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## STRENGTHENING THE SOCIAL DIMENSION OF INTERNATIONAL INVESTMENT AGREEMENTS BY INTEGRATING CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES

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### **Session 2.2.: The policy framework for investment: the social and environmental dimensions**

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# Strengthening the social dimension of international investment agreements by integrating codes of conduct for multinational enterprises

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## I. Introduction

*Best practices in promoting investment for development* as this year's theme of the OECD Global Forum on Investment is reminiscent of – apart from recent initiatives - the international discourses of the 1960s and '70s when the emphasis on development was predominant. Yet, no other subject on international investment is as topical and well-chosen as this one. Even if the efforts of the last decades in investment policies and laws are remarkable, as far as the increase of foreign direct investment (FDI) and the number of signed bilateral investment treaties (BITs) are concerned, they have still not had a great effect on development in developing countries. According to the UNCTAD *Trade and Development Report 2007*, the expansion of the world economy and trade of the past five years had not changed the persistent *imbalances* and net capital flow from developing to developed countries. The poorest countries do indeed benefit from sustained growth of the world economy but predominantly because of favourable price developments in many primary commodities.

*Imbalance* also serves as a keyword to describe the emphasis on the economic dimension of international investment regulations in comparison to the social dimension which has rarely been considered until now. In particular there is an imbalance in international investment law between regarding the interests and rights of investors on the one hand and the interests and rights of all the other parties affected by FDI on the other hand. With reference to the main providers of investment – multinational enterprises (MNEs) – the question is whether an imbalance exists between allowing rights without imposing obligations.

Before examining these questions in more detail, the extensive expressions *social dimension* of international investment agreements (IIAs) and *development* with its various aspects will be clarified.

If IIAs had a social dimension, these regulations would have a positive impact on human rights and e.g. the working, health and safety conditions connected with the activities of MNEs in host countries<sup>2</sup>. Investment has a considerable social, political and environmental impact besides economic growth as its main aim<sup>3</sup>. In this context MNEs can play both a negative and a positive role. The question here is if IIAs provide any obligations for MNEs to avoid negative consequences of their activities for the protection of human rights.

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<sup>2</sup> Similar: *Ortino*, Frederico, *The Social Dimension of International Investment Agreements: Drafting a New BIT/MIT Model?*, in: *International Law FORUM du droit international* 7, p. 243-250, at 243.

<sup>3</sup> UNCTAD, *World Investment Report 2007*, p. 145 ff.

Comparable to the various impacts of investment it must be recognised that development has many other aspects besides economic wealth. There is no universally accepted definition of development, but rather it depends on the institutional context which elements are attributed to it. In the UN Millennium Declaration eight Millennium Development Goals are defined, ranging from reducing extreme poverty by half to halting the spread of HIV/AIDS and providing universal primary education, all by the target date of 2015. In order to define development in the context of investment, the OECD can be consulted. With its *Initiative on Investment for Development* the OECD aims to support developing countries' efforts to attract and generate more and better investment. Therefore its tool *Policy Framework for Investment* provides important policy issues suitable for enhancing the development benefits of investment to society, especially the poor. In the foreword of this tool, economic growth and sustainable development are mentioned as objectives, thus the prosperity of countries and their citizens and the fight against poverty. Furthermore, it is stated that the Framework is to be viewed in the broader context of the UN Millennium Declaration and further multilateral efforts such as the Johannesburg Declaration on Sustainable Development.

Another *inclusive*<sup>4</sup> understanding of development could take into account such issues as safeguarding national security or safeguarding culture besides protecting property, labour or consumer rights. In addition to individual rights this last attempt at a definition also takes into consideration the public interests of the host country. Referring to investment agreements the question is again: Do these treaties have any provisions to respect e.g. the public interests of host countries as a contracting party?

Taking into account the social and environmental spill-over of foreign investment<sup>5</sup>, this paper will question whether and how strengthening the social responsibility of MNEs could promote investment for development. In particular, do IIAs today have any impact on human rights issues and whether e.g. codes of conduct for MNEs could be integrated into these agreements to improve their social dimension?

## **II. International investment law: achievements and challenges**

The following survey of the development of international investment law will – by acknowledging its achievements for the legal protection of investment – also highlight its main weak points regarding human rights and development.

### **1. Coherences between investment law, investment and development**

For the international legal framework for investment the issue development means analysing how international instruments on FDI can best promote the development of developing countries, which nowadays represent mainly, but no longer exclusively, the host countries for MNEs.

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<sup>4</sup> *Fatouros*, Arghyrios A., *International Investment Agreements and Development – Problems and Prospects at the turn of the Century*, in: Hafer, Gerhard et al. (eds.): *Liber amicorum – Professor Ignaz Seidl-Hohenveldern in honour of his 80th birthday*, The Hague 1998, p. 115 - 132 (120) referring to the *UNCTAD World Investment Report 1997*, at xxxv.

<sup>5</sup> Compare also *supra* note 2 p. 245, with a calling for a *holistic* approach to investment regulations.

The beneficial effect of FDI on development is not self-evident. FDI does not per se promote the (economic) development of a country<sup>6</sup>. In addition, the impact of BITs on FDI is rather small and the results are mixed<sup>7</sup>. Many countries conclude IIAs in order to attract foreign investment and limit at the same time their own scope to exercise national policy. It is a challenge, especially for developing countries, to strike a balance between attracting FDI and retaining policy autonomy<sup>8</sup>.

Therefore the interrelationship of investment and development must be analysed as well as the interrelationship of investment law and investment. To verify the beneficial effects of FDI in a particular state would require considering the conditions prevalent in the state in question as well as the world economy at the decisive time<sup>9</sup>. A differentiation between the types of foreign investment and a clarification of the necessary conduct on the part of the investors is also vital<sup>10</sup>. The last point means that the conduct of MNEs as the main providers of investment must be regulated<sup>11</sup>.

Besides the emphasis on liberalisation and free markets in recent years, the classical issue of international investment is currently returning to the fore after its previous climax in the 1970s. Tension between North and South has characterized much of the history of international rulemaking on foreign investment. Now new approaches developed in cooperation of North and South are required. Looking for new approaches necessitates clarifying the starting position, namely the state of current international investment law, its strengths and weaknesses.

## **2. International investment law: a brief overview**

The remarkable development of international investment treaties and jurisprudence in recent decades has led to the creation of a junior discipline of international investment law.

Originally, the legal protection of investors was regulated in public international law. To this day, the law concerning aliens guarantees as a part of customary international law that expropriations of foreign citizens are only lawful if they are caused for public welfare, if they are not discriminatory and if they are compensated.

The classic emphasis on legal protection of investment and thus of investors is still distinct as the core of international investment law. The focus is on protecting the investors' rights by simultaneously emancipating them from their home countries.

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<sup>6</sup> UNCTAD, World Investment Report 2003, at 83 ff.; *supra* note 4, at 121.

<sup>7</sup> See, e.g. UNCTAD, World Investment Report 2003, at 89 ff., *Hallward-Driemeier*, Mary, Do Bilateral Investment Treaties attract FDI? (2003), at 22 f., available on: [http://econ.worldbank.org/files/29143\\_wps3121.pdf](http://econ.worldbank.org/files/29143_wps3121.pdf); compare also the conflicting economic theories on foreign investment: *Sornarajah*, M., *The International Law on Foreign Investment*, 2<sup>nd</sup> edition, Cambridge 2004, at 50 ff.

<sup>8</sup> UNCTAD, World Investment Report 2003, at 89 ff.

<sup>9</sup> The main policy domains with the strongest impact on the investment environment are identified in the 2002 UN Monterrey Consensus on Financing for Development, to which the OECD Policy Framework refers to.

<sup>10</sup> *Supra* note 4, at 121.

<sup>11</sup> Compare also: *Sornarajah*, M., *The International Law on Foreign Investment*, 2<sup>nd</sup> edition, Cambridge 2004, at 69, noting that: "The charge that the law purposefully hides the role of the multinational corporations, yet vests rights in them, but avoids the issue of their responsibility, is one that is difficult to avoid".

The legal framework of international investment law is a fragmented landscape. The sources of international investment law are IIAs which could be placed in three categories:

- BITs, which should be mentioned first because of their exponential increase in recent years.
- Regional treaties like NAFTA, MERCOSUR or the Energy Charter Treaty.
- Sectoral investment agreements like the Energy Charter Treaty, to be mentioned also in this category.

Since the failure of the Multilateral Agreement on Investment (MAI) in 1998, no other comprehensive and multilateral agreement has so far succeeded this OECD initiative. Investment agreement contemplations at the WTO lacked success as well.

More than 2,500 BITs<sup>12</sup> worldwide constitute first and foremost the legal framework of international investment law. They comprise a widespread and growing legal regime. The popularity of BITs is a consequence due to mutual interests: protection of the home country's investors on the one hand and attraction of FDI for the host country on the other hand. In addition, BITs offer a high degree of flexibility. Since the late 1980s developing countries have been increasingly acting not only as host countries of FDI, but also as home countries of outward-flowing capital<sup>13</sup>.

### **3. BITs and international arbitration: emphasis on protection of investor's rights and interests**

It can be generally stated that the common content of all investment agreements is determined by the fundamental idea that FDI requires an investment climate characterized by stability and legal security. This insight has been partly denied in the past. The climate for FDI is today a welcoming one compared to the era of decolonisation when direct investments were seen as a threat to recently gained national sovereignty.

BITs usually provide regulations concerning admission, treatment, expropriation and dispute settlement. Numerous investor rights are granted under the headings of

- treatment (similar treatment of foreign investors to nationals of the host state),
- most-favoured-nation treatment (similar treatment of foreign investors to the best treatment accorded any third nation) and
- absolute standards of treatment (e.g. protection and security, fair and equitable treatment).

Moreover, guarantees against expropriation without compensation and due process as well as capital transfer provisions to guarantee transfer and repatriation of profits should be mentioned.

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<sup>12</sup> UNCTAD, Recent developments in international investment agreements (2006 – June 2007), (UNCTAD/WEB/ITE/IIA/2007/6).

<sup>13</sup> UNCTAD, Bilateral Investment Treaties 1959-1999, at 2, (UNCTAD/ITE/IIA/2).

If the host country violates one of the rights the investor may challenge measures implemented by a dispute settlement clause. BITs may provide for arbitration both under institutional and ad-hoc arbitration processes. The institutions which supervise arbitrations are the International Centre for the Settlement of Investment Disputes (ICSID), the International Chamber of Commerce, and the Stockholm Chamber of Commerce. Rules drafted by the UN Commission on International Trade Law (UNCITRAL) can be consulted to govern ad-hoc arbitrations. ICSID, as the body incorporated in many BITs, is the arbitral body that keeps its records most extensively public. However, the text of the awards must be kept private if both parties do not agree to publish. Therefore arbitrations are also viewed critically because they would create a legal regime by lacking safeguards of transparency<sup>14</sup>. Furthermore, “by demanding much in resources and expertise” international arbitration can be disadvantageous for developing countries<sup>15</sup>.

This is approved in a new UNCTAD study which points out the disadvantages of IIAs with extremely broad and imprecise provisions disputed in investment arbitrations leading to a new generation of concise IIAs<sup>16</sup>. Developing countries have particularly problems with this “resultant risk of incoherence” that parties to the *new* IIAs are also still parties to numerous *old* IIAs because developing countries with their “lack of expertise and bargaining power in investment rule-making” may have to negotiate on two divergent agreement models of their contract parties<sup>17</sup>.

#### 4. Interference of BITs with human rights

Typically BITs do not refer to international human rights obligations of the contracting parties, nor do they contain substantive clauses on human rights or any kind of investor obligation to respect human rights<sup>18</sup>. The U.S. Model BIT from 2004 is insofar an exception regarding its labour and environment provisions<sup>19</sup>.

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<sup>14</sup> *Suda*, Ryan, The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization, Global Law Working Paper 01/05, NYU School of Laws, Symposium – “Transnational Corporations and Human Rights”, at sections II.D.3 and V.A.4 expresses criticism not only in terms of lacking safeguards of transparency but also of legitimacy or accountability.

<sup>15</sup> UNCTAD, World Investment Report 2003, at 117.

<sup>16</sup> UNCTAD, Investor–State Dispute Settlement and Impact on Investment Rulemaking, (UNCTAD/ITE/IIA/2007/3).

<sup>17</sup> *Ibid*; compare also UNCTAD, World Investment Report 2004, at 93 explaining why the bilateral approach presents also less attractive features for developing countries, noting that “asymmetries in bargaining power put weaker economies at a disadvantage in the negotiations of bilateral agreements. Although this applies in all negotiating situations, it is particularly relevant in agreements between large developed countries and small and poor developing ones – and when bilateral agreements go beyond a narrow coverage. In some recent cases, the principal objective of investor protection has been complemented with liberalization clauses related to the right of establishment and an expanded list of restricted performance requirements. So, the other side of the “flexibility” of the bilateral approach is that developing countries may be entering IIAs of broader scope. The implications of this are – for example because of the MFN clause – still far from fully understood. [...] In addition, the extension of bilateral treaty coverage and the freedom of pairs of countries to define their provisions, could lead to uncertainty, potentially inconsistent rules and legal conflicts.

<sup>18</sup> *Peterson*, Luke Eric and *Gray* Kevin R., International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration, 2003, paper prepared by the International Institute for Sustainable Development (IISD) for the Swiss Department of Foreign Affairs, at 8 f.

<sup>19</sup> See Art. 12, 13 and the preamble of the updated U.S. Model BIT.

Indeed, negative implications of BITs for human rights can be pointed out. BIT provisions concerning expropriation may prevent host countries enforcing human rights norms against MNEs. Due to the fear of compensation requirements, host countries may refrain from regulating the operation of MNEs on their territory in areas such as the environment, public health and safety, and workers' rights<sup>20</sup>. Governmental regulations can easily have an impact on private property, and for this reason regulatory takings are particularly sensitive<sup>21</sup>. A state's fear of a lawsuit and of compensation obligation, resulting in abandonment of e.g. environmental or social regulation, is called a *regulatory chill*<sup>22</sup>. The difficulty in drawing a line between regulations which investors must comply with and regulatory takings for which compensation must be paid if they are to be lawful was indeed also one of the contentious points of the MAI negotiations.

Besides provisions concerning expropriation there are several other BIT provisions which may have negative implications for human rights; but all these provisions cannot be elaborated here<sup>23</sup>. Rather, one exemplary decision out of the growing body of ICSID jurisprudence shall be highlighted to illustrate this problem. In the arbitration *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*<sup>24</sup> the arbitral tribunal – constituted under the Spain-Mexico BIT – ordered Mexico to pay \$ 5.5 million in compensation to a Spanish corporation which had operated a landfill in Mexico prior to the denial, by a Mexican federal agency, of the renewal application for the landfill's operating permit. The tribunal held that the non-renewal, which was predicated on environmental- and health-related violations of the permit conditions and on community opposition to the landfill, violated two of the investment protection provisions in the BIT.

With regard to the issue of whether an environmental regulation could constitute a measure tantamount to expropriation, the Tribunal quoted the earlier ICSID award in the case of *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*<sup>25</sup> which held:

“Expropriatory environmental measures – not matter how laudable and beneficial to society as a whole – are in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for

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<sup>20</sup> UNCTAD, World Investment Report 2003, at 112 using environment as an example, noting that “if regulatory measures give rise to compensation, [...] a duty to compensate might inhibit a host country from enforcing its laws or from complying with international environmental agreements.”

<sup>21</sup> See *id.*, at 111.

<sup>22</sup> *Ibid.*, noting that „the major difficulty...is how to identify the point at which a process of governmental action changes to an incremental deprivation of an owner's rights, such that the deprivation becomes the subject of a duty to compensate. If that definition is drawn too widely it will catch entirely legitimate regulatory and administrative action... So an extensive interpretation of “regulatory takings” can limit the national policy space by hindering a government's right to regulate, creating the risk of “regulatory chill”, with governments unwilling to undertake legitimate regulation for fear of lawsuits from investors”.

<sup>23</sup> See *supra* note 13, at section I.B.3; Peterson, Luke Eric and Gray, Kevin R., International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration, 2003, paper prepared by the International Institute for Sustainable Development (IISD) for the Swiss Department of Foreign Affairs, at 16 f., 23 f.

<sup>24</sup> ICSID, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2 (2003), at <http://www.worldbank.org/icsid/cases/laudo051903FINAL.pdf> (Spanish original version), <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf> (unofficial English translation). All quotations will be from the unofficial English translation.

<sup>25</sup> ICSID, *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID case No. ARB/96/1, 15 ICSID Review-Foreign Investment Law Journal, 72, p.192 (2000).

environmental purposes, whether domestic or international, the state's obligation to pay compensation remains."<sup>26</sup>

The tribunal held that the action was expropriatory because "[t]he government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures."<sup>27</sup>

But this *Tecmed*-arbitration is remarkable and much-discussed among lawyers because the tribunal does not restrict its analysis to the effects on the investor (so called *effect doctrine*) but also considers the governmental interests involved (so called *police-powers doctrine*)<sup>28</sup>. In addition, the tribunal refers to the jurisdiction of the European Court of Human Rights and states that there "must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure"<sup>29</sup>. Insofar, this *Tecmed*-arbitration is a positive exception because it does not focus only on the particular BIT provisions but takes into account public interests and puts this in relation with the investor's interests.

Choosing this positive example may not prove or may even be understood as a disproof of the thesis that arbitration tribunals focus on BIT provisions and therefore on investment protection. But it must be pointed out that this *Tecmed*-arbitration is so far exceptional<sup>30</sup>. Generally the lack of any human rights obligations in BITs leads to their disregard in the decision-making of arbitral tribunals<sup>31</sup>.

## 5. Result

International investment law is a junior discipline with an emphasis focused on legal protection of investors' rights and interests. Accordingly, investment arbitration usually leads to the safeguarding of investors' rights. This focusing on the rights and interests of investors may lead particularly to the disadvantaging of developing countries with less human or monetary resources at their disposal. BITs do not refer to international human rights obligations of the

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<sup>26</sup> *ICSID*, Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2 (2003), at para. 121.

<sup>27</sup> *See id.*, at para. 116.

<sup>28</sup> *Id.*, at para. 118 ff.

<sup>29</sup> *Id.*, at para. 122, referring to European Court of Human Rights, in the case of *Mellacher and Others v. Austria*, judgment of December 19, 1989, 48, p.24 and in the case of *Pressos Compañía Naviera and Others v. Belgium*, judgment of November 20, 1995, 38, p. 19.

<sup>30</sup> *Sornarajah*, M., *The International Law on Foreign Investment*, 2<sup>nd</sup> edition, Cambridge 2004, at 125, noting that: "Arbitration tribunals, which usually accentuate the interests of foreign investors over those of the environment, are prone to decide in favour of investment protection."; at 375, noting that: "The principal position of arbitrators will remain that that there will be little scope for regulatory taking to be pleaded in order to justify non-payment of compensation. *Dicta* to the effect that environmental takings are subject to compensation was followed in *Tecmed v. Mexico*".

<sup>31</sup> *Compare also: Reinisch*, August, "Investment and..." - The Broader Picture of Investment Law, in: Reinisch, August/Knahr, Christina (eds.), *International Investment Law in Context*, Utrecht 2008, at 202, noting that "international investment arbitration remains a highly specialized dispute settlement mechanism [...] Non-investment matters are touched upon, but they rarely reach the limelight of investment disputes."

contracting parties, nor do arbitral tribunals – as a general rule – take into account human rights issues in their decision-making<sup>32</sup>.

### **III. Strengthening the social dimension of IIAs: Towards investment agreements regulating corporate social responsibility**

The *social dimension of international investment agreements* as one of the sub-themes of the OECD GFI 2008 picks up a topic which is currently starting to be discussed among experts on international law<sup>33</sup>. Detached from the focus on investment protection, scholars have recently been investigating on international investment law in a broader context, including e.g. its cultural, environmental, social and human rights aspects<sup>34</sup>. For instance, the experiences of NAFTA Chapter 11 and the MAI have been analysed to make suggestions for investment negotiations within the WTO<sup>35</sup>.

In comparison to most BIT provisions the Preamble of the NAFTA at least declares that the NAFTA Parties also resolve to

“create new employment opportunities and improve working conditions and living standards in their respective territories; [...] preserve their flexibility to safeguard the public welfare; promote sustainable development; and protect, enhance and enforce basic workers’ rights.”<sup>36</sup>

Thus, awareness of the social dimension of IIAs exists and is steadily growing.

In the following, the strengthening of corporate social responsibility in IIAs will be discussed as a particular aspect of the social dimension of IIAs and their particular relevance for developing countries.

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<sup>32</sup> This is to be understood as: no human rights provisions apart from human rights entitlements of investors.

<sup>33</sup> *Reinisch*, August, “Investment and...”- The Broader Picture of Investment Law, in: Reinisch, August/Knahr, Christina (eds.), *International Investment Law in Context*, Utrecht 2008; *Muchlinski*, Peter, *Corporate Social Responsibility and International Investment Law*, in: Muchlinski, Peter/Ortino, Frederico/Schreuer, Christoph, *The Oxford Handbook of International Investment Law (OUP) ILA Committee on the International Law on Foreign Investment (forthcoming 2008)*, *Hirsch*, Moshe, *Interactions between Investment and Non-Investment Obligations in International Investment Law*, in: Muchlinski, Peter/Ortino, Frederico/Schreuer, Christoph, *The Oxford Handbook of International Investment Law (OUP) ILA Committee on the International Law on Foreign Investment (forthcoming 2008)*; *Ortino*, Frederico, *The Social Dimension of International Investment Agreements: Drafting a New BIT/MIT Model?*, in: *International Law FORUM du droit international 2007*, p. 243-250; *Kriebaum*, Ursula, *Privatizing Human Rights. The Interface between International Investment Protection and Human Rights*, in: Reinisch, August/Kriebaum, Ursula (eds.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold*, Utrecht 2007.

<sup>34</sup> *Ibid*; *ICSID*, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Award, 20 May 1992, (ICSID Case No. ARB/84/3); *Froehlich*, Annette, *Cultural Matters in Investment Agreements and Decisions*, in: Reinisch, August/Knahr, Christina (eds.), *International Investment Law in Context*, Utrecht 2008. Among other things Froehlich reminds to the importance of cultural concerns already in the negotiations (and eventually for the failure) of the MAI; *supra* note 2; *Dolzer*, Rudolf/*Herdegen*, Matthias/*Vogel*, Bernhard (eds.), *Auslandsinvestitionen, Ihre Bedeutung für Armutsbekämpfung, Wirtschaftswachstum und Rechtskultur*, Freiburg 2006.

<sup>35</sup> *Kurtz*, *Jürgen*: *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*, Jean Monnet Working Paper 6/02.

<sup>36</sup> *NAFTA*, Preamble, signed on 17 December 1992; *see also supra* note 2, at 245 f., there Ortino points out the importance of preambular statements for the interpretation of treaty provisions.

## 1. Codes of conduct for MNEs

Public international law does not only focus on the protection of MNEs but also takes a close look at their control. The growing economic and political power of MNEs initiated in the early 1970s demand for their control. The insistence on control of MNEs' activities has accompanied the vindication of a "new international economic order". At that time, the control of MNEs was debated to protect developing countries and their sovereignty.

Since the 1990s, human rights concerns have led states, IOs, NGOs and last but not least experts on international law to consider the control of MNEs. Since then the human rights responsibility, accountability or liability of MNEs has been a much-discussed issue in international law<sup>37</sup>.

The business activities of MNEs have predominantly positive implications for developing countries. Due to their transfer of technology they are particularly an important source of innovation<sup>38</sup>. But MNEs may also have negative implications<sup>39</sup>. In order to attract FDI, developing countries in particular make concessions to MNEs, allowing them to "skirt labour and environmental regulations"<sup>40</sup>.

MNEs are not obliged to respect international law, particularly international human rights obligations, because they are no (or only partial) subjects of international law<sup>41</sup>. Therefore, numerous multilateral initiatives have created codes of conduct for MNEs to oblige them by so called *soft law* to respect e.g. human rights, minimum environmental standards or core labour standards<sup>42</sup>. The OECD Guidelines for Multinational Enterprises<sup>43</sup> and the ILO Tripartite

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<sup>37</sup> See among the vast literature e.g. Kamminga, Menno T./Zia-Zarif, Saman (eds.), *Liability of Multinational Corporations under International Law*, The Hague 2000; Zerk, Jennifer A., *Multinationals and Corporate Social Responsibility, Limitations and Opportunities in International Law*, New York 2006; Demirag, Istemi (ed.), *Corporate Social Responsibility, Accountability and Governance, Global Perspectives*, Sheffield 2005. *Liability of Multinational Corporations under International Law*, The Hague 2000, S. 1-15.

<sup>38</sup> UNCTAD, *World Investment Report 2003*, at 129; particularly regarding the positive and negative role of MNEs in extractive industries compare: UNCTAD, *World Investment Report 2007*, at 145 ff.

<sup>39</sup> Compare the Reports of the Special Representative of the U.N. Secretary-General on human rights and transnational corporations, John Ruggie, available on: [http://www2.ohchr.org/english/issues/trans\\_corporations/index.htm](http://www2.ohchr.org/english/issues/trans_corporations/index.htm) and the Business and Human Rights Report Centre, tracking the positive and negative impacts of over 4000 companies worldwide, at <http://www.business-humanrights.org>.

<sup>40</sup> UNCTAD, *World Investment Report 2003*, at 88.

<sup>41</sup> In dispute, denying in principle an international legal personality of corporations of municipal law: Brownlie, Ian, *Principles of public international law*, New York 2003, at 65; differentiating and accepting a *restricted* international legal personality: Delbrück, Jost in: Dahm, Georg/Delbrück, Jost/Wolfrum, Rüdiger (eds.) – *Völkerrecht*, Bd. I/2, Berlin 2002, at 245.

<sup>42</sup> See Petersmann, Ernst-Ulrich, *Codes of Conduct*, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume I (1992), at 627-632; Horn, Norbert (ed.), *Legal Problems of Code of Conduct for Multinational Enterprises*, Deventer/The Netherlands 1980; Thürer, Daniel, *Soft Law*, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume IV (2000), at 452-460; Shelton, Dinah (ed.), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System*, New York 2000.

<sup>43</sup> The Guidelines are addressed to the government of the 30 States parties of the Organisation, but have also been adopted by ten non-Member countries (Argentina, Brazil, Chile, Egypt, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia). These governments "recommend to multinational enterprises operating in or from their territories the observance of the Guidelines", Declaration on international investment and multinational enterprises, revised version of 27 June 2000, published in I.L.M. 40 (2001), at 237 ff.

Declaration of Principles concerning Multinational Enterprises and Social Policy<sup>44</sup> can be mentioned as two such initiatives. In the 1970s, numerous IOs created codes of conduct for MNEs<sup>45</sup>; since the 1990s innumerable private codes of conduct have also been initiated by enterprises, unions or NGOs. But only the codes of conduct created by IOs are qualified as *soft law* and therefore as a complex of norms lacking binding force but, nevertheless, producing significant legal effects. *Soft law* may prove helpful in developing, interpreting and clarifying international law. Codes of conduct for MNEs as a specific kind of *soft law* are often regarded sceptically because of their voluntary character and their lacking or indistinct effectiveness. However integrating codes of conduct for MNEs in IIAs could strengthen their effectiveness and the social dimension of IIAs.

## **2. Imposing investor human rights obligations in IIAs by integrating codes of conduct for MNEs**

As already stated, IIAs impose no obligations on investors with regard to human rights. Particularly codes of conduct for MNEs have no relevance for IIAs.

Concerning the OECD Guidelines for Multinational Enterprises there have been some steps in the right direction: adhering governments ensure that their support for the Guidelines finds expression in credit and investment promotion or guarantee programmes<sup>46</sup>. These references are positive approaches and they should be strengthened.

However codes of conduct or corporate social responsibility have not yet been integrated in IIAs. In the 1970s it was predicted that the impact of codes of conduct for MNEs depends on their integration in IIAs<sup>47</sup>. And, conversely, regulating investors' human rights obligations in IIAs would represent an important aspect of their social dimension.

This inclusion of corporate social responsibility obligations in IIAs is nowadays frequently demanded<sup>48</sup>. The integration of human rights obligations in BITs would facilitate the

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<sup>44</sup> The Tripartite Declaration was adopted by the *Governing Body* of the ILO at its 204<sup>th</sup> Session, on 16 November 1977, published in I.L.M. 17 (1978), at 422 ff.

<sup>45</sup> *Wildhaber*, Luzius, *Multinationale Unternehmen und Völkerrecht/Multinational Corporations and International Law*, in: *Berichte der Deutschen Gesellschaft für Völkerrecht, Heft 18, Internationalrechtliche Probleme multinationaler Korporationen/International Law Problems of Multinational Corporations*, Heidelberg 1978, at 53, listing initiatives of the UN, UNCTAD, UNIDO, UNCITRAL, ILO, OAS, OECD, EC, ILA.

<sup>46</sup> *OECD*, 2007 Annual Meeting of the National Contact Points, Report by the Chair, 19-20 June 2007, at 10ff.

<sup>47</sup> Compare already the indication of *Meessen* at the conference of experts on international law in 1978, in: *Berichte der Deutschen Gesellschaft für Völkerrecht, Heft 18, Internationalrechtliche Probleme multinationaler Korporationen/International Law Problems of Multinational Corporations*, Heidelberg 1978, at 399, noting that the relevance and legal impacts of codes of conduct should not be underestimated and that they would gain importance particularly as an integrated part of international investment agreements.

<sup>48</sup> Report of the *High Commissioner for Human Rights*, U.N. Economic and Social Council, Human rights, trade and investment (E/CN.4/Sub.2/2003/9), at para. 59, noting that "Promoting investors' obligations alongside investors' rights. Voluntary codes of conduct promoting corporate social responsibility are important; yet, as investors' rights are strengthened through investment agreements, so too should their obligations, including towards individuals and communities. To this end, initiatives to clarify and specify the legal responsibility of actors towards individuals and groups in the context of investment are important. Further, States could consider the issue of legal responsibility of investors within discussions concerning continuing investment liberalization and consider acknowledging these responsibilities in investment agreements."; also: International Institute for Sustainable Development (IISD) and its

consideration of human rights norms in investment treaty arbitration. This consideration would not mean that arbitral tribunals would become a forum for adjudicating FDI-related human rights claims against investors<sup>49</sup>. Rather, investment tribunals would adjudicate investor rights and pre-condition these rights on compliance of the investors with minimum human rights responsibilities<sup>50</sup>. This is about a “human rights approach to investment liberalization”<sup>51</sup>.

Furthermore, an integration of human rights obligations of MNEs in IIAs would provide a less controversial option to e.g. the extraterritorial jurisdictions for corporate complicity in human rights violations committed by MNEs outside the United States, such as those under the U.S. Alien Tort Claims Act<sup>52</sup>.

Integrating corporate social responsibility in IIAs would reconcile two issues which belong together: the rights and the obligations of investors in the immediate legal context of international investment law. This would strengthen the effectiveness of codes of conduct for MNEs on the one hand and balance the different interests concerned by IIAs on the other hand. In addition, this would promote investment for development by diminishing the negative implications of MNEs which are particularly relevant in developing countries<sup>53</sup>.

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Model BIT published in the IISD Model International Agreement on Investment for Sustainable Development, available at: [http://www.iisd.org/pdf/2005/investment\\_model\\_int\\_agreement.pdf](http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf).

<sup>49</sup> See *Peterson/Gray*, *supra* note 17, at 36, noting that “the inclusion of investor responsibilities in investment treaties [ ] would necessarily require that investment tribunals grapple more frequently and at an ever-greater level of sophistication with human rights norms. This presupposes ever-greater human rights expertise on the part of arbitrators, and invests these Tribunals with greater authority as fora where human rights concerns will be elaborated and interpreted. It must be stressed that investment tribunals would not become an adjudicative forum for human rights norms.”

<sup>50</sup> *Ibid.*

<sup>51</sup> See *supra* note 43: *High Commissioner for Human Rights*, at para. 56, noting that such an approach “examines what complementary measures are needed to ensure an appropriate balance of rights and obligations between States and towards investors, bearing in mind States’ responsibilities under human rights law”. The human rights approach would involve several courses of action: including the promotion and protection of human rights among the objectives of investment agreements; ensuring states’ right and duty to regulate; promoting investors’ obligation alongside investors’ rights; promoting international cooperation as part of investment liberalization; promoting human rights in the context of privatization; increasing dialogue on human rights and trade; and undertaking human rights assessments of investment liberalization. See *id.* at para. 57-63.

To strengthen human rights enforcement in the face of investment liberalization, the UN Commission on Human Rights has established “a working group to consider options for the elaboration of an individual complaints mechanism under the ICESCR.”

<sup>52</sup> U.S. Alien Torts Claim Act of 1789, 28 U.S.C. § 1350.

<sup>53</sup> See insofar also the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.