

Host state regulation of transnational corporate damages: a Chinese perspective on challenges and responses

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Article

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Abstract

Host states bear the primary territorial responsibility for regulating transnational corporate damages, yet their regulatory capacity is constrained by dual challenges: domestically, the necessity of extraterritorial reach exceeds the territorial limits of state jurisdiction; internationally, the investment-protection architecture suppresses regulatory sovereignty. This article argues that home state litigation and international accountability mechanisms can only supplement, not replace, host state regulation, and that developing host states must build their own institutional pathways to address these challenges. Using China—a major capital-importing developing state—as a case study, the article shows how the dual challenges manifest in three domains: the imbalance between administrative and judicial responses to transnational harm; uncertainties in choice of law and parent-company liability; and limits on the extraterritorial effect of host state judgments. It proposes a two-track response: recalibrating administrative–judicial coordination, refining the application of law in transnational torts, and developing corporate human rights due diligence at the domestic level; and designing reciprocity in investment dispute resolution while articulating a coherent host state position in the business and human rights treaty negotiations at the international level.

Introduction

The most prominent manifestation of the negative externalities of transnational capital (TNCs) is the harm inflicted on the local environment and human rights by transnational corporations in host states (transnational corporate damages, or ‘TNC damages’) (Clapham, 2006; Zerk, 2006; Ratner, 2001; Deva, 2003; Morgera, 2020).¹ In principle, infringements occurring within a state’s territory should be adjudicated by that state’s courts, with enforcement ensured by sovereign power. In practice, however, the complexity of TNC damages often renders effective regulation challenging, leaving victims unremedied.² To address the ‘impunity’ of TNCs, the international community has developed a range of accountability instruments, including the UN Guiding Principles on Business and Human Rights, ongoing treaty negotiations on business and human rights, the OECD Guidelines for Multinational Enterprises, and the ILO Tripartite Declaration. These instruments impose substantive requirements on TNCs and promote the vertical implementation of human rights obligations through domestic legislation (UN ECOSOC, 2017, para 10; OEIGWG, 2024). In recent years, home states of TNCs have also turned attention to the environmental and human rights consequences of their corporations’ overseas operations, enhancing accountability through legislative and judicial means.³ Yet the regulatory challenges of TNC damages remain unresolved: many irresponsible business practices continue to fall into a jurisdictional vacuum between the legal frameworks of host and home states, and between domestic and international law (Ahmad, 2022). Accountability and remedy for such violations face persistent obstacles, including jurisdictional and choice-of-law difficulties (Zerk, 2013, p 7).

In the dominant academic and policy narrative, host states—which have the closest connection to the violations and the primary regulatory responsibility—are repeatedly marginalised. Host state regulation is routinely portrayed in negative terms, with scholars citing lax investment regulation, outdated legal

systems and unjust judicial processes in developing host states as the predicate for introducing home state or international regulatory measures (UN HRC, 2011; Vastardis and Chambers, 2018; Skinner et al., 2013). This perspective overlooks the strategies and achievements of emerging developing states in regulating TNC damages, and ignores the capacity of Third World states to improve their domestic legal systems and strengthen their regulatory capabilities over time. As the primary stakeholders in TNC damages and the entities responsible for protecting citizens' human rights within their jurisdictions, host states merit a more sustained analytical engagement. This article therefore asks: how can host states—and China in particular—overcome the dual domestic and international challenges of regulating TNC damages?

China constitutes an instructive case for examining these challenges. As the second-largest capital importer in the world, China has a strong interest in establishing a normalised remedial mechanism for TNC damages through improved transnational legal frameworks. Although its gradualist approach to opening up has so far limited the frequency of TNC damages, the deepening of liberalisation has expanded permissible business activities for transnational capital in sectors involving public interests such as infrastructure, public services, energy and finance (NDRC and MOFCOM, 2024; UNCTAD, 2023), increasing the prospective risk of TNC damages. Because China has partially overcome the difficulties faced by developing host states while still confronting future contingencies, its experience offers analytically valuable material for other developing host states.

This article advances two principal arguments. First, host state regulation is structurally indispensable to the accountability of transnational capital; home state litigation and existing international mechanisms can only supplement, not replace, it. Second, the regulatory templates developed by host states such as China can—through careful institutional design at the domestic level and reciprocal arrangements at the international level—rebalance the asymmetries created by the prevailing investment-protection architecture, while also informing the position of developing host states in business and human rights treaty negotiations.

The remainder of the article proceeds as follows. The next section argues that host state regulation cannot be substituted by home state litigation or international mechanisms alone and is therefore indispensable to addressing TNC damages. The third section analyses the dual challenges that confront host state regulation: domestically, the tension between the necessity of extraterritorial reach and the territorial limits of state authority; internationally, the suppression of host state regulatory sovereignty by the neoliberal economic order and its investment-protection architecture. The fourth section turns to China as a case study, demonstrating how these challenges manifest in practice. The fifth section proposes a two-track response: domestically, recalibrating administrative–judicial coordination, refining choice-of-law rules and constructing corporate human rights due diligence obligations; internationally, designing reciprocity in investment dispute resolution and shaping the discourse of the business and human rights treaty negotiations.

The importance of host state regulation of TNC damages: limitations of supplementary regulation

Before turning to the challenges, it is necessary to explain why host state regulation occupies an indispensable position within the global system of regulating TNC damages. TNC damages frequently occur in third-world developing states (UN ECOSOC, 2006), and a state's rule of law directly conditions its capacity to regulate such complex harms. Scholars and practitioners generally argue that host states lack the ability or willingness to regulate, necessitating intervention from home states and the international community. This assumption is a major reason for the marginalisation of host state regulation. Yet external regulatory paths focus on individual-case justice rather than on the long-term development of host state regulatory capacity, and they neglect the interaction between external mechanisms and host state institutions.

Home state litigation, the principal non-local route, depends on a jurisdictional link with the home state—typically the residence of the victim or the involvement of home state interests. To exercise jurisdiction over a transnational tort occurring in a host state's territory, a home state court usually presupposes that the host state's judiciary cannot achieve substantive justice (*Piper Aircraft Co. v Reyno*, 454 US 235, 1981).⁴ Although framed in terms of comity and 'respect for host state judicial sovereignty', this negative assessment itself constitutes an intrusion into host state regulatory sovereignty and damages the reputation of developing host states' rule of law in the international community (Basaran, 2015). Hence the long-standing 'imperialist' critique of home state courts exercising extraterritorial jurisdiction in transnational corporate tort cases (Colangelo, 2011). Conversely, when home state courts apply the presumption against extraterritoriality to reject jurisdiction outright, victims may be left without remedy (*Kiobel v Royal Dutch Petroleum Co.*, 569 US 108, 2013). Ultimately, whether a home state accepts such lawsuits depends less on doctrinal rules of jurisdiction than on foreign-policy considerations and the relationship between executive and judicial branches. The double standard exhibited by the United States in the Chevron–Ecuador dispute is illustrative: when Ecuadorian victims sued Chevron, US courts invoked forum non conveniens to defer to the foreign forum; when victims later sought to enforce the Ecuadorian judgment, US courts reversed course and refused enforcement on grounds of fraud (*Chevron Corp. v Donziger*, 974 F Supp 2d 362, SDNY 2014). Judicial policy in the major home state jurisdictions (principally the United States, United Kingdom, Canada and the Netherlands) tends to evolve more rapidly than the time horizon of individual transnational tort claims. Home state litigation therefore cannot offer a consistent or stable route to remedy.

International regulation is similarly underdeveloped. The notion that TNCs lie wholly outside international law no longer reflects the contemporary international order; international law is increasingly capable of applying to TNCs either horizontally or vertically (Bilchitz, 2016). Yet neither path has matured in practice. Horizontally, soft-law instruments such as the UNGP have not generated norms with direct legal effect on TNCs, with only isolated domestic and arbitral cases pointing in that direction (*Urbaser v Argentina*, 2016); the scope of obligations remains narrow and faces resistance from large TNCs and capital-exporting states (Deva, 2016, p 22). Vertically, human rights treaties bind TNCs only through state

obligations of protection (UN ECOSOC, 2017, paras 30–31), without resolving how those obligations interact with investment-protection commitments. When a state's human rights duties conflict with its investment-protection duties, the competent dispute-resolution bodies are typically investment arbitration tribunals oriented toward investor protection (*Biwater Gauff v Tanzania*, 2008); international human rights law offers no comparable enforcement architecture. Indirect mechanisms that increase state obligations without enlarging state regulatory authority paradoxically impose additional burdens on the very host states that suffer most from TNC damages.

External methods can therefore only supplement, not replace, host state regulation. Only host states possess the territorial position, institutional capacity and informational base to balance individual justice against domestic economic and social realities (Benvenisti, 2013, p 309).

Dual challenges of host states in regulating TNC damages

The regulatory challenges facing host states arise from two distinct sources. Domestically, the imperative of extraterritorial regulation collides with the territorial limits of state authority. Internationally, the strengthening of host state regulatory capacity is suppressed by a global economic order organised around investment-protection mechanisms.

Domestic challenges: necessity of extraterritorial reach versus territorial jurisdictional limits

For ordinary torts, justice can usually be secured by acting against the proximate tortfeasor. TNC damages are different: host states must reach not only the subsidiary that directly caused the harm, but also the parent company, for two reasons. First, although damages are operationally inflicted by host-state subsidiaries, group-wide policies of production, safety and compliance are usually shaped by parent companies through intra-group control that crosses borders, generating a plausible basis for parent-company due diligence obligations in tort. Stopping at the subsidiary therefore cannot alter group policy or prevent recurrence. Second, TNC damages often involve large-scale or public-interest harms whose magnitude exceeds the compensation capacity of the subsidiary. In the Bhopal disaster, Union Carbide's Indian subsidiary held assets of less than US\$100 million, manifestly insufficient to cover the damages caused (Cassels, 1993, p 130). In the Deepwater Horizon explosion, although the directly liable entity was US-registered, the parent BP bore compensation liability running into the tens of billions of dollars, on the basis of US court judgments rendered in BP's home state (*In re: Oil Spill by the Oil Rig 'Deepwater Horizon'*, MDL No 2179). Whether TNC damages can be fully remedied therefore depends in many significant cases on whether the parent can be reached. If the host state cannot exercise extraterritorial jurisdiction over the parent, it cannot fully eliminate the effects of damage by acting against the subsidiary alone, nor can it secure adequate bargaining power against large transnational economic entities (Vastardis, 2018, p 285).

The territorial limits of state jurisdiction, however, make extraterritorial reach difficult for host states. The power to project regulation extraterritorially is distributed unequally and depends substantially on a state's own influence (Whytock, 2013). Most host states experiencing TNC damages are developing or underdeveloped, with limited extraterritorial-jurisdiction rules and limited international leverage. Their extraterritorial regulatory acts are unlikely to be recognised abroad. The Chevron–Ecuador litigation illustrates the difficulty: although an Ecuadorian court ordered Chevron to pay US\$11 billion in compensation for Texaco's pollution of the Amazon (*Aguinda v Chevron*, 2011), US courts refused to enforce the judgment on grounds of fraud and judicial corruption, and other jurisdictions followed suit, ultimately rendering the judgment ineffective (*Chevron Corp. v Donziger*, 2014). For developing host states, jurisdiction therefore remains substantially territorial. Moreover, host state regulation typically proceeds 'upstream' from subsidiary to parent, whereas home states can exert effects on overseas subsidiaries through internal corporate control without invoking external sovereign authority. The regulatory object is thus more firmly controlled by the parent's territorial state, and the effect of host state extraterritorial action largely depends on the parent's territorial state's willingness to cooperate. Where the latter is denied, host state extraterritorial regulation cannot consolidate into a regular practice.

If host states cannot effectively reach the overseas entities of a TNC, their regulatory effect stops at the subsidiary. TNCs can then evade accountability through transnational equity structures, fund transfers and tax-haven arrangements, or render subsidiaries shell companies without any compensation capacity (Muchlinski, 2021, ch 4). Even where a subsidiary is willing to assume responsibility, the parent can continue to direct damaging activity if host state sanctions are inadequate. The contradiction between the territorial limits of host state jurisdiction and the cross-border mechanisms of TNC damage thus forms the principal internal challenge.

International challenges: suppression of host state regulatory sovereignty by the neoliberal economic order

At the macro level, the weak regulatory position of host states is an external manifestation of structural inequality in the international economic order. Since the collapse of the Bretton Woods system, the neoliberal global order has emphasised free markets and 'relative competitive advantage', treating political 'distortions' of economic relations with suspicion. States, however, do not begin from a common baseline; the gains and losses of globalised domestic economies depend on their structural position vis-à-vis the international economic order. Developing host states must integrate into the 'global market' by rapidly revising domestic laws and signing international investment agreements, while maintaining low labour costs and a tolerant regulatory environment to sustain their 'relative competitive advantage'. Maintaining that advantage typically comes at the cost of exposing national public interests to exploitation by transnational capital. In the global value chain, large TNCs occupy the buyer role while host states and their domestic enterprises occupy the supplier role, and the coordinating effect of investment-protection mechanisms tilts the supply–demand relationship further toward the buyer (Picciotto, 2011, ch 8; Gereffi et al., 2005). Capital can readily relocate to lower-cost host states as

compliance costs rise, without making sustained contributions to local development. The continued exploitation of host state public interests by transnational capital is therefore a core proximate reason for the frequency and intractability of TNC damages in developing host states, and the neoliberal order that grants TNCs their advantageous position is the underlying cause.

Host state regulation is suppressed not only by capital mobility but also by the specific international rules that protect it. Regulatory measures taken against foreign investors can be challenged as expropriation or as breaches of fair and equitable treatment, under the dispute-resolution clauses of bilateral investment treaties or concession contracts—most often through ICSID or UNCITRAL arbitration. Even where host state courts are capable of penalising local subsidiaries, such penalties may be subsequently challenged at the international level by parent companies that bear no compensation risk. Arbitral tribunals, whether applying host state law or international law, possess the authority to assess the legality of host state sovereign acts; under an asymmetrical design favouring investor protection, this supranational authority functions primarily to protect foreign investment and constrain regulatory sovereignty. As investment-protection clauses are interpreted expansively, the scope of arbitral review approaches the full range of conduct attributable to host states under state responsibility (Crawford, 2013, p 547). In the Chevron–Ecuador dispute, the Ecuadorian court’s tort judgment was itself reviewed by an investment arbitration tribunal, which ultimately ruled that the judgment constituted a denial of justice (*Chevron v Ecuador*, PCA Case No 2009-23, 2018). Foreign investors can therefore coerce host states into withdrawing regulatory measures by threatening arbitration, and an adverse award entails substantial compensation liability. The resulting ‘regulatory chill’ (Tienhaara, 2011, p 606; Sornarajah, 2015, ch 5) limits the strengthening of host state regulatory capacity.

The challenges host states face in regulating TNC damages, then, are not merely a function of underdeveloped domestic rule of law; they are produced by the combined effects of a depoliticised geopolitical and neoliberal economic order. Developing states such as India, Ecuador and South Africa have actively participated in business and human rights treaty negotiations and have strengthened accountability mechanisms in domestic law and investment treaties, indicating that the marginalisation of host state regulation does not reflect a lack of regulatory will (Correa and Viñuales, 2022, ch 4). The international community should therefore not treat regulatory weakness as a purely domestic problem, but should clarify, through transnational and international legal mechanisms, the legitimacy standards governing host state regulatory measures and the level of respect owed to them by international adjudicators.

Manifestation of the regulatory challenges faced by host states in TNC damages: the case of China

Although the intensity and form of exploitation by transnational capital vary across host states, China constitutes an instructive case for observing the manifestation of these challenges. While China has built a comprehensive domestic legal system with mature enforcement and judicial mechanisms, its transnational legal architecture remains at an earlier stage of development. The common challenges

identified above will become increasingly salient as China's openness deepens in the context of a post-neoliberal economic order (Slobodian, 2018). The general domestic and international challenges therefore acquire distinctive manifestations in Chinese regulatory practice.

Manifestations of domestic challenges in China

China, as a host state, faces domestic challenges in three areas: a *policy* imbalance between administrative and judicial regulation; a *normative* gap in the extraterritorial application of law to transnational corporate damage cases; and a *practical* difficulty in ensuring extraterritorial enforcement of judgments.

Policy level: imbalance between administrative and judicial regulation

TNC damages have arisen in China, even if they have not always been theorised as transnational legal problems. In the Penglai 19 – 3 offshore oil-spill incident, the Chinese government intervened to order ConocoPhillips China Inc. ('ConocoPhillips China') to halt operations, clean up the spill and restore the marine environment; ConocoPhillips China ultimately paid RMB 2.3 billion in ecological restoration and compensation for damage to aquaculture and fisheries in coastal counties of Hebei and Liaoning provinces (State Oceanic Administration, 2012a, 2012b). The case involves TNC damages rather than a purely domestic tort, because the US-based parent ConocoPhillips exercised ultimate oversight and control, participated directly in negotiations with the Chinese government, and bore the principal financial burden of the settlement (ConocoPhillips, 2012, p 32).

China's regulatory response combined two paths. Administrative agencies such as the State Oceanic Administration and the Ministry of Agriculture ordered remediation and concluded a government settlement agreement with ConocoPhillips China and its parent that defined the scope and level of compensation, while preserving individual victims' right to litigate if they did not accept the settlement (State Oceanic Administration, 2012c; Zhao, 2014). From 2012, hundreds of fishermen filed lawsuits against ConocoPhillips China in maritime courts in Dalian, Qingdao and Tianjin seeking additional compensation. In practice, however, the content of the government settlement substantially shaped the judicial outcomes. Because the settlement agreement specified that only fishermen from a defined list of coastal districts and counties were entitled to compensation, ConocoPhillips China was able to use that scope as evidence that claimants from outside the list had not been affected by the spill, a position the courts largely accepted; the settlement agreement was also adopted as evidence in setting compensation standards, leading to the rejection of claims by fishermen and tourism businesses outside its coverage.⁵

China's response to Penglai 19 – 3 was thus centred on administrative oversight and negotiation, with judicial remedies playing a marginal role, and government settlement acting as the principal regulatory

instrument. Given the capacity of large TNCs to evade responsibility through capital transfers, entity changes and litigation resistance, achieving accountability through non-confrontational means is a practical choice that saves resources, accelerates remedy and avoids mass incidents. However, government settlements between host states and TNCs are concluded without public or victim participation, raising questions of transparency and representativeness; and, as the Penglai litigation illustrates, the findings of fact and commitments embedded in such settlements can substantially shape parallel judicial proceedings, even where the two paths are formally independent. The settlement agreement becomes the de facto standard for determining the scope and degree of tort liability, indirectly interfering with judicial proceedings that should be conducted independently (Bakan, 2015, p 285; Seck, 2011, p 40).

The risk runs further. Compensation under such settlements is typically conditioned on the host state waiving the right to pursue further accountability, with exemption clauses extending to parent and subsidiary companies and to related entities including successors. If secondary damage or long-term harm emerges after settlement, the host state's ability to hold the TNC accountable is sharply curtailed. In 2023, the Indian Supreme Court dismissed the Indian government's claim for additional compensation in the Bhopal case, relying on the settlement agreement concluded more than three decades earlier (*Union of India v Union Carbide Corp.*, 2023; Mukherjee, 2010, ch 2). The investment arbitration tribunal's holding that Ecuador's court judgment in Chevron constituted a denial of justice rested in significant part on the Ecuadorian government's waiver of collective litigation rights in the 1998 settlement (*Chevron v Ecuador*, 2018, paras 8.28–8.34). How administrative and judicial regulation are to be coordinated effectively is therefore a problem that all host states—developing host states in particular—must confront.

Normative level: legal application challenges in extraterritorial torts

In the Penglai 19 – 3 incident, some fishermen affected by the spill filed tort claims against ConocoPhillips in US federal courts (*In re ConocoPhillips Co. Penglai 19 – 3 Oil Spill Litigation*, No 4:13-MD-02472) rather than joining the parent as a co-defendant in domestic litigation, indirectly reflecting the then-immature state of China's transnational rule of law. With the entry into force of the Civil Code and the revision of the Civil Procedure Law, it has become possible to bring tort claims against TNC parent companies in Chinese courts. Whether China's legal system can deliver effective remedies for victims and protect collective and public interests, however, remains to be tested.

The distinctive structure of TNC damages affects both jurisdiction and choice of law. Under China's Civil Procedure Law, tort cases lie within the jurisdiction of the court of the place where the tort was committed or where the result occurred, allowing victims to elect either; the extraterritorial structure of TNC tort therefore does not affect the establishment of Chinese jurisdiction. Choice of law is more difficult: the place where the relevant act or omission occurred points to the parent's home state law, while the place of the result points to Chinese law. Given that the damage occurred in China, the victims

are predominantly Chinese citizens, and large-scale harms implicate Chinese public interest, considerations of close connection, the forum and public policy generally favour the application of Chinese law. Because subsidiaries are the direct perpetrators of TNC damages and usually act without intent to injure, with fault residing at the level of group policy or operational management, it is difficult to hold them jointly liable with the parent under joint tort or aiding-and-abetting rules. Absent piercing of the corporate veil, parent liability can therefore arise only where the parent has breached its due diligence obligations toward the subsidiary. Several developed home states, with their concentration of TNC parent companies, have begun to establish such due diligence obligations through legislation or case law; in common law systems the principal vehicle is the duty of care (*Vedanta v Lungowe*, 2019, paras 49–53; *Okpabi v Shell*, 2021, paras 25–27; Symeonides, 2016, ch 7).⁶ The UK Supreme Court has held that where there is a degree of business control between parent and subsidiary, or where the parent has made public commitments concerning group-wide policies, the parent owes a duty of care in relation to the tortious acts of its overseas subsidiary. Chinese tort law does not yet articulate equivalent human rights due diligence obligations for parent companies. Although some scholars argue that parent companies should bear fault liability for nonfeasance under existing tort principles, the argument is grounded in external sources—the social responsibility clause of the PRC Corporation Law and the UN Guiding Principles on Business and Human Rights—whose effect in tort determinations remains undetermined (PRC Company Law, 2023, art 5; UN HRC, 2011, Principle 11; Lin, 2010). In Chinese judicial practice, the civil obligation to act derives from statute, specific duty or prior conduct (Kunshan Court, 2019; General Principles of Civil Law, art 1165), and equity-based control or group-policy constraints between parent and subsidiary do not yet generate such an obligation. Although special relationships with the direct tortfeasor may generate duties to act, the recognised categories in Chinese tort law—such as guardian and employer liability (PRC Civil Code, arts 1188, 1191)—are limited; there is no general provision analogous to the common law duty of care.

In sum, parent companies in transnational corporate torts may meet the formal element of subject-form for aiding-and-abetting liability (control over the tortfeasor) and the behavioural element of nonfeasance liability, but they lack the behavioural element of the former and the subject form of the latter. Where the elements of a recognised tort cannot be fully satisfied, holding parents accountable through theoretical interpretation alone, even in the name of public-interest protection, would impose significant burdens on the courts. It is therefore generally more advantageous to apply the law of the parent's home state in developed states that recognise stricter due diligence obligations. Yet, in past practice, courts have overwhelmingly applied host state law (with the partial exception of host states whose colonial history brought parent companies within the common law duty of care; see *Chandler v Cape*, 2012; *Lubbe v Cape*, 2000). The combined effect of these choice-of-law uncertainties and the gaps in China's tort liability law is that victims seeking remedy face unexpected obstacles (van Calster, 2021, p 290).

Practical level: limits of the extraterritorial effect of adjudication

In the home state context, regulatory effect on overseas subsidiaries can be transmitted through the internal governance of the corporate group; host states cannot ordinarily achieve effectiveness by this route. Unless a TNC has continuing commercial interest in the host state market, or host state sanctions carry sufficient global weight to influence the group's worldwide business, the parent has no incentive to cooperate with host state regulatory measures. The binding force of state regulation and its extraterritorial reach therefore remain indispensable, and the question is how to make host state regulatory measures produce extraterritorial effect (Ryngaert, 2015a, p 442).

A state exercises jurisdiction through prescription, enforcement and adjudication, with extraterritorial enforcement the most intrusive on another state's sovereignty. Modern extraterritorial regulation typically operates by enacting laws with extraterritorial effect and applying domestic law extraterritorially (Ryngaert, 2015b, ch 1; Bradford, 2020, ch 1). Because China has not enacted special laws of this kind to regulate TNC damages, extraterritorial regulation can be achieved only through adjudication with extraterritorial effect. The extraterritorial enforceability of Chinese judgments, however, remains underdeveloped, and the means of compelling foreign entities to comply with judgments are limited. Even if a People's Court overcomes the normative obstacles and renders an effective judgment against a parent company, enforcement faces serious difficulty where the subsidiary lacks enforceable assets or has been wound up (as in the Bhopal case, *Chandler v Cape*, or the Ecuadorian Chevron litigation). China has signed bilateral judicial assistance treaties with relatively few states, especially few of the major capital-exporting states where TNC parent companies are concentrated. In the absence of recognition clauses, the factual-reciprocity standard predominantly applied in Chinese judicial practice presupposes a prior precedent of reciprocity, creating a perverse incentive for the recognition and enforcement of Chinese judgments abroad (Huang, 2020, p 248; Liu, 2023). Because large TNCs wield significant economic power and can influence the political dynamics of their home states, the recognition and enforcement of judgments against parents implicate not only judicial mutual trust between states but also the strategic interests of the requested forum. The lack of extraterritorial effect of judgments is therefore a major practical obstacle for China, as for other host states, in regulating TNC damages.

Manifestations of international challenges in China

The macroeconomic order challenges identified above translate, at the level of individual host states, into questions of foreign investment policy orientation and investment treaty drafting strategy. In terms of foreign investment policy, China's trajectory since the reform and opening up reflects a relatively gradualist approach to capital account liberalisation, with the central government retaining significant policy space throughout the reform period. By comparison, many developing host states that pursued more rapid liberalisation have struggled to mitigate the negative externalities of transnational capital and to translate inward investment into broader development outcomes such as employment generation, competitive markets and technological diffusion. China itself experienced a phase of preferential treatment for foreign investors and locally-driven regulatory competition before transitioning to a national treatment framework, deferring adoption of the pre-establishment national treatment and

negative list model until a later stage of economic development (Deng, 2021, p 110). As a result, the negative externalities of foreign investment have so far remained largely localised, without generating systemic conflicts between transnational capital and host state regulatory sovereignty—a configuration that is unlikely to be replicated as openness deepens.

The trajectory of investment treaty negotiation is following a similar arc. China's currently effective agreements are mostly first-generation conservative agreements oriented to safeguarding host state regulatory sovereignty (Wang, 2019, p 89), but as opening up deepens and capital exports increase, these no longer adequately protect Chinese overseas interests. Subsequent investment and trade agreements are likely to continue moving toward liberalisation. Since the Belt and Road Initiative, China's investment agreements with partner states have been predominantly liberal or balanced (Chi, 2019), indicating a general direction of policy. In this context, the number of investor–state dispute settlement ('ISDS') cases with China as respondent has been increasing, with state conduct under challenge including the withdrawal of pandemic-era policy support for commercial activity, changes to commercial land approval and the refusal to renew mining permits—all involving conflicts between public interest and foreign investor rights (*Hela Schwarz GmbH v China*, ICSID Case No ARB/17/19; Chi, 2022). As the fair and equitable treatment standard converges with the minimum standard under customary international law (*Glamis Gold v United States*, 2009, paras 599–616), arbitrary or disproportionate regulatory measures, and even judgments that do not amount to a denial of justice, may become subject to investment arbitral review. China's regulatory activity against TNC damages will accordingly face the suppression of regulatory chill. Reconciling China's dual role as capital-importing and capital-exporting state, and protecting host state regulatory sovereignty through investment treaty design appropriate to its conditions, are necessary considerations for future investment treaty negotiation.

Overcoming challenges in host state regulation of TNC damages: lessons from China for developing host states

Domestically, China has yet to establish a transnational legal system capable of fully addressing the regulatory challenges of TNC damages. Choice-of-law practice for extraterritorial torts is immature, the liability of parent companies for nonfeasance is undeveloped, and the extraterritorial enforceability of judgments is difficult to secure. In the absence of effective judicial remedy, efficiency-oriented government settlements have become an important instrument for regulating large-scale TNC damages, but over-reliance on them risks constraining the independence of judicial regulation. Internationally, the challenge posed by ISDS to regulatory sovereignty is intensifying. At the same time, the regulatory templates China develops in this area are likely both to shape and to be shaped by parallel efforts in other developing host states, given their shared structural position vis-à-vis transnational capital. China should accordingly focus on improving the domestic rules governing extraterritorial regulation while attending to the protection of regulatory sovereignty at the international level, optimising bilateral and multilateral investment agreements as components of the global economic order, and emphasising the

regulation and accountability of transnational capital in the business and human rights treaty negotiations.

Breaking through territorial jurisdiction limitations

In recent years, China has made significant progress in deepening judicial reform, environmental judicial activism and administrative public participation. These reform achievements have not yet been fully applied in the field of transnational rule of law, and the regulation of TNC damages remains a gap. Closing that gap requires not only special rules to govern transnational legal relationships, but also the non-discriminatory application of civil and commercial law to domestic and foreign subjects, and the equal treatment of cases involving domestic and foreign public-interest infringements. The territorial limits of capital regulation reflect a more fundamental incompatibility between domestic rule of law and the legal relationships involved in transnational production; breaking through these challenges depends on the comprehensive embedding of transnational rule of law in the policies, norms and effectiveness of TNC regulation (Cai, 2019, ch 7).

Restoring balance at the policy level: coordinating administrative and judicial regulation

Administrative departments are generally well positioned to safeguard public interests in environmental and safety matters, where primary regulatory responsibility lies with executive authority, while judicial power plays a supplementary and remedial role (Strauss, 1984, p 580; Tatel, 2010); in terms of functional positioning and institutional capacity, administrative power possesses comparative advantages in environmental management and protection that judicial power cannot match (Eskridge, 2013, p 415; Sunstein, 1989, p 540). In TNC damage cases, however, Chinese administrative departments have chosen to pursue accountability and remedy through government settlements that are necessarily case-specific, assuming functions that would more appropriately fall to judicial authorities and thereby foregoing the comparative advantages of administrative regulation. This pattern reflects, to some extent, the exclusivity tendency of administrative power in foreign-affairs matters: regulating TNC damages involves dealing with large foreign companies whose home states may invoke diplomatic protection, raising the prospect of inter-state tension (Dugard, 2009, paras 21–32). Judgments involving business and human rights may also intersect with a host state's broader positions in related treaty negotiations, generating institutional pressure for coordination across branches on foreign-affairs-sensitive issues.

China's policy choice should nonetheless strengthen the substantive role of judicial regulation in post-damage accountability and remedy, for three reasons. First, the risk of conflict between host state regulation of TNC damages and foreign sovereignty is comparatively low. Unlike sanction-blocking, which targets foreign public acts directly, regulation of TNC damages addresses harms caused by foreign private entities to interests located within the host state. Even where foreign-relations concerns

arise, they are secondary to the primary contradiction. Second, judicial regulation of TNC damages in China is largely absent, so its development poses no risk of crowding out administrative authority; normalising judicial remedy is a movement ‘from negative to positive’ rather than a spillover from ‘modest to full’. Third, in the transnational context, normalised judicial regulation is particularly important because administrative enforcement alone cannot project regulatory measures extraterritorially: only adjudication, with its higher international acceptance, can do so. Although government settlements offer efficiency, where regulation lacks extraterritorial effect TNCs retain the option of declining settlement on cost-benefit grounds and can transfer assets to evade liability; only where regulation can influence the global activity of the corporate group does the host state acquire genuine bargaining power.

The division of functions and coordination of positions between administrative and judicial authorities are accordingly two key nodes of institutional design. Administrative departments should focus on emergency response, damage control and ongoing commercial activity regulation, fixing key facts and evidence, and ensuring the implementation of large-scale remedial obligations that require executive capacity. The determination of legal liability and the content of remedy should rest with judicial authorities, ensuring fairness and creating the possibility of extraterritorial effect. Where government settlement remains the preferred path in particular cases, it should ensure public participation, conform to due process and be subject to supervision; conducting settlement under judicial supervision, or pursuing public-interest litigation through procuratorial organs (Zhuang, 2020), are appropriate alternatives. In terms of inter-branch coordination, the independence of judicial fact-finding must be preserved, while institutional mechanisms ensure that courts are informed of, and can take into account, the state’s articulated positions on foreign-affairs-sensitive issues. Within this framework, host state courts that engage substantively with transnational legal questions—including business and human rights and the extraterritorial reach of domestic law—can contribute to the gradual integration of transnational and international rule of law from a host state perspective.

Resolving normative challenges: choice of law for extraterritorial torts and parent-company due diligence

The normalisation of judicial regulation requires the establishment of procedural and substantive rules adapted to transnational corporate damage cases. Two reforms are particularly important.

Favourable choice of law for the injured party. In transnational tort cases, victims are typically in a disadvantaged position, and some states that take a broad interpretation of the place of tort have therefore adopted a ‘favourable to the victim’ approach to choice of law. Although such approaches risk increasing the burden on courts and disrupting tortfeasor expectations (Symeonides, 2009; Symeonides, 2020, p 257), transnational corporate torts present a special configuration that makes favourable choice of law more defensible. Ordinarily, applying the law of the place where the act was committed would disadvantage the victim, who cannot anticipate the location of the wrong. In transnational corporate tort cases, however, the parent company is usually domiciled in a developed state whose law contains more

developed human rights due diligence obligations; applying that law is therefore typically more favourable to victims and aligns with the parent's reasonable expectations regarding the applicable normative framework. If a Chinese court concludes that Chinese tort law does not support holding the parent liable for the acts of its overseas subsidiary, the application of the parent's home state law—incorporating duty of care or analogous due diligence obligations—is more protective of victims. Where applying home state law better safeguards China's public interest, it does not violate the mandatory-application provision of Article 5 of the Law on the Application of Laws to Foreign-related Civil Relations.

Constructing corporate human rights due diligence obligations. Application of home state law is effective only where that law itself recognises due diligence obligations. Where it does not, effective remedy cannot be achieved by that route. Moreover, as the place of damage, the location of the parties and the principal location of evidence, the host state is more closely connected to the dispute and its law is therefore the natural *lex fori* (Briggs, 2019, p 254); constructing human rights due diligence obligations within Chinese tort law is therefore necessary. Building such obligations through internationally recognised business and human rights frameworks and the vertical effect of human rights obligations would strengthen host state regulatory capacity, mitigate the regulatory chill imposed by the international economic order, enhance the extraterritorial effectiveness of regulatory action, and improve international recognition. Beyond enhancing the extraterritorial recognition of judgments, this approach allows domestic courts to deploy international-law discourse against transnational corporations—turning the very normative architecture that underwrites neoliberal suppression of host state regulatory sovereignty into a tool for resisting it. For reasons of domestic-law compatibility, however, human rights due diligence under business and human rights instruments is better understood as a principled foundation for the parent's duty of care than as a self-executing source of tort liability; the determination of liability still requires support from positive law within the broader policy orientation of strengthening TNC accountability.

Parent liability for the torts of subsidiaries requires proof that the parent breached its duty to act and that there is a causal connection between its control over the subsidiary and the resulting damage. As discussed, in the absence of joint tort or aiding-and-abetting liability, the duty and tort liability of the parent can presently only be developed from the general principle of special-relationship-based duties to act. According to existing Chinese scholarship, behavioural duties arising from special relationships are conditioned on risk control and reasonable reliance (Zhang, 2018, p 70). Intra-group rules, interest arrangements and group-level policies on production, safety and ESG establish strong parent control over subsidiaries and amount to substantial intervention in their operations, generating control over the risk of harm; the public disclosure of such rules and policies (for example, on corporate websites or in listed-company annual reports) creates reasonable reliance on the part of victims and the wider public. In these circumstances, the parent–subsidiary relationship should be recognised as a special relationship sufficient to trigger a duty to act, and the parent owes a duty to take prudent measures to prevent potential harm caused by the subsidiary. Until China issues general provisions on civil duties to act, or legislation analogous to France's *loi de vigilance* expressly imposing parent-company due diligence, this is a viable path to establishing parent-company duty and tort liability.⁷

Addressing the practical challenges of extraterritorial enforcement

The extraterritorial effect of judgments depends on the recognition and enforcement of judgments by other states. Strengthening international circulation of Chinese judgments through the network of bilateral and multilateral treaties on judicial assistance is the principal long-term strategy. As an interim measure, China's transition from factual reciprocity to presumed reciprocity in the recognition and enforcement of foreign judgments—which has begun in recent practice—should be consolidated as the standard approach for cases involving TNC damages, and should be supplemented by memoranda of understanding on judicial cooperation that build mutual trust between host states and the home states of TNCs (Huang, 2019; Cai and Wang, 2021; Slaughter, 2004, p 198; Kong and Wang, 2023). In tandem, citing business and human rights principles in judgments, even where the principles are not strictly necessary to fill remedial gaps, can strengthen the international mobility of rulings and contribute to the gradual development of judicial dialogue between host and home states. Such consensus is already reflected in domestic law in areas such as sustainable development, environmental public policy and carbon neutrality.

Safeguarding regulatory sovereignty: accountability of transnational capital under international law

The effectiveness of international law depends on state consent, allowing states to adjust and constrain international rules within a limited scope. For host states, international law also serves as a necessary tool to constrain transnational capital and to mitigate the constraints imposed by the neoliberal economic order on regulatory sovereignty. The protection of host state regulatory sovereignty requires both reform of investment agreements and broader recognition by the international community of the legitimacy of moderating transnational capital (Chimni, 2006, p 18).

Reciprocity in investment dispute resolution

Although investors typically have multiple options for resolving disputes with host states, host states generally lack equivalent procedural means to pursue investors for damages at the international level (Van Harten, 2013, p 79). The remedy of transnational corporate violations in ISDS currently occurs principally through counterclaims initiated by host states: in *Perenco and Burlington v Ecuador* (ICSID Case Nos ARB/08/6 and ARB/08/5), the Ecuadorian government's counterclaims for environmental damages succeeded before the arbitral tribunal. More fundamentally, the principle of 'equality of arms' requires that host states be able to advance claims against investors on the same procedural footing on which investors advance claims against them (McLachlan, 2018, para 89; Clover Alcolea, 2022). Even if a host state chooses not to use international dispute resolution, the existence of such mechanisms exerts a chilling effect that deters irresponsible business conduct by transnational capital. Incorporating

accountability mechanisms into ISDS design does not diminish host state sovereignty in the way that home state extraterritorial jurisdiction does; rather, it corrects the constraints imposed by the asymmetric ISDS architecture and provides supplementary governance pathways.

To this end, future investment treaty and multilateral trade agreement negotiations should ensure that dispute-resolution clauses establish reciprocal jurisdiction between host states and foreign investors, and that the applicable-law clauses provide an identifiable source of investor obligations—whether by reference to host state law (as in the ‘neutral jurisdiction + host state law’ model adopted in the China–Libya BIT) or through specific investor-obligation provisions. Without these features, even broadly worded ‘any dispute’ clauses may be interpreted to exclude host state counterclaims, as the tribunal in *Gavazzi v Romania* concluded notwithstanding the apparently neutral language of the dispute-resolution clause (*Gavazzi v Romania*, 2015, paras 152–158).⁸ By incorporating domestic legal obligations into the treaty framework, both the public interests of host states and the property rights of investors can be protected at the international level, achieving equality of rights and obligations between transnational capital and sovereign states.

Where a host state’s domestic legal framework already provides adequate substantive rules on the conduct of business entities—as is the case for China—there is no need to specify investor obligations comprehensively within the investment agreement; it is sufficient to incorporate the investor’s obligation to comply with host state law and to bring disputes regarding that clause within the scope of the dispute-resolution mechanism. The drafting choice between ICSID and non-ICSID arbitration involves a further trade-off: ICSID awards benefit from the strong enforcement guarantees of the Washington Convention but are subject to its self-contained system (ICSID Convention, arts 53–54), while non-ICSID awards are enforced under the New York Convention and remain subject to its public-policy and reciprocity reservations (NPC Standing Committee, 1986). For key sectors involving core national interests, non-ICSID arbitration may better preserve host state control; otherwise, ICSID will generally offer the more effective forum.

Host states in the business and human rights treaty negotiations: the case of China

The protection of host state regulatory sovereignty requires not only decentralised investment agreements but also broader international recognition of the legitimacy of moderating transnational capital. The business and human rights agenda currently carries the principal process in this field. As an agenda conducted within the framework of international human rights law, it has inherited the state-centric attributes of that field (He and Wang, 2019, p 4), which has tended to confine it to non-binding soft-law instruments. As doubts about the effectiveness of the UNGP soft-law path have grown (Melish, 2015; McCorquodale, 2014), the UN Human Rights Council adopted Resolution 26/9 in 2014, establishing the Open-ended Intergovernmental Working Group (‘OEIGWG’) to draft a legally binding instrument (‘LBI’) on business and human rights (UN HRC, 2014).

A central point of contention in those negotiations is whether transnational corporations should bear legally binding 'human rights obligations' or only soft-law 'human rights responsibilities'. The EU, the United States and transnational business groups have argued that imposing human rights obligations on TNCs misconceives international law (Ruggie, 2018), while Ecuador and other developing states most affected by TNC damages have advocated the explicit recognition of TNC human rights obligations. China's position significantly influences the direction of the negotiations. While China initially advocated the UNGP-aligned language of 'human rights responsibility', at the ninth session it for the first time expressly supported references to TNC 'human rights obligations'. This shift reflects a determination to regulate transnational capital through international law. As the host state counterclaim ruling in *Urbaser v Argentina* indicates (*Urbaser v Argentina*, 2016, paras 1137, 1195), although TNCs can no longer be wholly immune from international legal obligations under the impetus of the business and human rights agenda, the substantive content of those obligations remains to be specified through specific norms; explicitly state-bound human rights treaties cannot themselves supply that content. The current waning of confidence in the neoliberal economic order opens space for host states—China among them—to take a more active role in shaping the substantive content of international economic and human rights rules. The extent to which that space is used to reinforce rather than undermine host state regulatory sovereignty will depend on the coherence between national positions in treaty negotiations and the regulatory practice developed at the domestic level.

Conclusions

This article has argued that the dominant narrative in business and human rights scholarship—one that treats host state regulation as a residual or deficient layer in the architecture of TNC accountability—both misreads the institutional realities of contemporary host states and entrenches the very marginalisation it diagnoses. Host states face a structurally distinctive configuration of regulatory challenges. Domestically, they must reconcile the necessity of extraterritorial reach with the territorial limits of state authority. Internationally, their regulatory sovereignty is suppressed by an investment-protection architecture that translates regulatory measures into compensable interferences with foreign investment. Neither home state litigation nor existing international mechanisms can substitute for host state regulation in addressing these challenges; at most, they can supplement it.

Examining China—a host state whose engagement with transnational capital has been gradualist, whose domestic legal system is comparatively well resourced, and whose policy choices increasingly carry weight in international rule-making—brings these challenges into sharper relief. The Penglai 19 – 3 incident reveals an imbalance between administrative and judicial paths to remedy; the underdeveloped state of choice-of-law rules and parent-company duty of care in Chinese tort law illustrates the normative gaps that affect host state courts more generally; and the difficulties of enforcing host state judgments against foreign parent companies expose the practical limits of extraterritorial adjudication in the absence of robust judicial cooperation. The two-track response proposed above—recalibrating administrative–judicial coordination, refining the rules on extraterritorial application of host state law, and constructing corporate human rights due diligence obligations at the domestic level; while designing

reciprocity in investment dispute resolution and articulating a coherent host state position in the business and human rights treaty negotiations at the international level—is presented as one possible architecture, tested through Chinese practice but transposable, with appropriate modifications, to other developing host states.

The article makes three contributions to the existing scholarship. First, it addresses a gap in the TWAIL and business and human rights literatures: the tendency to treat developing host state regulatory capacity as a constant limiting factor rather than a contingent variable that international and transnational law can either reinforce or undermine. By centring host state regulatory sovereignty as an analytic and normative starting point, the article rejects both the ‘weak host state’ framing that underwrites home state extraterritoriality and the ‘sovereign immunity’ framing that absolves host states of regulatory responsibility. Second, in the context of Chinese transnational legal scholarship, it situates the regulation of TNC damages within the broader project of constructing China’s transnational rule of law—a project distinct from the US-style extraterritorial assertion of jurisdiction and from the EU-style supranational integration model, and one that may offer a workable template for other developing host states navigating similar structural pressures. Third, the article contributes a host state perspective to the ongoing OEIGWG negotiations on a legally binding instrument on business and human rights: it argues that the protection of host state regulatory sovereignty—rather than the extension of home state extraterritoriality—should be the organising principle of any future treaty if the instrument is to be meaningful for the states in which most TNC damages actually occur.

Two qualifications bear emphasis. The analysis advanced here neither assumes that all developing host states possess the institutional resources to follow the regulatory path traced through the Chinese case, nor suggests that host state regulation alone can fully redress the asymmetries between transnational capital and sovereign states. The argument is more limited: that host state regulation is indispensable, that its strengthening is possible, and that the international legal order must create the institutional space within which that strengthening can occur. Whether the regulatory templates sketched here can ultimately rebalance the power asymmetries between transnational capital and developing host states will depend on choices made in legislatures, courtrooms and treaty negotiations across the global South in the years ahead.

Endnotes

1. This article uses ‘transnational corporate damages’ rather than terminology associated with human rights, because human rights infringement by business enterprises usually involves aiding and abetting that of the host state. While corporate conspiracy remains a significant topic, this article focuses on the situation where the host state is not involved in the TNC damages and has some willingness (though not necessarily the ability) to hold the TNCs accountable.
2. Well-known cases include the Bhopal disaster caused by Union Carbide, the oil spill in the Niger Delta caused by Shell, the waste dumping in the Ecuadorian forest by Texaco, and forced movement caused by Unocal in Vietnam. In the last 20 years, host state victims have initiated dozens of cases

- against TNCs, with only two winning judgments (Chandler v Cape in the UK and Four Farmers v Shell in the Netherlands); many TNC damages have never been represented before adjudicative bodies.
3. The UK and Canadian Supreme Courts have adopted more lenient approaches to jurisdiction in transnational corporation tort cases, France has implemented the Duty of Vigilance Law, and the EU has passed the revised Corporate Sustainability Due Diligence Directive (see *Vedanta Resources PLC v Lungowe*, 2019 UKSC 20, para 51; *Nevsun Res Ltd v Araya*, 2020 SCC 5, paras 112–113; French Law related to Duty of Vigilance of Parent Companies and Commissioning Companies, Code de Commerce Art L 225-102-4, 2017).
 4. For example, the US doctrine of *forum non conveniens* requires courts to defer to the host state forum unless the latter is inadequate; this turns on a negative assessment of the host state's judicial capacity.
 5. A search of judgments on China Judgments Online (中国裁判文书网, <https://wenshu.court.gov.cn>) using 'Penglai 19 – 3' returns dozens of first-instance and appellate judgments rendered by maritime courts in Dalian, Qingdao and Tianjin between 2013 and 2020 in which the scope of compensation in the government settlement agreement was relied upon as evidence in determining individual claims.
 6. On the analytical structure of choice-of-law problems in transnational torts and the relevant Chinese procedural provisions, see Civil Procedure Law of the People's Republic of China (2023 revision), Articles 29 and 276.
 7. Some scholars view the duty of care as a form of piercing the corporate veil or argue that the parent company can only be held liable for torts through that pathway. There is a fundamental distinction, however: duty of care concerns case-specific liability, while veil-piercing concerns the general question of legal personality. In transnational corporate tort cases, veil-piercing is difficult to apply effectively—even where the parent exerts sufficient control over its overseas subsidiary to establish a duty of care, the threshold for veil-piercing may not be met—and the indiscriminate denial of corporate personality undermines the predictability of the business environment. Parent-company liability should therefore be realised through tort law without disturbing the integrity of the corporate-personality system; corporate independence should not negate the parent's duty of care where the conditions are met. See Blumberg (1993, p 105); Cossart, Chaplier and Beau de Lomenie (2017); and, for the statutory comparator, Loi No 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).
 8. For comparable restrictive readings of broadly worded jurisdictional clauses in investment treaty arbitration, see *Roussalis v Romania*, ICSID Case No ARB/06/1, Award (7 December 2011), para 869; *Amco Asia Corp et al v Republic of Indonesia*, ICSID Case No ARB/81/1, Resubmitted Case: Decision on Jurisdiction (10 May 1988), (1993) 1 ICSID Rep 543, 562.

Declarations

Ethical Approval

This article does not contain any studies with human participants performed by any of the authors.

Informed Consent

Informed consent was not required for this study.

Author Contribution

Xinchao Liu is the sole author. The author read and approved the final manuscript.

Data Availability

Data sharing is not applicable to this research as no data were generated or analysed.

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