of the corporate activities where it is defined through separate regulatory frameworks. For instance, environmental aspects are governed by Environmental Code, social aspects are regulated by labour and employment laws, and governance is included in the company law.

### f. International reports on foreign investors responsibility in Kazakhstan, including the China, France and EU's companies operating abroad

As any parts of the world where mining activities are dominant, there are environmental and human rights violations that are ongoing. Kazakhstan is one of the four countries in Central Asia with the highest number of human rights allegations.[145] For instance, six miners died and three were injured in the ArcelorMittal Temirtau company because of a methane and rock mass release.[146] Toxic waste from mining and metallurgy sectors is generated in the Eastern part of Kazakhstan.[147] Other examples include: waste from power plants and metal ore concentration plants in Almaty; coal mining, metallurgy and chemical industries in the Karaganda region; oil and gas industries waste in the Kyzylorda, Atyrau and West Kazakhstan regions; toxic and radioactive waste at the non-industrial and military zones of Baikonur and the Semipalatinsk nuclear testing sites.[148] One of the most polluted cities from extractive industry is Zhezkazgan where the water is highly polluted with extensive amounts of ammonium, ion, calcium.[149] Also this region has a high mortality rate where respiratory

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[143] *Mining 2024: Kazakhstan*, Chambers Practice Guides, https://practiceguides.chambers.com/practice-guides/mining-2024/kazakhstan

[144] The Astana Times, *National Action Plan on Business and Human Rights is Pivotal for Kazakhstan*, (2023), https://astanatimes.com/2023/10/national-action-plan-on-business-and-human-rights-is-pivotal-for-kazakhstan-says-expert/.

[145] Surma, Katie, *Mining 'Critical Minerals' in Eastern Europe and Central Asia Rife With Rights Abuses*, InsideClimate News, May 6, 2024, https://insideclimatenews.org/news/06052024/eastern-europe-central-asia-critical-mineral-mining-rights-abuse/

[146] Business and Human Resource Center, *Kazakhstan: ArcelorMittal Temirtau Fined After 200 Industrial Safety Violations Revealed at Abayskaya Mine* (2022), https://www.business-humanrights.org/en/latest-news/kazakhstan-arcelormittal-temirtau-fined-after-200-industrial-safety-violations-revealed-at-abayskaya-mine/

[147] Nugumanova, Lyazzat, Frey, Miriam, Yemelina, Natalya, & Yugay, Stanislav, *Environmental Problems and Policies in Kazakhstan: Air Pollution, Waste and Water*, IOS Working Papers, No. 366, Leibniz-Institut für Ost- und Südosteuropaforschung (IOS), Regensburg (2017).

[148] *ibid.*

[149] Gala Case Study, The Most Vulnerable City in Kazakhstan, https://www.learngala.com/cases/f38b07e9-79a7-4897-ac18-f9d6cc5e4a01/4

diseases are much higher than regional and national averages.[150] Another, highly vulnerable city with chronic dust pollution, poor working environment, lack of infrastructure and abandoned state is Bestobe which is considered as a mining city with 6000 residents. Altynalmas is a mining company with major ownership of Gouden Reserves B.V., a Netherlands-registered company.[151] As stated by the researchers, one of the largest coal mining regions in the country is the Karaganda Coal Basin where the biggest sources of air pollution is coming from in Kazakhstan.[152]

As stated by the TrustWorks Global[153], even though it is required by law to conduct public hearings and consult with local communities with regards to environmental and social impact assessments, the key stakeholders are lacking information during the project development.[154] As a consequence, it has long term effects on the health of local communities, such as the village Berezkova in north of Kazakhstan where 25 children and four adults were poisoned by toxic substances[155] and at least 45 percent of citizens are suffering from chronic illnesses.[156] Lack of transparency, perceptions of corruption, lack of control of local authorities are the main issues in the extractive industry's impact on human rights and environment.[157]

As reported by DialogueEarth,[158] During the investigation of 10 largest extractive companies operating in Kazakhstan, all face serious human rights violations. For instance, corruption facilitates human rights violations where in 2010 part of US ExxonMobil Tengizchevroil[159] which caused deaths and illnesses in the Tengiz oil field. Another foreign invested company North Caspian Operating[160] a company with ownerships from Eni (Italy), Exxon Mobil (US),

[150] *ibid.*
[151] Sochnev, Artyem, *Kazakhstan: Environmentalists Face Prison Over Opposition to Gold Mine*, Feb. 23, 2022, https://eurasianet.org/kazakhstan-environmentalists-face-prison-over-opposition-to-gold-mine
[152] Bočková, Mgr. et Mgr., Bohovic, Mgr. Bc. Roman, Hrnčiar, Mgr. Bc. Matúš, Muroň, Mgr. Mikuláš, Chytrý, Mgr. Jan, Skalský, Martin, Černochová, Ing. Marcela, & Kalmykov, Dmitriy, *Air Pollution in Kazakhstan as Seen from Space: Fundamental Analysis, Focus on the Karaganda Region, and Notes on Kazakhstan's Broader Impact on Climate Change* 13 (2023).
[153] Trustworks Global, *Natural Resource-Related Country Analysis: Kazakhstan*. https://trustworksglobal.com/publication/natural-resource-related-country-analysis-kazakhstan/
[154] Ospanova, Saule & Cotula, Lorenzo, *Transparency in Extractive Industry Legislation: Recommendations for Kazakhstan's Code on Subsurface Use*, IIED (2015).
[155] Trustworks Global, *Natural Resource-Related Country Analysis: Kazakhstan*, https://trustworksglobal.com/publication/natural-resource-related-country-analysis-kazakhstan/
[156] Business and Human Rights Resource Centre, *Karachaganak Petroleum Operating*, Report, June 2021, https://www.business-humanrights.org/en/companies/karachaganak-petroleum-operating-kpo/?issue=368.
[157] *ibid.*
[158] Reynolds, Ashley Nancy, *Opinion: Kazakhstan's Oil Sector is Rife with Human Rights Abuses*, DialogueEarth, Aug. 3, 2021, https://dialogue.earth/en/energy/kazakhstans-oil-sector-is-rife-with-human-rights-abuses/
[159] Business and Human Rights Resource Centre, *Tengizchevroil*, Report, June 2021, https://www.business-humanrights.org/en/companies/tengizchevroil-joint-venture-chevron-exxonmobil-kazmunaygas-lukarco/?issue=368.
[160] Business and Human Rights Resource Centre, *North Caspian Operating Company*, Report, June 2021, https://www.business-humanrights.org/en/companies/north-caspian-operating-company-ncoc/?issue=368.

Shell (Netherlands), Total (France), CNPC (China) has caused risks to tens of thousands residents in the Atyrau region to be exposed to poisoning. Mangistaumunaigaz is a joint venture between KazMunaiGas (Kazakhstan) and CNPC (China)[161] and Karazhanbasmunai jointly owned by KazMunaiGas and CITIC (China)[162] which had criminal charges against labour activists and violations of union rights and retaliation against protesting workers. Kazgermunai is also jointly owned by KazMunaiGas and CNPC which caused severe contamination on the environment.[163]

Kazakhstan is home to the largest reserves of transition minerals such as chromium, uranium, zinc and rare earth elements. Civil society organizations are already raising concerns on the issues of companies operating in this field where it lacks transparency, local community consultation, human rights protection and responsible business conduct.[164]

### g. International investment treaties

This section will oversee if Kazakhstan has made any attempts to include foreign investor obligations into existing international investment treaties in alignment with the human rights and environmental aspects, particularly climate change.

- Kazakhstan-Singapore BIT concluded in 2018 has a carve-out article on dispute settlement from tobacco related products.[165] It has also a regulation on expropriation where in rare circumstances State can adopt regulatory actions to protect public welfare such as health, safety and environment and this does not constitute expropriation.[166]
- EU-Kazakhstan Enhanced Partnership and Cooperation Agreement (2020) includes an article on climate change where parties are obliged to develop and strengthen their cooperation to combat and to adapt to climate change[167]; and also to contribute to sustainable development and good governance in environmental protection.[168]

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[161] Business and Human Rights Resource Centre, *Mangistaumunaigaz*, Report, June 2021, https://www.business-humanrights.org/en/companies/mangistaumunaigaz/?issue=368.
[162] Business and Human Rights Resource Centre, *Karazhanbasmunai*, Report, June 2021, https://www.business-humanrights.org/en/companies/karazhanbasmunai-joint-venture-citic-group-kazmunaygas/?issue=368.
[163] Business and Human Rights Resource Centre, *Kazgermunai*, Report, June 2021, https://www.business-humanrights.org/en/companies/kazgermunai/?issue=368.
[164] Business and Human Rights Resource Centre, *Fueling Injustice: Transition Mineral Impacts in Eastern Europe and Central Asia*, April 2024, https://www.business-humanrights.org/en/from-us/briefings/fuelling-injustice-transition-mineral-impacts-in-eastern-europe-central-asia/.
[165] Kazakhstan-Singapore Bilateral Investment Treaty §§ 1-2 (2018).
[166] Kazakhstan-Singapore Bilateral Investment Treaty art. 6 (2018).
[167] EU-Kazakhstan Enhanced Partnership and Cooperation Agreement ch. 8 (2020).
[168] EU-Kazakhstan Enhanced Partnership and Cooperation Agreement ch. 7 (2020).

- Japan-Kazakhstan BIT (2014) includes in the preamble and in a provision which recognizes the inappropriateness of encouraging investment by relaxing health, safety and environmental measures or by lowering standards.[169]
- Austria-Kazakhstan BIT (2010) has same provision as Japan-Kazakhstan BIT and also in the preamble, it acknowledges that investment agreements and multilateral agreements on the protection of environment, human rights or labour rights are meant to foster global sustainable development and that any possible inconsistencies there should be resolved without relaxation of standards of protection.[170]
- 42 BITs and 7 TIPs were concluded before 2010 which makes them old generation BITs.

Kazakhstan's BIT network is dominated by "old-generation" agreements that prioritise investment protection and say little about investor responsibility, but a small number of post-2010 treaties begin to engage with social and environmental concerns. The Japan-Kazakhstan BIT (2014), for example, acknowledges in its preamble and operative provisions that it is inappropriate to encourage investment by relaxing health, safety or environmental measures or by lowering labour standards, echoing the non-lowering-of-standards formula found in other recent Japanese and EU agreements. The Austria-Kazakhstan BIT (2010) similarly recognises, at preambular level, that investment agreements and multilateral environmental, human rights and labour instruments are meant to foster sustainable development and that conflicts between them should not be resolved by weakening protection standards.These provisions signal that Kazakhstan has begun to adopt sustainability language in its treaty practice, particularly around non-derogation from health, environmental and labour norms. However, they coexist with traditional clauses on FET, expropriation and investor-state arbitration that closely track earlier, protection oriented models. Kazakhstan's BIT network continues to consist of older treaties that offer broad substantive and procedural protections to foreign investors with minimal reference to human rights or environmental protection, and even in the newer BITs the recognition of public welfare regulatory space remains largely declaratory.

[169] Japan-Kazakhstan Bilateral Investment Treaty preamble, art. 24 (2014).
[170] Japan-Kazakhstan Bilateral Investment Treaty preamble, art. 4 (2014).

### (iii) Botswana

#### a. Constitution[171]

Article 8 of the Constitution is on the protection from deprivation of property. It states that no property of any description shall be compulsory acquired except where this acquisition is necessary for the interest of defence, public safety, public order, public morality, public health, town and country planning or land settlement; secure the development or utilization for a purpose beneficial to the community; or in order to secure the development or utilization of the mineral resources of Botswana. Chapter 2 covers the protection of fundamental rights and freedoms of individuals such as the right to life, personal liberty, protection from slavery and forced labour, inhuman treatment, deprivation from property, privacy of home, freedom of conscience, freedom of expression, assembly and association, freedom of movement, discrimination.

No one can be deprived of their life except by court sentence or in self-defense, and personal liberty can only be restricted in accordance with the law. It protects individuals' privacy in their homes and properties. The exceptions include cases related to national defense, public safety, public health, or town planning, and situations where the law requires inspections for taxes, rates, or duties, or when enforcing a court order. Additionally, the Constitution ensures that actions taken under these exceptions do not violate individuals' rights without due legal process or proportionality. Furthermore, the rights of individuals charged with a criminal offense ensured by the Constitution that they receive a fair and public trial by an impartial court. Further, it ensures that trials are conducted in public unless exceptional circumstances justify exclusion, such as to protect public order or the privacy of individuals involved.

The Constitution guarantees individuals the right to freedom of thought, religion, and belief, including the right to change one's religion and to manifest religious practices publicly or privately. However, restrictions on these rights can be imposed for reasons related to national defense, public safety, or the protection of others' rights. Section 12 protects the freedom of expression with exceptions for public order, health, or others' reputations. The freedom to assemble and associate is also included in the Constitution forming trade unions, subject to reasonable restrictions in the interests of public safety or the rights of others. Right to freedom of movement within Botswana is guaranteed and restrictions on movement may

[171] Constitution of Botswana (1966), english version: https://botswanalaws.com/consolidated-statutes/constitution-of-botswana

apply in cases of lawful detention or in accordance with laws that safeguard public welfare, health, or national security.

While it ensures several fundamental rights, limited exceptions are important when necessary for public welfare, national security, or the rights of others, always subject to due legal process and proportionality.

**b. Environmental Assessment Law**

Part II of this law includes the process of environmental impact assessment (EIA) and environmental management plan (EMP), procedure of appeals committee and it has annexes with relevant forms on the particular process such as EIA, EMP, rehabilitation plan, terms of reference (ToR), qualifications for certification of environmental assessment practitioners and their code of conduct.

During the development of EMP, competent authority has a right "to request" developers to consult stakeholders. The developers should engage practitioners into the assessment process and ensure that this responsible person shall hold meetings with affected people or communities to explain the nature of the activity and its effects. Furthermore, the competent authority shall conduct public hearings and provide further information relating to the activity.

It also includes the activities that require strategic EIA and a statement where it states the project, whether to conduct EMP or EIA, or both. For instance, extractive and associated industries on oil, coal bed methane, natural gas, heavy metals and radioactive minerals shall conduct both of these assessments when prospecting and exploration is on a freehold land, tribal or state land.

Scoping exercise in the EIA is also regulated by this law. This is a process of interaction between interested and affected parties, government agencies and project developers. The first step is identifying interested and affected parties which include, for example, local, national and international NGOs, local authorities such as tribal leadership, environmental practitioners and experts. The consultation plan shall be developed using different tools such as questionnaires, polls, surveys, workshops, public hearings and meetings. The final outcome is a report which identifies any policies and laws impacting on the proposed planning, development; describe the environmental issues identified and their causes; and summarize the views of stakeholders who were consulted.

Content of EIA[172] should include the baseline environment description, public consultation, identification and assessment of environmental impacts which covers positive and negative impact; long and short term impact; direct and indirect; recurring or nonrecurring; regional and local; cumulative and non-cumulative; reversible and irreversible; consideration of transboundary impacts; analysis of alternatives; mitigation measures; archeological impact assessment; impact mitigation; monitoring plan; decommissioning programme; conclusion and recommendations. There is also an appendices part which contain information not directly used for the report but needed for reference by technical experts.

As for the EMP[173], usually it is conducted when detailed EIA is not required or needed particularly when the considered project is not qualified for the EIA. The content of the report is similar to EIA, yet it has part on stakeholder consultation.

The law also regulates rehabilitation plans[174] and its content which covers purpose, location of project, areas of rehabilitation, transport arrangements, expected outcomes and so on.

### c. Investment law

Botswana does not have standalone investment law. However, there are few legislations which govern investment related activities.

First, Botswana Investment and Trade Centre Act adopted in 2011.[175] This Act aimed to provide grounding regulations for the merger of the Botswana Export Development and Investment Authority and the Botswana International Financial Services Centre into a single entity. This entity is a lead agency to promote investment, export development and trade facilitation.

Second, the Industrial Development Act of Botswana was adopted in 2019.[176] It aims to regulate the manufacturing entities through their licensing, registration and supervision to facilitate industrial development and for connected matters.

Lastly, the Special Economic Zones Act of Botswana was adopted in 2016. This act aims to make provision for the establishment, development and management of special economic zones, for creating a conducive environment for local and foreign investment; to facilitate

[172] Environmental Assessment Law of Botswana form E (2012).
[173] Environmental Assessment Law of Botswana form B (2012).
[174] Environmental Assessment Law of Botswana form C1 (2012).
[175] Access at: https://www.bitc.co.bw/Views/areas/main/about/home/media/BITC-ACT-2011.pdf
[176] Access at: https://www.gov.bw/sites/default/files/2020-03/The%20Industrial%20Development%20Act%202019_0.pdf

expansion of employment opportunities, attainment of economic growth targets and to provide for related matters. It established a Special Economic Zones Authority responsible for identifying economic zones, overseeing licensing and monitoring compliance.[177] Furthermore, it offers tax[178] and other types of incentives to attract foreign direct investment in specific economic zones such as one stop service centers for investors.[179] One of the features of this Act is that it requires the authority to evaluate the environmental protection standard and recourse for non-compliance with standards from the application to operate in a special economic zone: [180]

**d. Mines and Minerals: Subsidiary Legislation and Mines, Quarries, Works and Machinery Regulations**

Mines and Minerals: Subsidiary Legislation has four parts: Mines and Minerals (Demarcation of Mining Lease Areas) Regulations; Mines and Minerals (Health, Mortality and Labour Returns) Regulations; Mines and Minerals (Prospecting and Leasing Charges) Regulations; and Mines and Minerals (Restriction of Prospecting Activity for Coal) Order. The Health, Mortality and Labour returns require the employee to submit a report to the employer on this issue.

Mines, Quarries, Works and Machinery Regulation has different provisions concerning responsibilities and duties of competent persons; accidents; mine-rescue; safety and protection in working places; precautions in cases of danger; health and labour; ventilation, dust and toxic gases; dump; excavation. It has detailed regulation covering health and labour standards in the operation field and duty of persons in charge. For instance, it is a duty of persons in charge to use reasonable care and take responsible precautions to avoid danger to life, safety, or health of any person.[181] The manager shall also ensure that the book on instruction for the purpose of securing the safety and health of persons should be provided and kept.[182]

However, it has no regulation concerning the responsibility of a company on the affected local communities during the mining operations in both regulations.

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[177]Special Economic Zones Act 2016 pt. II (Botswana).
[178] United Nations Conference on Trade & Development (UNCTAD), Botswana Offers Tax Incentives in Special Economic Zones, Investment Policy Monitor (Oct. 22, 2021).
[179]Special Economic Zones Act 2016, pt. II, art. 4(2)(c) (Botswana).
[180] Special Economic Zones Act 2016, pt. VII, art. 32 (Botswana).
[181] Mines, Quarries, Works and Machinery Regulations art. 26 (1978).
[182] Mines, Quarries, Works and Machinery Regulations art. 17 (1978).

Botswana has another Act on Mineral Rights in Tribal Territories (1967) which transfers mining rights from seven tribes and tribal authorities to Botswana in the manner and at the conditions that are specified in agreements. Seven schedules include the text of these agreements. Article 1 of this agreement states "*There should be transferred to and vest in the President on behalf of the Republic of Botswana* ***without compensation*** *all the right, title and interest of the Tribe and Chief thereof in or to minerals within the [...] Tribal Territory including all mineral rights heretofore vested in the Tribe and Chief thereof and all monies accruing to the Tribe or Chief thereof under any Crown or State Grant of mineral rights"*. The definition of "mineral rights means the rights to prospect, search for, win or appropriate minerals", and "mineral" or "minerals" means any constituent of the crust of the earth including diamonds, oil and oil shale; but does not include soil or subsoil, sand, sandstone or gravel; stone suitable for building, road making, ballasting railways or similar purposes; salt or clay reasonably required by members of the tribe for their pastoral, agricultural or domestic purposes.

The current Mines and Minerals Act allows Botswana to buy 15 percent shareholding in any mining project upon being licensed. Currently, in 2024, Botswana is proposing a law which will require mining companies with a licence to sell a 24 percent stake in mines to locals if the government does not acquire the shareholding. [183]

### e. Business and Human Rights related regulatory framework

Botswana has not adopted a National Action Plan on Business and Human Rights and there is no information on whether Botswana is pushing for the binding legislation or policy framework.

Botswana has adopted a policy framework National Vision 2036: Achieving prosperity for all. This policy states that "*We will have a sustainable, vibrant and diversified mineral sector that is integrated into other sectors of the economy*". It also includes Human and social development and sustainable environment sections.

Even though, country does not specifically focus on the business and human rights issues, there are several regional initiatives. For instance, African Charter on Extractive Industries; Human Rights, and the Environment, the African Commission's Working Group on

[183] Business and Human Rights Resource Centre, *Botswana: Govt. Introduces Bill to Force Mining Companies to Sell at Least 24% Shareholding to Citizens*, 2024, https://www.business-humanrights.org/en/latest-news/botswana-govt-introduces-bill-to-force-mining-companies-to-sell-at-least-24-shareholding-to-citizens/

Extractive Industries, Environment and Human Rights Violations has developed State Reporting Guidelines and Principles; a Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector, which urges States Parties to adopt laws and regulations aimed at easing the economic hardships of communities affected by extractive activities in line with regional and international human rights laws and principles. [184]

Center for Health Human Rights and Development (CEHURD)[185] states that private sectors operating in health and education services do not often consider human rights which results in discrimination in access to these services, lack of transparency and accountability. Therefore, the African Commission on Human and Peoples Rights passed a Resolution No.550 in March 2023[186] to develop norms on the State's obligation to regulate private actors. This Resolution focuses on business and human rights where the Commission called member states to set an African Union Policy Framework on Business and Human Rights and tasked this work to the Working Group on Extractive Industries, Environment and Human Rights in Africa. Furthermore, the Commission also adopted a Resolution on Human Rights based approach to the Implementation and Monitoring of the African Continental Free Trade Area Agreement (AfCFTA).[187] It focuses on multiple issues such as mainstreaming of human and people's rights in the negotiations on and the implementation of the AfCFTA; the recognition and protection of the roles of vulnerable groups and those engaged in micro, small, and medium-size enterprises, in the context of trade in Africa and the impact of AfCFTA on this; and the assessment of the human rights implications to identify and address gaps.

As noted by the OHCHR report on Botswana's human rights record,[188] the country developed a Governance Code for State Owned Enterprises (SOEs) and Financial Reporting Regulations of 2021 in order to improve corporate governance, performance, transparency and accountability.

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[184] Abe, Oyeniyi, *The State of Business and Human Rights*, Friedrich-Ebert-Stiftung, Aug. 2022.
[185] Center for Health Human Rights and Development (CEHURD), Uganda & Training and Research Support Centre, *Policy Series No. 50, Regional Network for Equity in Health in East and Southern Africa*, Feb. 2024.
[186] The African Commission on Human and Peoples Rights, *Resolution on Business and Human Rights in Africa* - ACHPR/Res.550 (LXXIV) 2023, https://achpr.au.int/en/adopted-resolutions/550-resolution-business-and-human-rights-africa-achprres550-lxxiv-2023
[187] The African Commission on Human and Peoples' Rights, *Resolution on a Human Rights-Based Approach to the Implementation and Monitoring of the African Continental Free Trade Area Agreement* - ACHPR/Res.551 (LXXIV) 2023, https://achpr.au.int/en/adopted-resolutions/resolution-human-rights-based-approach-implementation-monitoring-achprres551
[188] *Botswana's Human Rights Record to Be Examined by Universal Periodic Review*, Apr. 28, 2023, https://www.ohchr.org/en/press-releases/2023/04/botswanas-human-rights-record-be-examined-universal-periodic-review

### f. International reports on foreign investors' responsibility in Botswana, including the UK's companies operating abroad

As stated above, the diamond industry is a large part of Botswana's economy. De Beers is an English company operating in this sector which caused several violations by their operations. For instance, the indigenous people in the Kalahari Desert have been systematically and forcefully removed from their land since 1995 where they still face challenges in enjoying the basic services. The State and De Beers have not been held responsible for this.[189] As compared with Mongolia, Botswana citizens are mostly pro diamond mining industry because of its economic importance. [190]

There are numerous partners selected by this company known as "*sightholders*".[191] These sightholders are required to comply with human rights and labor regulations to keep receiving rough diamonds from De Beers. The workers hired by these companies for polishing diamonds are on short term contracts sexually assaulted, threatened or punished for unionizing. There are a lot of negative impacts on health such as coughing and holding chemicals with bare hands. Around 3,500 workers, the majority of whom are women, are employed across 33 sightholders.

Botswana has a Diamond Workers Union (BDWU)[192] who wants to end worker's rights violations on the diamond cutting and polishing supply chain. In these supply chains, migrant workers are paid less; dispute resolution mechanisms are ignored; punished to unionizing. Therefore, the union wants to propose the company and the State officials for social dialogue to respond to these violations where the responsible personnels ignored.

Business and Human Rights Resource Center states[193] that even though Botswana's commitment included in the Nationally Determined Contributions (NDC) and mining operations are playing a crucial part in this energy transition with new technologies, many

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[189] Enough Project, *De Beers in Botswana: A Corporation's Impact on Human Rights*, posted by Hannah Weitzman, Dec. 11, 2013, https://enoughproject.org/blog/de-beers-botswana-corporations-impact-human-rights
[190] *ibid.*
[191] Louise Donovan, *Diamonds Brought Prosperity to Botswana. Women Workers Are Paying a Heavy Price*, The Fuller Project, Oct. 3, 2024, co-published with New Lines Magazine, https://fullerproject.org/story/diamonds-brought-prosperity-to-botswana-women-workers-are-paying-a-heavy-price/
[192] IndustriALL Global Union, *Botswana: Union Fights Union Busting in the Diamond Supply Chain*, 2024, https://www.industriall-union.org/botswana-union-fights-union-busting-in-the-diamond-supply-chain
[193] Business and Human Rights Resource Centre, *Inadequacies of the Law in Protecting the Rights of Mine Workers and Communities Against Climate Change*, 2022, https://www.business-humanrights.org/en/blog/inadequacies-of-the-law-in-protecting-the-rights-of-mine-workers-and-communities-against-climate-change/

workers are forecasted to lose their job. Social dialogue with workers at sectoral level is almost non-existent because of workers' lack of participation in the dialogue forums.

### g. International investment treaties

This section will oversee if Botswana has made any attempts to include foreign investor obligations into existing international investment treaties in alignment with the human rights and environmental aspects, particularly climate change.

- In 2016, South African Development Community Economic Partnership Agreement (EPA) was signed between Botswana, European Union, Eswatini, Lesotho, Mozambique, Namibia, and South Africa. This agreement aims to strengthen their trade links and establish close and lasting relations based on partnership and cooperation, to create new employment opportunities, attract investment and improve living standards in the territories of the Parties while promoting sustainable development. Article 97 includes general exception clause where nothing shall be construed to prevent the adoption or enforcement by either Party of measures necessary to protect public morals, to protect human, animal or plant life or health, relating to the importation or exportation of gold or silver, relating to the products of prison labour, imposed for the protection of national treasures of artistic, historic or archaeological value. These measures shall not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination.
- In 2011, Botswana and Zimbabwe signed a bilateral investment agreement (BIT) where it is not publicly available.
- The Belgium-Luxembourg Economic Union signed a BIT with Botswana in 2006 and it is not in force yet. There are several other BITs signed by Botswana with Mauritius, Ghana, Egypt, Zimbabwe, Malaysia and China between 2000 to 2005, where it is still not in force.
- Botswana-Germany BIT (2000) and Botswana-Switzerland BIT (1998) are in force. However, these old generation BITs do not cover any issues related to environment, human rights and investor responsibility.
- Regional trade agreements such as ACP-EU Samoa Agreement (2023), AfCFTA Investment Protocol (2023), EU-SADC EPA Group agreement, EU-SADC EPA Interim agreement are signed.

- SACU and Mozambique - United Kingdom EPA (2019), SACU - US TIFA (2008), SADC Investment Protocol (2006), EFTA - SACU FTA (2006), Cotonou Agreement (2000), SADC Treaty (1992), AU Treaty (1991) are in force.
- Botswana concluded 10 BITs, 9 of them were concluded before 2010.

Botswana has concluded ten BITs, nine of them before 2010, and participates in a range of regional and inter-regional economic agreements. Among its in force BITs, the Botswana-Germany BIT (2000) exemplifies the classic old-generation model. It grants broad protections to covered investments, including national treatment, most-favoured-nation treatment, protection against expropriation and access to investor-state arbitration, but contains no explicit provisions on environmental protection, human rights, labour standards or investor responsibilities. At the same time, Botswana is party to regional and inter-regional instruments such as the SADC Treaty, the SADC Protocol on Finance and Investment, the EU–SADC Economic Partnership Agreement and, more recently, the AfCFTA Investment Protocol and the ACP–EU Samoa Agreement, which incorporate sustainable-development language and general public-welfare exceptions. These newer agreements, however, operate alongside rather than in place of earlier BITs. The absence of explicit environmental or human rights clauses in force BITs means that any domestic effort to regulate extractive sector investors more robustly must navigate a legal landscape where the primary hard law commitments continue to favour foreign capital.

### 1.1.3. Interim Conclusion

Mongolia, Kazakhstan, and Botswana all face issues in balancing different interests because of their commodity dependence, with mining sectors contributing to significant portions of their economies and attracting foreign investment. While each country has taken steps to protect human rights and environment through their legal frameworks, implementation and enforcement remain inconsistent, particularly in relation to extractive industries.

Although Mongolia has made advancements with its legal framework such as guaranteeing the right to a healthy environment, its economy is still heavily reliant on mining exports. This sector has attracted significant FDI and plays a key role in the country's economic growth. The legal and regulatory framework of Mongolia provides a foundation for addressing environmental protection and human rights in relation to the extractive industry. The Constitution of Mongolia guarantees several human rights, emphasizing the State’s responsibility to ensure these rights. The Law on Environmental Protection enshrines the

"polluter pays" principle and places numerous obligations on businesses, including EIAs and EMPs, which should be presented to local communities. Mongolia's mining related regulatory framework also includes significant provisions for environmental protection. These laws ensure that exploration and mining companies must conduct EIAs and EMPs, and also provide financial guarantees for rehabilitation and environmental damage. However, challenges persist in fully involving local communities, especially nomadic herders, in environmental decision-making processes. The management of natural resources does not fully include nomadic herders, who are important stakeholders in Mongolia, leaving them vulnerable to the impacts of mining activities. The business and human rights regulatory framework in Mongolia acknowledges the State's responsibility to protect human rights from adverse business operations, and emphasizes the necessity for businesses to respect these rights. However, there is a lack of legislation related to mandatory corporate responsibility. International reports highlight ongoing human rights violations associated with mining operations caused by Chinese, French and Canadian foreign invested companies in different parts of the country. These are the adverse impact on herders' livelihoods, shrinking pasturelands, and environmental degradation which are caused by insufficient community participation and transparency in decision-making. The lack of consultation with local communities and failure to properly address the social and environmental impacts of mining activities continue to violate human rights and cause environmental degradation.

Kazakhstan is also heavily reliant on its extractive industries, particularly oil and gas. Kazakhstan has attracted substantial FDI into the energy sector. Similarly with Mongolia, Kazakhstan’s legal and regulatory framework has significant challenges in its enforcement. Kazakhstan's Environmental Code includes provisions for the "polluter pays" principle and mandates environmental monitoring by operators. It also sets out requirements for environmental permits to conduct public hearings which aims to engage communities in decision-making processes. However, exploration activities, which are considered to have minimal impact on the environment, are not required by the same process. The Code on Subsoil and Subsoil Use, which governs mining operations, encourages the involvement of local communities in environmental impact assessments but does not require that public feedback should be incorporated into decision-making. There have been numerous reports on toxic waste and air pollution which are linked to extractive industries. Human rights violations, such as unsafe working conditions and labor rights abuses, have been reported in Chinese, French and EU’s foreign-invested companies operating in the country. The

government still lacks mandatory human rights due diligence legislations but has made efforts to establish a National Action Plan on Business and Human Rights and include it into the international investment treaties.

Botswana also relies on its mining sector, particularly diamonds. This makes up over 50% of its GDP and with 91.5% of merchandise exports tied to mining. However, like Mongolia and Kazakhstan, Botswana's regulatory framework has gaps, particularly in holding companies accountable for social and environmental impacts. The country does not have mandatory human rights due diligence legislation and National Action Plan on Business and Human Rights. Moreover, its international investment agreements lack strong provisions for environmental protection and human rights. Although its legal framework includes regulations for health, safety, and environmental management, there is no specific provision addressing the responsibility of companies to local communities during mining operations. Botswana faces several human rights violations in the diamond industry particularly by the operations of UK invested companies.

As seen from the regulatory frameworks of Mongolia, Kazakhstan, and Botswana, there is an intention to balance economic, social, and environmental interests. However, in practice, they often prioritize economic growth, particularly through prioritizing extractive industries. This can be derived from the fact that while they have legal frameworks that recognize the importance of environmental protection and human rights, the implementation and enforcement of these laws can be inconsistent, often prioritizing economic interests due to the significant role of FDI in their economies. This is emphasized in numerous reports on human rights violations and environmental degradation in these countries by the foreign invested companies. For instance, local communities, particularly vulnerable groups like nomadic herders in Mongolia, involvement and environmental considerations are often limited or not fully incorporated into decision-making processes, highlighting a tendency to prioritize economic benefits over meaningful protection of the group’s rights. Based on this, one can conclude that although there is recognition of the need for sustainable development by protecting environment and human rights in their extractive industry, the drive for economic growth often takes precedence, with social and environmental concerns being secondary.

### 1.2. Diverse perspectives of home states

#### 1.2.1. Background

As stated above, the European Union countries such as France, the UK, China and Canada are the most invested countries in Mongolia, Kazakhstan and Botswana. Moreover, Chinese parent companies own the most of the ISDS protected coal plants followed by the UK, France, US, Italy, Japan, Netherlands, Austria, Germany, Canada, South Korea, Malaysia, UAE, Australia, Russia.[194]

#### 1.2.2. Analysis on the legal framework of the European Union (EU), France, China, the United Kingdom and Canada

In this part, I will analyze (i) constitution; (ii) legislations and policy framework related to mining, foreign investment, environment, corporate responsibility and human rights, and the policy framework on their corporations activities present in third countries; and (iii) international investment treaties with Kazakhstan, Mongolia and Botswana.

**(i) European Union**

**a. The Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and Treaty of Lisbon**

The European Union was initially about economic integration and a peace project.[195] The Maastricht Treaty or TEU established the EU and laid out core principles, objectives, and institutional structure. Building on this, the TFEU contains detailed rules on the functioning of the EU including internal market, economic and social policy. The Treaty of Lisbon, which came into force in 2009, amended and consolidated both the TEU and TFEU. Key reforms by this treaty was making the Charter of Fundamental Rights of the EU legally binding and clarifying its external relations competences.

Economic development features prominently, with detailed mechanisms to support growth, competition, and regional development. It demonstrates a strong commitment to fostering

[194]Discussed During the Side Event of the OECD 9th Investment Conference, Mar. 12, 2024.
[195] Jan Wouters, From an Economic Community to a Union of Values, in *The European Union and Human Rights* (Jan Wouters, Manfred Nowak, Anna-Luise Chané & Nicolas Hachez eds., Oxford Univ. Press 2020).

economic stability and integration with provisions related to competition,[196] state aid,[197] and economic coordination.[198]

Moreover, human rights and democracy are foundational to the treaties, reflected in the Union's commitment to promoting liberty, democracy, respect for human rights and the rule of law.[199] These principles form internal governance and external relations,[200] indicating that they are not secondary concerns but essential components of the Union's identity.[201] For instance, as a part of their global obligation to promote sustainable development outside of EU borders, it shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.[202] Moreover, Article 6 of the TEU covers the human rights, freedoms and principles stipulated in the Charter of Fundamental Rights of the European Union. This article underlines the EU's responsibility to ensure that the legislations and policies uphold fundamental rights and promote this within the Union and in its external relations.[203] Additionally, protocols[204] within the treaties reaffirm adherence to the European Convention for the Protection of Human Rights and Fundamental Freedoms, emphasizing liberty, democracy, and the rule of law as shared principles among Member States. However, academics[205] note that the conferral of competences to the EU has not followed through on the human rights commitments because the Treaty of Lisbon gave the EU responsibilities but not powers to enforce and promote human rights, which means that the unanimous decision-making of the Member States is needed to take initiatives related to third countries.

The treaties also address social and workers' rights. The Union supports Member States in improving workers' health and safety, working conditions, and social security. Policies emphasize protection in areas such as employment contracts and worker consultations. The

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196 Consolidated Version of the Treaty on the Functioning of the European Union, art. 101 and 102, 2012 O.J. (C 326).
197 Consolidated Version of the Treaty on the Functioning of the European Union, art. 107, 2012 O.J. (C 326).
198 Consolidated Version of the Treaty on European Union art.122, 2012 O.J. (C 326).
199 Consolidated Version of the Treaty on European Union art. 2, art.3.3, art.3.5, art. 6, 2012 O.J. (C 326).
200 Consolidated Version of the Treaty on the Functioning of the European Union, Title III, Ch. 1, 2012 O.J. (C 326).
201 Consolidated Version of the Treaty on European Union art. 21, 2012 O.J. (C 326).
202 Consolidated Version of the Treaty on European Union art. 21.1(d), 2012 O.J. (C 326).
203 Article 3(5) and 21(1) of the Consolidated TEU
204 For instance, Protocol (No 24) on Asylum for Nationals of Member States of the European Union, in Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 305, 2012 O.J. (C 326) 1, 305.
205 Jan Wouters, From an Economic Community to a Union of Values, in *The European Union and Human Rights* (Jan Wouters, Manfred Nowak, Anna-Luise Chané & Nicolas Hachez eds., Oxford Univ. Press 2020).

TFEU[206] outlines specific objectives to enhance workers' quality of life and social protections while fostering equal opportunities and sustainable growth. However, it is also worth noting that much of the literature in terms of social policy of the EU remains focused on labor markets and employment issues,[207] rather than internal and external broader human rights implications of EU policy such as rights of minorities and rights of affected communities by corporate actors in third countries.

Environmental protection and sustainable development are also integral to the treaties, with explicit requirements to integrate environmental considerations into all policies.[208] Principles like prevention, the polluter-pays principle, and the precautionary approach guide environmental actions, and objectives like combating climate change and preserving natural resources are central.[209] Union policy aims to preserve and improve the environment, protect human health, use resources prudently, and address global environmental challenges, including climate change.[210] Furthermore, the Union considers scientific data, regional conditions, and economic development when formulating its environmental policies.[211]

As stated in Article 2 of the TEU, the Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of environment. However, the question of where the EU strikes the balance between "the market" and "the social" is becoming an increasingly challenging issue.[212] Some academic literature[213] states that even though TEU clarifies sustainable development by including economic, social, and environmental pillars, the grounds of the EU's legal framework largely stems from economic integration which often

[206] Consolidated Version of the Treaty on the Functioning of the European Union, Title IV, Ch. 1 & Title IX, 2012 O.J. (C 326).
[207] See, for instance, Simon Deakin, The 'Capability' Concept and the Evolution of European Social Policy*,* 34 (1) *N. Z. J. Empl. Relat.* 7 (2005); Catherine Barnard & Simon Deakin, In Search of Coherence: Social Policy, the Single Market and Fundamental Rights, 31(4) *Indus. Relat. J.* (2000).
[208] Consolidated Version of the Treaty on the Functioning of the European Union, art. 11 & Title IX, 2012 O.J. (C 326) 47.
[209] Consolidated Version of the Treaty on the Functioning of the European Union, Title XX, art.191-193, 2012 O.J. (C 326) 47.
[210] Consolidated Version of the Treaty on the Functioning of the European Union, art. 191, 2012 O.J. (C 326).
[211] Consolidated Version of the Treaty on the Functioning of the European Union, art. 191, 2012 O.J. (C 326).
[212] Sasha Garben, The Constitutional (Im)balance Between "the Market" and "the Social" in the European Union*, 13 Eur. Const. L. Rev. 23* (2017).
[213] Nicolas de Sadeleer, Sustainable Development in EU Law: Still a Long Way to Go, 6(1) *Jindal Global L. Rev.* 39 (2015). "Traders can invoke Treaty rights in national courts, whereas victims of pollution lack a comparable Treaty-based right to a clean environment. Furthermore, the Commission can scrutinize national attempts to enact stricter environmental standards, and Member States sometimes fail to fully implement EU environmental directives, limiting their effectiveness. Despite the Lisbon Treaty's effort to place sustainable development on an equal footing with economic concerns, it remains silent on issues like equitable resource distribution across current and future generations. Consequently, although environmental goals are now more explicitly recognized, the enduring emphasis on market integration continues to overshadow environmental interests in practice".

conflicts with environmental regulation. This means that from one side, environmental policies seek to protect resources through regulation and on the other side, the internal market prioritizes liberalized trade and uniform rules. This creates an asymmetry that favors economic freedoms over environmental protection.

### b. Environmental policy and legislative framework

Articles 11 and 191 of the TFEU designate the EU as the authority on environmental policy, addressing issues such as air and water pollution, waste management, and climate change. The principles of precaution, prevention, pollution rectification at source, and the polluter-pays principle are foundational, as outlined in Directive 2004/35/CE of the European Parliament and of the Council on environmental liability for preventing and remedying environmental damage. The Directive creates a liability for those responsible for damage caused to the natural resources such as water, land, and protected species and also remediation to restore the environment to its natural former state.[214] After its adoption, Member States have been starting to transpose it into national legislation where it had several challenges including incomplete alignment with national regulations,[215] difficulties in covering costs for remedies, and determining environmental damage.[216]

The European Green Deal is a strategy to transform the EU into a resource efficient economy. It outlines key objectives, including net-zero greenhouse gas emissions by 2050, economic growth decoupled from resource use, and inclusivity in development. It focuses on protecting natural capital, addressing climate change, and reducing pollution through measures like the circular economy action plan, the biodiversity strategy for 2030, and the zero-pollution action plan. Starting with the launch of the Green Deal in 2019, there were many initiatives such as the European Climate Pact and Circular Economy Action Plan.[217] Afterwards, it has built key strategies such as Climate Target Plan[218] and Adoption of European Climate Law in 2021. The final legislative acts were Nature Restoration Law, Net-Zero Industry Act, Industrial

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[214] Francesco Andreotti, Daniele Montanaro & Laura Calcagni, A New Approach for Environmental Damage Assessment Pursuant to the European Union Environmental Liability Directive, 20(6) *Integrated Envtl. Assessment & Mgmt.* 2050 (2024).
[215] Kleoniki C. Pouikli, Overview of the Implementation of the Directive 2004/35/EC on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage at European Level, 57(25) *Desalination & Water Treatment* 11520 (2015).
[216] DG Environment (with Stevens & Bolton LLP & BIO Intelligence Serv.), Implementation Challenges and Obstacles of the Environmental Liability Directive: Final Report (2013), https://hal.science/hal-03859602/document.
[217] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_420
[218] European Commission, Press Release IP/20/1599, State of the Union: Commission Raises Climate Ambition and Proposes 55% Cut in Emissions by 2030 (Sept. 17, 2020), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_20_1599/IP_20_1599_EN.pdf.

Emissions Directive and so on. The European Climate Law[219] sets legally binding targets, such as a 55% reduction in net emissions by 2030 compared to 1990 levels. The EU also coordinates its environmental and climate strategies with international agreements, such as the Paris Agreement and the UN 2030 Agenda, while integrating climate concerns into other policy areas, including transport and energy. The Nature Restoration Law is the up to date legislative proposal as a part of the European Green Deal and it aims to set legally binding restoration targets to rehabilitate degraded ecosystems, contribute to reversing the decline in species and habitats, enhance ecosystem services and promote sustainable practices.[220]

However, despite the European Commission states that all stakeholders commitment and involvement is important to make this deal fruitful,[221] academics argue that it creates new challenges for the EU's social model which focuses on productive or economy-oriented social policy geared towards human capital.[222] Critics argue that the European Green Deal left the concept of "just transition" risking an exacerbation of existing socio-economic disparities.[223] Discussions around social inclusion into the European Green Deal highlight two debates.[224] One focuses on Inter-European debate centers on employment, job security and worker conditions led by trade unions and social NGOs supporting productive approaches to policy. The second debate highlights global inequalities and the disproportionate burden of climate change on marginalized groups, but they are not focusing on protective social policy issues. Scholars[225] argue that incorporating social rights based policies to mitigate inequalities within Europe and across the globe will be just transition and make the European Green Deal successful.

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[219]Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law), 2021 O.J. (L 243) 1.
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021R1119
[220] European Commission, *Nature Restoration Law Enters into Force* (Aug. 15, 2024), https://environment.ec.europa.eu/news/nature-restoration-law-enters-force-2024-08-15_en.
[221] European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal*, COM(2019) 640 final (Dec. 11, 2019), https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_1&format=PDF.
[222] Bernhard S., "From Conflict to Consensus: European Neoliberalism and the Debate on the Future of EU Social Policy," 4(1) *Work Organisation, Labour & Globalisation* 175 (2010).
[223] Katharina Zimmermann & Vincent Gengnagel, *Mapping the Social Dimension of the European Green Deal*, 25(4) Eur. J. Soc. Sec. 523 (2023), https://doi.org/10.1177/13882627231208698.
[224] ibid.
[225] ibid.

### c. Investment legal framework[226]

The EU's investment policy aims to promote investments that support sustainable development, respect human rights, and uphold high labor and environmental standards. It emphasizes corporate social responsibility and responsible business practices while preserving the rights of home and host countries to regulate their economies in the public interest.

In 2012, the EU adopted a regulation establishing transitional arrangements for bilateral investment agreements between EU Member States and non-EU countries to ensure consistency with EU competences and investment policies. This regulation allows Member States to maintain agreements signed before the Lisbon Treaty's entry into force and sets conditions for modifying or concluding new agreements. On April 6, 2020, the Commission submitted a report on the application of this regulation, addressing its role in aligning bilateral agreements with EU policy.

Concerns are growing about foreign direct investments from the EU into third countries, particularly in critical technologies with potential risks to EU technology and know-how. Some investments could lead to these technologies being used by non-EU actors to enhance military or intelligence capabilities. The Commission is examining these risks through a White Paper, focusing on outbound investments in critical technologies to assess their nature and scope and explore potential policy measures.

Furthemore, the EU's Action Plan on Sustainable Finance (SFDR) was adopted in 2018. It aims to redirect capital flows towards sustainable investment and includes guidelines that affect how European companies invest abroad. This plan promotes transparency and sustainability in financial activities, including cross-border investments.The SFDR contains ESG-specific transparency requirements to be disclosed to potential investors through various channels such as website, pre-contractual documents, and periodic reports.

### d. Business and Human Rights regulatory framework

Directive on Corporate Sustainability Due Diligence[227] has entered into force in 2024. The Directive aims to foster sustainable and responsible corporate behavior in companies'

[226] European Commission, *Investment Legal Framework of the EU*, https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/investment_en.
[227] *Directive 2024/1760*, 2024 O.J. (L 357) 1, https://eur-lex.europa.eu/eli/dir/2024/1760/oj.

operations and across their global value chains. It will ensure that companies identify and address human rights and environmental impacts of their actions inside and outside of the European Union.

The Directive establishes a duty for companies to identify and address potential and actual adverse human rights and environmental impacts within their operations, subsidiaries, and value chains and business partners. It also requires large companies to adopt a transition plan for climate change mitigation aligned with the 2050 climate neutrality objective of the Paris Agreement and intermediate targets under the European Climate Law. The rules apply to approximately 6,000 large EU companies with more than 1,000 employees and a net turnover exceeding EUR 450 million worldwide, and around 900 non-EU companies with a net turnover above EUR 450 million within the EU. SMEs and micro-companies are not directly covered but may be indirectly affected as business partners in value chains, with the Directive including measures to support their compliance.

To gain a better understanding of the motives and foundations behind this initiative, it is necessary to analyze the impact assessment (IA) report that was submitted to the Commission's Regulatory Scrutiny Board ("Board"). As stated in the IA, the primary goal of this initiative is to *better exploit the potential of the single market to contribute to the transition to a sustainable economy, to foster sustainable value creation and improve the long-term performance and resilience of EU companies*.[228] Internally, it increases directors' accountability for sustainable value creation and incorporates long-term sustainability factors into decision-making. Externally, it enhances corporate responsibility for preventing and mitigating adverse human rights and environmental impacts, including in value chains, aligning with the EU's international commitments. The IA outlines five specific objectives, including clarifying directors' duties, integrating sustainability risks, increasing accountability, improving access to remedies, and enhancing corporate governance practices.

The IA presented policy options across three areas: corporate due diligence, directors' duties, and directors' remuneration. It explored material and personal scope as well as enforcement mechanisms, emphasizing economic impacts such as effects on companies, trade, and competitiveness, alongside social impacts on working conditions and human rights. Additionally, the IA's analysis of impacts on third and developing countries received less

[228] *Commission Staff Working Document, Impact Assessment Report dated 23.2.2022*, accompanying the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

attention, with fewer stakeholders from these areas being included. The Explanatory Memorandum (EM) highlights the need for EU-level action to address transboundary challenges such as pollution, climate change, and human rights harms in global value chains, emphasizing the inefficiency of voluntary approaches to tackle these issues.

Stakeholder consultation is essential in the development of the Directive. The rules outlined in the Directive impose obligations on companies regarding their actual and potential adverse impacts on human rights impacts and environment contributed to or are directly linked to, with respect to their own operations, and those of their subsidiaries, and the operations carried out by entities in their value chain operations with whom the company has a business relationship, and on liability for violations of the obligations mentioned before. Engaging in meaningful stakeholder consultation allows for a better understanding of the specific needs and challenges faced by EU companies in their operations. The IA's consultation strategy encompassed various components including inception IA, engagement with social partners such as employers' organizations, trade unions, stakeholder workshops and meetings involving company law experts, business associations, individual businesses (including SMEs representatives), civil society organizations as well as the OECD. Moreover, it included a 15-week open public consultation (OPC) where it received more than 400,000 public responses and 149 position papers.[229] However, it is notable that only 6.6 percent of the respondents were from non-EU countries other than the UK and US, and only few responses were received from developing countries.[230] Despite this, 92 percent of stakeholders across all groups agreed on the necessity of a horizontal EU legal framework. Regarding the scope, 97 percent of respondents supported the extension of due diligence rules to third-country companies. Overall, CSOs expressed support for the need for mandatory due diligence obligations to all companies, regardless of their size, form, or location within the EU. In the stakeholder consultations conducted during the ex-post evaluations for the proposal of the Directive, some respondents expressed concerns about potential negative impact of due diligence rules on third countries. There are worries that companies investing in third countries with weaker human rights, including social and labor standards, and environmental

[229] *Annex 2 to the Commission Staff Working Document, Impact Assessment Report dated 23.2.2022*, accompanying the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.
[230] Veronique Girard, *Initial Appraisal of a European Commission Impact Assessment*, EUR. PARL. RESEARCH SERV. (Oct. 2022), at 7.

protections might be forced to withdraw from these countries if due diligence rules are enforced.[231]

After the adoption of the Directive, there were notable changes of the proposed text based in the IA. These are[232] removal of general duty of care and civil liability of directors with respect to sustainability, removal of the duty of directors to adapt company strategy in consideration of the actual and potential adverse impacts identified in the due diligence process which is considered as a voluntary measure, replacement of the term "value chain" with the narrower definition of "chain of activity", which excludes the use and disposal of companies products and services from the scope of due diligence, and limitations of the due diligence duties of financial undertakings to the upstream part of their chains of activities, thereby excluding scrutiny of the activities of their clients.

The Directive complements other EU regulations, such as the Non-Financial Reporting Directive (NFRD), Sustainable Financial Disclosure Regulation (SFDR), and the Taxonomy Regulation. The NFRD requires companies to disclose non-financial information but lacks substantive measures for addressing value chain impacts. The Directive adds substantive due diligence duties for companies to identify, prevent, and mitigate adverse impacts in operations, subsidiaries, and value chains. Proportionality considerations led to restricting the material and personal scope, excluding SMEs due to administrative burdens and limiting due diligence to clearly defined human rights and environmental impacts. Enforcement mechanisms combine sanctions and civil liability. Significant changes in the adopted proposal include removing the tier-based approach, extending due diligence obligations to all business relationships of a company.

In February 2025, the European Commission released the Omnibus package.[233] It is a set of legislative proposals from the Commission which is not mandatory until it goes through the EU legislative process where the European Parliament and the Council of the EU adopt it. This proposal seeks to reduce the scope and substance of the existing regimes, and would amend rules introduced under key regulatory frameworks: EU Corporate Sustainability

[231] Explanatory Memorandum in the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, at 19.
[232] Elena Calsamiglia & Valerio Novembre, *The Corporate Sustainability Due Diligence Directive: A Milestone or a Missed Opportunity?*, FLORENCE SCH. OF BANKING & FIN. (2024), https://fbf.eui.eu/the-corporate-sustainability-due-diligence-directive-a-milestone-or-a-missed-opportunity/.
[233] Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM (2025) 81 final, (Feb. 26, 2025). https://commission.europa.eu/publications/omnibus-i_en

Reporting Directive, the CSDDD, Taxonomy Regulation and Carbon Border Adjustment Mechanism. By this package, it has three core proposals with supporting documents. First, it proposes to delay the reporting by two years for large undertakings and for listed SMEs and certain financials, to push back the CSDDD transposition and first application by one year. The goal is to cut administrative burden and give companies time while the Commission streamlines the framework by revising the ESRS methodology for reporting, without abandoning Green Deal objectives. Second, it proposes to streamline CSRD and CSDDD: it narrows mandatory CSRD reporting to large companies with lower than 1000 employees, drops listed SMEs from scope, strengthens a value-chain cap where big companies cannot push excessive data requests onto smaller suppliers and the cap would directly apply to reporting company, scraps sector specific ESRS reporting methodology and adds voluntary SME standards. On CSDDD, it re-targets duties mainly to direct partners, reduces monitoring frequency, limits stakeholder engagement obligations, removes termination as a last resort measure, and revises penalties and liabilities to cut burden while keeping core aims. Third, simplification of the carbon border adjustment mechanism (CBAM).

To highlight the specific issues related to the current research, the proposal introduces several changes. First, it reduces the frequency of monitoring whereas the companies were previously required to conduct assessments of their due diligence policies and measures at least every 12 months,[234] they would now do so every 5 years, or earlier if there are reasonable grounds to believe the system is ineffective.[235] This shift is intended to lower compliance costs and simplify oversight for companies. Second, the scope of stakeholder engagement is narrowed. Engagement is now required only at selected stages of the due diligence process, with certain obligations removed to make consultations more proportionate and better tailored to company size, sector, and risk profile.[236] Before it required companies to conduct stakeholder engagement when deciding to terminate or suspend a business relationship and when adopting appropriate measures to remediate adverse impacts.[237] Third, the proposal removes the requirement to terminate business relationships as a "last resort".[238] Instead, if a company

[234] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/285, art. 15, 2024 O.J. (L 202) 1.
[235] Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM (2025) 81 final, at 41 (Feb. 26, 2025).
[236] *ibid.*
[237] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/285, art. 13, 2024 O.J. (L 202) 1.
[238] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/285, art. 10.6 and 11.7, 2024 O.J. (L 202) 1.

depends on specific supplies but those suppliers are linked to severe adverse impacts, the company must first exhaust all due diligence measures to address the issue. If these efforts fail, the company should suspend the business as a last resort while working with the supplier toward a solution.[239]

Many note that due diligence, particularly human rights due diligence, is not a one-off or box ticking exercise but rather it requires meaningful consultation with stakeholders. Surya Deva[240] identifies conceptual, operational, and structural limitations within the human rights due diligence practices. He argues that it focuses only on processes which do not hold companies accountable with meaningful outcomes where it over relies on businesses themselves to define and translate standards without meaningful stakeholder participation. Human rights due diligence can become a legitimizing tool for harmful activities where the businesses use cost-benefit calculations instead of real commitments to prevent from human rights violations, address harmful business models and deeper systematic inequalities. In order to make due diligence effective, Deva proposed six preconditions, such as expanding its scope to human rights, labor, and environmental standards; covering both large and small enterprises across global value chains; correcting power imbalances by strengthening worker and civil society input; requiring result-oriented obligations (not just procedural ones); drawing "red lines" where respect for human rights is realistically unattainable; and ensuring effective access to remedies. Meanwhile, Chiara Macchi[241] underscores how new EU directives can broaden the human rights due diligence scope beyond human rights to include environmental protection, climate change, and good governance. She emphasizes the importance of mapping the entire value chain and disclosing information about subsidiaries, suppliers, and business partners, which leads to enhancing oversight not only by the company itself but also by civil society organizations. Such transparency requirements with stricter obligations to implement policies aimed at preventing or mitigating adverse impacts, are intended to strengthen the accountability of a broad range of companies operating in or from the EU market. It is worth noting that Macchi's perspective complements Deva's concerns by showing how more expansive and transparent rules could address some of human rights due

[239] Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM (2025) 81 final, at 18 (Feb. 26, 2025).
[240] Surya Deva, *Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?*, 36 *Leiden J. Int'l L.* 389 (2023), https://doi.org/10.1017/S0922156522000802.
[241] Chiara Macchi, Business, Human Rights and the Environment: The Evolving Agenda (T.M.C. Asser Press 2022).

diligence practice's existing shortcomings, potentially moving the legal framework closer to ensuring genuine protection for rights holders.

Furthermore, the important feature is that the Directive has extraterritorial implications[242] which means that the EU requires companies to identify and mitigate negative impacts on human rights and environment across their operations including supply chains in third countries. Under the territorial principle of public international law, the State can assert jurisdiction within its own territory and all others should be considered as extraterritorial, which is an exception.[243] Extraterritoriality has different measures.[244] It can be divided into two which are "direct extraterritorial jurisdiction" and "domestic measures with extraterritorial implications". These two forms can be divided into different options such as public policies for companies, regulation through laws; and enforcement through adjudicative or other implementation processes. Direct extraterritorial jurisdiction refers to the regulations adopted by a state to regulate the conduct occurring outside its territory.[245] Domestic measures with extraterritorial implications is where a State regulates conduct occurring outside its territory on the basis of territorial jurisdiction over their private actors.[246] It means measures that regulate conduct abroad because they have legal presence within the EU ('territorial extension').[247] This is a technique where it imposes accountability to the parent company incorporated within the regulating State's jurisdiction which in turn has to apply these requirements to their subsidiary operating abroad.[248] These regulations involve applying a state's laws to external actors or activities based on significant connections or impacts within its territory. The Directive falls into the domestic legislation with extraterritorial implications because it applies not only to EU-based and non-EU companies with generated income in the EU but also to their supply chains in third countries.

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[242] "Extraterritoriality can be defined as the ability of a State, via its legal, regulatory, and judicial institutions, to exercise authority over actors and activities outside its own territory" in Jennifer Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*, Working Paper No. 592010 (Corporate Social Responsibility Initiative 2010), at 14.

[243] Nadia Bernaz, *Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?,* 117 J. Bus. Ethics 493, 495 (2012).

[244] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/14/27, 9 April 2010, para. 49.

[245] Nadia Bernaz, *Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?,* 117 J. Bus. Ethics 493, 495 (2012).

[246] Jennifer Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*, Working Paper No. 592010 (Corporate Social Responsibility Initiative 2010), at 15.

[247] Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62(1) The American Journal of Comparative Law 87, 90 (2014).

[248] ibid.

As the Directive requires incorporated companies to conduct due diligence in its own operations and also impose the same obligation on their third country subsidiaries and value chains with established business relationships, including providing contractual assurances,[249] this framework creates numerous implementation challenges. For instance, it will have a negative impact on small supply chains in the EU and also in third countries, particularly in developing countries.[250] This will be discussed further in the third Chapter of the thesis.

### e. International investment treaties with Mongolia, Kazakhstan and Botswana

The EU has concluded 83 treaties with investment provisions (TiP).

- In 1992, it concluded a Trade Cooperation Agreement with Mongolia which it entered into force in 1993. The European Economic Community and Mongolia aim to strengthen their commercial and economic relations, recognizing Mongolia's efforts to restructure its society and economy to promote democracy and progress. This cooperation, based on respect for democratic principles and human rights, will encompass a broad range of activities and evolve in line with both parties' development and policies.
- In 2015, Kazakhstan and the EU concluded Enhanced Partnership and Cooperation Agreement which entered into force in 2020. This agreement includes initiatives of the Parties to strengthen cooperation to combat and adapt to climate change, focusing on mutual benefits and addressing both bilateral and multilateral commitments. This includes joint efforts in mitigation, adaptation, technology development, expertise exchange, and participation in relevant international agreements such as the UN Framework Convention on Climate Change. Additionally, the Parties will enhance their cooperation on environmental issues to promote sustainable development and good governance, specifically targeting industrial pollution and emissions.
- In 2016, the European Union and its Member States signed the Economic Partnership Agreement with the SADC States, including Botswana, but the agreement has not yet entered into force. Chapter 2 of this agreement covers trade and sustainable development issues where environmental protection is mentioned.

[249] Luca Enriques & Matteo Gatti, The Extraterritorial Impact of the Proposed EU Directive on Corporate Sustainability Due Diligence: Why Corporate America Should Pay Attention (2022), https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/extraterritorial-impact-proposed-eu-directive-corporate

[250] Yenkong Ngangjoh-Hodu et al., The proposed EU Corporate Sustainability Due Diligence Directive and its Impact on LDCs, (2023).

### (ii) France

#### a. Constitution

The Constitution of the Fifth Republic of France, established on October 4, 1958, emphasizes the importance of sustainable development and environmental stewardship as fundamental national objectives. Article 6 specifically mandates that public policies must reconcile environmental protection with economic development and social progress to achieve sustainable development[251] and it is complemented by Articles 11 and 191 of the TFEU. This vision ensures that the present generation's needs are met without compromising the ability of future generations to fulfill their own needs. Complementing this, the Charter for the Environment[252] enshrines environmental protection as a constitutional principle. It declares that everyone has the right to live in a balanced and healthy environment and a duty to participate in its protection, repair damage they cause, and respect the precautionary principle where risks of serious and irreversible harm exist. Public policies must promote sustainable development by balancing environmental protection with economic and social progress, while guaranteeing access to environmental information, participation in decision-making, and fostering education, research and international cooperation.

Beyond national borders, the Charter commits France to align its environmental actions with European and international frameworks.[253] Together with provisions such as Article 53-1[254], which governs asylum agreements, and Title XI, addressing the Economic, Social, and Environmental Council, the Constitution encapsulates a holistic approach to intertwining human rights, sustainable progress, and environmental integrity.

#### b. Environmental Code of France

The Environmental Code of France (Code de l'environnement) was adopted on September 18, 2000 (with a consolidated version of 2010). The Code consolidates and organizes existing environmental laws into a cohesive structure, covering different areas such as pollution, biodiversity, natural resource management, and public participation. It outlines critical

[251] Constitution of the Fifth Republic of France art. 6 (1958). "Public policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress. In order to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardise the ability of future generations and other peoples to meet their own needs."
[252] Charter for the Environment of 2004, pmbl. & art. 1–10, Mar. 1, 2005, 2005 O.J. (L 029) (Fr.), available in translation at Conseil Constitutionnel, https://www.conseil-constitutionnel.fr/en/charter-for-the-environment
[253] Constitution of the Fifth Republic of France art. 10 (1958)."This Charter shall inspire France's actions at both a European and an international level."
[254]Constitution of the Fifth Republic of France art. 53.1 (1958).

principles and frameworks to balance environmental protection with economic development and public participation. Article L123-9 emphasizes the importance of involving the public in decisions regarding environmental impacts, mandating compulsory meetings in specific cases when requested by local authorities. Similarly, Article L121-1 establishes the National Public Debate Commission to uphold public participation in significant infrastructure or town planning projects with potential environmental impacts. This participatory approach is reinforced by the principle of access to information, as outlined in Article L110-1, ensuring transparency in matters related to hazardous substances and activities.

Key articles of this Code address the sustainable use and protection of natural resources. Article L110-1 recognizes natural areas, biodiversity, and air quality as part of the nation's common heritage, emphasizing their preservation as a general interest and a cornerstone of sustainable development. Articles such as L218-32 strictly prohibit harmful activities, including the discharge of hydrocarbons into the sea, to protect public health, marine life, and coastal economies. The Code also establishes guidelines for managing collective facilities, as detailed in Articles L541-43 and L542-11, promoting cooperation between local and regional bodies to enhance economic development while ensuring environmental safeguards.

In addition to addressing resource management, the Code includes provisions for regulating activities that intersect with environmental conservation and economic interests, such as hunting and forestry. Article L421-1 defines the role of the National Hunting and Wildlife Office in promoting sustainable wildlife management and ensuring compatibility between agricultural, forestry, and hunting interests under the agricultural-forestry-hunting balance outlined in Article L425-4. Climate change is also a significant focus, with Article L220-2 addressing atmospheric pollution and its effects on health, ecosystems, and the climate. The Kyoto Protocol was mentioned several times in the Code.

### c. Investment policy and regulatory framework

On 28 December 2023, through Decree No. 2023-1293 the Government of France implemented changes to the foreign investment screening regime. Notably, the Decree makes the regime to control non-European investors crossing the 10 per cent threshold of voting rights in listed French companies, initially introduced during the COVID-19, permanent. Additionally, the control scope will be extended to cover takeovers of branches of entities (unincorporated bodies under French law) governed by foreign law engaged in sensitive

activities. New sectors, including activities related to critical raw materials, research and development in photonics and low-carbon energy, and security of prisons, will now be subject to foreign investment control, reinforcing protection of national interests and security. However, this Decree does not apply to the French companies operating in other countries which is critical in terms of their own company activities especially in critical areas such as extractive industry in third countries.

### d. Business and Human Rights regulatory framework

The Sapin Act refers to the Sapin I Law which was enacted in France on January 29, 1993 to address corruption and increase transparency in both the public and private sectors. The Sapin II Act of France, adopted in December 2016, strengthens the country's anti-corruption framework and imposes an obligation on large companies to implement comprehensive anti-corruption compliance programs.

The law is structured around several key pillars aimed at preventing and addressing corruption. The first pillar involves the commitment of a company's governing body such as the chairman, CEO, and managers to ensure the establishment of an effective anti-corruption system. Specifically, under Article 17, these leaders are required to take responsibility for preventing corruption risks within the company, ensuring that the system is not only appropriate but effective in combating corrupt practices. This includes setting up specific procedures and structures to address corruption risks in the company's operations and ensuring the company complies with legal and ethical standards.

A second crucial pillar of the Sapin II Act is risk mapping. Companies must create a corruption risk map that identifies, analyzes, and ranks the company's exposure to potential corruption, including bribery and influence peddling. This map should take into account the company's activities, geographical areas of operation, and specific organizational processes. To support this, the law requires companies to implement a code of conduct that clearly defines unethical behaviors, including bribery and influence peddling, and integrates this code into the company's internal regulations. Moreover, training systems must be established for managers and employees who are most exposed to corruption risks. Finally, a whistleblowing system must be set up within companies, enabling employees to report any suspicious conduct that violates the company's code of conduct, ensuring that there are

mechanisms in place for employees to report issues confidentially and without fear of retaliation.

In parallel to the Sapin II Act, France also adopted its National Action Plan (NAP) on Business and Human Rights in 2017.[255] The NAP is a significant step towards integrating human rights considerations into business practices. The National Consultative Commission on Human Rights (CNCDH) played a key role in the development of the NAP, conducting research and organizing multi stakeholder consultations. The NAP includes mechanisms for monitoring and evaluating the implementation of recommendations related to business and human rights. In 2023, France's National Human Rights Institution (NHRI) published a report reviewing the implementation of the 2017 NAP. The report outlines 145 recommendations, including 20 priority actions, for the French government to take in promoting business practices that respect human rights both domestically and internationally. This reflects France's ongoing commitment to strengthening corporate responsibility and ensuring that business activities contribute positively to human rights.

The most important legislation concerning business and human rights is the French Duty of Vigilance Law adopted in 2017.[256] The French Duty of Vigilance Law applies to large French companies and their global operations, including in third countries. It requires these companies to prevent human rights violations, environmental harm, and health and safety risks in their supply chains and create vigilance plans to identify and mitigate those risks. It requires large companies with more than 5000 employees domiciled in France, or French based subsidiaries with more than 10,000 employees to put in place, effectively implement and publish a vigilance plan in order to identify and prevent the risks of severe violations of human rights and fundamental freedoms, health and safety and the environment including climate change which result from their own activities or the ones of companies under their control as well as the activities of subcontractors or suppliers with whom they have an established business relationship.[257]

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[255] *Global National Action Plans: France*, https://globalnaps.org/country/france/.
[256] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n° 0074 du 28 mars 2017, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/; Unofficial translation, https://www.business-humanrights.org/en/latest-news/french-duty-of-vigilance-law-english-translation/.
[257] Loi No. 2017-399 du 27 Mars 2017 Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses D'Ordre in Claire Bright & Karin Buhmann, Risk-Based Due Diligence, Climate Change, Human Rights and the Just Transition, *Sustainability* 2021, 13, 10454.

In order to establish and effectively implement a vigilance plan which shall include[258] a mapping assessment to identify and rank risks; set procedures to assess subsidiaries, subcontractors and suppliers; establish appropriate action to mitigate risks and prevent violations; and create an alert mechanism and monitoring scheme to assess the efficiency of the measures implemented. In case of non-compliance with the obligation, any interested party may notice the parent company or seek injunctive relief by the court, or those harmed by the activities of the company may establish or implement a plan to launch civil action and seek damages for negligence.[259] The Law uses risk-based approaches in the due diligence where it also expands its scope into environmental areas.

Compared to the California Transparency Act 2012 and UK Modern Slavery Act 2015, the French Law requires due diligence and imposes legal liability in case of ineffective implementation resulting in damages.[260]

The concept of vigilance largely resonates with the human rights due diligence standard under the UNGPs, including "measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health, and safety and the environment resulting from the own activities of the company or the companies under their control, or from the activities of their subcontractors and suppliers with whom they have an established business relationship.[261] The enforcement mechanism is two-fold where a company receives a 3-month formal notice to comply from an interested party; after the notice expiry, the interested party may request a court to order an injunction requiring the company to comply, which can be coupled with financial penalties in case of continued non-compliance;[262] If harm occurs, the civil liability action against the company can be brought before the court to obtain remuneration. This possibility opens a door to the victims to access to remedy, but in practice the barriers for them remain high. For example, the burden of proof is on the claimants.[263] In

[258] European Coalition for Corporate Justice (ECCJ), *Due Diligence Laws and Legislative Proposals in Europe: Comparative Table*, Mar. 2022.
[259] Sandra Cossart et al., The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All, 2 *BUS. & HUM. RTS. J.* 317 (2017).
[260] Li-Wen Lin, Mandatory Corporate Social Responsibility Legislation around the World: Emergent Varieties and National Experiences, *U. Pa. J. Bus. L.* (2020).
[261] Chiara Macchi, *Business, Human Rights and the Environment: The Evolving Agenda* (Springer 2022).
[262] This process was used in case against the company Total in connection with the environmental and human rights impacts of the company's oil projects, and in relation to the climate change impacts of its activities as described in Chatelain L., *First Court Decision in the Climate Litigation Against Total: A Promising Interpretation of the French Duty of Vigilance Law*, Sherpa, 2021.
[263] Macchi C., Bright C., *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislations*, in *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law*, 218-247 (Brill, Leiden 2020).
Savourey E., Brabant S., The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption, *6 Bus. & Hum. Rts. J.* 141 (2021).

terms of "established business relationship" definition remains a question. Even though it obliges companies to undertake human rights and environmental due diligence, the law has been seen by many companies as a reporting exercise because of the issues of uncertainty and specificity.[264]

Empirical reports show that most of the vigilance plans published by companies only meet the minimal requirements of the law and lack informative details and substantive performance.[265] Some scholars state that civil actions cannot remedy the victims since it is based on ordinary tort law[266] where it requires establishing three elements (damage, breach of duty and causation).[267] The obligation under the duty of vigilance law is to establish and implement a vigilance plan rather than to guarantee any actual preventive results of the plan, thus the occurrence of the harm will not be considered as a breach of duty.[268] Moreover, it is challenging for the foreign victims to seek remedy from the parent company based in France because of the difficulty to access the French courts and procedural laws, and even if they could submit a claim against a company the task of proving the causation in the tort suits is difficult.[269]

Another study[270] states that the law challenges the "separation principle" and establishes a regime of legal liability. The law is just a starting point for hardening foreign corporate accountability. However, its effectiveness to address negative externalities along global commodity chains will depend on processes in home and host state countries of MNCs. The study has analyzed the French company actions in Bolivia in the oil sector. It emphasized that the politics of knowledge that are embedded in highly asymmetrical constellations of power represent a major hurdle, both in relation to corporate reporting and to litigation cases against MNCs. It also states that effective implementation of mandatory supply chain regulations will largely depend on the question of whether a more equal playing field between civil society actors, states, and corporations from Global North and South can be created and whether home states countries will be willing and able to actually monitor and sanction MNCs located

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[264] Cossart S., *What Lessons Does France's Duty of Vigilance Law Have for Other National Initiatives?*, BHRRC Blog, 2019.
[265] Juan Ignacio Ibanez et al., *Devoir de Vigilance: Reforming Corporate Risk Engagement*, 2020, https://www.ipoint-systems.com/company/research-development/studies-reports/devoir-de-vigilance-in-france-report-2020/.
[266] *Conseil Constitutionnel, Décision No. 2017-750 DC of 23 March 2017*, 27.
[267] Stephne Brabant & Elsa Savourey, French Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies, *Int'l J. Compliance & Bus. Ethics* - Supplement to *Bus. & Bus. Legal Week* No. 50, 2017.
[268] Li-Wen Lin, Mandatory Corporate Social Responsibility Legislation around the World: Emergent Varieties and National Experiences, *U. Pa. J. Bus. L.* (2020).
[269] *ibid.*
[270] Almut Schilling-Vacaflor, Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?, *Human Rights Review* (2021).

in their jurisdictions. Unfortunately, the concrete experiences of vulnerable actors worldwide that are involved in or affected by global commodity chains will be decisive for answering the question of how meaningful and effective due diligence policies in the ambit of business and human rights actually are.

**e. international investment treaties with Kazakhstan, Mongolia and Botswana**

France has concluded 116 Bilateral Investment Treaties (BITs). The BITs between Mongolia and France (1991) and Kazakhstan and France (1998) both lack provisions on investor responsibility, environmental protection, and human rights. These agreements, effective from 1993 and 2000 respectively, do not address these issues which makes them old generation BITs. France has not concluded any investment agreement with Botswana.

**(iii) United Kingdom**

**a. Constitution**

The UK does not have a single written constitution. Instead it has an uncodified constitution where the rules and principles that govern the state are spread across different sources. The main sources of constitutional law are Acts of Parliament such as Magna Carta (1215), the Bills of rights (1689), the Human Rights Act (1998), the Parliament Acts (1911 and 1949), and the Constitutional Reform Act (2005). Court cases and judges made laws are also part of the constitutional framework. The

The Human Rights Act (1998) has incorporated the European Convention on Human Rights (ECHR) into UK law which allows individuals to enforce the ECHR in UK courts. It establishes a bill of rights and freedoms actionable by individuals through the courts. It has protected different rights including right to life, prohibition of torture, right to liberty, right to fair trial and so on, but no rights related to environment. To highlight, article 8 Right to Respect for Private and Family Life states that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

### b. Environmental Act 2021

The Act was introduced to replace EU environmental laws after Brexit, creating a domestic framework for protections on air, water, waste, and biodiversity. It empowers the UK government to set legally binding targets and establishes the Office of Environmental Protection (OEP) to monitor compliance and hold public bodies accountable. To highlight, it covers the broad context of what environmental protection means: protection of the natural environment from the effects of human activity; protection of people from the effects of human activity on the natural environment; maintenance, restoration or enhancement of the natural environment; monitoring, assessing, considering, advising or reporting. Reference to the Climate Change Act and other committees on climate change is also included.

ClientEarth[271] argues that while the Act is a step forward, it lacks the world leading ambition the government promised on clean air, governance and forest protection. It raises concerns about the 2022 consultations on targets, stating that the government failed to provide adequate information and did not allow enough time for meaningful participation. They also warned that delays in publishing the environmental principles policy undermine the act's effectiveness. Another issue is that stronger rules are needed to ensure accountability across industries, particularly agriculture and trade. The organization warns that without ambitious implementation, the act risks falling short of addressing urgent environmental challenges at home and abroad, particularly in the deforestation matters.

### c. National Security and Investment Act (NSI Act) 2021

The NSI Act gives the government powers to scrutinise and intervene in business transactions, such as takeovers, to protect national security, while providing businesses and investors with the certainty and transparency they need to do business in the UK.

### d. Business and Human Rights related regulatory framework

The UK was the first country to publish the National Action Plan (NAP) on Business and Human Rights in September 2013 and the first country to publish an update in May 2016.

In 2022, the UK published a policy paper on implementing the UN Guiding Principles on Business and Human Rights (UNGPs).[272] The UK's NAP aligns with the structure of the

[271] ClientEarth, *The UK Environment Act — What's Happening Now?*, ClientEarth (Apr. 1, 2022), https://www.clientearth.org/latest/news/the-uk-environment-act-whats-happening-now

[272] *UK National Action Plan on Implementing the UN Guiding Principles on Business and Human Rights: Progress Update, May 2020*,

UNGPs with three foundational pillars. Under Pillar 1, the UK government has taken significant steps to fulfill its duty to protect human rights. These include introducing the Modern Slavery Act, which requires large businesses to publish statements on their anti-slavery efforts, and launching the Modern Slavery Assessment Tool to help public bodies address supply chain risks. Additional measures include publishing detailed procurement guidance, adhering to OECD standards for environmental and social due diligence, and raising awareness of the Voluntary Principles Initiative for responsible business practices. The government has also partnered internationally to promote the UNGPs, strengthened rules on digital surveillance, and invested in programs to advance business and human rights. Under Pillar 2, the government expects businesses to respect human rights and has supported them with various tools and initiatives. This includes amendments to the Companies Act to enhance reporting on human rights impacts, providing guidance for compliance with the Modern Slavery Act, and supporting initiatives like the Corporate Human Rights Benchmark and the UNGPs' Reporting Framework. Financial support for the UN Global Compact and updates to the Overseas Business Risk service further reflect the UK's commitment to guiding businesses on respecting human rights. As a part of Pillar 2, the UK conducted stakeholder perception on non-financial reporting. However, this study does not include stakeholders in the value chains as a stakeholder rather interviewed professional bodies such as Association of Accounting Technicians, NGOs like ClientEarth, Investor Associations, and Institute of Corporate Responsibility and Sustainability etc. Pillar 3 emphasizes access to remedy for abuses, with efforts such as encouraging grievance mechanisms for companies operating abroad, funding projects to improve remedy procedures in other countries, and commissioning an independent survey to evaluate the UK's provision of access to remedy.

As the UK has updated the NAP in 2016, it issued an updated NAP titled "*Good Business – Implementing the UN Guiding Principles on Business and Human Rights"*. This update reaffirmed the UK's commitment to the UNGPs and followed a consultative process. Stakeholder engagement began with a consultation event, attended by 80 participants from business, civil society, academia, and government. This was followed by eight focused workshops in London covering the UNGPs' three pillars, conflict-affected areas, and modern-day slavery. A total of 55 organizations, including government departments, participated, and written submissions were also received. However, all engagement events

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https://www.gov.uk/government/publications/implementing-the-un-guiding-principles-on-business-and-human-rights-may-2020-update/uk-national-action-plan-on-implementing-the-un-guiding-principles-on-business-and-human-rights-progress-update-may-2020.

were confined to London, excluding other parts of England and the UK's devolved jurisdictions. Transparency was ensured by announcing the NAP in Parliament and publishing it on the government website, though details on funding for the update remain unavailable. The Updated NAP outlines various planned actions, including eight government commitments and five measures to help businesses fulfill their responsibilities. However, the commitments are broad and lack concrete outcomes, making monitoring challenging.[273] No explicit commitments related to remedy are included. Furthermore, a National Baseline Assessment (NBA) was neither conducted before the 2013 NAP nor the 2016 update, and the NAPs do not commit to one.

In 2017, the UK Parliament's Joint Committee on Human Rights published a report about its inquiry on human rights and business.[274] This received comments from stakeholders and included several criticisms such as it was limited in scope without baseline study or timetable and failed to reflect consultations with NGOs.

In 2015, the UK adopted the Modern Slavery Act. It aims to combat modern slavery and human trafficking within global supply chains. The Act applies to companies incorporated or operating in the UK with an annual turnover of £36 million or more, including parent companies and subsidiaries, that supply goods or services. These businesses are required to disclose an annual Slavery and Human Trafficking Statement, detailing their organizational structure, policies, and due diligence processes. The statement must also address identified risks in their operations and supply chains, steps taken to mitigate such risks, measures of effectiveness in preventing modern slavery, and training provided to staff. Approval by the company's Board and a Director's signature are mandatory. However, there are no criminal or financial penalties for non-compliance, limiting the enforcement mechanisms of the Act.

Study[275] shows that the Act emerged from debates among civil society groups, industry associations, and UK public authorities. However, it places the burden of legal liability for forced labor primarily on suppliers in developing countries rather than multinational corporations in the Global North. This creates challenges, as weak enforcement mechanisms, limited access to justice, or corruption in these countries often prevent forced labor cases from being effectively addressed. Recognizing these gaps, the Act seeks to encourage

[273] *Global National Action Plans: United Kingdom*, https://globalnaps.org/country/united-kingdom/.
[274] House of Lords, House of Commons Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, Sixth Report of Session 2016–17.
[275] Genevieve LeBaron & Andreas Ruhmkorf, The Domestic Politics of Corporate Accountability Legislation: Struggles Over the 2015 UK Modern Slavery Act, 17 *Socio-Economic Rev.* 709 (2019).

voluntary efforts by multinational enterprises to prevent modern slavery in their supply chains. Nonetheless, the study critiques the Act for codifying existing private governance approaches without introducing binding public standards or penalties, thereby reinforcing the status quo and failing to raise public accountability standards.

The Modern Slavery Act requires transparency in supply chains (Section 54) which also makes this legislative framework with extraterritorial implication.

**e. International investment treaties with Kazakhstan, Mongolia and Botswana**

The UK has concluded 110 Bilateral Investment Treaties (BITs). The BITs between Mongolia and the UK (1991) and Kazakhstan and the UK (1995) both lack provisions on investor responsibility, environmental protection, and human rights. These agreements follow a similar model and entered into force in the respective years. However, the UK has concluded a Treaty with the Southern African Customs Union which includes Botswana in 2019, effective in 2021, which contains Chapter II on Trade and Sustainable Development, explicitly addressing environmental issues.

**(iv) People's Republic of China**

**a. Constitution**

The Constitution of China was adopted at the Fifth Session of the Fifth National People's Congress and promulgated by the Announcement of the National People's Congress in 1982. It has been amended five times which makes the last one in 2018.[276]

Article 2 of the Constitution includes public participation where it states that people administer state affairs and manage economic, cultural, and social affairs through various channels and ways, as permitted by law. Article 14 of the Constitution emphasizes the establishment of a robust social security system aligned with the level of economic development. Article 26 highlights the State's commitment to protecting and enhancing both the living environment and the broader ecological system while combating pollution and other public hazards. It also promotes afforestation and forest protection. Article 5 mandates that all State organs, political parties, public organizations, enterprises, and institutions adhere strictly to the Constitution and laws, with violations subject to investigation. Article 18

[276] *English Version of the Chinese State Council's Official Website*, https://english.www.gov.cn/archive/lawsregulations/201911/20/content_WS5ed8856ec6d0b3f0e9499913.html.

permits foreign enterprises, organizations, and individuals to invest and engage in economic cooperation in China, provided they comply with the country's laws, which safeguard their legitimate rights and interests.

The Constitution further underscores the State's respect for and preservation of human rights. Article 99 empowers local people's congresses at various levels to ensure the implementation of constitutional and legal provisions within their jurisdictions. These congresses are authorized to issue resolutions, manage local economic and cultural development plans, and oversee public service advancements. At or above the county level, they are tasked with examining and approving regional economic and social development plans, budgets, and reports on their implementation. They also hold the authority to amend or revoke inappropriate decisions made by their standing committees.

**b. Environmental regulatory framework**

China has main principles related to the environment and its protection which is embodied within the concept of "Scientific Outlook on Development" which is similar with the Sustainable Development concept by the UN. The main principles which are included in the environmental impact assessment procedure regulated by major environmental laws of China such as Environmental Protection Law, Environmental impact Assessment Law, Law on Prevention and Control of Atmospheric Pollution, the Law on Prevention and Control of Water Pollution, the Law on Prevention and Control of Pollution caused by Solid Wastes, the Law on Water and Soil Conservation are promoting green development[277]; prioritizing prevention and integrating it with control; responsibilities of polluters and developers[278]; and public participation.[279]

The Chinese environmental policy and law started from 1973 covering the most historical stages of the concept of sustainable development in China. This includes development of national policies on environmental issues such as pollution incorporating government responsibility, environmental impact assessment, "three at the same time" pollution control

[277] Hu Jintao, *Hold High the Great Banner of Socialism with Chinese Characteristics and Strive for New Victories in Building a Moderately Prosperous Society in All Respects*, Report to the Seventeenth National Congress of the Communist Party of China (Oct. 15, 2007), http://news.xinhuanet.com/english/2007-10/24/content_6938749.htm
The official definition of Scientific Outlook on Development is that "it takes development as its essence, putting people first as its core, comprehensive, balanced and sustainable development as its basic requirement, and overall consideration as its fundamental approach".
[278] Environmental Protection Law of the People's Republic of China art. 2, 6, 7, 42, 43 (2014).
[279] Environmental Protection Law of the People's Republic of China art. 6 (2014).

facilities and so on.[280] Further, the current environmental policy is in line with the sustainable economy, society and environment and natural resources concept incorporated in the Agenda 21 of China: the White Book of China on Population, Environment, and Development in the 21st Century. [281] After the adoption of this Agenda, China began addressing its environmental challenges with a fresh perspective. It recognized that pollution was merely a symptom of deeper issues rooted in its economic growth model. With this realization, the Chinese government committed to steering its economic reforms toward sustainable development. In line with this vision, China's Agenda 21 emphasized that "sustainable development is a strategic choice that must be made by both developing and developed countries"[282] and highlighted the necessity of abandoning outdated, unsustainable development practices currently in use.[283] It led to the adoption of Scientific Outlook on Development in 2003 which features that putting people first and development must be comprehensive, balanced and sustainable.[284]

- Environmental Protection Law of China

Environmental Protection Law was adopted in 1989 and revised in 2014. It is a framework of legislation on prevention and control of different environmental issues such as pollution, conservation of nature. It aims to protect and improve the environment, prevent and control pollution and other public nuisances, safeguarding public health, promoting ecological civilization, and enhancing sustainable economic and social development.[285]

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[280] Wang Xi & Robert F. Blomquist, The Developing Environmental Law and Policy of the People's Republic of China: An Introduction and Appraisal, 5 *Geo. Int'l Envtl. L. Rev*. 25, 61–72 (Fall 1992).
[281] China's Agenda 21: White Paper on China's Population, Environment, and Development in the 21st Century ch. 2, at 4–11 (China Envtl. Sci. Press 1994).
[282] China's Agenda 21: White Paper on China's Population, Environment, and Development in the 21st Century ch. 2, 2.1 (China Envtl. Sci. Press 1994).
[283] China's Agenda 21: White Paper on China's Population, Environment, and Development in the 21st Century ch. 2, 2.5 (China Envtl. Sci. Press 1994).
[284]The Third Plenary Meeting of the Sixteenth Central Committee of the Chinese Communist Party, *Decision of the Central Committee of the Chinese Communist Party on Several Important Issues on Improving the Institution of Socialist Market Economy*, (Oct. 14, 2003), http://www.people.com.cn/GB/shizheng/1024/2145119.htm.
[285] Environmental Protection Law of the People's Republic of China art. 1 (2014).

The Law is based on the recommendations by academics,[286] that it should have three major players in the process of environmental governance which are government, enterprises and third parties. The parties all play their roles and work together to promote the progress of environmental protection where the government should take main responsibility, enterprises are regulated by the government and supervised by the third parties and avoid negative impacts caused by their operation. Third parties should have sufficient rights and resources to prevent the government from abusing its power and have control on illegal operations of enterprises. However, the implementation is widely criticized that there are not enough rules to safeguard the environmentally adequate decision making and enforcement of this law.[287] Article 6 includes the general rights and duties of the main three players. The Local People's Governments at all levels are responsible for the environmental quality within their regions. The environmental protection administrative department of the State Council oversees and supervises national environmental protection efforts, while the environmental protection administrative departments of local people's governments at or above the county level are responsible for supervising and administering environmental protection work within their respective regions.[288] Enterprises, public institutions, and other businesses shall prevent and reduce environmental pollution and ecological disruption, and assume liabilities for damage caused by them. Citizens shall raise their awareness of environmental protection, adopt low-carbon and economical lifestyles, and fulfill their obligation to protect the environment.[289]

The law includes important provisions on monitoring system,[290] environmental impact assessment,[291] settlement of trans-administrative boundary pollution disputes,[292] on-site

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[286] Wang Xi, *On the Amendment of the Environmental Protection Law of PRC and the Unification of Public Functions in Environmental Protection of the Government*, 3 Int'l & Comp. Envtl. L. Rev. (2008), edited by Wang Xi, *Shanghai Jiao Tong University Press*.
Wang Xi, *On the Three Major Issues to Be Solved by the Further Development of Environmental Law of China*, 4 Law Rev. (2008).
Wang Xi, *A Strategic Way for Improving Environmental Law of China*, 2 J. Shanghai Jiao Tong Univ. (Philos. & Soc. Sci.) (2009).
Wang Xi, *Inspiring Effects of the National Environmental Policy Act of the USA upon Improvement of China's Environmental Protection Law Regime*, 4 Mod. L. Sci. (2009).
Wang Xi, Luo Wenjun, et al., *On the Creation of an Environmental Civil Suit System in China*, 1 J. Shanghai Jiao Tong Univ. (Philos. & Soc. Sci.) (2010).
Wang Xi, *Legal Protection for Interactions between Parties in the Course of Environmental Protection*, 1 J. Shanghai Jiao Tong Univ. (Philos. & Soc. Sci.) (2012).
[287]Wang Xi & Lu Kun, *Environmental Law in China* (3d ed. 2022), *Wolters Kluwer Publishing*.
[288] Environmental Protection Law of the People's Republic of China art. 10 (2014).
[289] Environmental Protection Law of the People's Republic of China arts. 6, 10 (2014).
[290] Environmental Protection Law of the People's Republic of China art. 17 (2014).
[291] Environmental Protection Law of the People's Republic of China art. 19 (2014).
[292] Environmental Protection Law of the People's Republic of China art. 20 (2014).

inspections,[293] ecological red line,[294] ecological protection and rehabilitation management plans,[295] protection of air, water and soil,[296] general requirements on prevention and control of pollution caused by waste, radioactive substances and so on,[297] pollutant discharging fee,[298] licensing system for the discharge of pollutants,[299] prohibition on importing technologies and equipment not consistent with environmental standards.[300]

Chapter 5 includes provisions on information disclosure and public engagement.[301] It states that citizens, legal persons and other organizations have the right to obtain environmental information and participate in and oversee environmental protection. Local environmental protection departments are required to disclose relevant information and improve public engagement procedures. The State Council's environmental protection department releases unified national environmental quality information and monitoring data. It requires entities with significant pollutant discharges to disclose information about their pollutants and some construction projects which require environmental impact assessments to engage with public feedback. The chapter also ensures the whistleblower protection that requires authorities to keep confidential the information and protect the lawful rights and interests of whistleblowers.

As for the legal liability, the administrative and disciplinary sanctions, civil liabilities, and criminal penalties such as paying a fine, make correction, continuous fines until the liable party makes correction, restriction on production and suspension of business, and administrative detention.[302] Disciplinary matters for the government authorities and civil liabilities under Tort Law of China is for the damage caused by environmental pollution. Other violations of law constitute criminal liability. [303]

- Law on Environmental Impact Assessment

The Law on Environmental Impact Assessment (EIA) was adopted in 2002 with the last amendments made in 2018. It has two types of EIA procedures: one, on assessment of

[293] Environmental Protection Law of the People's Republic of China art. 24 (2014).
[294] Environmental Protection Law of the People's Republic of China art. 29 (2014).
[295] Environmental Protection Law of the People's Republic of China art. 30 (2014).
[296] Environmental Protection Law of the People's Republic of China art. 32 (2014).
[297] Environmental Protection Law of the People's Republic of China art. 42 (2014).
[298] Environmental Protection Law of the People's Republic of China art. 43 (2014).
[299] Environmental Protection Law of the People's Republic of China art. 45 (2014).
[300] Environmental Protection Law of the People's Republic of China art. 46 (2014).
[301] Environmental Protection Law of the People's Republic of China art. 53-58 (2014).
[302] Environmental Protection Law of the People's Republic of China art. 59-63 (2014).
[303] Environmental Protection Law of the People's Republic of China art. 69 (2014).

environmental impacts of planning activities (strategic environmental impact assessment (SEIA)), and another, on assessment of environmental impacts of construction projects. The SEIA is conducted on two plans. First, it shall be conducted on master plans on land use, regional or basin-wide or regional construction and it shall include prediction of environmental impacts and prevention measures.[304] Second, specialized plans on development of agriculture, animal husbandry, forestry, energy, water resources, transportation, urban construction, tourism, and natural resources.[305] Public participation is ensured in this provision where the meetings, hearings and other forms of consultation shall be conducted before the specialized plans which may have negative environmental impact and directly involve public interests and it should also consider the opinions of other organs, experts, and the general public.[306] The reports serve as a critical basis for decision-making on plans and if their conclusions are not accepted, decision-making bodies must provide explanations. This law also mandates reassessment for implemented plans with significant environmental harm which requires mitigating measures to address these negative impacts.[307]

The assessment for construction projects divides it into three categories based on their potential environmental impact. Projects with major impacts require a comprehensive EIA report, those with minor impacts need an environmental impact form, and projects with small environmental impacts need to fill in an environmental impacts registration form.[308] The contents of EIA reports are also provided by the law.[309]

The Law also includes relevant provisions on preparation and supervision of EIA reports[310] and review and approval.[311] It initially required certification for entities providing EIA services, with the Ministry of Environmental Protection (MEP) as the certifying authority but now the construction entities to either prepare their EIA reports themselves or entrust technical entities. Authorities must record and disclose any violations by these entities in public credit platforms. Before submitting EIA reports for approval, justification meetings or consultations with experts, departments, and the public are mandatory, and the reports must address accepted or rejected opinions. The environmental protection departments at the State Council and provincial levels oversee the review and approval of EIA reports and forms, with

[304] Law on Environmental Impact Assessment of the People's Republic of China art. 7 (2002).
[305] Law on Environmental Impact Assessment of the People's Republic of China art. 8(2002).
[306] Law on Environmental Impact Assessment of the People's Republic of China art. 11 (2002).
[307] Law on Environmental Impact Assessment of the People's Republic of China art. 14-15 (2002).
[308] Law on Environmental Impact Assessment of the People's Republic of China art. 16 (2002).
[309] Law on Environmental Impact Assessment of the People's Republic of China art. 17 (2002).
[310] Law on Environmental Impact Assessment of the People's Republic of China art. 19-21 (2002).
[311] Law on Environmental Impact Assessment of the People's Republic of China art. 22-28 (2002).

the Ministry of Ecology and Environment (MEE) handling assessments for nuclear, trans-provincial, and State Council authorized projects. Construction cannot commence without approved EIA documents, and proposed environmental measures must be implemented during the project. Post-completion, environmental authorities conduct investigations, addressing serious pollution or ecological damage by identifying causes and responsibilities.

Similarly to Environmental Protection Law, this law also provides legal liability including administrative disciplinary actions, fines, ceasing construction, restoring to the original state, and criminal penalties.[312]

On July 21, Third Plenary Session of the 20th Communist Party of China (CPC) Central Committee adopted a decision on ”Further Comprehensively Deepening Reforms and Promoting Chinese-style Modernization”.[313] As of July, 2024[314] China is preparing to adopt a legal code for the ecological environment which is expected to have five sections on general provisions, pollution prevention, ecological protection, green and low-carbon development , and legal liability with more than thousand provisions. It is expected to have final code by 2026. There are approximately 36 legislative frameworks,[315] both direct and indirect, that include environmental clauses in China. Academics[316] pointed out that the proposed reforms

[312] Law on Environmental Impact Assessment of the People’s Republic of China art. 29-35 (2002).
[313] Decision on Further Comprehensively Deepening Reforms and Promoting Chinese-style Modernization by the Third Plenary Session of the 20th CPC Central Committee (July 21, 2024), https://database.caixin.com/2024-07-21/102218258.html.
[314] Jiang Mengnan, *Environment Code in the Works*, *Dialogue Earth*, July 24, 2024, available at https://dialogue.earth/en/digest/environment-code-in-the-works/.
[315] Law on Promoting Cleaner Production (adopted in 2002; last amended in 2018); Environmental Protection Tax Law (adopted in 2016; amended in 2018); The Regulation on the Disclosure of Government Information (adopted in 2007; amended in 2019) by the State Council.
Law on Prevention and Control of Atmospheric Pollution (adopted in 1987; last amended in 2018); Law on Prevention and Control of Water Pollution( adopted in 1984; last amended in 2017); Law on Prevention and Control of Pollution Caused by Solid Wastes (adopted in 1995; last amended in 2020); Law on Prevention and Control of Noise Pollution (adopted in 1996; last amended in 2018); Law on Prevention and Control of Radiation Pollution (2003); Water Law (2016); Yangtze River Protection Law (2020); Law on Prevention and Control of Soil Pollution (2018); Law on Water and Soil Conservation (2010); Law on Desert Prevention and Transformation (2018); Regulations on Nature Preserves (2017); Provisions on Management of Nature Reserves for Forests and Wild Animals (1985); Provisions on Management of Marine Nature Reserves (1995); Wild Animal Protection Law (adopted in 1988; last amended in 2018); Biosecurity Law (2020); Regulations on Protection of Wild Plants (2017); Regulations on Protection and Management of Wild Medical Resources (1987); Regulations on Administration of Agricultural Genetically Modified Organisms Safety (2017); Forestry Law (2019); Grassland Law (2021); Fisheries Law (2013); Mineral Resources Law (1996); Marine Environment Protection Law (2016); Law on Administration of Sea Areas (2001); Law on the Protection of Offshore Islands (2009); Law Administration Law (adopted in 1986; last amended in 2019); Law on Urban and Rural Planning (adopted in 2007; last amended in 2019); Civil Code (2020); Civil Procedure Law (adopted in 1991; last amended in 2017); Administrative License Law (adopted in 2003; amended in 2019); Administrative Review Law (adopted in 1999; last amended in 2017); Administrative Penalty Law (adopted in 1996; last amended in 2021); Criminal Law (adopted in 1979; last amended in 2020).
[316] Jiang Mengnan, *Environment Code in the Works*, *Dialogue Earth*, July 24, 2024, available at https://dialogue.earth/en/digest/environment-code-in-the-works/.

aim to address inconsistencies across these laws and regulations, reducing enforcement confusion and enhancing their coherence and effectiveness.

### c. Foreign Investment Law of China

The law is adopted in 2019 and it aims to enhance openness, protect foreign investors' rights, and standardize foreign investment management, fostering a robust socialist market economy.[317] The law establishes pre-establishment national treatment and a negative list system to regulate foreign investment access.[318] Pre-establishment national treatment ensures foreign investors receive equal treatment with domestic investors during the investment access stage, while the negative list outlines specific fields with restricted or prohibited foreign investment. Investments outside the negative list are governed under the principle of equal treatment for domestic and foreign investors, with the negative list issued or approved by the State Council.

In 2024, China updated the previous negative list which was updated in 2021 with the title "Special Administrative Measures (Negative List) for Foreign Investment Access". [319] This new negative list has removed all restrictions for manufacturing sectors in which publication printing must be Chinese-controlled and prohibition on foreign investment in the application of traditional Chinese medicine processing techniques. As of 2022, the list included 31 sectors but now it has been reduced to 29. In agriculture, forestry, animal husbandry, and fishery, foreign investors are restricted from certain activities, including the production of genetically modified seeds and fishing in China's waters. Similarly, in mining, foreign investment in rare earth, radioactive minerals, and tungsten is prohibited. In energy, Chinese investors must maintain control over nuclear power plant construction and operation. Transportation sectors, including domestic water and air transport, civil airport projects, and postal services, also impose strict requirements for Chinese control or completely prohibit foreign involvement. Furthermore, in information technology, restrictions apply to telecommunications services, and several internet-based services are entirely closed to foreign investment.

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[317] Foreign Investment Law of the People's Republic of China art. 1 (2019).
[318] Foreign Investment Law of the People's Republic of China art. 4 (2019).
[319] CW, *China Promulgated the Negative List 2024 for Foreign Investment Access at National Level*, Nov. 2024, https://www.cwhkcpa.com/china-promulgated-the-negative-list-2024-for-foreign-investment-access-at-national-level/
Chinese version: https://www.ndrc.gov.cn/xxgk/zcfb/fzggwl/202409/P020240907514493057643.pdf

Other restricted areas include leasing and commercial services, where foreign investment in legal services and market surveys is limited, and scientific research, which prohibits foreign participation in sensitive fields such as human stem cells and certain geological studies. In education, foreign investors can only participate in cooperative institutions with Chinese majority control, while investments in compulsory or religious education are prohibited. Healthcare requires joint ventures for medical institutions, and cultural, sports, and entertainment sectors impose extensive restrictions, including bans on investments in news media, publishing, broadcasting, film production, and cultural relics.

### d. Business and Human Rights related regulatory framework

As for now, China does not have mandatory regulations which mandates corporations to conduct human rights due diligence. However, it has several binding and voluntary policies and measures.

- National Action Plan on Business and Human Rights

In 2021, China adopted its NAP which aims to respect, protect and promote human rights in the period from 2021 to 2025 with the title "*Human Rights Action Plan of China (2021-2025)*".[320] The document includes seven chapters covering economic, social and cultural rights; civil and political rights; environmental rights; protecting the rights of particular groups; education and research on human rights; participating in global human rights governance; and implementation, supervision and assessment. As a part of Chinese mission to participate in Global Human Rights Governance, it aims to contribute to the international cause of human rights where China will promote more just, fair, reasonable and inclusive international human rights governance, and work to build a global community of shared future. To fulfil this, China aims to promote responsible business conduct in global supply chains where it will encourage Chinese businesses to abide by the UNGPs in their foreign trade and investment, to conduct due diligence on human rights, and to fulfil their social responsibility to respect and promote human rights. China is also aiming to participate and play a constructive role in negotiations on the UN business and human rights treaty.

[320] Human Rights Action Plan of China (2021-2025), *State Council Information Office of the People's Republic of China*, Sept. 2021, https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/2022-11-28/Human-Rights-Action-Plan-of-China-2021-2025.pdf

- Guidelines for Social Responsibility in Outbound Mining Investments[321]

This non-binding guideline was adopted by China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (CCCMC) in 2014. Chinese outbound mining investments emphasize legal, ethical, social, and environmental responsibility, urging companies to respect stakeholder rights, practice transparency, and manage social and environmental impacts effectively. These guidelines apply to all phases of mineral exploration, extraction, processing, and investment cooperation, both within China and abroad, including mining-related infrastructure projects. They represent the overarching commitment of Chinese companies to promote harmonious and responsible mineral development. It is based on the UNGPs.

It also encourages Chinese mining enterprises to integrate social and environmental considerations into decision-making and operations, emphasizing ethical behavior, stakeholder engagement, and sustainable resource management to balance economic, environmental, and societal development. They promote minimizing the environmental impact of mining through waste reduction, ecosystem risk management, biodiversity conservation, and continuous environmental performance improvement.

Furthermore, mineral companies should establish mechanisms for social responsibility information disclosure, engage affected communities early, and ensure culturally appropriate and equitable interactions, especially with Indigenous peoples and vulnerable groups. They must respect stakeholders' rights, obtain Free, Prior, and Informed Consent (FPIC), avoid involuntary resettlement, and implement robust compliance systems including grievance mechanisms and human rights protections. Additionally, companies should conduct thorough environmental and social impact assessments, mitigate adverse impacts, conserve biodiversity, and establish systems for monitoring, risk management, and emergency response, ensuring transparency with affected communities.

- Guidelines for Green Development in Foreign Investment and Cooperation[322]

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[321] Asia Society Policy Institute, *Guidelines for Social Responsibility in Outbound Mining Investments*, Brief Blogspot, 2017, https://asiasociety.org/policy-institute/navigating-belt-road-initiative-toolkit/laws/chinese/guidelines-social-responsibility-outbound-mining-investments.

[322] Notice by the Ministry of Commerce and the Ministry of Ecology and Environment on Issuing the "Green Development Guidelines for Overseas Investment and Cooperation" (issued by the Ministry of Commerce & Ministry of Ecology & Environment, 2021), https://www.clientearth.org/media/jufbkljf/green-development-guidelines-for-overseas-investment-and-cooperation.pdf

This voluntary guideline was adopted by the Ministry of Commerce and the Ministry of Ecology and Environment of China in 2021. It covers the green development in outbound investment of China. These guidelines apply to voluntary efforts by businesses and local authorities, with central SOEs and relevant bodies tasked with building systems, ensuring accountability, and reporting major developments to the Ministry of Commerce and the Ministry of Ecology.

Businesses are encouraged to integrate green principles throughout their operations, including construction, production, and innovation, with a focus on clean energy investments like solar, wind, and biomass to drive global energy transformation. Companies are urged to adopt environmentally responsible practices, comply with host country laws, conduct environmental assessments, and establish green supply chains and manufacturing processes to reduce waste and emissions while enhancing resource efficiency. High environmental standards are advocated for planning and constructing overseas projects, promoting the use of eco-friendly materials and techniques to minimize environmental impacts and bolster the green branding of "Built in China."

Green economic and trade zones are to be developed as low-carbon and sustainable hubs with efficient recycling, pollutant management, and shared infrastructure to lower costs and emissions. Innovation in green technology is encouraged through the establishment of research and development centers and partnerships with international leaders, fostering talent and aligning domestic strengths with global advancements. Businesses are also guided to adopt green strategies, improve compliance systems, and enhance their global competitiveness in the green economy. To prevent environmental risks, companies must strengthen ecological risk management, adhere to host country laws and international standards, and implement contingency measures to address biodiversity and ecological impacts.

The guidelines also emphasize alignment with international frameworks like the UNFCCC, CBD, and SDGs while supporting the development of global green investment standards. Regulatory services are to be improved through strategic policy alignment, monitoring, and self-regulation mechanisms, with support from industry organizations and overseas Chinese chambers of commerce. Lastly, businesses are encouraged to build a strong green reputation by engaging with stakeholders, fulfilling corporate social responsibility in environmental

protection, and managing public perception. Reports and indices will be compiled to highlight achievements in green investment.

- Measures for the Administration of Legal Disclosure of Enterprise Environmental Information[323]

This measure was adopted in 2021. It regulates the disclosure of environmental information by enterprises in China, aiming to ensure transparency and strengthen social supervision. These measures, grounded in laws such as the Environmental Protection Law and the Clean Production Promotion Law, require enterprises to disclose environmental data accurately and comprehensively. The key enterprises covered by this measure are those discharging high environmental impact and receiving a high level public attention which are with significant discharges of pollutants, undergoing mandatory clean production audits,[324] or publicly disclosed companies and their subsidiaries that issue bonds if they are penalized due to their environmental violations in previous years, are obligated to disclose annual and interim environmental reports. Enterprises must establish internal standardized systems for managing, reporting, and preserving environmental data, prioritizing compliance with national monitoring standards.

Environmental disclosures must be truthful, timely, concise, and free from misleading information or omissions. These reports cover a range of topics which should be in line with "*Format Guidelines for Legal Disclosure of Enterprise Environmental Information*" (adopted in 2022).[325] It mandates enterprises to publish comprehensive annual and interim reports ensuring transparency in environmental compliance, emissions, waste management, and ecological impact. Reports must include accurate basic enterprise information, pollutant and carbon emissions data, environmental management practices, penalties, and emergency response measures. Important aspects include cleaner production audits, pollutant control facilities, and adherence to laws, with specific disclosure requirements for entities in carbon trading and those raising funds for climate or environmental projects.

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[323] Measures for the Administration of Legal Disclosure of Enterprise Environmental Information (adopted in 2021), https://www.mee.gov.cn/xxgk2018/xxgk/xxgk02/202112/t20211221_964837.html?mc_cid=45e6a7ad33&mc_eid=627c47469b

[324] As stated in Clean Production Audit Measures (2016), these are the companies that discharge pollutants in excess of national or local standards; companies that exceed the prescribed energy consumption limit for unit production; and companies that use toxic and harmful raw materials for production or discharge toxic and harmful substances during production.
Available at: https://www.gov.cn/gongbao/content/2016/content_5100040.htm

[325] Format Guidelines for Legal Disclosure of Enterprise Environmental Information (adopted in 2022), https://www.mee.gov.cn/xxgk2018/xxgk/xxgk05/202201/t20220110_966488.html

Oversight is provided by the Ministry of Ecology and Environment, with local authorities within their jurisdictions. However, the measures also grant the public, media and any other organization the right to report any violations of the requirements to disclose environmental information by entities to local authorities.The competent ecological environment department that receives the report shall verify and handle it in accordance with the law, and keep the relevant information of the reporter confidential to protect the legal rights and interests of the reporter.[326]

Non-compliance can result in penalties, including fines and public criticism. For instance, companies that breach the requirements stipulated in these measures by not disclosing environmental information or having incorrect or inaccurate information could be liable for a monetary fine of RMB 10,000 to RMB 100,000.[327]

### e. Policy related to China's investors and/or companies operations in third countries

Belt and Road Initiative (BRI)[328] was launched more than ten years ago in line with the UN 2030 Agenda for Sustainable Development and with the concept of "*Proposed by China but Belonging to the Whole World*". The BRI seeks to promote long-term, inclusive, and sustainable economic growth by incorporating sustainable development principles into the selection, execution, and management of projects. It aims to tackle the underlying causes and barriers to development across economic, environmental and social aspects, enhancing the self-sustaining progress of participating nations and it tries to establish a stable, sustainable, and risk-managed investment system with innovative and diverse financing models, ensuring commercial and fiscal sustainability.

China has committed to halting the construction of new coal-fired power plants abroad and is working to establish green finance platforms and international cooperation frameworks.[329] China is also advancing the Belt and Road South-South Cooperation on Climate Change, having signed 47 climate change MoUs with 39 countries, developed low-carbon demonstration zones in Laos, Cambodia, and Seychelles, and implemented over 70 climate

[326] Measures for the Administration of Legal Disclosure of Enterprise Environmental Information art. 25 (2021).
[327] Measures for the Administration of Legal Disclosure of Enterprise Environmental Information arts. 28–29 (2021).
[328] Information from the official website on Belt and Road Initiative Portal, https://eng.yidaiyilu.gov.cn/
[329] "It is prepared to collaborate with partner nations on biodiversity research, environmental security along the Maritime Silk Road, and the creation of platforms such as the Belt and Road Big Data Service for Ecological Protection and the Belt and Road Environmental Technology Exchange Center, alongside the Green Silk Road Envoys Program". https://eng.yidaiyilu.gov.cn/

mitigation and adaptation projects in more than 30 developing countries. The Silk Road Community Building Initiative has supported projects in over 20 areas, including poverty alleviation, disaster relief, humanitarian aid, environmental protection, and women's cooperation. It also encourages Chinese companies to adopt practices that meet international standards for environmental and social safeguards.

However, the BRI has faced numerous human rights concerns, particularly regarding forced displacement, labor abuses, environmental degradation, and lack of transparency. Notable examples include the forced relocation of indigenous communities due to the Lower Sesan Dam project in Cambodia[330] and widespread reports of forced labor, human trafficking, and violations of labor rights across BRI projects in various countries.[331] Deforestation and water contamination have also been linked to BRI activities[332], while China's debt financing has raised concerns about geopolitical leverage and its implications for human rights, including the loss of sovereignty in countries like Ecuador,[333] Sri Lanka[334] and Djibouti.[335] Despite these issues, China has committed to improving the sustainability of BRI projects, emphasizing "green and sustainable" development in line with the UN's 2030 Agenda for Sustainable Development and its own National Action Plan. However, experts argue that China must take stronger steps to ensure human rights protections, including due diligence and accountability mechanisms, in order to align the BRI with global human rights standards.[336]

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[330] Human Rights Watch, *Underwater: Human Rights Impacts of a China Belt and Road Project in Cambodia*, 2021, https://www.hrw.org/report/2021/08/10/underwater/human-rights-impacts-china-belt-and-road-project-cambodia.
[331] United States Office to Monitor and Combat Trafficking in Persons, *Forced Labor: The Hidden Cost of China's Belt and Road Initiative*, 2022, https://www.state.gov/wp-content/uploads/2022/07/Forced-Labor-The-Hidden-Cost-of-Chinas-Belt-and-Road-Initiative.pdf.
[332] International Federation for Human Rights, *BRI Watch Publications* (June 2020–Mar. 2022), https://www.fidh.org/en/region/asia/china/business-and-human-rights/belt-and-road-initiative-and-human-rights#ancre1.
[333] Dialogue Earth, *Few Options Left for Local Communities Opposing Ecuador's Largest Copper Mine*, 2019, https://dialogue.earth/en/business/11361-few-options-left-for-local-communities-opposing-ecuador-s-largest-copper-mine/.
Cintia Quiliconi & Pablo Rodríguez Vasco, *Chinese Mining and Indigenous Resistance in Ecuador*, Carnegie Endowment for International Peace, 2021, https://carnegie-production-assets.s3.amazonaws.com/static/files/files__Quiliconi_Vasco_-_China_Ecuador_revised.pdf.
[334] Shantanu Roy-Chaudhury, *China, the Belt and Road Initiative, and the Hambantota Port Project*, 15 *St. Antony's Int'l Rev.* 153, 153–64 (2019), https://www.jstor.org/stable/27027759.
[335] Mercy A. Kuo, *China in Djibouti: The Power of Ports*, *The Diplomat* blogpost, 2019, https://thediplomat.com/2019/03/china-in-djibouti-the-power-of-ports/.
Adaora Osondu-Oti, *China and Africa: Human Rights Perspective*, 41 *Afr. Dev./Afrique et Dév.* 49, 49–80 (2016), https://www.jstor.org/stable/90001834.
[336] Business and Human Rights Resource Center, *"Going Out" Responsibly: The Human Rights Impacts of China's Global Investments*, 2021, https://www.business-humanrights.org/en/from-us/briefings/going-out-responsibly-the-human-rights-impact-of-chinas-global-investments/.
International Federation for Human Rights, *BRI Watch Publications* (June 2020–Mar. 2022), https://www.fidh.org/en/region/asia/china/business-and-human-rights/belt-and-road-initiative-and-human-rights#ancre1.
United Nations, *Progress Report on the Belt and Road Initiative in Support of the United Nations 2030 Agenda for Sustainable Development*, 2020, https://www.un.org/sites/un2.un.org/files/progress_report_bri-sdgs_english-final.pdf.

As an important component within the BRI, China has established the Mongolia-Russia-China Economic Corridor[337] which facilitates trade and infrastructure between three nations. China also developed the Silk Road Railway which enhances trade routes and economic ties between China, Kazakhstan and Europe.[338] Furthermore, as Botswana is not directly involved in the BRI, China has invested in various infrastructure projects in the African continent, including Botswana.

### f. International investment treaties with Kazakhstan, Mongolia and Botswana

China has concluded 147 Bilateral Investment Treaties (BITs). he BITs between Mongolia and China (1991), Kazakhstan and China (1995), and Botswana and China (2000) all lack provisions on investor responsibility, environmental protection, and human rights. As of now, the Botswana-China BIT has not entered into force, while the others have been in effect since the early 1990s.

## (v) Canada

### a. Constitution

Constitution Act (1867) is a foundational law that created Canada's federal system within the United Kingdom. Afterwards, the Constitution Act (1982) was adopted which separated Canada's control from the United Kingdom. This latter document includes the Canadian Charter of Rights and Freedoms which guarantees fundamental rights and freedoms for all Canadian citizens and recognized aboriginal rights.

The recognition of aboriginal rights,[339] can have a significant impact on the investor's responsibility to conduct its operations and must protect the indigenous lands, cultures, or rights where it should consult with these communities.

### b. Environmental Protection Act[340]

Canadian Environmental Protection Act (1999) aims to protect the environment and human health by preventing pollution and promoting sustainable development. It declares that the protection of the environment is essential to Canadians' well-being and emphasizes that

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[337] James O'Brien, *The Mongolia-China-Russia Trilateral After the Belt and Road Forum*, *The Diplomat*, at https://thediplomat.com/2023/10/the-mongolia-china-russia-trilateral-after-the-belt-and-road-forum/
[338] OSCE Academy, *Between East and West* (2023), at https://www.osce-academy.net/upload/file/Between_East_and_West.pdf
[339] Constitution Act, 1982 § 35 (Can.).
[340] Environmental Protection Act, R.S.C. 1999, https://laws-lois.justice.gc.ca/eng/acts/c-15.31/page-1.html.

sustainable development should meet current needs without compromising future generations. The Government of Canada is committed to achieving sustainable development through an ecologically efficient use of natural, social, and economic resources, integrating environmental, economic, and social factors in decision-making by both government and private entities. The Act stresses the importance of pollution prevention as a national goal for environmental protection, considering both the short- and long-term human and ecological benefits of measures taken. The "polluter pays" principle is adopted, holding users, producers, and polluters responsible for toxic substances and waste.

Although it does not use the term "local community," the Act commits to Indigenous peoples' rights, aligning with the United Nations Declaration on the Rights of Indigenous Peoples and ensuring free, prior, and informed consent. The Government of Canada recognizes the value of both science and Indigenous knowledge in decision-making and encourages the development of alternative methods in environmental testing to reduce harm. Additionally, the Act promotes stakeholder participation, encouraging Canadians to be involved in decisions that affect the environment, reflecting the Government's commitment to inclusive and responsible environmental governance.

### c. Investment Act

Investment Act of Canada[341] was adopted in 1985 and is designed to help Canada attract beneficial foreign investment while ensuring it does not compromise national security. The Act allows the government to review foreign investments to assess their potential net benefit to Canada’s economy and to conduct national security reviews of investments, regardless of size. The Act applies to acquisitions, greenfield investments, and minority investments, with a focus on significant acquisitions of control over Canadian businesses. The net benefit review evaluates investments based on factors such as their impact on economic activity, employment, competition, and Canada’s ability to compete in global markets. The review also considers the investment's alignment with Canada's policies and its effect on intellectual property development funded by the government.

The national security review can be triggered for any foreign investment, even those not subject to mandatory filing requirements, such as minority investments. The review process is led by national security agencies and can last over 200 days. The government may take measures, including blocking the investment or requiring divestiture, if it is determined to

[341] Investment Canada Act, R.S.C. 1985, c. I-21.8, https://laws-lois.justice.gc.ca/eng/acts/i-21.8/index.html.

pose a threat to national security. This Act applies to all non-canadians who acquire control of an existing Canadian business or who wish to establish a new Canadian business and the net benefit review whether it is compatible with industrial, economic and cultural policies.

No particular provisions related to investor responsibility towards human rights and environment.

### d. Business and Human Rights related regulatory framework

Canada does not have a National Action Plan (NAP) on Business and Human Rights. However, it has adopted several binding and voluntary regulatory frameworks.

- Canada's Responsible Business Conduct (RBC) strategy: CORE and MSAB

Canada's Responsible Business Conduct (RBC) Strategy evolved from earlier government efforts focused on the global operations of the Canadian extractive sector. It was adopted in 2009 and influenced by recommendations from the National Roundtables on CSR, addressed issues raised in a 2005 parliamentary report on mining in developing countries.[342] It was replaced in 2014 with an enhanced CSR strategy, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility* in Canada's Mining Sector Abroad.[343]

The RBC strategy links trade-related government support for Canadian companies operating overseas to compliance with internationally recognized standards, including the UNGPs. Government support may be withdrawn if companies fail to meet these standards or refuse to engage in non-judicial dispute resolution processes. It also applies to companies in all sectors with global supply chains, not just the extractive industry.

Canadian Ombudsperson for Responsible Enterprise (CORE) which was appointed in 2019 plays a critical role in recommending penalties for companies that fail to meet RBC expectations. It has a mandate in investigating allegations of human rights abuses linked to Canadian corporations operating abroad through independent and collaborative fact-finding; making recommendations to resolve disputes, either to the parties involved or to the federal government. If a company fails to act in good faith during the review process, the CORE can recommend to the Minister trade measures such as withdrawing advocacy support or halting

[342] Standing Committee on Foreign Affairs and International Trade of Canada, *Mining in Developing Countries—Corporate Social Responsibility, Report*, June 20, 2005, https://www.ourcommons.ca/Committees/en/FAAE/StudyActivity?studyActivityId=1357621.
[343] *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Mining Sector Abroad* (2014), https://www.ourcommons.ca/Committees/en/FAAE/StudyActivity?studyActivityId=1357621.

future financial support from Export Development Canada. The CORE also monitors the implementation of its recommendations.The CORE forms part of Canada's initiative to provide a state-based, non-judicial access to remedy under UNGP Pillar 3, but, like its predecessor, the CSR Counsellor, it has yet to play an active role in resolving disputes between Canadian businesses and victims of rights violations.

Furthermore, the Multi-stakeholder Advisory Body on Responsible Business Conduct (MSAB) was created to advance RBC strategy and provide recommendations to the government. It comprised representatives from industry, non-governmental organizations, and academia. However, in July 2019, civil society and labour union members of the MSAB resigned, citing a lack of confidence in the government's commitment to corporate accountability abroad. The MSAB has not reconvened since.

In 2022, Canada launched a new five-year strategy titled *Responsible Business Conduct Abroad: Canada's Strategy for the Future (2022–2027)*.[344] This strategy outlines priorities for supporting Canadian companies in adopting world-leading RBC practices, gaining a competitive advantage, mitigating risks, and contributing to a strong, inclusive economic recovery. It applies to all Canadian companies operating abroad, regardless of size or sector, and emphasizes integrating Canadian values such as diversity, inclusion, human rights, and sustainability into global operations, including supply chains. The strategy aligns with Canada's international goals, such as advancing the Sustainable Development Goals and addressing climate change. Global Affairs Canada aims to enhance these efforts through bilateral and multilateral engagement, incorporating RBC practices into free trade and investment agreements, and fostering collaboration with stakeholders to promote democracy, human rights, gender equality, and environmental protection. Stakeholder engagement remains a critical component of this vision.

- Extractive Sector Transparency Measures Act

This act is aimed to implement Canada's international commitments to participate in the fight against corruption through the imposition of measures applicable to the extractive sector. It is applicable to Canadian extractive companies operating both domestically and internationally.[345] This means that Canadian companies with mining, oil, and gas activities

[344] *Responsible Business Conduct Abroad: Canada's Strategy for the Future (2022–2027)* (2022), https://www.international.gc.ca/trade-commerce/rbc-cre/strategy-strategie.aspx?lang=eng
[345] Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, § 8.

outside Canada must also report payments made to foreign governments.[346] The disclosures cover payments such as taxes, royalties, fees, production entitlements, bonuses, dividends, and infrastructure improvements, provided they meet certain thresholds.[347] In case of non-compliance, the penalty equals CAD 250,000 shall be made.[348]

- Regulations concerning Modern Slavery

House of Commons of Canada BILL C-423[349]

This act aims to combat certain forms of modern slavery by implementing specific measures and amending the Customs Tariff. It introduces the Modern Slavery Act, which mandates certain entities to report on actions taken to prevent and mitigate the risk of forced labour or child labour at any stage of manufacturing, production, growing, extraction, or processing of goods in Canada or abroad by the entity or in the manufacture, production, growing, extraction, or processing of goods imported into Canada by these entities. It establishes an inspection framework and grants the Minister authority to require entities to provide specific information. Its purpose is to fulfill Canada's international commitment to combat modern slavery by enforcing reporting requirements for entities involved in domestic and international goods production and importation.

Senate of Canada BILL S-216[350]

This enactment introduces the Modern Slavery Act, requiring certain entities to report on measures taken to prevent and mitigate the risk of forced or child labour in the production of goods either within Canada or abroad, as well as in goods imported into Canada. The Act establishes an inspection framework and empowers the Minister to request specific information from entities. Additionally, it amends the Customs Tariff to enable a prohibition on the importation of goods wholly or partially produced using forced or child labour, as defined under the Modern Slavery Act.

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[346] Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, § 2.
[347] Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, § 3.
[348] Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, § 24.
[349] House of Commons of Canada, *Bill C-423, An Act Respecting the Fight Against Certain Forms of Modern Slavery Through the Imposition of Certain Measures and Amending the Customs Tariff*, First Reading, Dec. 13, 2018, 64-65-66-67 Elizabeth II, First Session, Forty-Second Parliament, https://www.parl.ca/Content/Bills/421/Private/C-423/C-423_1/C-423_1.PDF.
[350] Senate of Canada, *Bill S-216, An Act to Enact the Modern Slavery Act and to Amend the Customs Tariff*, First Reading, Oct. 29, 2020, 69 Elizabeth II, Second Session, Forty-Third Parliament, available at https://www.parl.ca/Content/Bills/432/Private/S-216/S-216_1/S-216_1.PDF.

Both Bill C-423 (House of Commons) and Bill S-216 (Senate) are valid legislative proposals addressing modern slavery through the introduction of a "Modern Slavery Act." While they share similar goals, including mandating certain entities to report on measures to prevent and mitigate the risks of forced and child labour in goods production domestically and internationally, and establishing inspection frameworks, they differ slightly in scope. Bill S-216 explicitly amends the Customs Tariff to prohibit the importation of goods produced with forced or child labour, a provision not emphasized in Bill C-423. Both bills must proceed through their respective chambers and eventually align to avoid duplication or conflicts. Parliament may consolidate the bills into a single law, incorporating their complementary provisions.

- The Canada Business Corporations Act (CBCA) [351]

This act regulates Canadian business corporations, and in July 2019, it was amended to broaden the scope of corporate decision-making beyond shareholder interests. Under the revised act, companies are encouraged to consider the needs of various community stakeholders, including employees, retirees, pensioners, creditors, consumers, and governments, as well as environmental factors. Section 1.1 of the CBCA outlines that when acting in the best interests of the corporation, directors and officers may take into account not only the interests of shareholders but also those of other stakeholders. This includes considering factors such as the environment and the long-term interests of the corporation itself.

### e. Policy related to Canada's investors and/or companies operations in third countries

Above mentioned initiatives such as RBC and CORE both have extraterritorial implications where it investigates or outlines the operations of Canadian companies abroad, particularly through supply chains. Furthermore, the Extractive Sector Transparency Act also requires companies operating abroad their governments.

### f. International investment treaties with Kazakhstan, Mongolia and Botswana

China has concluded 46 Bilateral Investment Treaties (BITs). The BITs between Mongolia and Canada signed in 2016 and entered into force in 2017. As mentioned above, it has

[351] Canada Business Corporations Act, R.S.C., 1985, c. C-44, https://laws-lois.justice.gc.ca/eng/acts/c-44/index.html.

numerous provisions in relation with voluntary corporate social responsibility;[352] health, safety, and environmental measures which do not encourage investment by relaxing domestic measures;[353] expert reports on the factual issues concerning environment, health and safety matters;[354] and limited the scope of indirect expropriation.[355] Canada has not signed any investment treaties with Kazakhstan and Botswana.

### 1.2.3. Interim conclusion

The EU, France, the United Kingdom, China, and Canada all have established comprehensive legal frameworks which integrate environmental protection, human rights, and corporate accountability into their national and international policies.

The EU has made significant advancements in corporate responsibility such as the Corporate Sustainability Due Diligence Directive (CSDDD), mandating businesses to uphold human rights and environmental protections across their operations and supply chains in other countries. Moreover, some of the EU's Bilateral Investment Treaties (BITs) include sustainability and human rights in cross-border investments. Similarly, France has integrated these aspects into its national legal frameworks, with the French Constitution enshrining sustainable development concepts. The Environmental Code of France supports this by regulating pollution control and the Sapin II and Duty of Vigilance Laws requires companies to conduct due diligence on human rights and environmental risks throughout their supply chains. However, the practical enforcement of these laws, particularly in terms of access to justice for victims of human rights abuses in third countries, remains a challenge. France's old generation BITs with Mongolia and Kazakhstan lack modern provisions on human rights and environmental protection.

The Human Rights Act and the Environmental Act of the UK emphasizes human rights protection and environmental conservation. The UK's National Action Plan on Business and Human Rights and the Modern Slavery Act has been criticized for its reliance on voluntary compliance and lack of binding penalties. The UK's BITs concluded with Kazakhstan and Mongolia are lacking provisions on human rights and environmental standards, although recent agreements such as those with the Southern African Customs Union (SACU) including Botswana have begun to address sustainability and environmental issues.

[352] Article 14 of Canada-Mongolia BIT (2017)
[353] Article 15 of Canada-Mongolia BIT (2017)
[354] Article 33 of Canada-Mongolia BIT (2017)
[355] Annex B.10 of Canada-Mongolia BIT (2017)

China has a more evolving approach to human rights and corporate responsibility. The Chinese Constitution and environmental laws, including the Environmental Protection Law and the Law on Environmental Impact Assessment shows the country's commitment to sustainable development. Even though China has developed the National Action Plan on Business and Human Rights, the country has not established mandatory due diligence requirements for companies. Moreover, voluntary guidelines for outbound mining investments and foreign development projects under the Belt and Road Initiative (BRI) lack enforceability. There are facts that projects under BRI cause human rights violations and environmental degradation. China's upcoming legal reforms, including a comprehensive code for ecological protection, signal a commitment to improving environmental governance, though challenges in enforcement and regulatory consistency remain.

The Constitution and the Canadian Charter of Rights and Freedoms ensures fundamental rights and environmental protection. While the Canadian Environmental Protection Act promotes sustainable development and pollution prevention, the Investment Act facilitates foreign investment with a focus on economic and national security concerns without explicit attention to human rights or environment. Canada's Responsible Business Conduct (RBC) strategy and Canadian Ombudsperson for Responsible Enterprise (CORE) underscore the country's commitment to holding Canadian companies accountable for human rights and environmental impacts not only internally but also in their global operations, particularly in the extractive sectors. Canada's Extractive Sector Transparency Measures Act requires companies to disclose payments to foreign governments. However, issues remain in terms of aligning investment treaties with international human rights and environmental standards. No mandatory due diligence obligations for companies.

One can conclude that the EU and France gives priority to environmental sustainability, the UK seeks for balanced approach but with a focus on economic growth and social issues; China has initially prioritized economic development but started to increasingly integrate environmental and social considerations into relevant policies; and Canada places significant emphasis on social justice and environmental protection but its economic interests are prioritized in investment area. It is worth noting that despite these adequate initiatives, the foreign investors of these home countries are continuing to contribute or cause human rights violations and environmental degradation in the host countries like Mongolia, Kazakhstan and Botswana.

Taken together, these findings suggest that the apparent domestic "balancing" of sustainable development pillars in home states coexists with persistent accountability gaps in how their legal frameworks operate in practice. Despite more elaborate regulatory architectures, economic interests continue to shape the design and enforcement of rules governing their corporations' activities abroad, and environmental and human rights harms persist in host states. Home state frameworks therefore cannot be treated as a simple successful counterpart to host state "failures"; rather, they function as part of the same transnational legal and economic order that allocates regulatory authority and risk in ways that tend to favour capital exporting states and foreign investors over host state regulators and affected communities. The analysis does not claim that home states are domestically coherent or free of accountability problems; instead, it focuses on how their outward rules and practices contribute to harm in third countries.

### 1.3. Conclusion

Both host and home countries are aiming to balance economic, social, and environmental interests. However, host countries like Mongolia, Kazakhstan and Botswana often prioritize economic growth, particularly through extractive industries like mining, oil, and gas, which play a central role in their economies. Mongolia, heavily reliant on mining exports, has strong legal frameworks for environmental protection and human rights, but struggles with inconsistent enforcement and limited community involvement, especially when it comes to nomadic herders. Kazakhstan, with its dependence on oil and gas, has an Environmental Code and a National Action Plan on business and human rights, but also faces challenges with enforcement and transparency. Botswana, meanwhile, lacks a National Action Plan on Business and Human Rights and has a legal framework focused on environmental management, but with insufficient corporate accountability.

Home countries are also willing to balance these interests and aim to integrate sustainable development concepts into the regulatory framework. For instance, the EU and France prioritize environmental sustainability alongside economic growth and human rights. The UK takes a balanced approach, emphasizing both economic and social considerations, while also focusing on human rights protection. China, initially prioritizing economic development, has begun integrating more environmental and social policies and Canada emphasizes social justice and environmental protection. Despite the legal frameworks and commitments that home countries like the EU, France, the UK, China, and Canada have established, as

mentioned above significant environmental and human rights violations continue to occur in host countries like Mongolia, Kazakhstan, and Botswana as a result of the actions of companies from these home countries. These violations are especially prevalent in extractive industries, contributing to environmental degradation, community displacement, labor abuses, and other forms of violations. The core issue lies in the prioritization of economic development in host countries due to its dependency on mining and the gap between the legal frameworks of home countries and their implementation mechanisms in host states. While these home countries have regulations aimed at promoting responsible business practices, their practical effectiveness and extraterritorial reach is limited. While host states have progressive regulations, these primarily applied domestically and often lack extraterritorial reach, leaving companies with significant impact to commit human rights and environmental violations in host countries. Moreover, these regulations often lack strong enforcement mechanisms, clear penalties, or binding obligations for companies to ensure they respect international human rights and environmental standards in third host countries. Meanwhile, the regulations in host countries are also lacking effective implementation. Additionally, many international investment agreements, including those signed by home countries with host countries like Mongolia, Kazakhstan, and Botswana fail to include binding provisions for human rights and environmental protections.

Ultimately, while there is recognition in home countries of the need for responsible business conduct, the practical realities, particularly in developing host countries shows that economic interests continue to outweigh social and environmental concerns. This results in the continuance of violations that harm local communities and ecosystems in host countries. Addressing this issue will require stronger laws and enforcement of existing laws, more robust integration of human rights and environmental standards into international investment agreements, and enhanced accountability mechanisms for companies operating in these regions both from host and home states.

# CHAPTER II: HOST STATE CHALLENGES IN REGULATING FOREIGN INVESTOR (CORPORATE) ACCOUNTABILITY: STATE WEAKNESS AND ECONOMIC DEPENDENCE

## Introduction

As stated in chapter one, both host and home states have common challenges in balancing economic development with social and environmental protection. They often have legal and policy frameworks aimed at regulating corporate activity, but both struggle with enforcement gaps and limited corporate accountability. International investment agreements frequently lack binding human rights and environmental provisions, further exacerbating both state's ability to prevent harmful practices and leaving local communities vulnerable to violations such as environmental degradation, community displacement, and labor abuses. However, the specific challenges differ between the home and host states. Host states like Mongolia, Kazakhstan, and Botswana face weaker enforcement, resource constraints, and limited community involvement. By contrast, home states such as the EU and France, the UK, China, and Canada generally have more comprehensive legal frameworks for corporate responsibility but lack strong extraterritorial enforcement mechanisms and binding regulations. Consequently, companies operating in host states can exploit regulatory gaps and insufficient penalties for noncompliance.

Mongolia, Kazakhstan, and Botswana all rely heavily on extractive industries to drive economic growth, contributing a significant portion of their GDP and attracting substantial foreign investment. While each country has legal frameworks intended to protect the environment and human rights, implementation and enforcement remain inconsistent. For instance, nomadic herders in Mongolia often face limited inclusion in decision-making; Kazakhstan's oil and mining operations continue to generate pollution and labor abuses; and Botswana lacks strong mechanisms for corporate accountability or a Nation Action Plan (NAPs) on Business and Human Rights. Despite some efforts to establish EIAs, EMPs, and community consultations, economic considerations and the importance of FDI may diminish meaningful community engagement and adequate environmental protection, resulting in documented human rights violations and environmental degradation tied to Chinese, French, Canadian, and UK affiliated companies.

By contrast, the EU-France, the United Kingdom, China, and Canada have developed more comprehensive frameworks that integrate environmental protection, human rights, and

corporate accountability such as the EU's proposed Corporate Sustainability Due Diligence Directive, France's Duty of Vigilance Law, the UK's National Action Plan on Business and Human Rights, China's evolving environmental laws and voluntary guidelines for outbound investments, and Canada's Responsible Business Conduct strategy. However, key issues persist, which is no mandatory due diligence requirement or clear penalty structure, older BITs with Mongolia, Kazakhstan, and Botswana lack human rights and environmental provisions; enforcement in third countries remains weak due to extraterritorial limitations. Although these home states show their commitments to sustainability, social justice, and environmental responsibility, the prioritization of economic interests in overseas investments, and insufficient alignment of treaties and national laws with international standards, continues to cause human rights violations and environmental harm in host countries.

However, it is still somewhat too simplistic to say that host states only prioritize economic interests while home states primarily prioritize environmental and social pillars. Given their regulatory frameworks, these countries try to balance all three pillars, but each faces different constraints and tends to emphasize certain priorities more strongly due to their own context. Thus, it could be more accurate to say that host states often feel a stronger economic imperative due to dependence on extractive industries and FDI, while home states may have more developed social and environmental regulations within their national borders but often do not fully enforce them extraterritorially. Both sets of countries face a tension between promoting economic growth and ensuring robust environmental and social protections. It is especially true for host states heavily dependent on FDI and on single industry.

Many foreign investors establish subsidiaries in host countries and operate within their territory, they are obliged to comply with the legal requirements of those host countries. As mentioned before, while there are mechanisms in place to encourage responsible behavior and adherence to local laws, the effectiveness of these measures in fully safeguarding human rights and the environment remains a topic of ongoing debate. Therefore, two key questions arise: (i) whether a host state has a capacity to regulate corporate misconduct towards environment and human rights; and (ii) whether these different understandings of the sustainable development context which prioritizes economic interests due to reliance on FDI and extractive industry, have an impact on state capacity to regulate foreign investor misconduct at the national level?

To answer this, I will place two hypotheses based on these research questions.

**Hypothesis A:** Weak state and institutional capacity of host states leads to a failure to effectively regulate corporate (foreign investor) misconduct in host states.

**Hypothesis B:** Where economic interests are prioritized due to dependence on FDI, particularly in capital intensive sectors such as extractive industries, environmental and human rights protections suffer, resulting in inadequate regulation of corporate (foreign investor) misconduct in host states.

To examine these hypotheses, the chapter combines governance and economic indicators with doctrinal and policy analysis and selected illustrative cases of environmental and human rights harm. It operationalises state and institutional capacity through composite indicators such as corruption, judicial independence, rule of law, regulatory quality and electoral democracy, drawing on sources including V-Dem, the World Justice Project and Freedom House, and benchmarks each host state against global averages rather than against one another. It then analyses each country's dependence on FDI and commodity exports (notably from extractive sector) using data from UNCTAD, the IMF, the World Bank and national statistical offices, and reads these quantitative patterns alongside investment and mining laws, corporate responsibility frameworks and reports by international and civil society organisations documenting corporate abuses.

The governance indices are treated as indicative rather than determinative, in recognition of the liberal assumptions and ranking logics they embody and the critical debates surrounding tools such as the WGI and CPI in the governance-measurement literature.[356] These indices are therefore interpreted in light of the qualitative legal and policy analysis and case material, and not as neutral or exhaustive measures of institutional quality.

Following this, the conclusion will reflect on the broader implications of these findings by considering whether state and institutional capacity alone is sufficient for having adequate regulation or enforcing them, or if economic interests and political priorities also have an impact in regulating corporate behaviour. This chapter tests the assumption introduced in Chapter 1 that the effectiveness of corporate accountability mechanisms is shaped by host state capacity and prioritization of sustainable development pillars. By examining Mongolia,

[356] Christiane Arndt & Charles Oman, Uses and Abuses of Governance Indicators (OECD 2006); Rachel M. Gisselquist, Evaluating Governance Indexes: Critical and Less Critical Questions, WIDER Working Paper No. 2013/068 (UNU–WIDER 2013).

Kazakhstan, and Botswana, it evaluates how different legal, institutional, and policy configurations enable or constrain host state ability to regulate foreign investors.

## 2.1. State Capacity: institutional capacity and its impact on regulating corporate misconduct (Hypothesis A)

### 2.1.1. Defining the interrelationship between state and institutional capacity

Poor state capacity is a consequence and also a catalyst of weak institutional capacity. State capacity is a broader concept than institutional capacity where it refers to the ability of a state to implement policies, laws, deliver social services and maintain order. The institutional capacity refers to the ability of specific institutions such as judicial, regulatory and enforcement agencies to perform their functions adequately. Weak institutional capacity refers to the idea of lack of ability to function properly. States must possess basic state and institutional capacity in order to effectively regulate corporate misconduct. Before turning into the interrelation between these two concepts, it is important to understand the definition and how they are interrelated.

**State capacity**

Every country's capacity is different because of its historical and social factors, and at the same time certain capacity measures are important for all states in order to operate adequately. For instance, as stated by Willems and Baumert,[357] all countries need a minimum level of climate specific capacity. This is also true when it comes to regulating corporate actions in environmental and social spheres, states will need to have regulatory capacity to adopt adequate regulations with professional enforcement agencies, research centers which also require adequate and sufficient personnel with an expertise in the field.

The term "state capacity" lacks a universally accepted definition and measurement. Numerous studies have approached this concept from diverse perspectives, including revolutionary, power relations, and historical viewpoints.[358] Migdal describes state capacity as the ability of state leaders to utilize state agencies to influence societal behavior or achieve desired changes through planning, policies, and actions.[359] Tilly offers a perspective on

[357] Stephane Willems & Kevin Baumert, Institutional Capacity and Climate Action, OECD Doc. COM/ENV/EPOC/IEA/SLT(2003)5 (2003).
[358] Luciana Cingolani, *The State of State Capacity: A Review of Concepts, Evidence, and Measures*, WORKING PAPER SERIES ON INSTITUTIONS & ECONOMIC GROWTH: IPD WP13 (2013).
[359] Joel S. Migdal, *Strong Societies and Weak States: State–Society Relations and State Capabilities in the Third World* (Princeton University Press 1988).

stateness, defining it based on the state's capacity to raise tax and establish effective mechanisms for extracting necessary resources from the population.[360] Skocpol, on the other hand, conceptualizes state capacity as the state's ability to implement official goals, even in the face of potential opposition from social groups in challenging socioeconomic circumstances.[361] Weiss emphasizes the transformative capacity of the state, highlighting its ability to coordinate change.[362] Mann views state capacity through the lens of infrastructural power, referring to the state's ability to penetrate society and realize its objectives.[363] Hamm and King, in their study on FDI and economic growth, posits that the FDI has a positive impact on GDP only when coupled with high levels of state capacity and when there is a lack of well-functioning state is not a place, FDI impacts can be negative.[364] Charron and Lapuente define state capacity as the capacity to perform activities efficiently and without corruption.[365] Hanson and Sigman[366] add another dimension to the discussion by suggesting that defining and measuring state capacity requires addressing the question of "capacity for what".

As this concept lacks universal understanding, it hinders the effective measurement and complicates the process.[367] Dahl argues that state capacity is a state power which refers to the ability of one power (state) to get another actor (members of society) to do things they would not otherwise do.[368] Cingolani states that much of the literature agrees on the idea that state capacity refers to the state's ability to implement its goals and policies.[369] This ability includes internal organizational capabilities which are bureaucratic competences with resources and professionalism.[370] Lindvall and Theorell[371] state that state capacity is the

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[360] Charles Tilly, *The Formation of National States in Western Europe* 40 (Princeton University Press 1975).
[361] Theda Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research," in *Bringing the State Back In* (Peter B. Evans, Dietrich Rueschemeyer & Theda Skocpol eds., Cambridge University Press 1985).
[362] Linda Weiss, *The Myth of the Powerless State* (Cornell University Press 1998).
[363] Michael Mann, *The Sources of Social Power: A History of Power from the Beginning to A.D. 1769* (Cambridge University Press 1986).
[364] Hamm & King, *Post-manichean Economics: Foreign Investment, State Capacity, and Economic Development in Transition Economies*, Technical Report (2010).
[365] Charron, N. and Lapuente, V., "Does Democracy Produce Quality of Government?" 49 Eur. J. Pol. Res. 443 (2010).
[366] Jonathan K. Hanson & Rachel Sigman, Leviathan's Latent Dimensions: Measuring State Capacity for Comparative Political Research, 83 J. Pol. 1497 (2021) (published online Aug. 9, 2021).
[367] Jonathan K. Hanson & Rachel Sigman, Leviathan's Latent Dimensions: Measuring State Capacity for Comparative Political Research, 83 J. Pol. 1497 (2021) (published online Aug. 9, 2021).
Cullen S. Hendrix, Measuring State Capacity: Theoretical and Empirical Implications for the Study of Civil Conflict, 47 J. Peace Res. 273 (2010).
[368] Robert A. Dahl, The Concept of Power, 2 Behav. Sci. 201 (1957).
[369] Luciana Cingolani, The State of State Capacity: A Review of Concepts, Evidence and Measures, (UNU-MERIT Working Paper Series on Institutions & Econ. Growth, 2013).
[370] Miguel A. Centeno, Atul Kohli, Deborah J. Yashar & Dinsha Mistree, eds., States in the Developing World (Cambridge Univ. Press 2017).
[371] Johannes Lindvall & Jan Teorell, State Capacity as Power: A Conceptual Framework, STANCE Working Paper Series No. 1, Dep't of Pol. Sci., Lund Univ. (2016).

power to implement policies which should be distinguished from the degree of democracy and social constraint on state actions. This means that the state is capable of implementing related policies regardless of whether it is democratic or whether civil society organizations can monitor this power. This distinction helps us to see that a strong and capable state does not necessarily mean an open or democratic one, nor does it guarantee weak societal resistance.

Numerous studies have emphasized the importance of a strong legal system in regulating MNCs operations in host countries.[372] This assertion is supported by an econometric study conducted by Englehart[373], which examined more than 140 countries and demonstrated that the citizens of states with stronger state's capacity are better protected from the abuses of non-state actors. Englehart argues that the state's duty to prevent human rights abuses have two dimensions, normative and empirical. While states normatively should prevent human rights abuses, they may not always possess the empirical capacity to do so. Ruggie[374] also highlights that the most severe human rights abuses linked to corporations often occur in countries affected by or emerging from conflicts, or in those characterized by weak governance and rule of law.

**Institutional capacity**

In terms of regulating corporate operations, institutional capacity is a specific concept which refers to the ability of institutions such as regulatory agencies, courts and other state authorities to implement rules and respond to the corporate actions. Before institutional capacity had a narrower scope where it focused on building organizations and providing support for the decision making process between institutions, now it implies a broader focus on empowerment, social capital, and environment, culture, values and power relations that influence us.[375]

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[372] De Schutter, O., "Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations" (Report, Université Catholique de Louvain 2006B).
Eroglu, M., *Multinational Enterprises and Tort Liabilities: An Interdisciplinary and Comparative Examination* (Edward Elgar Publishing 2008).
[373] Englehart, N. A., "State Capacity, State Failure and Human Rights," 46 J. Peace Res. 163 (2009).
[374] John Ruggie, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/2006/97 (2006).
John Ruggie, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect, Remedy" Framework*, Report to the Human Rights Council, A/HRC/14/27 (2010).
[375] Johanna Segnestam et al., Country Environment Analysis: A Review of International Experience (Stockholm Env't Inst., Draft 2002).

As stated by Keohane,[376] institutions are sets of rules, processes or practices that prescribe behavioural roles for actors, constrain activity, and shape expectations. This means that institutional capacity is an enabling environment for the individuals and organizations to interact. For regulating corporate behaviour, these institutions must be credible and qualified. As stated by Segnestam,[377] there are five levels of institutional capacity: the individual (skills and performance), the organization (management capacity); national systems (organizations); the regulatory framework and public sector setting (public governance); and social norms, values and practices. The regulatory framework or public governance is essential in developing public policy.[378] The dimensions are political instability or weak governance and legislative process; ability of citizens, groups and associations to be active and monitor government's actions; quality of civil service; rule of law: effectiveness of judiciary and corruption issues.

There are several proposals in literature in terms of assessing or measuring the state capacity. Levi[379] states that good analysis of state capacity requires differing features of state to assess their relative importance. This means that the state's capacity is assessed with respect to functions or goals of the distinct components such as agencies, executive bodies and legal frameworks. Skocpol[380] refers to state capacities emphasizing the potential for the irregularity of state capabilities across sectors. Various research continued this approach by referring to the different capacities across state's agencies and regions.[381] However, some other critiques[382] state that by disaggregating the state capacity into various policy areas such as health, education or social security and assessing whether state performs well in each of these sectors can have adverse effects on political choices. This means that decision makers can

[376] Robert O. Keohane, International Institutions: Two Approaches, 32 Int'l Stud. Q. 379 (1988).
[377] Johanna Segnestam et al., Country Environment Analysis: A Review of International Experience (Stockholm Env't Inst., Draft 2002).
[378] Stephane Willems & Kevin Baumert, Institutional Capacity and Climate Action, OECD Doc. COM/ENV/EPOC/IEA/SLT(2003)5 (2003).
[379] Margaret Levi, The State of the Study of the State, in Political Science: The State of the Discipline (Ira Katznelson & Helen V. Milner eds., 2002).
[380] Theda Skocpol, Bringing the State Back In: Strategies of Analysis in Current Research, in Bringing the State Back In 3, 3–37 (Peter Evans, Dietrich Rueschemeyer & Theda Skocpol eds., 1985).
[381] Katherine Bersch, Sérgio Praça & Matthew M. Taylor, Bureaucratic Capacity and Political Autonomy Within National States: Mapping the Archipelago of Excellence in Brazil, in States in the Developing World 157, 157–83 (Miguel A. Centeno et al. eds., 2017).
Roberto Stefan Foa & Anna Nemirovskaya, How State Capacity Varies Within Frontier States: A Multicountry Subnational Analysis, 29 Governance 411 (2016).
Daniel W. Gingerich, Governance Indicators and the Level of Analysis Problem: Empirical Findings from South America, 43 Brit. J. Pol. Sci. 505 (2013).
[382] Luciana Cingolani, The State of State Capacity: A Review of Concepts, Evidence and Measures, (UNU-MERIT Working Paper Series on Institutions & Econ. Growth, 2013).
Miguel A. Centeno, Atul Kohli, Deborah J. Yashar & Dinsha Mistree, eds., States in the Developing World (Cambridge Univ. Press 2017).

prioritize one area over another instead focusing on the ability to implement goals which consequently, the state can perform well in a certain sector not because it lacks the capacity but because it prioritizes giving resources there.

There are two main approaches to measure state capacity. One, unified concept which treats state capacity as an overall measure with a single index.[383] While this can simplify comparisons, it often fails to show how states can be strong in one function but weak in others.[384] Second, multiple concepts where some scholars advocate for measuring and analyzing separate dimensions (fiscal or regulatory) of capacity which each dimension may vary significantly depending on institutional specifics, policy area, historical legacies, or regional contexts.[385] However, by choosing this we can overlook the broader concept of capacity with policy priorities.[386] The dimension of measuring state capacity could be extractive, coercive and administrative aspects.[387] Extractive in the meaning where state's ability to collect taxes, coercive refers to the state's ability to possess a monopoly on legitimate use of force within its territory, and administrative encompasses dimension of the state's capability as an organization to develop policy, public services and regulating commercial activity.[388] For instance, Englehart[389] used corruption, law and order, and extraction of tax with control variables of international war, democracy, GDP and population to measure state capacity. His findings confirm that stronger the state capacity, the better protected from non-state actors abuse.

In this section, I will use "state and institutional capacity" as an overarching term, acknowledging their interdependence. As stated before, state and institutional capacity are the concepts reinforcing each other and it is a broader term which includes institutional capacity

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383 Luciana Cingolani, The State of State Capacity: A Review of Concepts, Evidence and Measures, (UNU-MERIT Working Paper Series on Institutions & Econ. Growth, 2013).
Elissa Berwick & Fotini Christia, State Capacity Redux: Integrating Classical and Experimental Contributions to an Enduring Debate, 21 Ann. Rev. Pol. Sci. 71 (2018).
384 Michael Mann, The Autonomous Power of the State: Its Origins, Mechanisms and Results, 25 Eur. J. Soc. 185, 185–213 (1984).
Charles Tilly, Coercion, Capital, and European States, AD 990–1990 (Blackwell 1990).
385 Joel Migdal, Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World (Princeton Univ. Press 1988).
Margaret Levi, Of Rule and Revenue (Univ. of Cal. Press 1988).
386 Jessica Fortin-Rittenberger, Exploring the Relationship Between Infrastructural and Coercive State Capacity, 21 Democratization 1244 (2014).
Cullen S. Hendrix, Measuring State Capacity: Theoretical and Empirical Implications for the Study of Civil Conflict, 47 J. Peace Res. 273 (2010).
387 Theda Skocpol, Bringing the State Back In: Strategies of Analysis in Current Research, in Bringing the State Back In 3, 3–37 (Peter Evans, Dietrich Rueschemeyer & Theda Skocpol eds., 1985).
388 Jonathan K. Hanson & Rachel Sigman, Leviathan's Latent Dimensions: Measuring State Capacity for Comparative Political Research, 83 J. Pol. 1497 (2021) (published online Aug. 9, 2021).
389 Nathan A. Englehart, State Capacity, State Failure and Human Rights, 46 *J. Peace Res.* 163 (2009).

within it. This section follows Skocpol's conceptualization of state capacity as the state's ability to implement official goals, even in the face of potential opposition from social groups such as corporate actors. It also draws on Besley and Persson[390] definition of state capacity as the institutional capability of the state to carry out various policies effectively. It means that without strong institutions, even a state with broad capacity in other areas such as administration, tax collection, and military may still struggle to regulate corporate misconduct. Furthermore, it builds on Englehart's empirical measurement of state capacity to prove the correlation between weak state capacity and corporate misconduct; and Ruggie's highlight that human rights violations occur in weak governance and rule of law. Building on these theoretical frameworks, the next section will describe measurable indicators that show: (i) corruption levels, governance effectiveness, electoral democracy as state capacity; and (ii) judicial independence, rule of law, regulatory quality as institutional capacity measurement.

As for the measurement, I will not employ only a single index approach, rather I will cover a set of various indicators which can show the adequate picture of state and institutional capacity of the host countries. I apply Hanson and Sigman's[391] question "capacity for what" framework because it emphasizes that state capacity must be examined in relation to its function. This function is regulation on corporate behaviour and establishes corporate accountability regulations such as mandatory due diligence, environment, social and governance (ESG) regulations. Following this, the corruption, judicial independence, and regulatory quality components were chosen using Skocpol's[392] state's administrative capacity approach because it highlights that this concept is sector-specific, thus by following this approach, this section can measure how administrative weaknesses such as corruption can lead to failure in regulating corporate misconduct. Similarly, Charron and Lapuente[393] also focus on the absence of corruption and lack of efficiency which helps to further support the selection of indicators. These can be complemented with Dahl's[394] definition of state capacity as a state power to get social actors to comply with its authority and do things they would not otherwise do. This definition directly connects to the rule of law indicator which shows that without this, good regulations will lack adequate enforcement. Furthermore, Lindvall and

[390] Besley, T. and T. Persson, "The Origins of State Capacity: Property Rights, Taxation, and Politics," 99 Am. Econ. Rev. 1218 (2009) (cited in Martin J. Williams, "Beyond State Capacity: Bureaucratic Performance, Policy Implementation and Reform," 17 J. Institutional Econ. 339 (2021)).
[391] Jonathan K. Hanson & Rachel Sigman, Leviathan's Latent Dimensions: Measuring State Capacity for Comparative Political Research, 83 J. Pol. 1497 (2021) (published online Aug. 9, 2021).
[392] Theda Skocpol, Bringing the State Back In: Strategies of Analysis in Current Research, in Bringing the State Back In 3, 3–37 (Peter Evans, Dietrich Rueschemeyer & Theda Skocpol eds., 1985).
[393] Charron, N. and Lapuente, V., "Does Democracy Produce Quality of Government?" 49 Eur. J. Pol. Res. 443 (2010).
[394] Robert A. Dahl, The Concept of Power, 2 Behav. Sci. 201 (1957).

Theorell[395] argue that state capacity should be distinguished from the degree of democracy and Dahl states that democracy does not necessarily strengthen regulatory institutions. However, weak democracies often fail to regulate corporate misconduct because of weak rule of law and influence by corporate actors. Therefore, electoral democracy indicators should be assessed with other governance indicators to fully assess the state and institutional capacity to regulate corporate behaviour.

Therefore, the next two subsections will systematically analyze how various indicators adopted by different organizations contribute to measuring state and institutional capacity. By examining these components, I aim to establish causation between state and institutional capacity and failures in regulating corporate misconduct in Mongolia, Kazakhstan and Botswana, as put in hypothesis A.

### 2.1.2. Indicators: components for measurement

Corruption, judicial independence, and rule of law indicators are included because they provide a robust framework for assessing state and institutional capacity and have direct impact on effectively regulating corporate actions. For instance, corruption erodes trust in institutions and can lead to regulatory gap; judicial independence is essential to ensure that legal decisions remain unbiased and free from political or corporate interference; and the rule of law guarantees that laws are applied consistently, holding both public officials and corporate entities accountable. It is worth noting that these indicators are deeply interconnected as a high level of corruption can undermine judicial independence, which in turn weakens the rule of law. Furthermore, regulatory quality evaluates how well regulations are designed and enforced to balance private sector development with public interests. The reason for choosing electoral democracy is that it is essential to see how elections are conducted, particularly in the sense that fair and transparent elections are important for adopting adequate regulation. Together, these indicators not only underscore the core elements of state and institutional capacity but also complement a wider analysis of how effectively a state can regulate corporate actions.

Below, I will describe these components using each of the above mentioned indicators and the rationale behind choosing these indicators in relation to Hypothesis A.

[395] Johannes Lindvall & Jan Teorell, State Capacity as Power: A Conceptual Framework, STANCE Working Paper Series No. 1, Dep't of Pol. Sci., Lund Univ. (2016).

- Corruption

This will be analyzed based on the data from the Rule of Law by World Justice Project (WJP), Corruption Perception Index (CPI), World Governance Index (WGI), and Brettelsmann Transformation Index (BTI), and FreedomHouse. Rule of Law by WJP includes the absence of corruption as a factor. This covers three forms of corruption which are bribery, improper influence by public or private interests, and misappropriation of public funds or other resources. These forms of corruption extend to the fact that government officers in the executive branch, the judiciary, the military, police, and the legislature do not use public office for private gain. The CPI defines corruption as an abuse of entrusted power for private gain and forms of corruption are when public servants demand or take money in exchange for services, politicians misusing public money or granting jobs or contracts to their close relationships, and corporations bribing officials. The CPI ranks the corruption levels of the public sector. The WGI assesses control of corruption as a factor which covers perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as capture of the state by elites and private interests. Representative sources are public sector corruption, diversion of public funds, widespread corruption with indicators assessing whether corruption is pervasive in government, level of corruption between administration and citizen, measures of the risk that individuals or companies face bribery or other corrupt practices during their operations, sector-specific data, and other indices. The BTI governance index examines how well anti-corruption policy is designed and implemented in the country under the resource-efficiency component. Ultimately, the FH measures corruption by examining whether governments have implemented robust anti corruption measures. It looks at whether effective laws and programs are in place to prevent, detect, and punish corruption, including managing conflicts of interest, and whether excessive bureaucratic controls that might foster corruption are minimized. The independence and effectiveness of auditing and investigative bodies, ensuring that corruption allegations are thoroughly and impartially investigated and prosecuted. It also considers whether the media gives substantial coverage to these issues.

- Judicial Independence:

Judicial independence is usually included into the rule of law indicator. It will be analyzed based on the V-Dem, FH, Global State of Democracy (GSoD) and the BTI. The BTI covers independent judiciary indices under the rule of law indicator. It evaluates legal frameworks

that protect judicial autonomy, the presence of institutional safeguards such as transparent appointment processes and security of tenure, and the degree to which judges can operate without undue political or external interference. Additionally, it considers public perceptions of judicial fairness and impartiality, reflecting how well the judiciary functions in practice. The GSoD also measures judicial independence under the rule of law and it measures whether the judiciary is subject to the influence of other branches of government. Conversely, V-Dem measures judicial independence in two court instances: high court and lower court. The surveys are conducted asking the following question: when the high court in the judicial system is ruling in cases that are salient to the government, how often would you say that it makes decisions that merely reflect government wishes regardless of its view. Lastly, FH assesses whether the judiciary is truly independent by examining if judges are free from undue interference by the executive, political, economic, or religious influences. It looks at whether judicial appointments and dismissals are conducted fairly and whether judges make impartial decisions without favoring the government or special interests. It also evaluates the effectiveness of judicial decisions by checking if these decisions are respected and enforced by both governmental authorities and powerful private entities, even when the rulings run counter to their interests.

- Rule of Law

Rule of Law is measured by different organizations such as Rule of Law by WJP, GSoD, WGI, V-Dem, FH and BTI. Mostly it includes judicial independence and corruption components. Rule of law by WJP assesses different components such as constraints on government powers, fundamental rights, absence of corruption, open government, order and security, regulatory enforcement, civil justice and criminal justice. The GSoD covers four key factors such as judicial independence, personal integrity and security, predictable enforcement, and absence of corruption. As for the WGI, the Rule of Law index covers perceptions of the extent to which agents have confidence in and abide by the rules of society, specifically the quality of contract enforcement, property rights, the police, the courts, and likelihood of crime and violence. Representative sources are factors related to law and order, judicial performance, and property rights protection which assesses violent and organized crime, the fairness, speed, and enforceability of the judicial process, and the degree of judicial independence from the state. It also measures how effectively contracts are observed and enforced between national and foreign private parties and evaluates risks such as

expropriation, state contract alteration, and arbitrary pressures on private property. Moreover, the protection of intellectual property rights, public confidence in the police and judicial system, and the overall security of goods and persons are also included. The BTI extends to separation of powers, independent judiciary, prosecution of office abuse, and civil rights. The V-Dem measures rule of law to what extent are laws transparently, independently, predictably, impartially, and equally enforced, and to what extent the actions of government officials comply with law. Lastly, FH examines rule of law by assessing the overall fairness and integrity of a country's legal system. It examines whether the judiciary operates independently, free from political, economic, or religious interference, and whether judges are appointed, dismissed, and ruled impartially. It also checks if judicial decisions are respected and enforced by both governmental and private actors, ensuring a consistent application of the law. Additionally, the framework assesses the protection of due process in both civil and criminal matters, ensuring defendants have rights such as access to competent legal counsel and fair hearings. It scrutinizes law enforcement practices to prevent abuse of power and excessive use of force, and it evaluates whether legal systems guarantee equal treatment for all, protecting minority groups, noncitizens, and refugees from discrimination and ensuring they enjoy fundamental rights.

- Regulatory Quality

This indicator is measured by the WGI and it covers perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development. This indicator assesses market and regulatory environment through unfair competitive practices, price controls, discriminatory tariffs and taxes, and excessive protections. It also measures bureaucratic inefficiencies that affect business operations. Even though this indicator is focusing more on economic factors, it can be used to analyze broader institutional deficiencies to regulate and implement policies not only in the market sector, but also environmental and human rights protection.

Rule of Law by WJP does not include indices as regulatory quality, however, regulatory enforcement is covered. I included it into regulatory quality as a component because it measures effective regulatory enforcement, no improper influence, no unreasonable delay, respect for due process and no expropriation. This factor does not assess which activities a government chooses to regulate, nor does it assess which activities a government chooses to regulate, or considers how much regulation is appropriate. It is crucial because without

effective enforcement, even well-designed regulations fail to achieve their intended outcomes. Combining them can provide insights into not only the quality of the regulatory environment but also the practical application and enforcement of those regulations.

I will briefly mention the Environmental Performance Index (EPI)[396] As a part of regulatory quality. Because it uses 58 performance indicators across 11 environmental issues with three policy objectives: climate change, environmental health, and protecting ecosystem vitality to assess how countries established environmental policy targets and indicate which countries are best to address these environmental issues. The main objective of the EPI is to combine a broad set of indicators such as air and water quality, biodiversity, species protection, agriculture, forestry, fisheries, and climate change policies into a single composite score that reflects how well nations are managing their natural resources and environmental challenges.

- Overall governance performance

Overall governance performance score is given to the countries by the BTI based on the governance indicator with five different factors such as level of difficulty, steering capability, resource efficiency, consensus building, and international cooperation. The BTI's overall governance performance score is crucial for testing Hypothesis A because it offers a holistic measure of how well a state's institutions function. This score reflects not only the formal presence of governance structures but also their effectiveness in practice. If a country scores low, it suggests that its government struggles with critical tasks such as policy formulation, coordination, and resource allocation. Such weaknesses can extend to the enforcement of environmental and human rights protections, thereby allowing corporate misconduct to go unchecked. By correlating these governance weaknesses with failures in regulatory areas, the BTI score provides robust evidence to support the hypothesis that weak host state institutions lead to poor environmental and human rights protections.

- Electoral Democracy

This indicator is measured by V-Dem. It answers the question to what extent is the ideal of electoral democracy in its fullest sense achieved. I chose this indicator because it shows the core value of making decision makers responsive to citizens. This indicator is crucial for linking to the hypothesis because robust electoral democracy typically relates with higher

[396] Block, S., Emerson, J. W., Esty, D. C., de Sherbinin, A., Wendling, Z. A., et al. (2024). 2024 Environmental Performance Index. New Haven, CT: Yale Center for Environmental Law & Policy. epi.yale.edu

accountability and responsiveness in government. When elections are competitive and inclusive, citizens can hold leaders accountable, which incentivizes the implementation and enforcement of policies that protect environmental and human rights. Conversely, a low score on the V-Dem electoral democracy indicator suggests weak democratic practices, which often coincide with broader institutional weaknesses that can fail to effectively regulate corporate misconduct. Thus, the V-Dem electoral democracy indicator provides valuable insight into the overall strength of state institutions and their capacity to enforce necessary protections. Additionally, electoral democracy is measured by the FH. FH asks three different questions to the experts covering the election of both the head of government and national legislative representatives, examining aspects such as the timeliness of elections, transparency in voter and candidate registration, equal access to media and polling stations, and the use of secret ballots. The evaluation also considers whether independent election monitors have verified that the elections meet democratic standards and if any irregular or undemocratic practices have occurred. In addition, the framework analyzes the fairness and impartiality of the electoral laws by assessing if there is a clear and fair legislative framework for conducting elections, ensuring that election management bodies operate independently.

### 2.1.3. Indicators: Explanation of different organizations and methodology

The indicators that I will be analyzing are measured by different organizations and methodology, some part covers both corruption and/or rule of law, some only covers specific indicators such as rule of law, electoral democracy or regulatory quality.

I will further elaborate each of these below:

- **Rule of Law index (RoL) by World Justice Project**

The RoL by World Justice Project aims to measure rule of law in countries across the world with a multidisciplinary approach. They define rule of law as "*a durable system of laws, institutions, norms, and community commitment that delivers four universal principles: accountability, just law, open government, and accessible and impartial justice*". From this definition, it has four concepts: (i) accountability: the government as well as private actors are accountable under the law; (ii) just law: the law is clear, publicized, and stable and is applied evenly. It ensures human rights as well as property, contract, and procedural rights; (iii) open government: the processes by which the law is adopted, administered, adjudicated, and enforced are accessible, fair, and efficient; (iv) accessible and impartial justice where it

delivers timely by competent,ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.

The RoL index is measured by eight factors: constraints on government power, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil and criminal justice. The measurement process starts with surveys for practitioners, experts as well as surveys for the general public. Then collection and mapping the data onto 44 RoL indicators where scores for each of subfactors are compared globally. The data will be tested for biases and errors including quantitative data and qualitative assessments drawn from local and international organizations. External review is made by the Joint Research Center of the European Commission followed by proof reading comparing annual scores of countries. This indicator can be used to gather information on corruption and rule of law.

- **Judicial Independence by Global State of Democracy (GSoD)**

Judicial Independence is one indicator in the GSoD report by International IDEA. The concept of democracy is very general, therefore it was broken down into measurable attributes such as representation (free and equal access to political representation); rights (individual liberties and resources); rule of law (predictable and equal enforcement of the law and judicial checks on government power); and participation (active political involvement by the citizens). These attributes has sub-attributes (i) representation: credible elections, inclusive suffrage, free political parties, elected government, effective parliament, and local democracy; (ii) rights: access to justice, civil liberties, basic welfare, political equality; (iii) rule of law: judicial independence, absence of corruption, predictable enforcement, personal integrity and security; (iv) participation: civil society, civic engagement, electoral participation.

It summarizes information from 157 indicators collected from 20 data sets which include expert surveys, standard based in-house coding, observational data, and composite measures. These indices use a multi-layered approach to measure drawing on numerous expert-coded and observational indicators. For instance, access to justice is captured through V-Dem's questions on judicial corruption, removal of judges for misconduct, and the general accessibility of justice for men and women, supplemented by measures from CLD, BTI, and Freedom House. Civil Liberties is broken down further into subcomponents (freedom of expression, press, association and assembly, religion, and movement) using multiple

indicators from V-Dem, CLD, CIRIGHTS, and others. Political equality is subdivided into social group equality and gender equality, measured through V-Dem's expert-coded indicators and observational data and measures from BTI, Freedom House, and CIRIGHTS.

The Rule of Law encompasses several dimensions such as judicial independence, absence of corruption (drawing on multiple sources, including V-Dem, ICRG, and Freedom House), predictable enforcement (using V-Dem indicators of rule-abiding behavior in public administration, ICRG and BTI measures of bureaucratic strength and administrative capacity), personal integrity and security (capturing violations such as torture, extrajudicial killings, and political violence through V-Dem, PTS, and Freedom House data), and electoral participation with the International IDEA's observational data on voter turnout. This indicator can be used to gather information on rule of law, corruption, and judicial independence.

- **Varieties of Democracy (V-Dem project)**

The V-Dem project distinguishes between five high-level principles of democracy: electoral, liberal, participatory, deliberative, and egalitarian, and collects data to measure these principles.V-Dem employs a model to aggregate the responses of over 4,000 expert coders worldwide. V-Dem's political corruption index includes several indicators such as legislature corrupt activities and judicial corruption decisions; executive corruption index with executive bribery and corrupt exchanges and executive embezzlement and theft indicators; public sector corruption index with public sector corrupt exchanges and theft.

Rule of law index with access to justice for men and women; rigorous and impartial public administration; transparent laws with predictable enforcement; executive bribery and corrupt exchanges; public sector corrupt exchanges; executive embezzlement and theft; executive respects constitution; public sector theft; judicial accountability; compliance with judiciary; judicial corruption decision; compliance with high court; high court independence; and lower court independence indicators. This indicator can be used to gather data on corruption and rule of law.

- **Corruption Perception Index (CPI) by Transparency International**

The CPI is a composite measure that scores and ranks countries by how corrupt their public sectors are perceived to be, based on assessments from up to 13 reputable sources. It is the most widely used global indicator of corruption, partly because it covers extensive

geographical territory and combines at least three different data sources. These sources collectively measure expert and business executive perceptions across various dimensions of public-sector corruption. Because corruption often remains hidden, relying on perceptions is currently the most feasible approach, and careful questionnaires help ensure that the views collected align closely with objective indicators. One of the downsides, it does not capture certain issues, such as citizens' direct experiences of corruption, illicit financial flows, private-sector corruption, or the informal economy. Its focus on expert perceptions reflects the difficulty in gathering fully objective, transparent data about an inherently concealed phenomenon.

Nonetheless, the CPI combines multiple independent sources, it provides a more comprehensive and balanced picture of corruption in a given country than any one survey alone could offer. This methodology undergoes periodic reviews by the European Commission's Joint Research Centre.

- **Worldwide Governance Indicators (WGI)[397]**

The WGI started in 1996 covering almost two hundred countries and measures six dimensions of governance: voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law, and control of corruption. The indicators are based on hundreds of individual variables which were taken from existing data sources which reflect the survey responses from public, private and non-governmental organizations experts across the world.

The developers sees the concept of governance as the traditions and institutions by which authority in a country is exercised which includes (i) the process by which governments are selected, monitored and replaced; (ii) the capacity of the government to effectively formulate and implement sound policies, and (iii) the respect of citizens and the state for the institutions that govern economic and social interactions among them.[398] From this, six dimensions of governance has been identified which are (i) the process by which governments are selected, monitored, and replaced: accountability and political stability; (ii) the capacity of the government to effectively formulate and implement sound policies: government effectiveness

[397] Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, The Worldwide Governance Indicators: Methodology and Analytical Issues, 3 Hague J. Rule L. 220 (2011).
[398] ibid. at 222.

and regulatory quality; (iii) the respect of citizens and the state for the institutions that govern economic and social interactions among them: rule of law and corruption.

- **Bertelsmann Stiftung Transformation Index (BTI)**

Around 300 country and regional experts are collaborating to develop the BTI indicator. It analyzes and compares transformation processes towards democracy. which means that it evaluates developing and transition countries in ongoing social change towards democracy. The BTI assesses 17 criteria across 137 nations using scores reviewed through regional processes. The data is aggregated into two indices such as the Status index and Governance index. It includes evaluations of stateness, the rule of law, and democratic consolidation, performance, regulatory policies, and social inclusion.

In terms of methodology, each country is assessed by two experts (one foreign and one local) which uses a standardized codebook to develop qualitative criteria and quantitative indicators. After this, the review process by sector specific experts starts followed by the BTI board and scholars' reviews.

The Governance index is based on 20 indicators which examines how effectively policymakers manage development and transformation. The governance index comprises different indicators and criteria: (i) level of difficulty; (ii) steering capability; (iii) resource efficiency; (iv) consensus building; and (v) international cooperation.

- **Freedom House (FH)**

Freedom in the World is an annual report that assesses the state of political rights and civil liberties across 195 countries and 15 territories for a given year. Based on the principles of the Universal Declaration of Human Rights, the report emphasizes the real-world experiences of individuals rather than merely the legal guarantees provided by governments. It takes into account both state and nonstate actions and relies on a comprehensive review process involving over 130 analysts and numerous expert advisers to ensure that scores reflect actual conditions on the ground.

Countries and territories are evaluated using a detailed scoring system: 10 indicators for political rights and 15 for civil liberties, each rated on a scale from 0 (least free) to 4 (most free). These scores are then combined to assign a status of Free, Partly Free, or Not Free, with

additional designations such as "electoral democracy" based on meeting specific minimum thresholds. While the categories offer a general overview of a region's freedom, there is significant variation within each, underscoring the complex and multifaceted nature of political and civil conditions worldwide.

Some of the indicators like the Rule of Law category are made up of four individual questions so when their scores are summed, a country might receive a total score like 11 out of a possible 16. In contrast, the electoral process category comprises fewer questions like three, and its score is sometimes reported on a per-question basis, hence appearing on a 0–4 scale.

### 2.1.4. Assessment of Host States: Mongolia, Kazakhstan, Botswana

**Table 1. Comparative Comparison of Institutional Quality Indicators**

*(Higher = better, except for ranks and negative V-Dem values).*

| **Country** | **Indicators** | **RoL 2024 Rank (score)** | **GSoD 2022 Rank (score)** | **CPI 2024 Rank (score)** | **V-Dem 2023** | **WGI 2023** | **BTI 2024** | **FH 2024** |
|---|---|---|---|---|---|---|---|---|
| Mongolia | Corruption | 83 (0.43/0.51)[399] | | 114 (33/45)[400] | | 35.4/50[401] | 4/4.13[402] | 2/1.77[403] |
| Kazakhstan | | 59 (0.50/0.51) | | 88 (40/45) | | 47.2/50 | 4/4.13 | 1/1.77 |
| Botswana | | 50 (0.57/0.51) | | 43 (57/45) | | 73.6/50 | 6/4.13 | 3/1.77 |
| Mongolia | Judicial Independence | | 0.58/0.5 | | 1.05/0.30<br>0.68/0.44 | | 6/4.7 | 2/1.98 |

[399] Absence of Corruption: actual level of corrupt practices. Global Average score (GA): 0.51
[400] Absence of Corruption: actual level of corrupt practices.
[401] Control of Corruption: effectiveness of institutions in preventing and curbing corruption.
[402] Anti-corruption policy: strength of legal framework
[403] Anti-corruption laws effectiveness

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Kazakhstan | | | 0.3/0.5 | | -1.84/0.30<br>-1.39/0.44 | | 4/4.7 | 1/1.98 |
| Botswana | | | 0.68/0.5 | | 0.74/0.30<br>1.62/0.44 | | 9/4.7 | 3/1.98 |
| Mongolia | Rule of Law | 66 (0.53/0.55) | 71<br>(0.51/0.48) | | 0.48/0.55 | 43.9/50 | 6.3/4.61 | 11/7.53 |
| Kazakhstan | | 65 (0.54/0.55) | 112<br>(0.39/0.48) | | 0.26/0.55 | 36.8/50 | 3.5/4.61 | 4/7.53 |
| Botswana | | 51 (0.59/0.55) | 51<br>(0.56/0.48) | | 0.79/0.55 | 61.3/50 | 7.8/4.61 | 11/7.53 |
| Mongolia | Regulatory Quality | 75 (0.49/0.54)[404] | | | -0.27/-0.13 | 45.8/50 | | |
| Kazakhstan | | 58 (0.53/0.54) | | | -0.01/-0.13 | 53.3/50 | | |
| Botswana | | 44 (0.59/0.54) | | | 0.62/-0.13 | 67/50 | | |
| Mongolia | Overall governance performance | | | | | | 6.68/5.19 | |

[404] Regulatory enforcement. Included into regulatory quality because it measures effective regulatory enforcement, no improper influence, no unreasonable delay, respect for due process and no expropriation.It is crucial because without effective enforcement, even well-designed regulations fail to achieve their intended outcomes.

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Kazakhstan | | | | | | | 5.22/5.19 | |
| Botswana | | | | | | | 7.77/5.19 | |
| Mongolia | Electoral Democracy | | | | 0.55/0.49 | | | 4/2.37[405] |
| Kazakhstan | | | | | 0.28/0.49 | | | 0/2.37 |
| Botswana | | | | | 0.56/0.49 | | | 4/2.37 |

[405] Free and fair elections: where the current national legislative representative is elected through fair and free elections?

In this table, I compare Botswana, Mongolia, and Kazakhstan's scores and rankings in each indicator with global average rather than directly with each other. This is because using global averages as reference points, the assessment can accurately determine whether a country's indicators are relatively strong or weak within the global landscape rather than a limited group. It is also important because while these countries are all landlocked, they belong to different political, economic and legal traditions. For instance, Botswana and Mongolia are long standing democracies, while Kazakhstan is considered an authoritarian state. Thus, this analysis provides a clear idea of these countries' institutional and state capacity relatively to international standards. From the table above, the trend or patterns are clear.

- Corruption

The consistent trend can be seen for Botswana where it outperforms both Mongolia and Kazakhstan in the corruption indicators. In terms of RoL 2024, Botswana's score is 0.57 with a rank of 50 which is slightly above global average (0.51). It contrasts favorably with Kazakhstan's 0.50 (rank 59) and Mongolia's 0.43 (rank 83) which are below global average. This pattern is also the same in the CPI 2024 where Botswana's rank is 43 with a score of 57 is more than the global average (45). Mongolia's rank of 114 (score 33) and Kazakhstan's rank of 88 (score 40) which are lower than the global average . This data indicates that the public perception of corruption is notably lower in Botswana. The WGI 2023 further supports this trend where Botswana scored 73.6 far above than global average (50) compared to Kazakhstan's 47.2 and Mongolia's 35.4. Complementing these findings, the BTI 2024 Botswana scores 6 which is also above the global average (4.13) against the equal scores of 4 for both Mongolia and Kazakhstan; and the FH 2024 scores, with Botswana at 3 (which is far above global average- 1.77), Mongolia at 2, and Kazakhstan at 1, further supports this trend.

- Judicial independence

The analysis of judicial independence using the GSoD 2022, V-Dem 2023, BTI 2024, and FH 2024 indicators shows also clear, consistent trends among the three countries. In the GSoD 2022 measure, Botswana scores the highest at 0.68 which is far above the global average (0.5), with Mongolia following at 0.58, and Kazakhstan significantly lower at 0.30 than the global average. This indicates that Botswana's judicial framework is perceived as the strongest. Moreover, The V-Dem 2023 data reinforces this pattern where Botswana is at 0.74

in higher judicial independence (with a lower judicial independence of 1.62). These are far higher than the global average being 0.30 in higher judicial independence and 0.44 in lower judicial independence. Mongolia is at 1.05 (with 0.68) which is also higher than the global averages. Conversely, Kazakhstan shows negative values with -1.84 and -1.39 points to a notable weakness in its judicial independence. Furthermore, the BTI 2024 supports these findings where Botswana leads with a score of 9, higher than global average (4.7), followed by Mongolia at 6, and Kazakhstan at 4. The FH 2024 indicator follows the same pattern, with Botswana at 3, higher than the global average (1.98), Mongolia at 2, and Kazakhstan at 1.

- Rule of Law

The data shows a consistent pattern with Botswana emerging as the strongest performer, Kazakhstan as the weakest, and Mongolia falling in between. In the RoL 2024 indicator, Botswana has the rank (51) paired with the highest score (0.59)- which is higher than the global average of 0.55, while Mongolia and Kazakhstan, with ranks of 66 and 65 and scores of 0.53 and 0.54, which are slightly below global average. Similarly, the GSoD 2022 shows that Botswana again leads with a rank of 51 and a score of 0.56, higher than global average (0.48), while Mongolia with a rank of 71 and a score of 0.51, and Kazakhstan with much lower score of 0.39 than the global average with a rank of 112. The pattern continues with the V-Dem 2023 scores where Botswana scores a robust 0.79, far higher than global average of 0.55, Mongolia follows with 0.48, and Kazakhstan falls significantly behind at 0.26, far lower than global average. The WGI 2023 further supports this trend with Botswana achieving 61.3 which is higher than global average 50, Mongolia at 43.9, and Kazakhstan at 36.8. In the BTI 2024 scores, Botswana again scores highest at 7.8 which is much higher than the global average of 4.61, Mongolia's score of 6.3 is moderate, whereas Kazakhstan’s score of 3.5 is lower than the global average. The FH 2024 indicator, while showing the same between Botswana and Mongolia (both at 11) which is higher than the global average of 7.53, still places Kazakhstan at a significantly far lower level with a score of 4.

- Regulatory Quality

The data also demonstrates clear trends in regulatory quality. Looking at the RoL figures, Botswana leads with a rank of 44 and a score of 0.59 which is higher than the global average (0.54), followed by Kazakhstan with a rank of 58 and a score of 0.53, while Mongolia trails with a rank of 75 and a score of 0.49. This pattern is consistent across the V-Dem and WGI

indicators. Botswana's V-Dem score of 0.62 (higher than the global average of -0.13) and WGI score of 67 (higher than the global average of 50). Kazakhstan has a lower score than the global average which is V-Dem score of -0.01 and more than the global average WGI score of 53.3. Conversely, Mongolia's lower V-Dem score of -0.27 which is much lower than the global average and WGI score of 45.8. As for the EPI score, Mongolia is the weakest with rank of 143 from 180 countries, Botswana 66th and Kazakhstan 72nd which means that Botswana and Kazakhstan's environmental performance index showing regulatory quality in environmental issues are relatively strong.

- Overall governance performance

The table clearly shows a distinct ranking pattern among the three countries when assessing overall governance performance under the BTI framework. These countries are both scored higher than the global average which shows significantly positive overall governance performance. Botswana leads with the best performance with the highest score (7.77) which is more than the global average of 5.19. In contrast, Kazakhstan has the lowest score 5.22 but above the global average. Mongolia falls in between, with a score of 6.68.

- Electoral Democracy

The table reveals clear differences in electoral democracy performance among the three countries. Botswana and Mongolia exhibit similar V-Dem (0.56 and 0.55) which are higher than the global average of 0.49 and FH (4) which is higher than the global average (2.37). However, Kazakhstan shows a significantly lower V-Dem score of 0.28, far lower than the global average of 0.49 and an FH score of 0 which is also much lower than the global average.

I have also checked different indicators such as order and security and open government by Rule of Law (WJP); state legitimacy and public services by FSI; government effectiveness by WGI. This is because order and security measures absence of crime, civil conflict and violent redress which are essential for a stable political system. State legitimacy measures electoral integrity, the nature of political transitions, and political representation while also examining the transparency and accountability of ruling elites and the state's ability to perform basic functions like tax collection, with deficiencies often manifesting in mass protests, sustained civil disobedience, or armed insurgencies. This is important for maintaining a stable political environment and public trust. Open government measures transparency and accountability

such as publicized laws and government data, right to information, and complaint mechanisms. Furthermore, public services measure how well the state provides public services such as education and health. These are important components of government effectiveness. The trend and patterns were the same where Botswana leads the other two countries, Mongolia and Kazakhstan.

### 2.1.5. Interim conclusion

The six indicators to assess state and institutional capacity in regulating corporate misconduct are interrelated, for example, corruption can compromise judicial independence and undermine the rule of law. When government institutions are weakened by high levels of corruption, regulatory enforcement fails which in turn allows corporate interests to overcome public interests.

Across the corruption indicators, Botswana consistently performs above the global average. This suggests that its institutions are relatively strong in preventing or punishing corrupt practices, which, in turn, can increase environmental and human rights protection. By contrast, both Mongolia and Kazakhstan show corruption scores below global averages, showing vulnerabilities. One can conclude that if corruption level is high or corruption controls are weak, the capacity of institutions to oversee corporate activities and safeguard environmental and human rights standards are lower.

In terms of judicial independence, Botswana again is placed far above the global average on indicators like GSoD, V-Dem, BTI, and FH. A more independent judiciary is generally associated with a better capacity to enforce laws and offer legal remediation in cases of environmental harm or human rights abuse. Mongolia also indicates scores at or above the global average in several measures. Conversely, Kazakhstan's scores fall below global averages, reflecting limitations in its judiciary's ability.

Similarly, Rule of law indicators show Botswana above global averages, and Mongolia hovers slightly below or around. While Kazakhstan's scores register significantly below these benchmarks, suggesting notable institutional weaknesses. This raises concerns about consistent enforcement of laws and the protection of environmental and human rights.

Regulatory quality measures reflect a similar pattern. Botswana's ratings exceed global averages, while Mongolia's regulatory quality is generally below global averages.

Kazakhstan shows mixed results, with some indicators going below the global average and others just above it. Inconsistent or inadequate regulatory frameworks can leave gaps that enable corporate behavior with negative environmental or human rights consequences.

As for the electoral democracy assessments, Botswana and Mongolia surpassed global averages, indicating a higher level of public accountability that can help deter violations of environmental and human rights norms. In contrast, Kazakhstan's scores fall well below global averages, suggesting more restricted political competition and accountability.

Overall governance performance under the BTI framework shows that Botswana's score is well above the global average, Mongolia's is moderately above, and Kazakhstan's is only slightly above. Although Kazakhstan's overall governance ranking places it above the global average, weaknesses in other components, specifically corruption, judicial independence, and rule of law hinders the effectiveness of this indicator.

In conclusion, these findings lead to the statement that Botswana has a good state and institutional capacity, while Mongolia is partially facing challenges, and Kazakhstan is critical in regulating corporate activities towards environment and human rights. While stronger institutions suggest adequate capacity to regulate corporate misconduct, this alone does not necessarily correlate to stronger protections for the environment and human rights. This should be further coupled with the analysis on economic dependency, the current practical cases happening in these countries, the effectiveness of national regulatory framework enforcement, and how these countries diffuse international norms on human rights and environmental protection from non-state actors.

## 2.2. Prioritization of sustainable development pillars: economic interests and its impact on regulating corporate misconduct (Hypothesis B)

### 2.2.1. Dependency on FDI

In Chapter I, I discussed briefly the countries' dependence on commodities using statistics from the UNCTAD report.[406] Mongolia, Kazakhstan, and Botswana are countries heavily dependent on commodities, primarily relying on the mining and energy sectors,[407] which attract substantial foreign investment. Mongolia mainly relies on exports of minerals, ores,

[406] United Nations Conference on Trade and Development (UNCTAD), *The State of Commodity Dependence* 2023. https://unctad.org/publication/state-commodity-dependence-2023
[407] United Nations Conference on Trade and Development (UNCTAD), *The State of Commodity Dependence* 2023. https://unctad.org/publication/state-commodity-dependence-2023

and metals which accounts for 91percent of total merchandise exports, withcoal sector alone contributes about 58 percent. According to the 2022 statistical data,[408] 60.1 percent of the total investment was from foreign sources.Within that, the mining sector dominated, attracting around 82.5 of all percent of these foreign sources constituting foreign direct investment and 58 percent of the total foreign direct investment was in the mining sector.

Kazakhstan has been focusing on export driven growth,[409] attracting over 370 billion USD on FDI,[410] particularly in oil, which is the largest deposit in Central Asia. As stated by the UNCTAD,[411] Central Asia is the region with the highest commodity dependence rate, and Kazakhstan's rate was higher than 85 percent in 2018-2019. The energy sector alone accounted for more than 603.1 percent of merchandise exports during this period. Numerous scholars and decision makers[412] frequently highlight Kazakhstan's vulnerability to "Dutch disease".[413] In 2021, the mining industry accounts for a substantial share of both GDP and exports (on the order of 15–20 percent)[414] FDI flows to Kazakhstan increased and ost of the inflow goes to the oil and gas sector,[415] with nearly 50 percent of the total FDI flow in the country.[416]

As for Botswana, the diamond (mining) industry plays an outsized role in the economy[417] and it comprises 80 percent of exports.[418] Botswana focuses on building capacity and negotiating FDI with multinational companies.[419] As stated by UNCTAD, between 2018-2019, While mining, particularly diamonds, is heavily dominant in exports, its share of GDP is more

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[408] *ibid.*
[409] OECD, *Insights on the Business Climate in Kazakhstan*, (2023), https://doi.org/10.1787/BD780306-EN.
[410] Satubaldina, A., *Kazakhstan Has Attracted Over US$370 Billion in FDI Since Independence*, The Astana Times (2021), https://astanatimes.com/2021/12/kazakhstan-attracts-over-us370-billion-in-fdi-since-independence/.
[411] United Nations Conference on Trade and Development (UNCTAD), *The State of Commodity Dependence* 2023. https://unctad.org/publication/state-commodity-dependence-2023
[412] Samuele Bibi, *Oil Revenues, FDI, and Balance of Payment Dynamics: The Case of Kazakhstan Between the Supercycle Commodity Boom and Financial Subordination*, 90 *Res. Pol.* (2024).
Esanov, A., *Economic Diversification: The Case for Kazakhstan*, in *Revenue Watch Institute* (2015), http://www.imf.org/external/pubs/ft/scr/2010/cr10241.pdf.
Cappelli, F., Carnazza, G., & Vellucci, P., *Crude Oil, International Trade, and Political Stability: Do Network Relations Matter?*, 176 *Energy Pol.* (2023), https://doi.org/10.1016/J.ENPOL.2023.113479.
Sachs, J.D., & Warner, A.M., *The Curse of Natural Resources*, 45 *Eur. Econ. Rev.* 827 (2021), https://doi.org/10.1016/S0014-2921(01)00125-8.
[413] This means that increased exploitation of natural resources reduces the relevance of other sectors such as manufacturing.
[414] World Bank, *Mining Sector Diagnostic - Kazakhstan*, Report (Feb. 2023).
[415] N.B. Demeuov & A.M. Yesdauletova, *The Current State and Structure of Foreign Direct Investment in the Republic of Kazakhstan*, Eurasian National University of Kazakhstan (2023), https://bulecon.enu.kz/index.php/main/article/view/560/439.
[416] *ibid.*
[417] Mahembe, E. & Odhiambo, N. M., *The Dynamics of Foreign Direct Investment in SADC Countries: Experiences from Five Middle-Income Economies*, 11 *Probs. & Persp. in Mgmt.* 35 (2013).
[418] Keith Jefferis, *Management of Botswana's Diamond Revenues*, IMF PFM Blog (July 8, 2024), https://blog-pfm.imf.org/en/pfmblog/2024/07/management-of-botswana-diamond-revenues.
[419] Criscuolo, A., *Briefing Note: Botswana*, (2008), http://www.sitesources.worldbank.org.

modest.t[420] Botswana is among the world's most export-concentrated economies: it relies heavily on commodity exports, especially ores, metals, and precious stones. The diamond industry remains a leading destination for FDI in Botswana,[421] competing with other sectors to attract investment, though the absolute scale of FDI inflows has fluctuated in recent years. I will further elaborate the commodity dependence of these countries based on the data of different international organizations such as the IMF, World Bank and the countries national statistical data.

- Mongolia

As stated in the Country Economic Update by World Bank,[422] Mongolia's economy made 7.1 percent expansion in 2023 driven mainly by coal exports to China. This resulted in a budget surplus of 2.6 percent of GDP and a decline in public debt to 44.1 percent of GDP. World Bank prospects remain favorable with annual growth at 6.4 percent in 2025 with the support of the copper mine Oyu Tolgoi (Rio Tinto). However, it states that Mongolia's heavy reliance on mining underscores the importance of adequate fiscal and monetary policies and diversifying the economy. Similarly, the IMF[423] states that Mongolia's economy is strongly driven by coal exports. It also states that external vulnerabilities have eased because of the contributions made by FDI and other financing inflows. Growth is expected to stay strong in 2024 because of continued mining expansion, however, delays of "mega projects" related to mining and infrastructure could mitigate some imbalances. The Extractive Industries Transparency Initiative (EITI)[424] views that the extractive industry is the key economic sector of Mongolia and has been the main source of economic growth. The EITI[425] states that the mining sector of Mongolia alone accounts for 25 percent of the GDP, 90% of exports, and more than 30 percent of the state budget. It composes 57.7 percent of FDI and 66.70 percent of total sales. Total production of the mining sector reached 25.2 trillion MNT in 2022, increased by 26.6 percent from 2021 and total sales reached 44.4 trillion MNT in 2022, increased by 60.3 percent from 2021.

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[420] *ibid.*
[421] OECD, *Investment Policy Reviews: Botswana* (2014), https://www.oecd-ilibrary.org/oecd-investment-policy-reviews-botswana-2014_5k43n1vmkbjb.pdf?itemId=%2Fcontent%2Fpublication%2F9789264203365-en&mimeType=pdf.
[422] *World Bank, Mongolia Economic Update (May 2024),* https://www.worldbank.org/en/country/mongolia
[423] International Monetary Fund, *Mongolia: Concluding Statement of the 2024 IMF Staff Visi*t (Oct. 14, 2024).
[424] The Extractive Industries Transparency Initiative (EITI)# is a global coalition of governments, companies and civil society equally working together to strengthen governance and improve stakeholders' responsibilities in accountable use of revenues from natural resources (minerals, oil, natural gas) for the benefits of society by ensuring transparent reporting.
[425] MONGOLIA SEVENTEENTH EITI RECONCILIATION REPORT 2022, MONGOLIA EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (2022), https://eiti.org/documents/mongolia-2022-eiti-report

- Kazakhstan

As stated by the Bureau of National Statistics Kazakhstan,[426] the mining sector is a core field to the country's economy as the mining industry consists of 48.1 percent of total industrial products produced as of January 2025. Industrial production index was 101.3 percent because coal production increased by 116.7 percent, other metal ores by 106.7 percent, and extraction of other minerals by 101.5 percent. Furthermore, 28.4 percent of total investment goes to this sector, which is the largest share among all areas. The overall investment in mining and quarrying equals almost 800 million tenge, which shows the country's reliance on this sector even though this shows a 76.3 percent decrease in investment growth from the previous year.

As stated by the World Bank,[427] oil output fell by -1.6 percent, but the growth is projected to reach 4.7% in 2025 due to higher oil production. The IMF[428] states that the country's current account deficit is expected to remain moderate at about 1.5 percent of GDP in 2024. Foreign investment interests are emerging specifically in renewables and rare minerals. Growth has slowed in 2024 but remains relatively strong because of flat oil output. The IMF concludes that while the National Fund of Kazakhstan was created to safeguard the country's economic future and provide stability, its increasing depletion and over-reliance on transfers to avoid oil dependence to cover budget deficits have weakened the long-term goals.

- Botswana

As stated by Statistics Botswana,[429] at the beginning of 2024, diamond production decreased by 31 percent and copper also showed a slight decrease of 0.6 percent. However, when compared to the second quarter of 2024, production increased by 15.9 percent. Silver production increased by 25.3 percent, however, coal production increased significantly by 33.7 percent. Gold, copper, nickel and cobalt matte showed no production because the affected mines are still undergoing liquidation.

Similarly, the IMF[430] states that Botswana's diamond dependent economy has suffered a decrease, with exports falling because of weak global demand. The country's heavy

[426] Main indicators of industry performance (January 2025), https://stat.gov.kz/en/industries/business-statistics/stat-industrial-production/publications/315566/
[427] https://www.worldbank.org/en/country/kazakhstan/overview#3
[428] International Monetary Fund, *Republic of Kazakhstan: 2024 Article IV Consultation—Press Release and Staff Report,* IMF Country Report No. 25/30 (Jan. 2025).
[429] Statistics Botswana, Index of the Physical Volume of Mining Production: Third Quarter 2024, Stats Brief (2024).
[430] International Monetary Fund, *Botswana: 2024 Article IV Consultation—Press Release and Staff Report*, IMF Country Report No. 24/286 (2024).

dependence on diamond exports (over 90% of total exports), its large public sector, and the investment heavy nature of mining have increased vulnerability to external shocks and creates a weaker linkages with other economic sectors. Current state of high unemployment and income inequality shows that there is a need for economic diversification. Despite decades of good governance, Botswana's reliance on one sector has caused high youth unemployment and persistent inequality.

### 2.2.2. Prioritizing economic growth over environmental and human rights protections

To assess whether Kazakhstan, Botswana and Mongolia have prioritized economic growth driven by their dependence on mining industry, over environmental and human rights protections, I will briefly examine the current policies related to FDI and corporate responsibility focusing on their alignment with business and human rights international standards drawing from the analysis in chapter 1.

As previously seen, three countries' economies heavily rely on the mining sector. Even though these countries face ongoing human rights violations and environmental degradation, they continue to prioritize attracting FDI, particularly in the extractive industry.

Mongolia and Kazakhstan are among the top five landlocked developing countries which received the most FDI in 2023.[431] FDI in Mongolia increased significantly from 187.6 million USD to 4.5 billion USD between 2005 and 2011; however, it dropped to 2 billion USD in 2013 and further declined to 95 million USD in 2015.[432] This decline was attributed to falling commodity prices and regulatory uncertainties.[433] Mongolia has adopted the Law on Investment with an aim to protect the rights and interests of investors operating in the country and establish a guarantee of the investment environment. Currently, Mongolia is working to amend the Law on Investment to foster investment, protect the rights of investors, and ensure the greater access and efficiency of public services. In 2014, Mongolia adopted (currently revoked) State Mineral Policy 2014-2025 which focuses on providing national primary interests by developing conspicuous and responsible mining relied upon the private sector, in addition it will aim to develop multi sectored and balanced economic structure in the short and mid-term.[434] Mongolia also adopted an Action Plan of the Government of Mongolia for

[431] United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2023, at 14 (2023).
[432] Byambasuren Narantuya & Charles ("Chip") B. Rosenberg, Mongolia: Investment-Related Developments in the Mining Sector (Mar. 26, 2024, https://arbitrationblog.kluwerarbitration.com/2024/03/26/mongolia-investment-related-developments-in-the-mining-sector/
[433] Ibid.
[434] Mongolian State Great Khural, Resolution No. 18 (2014), State Minerals Policy 2014–2025, art. 1.1. (revoked in 2021)

2020-2024 by the Resolution No.24 dated April 2020 of State Great Khural. With this action plan, the Government of Mongolia aims to ensure human, economic, and social development. This document clearly outlines the country's aim in boosting investment in exploration of raw materials for high-tech industry such as rare earth elements, precious, non-ferrous and mixed metals, non-metallic minerals and oil.[435] Furthermore, as part of its foreign policy, Mongolia consistently protects the interests of foreign investors, attracting foreign investment in priority economic sectors, including mining.[436] As part of the green development policy, the country aims to ensure the healthy living environment for citizens[437] However, this action plan does not include concepts of human rights protection in the extractive industry despite current ongoing violations. Recently, Mongolia has signed an investment agreement with French Orano Group to operate a uranium project with an investment of 1.6 billion USD.[438] This commitment was followed by public debate and extensive protests by local communities due to its unknown environmental harm. [439]

Kazakhstan's FDI in 2023 almost doubled to 6.1 billion USD (increase by 83 percent), with increases in the mining sector to 4.1 billion USD.[440] The country lacks a long-term comprehensive mining policy,[441] though the Code on Subsoil and Subsoil Use regulates natural resources, aiming to promote sustainable resource development, incorporating provisions for environmental protection and human health. President Tokayev of Kazakhstan declared[442] to enhance the investment climate across different sectors and attract an additional 150 billion USD as a FDI by 2029. For instance, in geological exploration and mining, the country has attracted over $1 billion in private investment over the past six years, with 1.6 million square kilometers open for subsoil use. In the energy sector, international oil companies have contributed significantly to growth, tripling oil production over 30 years, with a goal to exceed 100 million tons annually. Investments in the petrochemical industry exceed $14 billion, including a polypropylene plant and an ongoing polyethylene project. Clean energy initiatives are also advancing, with agreements to develop 43 gigawatts of green

[435] Mongolian State Great Khural, Resolution No. 24 (Apr. 2020), Action Plan of the Government of Mongolia for 2020–2024, art. 3.2.5.
[436] Mongolian State Great Khural, Resolution No. 24 (Apr. 2020), Action Plan of the Government of Mongolia for 2020–2024, art. 4.5.3.
[437] Mongolian State Great Khural, Resolution No. 24 (Apr. 2020), Action Plan of the Government of Mongolia for 2020–2024, art. 5.1.
[438] Investment Agreement Signed for Mongolian Uranium Project, World Nuclear News (Jan. 17, 2025), https://www.world-nuclear-news.org/articles/investment-agreement-signed-for-mongolian-uranium-project
[439] Төсөл гацаахаар жагсаж эхлэв үү!, News.MN (Jan. 6, 2025), https://news.mn/r/2774772/.
[440] United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2023, at 13 (2023).
[441] World Bank, *Mining Sector Diagnostic – Kazakhstan Report* (Feb. 2023).
[442] Speech by President Kassym-Jomart Tokayev at the 36th Plenary Session of the Foreign Investors' Council, Palace of Independence, Kazakhstan (Oct. 31, 2024).

energy. As the world's largest uranium producer, Kazakhstan is moving forward with nuclear energy with the approval by citizens through referendum.[443] This referendum announced that 71 percent of voters supported the construction of a nuclear power plant.

Even though Botswana does not have separate investment law, the country's Mineral Policy (2022)[444] was adopted by the Ministry of Mineral Resources, Green Technology, and Energy Security. This policy aims to provide an investor friendly environment in the mining industry including different minerals such as diamonds, coal and precious metals aligns with Botswana's Vision 2036 long-term development policy. It also includes policies on local participation, safety, health and environment.[445] However, local participation within the context of this policy does not mean the local participation in the decision making process, rather it means to increase the level of citizen economic empowerment by participating in the mineral sector through contractors, financial services, local manufacturing and locally based supply chains. Moreover, the safety, health and environment policy focuses more on labour rights, rather than affected community rights. In order to implement Vision 2036, Botswana adopted National Development Plan (NDP) 12 which will continue from 2025 to 2030. The key aim of this plan is to diversify the economy by reducing the dependency on mining, and attracting inward FDI is a key policy priority for Botswana. The strategy on mining will also focus on promoting Botswana as a leading mining destination and diversifying diamond industry, which the government is aiming to diversify within the mining sector and encourage exploration for more mineral varieties such as copper, uranium and others.[446]

As for the policies on corporate responsibility focusing on business and human rights international standards, neither of the countries have mandatory legislation specifically requiring companies to implement human rights and environmental protection policies, or to conduct due diligence. In 2023, Mongolia adopted NAP by Resolution No.231 of Government of Mongolia for the protection of human rights in business activities, prevention of human rights violations, and restoration of violated rights. No legally binding corporate responsibility legislation has been enacted yet. Kazakhstan is still in the discussion process in adopting the NAP. Controversy, Botswana falls behind where it does not have a plan on adopting it. The countries have been regulating it by infusing the corporate responsibility

[443] Assel Satubaldina, *Kazakhstan's Official Referendum Results Out: 71% Back Nuclear Power Plant Proposal*, The Astana Times (Oct. 8, 2024), https://astanatimes.com/2024/10/kazakhstans-official-referendum-results-out-71-back-nuclear-power-plant-proposal/.
[444] Available at: https://www.bgi.org.bw/sites/default/files/Botswana%20Minerals%20Policy%202022.pdf
[445] Mineral Policy, arts. 3.6–3.7 (2022).
[446] National Development Plan 12, at 88 (2024).

provisions into sectoral legislations, such as investment and environmental law, or through regional initiatives.

### 2.2.3. Interim conclusion

The analysis demonstrates a clear pattern of economic dependency of these three countries on FDI and extractive industry. This shapes national policies that prioritize economic growth through their mining sectors. While there are some legislative frameworks related to corporate responsibility, there is a lack of mandatory regulations that would hold foreign investors accountable for their caused harm. Because investment and economic growth remain national priorities, the current regulatory framework suggests that Mongolia, Kazakhstan and Botswana will not offer or be slow in enforcing efficient regulatory mechanisms to hold corporations, especially foreign invested companies, accountable for environmental and human rights violations. However, this heavy dependence on FDI and extractives alone will not automatically show the failure in regulating corporate operations and thus, it needs more analysis on the empirical cases within these countries which will be discussed in the next section.

## 2.3. Discussion

It will address two key issues. First, it will examine how international norms on corporate accountability, human rights, and environmental protections influence the national regulatory framework of these countries. While hypothesis A and B demonstrates the state and institutional capacity, and dependency on FDI and extractive industry, this section will explore how these factors affect the adoption of enforcement of global norms at the domestic level. It will begin by the historical evolution of international investment law, highlighting power imbalances. Then it will examine binding and non-mining international frameworks including treaties, investment agreements, and soft law instruments. Finally, it will analyze the extent to which Mongolia, Kazakhstan and Botswana have ratified environmental and human rights treaties, incorporated foreign investor obligations into their national laws and investment treaties, and how these countries are engaging with international dialogues on this issue. The reason why I am including international norm diffusion into this part is that it provides context on how global regulatory frameworks and initiatives shape national corporate accountability regulations, helping to explain limitations and pressures that influence state's action towards this issue.

Second, the discussion will be synthesising hypothesis A and B with empirical cases from Chapter 1 to draw a broader conclusion. It will discuss the findings of hypothesis A (section I) and hypothesis B (section II), analyzing how state and institutional capacity weaknesses and economic dependency on FDI and extractive industry impact host states to regulate corporate misconduct in Mongolia, Botswana and Kazakhstan. This section will combine legal frameworks and its challenges with real world corporate abuses happening in each country, examining how foreign investment priorities shape national policies, influencing gaps and implementation challenges. The role of corruption, judicial independence, rule of law will also be highlighted.

By including these aspects into the discussion section will provide a holistic approach showing state and institutional capacity, along with prioritizing economic interests over the environmental and human rights aspects due to the state's dependency on FDI and extractive sectors, significantly impacting both domestic regulatory and international norm implementation in host states.

### 2.3.1. International norm diffusion into national regulatory framework

The notion of foreign investor responsibility is initially introduced within the international investment law discipline, where the issue on balancing foreign investor rights and obligations still persists. In order to better understand the foreign investor accountability, it is essential to understand the current global system and examine the historical roots that have shaped it. It is worth noting that the disagreement between Global South and North countries regarding the foreign investor responsibility remained completely unresolved until the end of the 1970s.[447] Investing countries demanded strong investor rights while offering voluntary investor standards, whereas investment receiving countries sought strong investor obligations but offered only voluntary state guidelines.[448] Even today, there is no universally accepted view on whether foreign investor responsibility towards the protection of human rights and environment should be included in mandatory international or national legal documents, despite a limited number of good practices.

Following World War II, business actors developed their ideas on foreign investment protection, which were then considered by their home states in the Global North.[449] These

[447]Karl P. Sauvant, The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned, 16 J. World Inv. & Trade 11, 11–87 (2015).
[448] Nicolas M. Perrone, Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment, 7 Bus. & Hum. Rts. J. 375, 375–96 (2022).
[449] Int'l Chamber of Com. (ICC), Fair Treatment for Foreign Investments: International Code, Brochure 129 (Aug. 1949).

ideas eventually incorporated into the well-known investment treaties and arbitral institutions we have today and the motivation behind this was the perceived threat to oil and mining businesses due to decolonization and the Cold War.[450] The multinational corporations (MNCs) saw the lack of investor obligations as an opportunity to take advantage of the institutional weakness and limitations of certain countries.[451] During the negotiations on global trade policies between 1946 and 1948, the UN and Western Europe favored the recognition of investor rights, stating that host states must adhere to investor protection rules.[452] However, Latin American countries disagreed and argued that foreign investors should be subject to domestic laws and courts as stated in Calvo Doctrine.[453]

The ICC has adopted Code for Fair Treatment for Foreign Investments, and the Abs-Shawcross draft which proposed similar guidelines, was submitted to the OEEC in 1958. These documents were supported by many business leaders and associations concerned with foreign investment protection, although they also faced criticism from scholars.[454] The reason foreign investor obligation did not receive enough attention was that global leaders believed human rights could be protected through international arbitration[455] or by inserting obligations into state contracts.[456] The World Bank took steps to establish international arbitration with the support of general counsels from banks, business leaders and participation of lawyers from Royal Dutch Shell.[457] This led to the establishment of the International Centre for Settlement of Investment Disputes (ICSID).

In the late 1960s, countries began to criticize the MNCs, considering them as agents of neocolonialism, and started to use their regulatory authority through nationalizations, taxes,

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George L. Ridgeway, *Merchants of Peace: The History of the International Chamber of Commerce* (Little, Brown & Co. 1959).

[450] Taylor St John, *The Rise of Investor–State Arbitration: Politics, Law, and Unintended Consequences* 132 (Oxford Univ. Press 2018).

[451] Nicolas M. Perrone, Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment, 7 Bus. & Hum. Rts. J. 375, 375–96 (2022).

[452] ibid.

[453] ibid.

[454] Arthur Larson, Recipients' Rights Under an International Investment Code, 9 J. Pub. L. 172 (1960).
Arthur Larson, *When Nations Disagree* 174–76 (La. State Univ. Press 1961).

[455] Int'l Chamber of Com. (ICC), Fair Treatment for Foreign Investments: International Code, Brochure 129 (Aug. 1949).
George L. Ridgeway, *Merchants of Peace: The History of the International Chamber of Commerce* (Little, Brown & Co. 1959).

[456] Hartley Shawcross, The Promotion of International Investment, Speech Before the Society to Advance the Protection of Foreign Investments, Cologne (1959), in Society to Advance the Protection of Foreign Investments, *Convention on Investments Abroad with Comments, Speeches and New Literature*, Pub. No. 3, at 46, 56–57 (J. Heider 1960).

[457]Taylor St John, *The Rise of Investor–State Arbitration: Politics, Law, and Unintended Consequences* 132 (Oxford Univ. Press 2018).

antitrust and performance requirements.[458] During the 1970s, scholars[459] increasingly agreed that international law should define investor rights and also obligations. They proposed a "Code of Behaviour for International Corporations", while states should also create appropriate institutions to coordinate national regulations and protect investment.[460] The Charter of Economic Rights and Duties of States (CERDS) was approved by the UN General Assembly in 1972. This initiative included the host state right to nationalize and regulate investments. White and Correa[461] argued that voluntary guidelines and information centers, seen as neoliberal proposals, do not adequately address the needs of the Global South and the extraterritorial effects of MNCs as compared to the CERDS.

In 1972, ICC Guidelines were also developed which included voluntary investor responsibility with the provisions on economic and social development plans and priorities of the host country. However, the OECD supported this type of guidelines only if investment receiving countries will ratify investment treaties and join ICSID.[462] Some countries rejected these guidelines, emphasizing the need for foreign investors to align their projects with national economic and social objectives.[463] Following these contradictions, the Group of Eminent Persons (GEP) of the UN, together with the MNCs, acknowledged that a binding multilateral agreement was not practical at this moment and one more time proposed the idea of developing a voluntary code on the rights and responsibilities of the MNCs.[464] Attention shifted to the investment treaties and the ISDS, leaving foreign investor obligations initiatives behind.[465]

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[458] Kwame Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (Int'l Publishers 1965).
James Greene, *The Search for Common Ground: A Survey of Efforts to Develop Codes of Behavior in International Investment. A Special Report to the U.S. Committee, Pacific Basin Council*, The Conference Board 4 (1971).
[459]Shinzo Ohya, Foreign Private Investment and Economic Growth, 5 Foreign Trade Rev. 510, 513–14 (1971).
[460] Detlev F. Vagts, The Multinational Enterprise: A New Challenge for Transnational Law, 83 Harv. L. Rev. 739 (1970).
[461] Eduardo White & Carlos Correa, El Control de las Empresas Transnacionales y la Carta de Derechos y Deberes Económicos de los Estados, in *Derecho Económico Internacional* 175 (Jorge Castañeda ed., Fondo de Cultura Económica 1976), cited in Nicolás M. Perrone, Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment, 7 Bus. & Hum. Rts. J. 375, 375–96 (2022).
[462] Business & Indus. Advisory Comm., Observations on the Note by the Secretariat of the OECD Development Assistance Committee Related to the International Chamber of Commerce Guidelines for International Investment, Meeting on June 25, 1973 (Edwin Martin Personal Papers, The John F. Kennedy Library, Box 37), cited in Nicolás M. Perrone, Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment, 7 Bus. & Hum. Rts. J. 375, 375–96 (2022).
[463]F. M. Black, Memorandum: Roundtable of Private Foreign Investment in Latin America, OECD FMB/878 (Feb. 27, 1973).
[464]U.N. Dep't of Econ. & Soc. Affs., *Summary of the Hearings Before the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and International Relations*, U.N. Doc. ST/ESA/15, at 38, 414–15 (1974), cited in Nicolás M. Perrone, Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment, 7 Bus. & Hum. Rts. J. 375, 375–96 (2022).
[465]Nicolás M. Perrone, Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment, 7 Bus. & Hum. Rts. J. 375, 375–96 (2022).

In the 1990s, after the adoption of bilateral investment treaties for almost 160 countries, the focus shifted to the multilateral level (the Multilateral Agreement on Investment). During this time, numerous MNCs drafted codes of conduct that shifted investor obligations into corporate social responsibility (CSR) for reputational reasons.[466] Consequently, the OECD has drafted voluntary guidelines on MNCs conduct, and the UN developed the Global Compact with voluntary recommendations on human rights, but without reference to national economic interests or state rights, which these initiatives were supported by proponents of investment treaties as Deutsche Bank, Royal Dutch Shell, Rio Tinto, and the ICC.[467] Attracting foreign investment and CSR are two sides of the decoupling rights and obligations of foreign investors.[468] Most of the BITs included CSR clauses where the host and home State shall encourage companies to voluntarily incorporate internationally recognized standards of CSR or the investors shall voluntarily comply with these standards.[469] However, these provisions allow investors to self-regulate their compliance with human rights and environmental responsibilities through CSR, rather than being obligated to do so.[470] As Florian Wittstein stated, CSR is described as part of what a responsible business or a good corporate citizen should be about, not what a host country or community is rightfully entitled to demand from corporations.[471]

From these initiatives and voluntary documents aimed at actually protecting foreign investors, it is evident that local communities, whose rights are affected or could have been affected, had no participation in their development. Instead, foreign investors and their home countries are focused on profit gaining, while host states embraced the process of industrialization.[472]

Currently, the promotion, protection, and fulfillment of human rights in business activities remain dependent on national governments and domestic human rights institutions.[473] This makes it essential for a host country to incorporate international environmental and human

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[466] Chiara Macchi, *Business, Human Rights and the Environment: The Evolving Agenda* (T.M.C. Asser Press 2022).
[467] James K. Rowe, Corporate Social Responsibility as Business Strategy, in *Globalization, Governmentality and Global Politics: Regulation for the Rest of Us?* 122 (Ronnie D. Lipschutz & James K. Rowe eds., Routledge 2005).
[468]Nicolás M. Perrone, Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment, 7 Bus. & Hum. Rts. J. 375, 375–96 (2022).
[469] Belarus-India BIT; Nigeria-Singapore BIT; Canada-Burkina Faso BIT.
[470]Barnali Choudhury, Human Rights in International Investment Law, in *European Yearbook of International Economic Law 2020* 175, 186 (Marc Bungenberg et al. eds., Springer 2021).
[471] Florian Wettstein, The History of "Business and Human Rights" and Its Relationship with Corporate Social Responsibility, in *Research Handbook on Human Rights and Business* 23, 23–45 (Surya Deva & David Birchall eds., Edward Elgar Publ'g 2020).
[472] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton Univ. Press 1995).
[473] Claire Methven O'Brien & Jolyon Ford, Business and Human Rights: From Domestic Institutionalisation to Transnational Governance and Back Again, 37 Nordic J. Hum. Rts. 216, 216–33 (2019).

rights norms into domestic regulations, especially when the countries are dependent on extractive industry and FDI. However, scholars[474] argue that international norm diffusion into national legislations is not a passive or automatic, but rather is shaped by national politics, culture, and negotiated by domestic actors amidst competing interests. This means that even states are committed to international human rights and environmental standards, their enforcement mechanisms remain inconsistent.

Given these limitations, at state level, many scholars and judicial institutions have advocated for expanding human rights obligations to include corporations, particularly MNCs at the international level.[475] However, corporations are not currently subject to international law and are not bound by any binding treaties. Instead, the most widely recognized but non-binding guidelines on duties and responsibilities of the states and corporate actors towards human rights such as the UNGPs. It is also important to note that soft law instruments are dominant at the international level due to the tensions among various stakeholders and historical power imbalances.

International regulatory frameworks either binding or non-binding, are important in pushing states to regulate corporate behaviour. However, it requires a certain stage of state and institutional capacity and political will to diffuse these norms into a national regulatory framework in order to implement adequately. This section examines how state and institutional capacity weakness (Hypothesis A) and economic prioritization (Hypothesis B) extractive industry and FDI dependency hinder the adoption and enforcement of global norms related to corporate accountability, human rights, and environmental protections at national level. Even if a state ratifies human rights and environmental treaties, weak enforcement and limited state and institutional capacity may prevent meaningful international norm diffusion. Moreover, given the fact that Mongolia, Kazakhstan and Botswana are heavily dependent on extractives and FDI, these states may be reluctant to implement the corporate responsibility

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[474] Amitav Acharya, How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism, 58 Int'l Org. 239, 239–75 (2004).
Andreas Bieler & Adam Morton, The Deficits of Discourse in IPE: Turning Base Metal into Gold?, 52 Int'l Stud. Q. 103, 103–28 (2008).

[475] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford Univ. Press 2006); Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Taylor & Francis 2012); Elisa Morgera, *Corporate Environmental Accountability in International Law* (Oxford Univ. Press 2020); Alyson Brysk & Michael Stohl, *Expanding Human Rights: 21st Century Norms and Governance* (Edward Elgar Publ'g 2017).
Cases: Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).; Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002). Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013); Milieudefensie et al. v. Royal Dutch Shell plc, Rechtbank Den Haag [District Court of The Hague], Case No. C/09/571932 / HA ZA 19-379 (May 26, 2021); German RWE Case (Saúl Luciano Lliuya v. RWE AG), Higher Regional Court of Hamm (OLG Hamm), Case No. 2 O 285/15 (Nov. 30, 2017); Kononov v. Latvia, App. No. 36376/04, Eur. Ct. H.R. (2010); Menarini Diagnostics S.R.L. v. Italy, App. No. 43509/08, Eur. Ct. H.R. (2011); Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

initiatives occurring at the international level fearing that strict regulations might decrease FDI flow. It will use a comparative synthesis approach which analyses different sources to draw a broader conclusion.

**(i) International regulatory frameworks and voluntary initiatives**

This part aims to answer the question about what commitments these states have made under international hard law and soft law frameworks. In doing so, I will describe what are the current initiatives at the international level related to corporate responsibility.

- International treaties on environment and human rights

First, I will cover the international binding regulatory framework on environment and human rights. Mongolia, Kazakhstan and Botswana are both parties to several human rights and environmental international treaties. These human rights treaties include, but not limited to, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social, and Cultural Rights (IESCR), Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC). Environmental treaties include United Nations Framework Convention on Climate Change (UNFCCC), Paris Agreement, Convention on Biological Diversity, Stockholm Convention on Persistent Organic Pollutants, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposals.
Mongolia alone ratified Convention on the Rights of Persons with Disabilities, Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. Botswana ratified International Convention on the Elimination of all Forms of Racial Discrimination, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and Kyoto Protocol. Kazakhstan ratified Convention on the Rights of Persons with Disabilities (CRPD) and Kyoto Protocol.

- International investment law framework and investor-state dispute settlement

Currently, there are 2832 BITs and 455 international agreements containing investment related provisions have been ratified. Around 83 percent of these were concluded before 2010 and are considered as “old generation BITs”.[476] In international investment agreements clauses regarding foreign investor responsibility are included, aiming to protect the environment and human rights through corporate social responsibility (CSR) , right to

[476] U.N. Conf. on Trade & Dev. (UNCTAD), Investment Policy Hub, https://investmentpolicy.unctad.org/

regulate , environmental and social impact assessment , not lowering the standard and in accordance with host State legislation clauses.[477] However, these older BITs do not include mandatory obligations for foreign investors related to environment and human rights, nor do they acknowledge the host country's right to take measures in response to climate change. As discussed in chapter one, Mongolia has made limited efforts to integrate foreign investor responsibility into BITs. It has 44 BITs and 4 treaties with investment provisions (TIPs), where 43 of them are considered as old generation which do not include adequate human rights, environmental, or climate related investor obligations. Kazakhstan has made some steps toward including foreign investor responsibility in its newer BITs. However, as the country has 53 BITs and 12 TIPs, 42 BITs and 7 TIPs were concluded before 2010. As for Botswana, it has very few 10 BITs, 9 of which were signed before 2010. While these three countries have some provisions in their recent treaties acknowledging foreign investor obligations, the majority of their BITs remain the older generation that prioritize investor rights over corporate responsibility.

As for the regional frameworks, it is worth mentioning the African Continental Free Trade Area Investment Protocol (African Protocol), a legally binding instrument. The African Protocol[478] was adopted in February 2023. Recognizing the importance of sustainable investment, it aims to prioritize industrialization, poverty reduction, and fostering a dynamic private sector while also enhancing investment-related human rights and human development through comprehensive reforms such as the Pan-African Investment Code, leveraging Regional Economic Communities' investment instruments, and navigating bilateral investment treaties and national laws.[479] The document has several features. First, it included sustainability aspects such as the benefits of investment to poverty reduction, furtherance of investment-related human rights and human development, SMEs, local communities and indigenous people in the preamble. Secondly, it covers a denial of benefit clause which encompasses a range of circumstances wherein investors activities are deemed detrimental to the essential and national interests of the host state. Thirdly, significant advancements have

[477] New generation BITs are the IIAs where the foreign investor responsibility towards protection of environment and human rights and SDG are regulated. For example, Morocco-Nigeria BIT, Argentina-Qatar BIT, Pan-African Investment Code, Mongolia-Canada BIT; Brazilian Model BIT, EU and Canada (CETA), Mongolia- Canada BIT, Dutch Model BIT, EU and Vietnam, EU and Singapore BIT, United States-Mexico-Canada Agreement; Agreement on the Protection and Reciprocal Protection of their Investment between Hellenic Republic and United Arab Emirates.. United States Model Bit 2012; Dutch Model BIT; China-Mongolia BIT.

[478] Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (AfCFTA Protocol on Investment 2023), https://edit.wti.org/document/show/e5d51824-c467-4e24-922b-3fb376d89550

[479] IISD, *The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area: What's in It and What's Next for the Continent?* (July 1, 2023), https://www.iisd.org/itn/en/2023/07/01/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent/

been made in aligning the IIA with climate change objectives. This includes provisions encouraging incentives for sustainable investments as low-carbon investments.[480] Additionally, the protocol incorporates exceptions aimed at providing benefits to foreign investors, notably by introducing the principle of "in like circumstances" within the framework of national treatment. This principle ensures that investments are assessed comprehensively, taking into account various factors such as their impact on local environments, public health, and global resources.[481] By including this, the states are entitled to treat investors and investments differently on the basis of above-mentioned characteristics.[482] Chapter 4 is fully dedicated to the sustainable development-related issues covering issues such as right to regulate, and investment and climate change. Chapter 5 addresses investor obligations encompassing areas as business ethics, human rights, labor standards, environmental protection, indigenous peoples and local communities, corporate social responsibility.

The current ISDS practice, which decisions were based on modern BITs, does not significantly shift from decoupling imaginary[483] investor rights and obligations. Numerous arbitral tribunals have failed to acknowledge situations where protecting human rights necessitates violating investor rights,[484] or they do not waive compensation when states take measures to protect the environment.[485] Some scholars argue that protecting both investor and human rights simultaneously is not a problem if we assume that states are always obligated to compensate investors.[486] On the other side, certain tribunals[487] have stated that investors should not be compensated for regulatory measures concerning human rights if they should have been aware of such risks through careful due diligence. Some other cases[488] observed that investor misconduct or a lack of due diligence does not significantly impact the

[480] AfCFTA Protocol on Investment, art. 8 (2023).
[481] AfCFTA Protocol on Investment, art. 12 (2023).
[482] IISD, *The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area: What's in It and What's Next for the Continent?* (July 1, 2023), https://www.iisd.org/itn/en/2023/07/01/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent/
[483] Nicolas M. Perrone, *Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment*, 7 Bus. & Hum. Rts. J. 375, 375–96 (2022).
[484] Suez & Others v. Argentina, ICSID Case No. ARB/03/17, Decision on Liability, ¶¶ 238–240 (July 30, 2010).
[485] Eco Oro v. Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 829 (Sept. 9, 2021).
[486] Nicolas M. Perrone, *Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment*, 7 Bus. & Hum. Rts. J. 375, 375–96 (2022).
[487] Eco Oro v. Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 829 (Sept. 9, 2021).
[488] Copper Mesa Mining Corp. v. Ecuador, PCA Case No. 2012-02, Award (Mar. 15, 2016); Bear Creek Mining Corp. v. Peru, ICSID Case No. ARB/14/2, Award (Nov. 30, 2017); South American Silver Ltd. (SAS) v. Bolivia, PCA Case No. 2013-15, Award (Nov. 22, 2018).

outcomes. However, there are instances where arbitral tribunals[489] have recognized the investors obligations under international law and required them to obtain free, previous and informed consent (FPIC) under ILO Convention.[490] Nonetheless, the majority of tribunals have disagreed with this view noting that international law does not include any investor obligation.[491] Despite these occasional positive outcomes, the investors have continued to use international arbitration to hinder domestic proceedings where they have been ordered to compensate the affected communities.[492]

- International soft law: United Nations Guiding Principles (UNGPs) and other initiatives related to corporate responsibility

In the early 2000s, the International Chamber of Commerce and the UN Secretary General started to develop a human rights-based code of conduct on multinational corporations (MNCs) where they adopted "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" commonly referred to as the "norms" by scholars.[493] However, this document was heavily criticized by the business actors and led to the appointment of John Ruggie as Special Representative for Business and Human Rights by the UN in 2005. Ruggie proposed a consensus and cooperation approach[494] and emphasized that businesses have no "duty" to respect human rights, as duty lies solely with the states, instead businesses have a "responsibility" to uphold human rights.[495] This responsibility is not based on legal obligations but on social expectations, and concepts such as good corporate citizenship and social licensing.[496] Ruggie focused on "knowing and showing" where due diligence as a means to assess and produce information over activities.[497] These developments ultimately led to the adoption of the UNGPs in 2011. The UNGPs are a set of voluntary guidelines for States and companies to prevent, address and

[489] Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia v. Argentina, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016).
[490] Bear Creek Mining Corp. v. Peru, ICSID Case No. ARB/14/2, Award, ¶¶ 664–666 (Nov. 30, 2017).
[491] ibid.
[492] Chevron Corp. v. Ecuador, UNCITRAL, PCA Case No. 2009-23; Shell v. Nigeria, ICSID Case No. ARB/21/7; Barrick v. Papua New Guinea, ICSID Case No. ARB/20/27.
[493] Nicolas M. Perrone, *Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment*, 7 Bus. & Hum. Rts. J. 375, 375–96 (2022).
[494] ibid.
[495] John Ruggie, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. E/CN.4/2006/97 (2006).
John Ruggie, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect, Remedy" Framework*, Report to the Human Rights Council, UN Doc. A/HRC/14/27 (2010).
[496] Mavluda Sattorova, *The Foreign Investor as a Good Citizen: Investor Obligations to Do Good*, in Jean Ho & Mavluda Sattorova (eds.), Investors' International Law 45, 45–70 (Oxford: Hart Publ'g 2021).
Chiara Macchi, *Business, Human Rights and the Environment: The Evolving Agenda* (T.M.C. Asser Press 2022).
[497] Carlos López, *The "Ruggie Process": From Legal Obligations to Corporate Social Responsibility*, in Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect 58, 58 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

remedy human rights abuses committed in business operations. It has three pillars: state duty to protect human rights; the corporate responsibility to respect human rights; and access to remedy for victims of business-related abuses.

It is important to note that the social expectations for firms to respect human rights are not legally binding and exist independently of domestic laws or host state policies.[498] The UNGPs received stronger support mainly from the Global North, while Global South and NGOs showed less enthusiasm[499] due to concerns regarding the enforcement mechanisms, limited compliance, vague interpretation of the UNGPs.[500] Diverse opinions exist on the UNGPs, with some arguing that it suits investors, businesses and the human rights industry of consultants and their impact on the practice is limited.[501] Nevertheless, this guideline is the most accepted international human rights standard in corporate operations.

Ongoing negotiations in the field of business and human rights including the Legally Binding Instrument (Business and Human Rights Treaty) initiated by Ecuador through Ecuador Resolution has made progress in ensuring the consistency between human rights and investment treaties by incorporating the notion of due diligence.[502] Moreover, the Hague Rules on Business and Human Rights Arbitration has been supported by various actors including business associations,[503] despite the questions regarding the consent of companies to arbitration or whether it would be preferred by the local communities because of its geographical situation.[504]

Another promising initiative which started in 2018 is from the OECD .[505] It has multiple guidelines such as the OECD Due Diligence Guidelines for Responsible Business Conduct, Guidelines for Multinational Enterprises. Furthermore, it developed sector specific due diligence guidelines such as for minerals, garment, agriculture, and other issues in supply

[498] United Nations Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

[499] Nicolas M. Perrone, *Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment*, 7 Bus. & Hum. Rts. J. 375, 375–96 (2022).

[500] Carlos López, *The "Ruggie Process": From Legal Obligations to Corporate Social Responsibility*, in Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect 58 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

[501] M. McVey, *Untangling the Authority of External Experts in the Corporate Implementation of the UN Guiding Principles on Business and Human Rights*, 21 J. Hum. Rts. 620, 620–38 (2022), https://doi.org/10.1080/14754835.2022.2105646.

[502] Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/76/238 (July 27, 2021).

[503] Jan Eijsbouts, *Arbitration, a New Remedy in Business and Human Rights*, ICC The Netherlands (June 22, 2020), https://www.icc.nl/2020/06/22/arbitration-a-new-remedy-in-business-and-human-rights/

[504]Lisa Sachs, Lise Johnson, Kaitlin Cordes, Jesse Coleman & Brooke Guven, *The Business and Human Rights Arbitration Rule Project: Falling Short of Its Access to Justice Objectives*, Columbia Ctr. on Sustainable Inv. (Sept. 2019), https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/152/

[505] Available at: https://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm

chains. Up to date, these Guidelines are endorsed by 51 countries worldwide including members and non-members of the OECD.

- Binding treaty on Business and Human Rights[506]

Since 2014, an open-ended intergovernmental working group of the Human Rights Council has been negotiating a legally binding instrument on business and human rights. The process is driven by the recognition that the existing soft law standards (notably the UN Guiding Principles on Business and Human Rights) and uneven domestic regulation leaves major accountability gaps, especially where transnational corporations operate across multiple jurisdictions and benefit from strong investment protections. The most recent drafts of the treaty centre the rights of victims to access remedy and would require states to regulate businesses within their jurisdiction or control, including those with transnational activities; impose mandatory human rights due diligence obligations across global value chains; and provide for civil, administrative and, in some cases, criminal liability for corporate human rights abuses.

The draft also contains provisions requiring states to ensure that future trade and investment agreements are compatible with the treaty's obligations, and to interpret existing agreements in a manner consistent with the protection of human rights. However, the treaty process negotiations are being slow. For host states such as Mongolia, Kazakhstan and Botswana, a robust treaty could, in principle, create an external legal basis to justify stronger regulation of foreign investors and to re-open conflicts between investment protections and community rights, but its effectiveness would still depend on political will, domestic implementation capacities and the willingness of home states to accept meaningful constraints on their own corporations.

- Multilateral dialogues

I will briefly describe the current situation and ongoing international reforms by different organizations. Drawing from the previously mentioned challenges, there are numerous

[506]https://www.ohchr.org/en/business-and-human-rights/bhr-treaty-process
Business & Human Rights Resource Centre, Summary: Third Revised Draft of the Binding Treaty on Business and Human Rights (Oct. 6, 2025),
https://www.business-humanrights.org/en/big-issues/binding-treaty/summary-third-revised-draft-of-the-binding-treaty-on-business-and-human-rights/
Business & Human Rights Resource Centre, The Road to Corporate Accountability: UN Business and Human Rights Treaty Under Scrutiny, (Oct. 21, 2021),
https://www.business-humanrights.org/en/blog/the-road-to-corporate-accountability-un-business-and-human-rights-treaty-under-scrutiny/

initiatives related to the alignment of current international investment law with environmental and human rights commitments of countries. These include OECD Future of Investment Treaties, UNCITRAL Working Group III Reform in investor-state dispute settlement (UNCITRAL WGIII), and African Continental Free Trade Area Investment Protocol (African Protocol).

*OECD work programme on the Future of Investment Treaties*

In March 2021 the OECD launched a work programme on the Future of Investment Treaties. This programme explores how investment treaties could help to address climate crisis challenges and how to deal with existing agreements which were designed decades ago with a different global economy and concerns in mind.[507] The work encompasses two tracks which focus on the alignment of investment treaties with the Paris Agreement and net zero, and development of specific substantive provisions from older generation treaties to current designs. On 11 March 2024, the OECD held its 9th Annual Investment Treaty Conference[508] with focus on methods of alignment of investment treaties with the Paris Agreement. The Global Stocktake commitments[509] on fossil fuels and renewables reinforced the urgency of OECD work on the Paris Agreement and net zero alignment of investment treaties.[510] During the 9th Annual Conference on Investment Treaties, several points have been raised by the OECD: (i) Ensuring the visibility of climate policies within investment treaties is crucial since it can promote the alignment of IIAs with climate change. It has several advantages such as encouraging governments to take more ambitious climate action by making their policies and performance more transparent and informing the market about key climate policies. (ii) Considering the necessity for plurilateral and multilateral climate action: addressing the urgency of the global climate crisis necessitates immediate engagement in plurilateral and multilateral climate action. OECD highlights several key considerations regarding this. Firstly, it addresses the global interest in reducing GHG emissions. Secondly, it allows agreed changes to be applied to existing IIAs, drawing on successful examples like the OECD and G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS),[511] which concluded negotiations on the Multilateral Convention to Facilitate the Implementation

[507] OECD, *The Future of Investment Treaties Program*, https://www.oecd.org/investment/investment-policy/investment-treaties.htm
[508] Available at: https://www.oecd-events.org/investment-treaty-conference
[509] Available at: https://www.oecd-events.org/investment-treaty-conference/content/keyresources
[510] Track 1 of OECD work on the Future of Investment treaties.
[511] Available at: https://www.oecd.org/tax/beps/

of the Pillar Two Subject to Tax Rule.[512] Thirdly, it encourages governments to agree to climate policy reforms for their investment treaty networks, similar to the ratification process for the 1997 OECD Anti-Bribery Convention,[513] which required ratification by a defined number of states collectively accounting for a certain percentage of OECD exports. Additionally, it will avoid uncertainties on whether climate rationale is being invoked selectively, particularly regarding defensive exposure to ISDS fossil fuel claims. Finally, it underscores the importance of interim and guiding political actions, suggesting that the plurilateral commitment to eliminate or reduce investment treaty benefits for fossil fuels could pave the way for accelerated work to operationalise the commitment and allow other countries to join.

The OECD has presented methods in three areas which seek to use existing treaty techniques adapted for purposes of climate goals which this brief will discuss in the second part. Two of them are related to the amendment of current existing treaties with sectoral approaches and one is related to the termination of investment treaties to eliminate benefits of fossil fuel investment.

*UNCITRAL WG III:*

The United Nations Commission on International Trade Law (UNCITRAL)'s Working Group III (WGIII) on Investor-State Dispute Settlement Reform[514] has been working since 2017. From its thirty-fourth to thirty-seventh session, the WGIII identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns, and from its thirty-eighth to forty-sixth session, the WGIII considered concrete solutions for ISDS reform. [515]

The work is carried out considering the issues related to (i) legal certainty of investment policies, effective and equal protection to investors and investments; (ii) fair, open and transparent mechanisms for the prevention and settlement of disputes;[516] (iii) arbitrators and decision makers; (iv) costs and duration of the ISDS cases; (iv) third-party funding; (v)

[512] Available at: https://www.oecd.org/tax/beps/multilateral-convention-to-facilitate-the-implementation-of-the-pillar-two-subject-to-tax-rule.htm
[513] Available at: https://www.oecd.org/corruption/oecdantibriberyconvention.htm
[514] UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session* (Vienna, 29 Oct.–2 Nov. 2018).
[515]UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Forty-Sixth Session*
[516] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat*, UN Doc. A/CN.9/WG.III/WP.166, 11 (30 July 2019).

implications and participation of third party (general public and local communities); (vi) other possible tools than arbitration to resolve investment disputes; (vii) exhaustion of local remedies, investor obligations and counterclaims; and (viii) regulatory chill and damages.[517]

There are two significant aspects to note regarding the WGIII process. First, its mandate focuses on the procedural aspects of the ISDS. However, several actors have been raising issues on this narrow focus. For instance, UN Working Group on Business and Human Rights along with other experts[518] have emphasized the need for systemic reform to address a risk by IIAs and ISDS to the regulatory space required by States to comply with their international human rights obligations and achieve the SDGs. They argue that it would be a lost opportunity to narrowly focus on amending the existing procedural rules. The UNCITRAL Secretariat in response to a request from WGIII has drafted example provisions related to several aspects including counterclaim and right to regulate.[519] However, some delegations viewed it as an expansion of the mandate beyond procedural issues of the ISDS,[520] whereas the WGIII interpreted its mandate as limited to procedural aspects.[521] Furthermore, delegates from Bahrain, Thailand and Indonesia expressed their concern on this limited interpretation while noting the importance of interconnection of substantive and procedural issues,[522] and other delegates have raised their concern on the regulatory chill during WGIII processes in

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[517] CCSI & UNCITRAL, *CCSI and UNCITRAL's Working Group III on Investor-State Dispute Settlement Reform*, https://ccsi.columbia.edu/content/ccsi-and-uncitrals-working-group-iii-investor-state-dispute-settlement-reform

[518] Working Group on Business and Human Rights, Special Procedures Mandate Holders of the United Nations Human Rights Council, *Submission to UNCITRAL Working Group III on Investor-State Dispute Settlement Reform*, submitted by the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the right to development; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; the Special Rapporteur on the rights of indigenous peoples; the Independent Expert on the promotion of a democratic and equitable international order; and the Special Rapporteur on the human rights to safe drinking water and sanitation, https://uncitral.un.org/sites/uncitral.un.org/files/public_-

[519] UNCITRAL, *Annotated Provisional Agenda (Vienna, 22–26 January 2024)*, 10.
UNCITRAL, *Draft Provisions on Procedural and Cross-Cutting Issues: Note by the Secretariat*, UN Doc. A/CN.9/WG.III/WP.231 (26 July 2023).

[520] UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Forty-Sixth Session (Vienna, 9–13 October 2023)*, ¶¶ 88, 97.

[521] UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November–1 December 2017) Part I*, 20.
"*Nonetheless, it was clarified that the mandate given to the Working Group focused on the procedural aspects of dispute settlement rather than on the substantive provisions*"

[522] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Bahrain*, ¶¶ 65–67.
UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Thailand*, ¶¶ 28–29.
UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of South Africa*, 20.
UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS): Comments by the Government of Indonesia*, ¶¶ 1–2.

2023.[523] Secondly, as mentioned by the UNCITRAL[524], the work was carried out in light of the 2030 Agenda for the SDGs, and is seen as a step towards realizing the broader SDG objectives, which include reducing poverty, empowerment of indigenous peoples, promoting decent work, access to affordable energy and water, and reversing environmental degradation and climate change. Moreover, it was noted that a reform on ISDS should ensure that it does not undermine the State obligations under the SDGs and Paris Agreement on climate change.[525] However, the process has not explicitly addressed aspects of aligning with the Paris Agreement or current issues such as regulatory chill.

**(ii) Interim conclusion**

Only Mongolia has adopted NAP on business and human rights in accordance with UNGPs, while Botswana and Kazakhstan have not. Neither countries are OECD members and they have not endorsed OECD Guidelines on Responsible Business Conduct. Consequently, they have not established National Contact Points (NCP). However, Kazakhstan is advancing in terms of regulatory framework for foreign investment through OECD recommendations[526] on responsible business practices.

Furthermore, all three countries have ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Kazakhstan is active in investment law reform and participated in the UNCITRAL WG III discussions. In 2020, Kazakhstan submitted its position[527] during the discussions, expressing concerns on third party funding in arbitration without having any scientific and theoretical assessment, and emphasized the nature of the third-party funding mechanism and the principle of access to justice, it must be regulated and considered by tribunal during the arbitration proceedings.

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[523] UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session (New York, 1–5 April 2019)*, ¶¶ 36–38.
UNCITRAL, *Summary of the Inter-Sessional Meeting on Investor-State Dispute Settlement (ISDS) Reform Submitted by the Government of the Republic of Korea*, ¶¶ 46, 47, 50.
UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS): Comments by the Government of Indonesia*, 10.
UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of South Africa*, 11.
UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission by the Government of Burkina Faso*, 10.
UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Forty-Sixth Session (Vienna, 9–13 October 2023)*, ¶¶ 88, 97.
[524] UNCITRAL, *Contribution of the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) with Regard to the Open Call for Input for Working Group on Business and Human Rights' Report on "Human Rights-Compatible International Investment Agreements (IIAs)"*, (Vienna, 21 Apr. 2021).
[525] UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) No. 1004*, 99.
[526]OECD, *Responsible Business Conduct in Kazakhstan* (OECD Publishing 2014).
[527] UNCITRAL Working Group III, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Kazakhstan*, UN Doc. A/CN.9/WG.III/WP.187 (Oct. 23, 2019).

Additionally, Mongolia has been a participant in the Extractive Industries Transparency Initiative (EITI) since 2002. Kazakhstan joined EITI in 2007, but Botswana is not a member. Furthermore, the African protocol is an important document for Botswana. The country ratified the African Protocol in 2023 which requires Botswana to align policy with quality standards enshrined into the document, particularly sustainable development related obligations of a state and an investor.

These commitments indicate that all three countries ratified core international human rights and environmental treaties. However, the advancement in terms of business and human rights, particularly in incorporating foreign investor obligations, and participation in international dialogues related to this are falling behind. One can state that this is due to the institutional capacity weakness (Hypothesis A) and economic prioritization (Hypothesis B) due to extractive industry and FDI dependency of these countries. Even these countries ratified human rights and environmental treaties, weak enforcement and limited state and institutional capacity may prevent meaningful international norm diffusion. Moreover, given the fact that Mongolia, Kazakhstan and Botswana are heavily dependent on extractives and FDI, these states are reluctant to implement the corporate responsibility initiatives by including it into legally binding documents such as BITs due to the fearing that strict regulations might decrease FDI flow.

### 2.3.2. Synthesizing hypothesis A and B

Mongolia, Kazakhstan, and Botswana have all developed legal frameworks aimed at ensuring the protection of environment and human rights. However, the enforcement of these frameworks poses a significant challenge in holding corporations (foreign investors) accountable, especially in extractive industry, because of state and institutional capacity, dependency on FDI and extractive industry. This section synthesizes the discussions on hypotheses, integrating empirical cases from chapter 1 to assess how these factors collectively impact the ability of host states to regulate corporate (foreign investor) accountability effectively.

Mongolia is heavily dependent on coal exports and its FDI. Its Constitution explicitly guarantees the right to a safe environment, aligning with global norms such as the right to a clean, healthy, and sustainable environment.[528] This commitment is enshrined by the Law on

[528] UNGA. Res. 76/300, The Human Right to a Clean, Healthy and Sustainable Environment, U.N. Doc. A/RES/76/300 (July 28, 2022).

Environmental Protection and related mining regulations, which aim to balance economic development with environmental protection. However, enforcement remains a significant challenge, particularly in mining sites and local communities as nomadic herders. Despite the efforts to regulate corporate actors by developing NAP and including their responsibility into certain legal frameworks, weak enforcement mechanisms hinder effective implementation. Key issues include gaps in the implementation of EIAs and SIAs in the mining sector, and failure to adopt mandatory corporate responsibility legislation. Companies operating in Mongolia often present their findings without meaningful community engagement, and consultations are sometimes held where local communities are not allowed to express their concerns. Moreover, the requirements related to "polluter pays" principle included in the environmental legislations remains weak in practice. Foreign companies, particularly Chinese investors, are often found to be neglecting social and environmental responsibilities, operating without transparency, lacking environmental management plans, and failing to consult local communities effectively. As discussed in chapter 1, this has resulted in significant environmental degradation and health issues, especially for Mongolian nomadic herders. Furthermore, corruption is another key challenge, as evidenced by Mongolia's relatively low CPI score of 33 out of 100, which undermines the state's capacity to regulate mining business practices effectively and this was also raised by the researchers and international organizations.[529] Weak regulatory quality with a score of -0.27 coupled with inadequate regulatory enforcement (0.49 out of 1) further shows the country's capacity to efficiently enforce the regulations. Additionally, while Mongolia has a relatively strong electoral democracy, the lack of political will and gaps in legal implementation continue to obstruct effective enforcement of environmental and human rights laws.

As for empirical cases, violations of herder's rights due to mining activities in at least four regions in Gobi were captured by Forum Asia.[530] It tried to identify several issues such as shrinking pastureland, impact on income and individuals, deterioration in community's health, health problems in livestock, consequences of migration to cities, reduction in water resource, increase in dust and noise pollution, failure of uranium company to engage local community participation in EIA, lack of transparency, flawed engagement agreements.

[529] Borgil Surenkhuu, Munkhtogtokh Bukhkhuyag & Natural Resource Governance Institute, *The Evaluation of Corruption Risk Management in the Decision-Making Process of Mongolia's Mining Projects* (2023).
[530]Forum Asia, *From Dreams to Dust: Examining the Impact of Mining on Herder Communities in Mongolia* (2023), https://forum-asia.org/wp-content/uploads/2023/04/From-Dreams-to-Dust_compressed.pdf.

Accountability Counsel[531] assessed the first 18 months of agreement implementation of Rio Tinto (British-Australian company) and Turquoise Hill resources (Canadian company) which operates Oyu tolgoi copper mine, with two-thirds of commitments completed or advancing, compared to the previous year's delays. While this represents commendable progress, much of the completed work affects only a small number of herder households. The most critical commitments such as constructing wells, opening pastures, and connecting herders to markets remain in early stages or unstarted. Three years after the agreements, challenges persist in achieving the broader community benefits necessary to sustain herders' traditional livelihoods near the mine. Most recently in 2024, Accountability Counsel, Gobi Soil, OT Watch, CEE Bankwatch Network, and 33 other NGOs from around the world sent a joint statement to the IFC and EBRD condemning their proposed additional financing to the OT mine and demanding the lenders place conditionalities on the loans. Furthermore, Chinese invested company PetroChina Dachin Tamsag is one of the biggest oil projects in the Matad soum of Dornod aimag. It has been operating for over 10 years under the Product sharing agreement with the Government of Mongolia. There are a number of violations related to the activity such as lack of transparency, lack of environmental management plan, overlap with the herder community lands, creating illegal transportation roads.[532]

Kazakhstan is heavily dependent on FDI and extractive industry in coal, rare earth metals and critical minerals. It has similar constitutional provisions with Mongolia, ensuring citizens' right to a healthy environment. However, the country faces even more severe challenges in enforcing these protections due to widespread corruption and governance issues. The country became one of the four countries in Central Asia with the highest number of human rights allegations.[533] With a CPI score of 40 out of a global average 45, Kazakhstan's high levels of corruption make it difficult for the government to regulate corporate activities effectively, particularly in industries like uranium and hydrocarbons. While the Environmental Code includes provisions for the "polluter pays" principle and mandates public hearings, significant gaps remain as the lack of mandatory social or human rights impact assessments. This absence negatively affected the communities from having a meaningful consultation that has

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[531] Mongolia: South Gobi Mining, Accountability Counsel, https://www.accountabilitycounsel.org/client-case/mongolia-south-gobi-mining/#overview
Accountability Counsel, *From Paper to Progress: Tracking Agreements Between Nomadic Herders and Mongolia's Largest Copper Mine* (2019). https://scorecard-static.s3-us-west-1.amazonaws.com/media/public/ProgressReport2019_en.pdf
[532]Interview with Activist Adilbish G. and Attorney Boldkhuu U. Representing the Sukhbaatar Aimag State Authority, Zindaa.mn (Nov. 22, 2022), https://news.zindaa.mn/471d.
[533] Surma, Katie, *Mining 'Critical Minerals' in Eastern Europe and Central Asia Rife With Rights Abuses*, InsideClimate News, May 6, 2024, https://insideclimatenews.org/news/06052024/eastern-europe-central-asia-critical-mineral-mining-rights-abuse/

an impact in decision-making processes. As discussed in the previous chapter, mining activities in many regions have led to severe environmental damage and human rights violations. Kazakhstan's judiciary is highly influenced by political considerations, scoring poorly in judicial independence (GSoD score: 0.30 out of 1.0) and the rule of law is weak (RoL score: 0.39 out of 1.0). It is worth noting that the country has a potentially good score in regulatory quality (WGI 53.3 compared to global average of 50.0) and regulatory enforcement with the RoL score of 0.53 compared to global average of 0.54. However, Kazakhstan's poor electoral democracy (V-Dem score: 0.28 compared to global average of 0.49) and limited political freedoms further reduce public accountability on corporate operations.

As mentioned in the previous chapter, Kazakhstan is facing several challenges due to the operations of the companies owned by the foreign investors from Italy, the US, Netherlands, France, and China. For instance, there have been several incidents related to labour rights issues. Kazgermunai[534] (owned by a Chinese company) company was fined for violating workers' rights and labour standards and received several fines for violating environmental law, particularly it operated without a permit for emissions. Many oil workers of Karazhanbasmunai[535] (owned by a Chinese company) were prosecuted for conducting a strike against the company. Another chinese owned company, Mangistaumunaigaz,[536] has been linked to oil leakage and oil fire which caused deadly air pollution. In 2014, the company denied accusations of violating environmental standards related to oil sludge disposal. A few years later, a gas-water column accident occurred at the Kalamkas oil field due to poor work organization and inadequate well parameters after repairs. In 2019, an oil fire broke out at the Kalamkas field following a water and gas leak. Environmental damage was estimated around 250 thousand USD with significant pollution of toxic substances. Another case is on North Caspian Operating Company[537] with part state owned with foreign investors from different countries, particularly from the European Union. In June 2021, human rights organizations and activists raised concerns about the health risks of residents of the Atyrau region because of toxic substance exposure from nearby oil fields of Kashagan and Tengiz. These fields

[534] Business and Human Rights Resource Centre, *Kazgermunai*, Report, June 2021, https://www.business-humanrights.org/en/companies/kazgermunai/?issue=368.
[535] Business and Human Rights Resource Centre, *Karazhanbasmunai*, Report, June 2021, https://www.business-humanrights.org/en/companies/karazhanbasmunai-joint-venture-citic-group-kazmunaygas/?issue=368.
[536] Business and Human Rights Resource Centre, *Mangistaumunaigaz*, Report, June 2021, https://www.business-humanrights.org/en/companies/mangistaumunaigaz/?issue=368.
[537] Business and Human Rights Resource Centre, *North Caspian Operating Company*, Report, June 2021, https://www.business-humanrights.org/en/companies/north-caspian-operating-company-ncoc/?issue=368.

contain compounds like sulphur and mercaptans, which can be deadly in high concentrations.Local residents have already been relocated because of health conditions to the exposure of these substances. Environmental impacts are also serious where the Kashagan project has been linked to severe pollution affecting even distant regions in Europe. Wastewater management including dumping toxic water in sewage systems is also worthy of concern. Access to water by local communities is at an edge and they cannot continue traditional livelihoods as fishing. State owned companies are being criticized for corruption and lack of public participation. Tengizchevroil[538] with foreign investors from the US and Russia, was linked to the corruption case. In June 2021, corruption was identified as a significant issue impacting human rights in Kazakhstan's oil sector. The management of this company has strong political ties with the US and Kazakhstan. Tengiz oil field was at the center of the Kazakhgate bribery scandal, where a U.S businessman funneled over 78 million USD in bribes to President Nursultan Nazarbayev. Despite legal proceedings, many key figures, including Giffen, faced little to no consequences. Giffen was never fined or imprisoned, and the case was further complicated by political interference from the U.S. and Kazakh governments. U.S. companies like Mobil and Chevron were also implicated, with Chevron maintaining ties to Giffen. Former Kazakh Prime Minister Nurlan Balgimbaev worked at Chevron, and Ravil Cherdabaev, the first Kazakh director of Tengizchevroil, later became Kazakhstan's oil minister. These ties helped the company avoid serious repercussions, including for illegal activities like extracting oil at incorrect depths, resulting in a $1.4 billion loss, which was resolved through document revisions rather than legal action.

Botswana is heavily dependent on the mining sector, particularly in diamonds. As previously stated, Botswana still has chosen to attract FDI in other mining sectors such as coal, even diamond trade has decreased. In contrast to other states, Botswana is a country with strong institutional capacity for enforcing environmental and human rights regulations compared to not only the other two countries, but also to global averages. While its Constitution does not explicitly guarantee environmental rights, it provides a strong foundation for public welfare and health. The Environmental Impact Assessment law mandates consultations with stakeholders and public hearings. However, the integration of the outcomes from social and human rights impact assessments into these decision making processes should be improved.

[538] Business and Human Rights Resource Centre, *Tengizchevroil*, Report, June 2021, https://www.business-humanrights.org/en/companies/tengizchevroil-joint-venture-chevron-exxonmobil-kazmunaygas-lukarco/?issue=368.

Botswana's low levels of corruption (CPI score: 57 compared to global average of 45) ensure that public officials are less likely to be influenced by corporate interests. Furthermore, Botswana has a high level of judicial independence (GSoD score: 0.68 compared to global average of 0.5), the strong rule of law (RoL score: 0.59 compared to global average of 0.55), regulatory quality (V-Dem score: 0.62 compared to global average of -0.13) with regulatory enforcement RoL score 0.59 compared to global average of 0.54, enable Botswana to effectively regulate corporate operations to be aligned with environmental and human rights standards. Botswana's strong electoral democracy (V-Dem score: 0.56 compared to global average of 0.49) fosters public engagement and ensures that elected officials are responsive to the needs of their citizens.

However, although the country has much fewer publicly available cases than Kazakhstan, human rights violations, particularly in the diamond mining industry, remain. For instance, the diamond giant De Beers, an English company, has faced numerous human rights violations. Since 1995, the indigenous people from the Kalahari Desert have been forcibly removed from their land. Furthermore, De Beers works with various partners called "sightholders,"[539] who must adhere to human rights and labor regulations to receive rough diamonds. However, workers employed by these sightholders, particularly those involved in diamond polishing, face harsh conditions, including sexual assault, threats, and punishment for unionizing. Many workers are on short-term contracts and exposed to hazardous conditions, such as inhaling dust and handling chemicals without proper protection. According to the Business and Human Rights Resource Center,[540] while Botswana's Nationally Determined Contributions (NDC) highlight the importance of mining in the country's energy transition, many workers are at risk of losing their jobs due to technological advancements in the industry. Social dialogue at the sectoral level is almost nonexistent.

[539] Louise Donovan, *Diamonds Brought Prosperity to Botswana. Women Workers Are Paying a Heavy Price*, The Fuller Project, Oct. 3, 2024, co-published with New Lines Magazine, https://fullerproject.org/story/diamonds-brought-prosperity-to-botswana-women-workers-are-paying-a-heavy-price/

[540] Business and Human Rights Resource Centre, *Inadequacies of the Law in Protecting the Rights of Mine Workers and Communities Against Climate Change*, 2022, https://www.business-humanrights.org/en/blog/inadequacies-of-the-law-in-protecting-the-rights-of-mine-workers-and-communities-against-climate-change/

### 2.3.3. Illustrative disputes

(i) Khan Resources v. Mongolia: strategic uranium and constrained regulatory spaces[541]

The dispute between Khan Resources and Mongolia arose from the cancellation of uranium exploration and mining licences at the Dornod deposit, originally granted in the late 1990s and early 2000s to a joint venture between Khan Resources and Mongolian state-owned entities. The investment took place under foreign investment framework and an earlier nuclear regime, at a time when uranium was not yet treated as a "strategic" resource demanding heightened public control. Against a backdrop of growing resource nationalism, concerns over Chinese influence, and shifting mining and nuclear legislation, the State Specialized Inspection Agency of Mongolia suspended and then revoked Khan's licences in 2009, officially on the basis of alleged regulatory violations and non-compliance with licence conditions. Shortly beforehand, Khan Resources had supported a takeover offer from China National Nuclear Corporation, which would have transferred control of Dornod to a Chinese state-owned company.

In 2011, the claimants initiated UNCITRAL arbitration administered by the Permanent Court of Arbitration, invoking three instruments: the joint-venture Founding Agreement, Mongolia's Foreign Investment Law, and the Energy Charter Treaty (ECT). Khan Resource's Dutch affiliate relied solely on the ECT, arguing that Mongolia's breach of its Foreign Investment Law obligations also violated the ECT through the umbrella clause, and that the cancellation of licences constituted an unlawful expropriation and breach of fair and equitable treatment. Mongolia raised jurisdictional objections, including a denial-of-benefits argument against the Dutch entity, and defended the measures as a legitimate exercise of regulatory powers over a sensitive strategic sector. In its 2012 jurisdiction decision and 2015 final award, the tribunal rejected these objections and held that Mongolia had illegally expropriated the investors' assets, ordering payment of roughly USD 80 million plus interest and costs, based largely on the valuation implied by the earlier Chinese takeover bid. Commentators have pointed out that this sum represented a significant share of Mongolia's

[541] Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company Ltd. v. The Government of Mongolia and MonAtom LLC, UNCITRAL, PCA Case No. 2011-09.
Joe Zhang, Tribunal Found Mongolia Liable for Unlawful Expropriation and Awarded More than US$80 Million in Damages, Investment Treaty News (Int'l Inst. for Sustainable Dev.), Aug. 4, 2015, https://www.iisd.org/itn/2015/08/04/khan-resources-inc-khan-resources-b-v-and-cauc-holding-company-ltd-v-the-government-of-mongolia-and-monatom-llc-pca-case-no-2011-09 (last visited Apr. 21, 2026).
Julian Dierkes, Arbitration Award to Khan Resources, Mongolia Focus (Mar. 2, 2015), https://blogs.ubc.ca/mongolia/2015/arbitration-award-to-khan-resources / (last visited Apr. 21, 2026).

education budget at the time, underlining the fiscal implications of adverse awards for a resource‑dependent host state.

In terms of host state capacity and FDI dependence, Khan Resources shows how international investment norms and treaty‑based arbitration interact with a fragile regulatory framework. Mongolian authorities reacted to domestic political pressures and strategic concerns by abruptly cancelling licences rather than using a predictable, rule‑based process to restructure the sector, which points to institutional weakness and a lack of solid mechanisms for renegotiating extractive contracts. The tribunal's reasoning then disciplined this kind of regulatory experimentation: it prioritised the protection of investor expectations and treated questions about who bears the risks of uranium extraction in Dornod, how benefits are distributed and how local communities are affected as peripheral. In terms of Hypotheses A and B, the case illustrates a pattern in which strong investor protections, combined with limited state capacity and fiscal reliance on FDI, shrink the political and legal room for adjusting control over strategic resources.

(ii) Kashagan environmental fines and arbitration in Kazakhstan: disciplining environmental enforcement[542]

Kazakhstan's Kashagan oil field, operated by the North Caspian Operating Company (NCOC) consortium, is one of the largest offshore oil developments globally and a cornerstone of the country's export‑led growth strategy. Following inspections in 2022 of sulphur storage practices at Kashagan's gas processing facilities, Kazakh environmental authorities imposed an administrative fine of approximately 2.3 trillion tenge (around USD 4.6–5.4 billion at the time) on NCOC in early 2023, citing serious ecological violations linked to excessive quantities of stored poisonous sulphur. The consortium, which includes major international oil companies alongside the national oil company KazMunayGas, contested the decision as disproportionate and inconsistent with permits, maintaining that its practices complied with applicable environmental rules.

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[542] Oil Majors Running Kazakh Kashagan Field File Arbitration over $4.6 Billion Fine, BOE Rep. (Feb. 24, 2026), https://boereport.com/2026/02/24/oil-majors-running-kazakh-kashagan-field-file-arbitration-over-4-6-billion-fine/ (last visited Apr. 21, 2026).
Kazakhstan Confirms International Players' Appeal over $4.6 Billion Fine, NewVision, Industry Dig. (Mar. 4, 2026), https://newvision.io/industry-digest/kazakhstan-confirms-international-players-appeal-over-4-6-billion-fine (last visited Apr. 21, 2026).
Reuters, Oil Majors Running Kazakh Kashagan Field File Arbitration over $4.6 Billion Fine, (Feb. 24, 2026), https://www.reuters.com/business/energy/oil-majors-running-kazakh-kashagan-field-file-arbitration-over-46-billion-fine-2026-02-24 / (last visited Apr. 21, 2026).

In February 2026, shareholders such as Shell, TotalEnergies, Eni and Exxon initiated arbitration proceedings to challenge the fine, filing a notice with an international arbitration institution (reported as ICSID) and framing the dispute as a breach of their rights under the Kashagan production sharing agreement and, potentially, relevant investment treaties. Kazakh officials have publicly insisted that the enforcement action reflects the state's sovereign right and responsibility to ensure environmental compliance in a highly sensitive project, emphasising that the arbitration will not deter the country from applying its ecological laws. The Kashagan dispute takes place against a broader backdrop of legal battles over revenue‑sharing and environmental compliance at projects such as Karachaganak, where Kazakhstan has extracted substantial settlements from consortia after arbitration and negotiation.

Although the Kashagan arbitration is ongoing, it already illuminates how environmental enforcement operates under conditions of hydrocarbon dependence and embedded international investment commitments. Kazakhstan has strengthened environmental legislation and signalled a greater willingness to impose large fines on powerful investors, but the availability of investment arbitration enables consortium members to reframe aggressive enforcement as arbitrary or excessive interference with their commercially protected interests. The potential for multi billion dollar awards or settlements exerts pressure on regulators whose decisions affect projects that are central to export earnings and fiscal stability, creating a structural tension between ecological obligations and the desire to remain an attractive destination for capital. In terms of Hypotheses A and B, Kashagan suggests that even when environmental norms diffuse into domestic law and institutions, the surrounding investment regime can discipline the extent to which those norms are enforced against foreign investors, reinforcing accountability gaps for communities living with the environmental risks of large scale extraction.

(iii) Central Kalahari and San communities and mining in Botswana: land, water and extractive governance [543]

In Botswana, the long running conflict in and around the Central Kalahari Game Reserve (CKGR) involves the relocation of San (Basarwa) communities, restrictions on access to water and land, and the development of mineral resources, particularly diamonds. Since the mid-1990s the government has pursued a policy of moving San residents out of the CKGR to resettlement villages, justifying these measures in terms of conservation, cost effective service delivery and integration into the national economy, while critics have argued that the relocations also facilitate mining activities within the Reserve. In 2002 authorities reportedly sealed existing boreholes and destroyed San water storage structures inside the CKGR, and non-governmental organisations were banned from providing food and water in the Reserve. At the same time, the government granted licences to companies such as Gem Diamonds/Gope Exploration Company to exploit diamond deposits in or near the CKGR, with licence conditions allowing water use for mining but not for San communities, prompting the UN Special Rapporteur on the rights of Indigenous Peoples to describe Botswana's position that San habitation is incompatible with conservation as inconsistent with its decision to permit a decades long diamond mining operation in the Reserve.[544]

Domestic litigation has become the main forum for contesting these policies. In 2006, the Botswana High Court held that aspects of the relocations were unlawful and that San applicants had been wrongfully deprived of their possessions, recognising their right to return to the CKGR. However, in 2010 the High Court ruled against San applicants seeking to reopen or drill boreholes for water, effectively upholding state control over water access even as diamond-mining projects moved forward, a decision described in the literature as a stark clash between indigenous communities' rights to water and land and the state's claimed authority over conservation and mineral exploitation. Analyses of Botswana's mineral governance point out that while the state has negotiated relatively advantageous fiscal terms in joint ventures such as Debswana, decision making over licence allocation, environmental

[543] Jeremy Sarkin, Amelia Cook, The Human Rights of the San (Bushmen) of Botswana – The Clash of the Rights of Indigenous Communities and Their Access to Water with the Rights of the State to Environmental Conservation and Mineral Resource Exploitation, 20 J. Transnat'l L. & Pol'y 1 (2010–2011).
Int'l Inst. for Democracy & Electoral Assistance, Mineral Resource Governance in Botswana (2025), https://www.idea.int/publications/catalogue/html/mineral-resource-governance-botswana (last visited Apr. 21, 2026).
Cong. Research Serv., Order Code RS21956, Botswana: The San (Bushmen) Rights Case (Oct. 19, 2004), https://www.everycrsreport.com/reports/RS21956.html (last visited Apr. 21, 2026).
[544] Report of the Special Rapporteur on the rights of Indigenous Peoples, Official Country Visit to Botswana, 1–12 September 2025 – End-of-Mission Statement 13–14 (2025).

management and benefit-sharing remains highly centralised, with limited institutionalised participation by affected communities.

For this thesis, the CKGR conflict functions as a mirror to the more formal investment disputes discussed above. There is no ICSID-style treaty arbitration, but the underlying structure is similar: a state-company nexus that channels substantial rents to the centre, weak procedural avenues for communities to influence extractive decisions, and legal processes that focus on the legality of specific administrative acts rather than on the broader distribution of benefits and harms. Even where conservation and human rights norms have formally diffused into Botswana's legal and policy frameworks, their application is constrained by a development model that prioritises mining led growth and state control over natural resources, with indigenous communities bearing the costs of relocation and restricted access to land and water. This case therefore complements the Mongolia and Kazakhstan disputes by illustrating how accountability gaps can persist not only through international arbitration but also through domestic governance arrangements that structurally marginalise those most affected by extractive projects.

### 2.3.4. Interim conclusion

Despite the differences in state and institutional capacity and different levels of occurrence in human rights and environmental violations, all three countries face enforcement failures. It can be attributed to a range of issues, including insufficient implementation, lack of community participation, inadequate regulatory oversight, and inconsistencies in their legal frameworks at certain levels. Companies in all three countries frequently go around the regulations, with consultations often conducted in a way that does not genuinely allow community members to express their concerns or influence decision-making. Furthermore, the "polluter pays" principle, although enshrined in law aligning with international norms, is not effectively enforced, and many businesses fail to address the environmental consequences of their operations. This is particularly evident in the mining sector, where foreign investment often exacerbates the neglect of social and environmental responsibilities.

Mongolia and Kazakhstan have significant regulatory weaknesses due to corruption, judicial independence and rule of law, which allows foreign investors to neglect their environmental and social duties, with limited transparency and consultation with affected communities. In Botswana, despite the legal framework in place and the country having relatively strong state

and institutional capacity with lower corruption and effective rule of law, there is insufficient accountability for mining companies, particularly in the diamond sector, where human rights violations such as forced displacement of indigenous communities have been reported.

Ultimately, the findings support the argument of hypothesis A and B. While Mongolia, Kazakhstan, and Botswana have legal frameworks in place to protect human rights and the environment, these findings demonstrate challenges in enforcement of these laws. Empirical cases clearly show that the countries are facing serious human rights and environmental violations by foreign investors from different countries like France, the UK, China, and Canada, despite the fact that some of host states (Botswana) have relatively good state and institutional capacity.

### 2.4. Conclusion

In the case of Mongolia and Kazakhstan, the low state and institutional capacity because of high corruption, dependent judiciaries, and weak rule of law significantly limits their ability to create and enforce laws to regulate corporate activities and align with human rights objectives. Foreign investors take this for advantage and ignore consultation requirements, environmental management plans, and avoid liability for damages.

By contrast, Botswana has a different situation because it has relatively high state and institutional capacity, with lower corruption, greater judicial independence, and a stronger rule of law compared to the other two countries and also global average. However, even with this higher state and institutional capacity, it still faces implementation challenges in mining sectors where forced displacement of indigenous communities and labor rights violations persist. This suggests that while state and institutional capacity is a necessary condition for ensuring effective laws and its enforcement, it is not always sufficient alone.

This confirms hypothesis A showing that weak state and institutional capacity exacerbates state's ability to adequately regulate corporate misconduct, and hypothesis B where states heavy dependence on FDI and extractive industries further adds challenges in regulating corporate misconduct. It is worth noting that state and institutional capacity is an important condition for effective regulation of corporate behaviour, but it does not always guarantee strong regulatory enforcement. Prioritizing economic interest because of extractive industry and FDI dependence, poor state and institutional capacity all together hinders the possibility of a host state to regulate corporate activities at the domestic level.

Furthermore, as discussed above, even when host states ratify international environmental and human rights treaties, their ability to implement these commitments at the national level is often impacted by weak state and institutional capacity, economic dependence on FDI and extractive industry. While these countries engage with various international frameworks, the national and international legal documents such as BITs still reflect an absence of room for foreign investor responsibility causing further imbalance.

Finally, without proper alignment between economic priorities, and social objectives, as well as strengthening the state and institutional capacity, reducing economic dependency on a single sector, even the most adequate legal frameworks may still face gaps in their implementation which will continue to cause human rights and environmental violations in host countries, leaving vulnerable communities at risk.

In this situation of Botswana with high dependency on single sector and FDI, Kazakhstan and Mongolia with low state and institutional capacity and high dependency on FDI and extractives, “political will” to incorporate stringent and mandatory human rights and environmental obligations for corporations, particularly foreign investors, is becoming an utmost important thing in safeguarding the affected communities in these host states.

These structural and institutional findings set the stage for the next chapter, which interrogates whether home state regulatory regimes such as due diligence laws offer meaningful alternatives, or whether they risk reproducing the same imbalance under a new legal form.

# CHAPTER III: SHIFTING RESPONSIBILITIES: EXTRATERRITORIAL REGULATION AND THE CONTINUITIES OF LEGAL AND ECONOMIC POWER

## Introduction

This Chapter 3 explores how home states have responded to these constraints by developing regulations with extraterritorial implications. Even these regulatory approaches presented as corrective or progressive, this chapter critically examines whether these legal frameworks truly support sustainable development and accountability of their companies in host states, or whether they establish new or similar forms of legal and economic dominance which reproduce historical asymmetries.

Chapter 2 revealed that the capacity of host states such as Mongolia, Kazakhstan, and Botswana to regulate foreign investor actions is severely limited by two aspects: institutional weaknesses such as high corruption, weak judiciaries, and limited rule of law; and by a heavy dependence on FDI, particularly in extractive industries. The prioritization of economic development over environmental and human rights protections in these countries is shaped by the necessity to attract and keep FDI. This situation creates the inability of host states to efficiently regulate the foreign investor accountability towards human rights and environment. At this moment, this responsibility to ensure corporate accountability has shifted to home states. As mentioned before, the home states are often economically rich countries in the Global North where multinational corporations and foreign investors are registered and incorporated. For the past years, home countries such as France, Germany, Canada, and the European Union introduced different regulatory frameworks aimed at addressing the adverse human rights and environmental impacts of their corporations and their supply chains operating abroad. These include mandatory due diligence laws such as France's Duty of Vigilance Law, EU Corporate Sustainability Due Diligence Directive, and other policy approaches which are discussed in Chapter I. These laws extend legal responsibility beyond territorial borders, holding multinational corporations accountable for rights violations in their global operations. However, this chapter questions whether the extraterritorial regulatory efforts of these home states truly represent a transformative shift towards equitable and sustainable development and promise long-term effectiveness in protecting human rights and environment in host countries, or whether it legitimize a system of which legal and economic power remains concentrated in the Global North. It argues that many of these frameworks are in high possibility to reinforce imbalance between host and

home states through legal mechanisms rather than provide effective long-term solutions for safeguarding human rights and environment from their companies' misconduct in host states.

To understand these developments, this chapter places the extraterritorial regulations within the broader history of international law by drawing on different theoretical frameworks including postcolonial theory, Third World Approaches to International Law (TWAIL), and critical legal scholarship. TWAIL scholars such as Antony Anghie,[545] Makau Mutua,[546] James Gathii,[547] and B.S.Chimni[548] have been arguing that international law was not designed as a neutral legal system, but evolved to legitimize and manage colonial ideology and its expansion. The supposed foundational concept of international law which are sovereignty, universality, and rule of law emerged from efforts to rationalize colonial control and have since been extended into postcolonial and neocolonial governance through development frameworks, investment treaties, and humanitarian interventions by different states and international organizations. For instance, Anghie's[549] work shows how the concept of sovereignty was developed to legitimize the colonization of non-European peoples, enabling legal doctrines to enforce hierarchical distinctions between "civilized" and "barbarians". This pattern continues to the current international legal system, where Global South states are expected to abide with standards they did not participate in shaping. Anghie talks about the model that has long structured how international law views the non-European world: not as sovereign equals, but as subjects to be gradually incorporated under European-derived norms and authority.

International investment law is an example of this historical continuity. As Chimni[550] says, the emergence of an "imperial global state" is driven by the consolidation of legal authority in institutions such as the World Bank, IMF, WTO, and international arbitral tribunals like ICSID. These institutions regulate the economic, political, and legal space of Global South in ways that prioritize investor protection. They are not neutral but actively support global hierarchy by diffusing liberal markets and investor rights into binding documents, while

[545] Antony Anghie, Rethinking International Law: A TWAIL Retrospective, 34 *Eur. J. Int'l L.* 7, 13 (2023), https://doi.org/10.1093/ejil/chad005.
Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 2-10 (Cambridge Univ. Press 2005).
[546] Makau Mutua, Savages, Victims, and Saviors: The Metaphor of Human Rights, 42 *Harv. Int'l L.J.* 201 (2001).
[547] James Thuo Gathii, TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography, 3 *Trade L. & Dev.* 26 (2011).
[548] B.S. Chimni, International Institutions Today: An Imperial Global State in the Making, 15 *Eur. J. Int'l L.* 1, 2-6 (2004).
B.S. Chimni, Third World Approaches to International Law: A Manifesto, 8 *Int'l Comm. L. Rev.* 3 (2006).
[549] Antony Anghie, Rethinking International Law: A TWAIL Retrospective, 34 *Eur. J. Int'l L.* 7, 13 (2023), https://doi.org/10.1093/ejil/chad005.
[550] B.S. Chimni, International Institutions Today: An Imperial Global State in the Making, 15 *Eur. J. Int'l L.* 1, 2-6 (2004).
B.S. Chimni, Third World Approaches to International Law: A Manifesto, 8 *Int'l Comm. L. Rev.* 3 (2006).

treating human rights and environmental obligations of foreign investors as soft and voluntary commitments. As argued by Chimni, Anghie, and Sornarajah in their collective work,[551] international law has consistently served to limit the redistributive power of third world states, hindering their sovereignty, and prioritize private property rights before public welfare goals. Koskenniemi's critique[552] also supports this argument. He demonstrates that the legal architecture inherited by postcolonial states was never intended to empower them but to integrate them into a global order defined by Western notions of statehood, governance, and civilization.

These dynamics further reinforces the historical marginalization of the host state legal system and their traditional knowledge. Eslava and Pahuja[553] argue that international law fundamentally shaped the state formation in the Global South where postcolonial states were created through the legal technologies that legitimized through Eurocentric templates of what constitutes governance, economy, and legality. Postcolonial theorist Escobar's[554] analysis of development also compliments this position by showing how the idea of "progress" has been used to legitimize interventions in the Global South, often exacerbating inequality under the name of modernization. For instance, some post-development scholars[555] argue that the SDG framework also often reproduces this pattern by universalizing Northern development models and metrics. Mutua's[556] "*Savage-Victim-Savior*" (SVS) metaphor further adds a powerful interpretive lens to this discussion. It reveals how the international human rights system, though framed as emancipatory, continues to cast Global South states as morally deficient actors in need of Northern rescue. This delegitimizes and undermines local legal systems and enables home state intervention and corporate voluntary self-regulation.

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[551] *The Third World and International Order: Law, Politics and Globalization* (Antony Anghie, Bhupinder Chimni, Karin Mickelson & Obiora Okafor eds., Martinus Nijhoff Publ'rs 2003).
[552] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge Univ. Press 2001).
[553] Luis Eslava & Sundhya Pahuja, The State and International Law: A Reading from the Global South, *Humanity: An Int'l J. Hum. Rts., Humanitarianism & Dev.* (forthcoming), https://ssrn.com/abstract=3161211.
[554] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* 6, 24 (Princeton Univ. Press 1995).
[555] Seema Arora-Jonsson, *The Sustainable Development Goals: A Universalist Promise for the Future*, 146 Futures 103087 (2023), https://doi.org/10.1016/j.futures.2022.103087.
Farhana Sultana, *An(Other) Geographical Critique of Development and SDGs*, 8(2) Dialogues in Human Geography 186 (2018), https://doi.org/10.1177/2043820618780788.
[556] Makau Mutua, Savages, Victims, and Saviors: The Metaphor of Human Rights, 42 *Harv. Int'l L.J.* 201 (2001); Makau Mutua, *Human Rights Standards: Hegemony, Law, and Politics* 179-180 (State Univ. of N.Y. Press 2016); Makau Mutua, *Human Rights: A Political and Cultural Critique* (Univ. of Pa. Press 2002).

Therefore, home state regulatory approaches must be evaluated not only by their content, but by their underlying normative assumptions, geopolitical effects, and power structures and imbalances.

Surya Deva[557] critiques John Ruggie, Special Representative of the Secretary General (SRSG)'s rhetorical division of responsibility, noting that the separation between state "duty to protect" and corporate "responsibility to respect" allows home states to escape scrutiny while host states are labeled as incapable or corrupt. According to Deva, this framing legitimizes regulatory shifts to the Global North without addressing the structural imbalances that weaken Global South governance in the first place. As Giuliani,[558] De Feyter,[559] and Buhman[560] state, even laws that aim to protect human rights and environment often fail in practice because of inadequate enforceability, procedural burdens, and a failure to integrate Global South perspectives. This is also supported by Bright and Macchi,[561] where they state that these developments must be examined not simply by their emergence, but also by their alignment with and capacity to realize the norms established by the UNGPs. The authors state that the UNGPs also reflect this tension where they articulate corporate responsibility without imposing binding obligations, and shift attention to host state failures while preserving corporate flexibility and not obliging home states to "look after" their corporations.

It is worth noting that the credibility of regulatory responsibilities placed on host states continues to be undermined by limited access to remedy for the affected communities. As Lambooy, Argyrou, and Varner[562] document, despite significant environmental damage, Chevron evaded enforcement through jurisdictional challenges, BIT, arbitration, and asset reallocation. These are the tactics that illustrate how corporations can leverage transnational law to go around accountability. Similarly, in Shell's Nigeria cases, affected communities struggled for decades to secure meaningful remedy, underscoring the limited power of

[557] Surya Deva, Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 78 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).
[558] Elisa Giuliani, *Business and Human Rights, History, Law and Policy: Bridging the Accountability Gap* (Book Review), 2 *Bus. & Hum. Rts. J.* 379, 379–80 (2017).
[559] Koen De Feyter, *Human Rights: Social Justice in the Age of the Market* (Zed Books 2005).
[560] Karin Buhmann, Navigating from 'Train Wreck' to Being 'Welcomed': Negotiation Strategies and Argumentative Patterns in the Development of the UN Framework, in Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? 29 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).
[561] Chiara Macchi & Claire Bright, Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation, in *Legal Sources in Business and Human Rights* (Martijn Scheltema, Liesbeth Enneking, Cees van Dam & Juan José Álvarez Rubio eds., Brill forthcoming 2020).
[562] Tineke Lambooy, Aikaterini Argyrou & Mary Varner, An Analysis and Practical Application of the Guiding Principles on Providing Remedies with Special Reference to Case Studies Related to Oil Companies, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 214 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

domestic and international grievance mechanisms. In the UK experience, as Richard Meeran[563] states, multinational corporations regularly leveraged the "corporate veil" and "forum non conveniens" arguments to avoid accountability for harms committed abroad.

These examples reflect what Rajagopal[564] has been termed "the selective reach of international institutions". Rather than accommodate critiques, international law has tended to reframe and neutralize them, often under the guise of reform. This calls for what Rajagopal terms "international law from below". It is a theory grounded in the histories, resistances, and epistemologies of those marginalized by dominant legal orders. This critique is reinforced by the work of postcolonial theorists like Chandana Alawattage and Susith Fernando,[565] who demonstrate that corporate social and environmental accountability practices in the Global South, especially Sri Lanka are embedded within postcolonial power structures. They argue that while local firms may appear to adopt global sustainability standards voluntarily, this is often shaped by asymmetrical global power relations rather than genuine legal choices. This study shows that institutional weaknesses in the Global South are not merely technical or domestic failures but systemic outcomes of a global economic order that compels local actors to "copy" dominant accountability norms for legitimacy. This emphasizes the need to investigate not just the spread of current accountability norms but the structural context within which they are adopted.

Building on this discussion, this chapter traces the evolution of international investment law, demonstrating how legal institutions historically designed to protect colonial trade and now shield foreign investors from domestic regulation. It then examines key extraterritorial initiatives of the UK, France, China, Canada, and the EU, critically examining their design, enforcement mechanisms, and normative reach. Drawing on van der Straaten and others,[566] Cutler[567] and others, it demonstrates how these initiatives continue to center Global North legal and moral frameworks, neglecting the priorities of communities in the host states. In the final section, it argues that what began the spread of accountability norms now might contain

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[563] Richard Meeran, Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 379 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

[564] B. Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* 79-94, 289-296 (Cambridge Univ. Press 2003).

[565] Chandana Alawattage & Susith Fernando, Postcoloniality in Corporate Social and Environmental Accountability, 48 *Accounting, Orgs. & Soc'y* 1 (2016).

[566] Khadija van der Straaten, Rajneesh Narula & Elisa Giuliani, *The Multinational Enterprise, Development, and the Inequality of Opportunities: A Research Agenda*, 54 J. Int'l Bus. Stud. 1623, 1625–26 (2023).

[567] A. Claire Cutler, Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy, 27 *Rev. Int'l Stud.* 133 (2001).

a high risk of becoming a project of continuing the legal imperialism cloaked under the language of sustainability and rights. As TWAIL scholars[568] and postcolonial theorists argue, reimagining transnational accountability requires not only legal reform, but a restructuring of the global legal order to include those who have been continuously silenced.

*TWAIL as analytical lens*

This chapter uses TWAIL and related postcolonial scholarship not only as a theoretical reference, but as a lens for reading specific legal instruments and interpretive practices. TWAIL directs attention to how doctrines and procedures that present themselves as neutral and universal are embedded in histories of empire, unequal bargaining power and racialised hierarchies, and to how they allocate voice and vulnerability between capital exporting and capital importing states.

Applied to international investment law and extraterritorial regulation, this lens guides the analysis in three ways. First, it foregrounds whose interests and knowledge are centred or marginalised when home states design due diligence, reporting and other extraterritorial regimes. Second, it treats key treaty standards such as fair and equitable treatment (FET), indirect expropriation, stabilisation clauses and investor–state dispute settlement (ISDS) not as technical protections of legitimate expectations, but as techniques through which foreign investors can resist regulatory change in host states and socialise risk back onto host communities. Third, it situated current reforms within the longer history of efforts by Third World states to assert permanent sovereignty over natural resources and to reshape the investment regime. It asks whether new regulatory initiatives actually redistribute power or instead reinforce older hierarchies.

### 3.1. Historical continuities: from colonial extraction to modern international investment law

The term “Rule of Law” can be argued that it has become the common threshold for different systems to be considered as adequate and civilised. However, Mattei[569]in his book named “*Plunder: When the Rule of Law is Illegal*”, the continuity between colonial and modern legal justifications for plunder becomes even more evident when examining how legal discourse

[568] Davinia Gómez Sánchez & Eduardo S. Arenas Catalán, Third World Approaches to International Law (TWAIL), in *Contemporary Methods in International Legal Research: Between Legal Interpretivism and Empirical Inquiry* 127 (Juan J. García Blesa ed., Springer 2024), https://doi.org/10.1007/978-3-031-69522-3.
[569] Ugo Mattei & Laura Nader, *Plunder: When the Rule of Law Is Illegal* (Blackwell Publ’g Ltd. 2008).

continues to frame rule of law as a civilizing mission. What was once framed as conquest is inherited in the language of investment protection and market liberalization, but the underlying structure remains the same. Contemporary development context presents law not just a tool of governance but as a vital precondition for market liberalization and foreign investment. Modern legal diffusion into one nation, either from other countries or international regulatory framework, often distributed by international organizations and western legal scholars, rely on the ideological claim that developing countries "lack" adequate legal systems. This "lack" aspect, he states, is often used to justify the imposition of Western legal norms and ideologies. The legal diffusion is portrayed as an act of benevolence, a gift of modernity to deficient societies, but the effect is to transplant legal systems that facilitate capital extraction. He further discusses doctrines like "t*erra nullius" and "discovery principle*" which held that European discovery conferred legal title over inhabited lands, justified the genocide and dispossession of Indigenous peoples and remain embedded in foundational legal doctrines such as U.S Federal Indian Policy. This logic not only devalues non-Western legal traditions, like Confucian li and fa,[570] Islamic sharia,[571] and indigenous jurisprudence, but replaces them entirely in favor of "neutral" or "common" legal solutions grounded in Western rationalism and market efficiency. Mattei further critiques classical liberal tradition of Locke[572] and Vattel[573] have laid the ideological foundations for this system. For instance, Locke in his work Second Treatise of Government (1689)[574] stated that land is a property if a man cultivates it: "Thus in the beginning all the world was America". Similarly, Vattel[575] stated that non-sedentary people, such as "savages", lacked proper land rights. These foundational claims enabled the legal reconfiguration of space in favor of extractive companies.

The emergence of international investment law from colonial concession agreements illustrates this inheritance.[576] As Sornarajah[577] states these agreements removed economic regulation from host state control, later evolving into quasi-international agreements that

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[570] Stanley B. Lubman, *Bird in a Cage: Legal Reform in China After Mao* 198 (Stanford Univ. Press 1999).
[571] René David & John E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (2d ed. Stevens 1978).
[572] John Locke, *Two Treatises of Government* (London 1698).
[573] Emmerich de Vattel, *The Law of Nations* (London, G.G. & J. Robinson 1797) (reprinted Law Book Exch., Ltd. 2005).
[574] John Locke, *Second Treatise of Government* ch. 5, §§ 32, 49 (1689).
[575] Emmerich de Vattel, *The Law of Nations* bk. 1, ch. 7, §§ 81–83 (London, G.G. & J. Robinson 1797) (reprinted Law Book Exch., Ltd. 2005).
[576] M. Sornarajah, Economic Neo-Liberalism and the International Law on Foreign Investment, in *The Third World and International Order: Law, Politics and Globalization* 173 (Antony Anghie, Bhupinder Chimni, Karin Mickelson & Obiora Okafor eds., Martinus Nijhoff Publ'rs 2003).
[577] ibid.

guaranteed foreign investors rights while separating them from local accountability. These arrangements laid the groundwork for a legal regime that continues to restrict host state sovereignty even though the newly independent states attempted to reclaim their economic sovereignty with the UN General Assembly resolution 1803 on Permanent Sovereignty over Natural Resources[578] and NIEO[579], where these initiatives have been considered non-binding by many countries.

Continuingly, this legal foundation was institutionalized through the development of arbitration mechanisms and investment treaties. Anghie[580] shows how colonial arbitration practices formed the blueprint for today's investor-state dispute settlement mechanisms (ISDS). Cutler[581] critiques how the origin story of international law often traced to the Peace of Westphalia which erases its colonial and exclusionary roots. By doing so, she draws on David Kennedy[582] to argue that modern legal formalism masks the colonial foundations of international law. Meanwhile, Singh[583] critiques that the notion of modern liberal legal frameworks are purely rational or secular, revealing their theological and civilization underpinnings, inherited from imperial governance. These ideological roots connect with the material structures. Amin[584] and Escobar[585] traces how colonial economies were structured to serve external markets, prioritizing the export of raw materials and labor for the benefit of capitalist states.

The 1980s–1990s nationalization wave,[586] under IMF and World Bank pressure, marked a turn away from these visions. Domestic elites and weakened regional coalitions abandoned

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[578] G.A. Res. 1803 (XVII), Permanent Sovereignty over Natural Resources (Dec. 14, 1962).
[579] G.A. Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, U.N. GAOR, 6th Special Sess., Supp. No. 1, U.N. Doc. A/RES/S-6/3201 (May 1, 1974).
[580] Antony Anghie, Rethinking International Law: A TWAIL Retrospective, 34 *Eur. J. Int'l L.* 7, 15 (2023), https://doi.org/10.1093/ejil/chad005.
The jurisprudence of the Iran–US Claims Tribunal and ICSID arbitrations, like Asian Agricultural Products v. Sri Lanka, formed the template for a global legal system that privileged capital over sovereignty, often granting foreign investors more power than domestic governments.
[581] A. Claire Cutler, Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy, 27 *Rev. Int'l Stud.* 133 (2001).
[582] David Kennedy, A New Stream of International Law Scholarship, 7 *Wis. Int'l L.J.* 1 (1988).
[583] Bhrigupati Singh, *What Comes After Postcolonial Theory?*, 62 *Sophia* 577, 580–81 (2023).
Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans., MIT Press 1985); Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (Univ. of Chi. Press 2008); John Milbank, *Theology and Social Theory: Beyond Secular Reason* (John Wiley & Sons 2008); Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Johns Hopkins Univ. Press 1993) in *Bhrigupati Singh, What Comes After Postcolonial Theory?, 62 Sophia 577, 582–84 (2023).*
[584] Samir Amin, *Unequal Development: An Essay on the Social Formations of Peripheral Capitalism* (Brian Pearce trans., The Harvester Press Ltd. 1976) (originally published as *Le Développement inégal*, Les Éditions de Minuit 1973).
[585] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* 6, 12-13 (Princeton Univ. Press 1995).
[586] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 213–16 (Cambridge Univ. Press 2005); M. Sornarajah, *The International Law on Foreign Investment* 26–29, 340–42 (3d ed. Cambridge Univ. Press 2017).

earlier resistance, creating what Perrone calls a "state of amnesia",[587] where many Global South states signed bilateral investment treaties (BITs) and accepted ISDS regimes where entrenched investor rights while undermining regulatory sovereignty. TWAIL scholars like Gathii[588] and Anghie[589] demonstrate international law was never neutral or universal. It emerged as a tool of empire, designed to manage colonial encounters and institutionalize European superiority. Postcolonial states inherited a legal framework stepped in subordination and structured to serve foreign interests, including those that legitimize investor rights over resource control. This continuity helps explain why contemporary investment law continues to reflect structural economic dominance rather than human rights and environmental protection. Kwame Nkrumah[590] famously described foreign investment in natural resources as a core mechanism of neo-colonialism.

Foreign investment, initially promoted as a catalyst for industrial catch-up, became central to import-substitution industrialization (ISI) strategies, often under protectionism policies and selective knowledge transfer.[591] However, economic liberalization in the 1990s weakened state power and allowed multinational corporations and elites to capture economic gains, often at the expense of broader development and public welfare echoing exploitative colonial patterns. Working people only gained attention when they organized collectively.[592]

This pattern is explicitly evident in the BITs and investor-state dispute settlement (ISDS) systems. As Perrone[593] explains, postindependence states often remained constrained by colonial era concessions and unequal treaties that hindered their ability to control their resources.[594] While investor protections became binding international obligations in the contracts they had no role in negotiating, host states' ability to regulate their economies was diminished. TWAIL scholars[595] display this phenomenon as the "weaponization of legality".

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[587] Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* 71–109 (Cambridge Univ. Press 2015); Nicolás M. Perrone, Foreign Investment Law: A TWAIL View, in *TWAIL Handbook* 14 (Tony Anghie, Michael Fakhri, Vasuki Nesiah, Karin Mickelson & B.S. Chimni eds., Edward Elgar forthcoming).
[588] James Thuo Gathii, TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography, 3 *Trade L. & Dev.* 26 (2011).
[589] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 6–9 (2005).
[590] Kwame Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (Int'l Publishers 1965).
[591] David S. Landes, *The Unbound Prometheus: Technological Change and Industrial Development in Western Europe from 1750 to the Present* (Cambridge Univ. Press 2003); Herman Schwartz, *States Versus Markets: Understanding the Global Economy* (Bloomsbury Publ'g 2018).
[592] Adam Fishwick, Labour Control and Developmental State Theory: A New Perspective on Import-Substitution Industrialization in Latin America, 50 *Dev. & Change* 655 (2019).
[593] Nicolás M. Perrone, Foreign Investment Law: A TWAIL View, in *TWAIL Handbook* (Tony Anghie, Michael Fakhri, Vasuki Nesiah, Karin Mickelson & B.S. Chimni eds., Edward Elgar forthcoming).,2023.
[594] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* 26–29 (Cambridge Univ. Press 2017).
[595] B.S. Chimni, Third World Approaches to International Law: A Manifesto, 8 *Int'l Comm. L. Rev.* 3, 14 (2006);
Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 213–216 (Cambridge Univ. Press 2005).

Even efforts such as Calvo Doctrine[596] and Mexico's nationalization[597] to have legal autonomy, were undermined by international standards like the Hull formula[598] which demanded full, prompt, and adequate compensation for expropriation. Postcolonial legal assertions, including the Bogota Agreement[599] and UN resolutions affirming permanent sovereignty over natural resources,[600] were often sidelined by Global North resistance.

These legal legacies are concretely embedded in global litigation and dispute resolution systems. Mechanisms such as Alternative Dispute Resolution (ADR) and ISDS mechanisms, found in trade and investment agreements, reflect the privatization of legal conflict resolution. ADR is often presented as more appropriate for developing countries that are presumed to "lack" the institutional capacity for formal legal adjudication. However, ADR exacerbates existing power asymmetries by shifting the dispute resolution from public courts to private panels, ADR consolidates legal authority in spaces dominated by corporate interests. For instance, arbitration clauses in investment treaties and investor-state contracts are standard now which relates to the ADR mechanisms founded by international organizations which were established by multinational corporations. These processes routinely exclude participation of victims or general public, favor secrecy, and render decisions with limited or no appeal. They enable corporations to challenge the domestic laws of sovereign states, with panels composed of private legal professionals who may lack impartiality and knowledge on the domestic system. For instance, the WTO dispute settlement process epitomizes this by originally framed as a legalistic, rule-based body, the WTO increasingly operates through closed door arbitration panels with no public participation or appeal mechanisms. The decision is binding on states but often opaque to citizens who are affected by the company operations.

It is worth mentioning that the current ISDS practice, which decisions were based on modern BITs, does not significantly shift from decoupling imaginary[601] investor rights and

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[596] Liliana Obregón, Carlos Calvo's Theoretical and Practical International Law (S.J.D. thesis, Harvard Law Sch. 2002).
[597] Letter from Cordell Hull to Eduardo Hay (July 21, 1938), reprinted in *Foreign Relations of the United States* (1938), vol. V, at 678–79, in Perrone.
[598] Ursula Kriebaum, Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* 7–8 (Oxford Univ. Press 2022).
[599] Stephen G. Rabe, *The Elusive Conference: United States Economic Relations with Latin America, 1945–1952*, 2 Diplomatic Hist. 279, 289–90 (1978); Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution* 136–45 (Cambridge Univ. Press 2021).
[600] G.A. Res. 1803 (XVII), *Permanent Sovereignty over Natural Resources*, U.N. Doc. A/RES/1803(XVII) (Dec. 14, 1962). Stephen M. Schwebel, *The Story of the United Nations Declaration on Permanent Sovereignty over Natural Resources*, in *Justice in International Law: Selected Writings of Stephen M. Schwebel* 401–15 (Cambridge Univ. Press 1994); Mohammed Bedjaoui, *Towards a New International Economic Order* 99 (UNESCO 1979).
[601] Nicolás M. Perrone, Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment, 7 *Bus. & Hum. Rts. J.* 375 (2022).

obligations. Numerous arbitral tribunals have failed to acknowledge situations where protecting human rights necessitates violating investor rights,[602] or they do not waive compensation when states take measures to protect the environment.[603] Some scholars argue that protecting both investor and human rights simultaneously is not a problem if we assume that states are always obligated to compensate investors.[604] On the other side, certain tribunals[605] have stated that investors should not be compensated for regulatory measures concerning human rights if they should have been aware of such risks through careful due diligence. Some other cases[606] observed that investor misconduct or a lack of due diligence does not significantly impact the outcomes. However, there are instances where arbitral tribunals[607] have recognized the investors obligations under international law and required them to obtain free, previous and informed consent (FPIC) under ILO Convention.[608] Nonetheless, the majority of tribunals have disagreed with this view noting that international law does not include any investor obligation.[609] Despite these occasional positive outcomes, the investors have continued to use international arbitration to hinder domestic proceedings where they have been ordered to compensate the affected communities.[610]

The UNCTAD and GEP debates of the 1970s further reveals the deep power imbalance.[611] As Global South states pushed for oversight mechanisms to regulate FDI, Global North countries and investor representatives resisted, insisting on arbitration and rejecting binding obligations.[612] These compromises laid the foundation for enduring inequalities in the global investment regime. At the systemic level, regulatory asymmetries persist because of the

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[602] *Suez, Sociedad General de Aguas de Barcelona S.A., & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, ¶¶ 238–240 (July 30, 2010).
[603] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, para. 829 (Sept. 9, 2021).
[604] Nicolás M. Perrone, Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment, 7 *Bus. & Hum. Rts. J.* 375 (2022).
[605] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, para.829 (Sept. 9, 2021).
[606] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 2012-02, Award (Mar. 15, 2016); *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/2, Award (Nov. 30, 2017); *South American Silver Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award (Nov. 22, 2018).
[607] *Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016).
[608] *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/2, Award, ¶¶ 664–666 (Nov. 30, 2017).
[609] ibid.
[610]See, e.g., *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23 (UNCITRAL); *Shell Petroleum N.V. & Shell Exploration & Production Africa B.V. v. Federal Republic of Nigeria*, ICSID Case No. ARB/21/7; *Barrick (Niugini) Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/20/27.
[611] Sundhya Pahuja & Anna Saunders, Rival Worlds and the Place of the Corporation in International Law, in *The Battle for International Law in the Decolonization Era* 141–67 (Jochen von Bernstorff & Philipp Dann eds., Oxford Univ. Press 2018).
[612] U.N. Dep't of Econ. & Soc. Affs., *Summary of the Hearings Before the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and International Relations*, U.N. Doc. ST/ESA/15, at 38, 414–15 (United Nations 1974).

unequal global law system. Pahuja's[613] work shows how post World War II international law reformulated colonial rationalities into a development-oriented framework aligned with Northern interests. Global governance institutions such as the IMF, World Bank and WTO now perform regulatory functions once held by colonial administrations. As Chimni[614] and De Feyter[615] argue, these institutions impose economic and legal models that hinder domestic policymaking and privilege foreign capital through agreements like TRIPS or TRIMS.

The Chevron-Ecuador litigation exemplifies this. After Texaco discharged toxic waste into the Ecuadorian Amazon and conducted a limited cleanup, affected communities sought compensation.[616] Chevron responded with transnational litigation and investment treaty arbitration, aiming to nullify domestic judgements. As stated by Lopez[617] and Meeran,[618] these legal strategies reproduce colonial logic. Rajagopal[619] connects these mechanisms to colonial traditions of combining security with development. The World Bank's mandate was shaped through geopolitical struggles, often aligning with Cold War interests rather than anti-colonial aspirations. Technocratic governance and external oversight, justified in the name of "well-being", served to deepen economic dependency rather than foster autonomy. These patterns persist in investment law, where corporate immunity and legal privilege override the developmental aims of host states.

Northern countries have begun to challenge aspects of this system particularly when they face investor claims. The European Union, for example, has coordinated the termination of intra EU BITs, proposed the shift from arbitration to permanent investment courts, and initiated withdrawal from the Energy Charter Treaty. This phenomena, from former capital exporting powers now subject to ISDS claims, has reshaped the academic and diplomatic landscape. It is worth mentioning that the most critique against investment law still comes from the Global

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613 Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge Univ. Press 2011).

614 B.S. Chimni, International Institutions Today: An Imperial Global State in the Making, 15 *Eur. J. Int'l L.* 1, 6-11 (2004); B.S. Chimni, Third World Approaches to International Law: A Manifesto, 8 *Int'l Comm. L. Rev.* 3 (2006).

615 Koen De Feyter, *Human Rights: Social Justice in the Age of the Market* (Zed Books 2005).

616 Tineke Lambooy, Aikaterini Argyrou & Mary Varner, An Analysis and Practical Application of the Guiding Principles on Providing Remedies with Special Reference to Case Studies Related to Oil Companies, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 214 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

617 Carlos López, The 'Ruggie Process': From Legal Obligations to Corporate Social Responsibility?, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 58 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

618 Richard Meeran, Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 379 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

619 B. Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* 73-94, 289-296 (Cambridge Univ. Press 2003).

North. It comes from scholars who are concerned about ISDS taking precedence over their public law principles, like Calvo in the 19th century, and from Global North states hit by ISDS cases, from the United States to Canada, Germany, Italy and the Netherlands. The efforts of European states to reform ISDS have been quite coordinated, and also attracted most of the academic attention. These include the termination of EU intra-BITs, the move away from arbitration to permanent courts, and the discussion and potential withdraw from the Energy Charter Treaty with prolonged survival clauses.[620] However, this focus often sidelines broader inquiries into how foreign investment can equitably contribute to development. Instead, diplomatic and scholarly debates tend to revolve around balancing investor protection with the right to regulate, such as the inclusion of exception provisions, while questions related to the underlying rules of foreign investment remain in the background.[621] Sometimes these questions are replaced by Global North due diligence legislation.[622] The softening of legal obligations in these reform movements is even more pronounced in the rise of soft law instruments. Frameworks such as due diligence laws reflect a commitment to transparency without enforceability. As Claire[623] notes, the UK and Australian Modern Slavery Acts encourage businesses to report their practices, but impose no binding requirements. Critics like Surya Deva,[624] Carlos Lopez[625] and David Bilchitz[626] emphasize how the John Ruggie's UNGPs marked a retreat from earlier initiatives, such as the UN Norms on corporate responsibilities that sought to make international law applicable to corporations. Rather than mandating corporate accountability, soft law frameworks emphasize social expectations and stakeholder engagement which terms that diffuse accountability but undermine legal enforceability. Giuliani's review states that business and human rights violations are not new, but have long-standing roots in colonial-era economic

[620]Center for International Environmental Law (CIEL), *EU Exit from Energy Charter Treaty: Win for People, Environment, and Climate* (May 30, 2024), https://www.ciel.org/news/eu-exit-from-energy-charter-treaty/
IISD, The Energy Charter Treaty Survival Clause (2024),
https://www.iisd.org/publications/brief/energy-charter-treaty-survival-clause
[621] Nicolás M. Perrone, The ISDS Reform Process: The Missing Development Agenda, S. Ctr., Investment Policy Brief No. 19 (2020).
[622] Surya Deva, Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?, *Leiden J. Int'l L.* 1 (2023).
[623] Chiara Macchi & Claire Bright, Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation, in *Legal Sources in Business and Human Rights* (Martijn Scheltema, Liesbeth Enneking, Cees van Dam & Juan José Álvarez Rubio eds., Brill forthcoming 2020).
[624] Surya Deva, Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 78 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).
[625] Carlos López, The 'Ruggie Process': From Legal Obligations to Corporate Social Responsibility?, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 58 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).
[626] David Bilchitz, A Chasm Between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 107 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

structures.[627] She discusses the Atlantic slave trade, the rise of international labor law (ILO conventions), and the prosecution of industrialists after WWII as critical antecedents. These events illustrate how economic power has historically operated with legal complicity and selective accountability, offering a continuity between colonial extraction and modern regimes that protect investor interests over labor and human dignity.

The critical insights of postcolonial theorists like Homi Bhabha, Edward Said, and Frantz Fanon[628] illustrate how colonial logics of domination continue to permeate today's CSR and sustainability practices. They argue that social and environmental accountability initiatives in postcolonial contexts creates what they call a "textual(real)ity" where spaces in which local managers engage global discourses to reshape both their practices and identities. This, they argue, is how corporate globalization sustains the civilizing mission of colonial empires, even as it adopts the language of ethics and development. Mutua[629] builds on this by arguing that the contemporary human rights regime is itself the ideological heir to colonial legal structures. He traces the framing of foundational instruments like the Universal Declaration of Human Rights to Eurocentric philosophical traditions, noting the exclusion of Global South traditions from the foundational moment of human rights standard setting.[630] He argues[631] that the post WWII universalization of human rights emerged in response to intra-European horrors like Holocaust, not colonial atrocities. This selective approach has allowed the West to define human rights standards while ignoring their own imperial histories, privileging liberal legality as the sole legitimate civilizational model. Therefore, the architecture of rights and regulation continues to embed colonial economic subjugation, particularly when sovereignty and development are subject to extraterritorial norms favoring investor interests.

This trajectory parallels the later evolution of international investment law. Colonial concessions were rebranded as legal protections for foreign capital, preserving economic asymmetries under a new term of investor rights. As Daniel Augenstein and David Kinley[632] argue, today's debate on extraterritoriality merely extends the control functions of earlier

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[627] Elisa Giuliani, *Business and Human Rights, History, Law and Policy: Bridging the Accountability Gap* (Book Review), 2 *Bus. & Hum. Rts. J.* 379, 379–80 (2017).

[628] Chandana Alawattage & Susith Fernando, Postcoloniality in Corporate Social and Environmental Accountability, 48 *Accounting, Orgs. & Soc'y* 1 (2016).

[629] Makau Mutua, Savages, Victims, and Saviors: The Metaphor of Human Rights, 42 *Harv. Int'l L.J.* 201, 212-218 (2001).

[630] Makau Mutua, *Human Rights Standards: Hegemony, Law, and Politics* 167-169 (State Univ. of N.Y. Press 2016).

[631] Makau Mutua, *Human Rights: A Political and Cultural Critique* (Univ. of Pa. Press 2002).

[632] Daniel Augenstein & David Kinley, When Human Rights 'Responsibilities' Become 'Duties': The Extra-Territorial Obligations of States That Bind Corporations, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 271 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

imperial legal systems. Where empires once exercised power through direct governance, modern investment agreements and arbitration mechanisms now enforce corporate prerogatives through indirect legal insulation. As Anghie[633] observes, colonialism was not an application of international law but it was constitutive of it. Many of its core doctrines, especially sovereignty, were formulated in response to managing relations between Europe and its colonial subjects. This colonial confrontation did not only shape international law but set a foundation for it.

### 3.2. Regulatory shift: the rise of home state extraterritorial regulations

The colonial legacies of legal and economic domination were not simply erased with formal decolonization. Instead, they may be reconstituted through the international investment regime and embedded in new legal instruments that continue to prioritize investor protection over human rights and environmental protection in host states. As host countries remain structurally subordinated within this regime, a parallel development has emerged from the home states: the rise of extraterritorial regulatory frameworks that aim to govern corporate conduct abroad. These regulatory frameworks claim to offer a corrective to transnational corporate impunity. Yet, they raise urgent questions about regulatory legitimacy, inclusion, and accountability. The next section traces this shift: how home states in the Global North, under pressure from civil society and reputational risk, began to export their regulatory norms extraterritorially, often without meaningful participation from host states or affected communities. As this thesis discussed the extraterritorial regulatory initiatives by home countries in Chapter I, this part analyzes these initiatives from a host country perspective, focusing mostly on the current enforcement mechanisms and practical implications.

#### 3.2.1. Objective and scope of the extraterritorial regulatory initiatives of home states

The following table presents the objective, scope, impact, accountability mechanisms, sanctions for non-compliance, and legal binding nature of the regulatory initiatives analyzed in this thesis, offering a concrete overview of the issue.

[633] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 3, 38 (Cambridge Univ. Press 2005).

**Table 2. Summary table of extraterritorial regulations**

| Regulatory Framework | Objective | Who is accountable | Penalties | Binding? | Articles | Extraterritorial implications |
|---|---|---|---|---|---|---|
| EU Directive on Corporate Sustainability Due Diligence | Due Diligence on human rights and environment | Company management and directors | Fines, civil liability | Yes | Art 1-34 | Yes. Applies to EU and non-EU companies with substantial EU operations (over €450M turnover). Covers entire global value chains, including operations abroad. |
| EU Corporate Sustainability Reporting Directive | Sustainability Reporting | Company boards and auditors | Fines (national level) | Yes | Arts. 1–4 of Directive 2022/2464 amending 2013/34/EU | Yes. Requires certain non-EU companies with EU operations (≥€150M turnover) to report on sustainability. Applies to global operations if financial ties exist to the EU. |
| French NAP | Align with UNGPs; promote human rights in business | French government leads, companies encouraged to comply | None | No | Policy document | Yes (soft law). Encourages French companies to respect human rights abroad, but it's voluntary. |
| Duty of Vigilance Law | Prevent human rights and environmental risks in supply chains | Large french companies management | Civil liability and court injunctions | Yes | Articles L. 225-102-4 and L. 225-102-5 of the Commercial Code | Yes. Applies to large French companies' global supply chains and subsidiaries, including operations outside France. |

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|---|---|---|---|---|---|---|
| UK NAP | Promote UNGPs implementation | UK Government, companies encouraged to comply | None | No | Policy document | Yes (soft law). Sets expectations for UK companies operating globally, but has no legal force. |
| UK Modern Slavery Act | Criminalize slavery and increase supply chain transparency | Corporate boards and individuals for slavery offences | Life imprisonment and civil compliance orders for companies | Yes | Sections 1-4; section 54 | Yes. Requires companies doing business in the UK to disclose anti-slavery measures even if the supply chain risks are abroad. Applies to foreign suppliers indirectly. |
| China NAP | Promote human rights including CSR | Government; companies are encouraged to comply | None | No | Policy document | Limited. Encourages Chinese companies to respect human rights abroad, but there's no legal enforcement and no explicit extraterritorial jurisdiction. |
| Outbound mining guidelines (2014) | CSR in overseas mining | Mining companies | None | No | Policy document | Yes (soft law). Applies to Chinese mining companies' overseas investments, but is voluntary. |
| Green Development guidelines (2021) | Promote green BRI investments | Chinese foreign investors | None | No | Policy document | Yes (soft law). Guides Chinese companies to adopt green practices in BRI and foreign projects, but is non-binding. |
| Environmental disclosure measures (2022) | Mandatory environmental reporting | Corporations (management) | Fines, blacklisting | Yes | Art. 3–5, 9–12, 20–22 | No, domestic only. Applies only to Chinese operations, not to Chinese companies' activities abroad. |
| Belt and Road Initiative | Build global infrastructure and trade | Chinese government; | None | No | Strategic document | Yes (strategic policy document). BRI projects occur outside China, but there's no |

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|---|---|---|---|---|---|---|
| | | companies | | | | binding legal framework and mostly bilateral deals and investments. |
| RBC strategy (2022) | Promote responsible business abroad | Global Affairs Canada; companies expected to comply | Denial of trade services, reputational risks | No | Policy document | Yes (soft law). Sets expectations for Canadian companies globally, but has no legal enforceability. |
| Corporate Transparency Measures | Fight financial crime through beneficial ownership disclosure | Corporate directors and secretaries | Fines up to USD200k, jail up to 6 months | Yes | CBCA Sections 21.1–21.4 | No, domestic only. Applies only to Canadian federal corporations registered under the CBCA. |
| Canada Modern Slavery Act | Combat forced/ child labour in supply chains-transparency | Boards of directors and corporate officers | Fines up to USD250k | Yes | Sections 4–5, 11–13, 21 | Yes. Requires companies to report on efforts to prevent forced/child labor in global supply chains, even if the risk is outside Canada. |

### 3.2.2. Participation of host countries and the affected communities into the pre-regulation making process and post regulation-implementation process

A comparative analysis of the current home state regulatory frameworks reveals a clear trend in which the newest corporate accountability initiatives have extraterritorial reach, but systematically exclude host states and affected communities from the rule-making process. For instance, the EU CSDDD imposes mandatory due diligence obligations on both EU and non-EU companies, applying to entire global value chains, including operations in host countries. Similarly, EU CSRD mandates sustainability disclosures from certain non-EU companies operating in the EU, covering environmental and social impacts across their global operations. However, neither directive provides mechanisms for affected communities or host country governments to participate in setting the standards that impact them. While the EU has adopted European Sustainability Reporting Standards (ESRS) under the CSRD, which explicitly encourage companies to identify and engage with affected stakeholders, it focuses primarily on disclosure obligations, not due diligence or prevention measures. The standard requires companies to report on how they involve stakeholders in identifying material sustainability,[634] but they do not require them to consult communities to mitigate risks before they occur. Similarly, the CSDDD does not specifically require affected communities to be involved in the design, implementation or monitoring of due diligence measures and left it to the discretion of companies and/or Member state's national legislation. From my perspective, stakeholder consultation is essential in the development of the Directive. The rules outlined in the CSDDD impose obligations on companies regarding their actual and potential adverse impacts on human rights impacts and environment contributed to or are directly linked to, with respect to their own operations, and those of their subsidiaries, and the operations carried out by entities in their value chain operations with whom the company has a business relationship, and on liability for violations of the obligations mentioned before. Engaging in meaningful stakeholder consultation allows for a better understanding of the specific needs and challenges faced by EU companies in their operations.

The CSDDD impact assessment (IA) consultation strategy encompassed various components including inception IA, engagement with social partners such as employers' organizations,

[634] European Commission, Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 Supplementing Directive 2013/34/EU as Regards Sustainability Reporting Standards, 2023 O.J. (L 310) 1; see also ESRS 1, Section 4.2, and ESRS 2, GOV-3, requiring disclosure of stakeholder engagement processes but not mandating preventive action or decision-making participation.

trade unions, stakeholder workshops and meetings involving company law experts, business associations, individual businesses (including SMEs representatives), civil society organizations as well as the OECD. Moreover, it included a 15-week open public consultation (OPC) where it received more than 400,000 public responses and 149 position papers.[635] However, it is notable that only 6.6 percent of the respondents were from non-EU countries other than the UK and US, and only few responses were received from developing countries.[636] 92 percent of stakeholders across all groups agreed on the necessity of a horizontal EU legal framework. Regarding the scope, 97 percent of respondents supported the extension of due diligence rules to third-country companies. Overall, CSOs expressed support for the need for mandatory due diligence obligations to all companies, regardless of their size, form, or location within the EU. In the stakeholder consultations conducted during the ex-post evaluations for the proposal of the Directive, some respondents expressed concerns about potential negative impact of due diligence rules on third countries. There are worries that companies investing in third countries with weaker human rights, including social and labor standards, and environmental protections might be forced to withdraw from these countries if due diligence rules are enforced.[637]

The French Duty of Vigilance Law requires large French companies to identify and prevent human rights and environmental risks across global supply chains, but host country or local community input into the vigilance plan development or the law itself is not mandated. The UK Modern Slavery Act and the Canada Modern Slavery Act also have extraterritorial implications. Both require companies to report on risks of forced and child labor in their global supply chains. However, these laws prioritize transparency and disclosure, rather than mandating preventative measures or requiring meaningful consultation.

China took a similar path but through mostly soft law instruments. These encourage Chinese companies to adopt responsible practices in their overseas investments. However, these guidelines remain voluntary, and do not require companies to consult local communities or conduct social and environmental impact assessments abroad. Canada similarly set expectations for Canadian companies for their abroad operations. However, it remains as soft

[635] See Annex 2 of the Annexes to the Commission Staff Working Document, Impact Assessment Report, SWD (2022) 42 final, at Annex 2 (Feb. 23, 2022), accompanying Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM (2022) 71 final.
[636] Véronique Girard, Initial Appraisal of a European Commission Impact Assessment, European Parliamentary Research Service (EPRS), at 7 (Oct. 2022).
[637] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM (2022) 71 final, at 19 (Feb. 23, 2022) (Explanatory Memorandum).

law and does not involve or require host country participation in standard setting or enforcement.

This critique is also backed with the current academic literature. Some studies[638] critically evaluates the neoliberal frameworks that shape corporate due diligence regimes, especially as they pertain to human rights and environmental obligations. It argues that contemporary regulatory mechanisms reflect a managerialist logic that prioritizes risk to companies rather than risk to rightsholders. They claim that this approach reinforces structural inequalities in global supply chains, often ignoring historical injustices and power imbalances. Drawing on the TWAIL approach, the authors also emphasize the need for a transformative due diligence regime that centers the experiences and voices of workers and communities in the host states. The authors advocate for an integrated approach to corporate due diligence that goes beyond compliance-based models by incorporating participatory mechanisms, including genuine engagement with affected communities and civil society actors. The article also calls for a rethinking of legal remedies, emphasizing that access to justice should not depend on the Global North's courts and legal systems alone. Instead, local jurisdictions and affected peoples should be empowered to define the contours of corporate accountability. Surya Deva[639] also critically examines the emerging trend of these legislation in Europe, arguing that while these laws are promoted as groundbreaking tools to improve corporate accountability, they risk becoming a "mirage" for rightsholders. These frameworks have been primarily shaped by state and business actors in the home states, often without adequately involving the people whose rights are at stake. As a result, the laws often reflect the priorities of corporations rather than the lived realities, grievances, and access-to-remedy needs of workers and communities affected by corporate misconduct.

The Danish Institute of Human Rights has concluded an analysis[640] on NAPs around the world. According to this analysis, all analyzed states who have adopted the NAPs have held stakeholder events during their NAP development processes and they have different styles of engagement events. Affected communities may be prevented from participating because of different reasons such as resources and financial support. Even though it says that states have

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[638] Fatimazahra Dehbi & Olga Martin-Ortega, *An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective*, 17 REGULATION & GOVERNANCE (June 19, 2023), https://doi.org/10.1111/rego.12538.

[639] Surya Deva, *Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?*, 7 Bus. & Hum. Rts. J. (2023), https://doi.org/10.1017/bhj.2023.2.

[640] Danish Institute for Human Rights & International Corporate Accountability Roundtable, *Global National Action Plans on Business and Human Rights (GlobalNAPs)*.

been including at some point the local communities, the extent on how they incorporate their concerns and ideas into the NAP remains still questionable.

**Table 3. Inclusion of host states and potential affected local communities in pre-regulation process and during implementation**

| **Regulatory Framework** | **Inclusion in pre-regulation process** | **Consultation during due diligence and reporting processes** |
|---|---|---|
| EU Directive on Corporate Sustainability Due Diligence[641] | Limited.The proposal of Directive was accompanied by consultations and impact assessments, but did not adequately involve host states or affected communities or the NGOs. | Companies must conduct stakeholder engagement during the due diligence process (Article 13). But it is a corporate discretion obligation after national law adoption. |
| EU Corporate Sustainability Reporting Directive[642] | Limited. Public consultation was held but no dedicated mechanism for host state and community inclusion. | Companies are required to report on stakeholder engagement (Article [...]) but there is no binding duty to consult communities. |
| French NAP[643] | No. Multistakeholder process only within France. | Encourages to consult, but not binding. |
| Duty of Vigilance Law[644] | No. CSOs and unions within France were engaged. No formal mechanism to involve host country stakeholders in setting the standards. | Companies must consult stakeholders during the vigilance plan development process, but there is no mandatory participation into the design or monitoring. |
| UK NAP | No. CSOs, business and trade unions within the UK were involved. | None. |
| UK Modern Slavery Act[645] | No. Only with businesses and NGO. No input from host states and communities during the initial drafting phase. | Companies should disclose anti slavery measures but are not required to consult with stakeholders. |
| China NAP[646] | No. Drafted without formal host state or community consultation or inclusion. | Encourages but not mandatory. |
| Outbound mining guidelines | No. Drafted without formal host state | Encourages but not mandatory. |

[641]European Commission, Impact Assessment Report, SWD (2022) 42 final, Annex 2 (Feb. 23, 2022).
[642] Explanatory Memorandum, COM (2022) 71 final, at 19 (Feb. 23, 2022). ESRS (CSRD Reporting Standards) - EFRAG Public Consultation on Draft ESRS, April–August 2022
[643] Ministère de l'Europe et des Affaires étrangères, National Action Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights (2017), at 5–6.
ECCJ & Shift, *Human Rights Reporting in France: A Baseline Study*, 2019.
[644] Shift Project & ECCJ, Human Rights Reporting in France: A Baseline Study, at 5–7 (2019).
[645] UK Modern Slavery Act (2015) | - Home Office, Modern Slavery Act 2015 Impact Assessment (2014).
[646] No public record of host state consultation during drafting.

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|---|---|---|
| (2014)[647] | or community consultation or inclusion. | |
| Green Development guidelines (2021)[648] | No. Drafted without formal host state or community consultation or inclusion. | Recommends at project level but not mandatory. |
| Belt and Road Initiative[649] | No. It was based on state to state negotiations without affected communities or CSO engagement. | Encourage community engagement in EIAs in the project guideline but not mandatory. |
| RBC strategy (2022)[650] | No. Only domestic consultation.[651] | Encourages but not mandatory. |
| Canada Modern Slavery Act[652] | No. However, these consultations on import bans and due diligence design was with businesses, NGOs and experts eliminating host states and communities.[653] | Companies are required to report on risks of forced and child labor in supply chains but not required to consult or include into the process. |

Drawing from the legal scope and participatory gaps identified in previous subsections, this part outlines the risks, tensions, and consequences that emerge when host state actors and communities are neglected in both the design and implementation of extraterritorial regulatory frameworks.

This raises several concerns, specifically in procedural justice, regulatory fragmentation, and geopolitical power asymmetries.[654] When host states and local communities are sidelined from these regulatory frameworks, new forms of accountability may emerge, but they risk reinforcing historical patterns of Global North countries.[655] This will be discussed in the next sections of this chapter.

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[647] Policy document publicly issued without consultation record (greenfdc.org)
[648] Describes domestic multi-stakeholder consultation process only.
[649] Focused on domestic stakeholder consultation (chinadaily.com.cn)
[650] No foreign community consultation documented.
[651]Global Affairs Canada, Responsible Business Conduct Abroad: Canada's Strategy for the Future 2022–2027, at 6–8 (2022).
[652] Consultation process described in NAP Foreword and Introduction, but no mention of host state consultation. |
[653] Torys LLP, *Canada Launches Consultations to Strengthen Modern Slavery Regime*, Torys LLP (Nov. 2024), https://www.torys.com/en/our-latest-thinking/publications/2024/11/canada-launches-consultations-to-strengthen-modern-slavery-regime.
[654] Sara L. Seck, Home State Responsibility and Local Communities: The Case of Global Mining, 11 Yale Hum. Rts. & Dev. L.J. 177 (2008).
Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge Univ. Press 2011).
Olivier De Schutter, Towards a New Treaty on Business and Human Rights, 1 Bus. & Hum. Rts. J. 41 (2015).
[655] Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge Univ. Press 2015).
Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge Univ. Press 2004).

I would like to briefly point out the risks, tensions and consequences of these gaps. Lack of procedural justice including remedies and meaningful participation of affected communities in the design of regulatory mechanisms causes a failure to involve local communities in decisions that shape their own livelihoods and environment.[656] It further affects legal and regulatory sovereignty. Pahuja[657] highlights how transnational legal interventions can unintentionally reinforce colonial hierarchies and Anghie[658] has shown how history of international law is deeply entwined with imperial patterns of control. Therefore, home state due diligence and reporting initiatives raise the risk of regulatory displacement where host state frameworks are overshadowed by external standards that may not align with local legal cultures and socio-economic context. Moreover, it can create new accountability gaps which means that while home state regulations provide mechanisms for addressing extraterritorial harms, they often do not grant affected communities direct access to enforcement processes.[659] This may create a form of governance that is so called progressive but practically limited to delivering justice for actually affected communities. Because of this, communities may be in between ineffective domestic remedies and foreign regulatory systems which they have no or little control.

Furthermore, small suppliers in the host states may lack capacity to meet stringent standards, risking market exclusion or financial strain. A European Parliament study[660] highlights that, for instance in the context of the German Supply Chain Act and CSDDD, small suppliers often lack the knowledge or financial capacity to meet EU requirements. It is enriched with the discussion[661] on how the CSDDD impacts SMEs arguing that its regulatory complexity and indirect supply chain obligations may burden SMEs and hinder innovation. The authors critique the lack of proportionality mechanisms and propose a model showing that the directive's effects on entrepreneurship vary by sector, market position, and sustainability readiness. Similarly, Weber[662] argues that the CSDDD exerts a "*brussels-effect*" by effectively

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[656] Comm. on Econ., Soc. & Cultural Rts., General Comment No. 24, State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, para. 32–34, U.N. Doc. E/C.12/GC/24 (2017).
[657] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge Univ. Press 2011).
[658] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge Univ. Press 2004).
[659] Sara L. Seck, Home State Responsibility and Local Communities: The Case of Global Mining, 11 Yale Hum. Rts. & Dev. L.J. 177 (2008).
[660] Aoife Hanley, Finn Ole Semrau, Frauke Steglich & Rainer Thiele, *The Cumulative Effect of Due Diligence EU Legislation on SMEs*, at 5–7 (Sept. 2023) (Policy Dep't, Directorate-General for External Policies, European Parliament), https://www.europarl.europa.eu/RegData/etudes/STUD/2023/702597/EXPO_STU%282023%29702597_EN.pdf.
[661] Juan Dempere, Eseroghene Udjo & Paulo Mattos, *The Entrepreneurial Impact of the European Directive on Corporate Sustainability Due Diligence*, 14 Admin. Sci. 266 (2024), https://doi.org/10.3390/admsci14100266.
[662] Anne-Marie Weber, *Expanding the Toolbox of Sustainable Business Law: The Transnational Impacts of the EU Corporate Sustainability Due Diligence Directive (CSDDD)*, 42 Pace Envtl. L. Rev. 155 (2024).

exporting EU norms to non-EU suppliers and business partners, compelling compliance outside EU jurisdiction. She cautions that harmonisation under the Directive may inadvertently stifle more progressive national legislation, reduce legal innovation, and impose disproportionate compliance burdens on SMEs, especially in host jurisdictions.

Inadequate reporting practices are raised by different NGOs where companies produce due diligence reports without actually changing their harmful operations. For instance, ClientEarth argues that without enforcement mechanisms and accountability, corporate reporting may turn into tickbox exercises rather than efficiently address the issue.[663] Also, despite legal frameworks, access to justice remains severely limited for affected communities and studies state that the obstacle including corporate legal immunities, costs, short limitation period, forum non conveniens affects the victims.[664]

OECD[665] notes that while many due diligence laws are based on their standards, it varies in scope, requirements and terminology creating divergence in approaches that reduces overall effectiveness. The OHCHR[666] called the EU institutions to ensure that CSDDD is fully aligned in all essential elements with UNGPs and put people affected and potentially affected by adverse impacts at the core of the due diligence process, and it also stressed that meaningful consultation is vital to ensuring that human rights due diligence achieves its objectives. Moreover, the NGOs have been explicitly emphasizing the lack of direct consultation with indigenous peoples, frontline communities in mining zones, agricultural sectors and conflict areas. For instance, Amnesty International research titled "Recharge for Rights" covering cobalt mining in the DRC highlights that the affected people had no say in the design of supply chain reforms.[667] Similarly, the BHRRC highlights recurring exclusion of indigenous people and labor rights holders from planning and oversight of extractive projects.[668]

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[663] ClientEarth & Frank Bold, *Towards New Human Rights and Environment Due Diligence Laws: Reflections on Impacts on Corporate Practice* 15 (Oct. 2024), https://www.biicl.org/documents/186_towards_new_hredd_laws_reflections_impacts_on_corporate_practice_15_oct.pdf.
[664] Int'l Corp. Accountability Roundtable, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations of Transnational Business* (2021).
[665] Org. for Econ. Co-operation & Dev., *Considerations for Approaches to Due Diligence Policy Co-operation* (2025).
[666] Office of the U.N. High Comm'r for Hum. Rts., *EU: OHCHR Urges EU to Ensure Corporate Sustainability Due Diligence Directive Is Aligned with UN Guiding Principles on Business and Human Rights* (Feb. 23, 2024), https://www.business-humanrights.org/en/latest-news/eu-office-of-the-un-high-commissioner-for-human-rights-urges-eu-to-ensure-due-diligence-directive-is-aligned-with-un-guiding-principles/.
[667] Amnesty Int'l, *Recharge for Rights: Power, Justice and the Supply Chains for Rechargeable Batteries* (Oct. 2024), https://www.amnestyusa.org/wp-content/uploads/2024/10/Recharge-for-Rights.pdf.
[668] Business & Hum. Rts. Res. Ctr., *Canada: Alleged Insufficient Consultation with Indigenous Peoples Regarding the Expansion of Copper Mountain Mine* (Apr. 2024), https://www.business-humanrights.org/en/latest-news/canada-alleged-insufficient-consultation-with-indigenous-peoples-regarding-the-expansion-of-copper-mountain-mine/.

However, there might also be positive outcomes from these regulatory frameworks. For instance, some research[669] shows potential for improved wages, labor protections, and working conditions in the host states due to global supply chain regulation. International organizations such as the ILO and UNCTAD support due diligence and reporting initiatives to help host states' regulatory systems due to local governance standards.There is a comprehensive study[670] evaluates the economic impact of the CSDDD that it could generate positive welfare outcomes in both the EU and the Global South if implemented robustly. While direct compliance costs for companies are expected to be modest, the Directive's dynamic effects, such as improved labor conditions and strengthened worker power are seen as key drivers of long-term benefits. These outcomes depend on strong enforcement, inclusion of the financial sector, and binding standards to prevent loopholes and ensure meaningful impact across global value chains.

The emergence of home state due diligence and reporting initiatives marks a notable shift in transnational corporate regulation. These frameworks extend accountability beyond borders, including new legal obligations for their companies operating overseas. However, as discussed above, the scope, design, and implementation of these regulations often reflect the priorities of home states, not host states or affected communities. Many host states and affected communities are in doubt whether these regulatory developments represent a complex issue on whether they offer a new system of accountability but have a risk of reproducing power imbalances and control?

### 3.3. Regulatory contradictions and accountability gaps: a critical account of extraterritorial frameworks

#### 3.3.1. Accountability without reparation

Many scholars have raised doubts about the ability of home state extraterritorial regulations to meaningfully constrain corporate misconduct abroad. Critics argue that these laws tend to prioritize corporate risk management and reputational control rather than redistributive justice

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[669] Anna Szymczak & Joanna Wolszczak-Derlacz, *Global Value Chains and Labour Markets—Simultaneous Analysis of Wages and Employment*, 58 J. Lab. Mkt. Res. 9 (2024), https://labourmarketresearch.springeropen.com/articles/10.1186/s12651-024-00367-w.
World Trade Org., *Global Value Chains for Inclusive Development: Background Report* (2023), https://www.wto.org/english/res_e/booksp_e/10_gvc23_ch7_dev_report_e.pdf.
Int'l Labour Org., *Wages and Working Conditions in and out of Global Supply Chains* (2018), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_dialogue/@act_emp/documents/publication/wcms_619715.pdf.

[670] Johannes Jäger, Gonzalo Durán & Lukas Schmidt, *Expected Economic Effects of the EU Corporate Sustainability Due Diligence Directive (CSDDD)* (Sarah Bruckner ed., AK Wien 2023).

or victim-centered reparation. Dehbi and Martin-Ortega[671] caution that current HRDD models focus on mitigating risk to companies, not addressing historical and structural harms. Similarly, Justine Nolan[672] and Anita Ramasastry[673] note that these laws impose no duty to prevent harm but only to show efforts to identify risks, thus enabling "strategic ignorance." As TWAIL scholars like Gathii[674] and Mutua[675] warn, legal reforms that do not emerge from local struggles risk becoming technocratic tools of hegemony, offering visibility without voice and legality without justice. Pahuja's[676] concept of "critical faith" further explains why Global South actors still invoke international law: not out of naivety, but from strategic hope in its universal promise. Yet, extraterritorial frameworks displace local legal agencies, redefine justice through home state standards, and operate as top-down governance mechanisms. Scholars such as Perrone,[677] Singh,[678] and Chimni[679] show that while such reforms may appear progressive, they often entrench unequal exchange and reproduce the colonial logic of civilizing missions under the guise of responsibility and sustainability.

Some studies[680] emphasize the extraterritorial reach of the EU's CSDDD is legally possible under EU law due to the "effects doctrine," which allows regulation of foreign entities with a significant economic presence. However, the authors stress that enforcement and compliance burdens for foreign firms raise serious questions about practical feasibility and political acceptability.

Transnational legal theory by Buhmann and Feld,[681] who argue that it constitutes a transnational legal order by blending hard and soft law mechanisms and extending legal

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[671] Fatimazahra Dehbi & Olga Martin-Ortega, *An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective*, Reg. & Governance (2023), https://doi.org/10.1111/rego.12557.
[672] Justine Nolan, The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 138 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).
[673] Anita Ramasastry, Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 162 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).
[674] James Thuo Gathii, TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography, 3 *Trade L. & Dev.* 26 (2011).
[675] Makau Mutua, Savages, Victims, and Saviors: The Metaphor of Human Rights, 42 *Harv. Int'l L.J.* 201, 228-231 (2001).
[676] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge Univ. Press 2011).
[677] Nicolás M. Perrone, Foreign Investment Law: A TWAIL View, in *TWAIL Handbook* (Tony Anghie, Michael Fakhri, Vasuki Nesiah, Karin Mickelson & B.S. Chimni eds., Edward Elgar forthcoming).,2023.
[678] Bhrigupati Singh, *What Comes After Postcolonial Theory?*, 62 *Sophia* 577, 584–86 (2023).
[679] B.S. Chimni, International Institutions Today: An Imperial Global State in the Making, 15 *Eur. J. Int'l L.* 1, 17-21 (2004).
[680] Luca Enriques, Matteo Gatti & Roy Shapira, How the EU Sustainability Due Diligence Directive Could Reshape Corporate America, Eur. Corp. Governance Inst., Law Working Paper No. 817/2025, Bocconi Legal Stud. Rsch. Paper No. 5083571, Rutgers L. Sch. Rsch. Paper (forthcoming 2025), https://ssrn.com/abstract=5083571.
[681] Karin Buhmann & Leonard Feld, *Shifting Boundaries: A Transnational Legal Perspective on the EU Corporate Sustainability Due Diligence Directive*, 15 Transnat'l Legal Theory 370 (2024).

expectations beyond the EU's jurisdiction. The Directive reshapes the relationship between EU and member state law by requiring harmonized due diligence obligations, yet leaving enforcement to national authorities. It also projects EU normative standards into global supply chains and aligns with international frameworks like the UNGPs and OECD Guidelines, thereby positioning the EU as a global regulatory actor. However, the 2025 "Omnibus Package" introduced by the European Commission significantly diluted the CSDDD and related sustainability frameworks.[682] Key revisions delayed implementation (to 2028), raised thresholds for covered companies, removed the civil penalty floor, and limited due diligence to tier-one suppliers. These revisions were framed as pro-growth reforms, but critics argue they compromise accountability and signal regulatory retreat under lobbying pressure. In their critique of the final compromise text of the CSDDD, Schmid and Thomale[683] argue that while the Directive aims to enforce ESG obligations across value chains and harmonize existing national laws it suffers from legal overreach, vague liability standards, and procedural gaps such as unclear jurisdiction and burdensome proof requirements. These flaws risk deterring investment in high-risk regions and incentivizing supply chain consolidation, harming suppliers in developing countries.

As for the UK Modern Slavery Act (MSA), there are plenty of critiques which discuss the acts in different issues in different fields. Drawing on a dataset of over 30,000 statements filed between 2020 and 2022 in the UK Modern Slavery Compliance Registry, the study[684] analyses the issues are the exemption of public sector entities and the legal permissibility of submitting statements declaring no actions were taken. These shortcomings suggest that while the MSA promotes greater transparency, its current structure still leans toward reputational risk management rather than substantive corporate accountability. Moreover, Haynes[685] critiques the influence of the MSA on Caribbean anti-trafficking laws, arguing that its transplantation has been limited and, in some cases, counterproductive. He highlights how UK courts' narrow interpretation of protections such as the non-punishment provision undermines the rights of Caribbean trafficking survivors. Haynes concludes that Caribbean

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[682] Vinson & Elkins LLP, *The EU's Proposed Omnibus Package—Sustainability Reporting Simplified*, V&E Envtl. Update (Mar. 25, 2025).
[683] Stephan Schmid & Chris Thomale, *Private Enforcement in the EU Corporate Sustainability Due Diligence Directive—A Critical Comparative Law and Economic Analysis of the Final Compromise* (May 22, 2024), https://blogs.law.ox.ac.uk/oblb/blog-post/2024/05/private-enforcement-eu-corporate-sustainability-due-diligence-directive
[684] Heather Carle & Linda Brewer, *The United Kingdom Modern Slavery Act: Are We Making Progress? A Look at Organizational Commitment to Eradicating Modern Slavery*, 30 Transnat'l Corp. 71 (2023).
[685] Jason Haynes, *The Troubling Influence and Impact of the UK's Modern Slavery Agenda on Caribbean Anti-Trafficking Law and Practice*, 4 J. Hum. Trafficking, Enslavement & Conflict-Related Sexual Violence (forthcoming 2024), https://doi.org/10.1007/s43576-024-00142-4.

states need culturally grounded, victim-centered approaches that address colonial legacies rather than uncritically adopting British legal models. Davies and Kachynska[686] criticizes the UK's approach, shaped by "crimmigration" logic, often conflates trafficking with irregular migration, leading to punitive responses that undermine migrant protections. The article critiques the UK's "world-leading" narrative on modern slavery, showing how its enforcement-oriented model fails to address root causes. The authors emphasize that these policies contribute to systemic exclusion and exploitation, especially in labor-intensive sectors. They call for a policy shift that centers migrant rights, balances humanitarian and security concerns, and responds to evolving political and labor realities. Dehbi and Martin-Ortega[687] argue that while current regulatory models emphasize risk mitigation and corporate compliance, they largely overlook questions of justice, historical inequality, and redistributive obligations and call for embedding due diligence in broader struggles for environmental and economic justice, emphasizing the need for reparative approaches that address both past and ongoing harm.

France's Duty of Vigilance Law, despite its groundbreaking nature, has likewise struggled with enforcement. Although the law mandates companies to publish vigilance plans addressing human rights and environmental risks, civil society litigation remains the main enforcement avenue, with only modest outcomes to date. Scholars like Schilling-Vacaflor and Gustafsson[688] document key barriers, including a lack of transparency, jurisdictional ambiguity, and limited court familiarity with transnational harm. Reinsberg and Steinert[689] further find that the law has not negatively impacted corporate profitability, but that compliance has been superficial for many firms, focusing on reputational management over substantive reform. Both the CSDDD and France's Duty of Vigilance Law share a common structural flaw: the exclusion of host states and affected communities from their design and

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[686] Jon Davies & Maryana Kachynska, *The Impact of UK Modern Slavery Policy on Eastern European Migrants*, 4 J. Hum. Trafficking, Enslavement & Conflict-Related Sexual Violence (forthcoming 2024), https://doi.org/10.1007/s43576-024-00145-1.

[687] Fatimazahra Dehbi & Olga Martin-Ortega, *An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective*, Reg. & Governance (2023), https://doi.org/10.1111/rego.12557.

[688] Nadia Bernaz & Antoine Duval, *The French Duty of Vigilance Law After Its Implementation: (In)Effectiveness, (Un)Accountability and (In)Justice?*, ASIL Insights (2024), https://bhrj.blog/2024/12/09/the-french-duty-of-vigilance-law-after-its-implementation-ineffectiveness-unaccountability-and-injustice

Almut Schilling-Vacaflor & Maria-Therese Gustafsson, *Litigation Under the French Duty of Vigilance Law: An Opportunity to Drive Change?*, Business and Human Rights Journal Blog (Dec. 17, 2024), https://bhrj.blog/2024/12/17/litigation-under-the-french-duty-of-vigilance-law-an-opportunity-to-drive-change/.

[689] Bernhard Reinsberg & Christoph Valentin Steinert, *The French Duty of Vigilance Law: Reconciling Human Rights and Firm Profitability*, J. Hum. Rts. & Env't (published online July 17, 2025) (forthcoming).

implementation. The Danish Institute for Human Rights[690] notes that the French NAP on Business and Human Rights does not include mechanisms to involve communities affected by French corporate activities abroad. The UK's 2013 and 2016 NAPs similarly focus on domestic stakeholders and voluntary measures, with little engagement from rights-holders abroad.

China's regulatory approach to overseas mining further illustrates these governance gaps.[691] As Human Rights Watch's *Promises Unfulfilled* report (2011)[692] details, its drafting was limited to state-controlled bodies, with no involvement from independent civil society or affected communities. The plan lacks enforcement, consultation, or transparency and reinforces repression of dissenters. Despite domestic adequacy in environmental law, Chinese companies operating abroad face no binding requirements equivalent to China's internal environmental impact assessments or "green mine" certifications. While voluntary instruments like the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters (CCCMC) Guidelines and the 2021 Green Development Guidelines[693] urge companies to follow international best practices and exceed weak host state standards, enforcement mechanisms remain absent. The broader Belt and Road Initiative (BRI)[694] mirrors these issues, with opaque financing, environmental degradation, and community exclusion characterizing many projects.

This pattern across jurisdictions reveals that despite rhetorical commitments to human rights due diligence, affected communities remain sidelined in the governance of transnational corporate accountability.

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[690] Daniel Morris et al., *National Action Plans on Business and Human Rights: An Analysis of Plans from 2013–2018* (Danish Inst. for Human Rights 2018), https://globalnaps.org/resources/.

[691] Chen Yu, *Can China Fix the Problems with Transition Mineral Mining Abroad?*, Global Witness (July 1, 2025), https://www.globalwitness.org/en/blog/can-china-fix-the-problems-with-transition-mineral-mining-abroad/.
Global Witness report *"Digging Deeper: The Hidden Risks of the Global Chinese Mining Sector"* (2024)
Zhen Tian, *China's Due Diligence Legislation for Environmental Governance on Transnational Corporations: History and Future*, 66 ENV'T (Sci. & Pol'y for Sustainable Dev.) 7 (2024).
Han Zhu & Jun Lu, *The Crackdown on Rights-Advocacy NGOs in Xi's China: Politicising the Law and Legalising the Repression*, 31 J. CONTEMP. CHINA 678 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887239.
Inclusive Development International, *Holding Chinese Corporations Accountable: Mining & Minerals* (Aug. 17, 2022), https://www.followingthemoney.org/mining-and-minerals/.

[692] Human Rights Watch, *Promises Unfulfilled: An Assessment of China's National Human Rights Action Plan* (Jan. 11, 2011), https://www.hrw.org/report/2011/01/11/promises-unfulfilled/china-human-rights-action-plan-fails-deliver

[693] Christoph Nedopil Wang & Yingzhi Tang, *Interpretation of the "Green Development Guidelines for Foreign Investment and Cooperation"* (July 26, 2021), https://greenfdc.org/interpretation-of-the-green-development-guidelines-for-foreign-investment-and-cooperation/

[694] Elaine K. Dezenski & Josh Birenbaum, *Tightening the Belt or End of the Road? China's BRI at 10* (Foundation for Defense of Democracies, Feb. 27, 2024), https://www.fdd.org/analysis/2024/02/27/tightening-the-belt-or-end-of-the-road/.

From a TWAIL perspective, home state due diligence and reporting laws can be read as new sites where the authority to define "responsible" corporate conduct and to police compliance is recentralised in the Global North. While these instruments may create some openings for affected communities to contest corporate practices, they also position European or North American regulatory and judicial institutions as the primary arbiters of transnational harms, with host state institutions and local normative orders relegated to the status of factual background or evidence. The limited and largely consultative involvement of Mongolia, Kazakhstan and Botswana in the design of these regimes, and the absence of binding obligations to support host-state enforcement or to provide reparation in situ, illustrate how reform can reproduce hierarchies even as it expands the vocabulary of accountability.

Arbitral practice to date has reinforced this ambivalence. Tribunals have begun to acknowledge corporate social responsibility and soft law human rights standards, and in a few cases have accepted the possibility of investor counterclaims or recognised that companies may bear obligations under international law, but they have generally treated such standards as interpretive context rather than as independent, enforceable duties. References to home state due diligence or reporting frameworks have occasionally appeared in arguments and awards, yet they rarely alter the core structure of protection under FET and expropriation clauses, and have not led tribunals to require investors to meet robust human rights or environmental due diligence obligations as a condition for accessing investment protection. The result is that home state regulatory initiatives and tribunal practice remain only loosely connected: extraterritorial laws may shape corporate reputational risk and regulatory expectations, but they have only marginally penetrated the hardlaw architecture of ISDS that continues to shield investors from the full consequences of their conduct abroad.

As mapped in Chapter I, the three host states confront these emerging home state regimes from within investment treaty networks that remain strongly protection-oriented: Mongolia's BITs are dominated by pre-2010 treaties, with the Canada-Mongolia BIT adding only cautiously framed CSR and public-welfare language; Kazakhstan has layered non-lowering-of-standards rhetoric in a few recent treaties on top of older, investor-centric agreements; and Botswana continues to operate under classic "old-generation" BITs such as the Botswana–Germany treaty, whose protections sit uneasily alongside regional sustainable-development commitments. This background matters because it shapes what extraterritorial frameworks can realistically deliver: they are imposed on a legal architecture

that still prioritises the stability of investor expectations over enforceable obligations towards affected communities.

### 3.3.2 Practical implications

#### (i) Practice under extraterritorial frameworks

There are not many cases which applied the current binding extraterritorial regulation, or mentioned the voluntary standards in the decision. The most applied regulation is the French Duty of Vigilance Plan with currently 10 known legal notices and 13 ongoing judicial processes requesting an injunction mostly by CSOs and Trade Unions.[695]

**Table 4. Overview of Duty of Vigilance Litigation (2019-2023)**

| Case | Process/Year | Description |
|---|---|---|
| BNP Paribas Deforestation | Formal notice 2022<br>Summons 2023 | Formal notice for its financial support of Marfrig (Brazilian largest meatpacking company) which is guilty for violations contributing to deforestation, land grabs, and slave like practices. |
| Deplastify Now (9 major food companies) | Formal notice 2022<br>Summons 2023 | These companies approach to plastic pollution means they are failing to live up to their duties, incomplete and unsatisfactory measures on plastics |
| Idemia in Kenya | Formal notice 2022<br>Summons 2022<br>Settlement Agreement 2023 | Sued Idemia for failing to identify and address human rights risks linked to its provision of a technology to capture the population's biometric data in Kenya. |
| Casino in the Amazon | Formal notice 2020<br>Summons 2021 | On the account of the company, sales of beef are linked to deforestation and land grabbing. |
| Groupe la Poste | Formal notice 2021<br>Summons 2021 | For breach of their duty for regularisation of the situation of several hundred undocumented workers employed under the subcontracting contracts. |
| SUEZ in Chile | Formal notice 2020<br>Summons 2021 | Suez holds the majority of water supply in the region where people left without water supply and it was contaminated. |
| Yves Rocher | Formal notice 2020 | For their breach of freedom to join the trade |

[695] https://plan-vigilance.org/les-affaires-en-cours-actions-en-justice/

| | | |
|---|---|---|
| | Summons 2022 | union in Turkey employees. |
| EDF in Mexico | Formal notice 2019<br>Summons 2020 | Absence of adequate FPIC in wind farm projects. |
| Total in Uganda | Formal notice 2019<br>Summons 2019<br>Dismissal order 2023 | Failed to comply with human rights and environmental protection obligations in the oil project of Uganda. |
| Total and Uganda II | Formal notice 2019<br>Summons 2023 | Second summon to obtain compensation for affected communities. |
| Total and Climate Change | Formal notice 2019<br>Summons 2020 | Failure of climate actions to be in line with IPCCC. |
| Total in Yemen | Formal notice 2022<br>Summons 2023 | Human rights violations by the forces set up by Total. |
| BNP Paribas | Formal notice 2022<br>Summons 2023 | For its high risk activities in the oil and gas sectors. |
| Teleperformance | Formal notice 2019 | Risk of violations of workers rights in Colombia, Mexico and Philippines, but not included in the vigilance plan. |
| XPO Logistics | Formal notice 2020 | Shrink responsibility for outsourced, temporary and subcontracted workers and their working conditions. |
| Total Russia | Formal notice 2022 | Risk of financing the war. |
| Orano and EDF Russia | Formal notice 2022 | Not ending the commercial relations with the Russian nuclear industry. |
| McDonald's | Formal notice 2022 | No vigilance plan published. |
| BNP Paribas, Credit Agricole and BPCE and Coal mines in Colombia | Formal notice 2023 | Accused of financing the mining activities which cause environmental and human rights abuses. |
| STMICROELECTRONICs | Formal notice 2023 | Accused of failing to meet its environmental and social obligations in the project to expand its sites. |
| U Cacao Cooperative | Formal notice 2023 | To take necessary measures to exclude chocolate derived from deforestation and forced child labor from the global supply chain in Cote d'Ivoire and Ghana. |

In 2019, TotalEnergies was the first company to face enforcement claims in 2019 for the climate change impact of its activities, human rights violations which resulted from oil

projects in Tanzania and Uganda. During this time, TotalEnergies prepared to drill more than 400 oil wells in the natural part of Uganda. The first claims debated the courts whether civil or commercial courts were competent to hear claims based on the Law. The court decided that before anyone can take legal action under the French Duty of Vigilance Law, they must first send a formal notice to the company. If they skip this step, the case will be dismissed. The claimants were an association of NGOs and after three years of launching the battle, the judges considered that the case was inadmissible due to procedural points.

Moreover, formal notice and claim to the court must refer to the same vigilance plan version. If a different or updated plan is mentioned in the lawsuit, the case can be rejected. This happened in the case against TotalEnergies and Electricite de France.[696] However, the law doesn't clearly say that the same version of the plan must be in the claim. This practice causes problems for the claimants because companies usually change their vigilance plans after receiving a formal notice. If the claimants are not allowed to update their complaints to reflect these changes, their concerns might seem outdated. In order to address this, the judge suggested that claimants send a new formal notice every time the plan changes which is a time consuming and difficult process for claimants. Furthermore, the judge states that every issue raised in the formal notice must be properly discussed before filing a lawsuit. Having meetings with companies does not constitute an official warning.[697] This is also not mentioned by the law. Lastly, claimants must send the formal notice and lawsuits to the exact company that wrote the vigilance plan. This creates confusion when large companies are involved. It was true in the Vigie v. Suez[698] case where one of the claimant NGOs were saying that based on this interpretation, it will be impossible for organizations to know which company to sue if the vigilance plan is not signed.

There are no cases that were initiated solely on the basis of the UK Modern Slavery Act. However, there are decisions that reflect how the UK courts are seeing corporate conduct regarding forced labour and supply chains. One of them is the Dyson&Others v. Kumar Limbu&Ohers.[699] In this case the UK Supreme Court denied Dyson's appeal and allowed

[696] Notre Affaire à Tous et al. v. TotalEnergies SE, Tribunal judiciaire [TJ] [ordinary court of first instance], Paris, 5e ch., 2e sect., No. RG 22/03403, Ordonnance du juge de la mise en état, 6 juill. 2023 (Fr.).
Fédération Internationale des ligues des droits de l'Homme (FIDH) et al. v. Vigie Groupe (formerly S.A.S. Suez Groupe), Tribunal judiciaire [TJ] [ordinary court of first instance], 5e ch., 2e sect., No. RG 22/07100, Ordonnance du juge de la mise en état, 1 juin 2023 (Fr.).
[697] Notre Affaire à Tous et al. v. TotalEnergies SE, Tribunal judiciaire [TJ] [ordinary court of first instance], Paris, 5e ch., 2e sect., No. RG 22/03403, Ordonnance du juge de la mise en état, 6 juill. 2023 (Fr.).
[698] Fédération Internationale des ligues des droits de l'Homme (FIDH) et al. v. Vigie Groupe (formerly S.A.S. Suez Groupe), Tribunal judiciaire [TJ] [ordinary court of first instance], 5e ch., 2e sect., No. RG 22/07100, Ordonnance du juge de la mise en état, 1 juin 2023 (Fr.).
[699] *Limbu & 23 Others v. Dyson Tech. Ltd. & Others*, [2023] EWHC 2592 (KB) (Eng.).

claims by 24 migrant workers who suffered forced labour at a supplier in Malaysia to proceed in English courts. The court decided that the UK companies can be sued in the UK even for abuse occurring abroad when they have sufficient jurisdictional links and corporate influence over supplier conduct. This is an important case even though it did not fall under the Modern Slavery Act for showing that the UK headquartered businesses can no longer ignore the rights violation.

Other discussed extraterritorial frameworks have not, as of this research, generated publicly available court or arbitral decisions directly applying them. This may be because of either non-binding nature, or most of them are transparency-based reporting statutes which do not give rise to the official cases. The actions covered by these frameworks usually fall under the tort law, not the act itself.

While extraterritorial frameworks have opened new legal spaces for NGOs or local communities, their impact has been constrained by procedural obstacles, weak enforcement, and limited remedial outcomes. Laws may create visibility and formal processes but rarely deliver outcomes for affected communities living abroad which illustrates accountability without reparations. Diamonds/Gope Exploration Company

**(ii) Implications for host states: BIT designs and constrained regulatory space**

From a TWAIL perspective, the practical implications of extraterritorial regulation in Mongolia, Kazakhstan and Botswana cannot be understood in isolation from the design of key investment treaties binding these states. As Chapter I showed, new generation instruments such as the Canada-Mongolia BIT (2016), the Japan-Kazakhstan BIT (2014) and the Kazakhstan-Singapore BIT (2018) have introduced sustainability language and in the Canadian case, a corporate social responsibility clause and an annex on indirect expropriation.[700] Yet these innovations coexist with classic protections for foreign investors: open ended fair and equitable treatment (FET) standards, broad expropriation and "measures tantamount to expropriation" clauses, and investor-state dispute settlement (ISDS) provisions that give investors direct access to arbitration. Sornarajah's work on indirect expropriation and the right to regulate underlines how such formulations, when coupled with expansive arbitral interpretations of FET and expropriation, operate as governance tools that discipline

*Dhan Kumar Limbu & Others v. Dyson Tech. Ltd. & Others*, [2024] EWCA Civ 1564 (Eng.).
*Limbu & Others v. Dyson Tech. Ltd. & Others*, UKSC 2025/0019 (permission to appeal refused May 1, 2025) (UK).
[700] Article 10 and Annex B.10 of Canada-Mongolia BIT(2017)

regulatory autonomy in the Global South, particularly where states are fiscally dependent on extractive exports.[701] Gathii's analyses of African investment treaty practice similarly show that, even where African states have begun to insert sustainable development language into newer instruments, they remain constrained by older, protection heavy treaties whose FET and expropriation clauses have been read in ways that prioritise investor expectations over distributive and environmental concerns.[702]

The Canada-Mongolia BIT illustrates this tension. On the one hand, it contains an explicit corporate social responsibility provision (Article 14) that "encourages" enterprises to voluntarily incorporate internationally recognised CSR standards addressing labour, the environment, human rights, community relations and anti‑corruption into their internal policies. It also includes provisions on health, safety and environment that commit the parties not to encourage investment by relaxing domestic standards, and an annex on indirect expropriation which clarifies that non‑discriminatory regulations adopted for legitimate public‑welfare objectives, such as the protection of health, safety and the environment, "do not normally constitute indirect expropriation." On the other hand, the treaty retains a broadly drafted FET clause, expansive coverage of "investment" and "investor," and full ISDS, giving investors direct recourse to arbitration under ICSID or UNCITRAL rules. In light of Sornarajah's critique, the Canada-Mongolia BIT's annex's statement that non‑discriminatory public‑welfare measures 'do not constitute indirect expropriation, except in rare circumstances,' and the lack of binding investor obligations suggest that the annex on indirect expropriation operates mainly as interpretive guidance rather than a real rebalancing of rights and duties. It acknowledges public‑welfare regulation, but still leaves tribunals ample room to classify far reaching environmental or social measures as compensable expropriations when they affect investor expectations. Together with Mongolia's older BITs and the Energy Charter Treaty, the Canada-Mongolia BIT therefore fits what Gathii describes as a layered regime: new sustainability‑inflected language is added on top of an existing architecture that remains focused on investor protection.

Kazakhstan's recent treaties with Japan and Singapore show similar dynamics. The Japan-Kazakhstan BIT's preamble and operative provisions "recognise that these objectives can be achieved without relaxing measures and standards applicable in the Areas of the

[701] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 300–35 (4th ed. 2017)
OECD, "'INDIRECT EXPROPRIATION' AND THE 'RIGHT TO REGULATE' IN INTERNATIONAL INVESTMENT LAW" (OECD Working Papers on International Investment No. 2004/04)
[702] James Thuo Gathii, Africanizing International Investment Law, 9 AFR. J. INT'L ECON. L. 1, 15–30 (2022)

Contracting Parties in the field of health, safety and environment," and emphasise the importance of cooperative labour-management relations. The Kazakhstan-Singapore BIT echoes this orientation, aiming to create "favourable conditions" for investment on the basis of equality and mutual benefit and incorporating balance-of-payments and other exceptions, while providing detailed ISDS mechanisms that include consent to arbitration before domestic courts, ICSID, UNCITRAL and other fora for alleged breaches of the treaty. At the same time, both treaties retain standard FET and expropriation clauses, including protection against "measures having effect equivalent to expropriation," without giving host states explicit carve-outs for regulatory change in sensitive sectors or imposing concrete, enforceable obligations on investors to respect human rights or environmental norms. In Sornarajah's terms, this mix of broad protection standards and investor-controlled access to several arbitral fora has a stabilising effect on the status quo. Efforts by Kazakhstan to adjust fiscal terms, enforce stricter environmental rules (as in the Kashagan fines), or respond to climate commitments can easily be reframed as alleged breaches of FET or indirect expropriation, while the CSR style and non lowering of standards clauses do not carry comparable legal weight.

The Botswana-Germany BIT (2000) is an old generation treaty, and it makes the asymmetry very visible. It grants investors national treatment and most-favoured-nation treatment (MFN), protection against expropriation and "measures tantamount to expropriation," free transfer of capital, and access to ISDS, but it does not include any explicit environmental, human rights or labour clauses, nor carve outs that affirm a right to regulate for public welfare objectives. The expropriation article requires that any taking be for a public purpose and that it be accompanied by "prompt, adequate and effective" compensation equal to the value of the investment immediately before the measure became public, with disputes over legality and compensation subject to review by "due process of law." In the absence of countervailing investor obligations or clear public welfare exceptions, and given existing arbitral practice on indirect expropriation, this drafting makes regulatory measures that significantly affect foreign owned mining projects, for example changes in royalty rates, stricter environmental standards or restrictions linked to indigenous land claims, potentially vulnerable to challenge as expropriatory. Gathii's analysis of African states' engagement with investment treaties emphasises that such older agreements continue to channel legal and economic power towards capital exporting states and their investors, even where regional

instruments such as the SADC Investment Protocol or the AfCFTA Investment Protocol articulate more balanced visions of sustainable development.

Across the four BITs, the pattern is consistent. Newer agreements such as Canada-Mongolia, Japan-Kazakhstan and Kazakhstan-Singapore now acknowledge, mostly in preambles or general clauses, that investment should not be promoted by weakening health, safety, environmental or labour standards and that CSR and sustainable development are relevant. However, they leave the core protections for investors such as FET, broad expropriation language and ISDS, essentially unchanged, and they rarely include stabilisation provisions that clearly reserve a wide, non-compensable regulatory space for host states beyond narrow public order exceptions. The Botswana-Germany BIT illustrates what remains the dominant model in many African and Central Asian treaty networks: strong investor protections without investor obligations and without explicit recognition of host state duties to regulate in the public interest. In line with the critiques, this design helps explain why the rise of home state due diligence and reporting regimes has not produced a fundamental shift in legal power. For investors operating in Mongolia, Kazakhstan and Botswana, BITs and ISDS still offer solid tools to resist regulatory change, while affected communities, even when they can invoke extraterritorial frameworks, remain structurally disadvantaged in a legal order that treats their claims as, at best, derivative of state to state or investor-state obligations.

**(iii) Implications of disputes in host states**

The three episodes discussed in Section 2.3.3 of this thesis, Khan Resources v. Mongolia, the Kashagan environmental fines and ensuing arbitration, and the Central Kalahari conflict in Botswana, give concrete form to the structural dynamics highlighted by TWAIL critiques of investment law and home state regulation. In each example, state authorities confronted the distributive and ecological consequences of extractive projects that are central to their development strategies and, in different ways, tried to reassert control, adjust investor obligations or respond to domestic political pressure. In Khan Resource and Kashagan, these attempts quickly became framed as treaty based violations such as unlawful expropriation, breach of fair and equitable treatment, interference with stabilised contractual arrangements, and were moved into arbitral fora whose legal focus and remedial tools are well designed to protect investors' economic interests but ill-suited to address social and environmental harm. In the Central Kalahari, by contrast, the conflict unfolded mainly in domestic courts and administrative processes, yet the basic pattern was similar: the central state retained control

over decisions on mining and conservation, while San communities bore the costs of relocation and reduced access to land and water.

Scholarship has long identified arbitral practice on expropriation and fair and equitable treatment as a key channel through which investment law disciplines host state regulation, especially in the Global South. In Khan Resources, the tribunal's decision to characterise Mongolia's abrupt licence cancellation as unlawful expropriation, and to value the investment by reference to a previous takeover bid, turned a contested attempt at resource nationalism into a compensable wrong, while the distributional and environmental dimensions of uranium extraction remained marginal to the reasoning. The Kashagan dispute, even at this early stage, points in a similar direction: a very large environmental fine imposed on a flagship project is rapidly reframed by investors as a possible treaty breach, forcing Kazakhstan to defend its enforcement action not only at home but also before an international tribunal whose jurisprudence on proportionality and "legitimate expectations" gives wide scope to scrutinise regulatory choices. In both cases, host state fiscal dependence, the centrality of extractive projects and the availability of ISDS combine to generate a "reasonableness" benchmark attuned more to the sensitivities of capital than to the perspectives of affected communities.

From a TWAIL standpoint, the Central Kalahari conflict shows that similar accountability gaps can arise even without a formal ISDS, when global extractive value chains intersect with domestic governance arrangements. Botswana's courts recognised certain procedural and property rights for San communities, but the wider legal and policy framework still treated their access to land and water as contingent on state priorities in conservation and mineral exploitation. This mirrors observation that local communities in transnational business and human rights disputes are often treated mainly as sources of facts and evidence about harm, while the deeper questions of how authority is allocated, and whose interests are structurally prioritised, remain largely shielded from challenge.[703] Across all three episodes, communities most directly affected by extraction depend on host state institutions and, at best, indirect leverage through home state norms and soft law standards, whereas investors have direct access to powerful adjudicatory venues and, increasingly, can invoke home state due diligence and CSR language as proof of compliance rather than as sources of binding obligations.

[703] Sara L. Seck, Home State Responsibility and Local Communities: The Case of Global Mining, 11 Yale Hum. Rts. & Dev. L.J. 177 (2008).

Taken together, these three episodes support Hypotheses A and B. They show, first, that host state capacity and dependence on foreign investment shape how international norms are taken up and enforced in practice; and second, that the investment regime and new home state measures work largely to stabilise investor protections, while leaving accountability for local harms fragmented, conditional and often incomplete.

### 3.3.3. Reform Without Change: Legal and Epistemic Inequalities?

While extraterritorial laws have emerged as a regulatory response to corporate impunity, they continue to operate within a legal architecture that privileges home state power. These laws allow home states to assert normative authority abroad, while protecting their own investors from reciprocal obligations through BITs and ISDS. As Perrone[704] observes, this dual regime produces a legal order in which home state sovereignty is expansive and extraterritorial, while host state regulatory efforts, particularly those aimed at redistribution or environmental justice face procedural, financial, and political constraints. Host states are often structurally limited in their capacity to enforce accountability due to reliance on a single export sector, donor dependence, and fears of investor retaliation under ISDS claims. This produces a form of rule without rights, where corporations exercise regulatory-like authority without binding duties of reparation or participatory accountability.

This legal asymmetry is compounded by epistemic hierarchies that shape what counts as legitimate law and knowledge. Pahuja's[705] concept of the "juridical monopoly" reveals how international law continues to privilege Euro-American norms such as “rule of law,” “sustainable development,” and “rational governance” while sidelining non-Western legal orders and practices. Escobar[706] and Gathii[707] critique how these frameworks universalize development and compliance logics, obscuring situated knowledge and disqualifying alternative pathways to justice. As Bartley[708] and TWAIL scholars[709] note, these forms of governance embed asymmetries in both participation and enforcement. While companies can

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[704] Nicolás M. Perrone, Foreign Investment Law: A TWAIL View, in *TWAIL Handbook* (Tony Anghie, Michael Fakhri, Vasuki Nesiah, Karin Mickelson & B.S. Chimni eds., Edward Elgar forthcoming).,2023.
[705] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge Univ. Press 2011).
[706] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* 6, 12-13 (Princeton Univ. Press 1995).
[707] James Thuo Gathii, TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography, 3 *Trade L. & Dev.* 26 (2011).
[708] Tim Bartley, *Rules Without Rights* (Oxford Univ. Press 2018).
[709] *The Third World and International Order: Law, Politics and Globalization* (Antony Anghie, Bhupinder Chimni, Karin Mickelson & Obiora Okafor eds., Martinus Nijhoff Publ’rs 2003).

use private standards to demonstrate compliance, affected communities often lack access to the rule-making process, grievance mechanisms, or remedial avenues.

International law not only privileges certain norms but also applies them selectively. Perrone[710] illustrates the selective deployment of legal standards by Global North actors: during decolonization, they rejected arbitration for themselves but insisted on it when Global South countries nationalized foreign assets. Gathii[711] critiques this asymmetry, noting how Global North states export their legal standards while Global South approaches are marginalized as parochial or corrupt. He highlights the dominance of Western legal traditions in shaping "global" jurisprudence and knowledge production. Amin's[712] structural analysis shows how international economic law reinforces legal subordination by protecting Northern capital while undermining Global South regulatory autonomy. Similarly, Mutua[713] critiques human rights law's Eurocentric bias, portraying Western legal traditions as universal while casting Global South systems as inferior. Chimni[714] argues that the global legal order selectively enforces rules, holding Global South actors accountable while granting Northern states flexibility, including in WTO and ICC frameworks. Anghie[715] also criticizes this selective application of international law, noting how it disciplines Global South states while exempting Northern actors from equivalent obligations. Furthermore, Giuliani[716] points out that investor rights in arbitration frequently override human rights protections, even when such clauses exist in treaties.

Beyond states, MNEs enforce home country values globally through private compliance mechanisms. As Bartley[717] notes, MNEs enforce home country values globally through private compliance mechanisms, marginalizing local norms and creating regimes "without rights". Cutler[718] explains that TNCs hold enormous de facto power while enjoying de jure

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[710] Nicolás M. Perrone, Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment, 7 *Bus. & Hum. Rts. J.* 375 (2022).
[711] James Thuo Gathii, TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography, 3 *Trade L. & Dev.* 26 (2011).
[712] Samir Amin, *Unequal Development: An Essay on the Social Formations of Peripheral Capitalism* (Brian Pearce trans., The Harvester Press Ltd. 1976) (originally published as *Le Développement inégal*, Les Éditions de Minuit 1973).
[713] Makau Mutua, Savages, Victims, and Saviors: The Metaphor of Human Rights, 42 *Harv. Int'l L.J.* 201 (2001).
[714] B.S. Chimni, International Institutions Today: An Imperial Global State in the Making, 15 *Eur. J. Int'l L.* 1, 2-6 (2004). B.S. Chimni, Third World Approaches to International Law: A Manifesto, 8 *Int'l Comm. L. Rev.* 3 (2006).
[715] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 213–16 (Cambridge Univ. Press 2005).
[716] Elisa Giuliani, *Business and Human Rights, History, Law and Policy: Bridging the Accountability Gap* (Book Review), 2 *Bus. & Hum. Rts. J.* 379, 379–80 (2017).
[717] Tim Bartley, *Rules Without Rights* (Oxford Univ. Press 2018).
[718] A. Claire Cutler, Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy, 27 *Rev. Int'l Stud.* 133 (2001).

invisibility under international law, making them unaccountable yet norm-setting entities. Eslava and Pahuja[719] show how host states were made scapegoats for development failures.

Even within the UN system, efforts to formalize corporate human rights duties have reproduced these hierarchies. As Chimni[720] and Mutua[721] argue, the SRSG's "Protect, Respect and Remedy" framework reinforced legal pluralism for corporations (via voluntary responsibility) while treating Global South states as potential sites of failure requiring external discipline. López[722] observes that the SRSG's reliance on "social expectations" instead of legal obligations entrenches soft law for corporations but hard law for host states. Bilchitz[723] criticizes the UNGPs for reinforcing corporate flexibility while limiting host state sovereignty.

These critiques show that extraterritorial regulations promise reform but fail to deliver structural transformation. International law continues to reproduce structural inequality where reform becomes without change.

### 3.4. Conclusion

This chapter has demonstrated that the rise of extraterritorial regulations, while often celebrated as progressive steps toward global corporate accountability, must be situated within longer histories of legal and economic domination. Investment treaties and ISDS tribunals continue to insulate investor rights from meaningful regulation while limiting the developmental autonomy of host states. Even where reforms are introduced, such as in the EU's withdrawal from the Energy Charter Treaty or the emergence of due diligence laws, the underlying question remains whether such measures redistribute power or simply repackage existing hierarchies in a different way.

A critical finding is that affected communities and host states are consistently excluded from both the design and implementation of these extraterritorial initiatives. Consultation processes surrounding frameworks like the EU CSDDD and CSRD illustrate this gap: despite

[719] Luis Eslava & Sundhya Pahuja, The State and International Law: A Reading from the Global South, *Humanity: An Int'l J. Hum. Rts., Humanitarianism & Dev.* (forthcoming), https://ssrn.com/abstract=3161211.
[720] B.S. Chimni, International Institutions Today: An Imperial Global State in the Making, 15 *Eur. J. Int'l L.* 1, 4-5, 22-23, 25-27, 26-28 (2004).
[721] Makau Mutua, *Human Rights: A Political and Cultural Critique* (Univ. of Pa. Press 2002).
[722] Carlos López, The 'Ruggie Process': From Legal Obligations to Corporate Social Responsibility?, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 58 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).
[723] David Bilchitz, A Chasm Between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles, in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 107 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013).

their global reach, participation remains largely confined to home state institutions and stakeholders. This absence undermines procedural justice, leaving communities caught between weak domestic remedies and distant foreign regulatory systems in which they have little say. As we seen above, there are numerous discussions among the TWAIL and postcolonial scholars that emphasize this is not a matter of technical oversight but reflects entrenched epistemic hierarchies whereby Northern concepts of legality, sustainability, and accountability are universalized without any input from South countries even though they are impacted.

At the same time, soft-law instruments such as the UNGPs have reinforced these imbalances by shifting attention to host state "failures" while leaving corporate responsibility largely voluntary. The due diligence regimes are centered on protecting companies from reputational risk, further distances these frameworks from the lived realities of rightsholders. This "accountability without reparation" is evident in landmark cases such as Chevron in Ecuador, Shell in Nigeria, and TotalEnergies cases where affected communities remain trapped in prolonged struggles for remedy despite the existence of global standards.

For these reasons, the chapter concludes that extraterritorial corporate accountability frameworks will remain structurally limited unless they incorporate the interests of host states and the voices of those most affected. This requires moving beyond procedural box-ticking and risk-management approaches and views toward mechanisms that genuinely redistribute power in the transnational legal order by increasing the participation of the local communities. Reorienting accountability from corporate protection to community-centered justice entails recognizing the agency of host states and affected peoples, not as passive recipients of these norms but as co-authors of global standards.

## OVERALL FINDINGS AND CONCLUSION

This thesis examined how foreign investor (corporate) accountability is shaped in resource rich countries through the interaction of state capacity, foreign investment dependence, and the evolving reach of extraterritorial laws. It sets out to address three core issues: (i) divergent sustainable development pillar priorities shaping accountability; (ii) state capacity under FDI dependence; (iii) extraterritorial regulation and global asymmetry.

Taken together, the three chapters demonstrate that issues in foreign investor (corporate) accountability are not incidental or purely domestic governance failures; they are structurally produced at the intersection of weak or constrained host state capacity, economic dependence on extractives, and an international legal order that continues to privilege foreign investor interests.

To examine how these structural dynamics were analyzed throughout the thesis, the research used multi-method comparative design that integrated doctrinal legal analysis, qualitative policy evaluation, quantitative governance indicators, and critical legal theory to trace how corporate accountability is shaped across domestic and transnational regulatory schemes. It began with a comparative qualitative analysis of national legal and policy frameworks in host and home states, using content analysis of primary legal instruments and strategic documents to determine how each state prioritizes the economic, social, and environmental pillars of sustainable development. It then applied a most different case logic for comparative case study of Mongolia, Botswana and Kazakhstan, combining legal and institutional assessment with governance metrics to evaluate how institutional capacity, economic dependence, and enforcement performance intersect to constrain regulatory effectiveness. Lastly, the research conducted a doctrinal and comparative analysis of EU (France), the UK, Canada, China's (home states) due diligence and reporting laws, supplemented by parliamentary debates, implementation reports, and NGO assessments, and interpreted through a TWAIL critical lens to uncover how these emerging frameworks may reinforce or challenge existing global power asymmetries. Together, this multi-layered methodological approach enabled a comprehensive analysis of how law, institutional strength, economic structures, and global governance mechanisms collectively determine the persistent gaps in foreign investor accountability.

**Chapter I** showed that host and home states do not share a common, neutral understanding of sustainable development. Mongolia, Kazakhstan, and Botswana all struggle to balance competing interests because their economies lean heavily on extractive industries that attract

massive foreign investment while generating human rights and environmental harms. Their legal frameworks normally protect communities and ecosystems, but enforcement collapses. Mongolia guarantees environmental rights and mandates EIAs, EMPs, and rehabilitation obligations, yet local communities like nomadic herders are sidelined and foreign invested mines continue degrading land and livelihoods with little accountability. Kazakhstan's Environmental Code promotes community engagement and polluter pays principle, but loopholes and selective enforcement let companies dodge meaningful oversight, leaving toxic waste, labor abuses, and rights violations unaddressed. Botswana's diamond dependent economy shows the same where regulations exist but lack enforcement, there is no mandatory human rights due diligence, and affected communities remain exposed to harm from foreign invested mining operations.

These countries show the language of sustainability, human rights, and environmental protection, but their commitment evaporates when it collides with extractive sector profits. Implementation is inconsistent, vulnerable groups are not meaningfully included in decision making, and foreign invested projects routinely cause environmental degradation and human rights violations. Despite the appearance of balance in their legal frameworks, economic growth is consistently prioritized over social and environmental safeguards.

Meanwhile, the home states - EU (France), the UK, China and Canada - present elaborative legal architectures that formally integrate environmental protection, human rights, and corporate responsibility into their domestic and international frameworks. The EU's CSDDD imposes mandatory due diligence across supply chains, and several EU BITs incorporate sustainability obligations. France's Duty of Vigilance law requires companies to address human rights and environmental risks, but the enforcement and access to justice remain weak. The UK embeds rights and environmental duties into legislation but relies heavily on voluntary compliance, while older BITs with Mongolia and Kazakhstan lack meaningful rights or environmental standards. China's evolving framework includes constitutional guarantees, environmental laws, and voluntary guidelines for outbound investment, yet projects continue causing environmental damage and rights abuses due to uneven enforcement and the absence of binding due diligence. Canada promotes responsible business conduct through CORE and transparency legislation, but investment treaties still prioritize economic interests and mandatory due diligence remain absent.

The reality behind these frameworks are less flattering. Although the EU and France project strong commitments to sustainability, the UK aims for a balanced approach leaned toward economic interests, China is slowly integrating social and environmental considerations, and Canada emphasize justice and environmental protection while protecting its investment priorities, none of these states prevent their companies from contributing to human rights violations and environmental harm abroad. In practice, foreign investors from these jurisdictions continue to play a role in abuses occurring in Mongolia, Kazakhstan, and Botswana. This underscores that "home" and "host" are not simply opposites in a linear accountability chain, but interdependent sites within a legal and economic architecture that enables corporations to externalise risks and harms across borders.

The three pillars are not genuinely balanced: neither host states nor home states fully balances the three pillars in practice, instead, each prioritizes economic interests in different ways. Host states face strong economic pressures and the constant risk that investors might withdraw which puts more focus on the economic pillar, while home states continue to hold the main regulatory and economic power which may be trying to balance the focus with environmental and social pillars, but it remains limited in host states where the impacts of their companies are occurring.

**Chapter II** tested Hypothesis A (that weak state and institutional capacity in host states leads to failures in regulating corporate misconduct) and Hypothesis B (that where economic interests are prioritized due to dependence on FDI and extractive industries, human rights and environmental protections suffer). For Hypothesis A, it used six indicators: corruption, judicial independence, rule of law, regulatory quality, overall governance performance, and electoral democracy. These are used to assess state and institutional capacity in regulating corporate misconduct are tightly interlinked: corruption undermines judicial independence, weakens the rule of law, and ultimately sabotages regulatory enforcement. When corruption is high, government institutions lose the ability to constrain corporate operations, allowing private interests to overpower public welfare.

This general pattern becomes clearer when comparing performance across the three case study countries. Botswana consistently outperforms the global average on corruption indicators, suggesting stronger institutional resilience and a greater likelihood of protecting environmental and human rights. In contrast, Mongolia and Kazakhstan sit below global averages, revealing vulnerabilities that decrease their capacity to regulate corporations.

Judicial independence and rule of law measures reinforce this pattern. Botswana scores far above global averages across different indicators showing a judiciary capable of enforcing laws and offering genuine legal remedies in cases of environmental harm or rights abuses. Mongolia performs around or slightly above global averages, suggesting moderate institutional ability. Kazakhstan, however, falls consistently below the benchmarks, exposing deep structural weaknesses in its judiciary and rule of law. These deficiencies translate into weaker protection of the environment and human rights standards. Regulatory quality shows similar patterns. Botswana again exceeds global averages, while Mongolia consistently falls below them. Kazakhstan displays mixed performance, around or below global benchmarks depending on the indicator. Weak or inconsistent regulatory frameworks create loopholes that corporations can easily exploit, particularly in sectors like mining where environmental and human rights impacts are more severe. Although overall governance scores place Botswana well above global averages, Mongolia moderately above, and Kazakhstan only slightly above, Kazakhstan's governance rating is offset by major weaknesses in corruption, judicial independence, and rule of law. These weaknesses directly constrain their ability to design, enforce, and defend stringent regulations against powerful foreign investors, who can ignore or tick box consultation requirements, EIAs/EMPs, and liability. Taken together, these findings show that Botswana possesses comparatively strong institutional capacity, Mongolia faces partial but significant challenges, and Kazakhstan is operating from a critical deficit in regulating corporate misconduct.

It is worth noting that Botswana presents an important nuance. Despite Botswana having comparatively high state and institutional capacity, problems persist: forced displacement of Indigenous communities, labour rights abuses, and ongoing environmental harm in mining areas. While human rights and environmental violations are less frequent than in the other two countries, this does not mean that higher state capacity eliminates such harms. Rather, Botswana illustrates that strong institutions, although a necessary condition for effective regulation, are not sufficient where economic dependence on a single commodity like diamonds and FDI remains extreme, and where there is limited political will to impose binding constraints on foreign investors. In other words, strong formal institutions alone do not guarantee strong environmental or human rights violations. Institutional capacity must be assessed alongside economic dependency, real world enforcement, and how effectively international human rights norms are integrated into domestic regulatory practice. These structural indicators only tell part of the story.

This insight directly connects to the findings under Hypothesis B. It shows that Mongolia, Kazakhstan, and Botswana remain heavily reliant on foreign direct investment and extractive industries, shaping national priorities that privilege economic growth over corporate accountability. Legislative frameworks may exist, but mandatory corporate responsibility measures, especially those targeting foreign investors are largely absent. Given their economic dependence on mining, none of these countries are structurally incentivized to adopt or enforce stringent regulations that would hold foreign corporations accountable for environmental and human rights violations.

The economic prioritization is reinforced by the structure of international investment law. International norms on corporate accountability, human rights, and environmental protections, while increasingly articulated through treaties, investment agreements, and soft law initiatives, remain largely ineffective at domestic level due to historical power imbalances in international investment law. Despite broad ratification of international human rights law and environmental treaties, these commitments have not translated into meaningful enforcement. Most bilateral investment treaties binding these states are old generation agreements that prioritize investor protection and rely on voluntary corporate social responsibility clauses rather than mandatory obligations. International soft law instruments have further reinforced this voluntary model, allowing investors to self-regulate while limiting host states regulatory space.

The empirical analysis reveals systemic enforcement failures across all three states, despite differences in institutional capacity. Weak implementation, superficial community consultations, inadequate oversight, and gaps within legal frameworks allow companies to bypass regulations. The polluter pays principle, though present in each country's law, is not effectively applied, enabling businesses to externalize environmental harm without meaningful consequences. Mongolia and Kazakhstan's structural issues with corruption, judiciary limitations, and weak rule of law exacerbate these failures. Botswana, despite stronger institutions, still falls short in enforcing accountability in the diamond sector, where abuses such as displacement of Indigenous communities have been documented.

Crucially, these cases show that international norm diffusion is neither automatic nor neutral. It is filtered through domestic political priorities, institutional weaknesses, and fears of losing investment. As a result, enforcement gaps persist, corporate abuses continue, and international arbitration mechanisms frequently undermine domestic accountability efforts.

Even recent reform initiatives at the multilateral and regional levels, while normatively promising, have not yet to overcome entrenched structural asymmetries or deliver binding investor responsibility.

On this basis, Chapter II concludes that both Hypothesis A and Hypothesis B are confirmed. Weak or constrained state and institutional capacity amplifies the difficulty of regulating corporate misconduct, and heavy dependence on FDI and extractive industries pushes host states to prioritize economic gains over social and environmental protections. Even when host states ratify international environmental and human rights treaties and transpose them into national law, implementation is frequently undermined by institutional weakness, economic dependency, political will to protect investment flows, and legal instruments especially BITs that leave virtually no space for investor responsibility. In other words, the problem is not simply a lack of norms or inadequate implementation, but a structural misalignment between economic priorities, institutional capacity, and enforcement practice.

**Chapter III** then shifted the focus to home state responses and the rise of extraterritorial regulations such as mandatory due diligence laws, sustainability reporting obligations, modern slavery acts, RBC strategies, and related policy instruments of home states. When seen in light of the history described by TWAIL and postcolonial scholars, these measures look much less transformative than it is claimed to be. The deep historical continuities between colonial extraction and modern investment law reveal how the very foundations of today's regulatory systems remain rooted in colonial logic. The diffusion of western legal norms into the third countries continues to be framed as the remedy for supposedly deficient legal systems, displacing non-western traditions while facilitating access to resources. Colonial doctrines like terra nullius, together with the political theories, established the ideological basis for reconfiguring land and labour service of capital which is an influence that persists in the structure of contemporary international investment law.

The evolution of international investment law directly reflects this colonial inheritance. Early concession agreements stripped regulatory authority from colonized territories and empowered foreign investors, laying the foundation for a regime that continues to elevate investor rights above host state sovereignty. Even when postcolonial states attempted to reclaim control through different regulatory tools, these efforts were dismissed as non-binding, leaving third countries trapped within legal structures designed to prioritize external capital. ISDS mechanisms, rooted in colonial arbitration practices, privatize dispute

resolution and systematically exclude communities and domestic institutions. Modern tribunals usually protect investor rights even when states regulate to safeguard human rights or the environment, while ADR mechanisms further entrench corporate influence by shifting adjudication from public courts to private panels. Different cases show how multinational corporations deploy transnational arbitration to avoid accountability.

Extraterritorial regulations are layered on top of this existing imbalance. The analysis of instruments such as the EU CSDDD and CSRD, France's Duty of Vigilance Law and NAP, UK measures, Canadian RBC strategies and Modern Slavery Act, and Chinese guidelines revealed several recurring features. First, they impose extraterritorial obligations on corporations but exclude host states and affected communities from the design of the standards imposed on them. These frameworks operate through managerial, risk-based logic centered on protecting companies from liability rather than preventing harm to rights holders. They are designed in home state institutions, with limited or no meaningful participation from host governments or affected communities in the host states mostly in the Global South, either at the rule making stage or in implementation and enforcement. Consultation processes remain overwhelmingly symbolic, and the lived experiences of workers, indigenous communities, and local residents are rarely incorporated into these processes. Communities harmed by corporations frequently find themselves trapped between ineffective domestic remedies and distant foreign mechanisms over which they have little influence. Even when due diligence frameworks promise positive outcomes, these should depend entirely on strong enforcement and genuine stakeholder participation. Second, they often leave the core structures of the global economy such as ISDS, old-generation BITs, and the underlying distribution of authority and voice in international law untouched so that the reform takes place without any real shift in power.

Chapter III therefore argues that many extraterritorial initiatives generate accountability without reparation and reform without change: rules are predominantly designed in home state institutions; host states and affected communities are rarely meaningful co-authors; and implementation can displace or overshadow domestic legal orders rather than reinforcing them and putting more pressure on companies. These frameworks risk producing global governance from above: accountability that is managed, monitored (if any), and framed in the home states mostly in the Global North, while those most affected remain at the margins of norm creation, monitoring, and remedy.

Bringing these strands together, the thesis claims that the corporate accountability gaps in Mongolia, Kazakhstan, and Botswana are not just the result of weak governance at the domestic level. It argues that divergent interpretations of sustainable development, weak regulatory capacities and economic independence between host and home states entrench the lack of corporate accountability in the developing countries, despite the rise of extraterritorial due diligence regimes. They are the product of a global legal-economic order that structurally constrains host state capacity, incentivizes the prioritization of extractive led growth, and re-centralizes regulatory authority in home states which continue to marginalize affected communities.[724]

**In light of the above, this thesis suggests the following:**

- Rethinking the approach to global governance

First, global governance cannot be reduced to home states "fixing" their companies' accountability from afar. A different starting point is to treat host states, home states, affected communities, and international organisations as co-producers of norms and enforcement mechanisms. That implies abandoning the issue that governance is either purely "domestic" (host state regulation) or purely "external" (home state due diligence laws), and instead designing shared governance regimes that deliberately distribute roles and responsibilities.

Second, the thesis suggests that we need to reconceptualise responsibilities using a common but differentiated responsibility (CBDR) logic, adapted to the home and host state context, and to corporate accountability. As for the common responsibility, both home and host states share an obligation to ensure that economic activity, especially in extractive sectors, is consistent with human rights and environmental protection. Corporate accountability is not an optional addition and it is part of what sustainable development actually means. However, from differentiated responsibility, the scope and strength of states' obligations should reflect their capacity, the benefits they have gained from the existing system, and their position in the global economy. Home states, especially capital exporting states that have historically profited from extractive industries should carry heavier duties. These include strong and enforceable due diligence laws, guaranteed participation and meaningful consultation before

[724] While these conclusions are robust, it is important to acknowledge the limitations of this project. Its scope is restricted to three host states and a selected group of home states and regulatory instruments. It relies heavily on secondary data and international indices that may themselves carry methodological biases; and it does not empirically follow individual cases through litigation or administrative processes over time. Future research could broaden the comparative range of host states, integrate more extensive engagement with affected communities, and trace how specific companies navigate the interplay between host state law, home state extraterritorial regulations, and investment treaty obligations in practice.

and after its adoption, access to their courts for affected communities, financial and technical support to strengthen host state regulators, and bringing their trade and investment policies on third countries into line with these standards. By contrast, host states, which are expected to pursue economic development and improve governance while remaining economically dependent on foreign capital, need flexibility and policy space. They should not be overloaded with obligations that exceed their financial, political, or institutional capacity, nor should they be penalised through investment withdrawal when they try to introduce stricter regulations.

- Towards true collaboration in governance

First, establish joint home and host state oversight bodies for major projects or sectors like mining, with equal representation from host and home governments, affected communities, and relevant international organizations.

Second, international organizations should not only advise host states but provide platforms where host states and affected communities can shape standards. These platforms are essential to establish monitoring and standard setting negotiations and groups. Moreover, project level and sector level governance should institutionalise ongoing, not one-off, participation: elected community councils, independent grievance mechanisms with decision-making power, and mandatory disclosure and consultation cycles. Multilateral and joint mechanisms can redistribute agenda-setting power.

- Aligning sustainability as a genuine driving force

Sustainability should not be reduced to ESG metrics designed in home state financial centres without any consequences other than not continuation of investment. Instead, it should function as a substantive constraint on investment: projects that threaten core environmental thresholds or fundamental rights should not proceed, regardless of their profitability. Host states should be supported financially and technically to design local sustainability indicators that reflect their own development and environmental priorities, rather than importing generic global benchmarks. If sustainability is treated as the driving force of governance, not just a branding exercise, then economic, social, and environmental objectives must be negotiated together, with explicit recognition that host states have legitimate development needs and limited capacities, and that home states must bear a disproportionate share in this matter.

- Rewriting the international investment law

ISDS and old generation BITs must be reformed or replaced to remove structural disincentives for host states to regulate. That includes incorporating direct foreign investor obligations and counterclaims for human rights and environmental harm. No company should enjoy the benefits of investment protection treaties without being subject to corresponding human rights and environmental obligations enforceable by affected communities. This can be done through either reforming investment treaties or extraterritorial regulations.

- From symbolic to material accountability

If home states take on stricter duties including due diligence, funding, enforcement, and remedy, while host states gain greater policy support and pursuit of economic development, accountability can become less dependent on the narrow capacity of host state or their dependency on one sector, and more anchored in explicit obligations.

Ultimately, this thesis shows that foreign investor (corporate) accountability failures in Mongolia, Kazakhstan, and Botswana are not exceptions, implementation gaps, or transitional issues. They are the predictable outcome of a global legal and economic system that distributes power asymmetrically while distributing responsibility downward. Host states are expected to regulate powerful foreign investors despite constrained institutional capacity, economic dependence, and legal regimes that hinders effective regulation, while home states retain control over capital, norm-setting, and enforcement but externalize the harms of their corporations activities in third countries. Extraterritorial due diligence regimes, while progressive, do not resolve this contradiction as long as they leave intact the investment law structures, arbitration mechanisms, and extractive growth imperatives that systematically undermine host state regulatory autonomy and marginalize affected communities. As long as accountability is designed around managing corporate risk rather than preventing harm, it will continue to operate symbolically rather than materially.

A shift toward meaningful corporate accountability in host states therefore requires more than new laws or additional reporting obligations; it requires a redistribution of regulatory power, voice, and responsibility across the global economy. Accountability must be grounded in binding investor obligations, shared responsibility between home and host states, and institutionalized participation of affected communities at every stage of law and policy making, investment decision-making, monitoring, and remedy. Without this, sustainability

will remain a rhetorical commitment subordinated to extractive profits, and corporate accountability will continue to be performed rather than enforced.

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