7-2024

Building responsible and sustainable supply chain frameworks: Limits of international investment law and the CSR initiatives taken by the EU and China

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Stefanie Schacherer, 'Building Responsible and Sustainable Supply Chain Frameworks: Limits of International Investment Law and the CSR Initiatives Taken by the EU and China' (2024) 32 Asia Pacific Law Review, 347-369

Building Responsible and Sustainable Supply Chain Frameworks: Limits of International Investment Law and the CSR Initiatives Taken by the EU and China

Stefanie Schacherer*

Abstract

Supply chains play a pivotal role in global economic relations, fostering growth, employment, and poverty alleviation. Multinational enterprises (MNEs) are central actors in these chains, bearing responsibilities towards workers and the environment. Corporate Social Responsibility (CSR) standards guide MNEs in assessing the societal and environmental impacts of their activities, though these standards remain largely voluntary. Recent investment treaty practice shows a trend to incorporate CSR provisions in international investment agreements (IIAs), but such clauses fail to impose direct human rights, labour and environmental obligations on investors. Amidst this landscape, the EU and China, major players in global trade and investment, have established diverging legal and policy frameworks to build responsible and sustainable supply chains. Considering these developments, the objectives of this article are twofold. First, the article explores the integration of CSR in international investment law. Second, it evaluates the different CSR initiatives taken by the EU and China that frame their foreign direct investments. Focusing on EU-China FDI relations, the article delineates implications for global supply chain governance offering insights into the evolving landscape of CSR frameworks, and the plagued path in adopting mandatory corporate responsibility standards.

Keywords

Belt and Road Initiative, China, corporate social responsibility (CSR), due diligence, environmental protection, ESG, European Union, global supply chains, human rights, sustainability.

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I. Introduction

Supply chains are an integral feature of international production, trade, and investment, and have contributed to economic growth, job creation and poverty reduction. This growth, however, has brought its own challenges. Working conditions in supply chains have often fallen short of international standards, and there has been a significant impact on the environment and global climate. Through supply chains, multinational enterprises (MNEs) are connected to millions of workers and communities around the world. Such connections are the basis of responsibilities to respect the rights of affected people and to mitigate the externalities caused to the environment and climate.

Standards of Corporate and Social Responsibility (CSR), Responsible Business Conduct (RBC) and Environmental, Social and Governance (ESG) have become important frameworks that ought to support MNEs in assessing the impact of their operations on society and the environment.[1] To date, numerous international standards on responsible and sustainable supply chain management exist. These international standards are mainly voluntary initiatives which refer to activities that are considered to exceed simple compliance with the law and have become integral parts of corporate management. International investment agreements (IIAs) are crucial for governing supply chains as they offer protection, legal certainty, and risk mitigation for foreign investors. In recent years, states have started incorporating sustainable development principles in IIAs with the aim to encourage responsible business conduct. While exceptions exist, these treaties do not go beyond the promotion of international best practices and do not impose direct investor obligations on matters of labour and human rights, environmental protection, and climate change mitigation.

[1] All these concepts await uniform definitions. On CSR see, Kate Miles, *The Origins of International Investment Law - Empire, Environment and the Safeguarding of Capital* (CUP 2013) 217. See also Jarrod Hepburn and V Kuuya, 'Corporate Social Responsibility and Investment Treaties', in: Cordonier Segger Marie-Claire, Markus W Gehring and Andrew P Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 592: 'a corporation is expected to attain its profit-making goals while also ensuring that it behaves like a good corporate citizen whose activities enhance the enjoyment of human and environmental rights and reflect positive business ethics'. On RBC, see OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct', <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm> accessed 10 February 2024. On ESG, see Elizabeth Pollman, 'The Making and Meaning of ESG', ECGI Working Paper Series, No. 659/2022.

The European Union (EU) and China are both among the biggest exporters and receivers of foreign direct investment (FDI) globally.[2] EU investments in China amounted to 10 billion USD, and Chinese investments in the EU amounted to 10.34 billion USD in 2022.[3] Responsible and sustainable investment and supply chains has become an increasingly important issue for China and the EU. Investments in low-carbon, sustainable and high-quality infrastructure are a focus of the Belt and Road Initiative (BRI). The EU, through its trade and investment policy, mainstreams sustainable development in all its trade and investment agreements.[4] The negotiations of the Comprehensive Agreement on Investment (CAI) have highlighted that the EU and China seek to strengthen responsible and sustainable business conduct in their bilateral relations since the final treaty text contained a comprehensive chapter on investment and sustainable development, which also provides for the promotion of CSR.[5] Yet the CAI proved short-lived. After seven years of negotiations, only five months passed between its political agreement in December 2020 and the European Parliament voting to freeze its ratification in May 2021. Given today's heightened geopolitical tensions, the agreement will most likely never enter into force.

With the demise of the CAI, however, the promotion of responsible and sustainable FDI in the bilateral relations of the EU and China falls back into the realm of national law and national policy frameworks. One acclaimed development in this area has been the EU's adoption of the Corporate Sustainability Due Diligence Directive (CS3D).[6] With this unilateral legislation, the European Commission has intended to strengthen responsible business conduct in global supply chains.

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[2] UNCTAD, *World Investment Report* (UN 2023) 6, 8. See also, European Commission, 'EU's position in world trade' <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-position-world-trade_en> accessed 15 February 2024.

[3] Ministry of Commerce of the People's Republic of China, National Bureau of Statistics and State Administration of Foreign Exchange, '2022 Statistical Bulletin of China's Outward Foreign Direct Investment' 15 <http://images.mofcom.gov.cn/hzs/202310/20231007152406593.pdf> accessed 1 February 2024. As reported, Chinese investment into BRI nations hit highest since 2018 as Chinese firms put 50 billion USD in foreign projects in 2023. See Bloomberg News <https://www.bloomberg.com/news/articles/2024-02-05/chinese-investment-into-bri-nations-hits-highest-since-2018> accessed 10 February 2024.

[4] Stefanie Schacherer, *Sustainable Development in EU Foreign Investment Law* (Brill 2021) 148-222.

[5] Lorenzo Cotula, 'EU–China Comprehensive Agreement on Investment: An Appraisal of Its Sustainable Development Section' (2021) 6 Business and Human Rights Journal 360, 363; See more generally, Julien Chaisse and Matthieu Burnay, 'Introduction – CAI's Contribution to International Investment Law: European, Chinese, and Global Perspectives' (2022) 23 JWIT 497.

[6] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 Brussels, 23.2.2022 COM(2022) 71 final 2022/0051(COD). A final draft was leaked by MP Axel Voss in February 2024, <https://www.linkedin.com/feed/update/urn:li:activity:7158052468679917568/> accessed 29 February 2024.

However, the CS3D has encountered significant headwinds during the final legislative procedure.[7] At the time of writing, a modified and 'watered-down' text was approved by the Council and awaits its final approval by the European Parliament.[8] Concurrently, the EU has successfully adopted several other legislations seeking to frame responsible and sustainable supply chains.[9] As for China, measures to promote CSR amongst its corporations operating abroad are taken through the adoption of more flexible frameworks consisting of general and sector-specific guidelines. All these developments on responsible supply chains raise new and old questions regarding the most effective legal instruments for fostering and strengthening CSR standards.

Against this backdrop, the present article seeks to grapple with two inter-related questions that are likely to assume greater significance in coming years. To what extent can and should international investment law integrate CSR commitments, including due diligence requirements for MNEs? And to what extent are unilateral CSR initiatives of the EU and China strengthening international frameworks for responsible and sustainable supply chains? The article examines these questions from a comparative international law perspective.[10] With the two research questions in mind, the comparison unfolds on two fronts: firstly, it examines the practices of the EU and China in integrating CSR obligations within their IIAs. Secondly, it scrutinizes the unilateral strategies of the EU and China in shaping CSR. While the article looks at the FDI relations between the EU and China, the analysis aims to offer broader findings on the limits of international investment treaties in fostering investors' responsibilities as well as on the impacts of unilateral state-led CSR initiatives.

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[7] The CS3D failed a first vote in the Council on 28 February 2024. <https://www.euronews.com/my-europe/2024/02/28/corporate-sustainability-rules-in-doubt-after-failing-secretive-national-vote> accessed 29 February 2024.

[8] The Council approved a modified version of the CS3D on 15 March 2024. See, Shearman & Sterling, 'Perspectives', 18 March 2024, <https://www.shearman.com/en/perspectives/2024/03/eu-council-waters-down-corporate-sustainability-due-diligence-directive--cs3d> accessed 22 March 2024.

[9] See Section IV. These EU legislations include: Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 Establishing a Carbon Border Adjustment Mechanism, OJ L 130 52 (hereafter CBAM Regulation); Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150 206 (hereafter Deforestation Regulation); Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting OJ L 322 15 (hereafter CSRD).

[10] Comparative international law focuses on similarities and differences between national and regional actors in their approach to international law. See, Anthea Roberts and others, *Comparative International Law* (OUP 2018) 4.

The remainder of the article is divided into four parts. First, the article revisits the rationale of CSR as well as the challenges of regulating and enforcing human rights and environmental obligations of MNEs (Section II). Second, the article critically assesses the ways in which recent IIA treaty drafting has sought to incorporate CSR standards while also highlighting the limits of international investment law and arbitration (Section III). Next, the article presents and contrasts the unilateral initiatives taken by the EU (Section IV) and China (Section V). The article concludes with an evaluation of the recent developments (Section VI).

II. Soft Law, Governance Gaps, and the Problem of the Missing Forum

International CSR frameworks and other existing international guidelines on responsible and sustainable business conduct are voluntary. In other words, they fall under the category of international soft law. The benefits of international CSR frameworks lie in their capacity to standardize business practices globally and therefore allow a certain level playing field. Often, they help MNEs to enhance their reputation, engage in risk mitigation and stakeholder consultations. However, these standards, despite their positive impacts, have not resulted in legal certainty for neither companies nor victims in cases of human rights violations or environmental degradations.

Standards pertaining to responsible and sustainable supply chains have been enshrined and elaborated in numerous international guidelines and soft law instruments. The OECD Guidelines for Multinational Enterprises (MNE Guidelines) has been among the first of this kind. Since 1976, with regular updates, the OECD has published a set of recommendations that are jointly addressed by governments to multinational enterprises. The MNE Guidelines provide principles and standards of good practice. The observance of the Guidelines by enterprises is not legally enforceable. Whereas the countries adhering to the Guidelines make a binding commitment to implement them, and, notably, to set up National Contact Points.[11] In this respect, the OECD Guidelines uniquely incorporate a neutral third-party review of MNEs' conduct adherence to the

[11] The National Contact Points (NCPs) are implemented in domestic legislation, but States dispose of flexibility concerning their precise organisational form. OECD, 'OECD Guidelines for Multinational Enterprises', annexed to 2000 OECD Declaration on International Investment and Multinational Enterprises, DAFFE/IME(2000)/20); (2001) 40 ILM 237 as amended, part A. 'An NCP may be a governmental unit, or an organisation consisting of government representatives, independent experts and representatives of business, worker organisations and other non-governmental organisations'.

guidelines. As regards their content, the MNE Guidelines encompass the stipulation that companies must respect international human rights and environmental standards, the latter of which was updated in 2023 to also include climate change standards.[12]

The UN Global Compact is another central CSR instrument at the international level that sets out ten key principles addressed to MNEs. These principles relate to human rights, labour, environment, and anti-corruption. The UN Global Compact is directly addressed at businesses, yet the framework lacks an enforcement mechanism. The only monitoring is ensured by the UN Global Compact secretariat, which compiles lists of companies and progress reports, illustrating the extent of their commitment in implementing the ten principles.[13] Currently, more than 20'000 companies are participating.[14]

Another important standard-setting instrument constitutes the UN Guiding Principles on Business and Human Rights.[15] They outline the responsibilities of states and businesses to respect, protect, and remedy human rights abuses in the context of corporate operations. They set out that enterprises should respect human rights, have responsibilities towards human rights and should implement policies in this respect, including conducting due diligence processes to identify, address and mitigate potential risks. The UNGPs state, corporations have a corporate responsibility to respect human rights. The UNGPs also prescribe human rights due diligence as an ongoing process for businesses. At the same time, this responsibility is not a legal norm. John Ruggie and John Sherman affirmed that 'the corporate responsibility to respect human rights under the Guiding Principles […] is neither based on nor analogizes from state-based law. It is rooted in a transnational social norm, not an international legal norm'.[16] This means that Pillar II was not intended to have legal enforceability; instead, it was envisioned to function as a norm beyond legal

[12] OECD, Ministerial Council Meeting, 'Declaration on International Investment and Multinational Enterprises' (2023) Annex 1.
[13] UN Global Compact, 'Guide to Corporate Sustainability', <https://www.unglobalcompact.org/docs/publications/UN_Global_Compact_Guide_to_Corporate_Sustainability.pdf> accessed 20 February 2024.
[14] UN Global Compact, Participants <https://unglobalcompact.org/what-is-gc/participants> accessed 10 February 2024.
[15] UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' [2011] A/HRC/17/31.
[16] John Gerard Ruggie and John F Sherman, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28 EJIL 921, 923.

constraints, coexisting alongside other legal norms.[17] The idea has been that MNEs will, on a voluntary basis, implement human rights and environmental due diligence.

Lastly, the Tripartite Declaration of Principles for Multinational Enterprises and Social Policy of the International Labour Organisation (ILO) figures on the list of key CSR instruments.[18] It provides guidance and good practices regarding socially oriented principles for multinational enterprises. This instrument is grounded on the principles contained in international labour conventions and recommendations, such as non-discrimination in employment, freedom of association, no child or forced labour or occupational health and safety.

These key instruments exist next to numerous sector and industry specific instruments.[19] The past years have also shown that a constantly growing number of MNEs has adopted CSR policies, and supply chain due diligence strategies as tools to pinpoint risks within production and distribution. MNEs have increasingly embraced due diligence processes, recognizing the potential for gaining a competitive edge.[20] This trend aligns with the mounting market expectations for companies to operate sustainably, allowing them to steer clear of undesirable reputational risks with consumers and investors who are increasingly attuned to sustainability considerations. At the same time, as this article argues, the panoply of international voluntary CSR frameworks bears disadvantages for companies and affected communities.

Firstly, companies contemplating the utilisation of CSR standards and due diligence commitments may encounter challenges. These difficulties may stem from factors such as the lack of legal clarity

[17] Surya Deva, 'The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface' BHRJ (2021) 6(2), 338.
[18] ILO, 'Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy' (1977 revised 2017).
[19] E.g., International Council on Mining and Metals (ICMM), 'ICMM Human Rights Due Diligence Guidance' (2023), <https://www.icmm.com/website/publications/pdfs/social-performance/2023/guidance_human-rights-due-diligence.pdf?cb=58439> Roundtable on Sustainable Palm Oil (RSPO), 'Principles and Criteria for the Production of Sustainable Palm Oil' (2018, revised 2020) <https://rspo.org/resources/?id=6025> Global Organic Textile Standard, 'GOTS Due Diligence Handbook for Certified Entities' (2023), <https://global-standard.org/images/resource-library/documents/GOTS_Due_Diligence_Handbook_for_Certified_Entities_10.pdf> OECD and Food and Agriculture Organization of the United Nations, 'OECD-FAO Guidance for Responsible Agricultural Supply Chains' (2021), <https://mneguidelines.oecd.org/How-the-OECD-FAO-Guidance-can-help-achieve-the-Sustainable-Development-Goals.pdf> all accessed 14 February 2024.
[20] E.g., Unilever, 'Human Rights Progress Report' (2021) <https://www.unilever.com/files/cefcd733-4f03-4cc3-b30a-a5bb5242d3c6/unilever-human-rights-progress-report-2021.pdf> Heineken, 'Respecting human rights', <https://www.theheinekencompany.com/our-company/respecting-human-rights>; Patagonia, 'California Transparency in Supply Chains Act of 2010 (SB 657) <https://www.patagonia.com/california-transparency-in-supply-chains-act-sb-657.html> all accessed 14 February 2024.

surrounding corporate due diligence obligations, i.e., which activities fall under these obligations. In other words, do these commitments include human rights, environmental protection, and climate change mitigation? And if so, what does this mean for the process of due diligence and stakeholder engagement? One company can never be sure of what and how another company implements sustainability standards, and hence, no level-playing field can be established, which would, in return, establish a level-playing fields and enhance fair competition among companies.[21] The intricacy of value chains, market pressures, information gaps, and associated costs for monitoring and implementation make it furthermore less appealing for MNEs to comprehensively engage in CSR strategies. Consequently, the advantages of CSR practices remain limited across companies and various economic sectors.

Secondly, voluntary international corporate standards, do not offer legal certainty for victims in the event of harm. The existence of these frameworks has not led to significant improvements across sectors.[22] Negative externalities, such as pollution, and other adverse impacts stemming from production and consumption are still observable.[23] Indeed, numerous MNEs have been implicated in detrimental human rights and environmental effects despite their implementation of CSR strategies.[24] Such adverse impacts encompass issues such as forced labour, child labour,

[21] OECD (n 12).

[22] See Caitlin Daniel and others, 'Remedy Remains Rare: An analysis of 15 years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct' (OECD Watch 2015). See also, Caitlin Daniel and others (eds), 'Glass half full? The State of Accountability in Development Finance', Centre for Research on Multinational Corporations (SOMO) 2016.

[23] The coal, oil, gas, cement, and flaring industries' CO_2 emissions saw an upward trend from 2010 to 2022 despite a dip in 2020 due to Covid-19. See Our World in Data, 'CO_2 emissions by fuel or industry, World' (2023) <https://ourworldindata.org/grapher/co2-emissions-by-fuel-line> accessed 15 February 2024. Deaths attributable to ambient air pollution and toxic chemical pollution (such as lead), 'which are the unintended consequences of industrialisation and urbanisation, have risen by 7% since 2015 and by over 66% since 2000.' See Richard Fuller and others, 'Pollution and Health: A Progress Update' (2022) 6 Lancet Planet Health 535, 547; See also, Anselm Schneider and Andreas Georg Scherer, 'State Governance Beyond the 'Shadow of Hierarchy': A Social Mechanisms Perspective on Governmental CSR Policies' (2019) Organisation Studies 1147, 1168: 'The potential profits accruing from CSR do not seem sufficient to motivate companies to address effectively externalities'.

[24] E.g., Royal Dutch Shell profess commitment to CSR since 2000 but practises non-compliance as the companies' activities in Nigeria highlight. In 2021, The Hague Court of Appeal found Shell liable for damage resulting from an oil spill near the Village of Oruma in Nigeria. See *Four Nigerian Farmers and Stitchting Milieudefensia v. Royal Dutch Shell plc* [2021] ECLI:NL:2021:132 (Oruma), [2021] ECLI:NL:2021:133 (Goi) and [2021] ECLI:NL:2021:134 (Ikot Ada Udo). Repsol commits to CSR programmes since 2007. See Emily Billo, 'Sovereignty and Subterranean Resources: An Institutional ethnography of Repsol's Corporate Social Responsibility Programs in Ecuador' (2015) 59 Geoforum 268, 270. In 2022, Repsol Peru B.V. (incorporated in the Netherlands) and its parent company Repsol S.A. (incorporated in Spain) was found responsible for an oil spill at their subsidiary (La Pampilla) in Peru. Repsol S.A. is now facing a $1 billion class action suit in Dutch courts. See Marcelo Rochabrun, 'Repsol Sued in Class Action for $1 Billion Over Peru's Worst Oil Spill' *Bloomberg* (15 January 2024)

insufficient workplace health and safety, exploitation of workers, as well as environmental concerns like greenhouse gas emissions, pollution, biodiversity loss, and ecosystem degradation.

From the standpoint of victims of misconduct by MNEs, voluntary standards offer little to no assistance. At the international level, there are no effective ways of holding to account MNEs and foreign investors who violate human rights, labour rights or environmental protection standards. The discussions surrounding the Binding Treaty on Business and Human Rights (BHR) are ongoing but have not yet delivered concrete outcomes.[25] The proposed BHR Treaty's purpose is to oversee the operations of transnational corporations, and institute compulsory human rights due diligence buttressed by a stringent enforcement mechanism.[26] Nevertheless, as the negotiations have not been finalised, the treaty is to no avail in complementing global CSR standards.

The circumstances of victims in transborder contexts are compounded by the prevalent deficiency in domestic laws of host states, which frequently lack effective mechanisms for individuals to seek recourse against foreign companies for the damages incurred as a result of corporate actions.[27] All this is corroborated by the lack of resources of many States to follow up on complaints. The reason for such concerns is that even though MNE activities fall under the domestic legal order of the home state, the regulation applicable as well as the judicial system are often not sufficient to ensure sustainable practices and to hold businesses accountable.[28] And depending on the economic leverage of a given MNE, countries might turn a blind eye to domestic law violations relating to social and environmental matters.

<https://www.bloomberg.com/news/articles/2024-01-15/pogust-goodhead-sues-repsol-claiming-1-billion-over-peru-oil-spill> accessed 14 February 2024.

[25] The international community is grappling with negotiations for a binding treaty on MNEs. Initiated in 2014 by the Human Rights Council at the behest of Ecuador, the Business and Human Rights (BHR) treaty process has been entrusted to an Open-ended Intergovernmental Working Group on Transnational Corporations and other business enterprises regarding human rights. See, UN Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', [2014] A/HRC/RES/26/9.

[26] UN Human Rights Council, Ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 'Updated draft legally binding instrument (clean instrument)' (July 2023) <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf> accessed 15 February 2024, Arts 2 and 6.2.

[27] Lise Johnson, Lisa Sachs and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2020) Columbia Journal of Transnational Law 58, 37.

[28] Joshua Waleson, 'Corporate Social Responsibility in EU Comprehensive Free Trade Agreements: Towards Sustainable Trade and Investment' (2015) 42 Legal Issues of Economic Integration 2, 147.

Beyond the host state, litigations against corporations faces difficult legal hurdles for harmed individuals and communities to bring civil lawsuits against a parent corporation in the home state for acts of its foreign subsidiaries that commit human rights and other violations in the host state. The courts of home states are often unavailable due to the operation of the *forum non conveniens* doctrine, which gives judges the discretion to decline to hear a case if it could be more appropriately and effectively adjudicated in another jurisdiction.[29] The doctrine is based on considerations regarding judicial resources, the ineffectiveness of adjudicating a case distant from the location of evidence and witnesses, and the potential diplomatic implications of such litigation.[30] However, the *forum non conveniens* doctrine might constitute an important barrier to access to remedy in certain cases. Therefore, the BHR treaty draft requires from states to take necessary measures to ensure that 'decisions by relevant state agencies relating to the exercise of jurisdiction […] shall respect the rights of victims in accordance with Article 4, including with respect to: (a) the discontinuation of legal proceedings on the grounds that there is another, more convenient or more appropriate forum with jurisdiction over the matter.[31] In other words, the provision requires adjudicators to apply the *forum non conveniens* doctrine cautiously and in light of potential violations of the victims' human rights and fundamental freedoms.

Another hurdle for victims is the inequality in financial resources. It has become apparent in past cases that corporate defendants have seemingly endless resources to pour into legal defence and often enough take benefit from the complex web of legal structuring across borders as single legal entities, each with carefully crafted holdings of assets and liabilities.[32] In sum, victims often face significant challenges in seeking justice and redress for harms caused by corporate activities across international borders and supply chains. As these hurdles continue to exist, voluntary CSR instruments have not been and will not be sufficient to address the governance gap at the international level of corporate accountability.[33]

[29] Maya Steinitz, *The Case for an International Court of Civil Justice* (CUP 2019) 4.
[30] Ibid.
[31] Draft BHR Treaty (n 25), Art 9.3(a).
[32] Joshua Waleson (n 28) 147.
[33] See also, Suya Deva argued that 'the UNGPs alone are unlikely to be enough to challenge or confront the existing structure of irresponsibility and inequality', see Surya Deva (n 17) 338.

III. The Persisting Asymmetries in International Investment Law

International investment law remains, the law that addresses the mistreatment by host states of foreign investors and not the other way round. Few contend that international investment agreements should address the behaviour of foreign investors when conducting their business abroad.[34] One primary argument supporting the inclusion of concrete obligations on foreign investment within IIAs is the just described persistent accountability gap for the misconduct of MNEs at the international level. Another important argument revolves around the need to align investment flows with sustainability strategies. CSR has emerged as a vital policy tool in the IIA reform since responsible business conduct not only fosters the contribution of investment to sustainable development but also serves as a crucial aspect in achieving it. Consequently, the ongoing reform debate surrounding investors' conduct emphasizes the necessity of refining international provisions and processes to ensure investor adherence to responsible business activities thereby contributing to the sustainable development of the host country.[35]

Most of the recent IIAs contain what can be coined indirect investor obligations. These provisions are obligations that require the contracting parties to adopt measures aimed at regulating and guiding the behaviour of MNEs, and sometimes only require the promotion of such standards.[36] Only few, and mainly model investment treaties, seek to counterbalance the broad protection standards that foreign investors enjoy with more concrete obligations. In contrast to indirect investor obligations, these obligations are direct as they are addressed to foreign investors.[37] The

[34] Belengar Francis Maïnkade, 'Corporate Human Rights Obligations of Investors in Recent Investment Agreements: The Progressive Hardening Process of CSR Clauses' (2023) 9 Heliyon e15120; Mao Jun Xiang and Belengar Francis Maïnkade, 'The Human Rights-Based Approach to Sustainable Development: Lessons from Recent African Investment Treaty Practice' (2023) 9 Heliyon e18578; Takwa Tissaoui and others, 'Research Health Policy Implications of Corporate Social Responsibility Provisions in International Investment Agreements' (2024) 102 Bulletin of the World Health Organization 94; Makane M Mbengue and Stefanie Schacherer, 'Evolution of International Investment Agreements in Africa: Features and Challenges of Investment Law "Africanization"' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds) *Handbook of International Investment Law and Policy* (Springer 2019) <http://link.springer.com/10.1007/978-981-13-5744-2_77-1> accessed 21 March 2024

[35] Agenda 2030 promotes a multi-stakeholder partnership on sustainable development, which seeks to mobilise and to share 'knowledge, expertise, technology and financial resources'. Multinational enterprises (MNEs) investing in foreign countries are part of the global partnership. See, Agenda 2030, targets 17.16 and 17.17.

[36] Karsten Nowrot, 'Obligations of Investors', in Marc Bungenberg and others (eds), *International Investment Law - A Handbook* (Hart Nomos 2015) 1165, pt 18.

[37] Ibid, 1161, pt 11.

latter type of provision requires further treaty adaptations allowing for procedural avenues to enforce investors' duties.[38]

A. Moderate Rebalancing

Recent IIAs contain specific CSR provisions, which mainly refer to best business practices related to CSR in general, or to internationally recognised CSR guidelines and standards.[39] While some variations exist, these provisions are addressed to the contracting parties and do not directly engage foreign investors. The CAI is for this category of CSR commitments an illustrative example. It states:

Article 2 'Corporate Social Responsibility'

1. The Parties recognise the important contribution of Corporate Social Responsibility or Responsible Business Conduct to strengthening investment's positive role in sustainable growth, and in this way contributing to the objectives of this Agreement.
2. Each Party agrees to promote responsible business practices, including by encouraging the voluntary uptake of relevant practices by businesses, taking into account relevant internationally recognised guidelines and principles, such as the UN Global Compact, the UN Guiding Principles on Business and Human Rights, the ILO Tripartite Declaration Principles concerning Multinational Enterprises and Social Policy, and the OECD Guidelines for Multinational Enterprises.
3. The Parties commit to exchanging information and, as appropriate, cooperating on promoting responsible business practices.[40]

While the CAI ultimately did not succeed, it showed China's openness in integrating CSR commitments.[41] Many of the recent IIAs highlight the same trend of having best-endeavour CSR commitments addressed to the contracting parties.[42] The Singapore-EU FTA, for instance, also contains soft provision providing that the contracting parties 'should make special efforts to promote' voluntary CSR practices.[43] The CETA formulates that the parties 'agree to strive to

[38] Potential enforcement avenues go beyond the scope of the present paper. For an examination of accountability mechanisms in international investment law, see Martin Jarrett, Sergio Puig and Steven Ratner, 'Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals' (2023) 14 Journal of International Dispute Settlement 259.
[39] E.g., EU-Colombia/Peru FTA, Art 271; EU-Central America FTA, Art 288.
[40] CAI, Section IV, Sub-Section 1, Art 2 'Corporate Social Responsibility'
[41] Julien Chaisse, 'FDI and Sustainable Development in the EU-China Investment Treaty: Neither High nor Low, Just Realistic Expectations', Columbia FDI Perspectives No. 323, 24 January 2022, <https://ccsi.columbia.edu/sites/default/files/content/docs/fdi%20perspectives/No%20323%20-%20Chaisse%20-%20FINAL.pdf> accessed 22 March 2024. See also, Petros Mavroidis and Andre Sapir, 'What Is so Special about CAI?' (2022) 30 Asia Pacific Law Review 348.
[42] See also Kathryn Gordon and others, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact-Finding Survey' (2014) OECD Working Papers on International Investment 2014/01.
[43] EUSFTA, TSD chapter, Art 12.11(4).

promote' economic activities that promote decent work and environmental protection including by 'encouraging the development and use of voluntary best practices of [CSR] by enterprises'.[44] Under the Comprehensive Progressive Trans-Pacific Partnership (CPTPP), the parties generally 'reaffirm the importance' of encouraging CSR.[45] A similar formulation can be found in the PACER Plus Agreement.[46] Canada only includes hortatory CSR obligations addressed to the contracting parties mostly formulated as 'should encourage' and seldom 'shall encourage'.[47] References to CSR standards come with soft commitments, leaving contracting parties with discretion as to how CSR promotion unfolds at the national level. The minor differences in the wording of these provisions, i.e. their variations of 'should' or 'shall' commitments should not be overrated. A 'shall' obligation to promote remains soft as the verbs 'to promote' or 'to encourage' are flexible including a variety of measures that a contracting party can take to satisfy such CSR obligation.

The recent EU-Angola Investment Facilitation Agreement, too, opts for a promotional provision addressed to the contracting parties. The provision contains a reference to the importance of investors to implement due diligence 'in order to identify and address adverse impacts, such as on the environment and labour conditions, in their operations, their supply chains and other business relationships'.[48] CSR provisions have become a common practice of EU's investment law-making. As for China these provisions are yet rare in BITs but can increasingly be found in China's FTA.[49] For instance, the China-Cambodia FTA provides that the contracting parties facilitate investments 'to comply with required standards on environmental impact assessment and social impact assessment and assessment processes applicable to their proposed investments prior to their establishment'.[50]

[44] CETA, Art 22.3(b): continues 'such as those in the OECD Guidelines for Multinational Enterprises, to strengthen coherence between economic, social and environmental objectives'; and EUVFTA, Art 13.10(2)(e).
[45] CPTPP, Art 9.17.
[46] PACER Plus, Art 5(2); See also Chile-Hong Kong China SAR BIT, Art 16.
[47] See Canadian BITs with Guinea, Art 16; with Burkina Faso, Art 16; with Serbia, Art 16. An exception constitutes the BIT with Côte d'Ivoire as it contains a binding obligation: 'shall encourage', see Art 15. Similar hereto are Canadian FTAs, e.g., Canada-Peru FTA, Art 810.
[48] EU-Angola SIFA, Art 34.1.
[49] Qian Xu, 'Scoping the Impact of the Comprehensive Agreement on Investment: Liberalization, Protection, and Dispute Resolution in the next Era of EU–China Relations' (2022) 30 Asia Pacific Law Review 93, 121. The author finds that in general 'human rights-friendly provisions in Chinese IIAs have gradually increased since 2000'.
[50] China-Cambodia FTA, Art 8.3(3). See also China-Cambodia FTA, Art 8.4.

The voluntary CSR standards bear some benefits, especially as they set out a comprehensive set of areas of compliance and of actions for MNEs on which contracting states can further cooperate. These instruments can also inspire national legislators to implement CSR standards in their domestic laws. However, and in the same vein as for CSR in general, indirect CSR promotion through IIAs will likely prove ineffective in pre-empting investor misconduct.[51]

B. Adjusting Imbalances

Direct investor obligations are more critical in adjusting the asymmetries of IIAs. In terms of drafting direct investor obligations, treaty practice can be further distinguished between those provisions addressed to investors that are drafted in best-efforts obligations, and those that are binding obligations for investors.[52] The former approach can mainly be found in Brazilian IIA practice, where investors 'shall strive to achieve' a contribution to sustainable development, or 'shall endeavour to comply' with voluntary CSR principles and standards.[53] Such formulation can also be found in the Indian Model BIT, according to which, investors 'shall endeavour to voluntarily incorporate internationally recognised standards'.[54] Other countries have opted for even softer formulations towards investor obligation stating that investors 'should make efforts' to responsible business conduct.[55]

A notable feature of the Africanisation of international investment law has consisted in formulating concrete investor obligations.[56] Several African investment treaties have integrated provisions with binding obligations. The recently finalised Protocol on Investment (POI) to the Agreement establishing the African Continental Free Trade Area.[57] The POI contains a set of investor obligations, which relate to human rights, labour protection, environmental protection, indigenous

[51] Nicolas Bueno and others, 'Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses' (2023) 24 The Journal of World Investment & Trade 179, 198-210. See also, Caroline Lichuma, 'International Investment Law Reforms and the Draft Business and Human Rights Treaty: The More Things Change, the More They Remain the Same?' (2023) 24 The Journal of World Investment & Trade 718, 742-743.

[52] On the debate of whether corporations can be addressee of international law obligations, see Oliver de Schutter, *International Human Rights Law* (CUP 2019) 468.

[53] Brazil-Suriname CIFA, Art 15.1-2; see also Brazil-Ethiopia CIFA, Art 14.1-2; Brazil-Malawi CIFA, Art 9.1-2.

[54] Indian Model BIT, Art 12.

[55] E.g., Argentina-Qatar BIT, Art 12.

[56] Makane M Mbengue and Stefanie Schacherer, 'The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime', JWIT 2017.

[57] The Protocol on Investment (POI) under the African Continental Free Trade Area (AfCFTA) began among the 54 countries that are parties to the AfCFTA in December 2021. At the 36th Ordinary Session of the Assembly of Heads of State and Government of the African Union on 18-19 February 2023, the Assembly concluded and approved a draft AfCFTA Investment Protocol. It is still subject to ratification and implementation by AfCFTA State Parties.

peoples' rights, socio-political obligations, anti-corruption, CSR in general, transfer pricing, taxation, and corporate governance.[58] The BIT between Morocco and Nigeria also provides for a series of investor obligations. First, investors shall conduct environmental and social impact assessments of their investment prior to starting the activity.[59] Second, investors shall not bribe or engage in corruption.[60] Third, investors once established must maintain environmental standards, uphold human rights and act in accordance with the ILO Declaration.[61] Similar approaches, although less extensive, can be found in the model BITs of Ghana and Botswana.[62]

Neither the EU nor China currently chooses to incorporate direct investor obligations in their respective IIAs, whereas other countries have started to do so. There are several reasons behind this alternative approach. One reason is the concern that domestic legislation and enforcement mechanisms may not be robust enough to ensure responsible business conduct within a country's territory. IIAs can and should supplement the CSR framework and should address the governance gap described in the previous section. At the same time, current treaty practice of direct investor obligations comes with certain shortcoming, such as insufficiently defining the beneficiaries of the newly formulated investor duties and most importantly these provisions often pay too little consideration on how to victims of investors' misconduct can enforce these obligations.[63]

C. Limits of Counterclaims in Investor-State Arbitration

International investment law currently has limitations in holding MNEs accountable since the majority of IIAs do not contain direct investor obligations. In addition, the treaties that contain direct investor obligations are either model IIAs or are treaties that have not yet entered into force. This section argues that the avenue of counterclaims in investor-state dispute settlement (ISDS) proceedings, which a host state could pursue against an investor for violations of human rights or environmental standards, also presents significant limitations. ISDS is an asymmetric procedure, where the investor can claim based on an IIA against a state. Neither host states nor third parties (such as citizens injured by MNEs' activity) can bring claims against investors. At the same time, there has recently been significant focus on environmental and human rights counterclaims within

[58] AfCFTA Investment Protocol, Arts 33-40.
[59] Morocco-Nigeria BIT, Art 14.2-3.
[60] Ibid, Art 17.
[61] Ibid, Art 18.
[62] Ghana Model BIT, Art 12; Botswana Model BIT, Art 11.
[63] Bueno and others (n 51) argue that the legal liability of an investor in host states should be better addressed in IIAs. See also, Jarrett and others (n 38) 269, Xiang and Maïnkade (n 34) 12.

investment arbitration. This trend is perceived as a means to recalibrate the asymmetric investor-state relationship.

The rising frequency of states resorting to counterclaims indicates a heightened call for acknowledgment of investors' wrongdoings. States have brought counterclaims against investors on the basis of contracts[64], domestic laws[65], as well as international law[66]. Nevertheless, the prevalence of successful environmental and human rights counterclaims has been notably low thus far.[67] There are several aspects that form the obstacles surrounding counterclaims in investment arbitration. One originates from the difficulties to establish jurisdiction based on the IIA due to the narrow arbitration clause and the close connection test.[68] A second obstacle and connected obstacle is that these claims are mostly rooted in domestic law.[69] Lastly, for the claims based on international law, the obstacle lies in the fact that international environmental law, nor international human rights law is directly addressed to MNEs.

The latter point has been illustrated in the case of *Urbaser v. Argentina*, in which the tribunal affirmed its jurisdiction to hear the state's human rights counterclaim.[70] On a substantive level, the tribunal held that international human rights were part of the applicable law in the dispute because the relevant IIA contained a reference to 'general principle of international law'.[71] It is hence important to note that the tribunal development its argument based on general human rights law and not on the specifics of the applicable IIA, which did not contain direct investor obligations.[72] Moreover, the tribunal considered that companies have human rights obligations under

[64] *Metro de Lima v. Peru (I)*, ICSID Case No. ARB/17/3, Decision on Jurisdiction and Liability, 6 July 2021, paras 950-951, and 973.
[65] *Anglo American v. Venezuela,* ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019, paras 529-530; *Aven and others v. Costa Rica,* ICSID Final Award, 18 September 2018, paras 734-735, and 742; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Counterclaims, 7 February 2017, paras 73-74; *Rusoro Mining v. Venezuela*, ICSID Award, 22 August 2016, para 606; *Perenco v. Ecuador*, ICSID Interim Decision on the Environmental Counterclaim, paras 34-35, 70, 321.
[66] *Aven and others v. Costa Rica* (n 65) paras 699, 738.
[67] Jean Ho, 'The Creation of Elusive Investor Responsibility' (2019) 113 AJIL Unbound 10. Jean Ho also finds that states are not making sufficiently use of counterclaims.
[68] Elise Ruggeri Abonnat, 'Counterclaims', Jus Mundi, Wiki Notes, 1 August 2023.
[69] For a more extensive examination, see, Xuan Shao, 'Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law', (2021) JIEL 24 Issue 1, 157.
[70] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016.
[71] Ibid, para 1188.
[72] Markus Krajewski, 'A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application' (2020) 5 BHRJ 105, 122.

international law.[73] It found, by citing international human rights instruments, that human rights obligations such as the right to water can directly be imposed on international corporations. The tribunal concluded, however, that international human rights obligations are addressed to States and are not drafted in a way as to contain obligations on corporations.[74] Consequently, the investor was not liable for not effectively ensuring the human right to water, reasoning that, in this case, related international obligations applied to states only.

One might be inclined to argue that the use of counterclaims shows that arbitral tribunals are re-balancing the asymmetries in international investment law. Especially since the *Urbaser* tribunal held that an investor bears in principle certain human rights obligations. However, these developments in ISDS are periodic evidence and do not signify a systemic shift. Given the nature of ISDS, it is currently unclear and unpredictable how tribunals will engage with counterclaims and the question of investor obligations in the future. The ongoing ISDS reform debate has yet to provide clear guidance for states on how to address counterclaims. This lack of clarity is apparent in the discussions within UNCITRAL's Working Group III (WG III). While, the UNCITRAL Secretariat has circulated a document with draft provisions on this matter, WG III delegates have not yet discussed it.[75] The topic is likely to be controversial since the WG III is divided on whether all provisions in this document, including counterclaims, fall within the mandate. Consequently, the outcome remains uncertain.

IV. EU's Pursuit of Responsible and Sustainable Supply Chains

As the previous sections have shown, it cannot be assumed that international CSR standards will provide tangible outcomes for the improvement of corporate accountability. Moreover, international law, especially international investment law, is ineffective in its current state due to the absence of direct investor obligations. In such instances where international solutions prove impossible to achieve, national law serves as the fallback, offering a framework to address CSR

[73] *Urbaser v Argentina* (n 70) paras 1194-1195. The tribunal also held that, even if a BIT does not contemplate investors as subjects of international law, this would not undermine the idea that foreign investors could be subjected to international law obligations. Moreover, the tribunal stressed that, in the light of recent developments in international law, it could no longer be admitted that companies operating internationally would be immune from becoming subjects of international law.
[74] Ibid, paras 1205-1207.
[75] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Draft provisions on procedural and cross-cutting issues, 26 July 2023, Note by the Secretariat, UN A/CN.9/WG.III/WP.231

and due diligence more comprehensively within the confines of a state's jurisdiction.[76] Several European States have started to adopt national laws regulating corporate responsibilities in the fields of human rights and environmental protection.[77]

For the EU, the European Green Deal gave new impetus to rethink sustainable business activities that are conducive for the transition towards a more sustainable global economy. In its characteristic fashion, the EU endeavours to spearhead the normative framework of the transition. The Green Deal states that '[a]s the world's largest single market, the EU can set standards that apply across global value chains'.[78] Indeed, the EU has adopted a number of legislative acts supporting the EU's trade and investment policy aim to accelerate the transition to a more responsible and sustainable global economy.[79] Illustrative laws in this respect are the CS3D, the Carbon Border Adjustment Mechanism (CBAM Regulation) and the Deforestation Regulation.[80]

A. The CS3D and Mandatory Due Diligence Obligations

The CS3D establishes a legal framework aimed at fostering European and global standards for responsible and sustainable business practices in global supply chains. As a directive it is addressed to EU Member States requiring them to ensure that companies conduct human rights and environmental due diligence (HREDD). At the time of writing, the CS3D experienced significant political opposition coming from certain Member States.[81] A compromise on the CS3D could, however, be reached and a modified text was recently endorsed by the Council.[82] The modified version represents a diluted rendition of previous proposals.[83] Specifically, it encompasses a reduced number of companies and activities, and its implementation is envisioned to occur more

[76] Vaughn Lowe, *International Law* (OUP 2007) 173.
[77] For an overview of such legislations, see <https://mneguidelines.oecd.org/Session-note-2021-OECD-Garment-Forum-Mandatory-due-diligence-legislation-design-perspectives-from-the-garment-and-footwear-sector.pdf> accessed 4 March 2024.
[78] Communication from the European Commission, 'The European Green Deal, COM(2019) 640 final, 22.
[79] Communication from the European Commission, 'The Power of Trade Partnerships: Together for Green and Just Economic Growth', COM(2022) 409 final, 3-4.
[80] CS3D (n 6), CBAM Regulation (n 9), Deforestation Regulation (n 9).
[81] Responsible Investor, 'CSDDD faces "race against time" after EU member states fail to back text', <https://www.responsible-investor.com/csddd-faces-race-against-time-after-eu-member-states-fail-to-back-text/> accessed 25 March 2024.
[82] The vote on 15 March 2024 marked the final chance for the CS3D to be approved by the Council before the European parliamentary elections scheduled for June 2024. The European Parliament is expected to pass the revised Directive on 24 April 2024, completing the formal legislative process. See Shearman & Sterling (n 8).
[83] The March 2024 version of the CS3D is not available at the time of writing. Therefore, the analysis is mainly based on the previous proposal and on press reports.

gradually than initially proposed. Three aspects of the law and its modification deserve to be highlighted here.

First, the modified CS3D upholds the fundamental concept of obligatory HREDD. More concretely, it mandates companies to implement systems that identify risks to human rights and the environment. Companies are also required to respond with measures aimed at preventing, mitigating, ending, or at least minimizing such risks, and they are obligated to report on these actions. The modified version also maintains the obligation to establish a climate transition plan and to identify climate change risks, including for entities within the financial sector. However, in the previous proposal, the due diligence requirement extended to companies' upstream and downstream activities across their supply chains. The new version adopted a narrower concept of 'chain of activities' covering only specifically listed parts of the supply chain. Moreover, two types of downstream activities are no longer included, i.e., those performed by indirect business partners, as well as downstream activities at the product disposal stage, including dismantling, recycling, composting, and landfilling.[84]

Second, the scope of the CS3D has considerably been reduced. The directive initially was to apply to EU companies with over 500 employees and a global turnover exceeding EUR 150 million.[85] Reportedly, this has change to 1000 employees and a global turn-over of EUR 450 million. Non-EU companies will now be obligated to adhere to the directive solely if they generate a net turnover of EUR 450 million within the Union, as opposed to the previously agreed threshold of EUR 150 million. The lower employee and net turnover thresholds for EU and non-EU companies operating in high-impact sectors (defined to include, e.g., textiles, clothing, footwear, agriculture, forestry, fisheries, food & beverages, extraction of mineral resources and construction) has entirely been repealed.[86]

Third, the mandatory HREDD obligations continue to be backed with two enforcement mechanisms: administrative supervision and civil liability. The civil liability clause, in particular, has the potential to play a transformative role in ensuring compliance with the HREDD obligations and in providing access to remedies for affected individuals. Notably, only the French *Loi de*

[84] Shearman & Sterling (n 8).
[85] CS3D (n 6), Art 2 (1).
[86] CS3D (n 6), Art 2 (1)(b), Arts 17-19 and Art 22.

Vigilance and the CS3D are among the rare examples of due diligence laws that provide for civil liability.[87] However, the CS3D as a directive depends on the implementation at the Member States level, and the new version grants Member States additional discretion to establish the criteria under which trade unions, non-governmental organizations, or national human rights institutions can initiate collective redress mechanisms on behalf of victims. Moreover, in its new version, the CS3D also states that the directive's provisions should not be construed as obliging Member States to expand their national laws on representative actions to cover claims under the directive.

B. Addressing Climate Change and Biodiversity Loss in Supply Chains

Other EU legislations aimed at fostering responsible and sustainable supply chains have already come into effect, focusing largely on enhancing the integration of climate change and biodiversity considerations into trade and production processes for specific goods. The CBAM Regulation serves as a significant example in this regard. It has the aim to put a 'fair' price on the carbon emitted during the production of carbon-intensive goods that are entering the EU market. In this respect, the CBAM Regulation seeks to ensure fair competition among EU and non-EU producers, to address carbon leakage and reduce greenhouse gas emissions, and to encourage cleaner industrial production along supply chains outside the EU.[88] Currently, the CBAM applies to imports of goods, such as cement, iron and steel, aluminium, fertilisers, electricity, and hydrogen products. The EU aims to evaluate and broaden the scope of the CBAM by 2030, intending to cover more than half of emissions in EU Emissions Trading System (ETS) sectors by the full implementation in 2034. Initially, CBAM importers have reporting obligations, with the first quarterly reports due on 31 January 2024. From 1 January 2026, authorised CBAM declarants must submit annual reports and acquire CBAM certificates, with financial implications starting from that date. The price of CBAM certificates will be linked to the average price of allowances in the EU ETS, thereby harmonising carbon pricing costs for both EU and non-EU producers.

In other words, the CBAM has significant impacts on jurisdictions outside the EU and puts pressure on non-EU countries to amend their domestic laws to incentivize companies to decarbonize their supply chains. In pursuit of this goal, the CBAM endeavours to enhance the

[87] 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.
[88] European Commission, 'Carbon Border Adjustment Mechanism', <https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en> accessed 4 March 2024.

transparency of nations' carbon pricing strategies and broaden the scope of data regarding companies' emissions across diverse markets.[89] Additionally, the CBAM incentivizes EU trading partners to track their emissions and implement their own carbon pricing regulations via a compensatory mechanism. Under this system, when third countries implement a carbon tax scheme connected to an ETS, their exporters could offset the equivalent costs, potentially exempting their goods from the EU carbon tax.[90] The CBAM has sparked controversies.[91] For some, it represents a crucial means to achieve the region's climate objectives, while others, especially in emerging markets, view it as an unfair, protectionist policy that penalizes countries with lesser responsibility for climate change.[92]

Another noteworthy legislation of the EU is the Deforestation Regulation, which aims to guarantee that goods consumed by EU citizens do not contribute to global deforestation or forest degradation.[93] According to the Regulation, any entity involved in placing commodities like soy, beef, palm oil, wood, cocoa, coffee, rubber, and their derivatives—such as leather, chocolate, tires, or furniture on the EU market or exporting them from it must demonstrate that the products are not sourced from recently deforested areas or have contributed to forest degradation. MNEs are required to uphold due diligence practices.[94] The due diligence requirement under the Regulation includes the collection of information, data and documents to demonstrate that the product is deforestation-free, as well as risk assessment and risk mitigation measures have been taken.[95] Lastly, companies must provide transparent information on their supply chain practices and report annually on deforestation risks and actions taken.[96] As in the case of the CBAM, the Deforestation Regulation has provoked criticism, which also portrayed it as a 'veiled protectionist measure'.[97]

[89] CBAM Regulation, consid. 72.
[90] CBAM Regulation, Art 9.
[91] Roza Nurgozhayeva and Dan W Puchniak, 'Corporate Purpose Beyond Borders: A Key to Saving Our Planet or Colonialism Repackaged?', European Corporate Governance Institute - Law Working Paper No. 744/2023, 24-26.
[92] John Manners-Bell, 'The Supply Chain Impact of EU's Controversial New Carbon Tax', <file:///Users/ssch/Desktop/Impact-of-Carbon-Tax_Jan-2023-2.pdf> accessed 4 March 2024.
[93] Deforestation Regulation, Art 1. The Regulation will come into full effect on 30 December 2024, and 30 June 2025 for small and micro-enterprises.
[94] Deforestation Regulation, Art 8.
[95] Deforestation Regulation, Art 8 in combination with Arts 3, and 9-11.
[96] Deforestation Regulation, Art 12.
[97] Anthony Iswara and others, 'European Union Palming Off Deforestation Regulation to Smallholders in Indonesia' East Asia Forum 2023 <https://www.eastasiaforum.org/2023/10/10/european-union-palming-off-deforestation-regulation-to-smallholders-in-indonesia/> accessed 5 March 2024

The EU has been accused of seeking to leverage trade advantages by establishing entry barriers for products from nations that may struggle to adhere to the new regulation.[98]

C. Legitimacy Questions concerning EU's Supply Chain Legislations

The EU's legislative package governs activities of companies abroad. In a way this establishes hierarchies not only over companies but also over other states.[99] The EU justifies its extra-territorial legislations by underscoring the laws' ability to address common action problems, i.e. setting product standards and obligations for companies to mitigate their negative impact on human rights and the environment. The mandatory obligations in the EU's autonomous legislations combined with the EU's trading power can lead to seeing EU sustainability legislations as a means of imposing EU standards on the world. Many states, especially developing countries, might be doomed to surrender to EU regulations, which stands in contrast to the formal conception of equality between states.

One can also see the recent EU legislations from the perspective of the sustainability imperatives, stemming from climate change and biodiversity loss, as well as the persisting accountability gap for multinational corporations and their supply chains under international law. From the latter perspective, the CS3D, the CBAM and the Deforestation Regulation, offer an approach to addressing transnational challenges. From this perspective, the EU is not primarily seeking to expand its sovereignty or enhance its normative power but is rather working on a framework that increases the overall governance capacity over supply chains and MNEs.[100] While this perspective does not wash away legitimacy concerns, it portrays unilateral sustainability regulations in a less 'aggressive' light.[101]

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[98] Ibid. See also, Politico, 'Trade partners see red over Europe's green agenda' 16 January 2023, <https://www.politico.eu/article/eu-green-agenda-has-its-trading-partners-seeing-red-climate-neutrality/> accessed 5 March 2024.

[99] Nico Krisch, 'Jurisdiction Unbound: (Extra)Territorial Regulation as Global Governance' (2022) 33 EJIL 481, 504.

[100] Ibid, 511 referring to Cedric Ryngaert, *Selfless Intervention: Exercising Jurisdiction in the Common Interest* (OUP 2020) 189. See Deforestation Regulation, consid. 11: '[Member States] have emphasised that since current policies and action at global level on conservation, restoration and sustainable management of forests do not suffice to halt deforestation'.

[101] Nurgozhayeva and Puchniak (n 91) 20.

V. China's Approach to Responsible and Sustainable Supply Chains in the BRI and Beyond

This section now examines China's approach to building responsible and sustainable supply chains. China's approach diverges considerably from the legalistic approach of the EU. Currently, China relies on a complex web of soft law standards, industry guidelines, and sector-specific initiatives. As a result, it is challenging to discern any indication of a harmonized CSR approach across the BRI. While the EU's legislative package extending to supply chains beyond its borders may face legitimacy challenges, questions should be raised about the effectiveness and actual impact of China's flexible and malleable CSR strategies in promoting responsible business conduct and preventing misconduct by MNEs.[102]

A. The Interplay between BRI Guidelines and Sector-Specific Guidelines

The concept of CSR 'arrived' in China in the 1990s through global supply chains.[103] The social and environmental movements in the West had the consequence that large MNEs adopted social and environmental criteria in selecting their suppliers in China.[104] Resistance towards the concept existed at first, but CSR gradually turned into an internally accepted framing of corporate responsibilities.[105] Today, China's corporate law, Article 19, states that a company bears social responsibilities.[106] The recently added Article 20 introduces additional clarifications, explicitly stating the stakeholders that companies must consider when conducting business operations and introduces references to environmental protection.[107] The provision also states that the government 'shall encourage companies to participate in public welfare activities and publish social responsibility reports'.[108] In addition to corporate law, Chinese government agencies are active in promoting CSR amongst their corporations, operating both inside and outside of China.[109] These

[102] Heng Wang, 'China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability' (2019) 22 Journal of International Economic Law 29, 43-49.
[103] Li-Wen Lin, 'Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China' (2020) 68 The American Journal of Comparative Law 576, 580. At the same time, the values of CSR exist in China since Confucius, see Menxin Lu, *Corporate Social and Environmental Responsibility: Another Road to China's Sustainable Development* (Brill 2019) 229.
[104] Menxin Lu, (n 103) 228.
[105] Lin (n 103) 581.
[106] Company Law of the People's Republic of China (2023 Revision) Art 19: 'When conducting business operations, a company shall comply with the laws, regulations, social morality, and business morality, act in good faith, and accept the supervision of the government and general public.' The law is to be effective on 1 July 2024.
[107] Company Law of the People's Republic of China (2023 Revision), Art 20.
[108] Ibid.
[109] Karin Buhmann, 'Chinese Human Rights Guidance on Minerals Sourcing : Building Soft Power' (2017) 46 Journal of Current Chinese Affairs, 141.

government-led initiatives are complemented by sectorial guidelines, elaborated by industry associations, especially in sectors relevant for the BRI, such as mining and infrastructure.

In recent years, a certain greening of the BRI with several CSR instruments being adopted could be observed.[110] For instance, in 2018, the Green Investment Principles (GIP) for the Belt and Road was launched jointly by the China Green Finance Committee and the City of London. The GIP has grown rapidly to an international network of 40 signatory institutions and 12 supporting institutions, most of which are large financial institutions with total assets held or managed by these members exceeding 49 trillion USD.[111] The GIP promotes sustainable investment along the Belt and Road through seven principles spanning strategy, operations, and innovation. Principles 1 and 2 advocate integrating sustainability into corporate strategies and management systems at all levels. Principles 3 and 4 emphasize stakeholder engagement at the operational level, including environmental risk analysis and conflict resolution. Principles 5 to 7 encourage the use of green financial instruments, adoption of green supply chain practices, and capacity-building through knowledge sharing.[112]

In 2021, the Chinese Ministries of Environment and Ecology (MEE) and of Commerce (MOFCOM) jointly published the Green Development Guidelines for Foreign Investment and Cooperation (hereafter: Green Development Guidelines), which seek to accelerate the process of making overseas investment and cooperation more environmentally friendly, thereby contributing to the cultivation of a new development approach.[113] One year later, in 2022, the same ministries published the Guidelines for Ecological and Environmental Protection of Foreign Investment and Cooperation Construction Projects (hereafter: BRI Guidelines).[114] The instrument aims to promote

[110] Desheng Hu and others, 'On the Environmental Responsibility of Chinese Enterprises for Their FDIs in Countries within the One Belt and One Road Initiative' (2017) 5 The Chinese Journal of Comparative Law 36.
[111] GIP website <https://gipbr.net/index.aspx?m=1> accessed 27 February 2024.
[112] Ibid.
[113] Ministry of Commerce and Ministry of Ecology and Environment, 'Guidelines for Green Development in Foreign Investment and Cooperation' (2021). See, unofficial translation by Client Earth, <https://www.clientearth.org/media/jufbkljf/green-development-guidelines-for-overseas-investment-and-cooperation.pdf> accessed 27 Feb 2024.
[114] Ministry of Ecology and Environment of the People's Republic of China (MEE) and the Ministry of Commerce of the People's Republic of China (MOFCOM), '对外投资合作建设项目生态环境保护指南' [Guidelines for Ecological and Environmental Protection of Foreign Investment and Cooperation Construction Projects. Hereafter: 2022 BRI Guidelines] (6 January 2022) <https://www.mee.gov.cn/xxgk2018/xxgk/xxgk05/202201/t20220110_966571.html> accessed 4 February 2024.

sustainable development of foreign investment and a green Belt and Road construction.[115] The BRI Guidelines apply to state-owned enterprises participating in foreign investment and construction projects.[116] While the BRI Guidelines omit the term CSR, its Article 3 encourages enterprises implementing foreign investment cooperation projects to abide by host country's ecological and environmental laws, regulations, and policy standards.[117] The Green Development Guidelines and the 2022 BRI Guidelines are typical soft law instruments with best-endeavour provisions and no stringent enforcement mechanism. They exist and operate next to other voluntary guidelines elaborated by various actors, including industry associations and international partners.

The interplay between the 2022 BRI Guidelines and industry guidelines can be observed in the energy and mining sectors. Article 10 of the BRI Guidelines encourages enterprises implementing energy projects to consider clean and green renewable energy projects. Article 12 encourages mining companies to implement measures relating to pollutants and solid waste, strengthen environmentally friendly designs, reduce ecological damage and land use, and to carry out ecological restoration and biodiversity protection. Article 3 invites enterprises to refer to sectorial guidelines, namely the 'Guidelines for Social Responsibility in Outbound Mining Investment' (GSRM), published by the China Chamber of Commerce of Metals, Minerals and Chemical Importers & Exporters (CCCMC) and supported by the German Development Agency (GIZ).[118] The GSRM provides guidance for the 'exploration, extraction, processing and investment cooperation of mineral and energy resources inside and outside of China'.[119]

It is interesting to note that the scope of the 2017 GSRM is broader than the scope of the BRI Guidelines, as the former applies to both Chinese internal and external investment projects in general.[120] Another industry-led instrument, the 'Guidelines for Sustainable Infrastructure for Chinese International Contractors (SIG),' encompasses a broad scope. It applies to overseas infrastructure projects involving Chinese companies or consortia led by Chinese companies,

[115] General Office of the MEE and the General Office of MOFCOM, 'Notice on Issuing the "Guidelines for Ecological Environmental Protection of Foreign Investment Cooperation and Construction Projects' (5 January 2022).
[116] Ibid.
[117] 2022 BRI Guidelines (n 114) Art 3.
[118] Chinese Chamber of Commerce of Metals, Minerals and Chemical Importers & Exporters (CCCMC), 'Guidelines for Social Responsibility in Outbound Mining Investments (GSRM)' (2017).
[119] Ibid, para 2.
[120] Ibid, para 1.

covering the entire process from funding, planning, design, construction, operation and maintenance to closure.[121] The BRI Guidelines, published by Chinese ministries, are narrower in scope than these two sectorial guidelines, because they only cover SOEs. At the same time, all these guidelines that are framing CSR standards in the BRI are unstandardised as to their coverage of companies making no reference to employee numbers or net turnovers.

B. Embedding Chinese CSR Guidelines in International Frameworks

The examination of China's CSR approach also reveals that the 2022 BRI Guidelines and other Chinese policy instruments as well as the industry guidelines seek to embed Chinese approaches in international standards pertaining to CSR and even HREDD. Noteworthy is, for instance, that China's current Human Rights Plan (2021–2025), not only makes reference to the UNGPs but also states that China commits to 'fulfil its commitments to the international community with sincerity'.[122] The Plan encourages 'Chinese businesses to abide by the [UNGPs] in their foreign trade and investment, to conduct their due diligence on human rights, and to fulfil their social responsibility to respect and promote human rights'.[123]

The 2022 BRI Guidelines are indicating that international CSR standards can be a complement to host states' legal frameworks. Under the just mentioned Article 3, enterprises should not only adhere to the host country's CSR framework but should, in instances where the host country lacks relevant standards or has lower requirements, endeavour to meet internationally accepted standards. In this respect, the BRI Guidelines refer to international law but make no reference to specific international instruments. Conversely, the 2021 Green Development Guidelines[124] specifically mention the UN Sustainable Development Goals, the UN Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity and the above-mentioned GIP. The GSRM addresses human rights, environmental, and climate change issues. The instrument refers to 28 soft law instruments in its Annex concerning human rights and environmental considerations.

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[121] Guidelines for Sustainable Infrastructure for Chinese International Contractors (SIG) issued by the China International Contractors Association and Dagong Global Credit Rating, <https://asiasociety.org/policy-institute/navigating-belt-road-initiative-toolkit/laws/chinese/guidelines-sustainable-infrastructure-chinese-international-contractors-sig> accessed 28 February 2024.

[122] The State Council Information Office of the People's Republic of China, 'Human Rights Action Plan of China (2021 – 2025)' (September 2021) <https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/2022-11-28/Human-Rights-Action-Plan-of-China-2021-2025.pdf> accessed 15 February 2024, 41.

[123] BRI Guidelines (n 114), Art 3.

[124] Guidelines for Green Development in Foreign Investment and Cooperation (n 113), Part III, para 8.

While the GSRM makes no reference to the UNFCCC and the Paris Agreement, it still refers to the International Council on Mining and Metal's Position Statement on Climate Change Policy Design, and addresses climate change-related concerns by requiring companies to develop and implement greenhouse gas emission reduction policies and measures.[125]

C. Due Diligence and Flexible Enforcement

As highlighted so far, the examined Chinese instruments incorporate both human rights and environmental aspects. The reliance on due diligence, however, has not yet found complete acceptance in China's CSR framework, even though elements of emerging HREDD standards can be observed. The 2022 BRI Guidelines encourage the identification and minimisation of harms to the environment and to the climate (Articles 7 and 8) without explicitly mentioning the term due diligence. Under Article 7, enterprises should carry out environmental impact assessments and take reasonable measures to minimise and eliminate potential adverse effects. Under Article 8, enterprises should 'prevent and minimise adverse effects caused by the project on the environment', including to minimise greenhouse gas emissions during the construction period. Article 14 provides for monitoring and recording of pollutants and emissions. While investigation, mitigation and monitoring fall under due diligence practices, the 2022 BRI Guidelines do not provide for an accountability or compliance mechanism that would allow to enforce Articles 7, 8 and 14. In other words, the BRI Guidelines only encourage enterprises to report on their activities and efforts to comply with relevant ecological and environmental protection rules, to exchange information regarding their projects' ecological and environmental protection, and to gather feedback regarding environmental impacts from relevant communities.[126] As argued throughout this article, voluntary guidelines are not enough to secure responsible and sustainable supply chains, nor do they allow for a harmonised CSR framework that would be applicable for Chinese outward FDI in the BRI context.

This shows that China's approach currently does not indicate a trend towards more binding CSR or HREDD frameworks. In fact, China has shown reluctance towards too stringent HREDD implementation in the context of the BHR treaty negotiations. Notably, China's position at the sixth session of the working group of the BHR treaty in 2020 was that companies that perform due

[125] GSRM (n 118), para 3.7.11.
[126] 2022 BRI Guidelines (n 114), Arts 22-24.

diligence obligations should by default be exempt from liability, unless the company committed conspiracy or other similar actions. One reason that China put forward was to say that companies should not be discouraged to establish human rights compliance policies and prevent companies from losing the motivation to establish such policies since they could still be held liable despite their efforts.[127]

Industry guidelines also complement the BRI Guidelines regarding due diligence. These guidelines show a clearer integration and operationalisation of due diligence. The GSRM, for instance, provides that as part of their supply chain management, mining companies 'should conduct due diligence and establish internal control systems to identify, assess and manage risks in their supply chain'.[128] In this respect, the GSRM should be read together with the 'Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains'.[129] The latter has been elaborated with the support of the OECD and are designed to align Chinese companies' due diligence efforts with international standards.[130] Together with the GSRM they encourage companies to conduct risk-based mineral supply chain due diligence. Yet here too, the industry guidelines do not offer more than mere recommendations to corporations to '[d]evelop a compliance and integrity management system and ensure its implementation, including an independent audit system, an effective internal control system, due diligence system, risk assessment, staff-at-risk training, grievance mechanisms, and punitive measures'.[131] While these and other efforts are going in the right direction, especially for the mining sector, they do not establish a predictable CSR framework or are likely to tackle any of the sustainability challenges deriving from corporate activities.

VI. Concluding Remarks

The international community has debated the need for international regulation and oversight of MNEs for several decades. While states have thus far resisted the development of an

[127] China's comments on Article 8 of the BHR Treaty, see <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/Article8/States/China_Article_8.docx> accessed 27 February 2024.
[128] GSRM (n 118), para 3.3.4
[129] Ibid, para 3.3.6. referring to the 'Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains', elaborated by CCCMC and the OECD (2015) <https://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm> accessed 28 February 2024.
[130] Ibid.
[131] GSRM (n 118), para 3.2.2.

internationally binding legal instrument on the subject, there has been a proliferation of voluntary and non-binding international CSR instruments and initiatives. Amidst the climate change crisis, persistent global inequality, and the imperatives of the green transition, there is a certain urgency today to reassess how accountability for MNEs and their supply chains can be enhanced. In this regard, the present article examined two avenues: international investment treaty law on one hand, and unilateral state initiatives, either in the form of mandatory due diligence laws or voluntary guidelines, on the other.

Direct corporate obligations have emerged in international investment treaties and a progressive hardening of CSR clauses can be observed. Developing countries are playing a pioneering role as their recent IIAs include direct investor obligations. However, the ability of the IIA regime to operate as a framework that fosters sustainable and responsible supply chains is still limited. First, the innovative treaties remain inactive and thus do not apply to investor-host state relations. These treaties are either model investment treaties or have yet to be ratified. Second, and even more concerning, recent treaties and revised IIAs from major economies such as the EU and China still lack a robust mechanism to adequately regulate investor behaviour.

Addressing the reluctance in integrating investor obligations into new IIAs requires confronting issues such as a lack of political will, scepticism toward treaty innovations, and potential resistance from the business sector.[132] Some argue that it is the responsibility of host states, not investors, to ensure that investment projects and supply chains are sustainable and minimize negative environmental and social impacts. However, overlooking investor responsibilities in treaty texts ignores the potential for negative impacts of foreign investment to cause dissatisfaction globally and locally, leading to discontent and resistance among communities and ultimately undermining the success of investment projects. As major FDI importers and exporters, China and the EU could better direct the IIA reform towards the integration of direct investor obligations and embrace new drafting approaches including strengthening avenues for enforcement. Making minor adjustments to IIAs to include superficial mentions of CSR merely deflects attention from the larger issue of the regime's fundamental objectives.

[132] Mavluda Sattorova, 'Investor Responsibilities From A Host State Perspective: Qualitative Data And Proposals For Treaty Reform' (2019) AJIL Unbound, 1 (113) 26.

Absent any international legally binding instrument on MNEs, mandatory HREDD legislations of certain states and the EU appear to be a promising development. This article shares this assumption and positive outlook on HREDD legislations seeking to guarantee more responsible and sustainable supply chains. At the same time, the examined CS3D has shown that the new legislation comes with limitations as to its scope and enforcement. In particular, the civil liability provision, which could theoretically provide better access to remedies for victims, will depend on the specifics of EU Member States' legislation and implementation. As more states undertake legislative initiatives concerning HREDD, it is crucial that these efforts reflect an approach prioritizing the rights of individuals and communities. Furthermore, the international dimension of the issue should not be forgotten; states can and should cooperate and exchange information regarding their regulatory initiatives.

China's approach to CSR and HREDD contrasts significantly with that of the EU. China lacks equivalent laws governing global supply chains. This divergence is somewhat expected, given China's historical preference for a flexible approach characterized by the use of soft law in implementing the BRI and the activities of Chinese companies overseas. However, the limitations of the Chinese approach are readily apparent. First, voluntary standards are unlikely to yield tangible results, as demonstrated by international experience over the past four decades. Second, voluntary standards enable companies to selectively adopt rules and obligations without incurring additional costs to their business activities. Third, the plethora of Chinese initiatives and guidelines fails to achieve harmonization of CSR standards throughout the BRI. Such harmonization, however, would be desirable to ensure a level playing field and more predictability for all stakeholders involved.

The EU's legislative package consisting of the CS3D, the CBAM and the Deforestation Regulation, extends to supply chains beyond its borders and may therefore face legitimacy challenges. Questions should be raised about the effectiveness and actual impact of China's flexible and malleable CSR strategies in promoting responsible business conduct and preventing misconduct by MNEs. With growing concerns among stakeholders in both developed and developing countries about the distributive impacts of corporate actions as well as the highted sustainability imperatives, this article argued that all states, especially the EU and China, should continue to work on legally binding frameworks shaping sustainable behaviours of MNEs.

Lastly, it should be mentioned that the present study has certain limitations. First, the article could only touch on certain and recent aspects of the complex web of the international frameworks relating to responsible and sustainable supply chains thereby lacking an exhaustive analysis of all state-based and industry-led initiatives. Especially, many of the firm-based initiatives could not be examined.[133] A second limitation of the study is that it does not take empirical evidence into account, which could shed light on the sustainability impacts of European companies abroad as well as the BRI. That said, the present article has shown that there are important new developments in international economic law how states seek to tackle corporate accountability in global supply chains.

Acknowledgements

The author acknowledges and is grateful for the support of the Singapore International Dispute Resolution Academy's BRI Program.

The author is indebted to Hor Wen Qin for her excellent research assistance and efforts in translating Chinese policy instruments for which no official translation exists. Lastly, the author is also grateful for the helpful comments received from the two anonymous reviewers. Any inaccuracies or oversights remain attributable to the author.

Disclosure statement

No potential conflict of interest was reported by the author.

[133] For an analysis of firm-based initiatives, see Nurgozhayeva and Puchniak (n 81).