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Resumé of the dissertation

The beauty of the beast: how international investment law can contribute to the promotion of responsible business conduct?

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Can law motivate businesses to behave proactively for the common benefit? Should it show appreciation for 'greener' and more sustainable business conduct? If altruism is not a myth in business ethics, what role can law play in its reinforcement? And how shall it sanction businesses for eventual misconduct, without discouraging them from making positive contributions? The challenges faced by the international community, such as achievement of sustainable development goals, energy transition and mitigation of climate change, will require a broad engagement of various actors. They will require sufficient funding. The reliance on public funds for that purpose creates risks of budget deficits, which states and society may mitigate by resorting to private investments. Their cross-border regulation, means of encouragement and guarantees of protection form the interest scope of a special legal discipline, international investment law. While its historical focus was the protection of foreign investments against arbitrary actions of states, there is a growing attention towards investor behavior. But how can law deter investor misconduct and encourage positive behavior among foreign investors?

My dissertation addresses the issue of investor behavior from the perspective of international investment law. International investment law is in a time of political and regulatory turmoil resulting from both growing international attention to corporate social responsibility and the ongoing reform of investor-state dispute settlement, spearheaded by the United Nations Commission on International Trade Law (UNCITRAL). I appeal to legal practitioners, businesses and society in general by explaining how foreign investors may contribute to their own losses and attract counterclaims for damages in dealings with states hosting their investments. In particular, I argue that voluntary contributions to the general welfare should play a role in the assessment of corporate liability and act as legal incentives for the encouragement of responsible business conduct. While the dissertation addresses virtually any investors around the world with substantial business interests abroad, it can be of specific interest to Danish (and other Nordic) companies with ambitions of becoming value-based industry-leaders in their fields.

In terms of practical composition, in the dissertation I develop a theoretical understanding of the regulation of investor behavior in international investment law, starting from its historical and policy objectives, further advancing to the existing mechanisms of regulation and advocating for the novel and theoretically promising ones. The structure contains seven substantive chapters and a concluding chapter, as described in greater detail below.

The introductory chapter sets the scene for subsequent research framework. It puts forward the long-neglected legal framework for the regulation of investor behavior, which shows signs of growing public and doctrinal attention in recent years. The chapter also ties the under-investigated notion of 'investor behavior' with more widespread notions, such as sustainable development, corporate social responsibility and responsible business conduct. It reviews the existing initiatives dealing with the promotion of responsible business conduct on the

international level, concluding on their insufficiency due to the lack of political will or scarce opportunity for large-scale regulatory changes.

In the second chapter I review the status quo by observing the mechanisms dealing with investor behavior in international treaties and the practice of investment arbitration tribunals. The focus falls on the mechanisms dealing with the 'negative' side of behavior, addressed in the doctrine as 'investor misconduct.' I take a critical approach to the notion, discussing its limitations, which assist in preserving the structural bias of investment protection system. Indeed, if investor misconduct only concerns the chances of investor to receive compensation, states 'benefit' solely from not paying it or paying in the reduced amount. However, the recovery of affirmative damages from investors may neutralize the bias, provided there are procedural mechanisms and substantive legal rules for doing so. The search for such mechanisms becomes my focus in the subsequent chapters.

In the same chapter I also look at whether tribunals give any account of 'positive' behavior of investors. I argue that an analogy with 'law-abiding citizens' may be conceptually-flawed, as the lack of performance according to certain obligations would likely fall under 'investor misconduct.' Instead, I propose a higher threshold, where only voluntary contributions from businesses for the general welfare in the country of operation would count as manifestations of their true 'positive' behavior. Surprisingly, the review of arbitration practice shows no appreciation of such voluntary contributions, often admitting them as a factor of low importance.

The search for better legal mechanisms of appreciation of such 'positive' contributions leads to centuries-old comparators from more established areas of law. The methodological possibilities for their use form the main focus of chapter three, in which I make a case for the use of comparative legal method in international investment law. The scope of analogical reasoning and source references to private law is a contested issue of international law, however, one can refer to general principles of law as one of its sources. I argue that the reference to uniformly applied principles of private law may fill the regulatory gaps arising in situations when tribunals need to decide on issues of investor liability.

Furthermore, one can question, whether investors can agree on the limitation of liability in their contractual arrangements with host states? In chapter four, I look closer at contractual relationships in investment arbitration cases. Following the structural bias of the investment protection system, where only investors can bring claims against states, states try to rely on such contractual arrangements in order to limit their potential liability. Similarly to private parties, investors often resort to contractual limitation of liability clauses, a widespread legal mechanism, which has certain typical characteristics and interpretation rules in comparative contract law. The review of arbitration practice shows that tribunals admit these characteristics and make use of similar interpretation rules. However, in cases established under investment treaties, tribunals have long seemed rather reluctant to give effect to agreements on limitation of liability, due to the thin – and frequently over-formalized, - separation line between contract and treaty matters. The situation is changing in the recent cases, where tribunals gave effects to contractual limitations, by treating them as *de facto* limitations on the amount of otherwise eligible compensation. While the use of contractual limitation of liability clauses for shielding investors from liability seems premature at the current stage, the situation may change with the eventual redesign of international investment agreements. I conclude the chapter on the guiding role of comparative private law in their use and interpretation in international investment law.

A closer look at the mechanisms of investor liability reveals a combination of two different regimes: a reduced or forfeited claim for compensation and (counter-)claims for affirmative damages against the investor. In chapter five I observe the emergence of both mechanisms in

the treaty negotiation practice and the practice of arbitral tribunals, noting their gradual development and potential shortcomings. It further suggests looking at private law comparators for regulatory guidance.

Such comparators come forward in chapter 6, as *benevolent intervenors,* a novel legal category conceptually similar to Good Samaritans. In this chapter I look into the regulation of the liability of benevolent intervenors in comparative private law and discusses whether – and under which conditions – one can apply it by analogy to investor liability.

In chapter seven I further conceptualize the policy of leniency, as a particular regulatory instrument applicable to the liability of intervenors. I argue that the practice of investment tribunals already shows some signs of its recognition. In turn, the chapter advances a normative claim that tribunals can further instrumentalize the policy as a mechanism of encouragement of responsible business conduct. I conclude with some suggestions for the practical implementation of the policy in investment arbitration cases.

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