# Chapter 12.
# Conclusion: Towards an International Responsibility of Investors

> IIAs can do more to enhance responsible investment. Although (foreign) investment can create positive conditions for improving peoples' lives, it can also carry the risk of negatively impacting on the environment, peoples' health and the enjoyment of their human rights. These effects can be aggravated due to domestic regulatory lacunae. It is important, therefore, that while IIAs continue to provide a firm basis for investment protection, they should also begin to address more directly investor responsibilities.[1]

With these words, UNCTAD called for reforming international investment governance in 2015. The present study has shown that investment law is one step ahead: it *already gives rise* to investor responsibilities to a significant extent. The field has already begun the process of complementing investor rights with obligations.

Already today, IIAs do more than solely protect the investor, they also contain investor obligations. They impose binding standards of conduct towards the public interest: how the investor should behave towards, for example, the environment and human rights of others. It seems as though reform discussions so far have not paid enough attention to this development. Focussing on strengthening the host state's right to regulate remains important – but the right to regulate only accords a passive role to the public interest, as an argumentative means to justify that the host state infringes on investor rights. In contrast, the investor obligations analysed in this book actively expect public interest-friendly conduct from the investor.

---

1 UNCTAD, *World Investment Report: Reforming International Investment Governance* (United Nations Publications 2015) 126; in the same vein UNGA 'Human Rights-Compatible International Investment Agreements. Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (27 July 2021) UN Doc A/76/238 paras 24–25, 63–66.

The findings of this book join UNCTAD in observing that 'the IIA regime is going through a period of reflection, review and revision'.[2] There are dynamics to provide IIAs with a new function: to hold investors responsible instead of only disciplining states. On the UN level, the Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights has been discussing the creation of legally binding international obligations of corporations. However, given that states have, so far, not agreed on such a treaty, these discussions are yet to come to fruition and have recently concentrated more on new obligations of states towards companies. Investment law has been more successful in this regard. Hence, paradoxically, a field that many have criticised for its pro-investor bias has started to offer solutions for holding transnationally operating corporations accountable. This, of course, is contrary to its original exclusive purpose – to protect the investors.

More precisely, this study has identified two different types of obligations in investment law practice: direct (Part I) and indirect (Part II), allowing for common conclusions (Part III). The former have emerged in first IIAs and arbitral awards. The latter are already substantially established in arbitral jurisprudence – and constitute a new doctrinal category that this book introduced.

## I. The dawn of direct obligations (Part I)

Direct obligations are similarly construed as obligations in international criminal law. They are international obligations directly applicable to investors as private actors – without the state having to act as an intermediary (Chapter 2). In international law, such obligations exist only exceptionally. Yet, they have recently emerged in investment practice. Most likely, it is IIAs' bilateral setting that made possible what states have failed to achieve multilaterally so far. In other words, IIAs serve as a tool in which like-minded states can create direct investor obligations in their mutual relations. As a corollary, they only apply to investors of the state parties' nationality.

The ICSID Tribunals' rulings in *Burlington v Ecuador* and *Perenco v Ecuador* in 2017 and 2019 present good examples of direct obligations. They concerned Ecuador's counterclaims against the companies Burlington and

2 ibid, 120.

Perenco. Here, the Tribunals applied a direct obligation to prevent environmental pollution. They held that the investor must pay a compensation of USD 54.539.517 and USD 39.199.373 to Ecuador for polluting soil and groundwater, respectively.[3]

Findings like these indicate that such direct obligations already have stronger ground in investment practice than usually perceived (Chapter 3). On the one hand, many developing countries have invented new treaty clauses with direct obligations. They feature in new model BITs and IIAs, *inter alia* by Brazil, India and many African countries as well as the African Union. This development is remarkable on its own. However, even investors from developed countries may be subject to direct obligations pursuant to 'conventional' IIAs. In such constellations, five arbitral tribunals have recently accepted direct obligations in different forms. These are the UNCITRAL awards in *Al-Warraq v Indonesia* in 2014 and in *Aven v Costa Rica* in 2018 as well as the ICSID awards in *Urbaser v Argentina* in 2016, *Perenco v Ecuador* in 2015 and 2019 and *Burlington v Ecuador* in 2017.

Existing practice has even developed to the point that it allowed this study to systematise different techniques of creating direct obligations in investment law. Most of these techniques have in common that they refer to existing standards of conduct outside of investment law. These include international obligations of states under international treaties and customary law, domestic investor obligations and CSR norms. As of today, the interplay with domestic obligations has the greatest potential for bringing about direct obligations. These norms are already tailored to private actors. And they comprehensively cover different facets of the public interest in branches such as administrative law, human rights and environmental law. In particular, domestic obligations can form part of the applicable law in an investment arbitration. The arbitration internationalises these domestic obligations in a manner tantamount to the actual creation of an international norm.

Counterclaims provide states with an international means of enforcing these direct obligations (Chapter 4). They are not new instruments. However, only in the course of the last couple of years, states have discovered their potential to take on a new function: enforcing direct obligations against investors who have impaired the public interest. Arbitral awards

3 *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017) para 889; *Perenco Ecuador Ltd. v The Republic of Ecuador*, ICSID Case No. ARB/08/6, Award (27 September 2019) para 1023; see above Chapter 3.VI.2.

allow host states to do so even against investors' assets outside of their territory. To that end, these awards qualify as part of the ICSID or New York Convention's global enforcement systems. The analysis revealed that the requirements for filing a counterclaim are lenient – already today, many IIAs allow for counterclaims. The five arbitral awards mentioned above form the forefront of this new development. For the first time, the awards in *Burlington v Ecuador* and *Perenco v Ecuador* in 2017 and 2019 successfully applied a direct obligation to the detriment of an investor[4] – a milestone in investment law history. Of course, the encountered new practice is still small, considering the many investment arbitrations and IIAs worldwide. Notwithstanding, the findings reflect dynamics indicative of a new qualitative approach – possibly even signaling the dawn of direct obligations in the field (Chapter 5).

## II. The presence of indirect obligations (Part II)

Beyond these direct obligations, Part II has identified even better-established indirect obligations. They are standards of conduct which the state cannot force the investors to observe. However, if the investors do not comply, they suffer negative legal consequences. They forfeit investment protection in full or in part (Chapter 6). Although one could also understand them as conditions for investor rights, this book chooses to describe them as a sub-type of an obligation. The term 'indirect obligations' reflects that investors face actual expectations regarding their behaviour. It also shows that they have a partly compulsory character. Even though states cannot enforce them through counterclaims, they automatically accord a sanction in case of a breach. Hence, they change investors' legal position under an IIA against their will.

For example, one could imagine an indirect obligation as an IIA clause with the following content:

> If the investor does not comply with the duty to protect human rights as enshrined in the ICCPR, the right to protection against expropriation granted in this treaty does not apply.

Arbitral jurisprudence has already established many such indirect obligations (Chapter 7). Yet, tribunals have thus far not employed this term. Instead, they have interpreted different requirements of investment law

4 ibid.

in a manner which is functionally equivalent to an indirect obligation: as being conditional on proper investor behaviour. Sometimes, tribunals have built on explicit IIA clauses. More often, they have interpreted 'conventional' IIAs in a manner which brings about indirect obligations. Such jurisprudence can be found for a broad range of different investment law requirements. And they impose standards of conduct relating to very different aspects of the public interest. They include environmental protection, human rights, the national economy, and the rule of law, to name but a few. This is another reason why this book chooses to identify them as structurally common indirect obligations.

More specifically, one can find them implied in jurisdiction and admissibility requirements of investment arbitration. Here, they condition the procedural right to file an investment claim against the host state. Furthermore, indirect obligations have been accepted as part of investor rights' requirements. Non-compliance disqualifies investors from substantive investment protection – such as in the above-mentioned example of protection against expropriation. Finally, rules on compensation contain indirect obligations too. If investors violate them, tribunals reduce the amount of damages which investors otherwise could have claimed from the host state for violating their investor rights. Apart from arbitral awards, new IIAs have invented new explicit clauses on indirect obligations, too.

However, so far, these obligations have developed rather chaotically. Largely, arbitral jurisprudence has discussed the respective requirements of investor rights only in a case by case manner – without being conscious of their common character as obligations. Nevertheless, indirect obligations appear to follow a certain basic order. Those which form part of jurisdiction and admissibility requirements operate as a filter which sanction *prima facie* or particularly grave violations of the public interest. Within the substantive requirements of investor rights, tribunals were generally reluctant to automatically deprive investors of protection for their misbehaviour. Here, indirect obligations build especially on defined domestic and international norms outside of investment law. In contrast, rules on compensation allow for more flexible sanctions for the breach of an indirect obligation: Tribunals may reduce compensation only in part. This allows for more nuanced results which weigh the appropriate sanction against the gravity of the investor's and the host state's misconduct.

And arbitral jurisprudence is still developing. The study has also shown that not all awards which examined investors' misconduct bring about indirect obligations. Sometimes, tribunals merely considered misconduct as one balancing factor amongst others within the analysis of an investor

right. In these instances, there is, thus, no automatic sanction for breaching a standard of conduct. It is a different way of giving weight to investors' behaviour. Here, infringing with the public interest 'tips the scales' against the investor in the legal analysis. This book was careful in distinguishing these instances from other treaty clauses and cases which gave rise to indirect obligations as defined here.

Nevertheless, even to consider misconduct as a balancing factor is a novelty. It contributes to broader dynamics that investment protection should be dependent on proper investor behaviour. Together, arbitral jurisprudence and new IIAs outline a new interpretation of investment law. Therein, indirect obligations constitute the most stringent way of imposing standards of conduct on investors without creating direct obligations (Chapter 8).

## III. Common implications (Part III)

### 1. Rebalancing investment law

Together, direct and indirect investor obligations contribute to rebalancing investment law from within (Chapter 9). They alter a traditional characteristic of the field: its asymmetry. Originally, it only accorded rights without obligations. To rest within this type of wording, investor obligations make investment law more symmetrical. As a corollary, IIAs in which investor rights and obligations go hand in hand have a stronger emphasis on the public interest. They depart from an exclusive focus on defending investors' economic interests.

This change alters the overall purpose that IIAs serve. Originally, they aimed to attract any foreign investment to foster the host state's development. By providing international protection, investors should experience less risk and hence be more ready to invest abroad in the first place. Investment law with investor obligations operates differently. Only public interest-friendly investments receive unconditional protection. Investors who violate the public interest either face direct obligations – and respective compensation counterclaims by the host state – or forfeit investment protection. Both neutralise IIAs' risk reducing effect. This means that such IIAs only attract selected, public interest-friendly investments: quality comes before quantity. In other words, such IIAs do not rely on the assumption that any increase of the investment volume will preponderantly serve the public interest. In doing so, IIAs build on the concept of

sustainable development that there must be an equilibrium between the economy, the environment, and society.

To achieve sustainability within investment law, investor obligations offer a reform approach that is complementary to reinforcing the right to regulate. Both serve to strengthen the public interest in the analysis of investor rights. The right to regulate focusses on the state as the guardian of the public interest. Investor obligations express that investors take an active part in that task, too.

However, investor obligations also interact with the right to regulate. On the one hand, they contribute to strengthening it. On the other hand, investor obligations may also limit the host state's right to regulate. With regard to the former, generally, to the extent they prohibit investor misconduct, the IIA also allows the host state to interfere with the investor domestically. Nevertheless, investor obligations do not provide host states with a *carte blanche*. Investor rights and obligations must be interpreted in harmony; hence, especially the manner in which the host state interferes with the investor will still remain under scrutiny. As for the limits that investor obligations may impose on the right to regulate, it is useful to consider that they constitute international standards of conduct. This entails that states to some extent lose control of their interpretation and application – for example, arbitral tribunals can interpret them autonomously in unexpected ways. In this respect they are no different from other international standards.

## 2. Regulating investment based on incentives

Furthermore, in contrast to right to regulate clauses, investor obligations have the potential to serve as a new international regulatory instrument (Chapter 10). IIAs could, for example, alleviate the problem of regulating corporations which operate beyond national borders. The study has examined two different ways in which investor obligations could serve to regulate investors' behaviour.

First, as a command-and-control tool which responds to unwanted behaviour, possibly by force, and punishes it. Yet, in contrast to domestic legal systems with courts and executive agencies, investor obligations lack the international institutions and procedures to serve this regulatory approach effectively. Investment law only provides for counterclaims to enforce direct obligations in an international procedure. And by their nature,

counterclaims remain a *reactive* enforcement means. States may file them after investors themselves have raised an arbitral claim.

However, IIAs may fulfil an incentive-based regulatory approach. Such regulatory strategies operate by offering advantages or the menace of sanctions. Then, their addressees comply voluntarily and pre-emptively to receive the former or avoid the latter.

The prospect of receiving investment protection constitutes such an incentive. Investor rights have an economic value for investors. They reduce their investment risk in an unknown, potentially unstable regulatory environment. In addition, investors may receive better financing conditions. In this view, the threat of losing investment protection deters investors from breaching an investor obligation. Serving their own interest, they will comply in order to qualify for protection in case they need it. Direct and indirect obligations both produce this incentivising effect. In the case of direct obligations, investors face a counterclaim which would offset any potential gain that investor rights offer. The indirect ones automatically neutralise investor rights by depriving them of protection. In short, investor obligations use investor rights as leverage to induce public interest-friendly behaviour.

In contrast to the right to regulate, this regulatory effect operates in a way detached from the host state's domestic legal system. It only builds on the presence of international investment protection. Even if the host state shows no domestic regulatory activity, there is an incentive for investors to comply with investor obligations pre-emptively. Otherwise, they run the risk that, at a later point in time, they will not have investment protection available. And indeed, investment protection was precisely invented to provide a more stable investment environment even though host states' policies and governments may change unpredictably. With this pre-emptive steering effect, investor obligations may, to a certain extent, compensate for the lack of regulatory action by an unwilling or unable host state.

The study also describes the limits of this regulatory effect. For example, much depends on the actual economic value of the concrete IIA to the specific investor. Hence, IIAs' steering potential is best understood as complementing other regulatory approaches, especially on the domestic level.

## 3. A case study for the individual's role in international law

Looking at the broader picture, the recent development of investor obligations allowed to outline what they imply for the individual's role in

international law (Chapter 11). Herein, the investor as a natural or private legal person serves as a case study for general international law.

This book has shown that investor obligations bring about a new form of international 'civil' responsibility of individuals. The concept of responsibility has been established in particular for states. So far, individuals are subject to such responsibility only in international criminal law. Conceptually, foreign investors now face a new form of individual responsibility. In analogy to the ILC's terminology on the responsibility of states, investor obligations contain primary rules – the substantive standards of conduct not to harm, for example, the environment or human rights of others. Furthermore, investor obligations also imply secondary rules on the legal consequences for breaching these primary rules. They are reflected in the division between direct and indirect obligations: to pay compensation or to lose an investor right, respectively. This understanding allows for further insights. In particular, the fact that investors are responsible does not mean that states are relieved of their obligations. On the contrary, it is established in international law that two subjects can be separately responsible for the same harmful outcome – the so-called shared responsibility which can also apply to investors and states.

Furthermore, in bringing about international responsibility, investor obligations can be understood as phenomena of Global Administrative Law. In this sense, investor obligations 'administer' how investors, as private actors, relate to public goods and individual rights of others – similar to how domestic administrative law defines what private actors must do to safeguard the environment, the health of others, and so on. In doing so, investor obligations follow public law principles. For example, the public law principle of proportionality requires a weighing and balancing of all interests affected in a certain case. Most investor obligations reflect such a weighing and balancing and thus build on this principle. Furthermore, investor obligations govern investor behaviour beyond traditional state regulation in the state's domestic legal system. They combine many different sources such as international obligations of states, CSR norms and domestic law. Moreover, investment tribunals acquire new functions as comprehensive fora to adjudicate if investors' behaviour towards the public interest was appropriate – similar to the role of domestic administrative courts.

Turning to a more fundamental perspective, the study has put investor obligations into the context of international law's general development. In this view, they serve as a reference field for how international law increasingly addresses individuals directly – without mediatising them through

states. So far, many consider investment law as an example of a field of international law that has awarded individual rights. This study shows that it fuels this development even further by also according individual obligations.

However, in contrast to international law's general trend, investor obligations rest less on a fundamental concern for values. Especially international human rights build on the idea that they empower all persons because of their human dignity, liberty and equality. Here, individual rights embody a universal value that is protected *erga omnes*. In comparison, investor obligations serve a more pragmatic telos. IIAs are a result of a bilateral bargain. Any contained investor obligations merely have effect *inter partes* for investors of the right nationality. And IIAs give no corresponding individual rights to the actual victims of violations that investors committed. This shows that even IIAs which contain obligations still follow the main economic goal of fostering sustainable development by attracting quality investment. Investor obligations remain but a means to that end.

## IV. Outlook

Investor obligations reflect a changing understanding of the investor's role in society. In UNCTAD's words:

> As the global community's views on development have evolved, societies' expectations about the role of foreign investment have become more demanding. Today, it is no longer enough that investment creates jobs, contributes to economic growth or generates foreign exchange. Countries increasingly look for investment that is not harmful for the environment, which brings social benefits, promotes gender equality, and which helps them to move up the global value chain.[5]

These societal expectations have found their way into investment law. It is a welcome development as it reacts to foreign investments' high and rising impact on society. At the same time, what is necessary is a reasonable rebalancing of the field. Investor obligations can only unfold their poten-

5 UNCTAD (n 1) 127.

tial if they operate hand in hand with effective investment protection.[6] Investor rights provide the fertile soil in which obligations may grow.

This book's main contribution is to shed light on investor obligations' recent, sometimes chaotic 'growth'. It invites further research on questions that it could not cover. For example, one should further discuss which of the two, direct or indirect obligations, or perhaps even both in certain situations, are the most preferable for investment law. It is open to discussion whether different aspects of the public interest should be treated differently – for example, if investor obligations should vary in the way they function and are structured if they protect the environment as opposed to third parties' human rights and *vice versa*. Further thinking is required if the identified investor obligations produce those risks against which scholars have warned who are generally sceptical of international obligations directly applicable to non-state-actors.[7] Suggestions should be made on how civil society and victims of investor misconduct could invoke their rights against investors on the international level. Currently, they have no say in this matter that is exclusively between the state and the investor. Furthermore, empirical studies are needed to measure the extent to which investor obligations can actually steer foreign investors' behaviour in practice. Beyond investment law, this book may inspire exploration of indirect international obligations of non-state actors in other areas of international law.

For the time being, the present study may serve to raise awareness of the fact that investor obligations are a complex but promising concept. Their further development remains precarious. Only a small portion of IIAs have so far brought about direct obligations. It remains to be seen if other IIAs follow suit. In addition, tribunals may still change their jurisprudence on indirect obligations. There is also the danger that tribunals may interpret MFN and national treatment rights in a way that undermines investor obligations.[8] Much depends on states' willingness to support investor obligations in the future. While investment law is currently in a transitional stage, it remains in the hands of the states to decide in which direction to steer its development. In this sense, investor obligations may prove a

6 Andrea K Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17(2) Lewis & Clark Law Review 461, 479; Patrick Abel, 'Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration: Fallacies and Potentials of the 2016 ICSID Urbaser v. Argentina Award' [2018] Brill Open Law 1, 25.

7 See above Chapter 11.I.3.

8 See Chapter 3.VII.4.b).

valuable new element of investment law and serve to further the field's legitimacy that has been under attack for quite some time.