

## Chapter 5.

### Interim Conclusion: The Dawn of Direct Obligations

All in all, Part I has shown that direct obligations have recently emerged in international investment law – not only as important possible reform suggestions but already in first instances in investment law practice. These obligations are legally binding and directly applicable to foreign investors as a matter of international law. Investors owe them to the respective host state. They relate to the protection of different facets of the public interest such as human rights, workers' labour rights, environmental protection and anti-corruption. And states are capable of internationally enforcing them through arbitral counterclaims under many IIAs. While especially African states have recently included direct obligations into new IIAs and model instruments,<sup>1</sup> the analysis has shown that this trend is not limited to the African continent.

It is remarkable that investment law is subject to such a development as a field that used to be famous for its asymmetry: the awarding of rights without obligations. It has shared this feature with other branches of international law which only exceptionally provide for obligations directly applicable to non-state actors.

In the substantive dimension, the analysis has shown that investment law even allows to discern a nascent doctrine of direct obligations. Varying techniques for their creation, drawing on different normative sources exist, and each comes with its own advantages and shortcomings. As of today,

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1 On African reform efforts of investment law which contain direct foreign obligations towards the public interest see Meg Kinnear and Paul J Le Cannu, 'Concluding Remarks: ICSID and African States Leading International Investment Law Reform' (2019) 34(2) ICSID Review 542, 544 with a general comment on the features of African investment law reforms; Makane M Mbengue, 'Africa's Voice in the Formation, Shaping and Redesign of International Investment Law' (2019) 34(2) ICSID Review 455, 465–466 on direct obligations as an 'overarching objective' to balance 'investors' rights and obligations' as part of a broader domestic, bilateral and regional reform effort of 'Africa as a rule maker' (462) of investment law; Priscila Pereira de Andrade and Nitish Monebhurrun, 'Mapping Investors' Environmental Commitments and Obligations' in Jean Ho and Mavluda Sattorova (eds), *Investors' International Law* (Hart 2021) 277–278 on African IIAs as 'avant-gardist examples' for direct environmental investor obligations.

the most promising and easiest method is to employ domestic obligations. IIAs and investment arbitration can internationalise and turn them into norms that are detached from their domestic origins.

Procedurally, states have given arbitral counterclaims, an old instrument of investment arbitration, a new purpose: to examine if investors wrongfully violated public goods or individual rights of others. Even though counterclaims have always been available, it appears that states and scholars have become conscious of their potential only in the last years. The jurisdiction and admissibility requirements are relatively lenient, allowing for counterclaims in a significant number of current IIAs. While they remain reactive enforcement tools which presuppose a prior primary claim by the investor, they empower the host state to enforce against assets of the investor outside of its territory.

Of course, the encountered new practice is still little in quantity vis-à-vis the more than 3000 existing IIAs and compared to the many investment arbitration proceedings conducted so far. Most states remain reluctant to include direct investor obligations in IIAs. Notwithstanding, the findings reflect dynamics indicative of a new qualitative approach that one should not underestimate<sup>2</sup> – possibly even signaling the dawn of direct obligations.

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2 For a more sceptical position see Karsten Nowrot, 'How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?' (2014) 15(3/4) *Journal of World Investment & Trade* 612, 636; Markus Krajewski, 'A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application' (2020) 5(1) *Business and Human Rights Journal* 105, 114, 120–121.