

Chapter 8.

Interim Conclusion: Established Indirect Obligations

Part II has shown that, already today, indirect obligations are quite broadly established in investment law. They constitute standards of conduct that investors are free to comply with – but if they choose not to do so, investment law accords a sanction in the form of a loss of right. This may be that the investment claim to an arbitral tribunal becomes inadmissible or will not suffice to establish the tribunal’s jurisdiction. Alternatively, investors may be deprived of investor rights as a matter of substantive investment law. Or their investor right could be partly devaluated because they receive less compensation for a violation than they would otherwise have been granted.

The term ‘indirect obligations’ is not yet used in practice. Instead, Part II introduced it to reflect that tribunals have imposed standards of conduct towards the public interest on investors. These penetrate the entire investment law doctrine. Of course, tribunals only adjudicate on the case at hand, and concentrate on the concrete requirement in dispute. The term ‘indirect obligations’ sheds light on the fact that the high number of analysed awards constitutes a pattern. It serves to show that these single instances follow a common development which is to condition investment protection on proper investor behaviour.¹

These indirect obligations relate to how the investor affects the public interest. Herein, investment law departs from an earlier, private or com-

1 The increasing application of investor obligations in investment arbitration is, as Jean-Michel Marcoux and Andrew Newcombe, ‘Bear Creek Mining Corporation v Republic of Peru: Two Sides of a “Social License” to Operate’ (2018) 33(3) ICSID Review 653, 658 have put it, ‘the elephant in the room’; in the same vein Jorge E. Viñuales, ‘Investor Diligence in Investment Arbitration: Sources and Arguments’ (2017) 32(2) ICSID Review 346, 367; Matthew A.J. Levine, ‘Emerging Practice on Investor Diligence: Jurisdiction, Admissibility, Merits’ in Julien Chaisse, Leila Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 1101; for a more sceptical perspective see Mavluda Sattorova, ‘Investor Responsibilities from a Host State Perspective: Qualitative Data and Proposals for Treaty Reform’ (2019) 113 AJIL Unbound 22, 24 who considers that the inconsistency of arbitral jurisprudence precludes that investor obligations become established by reinterpretation of IIAs and calls for creating new, reformed IIAs.

mercial law paradigm: investor rights are not only about delineating which business risk the investor must bear anymore – investors must also earn investment protection by fulfilling a certain role in the society through their actions.² Investment tribunals have examined investors' impact on a broad range of different public goods and individual rights, including human rights, the environment, labour standards, the host state's economy, cultural heritage and the rule of law.

Tribunals have applied different methods to construe indirect obligations. Some built on explicit IIA provisions, for example the requirement to comply with domestic law. But the majority found them also to be implicit in IIAs. Thus, it is ordinary treaty (re-)interpretation pursuant to Art 31 VCLT that brought about indirect obligations – supported by recent IIAs with new treaty designs. In contrast, the study found the clean hands-doctrine to be redundant to that end.

Part II has proven indirect obligations to be a useful concept. It reflects that there are international behavioural expectations towards the investor with a partially compulsory effect. This insight is important, because Part I has shown that direct obligations have only emerged recently and remain few in numbers. Similar to direct obligations, indirect obligations operate without requiring enforcement by the state as an intermediary. In fact, by definition states cannot enforce indirect obligations. But they do not need to either. Instead, indirect obligations apply the above-mentioned sanction automatically. If investors do not comply, they forfeit investment protection *ipso jure*. In this understanding, investors do not only face standards of conduct in the form of direct obligations discussed in Part I, but also (and on a much broader basis) in the form of indirect obligations.

The study was careful to distinguish these indirect obligations from other approaches of examining investors' misconduct. Sometimes, tribunals took account of such misconduct only as a balancing criterion amongst others within the analysis of an investor right. Then, misconduct only 'tips

2 For a different interpretation and suggestion on contributory misconduct of the investor see Martin Jarrett, *Contributory Fault and Investor Misconduct in Investment Arbitration* (Cambridge University Press 2019) 95–97, 162–163 who proposes that tribunals should apportion the contributions of investors and the state to the state's breach of an investor right based on the economic contributions or net income of the investor to the host state's economy (instead of punishing investors for their fault), which, arguably, rather follows a private law paradigm and ideas of unjustified enrichment – on the other hand, he considers post-establishment illegality to be based on an 'affront to state sovereignty' (126) which appears to be closer to the public law paradigm identified here.

the scales' against the investor. In contrast to indirect obligations, there is no automatic sanction – investors are just less likely to win their case. This approach is more flexible than indirect obligations because investment protection is not strictly contingent on pro-public interest behaviour. Nevertheless, these cases contribute to a broader trend of making investment law dependent on proper investor conduct. This development is dynamic, as the reinterpretation of existing investment law and reform proposals go hand in hand. Within this development, indirect obligations are the most stringent method of giving investor misconduct legal relevance.

Notwithstanding, these different indirect obligations lack coordination. Only rarely have tribunals addressed the question of whether a certain standard of conduct should rather condition admissibility or jurisdiction, substantive investor rights or determine the amount of compensation. Nor have they addressed the question of whether different aspects of the public interest should be treated differently. Indirect obligations remain chaotic.

For this reason, Part II concentrated on shedding light on the presence of indirect obligations in investment practice itself. To identify this presence is an important observation. As the subsequent Part III will show, they have an important role to play in rebalancing investment law and steering investors in a public interest-friendly way.