Chapter 9.
The Internal Perspective: Rebalancing Investment Law

Investor obligations rebalance investment law from within. Direct and indirect obligations are parts of the same development towards a symmetrical investment law in which rights and obligations go hand in hand (I.). They constitute an approach of changing investment law's value preferences – emphasising the public interest more strongly and providing investors at least to some extent with a new, 'public' role (II.). In consequence, they change the field's character towards a 'sustainable investment law' (III.). In doing so, investor obligations represent a reform option complementary to the oft-suggested reinforcing of host states' right to regulate. At the same time, they interact with the latter – depending on the perspective, they simultaneously expand and limit the right to regulate (IV.).

I. One common development towards symmetry

Direct and indirect obligations encountered in Parts I and II form part of the same development: a change in investment law to complement investor rights with obligations.

To recall: originally, investment law provided neither for direct nor for indirect obligations.[1] As an asymmetrical branch of international law, one of its main characteristic has always been that states would award rights without imposing obligations.[2]

1 See the similar historical remarks for direct and indirect obligations in Chapter 2.V and Chapter 6.VIII.

2 *Hesham Talaat M. Al-Warraq v The Republic of Indonesia*, Final Award (UNCITRAL, 15 December 2014) para 659; Patrick Dumberry and Gabrielle Dumas-Aubin, 'A Few Pragmatic Observations on How BITs Should Be Modified to Incorporate Human Rights Obligations' (2014) 11(1) Transnational Dispute Management 1, 2–3.

Investor obligations depart from this asymmetry.[3] Direct obligations do so to the full extent. Outright, they produce symmetry as investors face rights and obligations. Indirect obligations have a similar effect: their standards of conduct express behavioural expectations towards the investor. Even though it is true that investors are free in choosing to comply, a breach neutralises the IIA's investor rights. Therefore, only by observing these standards, they qualify for investment protection in the first place. In this sense, investment law forms a 'package' which contains symmetrical rights and obligations.

For example, a hypothetical IIA may impose a direct obligation to comply with a certain ILO Convention, thus symmetrically awarding both rights and obligations. Within the logic of the IIA, a similar clause drafted as an indirect obligation is no different. Technically speaking, the IIA still only awards rights. But investors can only invoke these rights if they comply with the ILO Convention. Both effects are qualitatively new to investment law – even though direct obligations surely constitute the more advanced alternative.

What is more, direct and indirect obligations share a common feature as they both operate detached from the host state's domestic legal system. Many encountered obligations define their content without regard for domestic law. The techniques to create direct obligations resonate in the way tribunals construed indirect obligations: to refer to international obligations of states,[4] to CSR,[5] to the (few) directly applicable international obligations of private actors[6] or by defining an entirely new standard.[7] For

3 Supported by Jorge E. Viñuales, 'Investor Diligence in Investment Arbitration: Sources and Arguments' (2017) 32(2) ICSID Review 346, 367; Tomoko Ishikawa, 'Counterclaims and the Rule of Law in Investment Arbitration' (2019) 113 AJIL Unbound 33, 37 focussing on counterclaims; Barnali Choudhury, 'Investor Obligations for Human Rights' (2020) 35(1–2) ICSID Review 82, 100, 102–103 however without distinguishing between direct and indirect obligations within the meaning of this book; James J Nedumpara and Aditya Laddha, 'Human Rights and Environmental Counterclaims in Investment Treaty Arbitration' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), Handbook of International Investment Law and Policy (Springer 2021) 1849 who consider counterclais to 'assume substantial relevance' and to 'remedy the inherent asymmetry' of investment arbitration.

4 See for example Chapter 3.II, Chapter 7.I.3 and Chapter 7.II.4.

5 See for example Chapter 3.III and Chapter 7.II.3; see also Choudhury (n 3) 101 who shares the assessment that investor obligations may 'harden' soft law human rights responsibilities of investors.

6 See for example Chapter 3.I and Chapter 7.I.3.

7 See for example Chapter 3.V and Chapter 7.I.1.

example, the analysis has encountered the approach to integrate already-existing international obligations of private actors as a direct obligation – the *Urbaser v Argentina* award[8] – and an indirect obligation – the *ordre public international* as understood by the *World Duty Free v Kenya* award.[9]

On the other hand, another common feature encountered was that the obligations have sometimes defined their content indeed by referring to domestic law[10] – this way taking advantage of the fact that domestic regulation offers many obligations already tailored to private actors, usually comprehensively covering the public interest. Moreover, both types of obligations internationalised these domestic norms in the course of referring to them – by explicitly requiring qualified violations, applying domestic law in harmony with international law and interpreting domestic law autonomously.[11]

Furthermore, direct and indirect obligations are both enforced internationally. States can file counterclaims for the former. And in case of the latter, while one could argue that states cannot enforce them at all as investors are free to comply, one could, however, understand the automatic sanction that they apply in case of a breach as a form of an 'enforcement'.

To illustrate this by the above-mentioned example: Counterclaims are the international means to enforce the ILO Convention in case of a direct obligation. If it was an indirect obligation, states would not be able to file a counterclaim. But the breach would deprive the investor of protection under the IIA. This sanction applies automatically and thus is, in this sense, 'self-enforced'. The difference between such indirect obligation and the direct obligations is more minor than it seems at first glance: In most cases, just like any investment claim, counterclaims will primarily serve to enforce compensation.[12] They thus emphasise the enforcing of the breach's

8 See Chapter 3.I.2.

9 See Chapter 7.I.3.b).

10 Compare for example the elevating of domestic investor obligations to direct substantive international investor obligations (Chapter 3.IV), the applying and internationalising of domestic investor obligations in investment arbitration (Chapter 3.VI) and the criterion of compliance with the host state's domestic law as a jurisdiction or admissibility criterion for investment arbitration claims by investors (Chapter 7.I.2).

11 See for example Chapter 3.VI.3.a), Chapter 7.I.2.c) and Chapter 7.II.5.c).

12 For analyses which similarly emphasise compensation see Andrea K Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17(2) Lewis & Clark Law Review 461, 475–476; Thomas Kendra, 'State Counterclaims in Investment Arbitration – a New Lease of Life?' (2013) 29(4) Arbitration International 575, 599–600 and the focus on the risk of liability for environmental dam-

secondary consequences rather than compelling actual compliance with the ILO Convention.

Overall, this means that direct and indirect obligations are new instruments with which investment law directly addresses investors' misconduct – without the state as an intermediary. Instead of only disciplining states, investment law starts to discipline investors too; hence, investor obligations continue the trend towards a 'generalisation'[13] of investment law. One could say that the field is transitioning from an 'international investment *protection* law' to a more holistic 'international investment law'.

II. Rebalancing investment law from within

Together, direct and indirect obligations change the field's underlying value preferences by strengthening the public interest compared to the protection of the investors' economic interests (1.). They represent an approach of rebalancing investment law from within. They come about from reinterpreting investment law and creating new IIA designs, albeit in a rather chaotic development (2.). This development changes the investor's role into an actor entrusted with serving the society to a certain extent (3.).

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age caused by the investor by James Harrison, 'Environmental Counterclaims in Investor-State Arbitration: Perenco Ecuador Ltd v Republic of Ecuador, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015 (Peter Tomka, Neil Kaplan, J Christopher Thomas)' (2016) 17(3) Journal of World Investment & Trade 479, 487.

13 'Generalisation' is used in the title of the article by Peter-Tobias Stoll and Till P Holterhus, 'The "Generalization" of International Investment Law in Constitutional Perspective' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press 2016); see also 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, 613 on how investment law as a specialised field that hardly received scholarly attention turned into an area of law in which the balance between investors' economic interests and the 'domestic steering capacity' of host states in a comprehensive sense is heatedly debated in the public and academia alike.

1. Strengthening the public interest

Turning investment law symmetrical strengthens the role of the public interest.

In the last years, many have criticised investment law for being biased towards investors. This observation was one of this study's starting points.[14] Critics alleged that tribunals interpreted investors rights overly broadly: Investors would enjoy too far-reaching protection that could shield them even against host states' legitimate regulatory concerns, and the high amounts of compensation they could receive amounted to unjust international privileges. In short: they claimed that investors' economic concerns trumped the public interest.

Investor obligations are suitable to address this criticism.[15] They offer a way to emphasise the public interest in IIAs. Already the mere presence of

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14 See Chapter 1.II.3.

15 See the similar assessment on imposing human rights obligations through IIAs by George K Foster, 'Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties' (2013) 17(2) Lewis & Clark Law Review 361, 405; Choudhury (n 3) 103. For suggestions to introduce or use investment arbitration counterclaims see Gustavo Laborde, 'The Case for Host State Claims in Investment Arbitration' (2010) 1(1) Journal of International Dispute Settlement 97, 97–98; Bjorklund (n 12) 475–477; José A Rivas, 'ICSID Treaty Counterclaims: Case Law and Treaty Evolution' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015) 780; Stefan Dudas, 'Treaty Counterclaims Under the ICSID Convention' in Crina Baltag (ed), *ICSID Convention After 50 Years: Unsettled Issues* (Wolters Kluwer 2017) 405; Makane Moise Mbengue and Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18(3) Journal of World Investment & Trade 414, 445; Mark A Clodfelter and Diana Tsutieva, 'Counterclaims in Investment Treaty Arbitration' in Catherine Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edn, Oxford University Press 2018) para 17.02; UNCITRAL 'Possible Reform of Investor-State Dispute Settlement (ISDS), Multiple Proceedings and Counterclaims' (22 January 2020) UN Doc A/CN.9/WG.III/WP.193, para 33; with some critical reservations Ina C Popova and Fiona Poon, 'From Perpetual Respondent to Aspiring Counterclaimant? State Counterclaims in the New Wave of Investment Treaties' (2015) 2(2) BCDR International Arbitration Review 223, 244–245; Maxim Scherer, Stuart Bruce and Juliane Reschke, 'Environmental Counterclaims in Investment Treaty Arbitration' (2021) ICSID Review 36(2) 413, 434–435. Investor obligations may even contribute to alleviating distributive justice concerns as envisaged by Steven R Ratner, 'International Investment Law Through the Lens of Global Justice' (2017) 20(4) Journal of International Economic Law 747, 758.

obligations along rights contributes to that end. Such obligations change the overall architecture of an IIA because they express a value judgment that investors' protection has its limits. Contextual interpretation pursuant to Art 31 (1) VCLT requires tribunals to take this into account when applying other clauses of the IIA, including investor rights. Therefore, even when a concrete obligation is not at stake, they 'tip the scales' in an IIA towards the public interest.

Furthermore, naturally, the public interest is emphasised because IIAs formulate respective standards of conduct – and accord negative consequences in case of a breach. The findings in Parts I and II have shown that investor obligations tend to be comprehensive in their substantive scope: often, it has appeared possible to apply them to very different public goods and individual rights. This indicates that they could potentially operate as a form of general international regulation for all aspects of foreign investment activity.

Yet, investor obligations can also operate in a more specific manner. States can define the type of conduct that they consider detrimental. They can tailor the obligations to problems they have encountered with foreign investment in the past. For example, environmentally-friendly states may choose to predominantly include environmental investor obligations. In the same vein, arbitral jurisprudence on indirect obligations has quite often considered and sanctioned corruption by investors. Herein, the development of such obligations towards the rule of law reflects a regulatory need that has arisen in practice and to which tribunals have reacted.

At the same time, it is problematic that investor obligations often remain fairly indeterminate – this is especially true for indirect obligations. One may doubt that some of these obligations will actually bring about a rebalancing effect. For example, the indirect obligation that stems from the requirement to contribute to the host state's development does not yet

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The integration of norms from other areas of international law into international investment law to 'temper investor rights' has been suggested by Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 331. Generally on the prospect of including public interest considerations in IIAs, see Nowrot (n 13) 644. For a contrary position in the context of counterclaims see Xuan Shao, 'Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law' (2021) 24(1) Journal of International Economic Law 157, 160–165 who argues that only domestic law is a feasible basis for environmental obligations of investors.

set a defined standard of conduct.[16] Notwithstanding, a substantial number of investor obligations is already fairly determinate – for example those which build on domestic provisions.[17] And the general trend towards a stronger emphasis on the public interest is clear. This is underlined by the high number of identified investor obligations throughout the entire investment law doctrine.

2. Reinterpretation and new treaty designs

This rebalancing of investment law represents a way of changing investment law from within. It rests on two pillars:

First, states have introduced new IIA designs with innovative clauses. Recurrently, the analysis has found that especially developing countries like India, Brazil and African states engage in such novel treaty-making. The new clauses are highly diverse, encompassing direct and indirect obligations alike. Even where these new clauses have so far only appeared in model BITs, these may serve as negotiating positions with other states and can bring about more public interest-oriented IIAs – even if the respective state cannot completely convince the other party from its model.

Second, many investor obligations followed from reinterpreting existing IIAs.[18] Increasingly, tribunals have been reading indirect obligations into investment law. This constitutes an approach that allows to transform the many IIAs in force without the need for creating new treaties. It offers an alternative to states which otherwise would consider terminating IIAs they perceive to overly disfavour their side.[19]

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16 See Chapter 7.I.1.c).

17 See in particular Chapter 7.I.2 and Chapter 7.II.5.

18 Some even consider that investment law practice is merely discovering features that have always existed. On the requirement to comply with domestic law as such a 'dormant' requirement see Panayotis M Protopsaltis, 'Compliance with the Laws of the Host Country in Bilateral Investment Treaties' (2015) 12(6) Transnational Dispute Management 1, 2–3; Jeff Sullivan and Valeriya Kirsey, 'Environmental Policies: A Shield or a Sword in Investment Arbitration?' (2017) 18(1) Journal of World Investment & Trade 100, 117.

19 This is what Stephan W Schill, 'The Sixth Path: Reforming Investment Law from Within' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015) 624–625 calls the 'sixth path'; for example also suggested by Kendra (n 12) 600; in the same direction Miles (n 15) 383; for an overview of different reform approaches see

However, reinterpretation takes place on a case-by-case basis, and single awards with new interpretive approaches may constitute a trend only if encountered consistently and over a period of time. When adjudicating, tribunals are restricted by the facts of the given case and can only decide on the concrete dispute that has arisen. It follows that they can only reinterpret selectively and concentrate on the specific problem presented by the parties. As a result, much of the developments that especially Part II on indirect obligations has presented, constitutes a fairly chaotic, still ongoing process.[20] The different types of indirect obligations lack coordination. As seen, so far there is no overarching system that defines if and why certain misconduct is treated as a matter of jurisdiction and admissibility, substantive investor rights or rules on compensation.

3. A changing role of investors

This chaotic evolution is due to a gradual, ongoing change of how states and society perceive the role of investors in investment law. To include investor obligations in IIAs means changing this role profoundly.

As IIAs impose standards of conduct towards the public interest, they express the idea that investors have an active role to play in a host state's society.[21] Some standards expect them not to impair public goods and

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the contributions in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2017).

20 Generally on the dynamic character of investment law see José E Alvarez and others (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press 2011); see also Stephan W Schill, 'Cross-Regime Harmonization Through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights' (2012) 27(1) ICSID Review 87, 90 on the dynamic relationship of different areas of international law; Steffen Hindelang and Markus Krajewski, 'Conclusion and Outlook: Whither International Investment Law?' 377–379 sketching dynamic paradigm shifts in international investment law.

21 See also Choudhury (n 3) 103 who considers introducing human rights investor obligations to better align international investment law with 'society's expectations for business, which is necessary for businesses' (including foreign investors') social licence to operate'; Nicolás M Perrone, 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' (2019) 113 AJIL Unbound 16, 16–17 who calls for an '*inclusive*, relational approach to foreign investment governance' (emphasis in the original). cf the identification of changes in tribunals' perspectives by Moshe Hirsch, 'Investment Tribunals and Human Rights Treaties: A Sociological Perspective' in

individual rights of others.[22] Many obligations may require the investor to go even further and promote the public interest.[23] In contrast, the originally envisaged role of foreign investors was different: Generally, IIAs assured them the right to be left alone by the state and to follow their own economic interests.

This fundamental change of role goes even deeper. In Part II, the study has revealed that some tribunals also take account of investor misconduct without establishing indirect obligations. Instead, they only consider it as a balancing factor – especially as part of investor rights' substantive requirements. These tribunals introduced the described new expectations in a more preliminary, cautious manner while following the same tendency as indirect and direct obligations.

Investment law's development is part and parcel of increasing demands towards corporations. The understanding that businesses can limit themselves to achieve profits is increasingly contested. On the UN level, the business and human rights discussions encourage, at the very least, a moral responsibility for individual rights and public goods.[24] Parts I and II have shown that investment law does not operate in a vacuum. Investor obligations can be understood as reflective of these international debates – especially as they often build on pre-existing international standards of conduct.

Consequently, investment law shifts the traditional divide between the public and the private. As originally envisaged, these ambits were clearly distributed: the host state represents the public sphere, the investor the private. As IIAs impose and enforce public interest obligations on investors, investors do enter, at least partly, the public sphere. In the process of doing so, they also become entrusted with safeguarding the public interest.

III. Sustainable investment law

Rebalancing investment law towards a partially public role for the investor has consequences for the field's overall character. This Section will show

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Freya Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (Cambridge University Press 2013) 100–103.

22 For example, the principle of contributory negligence sanctions investors who acted negligently towards the public interest, see Chapter 7.III.2.

23 For example, the requirement to contribute to the host state's development, see Chapter 7.I.1.

24 See Chapter 1.III.1.

that the encountered investor obligations turn it into a 'sustainable investment law'. To begin, it will shortly describe the concept of sustainable development (1.). It will then show that the shift towards sustainability is best understood against investment law's original purpose of increasing the volume of foreign investment (2.). Finally, it will demonstrate that introducing investor obligations changes this telos to only attract *quality* investment – in line with the concept of sustainable development (3.).

1. The concept of sustainable development

The concept of sustainable development was first introduced in the 1970s and has received increasingly stronger ground in international law from the late 1980s onwards.[25] It concerns the way societies and states should evolve. The UN define it as a

> development that meets the needs of the present without compromising the ability of future generations to meet their own needs. […] For sustainable development to be achieved, it is crucial to harmonize three core elements: economic growth, social inclusion and environmental protection. These elements are interconnected and all are crucial for the well-being of individuals and societies.[26]

25 See the overview by Ulrich Beyerlin, 'Sustainable Development' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (October 2013) paras 2–8; important milestones of how the concept crystallised in international law are the World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987), the UNGA 'Rio Declaration on Environment and Development' UN Doc A/CONF.151/26 (Vol. I) (12 August 1992) and UNGA 'Transforming Our World: The 2030 Agenda for Sustainable Development' UN Doc A/RES/70/1 (25 September 2015); see further Giorgio Sacerdoti, 'Investment Protection and Sustainable Development: Key Issues' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press 2016) 23–28.

26 ‹www.un.org/sustainabledevelopment/development-agenda/› accessed 7 December 2021 in the FAQ, 'What is sustainable development?'.

The UN have translated sustainable development into an Agenda which includes 17 goals and 169 targets that states strive to meet by 2030.[27] The UN Development Goals also address investment as follows:

> Goal 10. Reduce inequality within and among countries […]
>
> 10.b Encourage official development assistance and financial flows, including foreign direct investment, to States where the need is greatest, in particular least developed countries, African countries, small island developing States and landlocked developing countries, in accordance with their national plans and programme. […]
>
> Means of implementation and the Global Partnership […]
>
> 67. Private business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation. We acknowledge the diversity of the private sector, ranging from micro-enterprises to cooperatives to multinationals. We call upon all businesses to apply their creativity and innovation to solving sustainable development challenges. We will foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other ongoing initiatives in this regard […].[28]

The UN acknowledge that private investment forms an important means to achieve the Sustainable Development Goals, in particular to support developing countries. Foreign investors should take an active role to that end. Yet, the UN also highlight that investments have to operate in line with public goods and individual rights of others – reflecting the general approach of harmonising the three mentioned dimensions of sustainability.

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27 Most prominently reflected in the 17 UN Sustainable Development Goals for 2030, see 'UNGA Res 70/1' (n 25).

28 UNGA 'Transforming Our World: The 2030 Agenda for Sustainable Development' UN A/RES/70/1 (21 October 2015), paras 10b and 67. They contain further, more specific references to investment for ending hunger through sustainable agriculture in para 2 and in the energy sector in para 7.a.

2. The original purpose to increase investment volume

To understand how the investor obligations identified in this book fit the idea of sustainable development, it is useful to recall investment law's original purpose: IIAs should focus on protecting investors in order to attract foreign investment to the state parties. In this vein, the ICSID Conventions' preamble states at the very beginning:

> Considering the need for international cooperation for economic development, and the role of private international investment therein; […]

The 1965 Report of the Executive Directors on the ICSID Convention explicitly explains how the ICSID Convention may serve economic development:

> 9. In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating *a larger flow* of private international capital into those countries which wish to attract it.[29]

In other words, by awarding international protection states have generally aimed to attract *any* foreign investment. Investment law has served to increase the total foreign investment volume. In this view, the host state benefits from a stronger economy and the home state from new markets for corporations of its nationality which may bring profits home. This original purpose does not provide for holistically intertwining the economy with the environment and society that the (later invented) concept of sustainable development promotes.

29 IBRD 'Report of the Executive Directors on the Convention of the Settlement of Investment Disputes Between States and Nationals of Other States' ICSID/15/Rev.1, 35–49 (18 March 1965), para 9 (emphasis added).

3. Towards attracting sustainable investment

Investment law with investor obligations transforms this original purpose into the furthering of *sustainable* development.

By imposing obligations, investment law practically limits its scope to those investors who behave in accordance with the public interest. In turn, only such well-behaved investors do not have to fear counterclaims or the loss of investment protection. It is a choice of quality over quantity: rather than increasing *any* foreign investment flow, it offers an incentive exclusively for investors who abide by the imposed standards of conduct. This means that instead of fostering any economic development, IIAs now promote only sustainable development.[30]

These findings of a turn to sustainability are in line with UNCTAD's observations which in 2015 proposed a more sustainable investment law. It outlined a reform concept to that end in its 2015 Investment Policy Framework for Sustainable Development.[31] Then, in 2017, UNCTAD identified that these reforms had indeed reached a 'phase 2' in practice.[32] It found

30 In the same vein Gudrun Monika Zagel, 'Achieving Sustainable Development Objectives in International Investment Law' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), Handbook of International Investment Law and Policy (Springer 2021) 1955–1957; cf for a *de lege ferenda* perspective Howard Mann, 'Reconceptualizing International Investment Law: Its Role in Sustainable Development' (2013) 17(2) Lewis & Clark Law Review 521, 540–541 who proposes investor obligations as a solution for aligning investment law with sustainable development; similarly Graham Mayeda, 'Sustainable International Investment Agreements: Challenges and Solutions for Developing Countries' in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew P Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 544; Choudhury (n 3) 102; Surya Deva, 'Conclusion: Investors' International Law: Beyond the Present' in Jean Ho and Mavluda Sattorova (eds), *Investors' International Law* (Hart 2021) 314–316. Such a shift has been demanded by stakeholders, see for example Howard Mann, 'Civil Society Perspectives: What Do Key Stakeholders Expect from the International Investment Regime?' in José E Alvarez and others (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press 2011) 27.

31 UNCTAD 'Investment Policy Framework for Sustainable Development' UNCTAD/DIAE/PCB/2015/5 (2015).

32 UNCTAD, *World Investment Report: Investment and the Digital Economy* (United Nations Publications 2017) 126. In the same vein, others have observed that the still rather young international investment law system has matured from a phase of 'infancy' to ongoing 'adolescence', '[a]pproaching […] adulthood', see Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107(1) American Journal of International Law 45, 75–93

that a 'sustainable development-oriented IIA reform has entered the mainstream of international investment policymaking'.[33] In UNCTAD's view, it complemented other approaches such as promoting and facilitating investment, reforming investment dispute settlement and reinforcing the right to regulate. As examples for such policy strategies it explicitly mentioned the ensuring of responsible investment.[34]

IV. Interactions with host states' right to regulate

UNCTAD's remarks lead the analysis to another starting point of this book: How do the encountered investor obligations relate to host states' right to regulate? Strengthening the latter has been at the heart of reform suggestions in the last years.

It is submitted that investor obligations are a complementary rebalancing approach (1.). However, as investor obligations become part of IIAs, they also interact with the right to regulate. Depending on the perspective taken, they can strengthen (2.) or limit (3.) it.

1. Complementary reform options

In their effort to rebalance investment law, investor obligations and the right to regulate serve the same purpose.

To recall the right to regulate-approach for a better comparison:[35] Proponents of a stronger right to regulate focus on the host state. They aim to limit investor rights' disciplining effect on states. As a result, the leeway of states to regulate for the public interest should increase. In particular, in doing so, they should face less investment claims. In order to provide clarity that the state can enact such legislation, they suggest different ways to reform investment law. On the one hand, IIAs should include new right

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with reference to Brigitte Stern, 'The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate' in José E Alvarez and others (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press 2011) 175 who observes a '*crise de croissance*' in the backlash against international investment law.

33 UNCTAD, *World* (n 32) 126.

34 ibid; this observation is supported for example by Hindelang and Krajewski (n 20) 380–381.

35 See already Chapter 1.II.3.

to regulate clauses. They operate as justifications for a breach of an investor right or even as carve-out clauses. Often, they specify areas of the public interest in which the host state is free to regulate, for example human rights, environmental protection and social standards. On the other hand, one should foster the right to regulate by interpreting investor rights under existing IIAs more restrictively. To that end, especially systemic interpretation in accordance with other international treaties such as human rights pursuant to Art 31 (3) (c) VCLT is advised.[36]

The similarities of the right to regulate to the encountered investor obligations are apparent. Both approaches give greater weight to the public interest in the overall balance with investors' economic goals. The scope of relevant public goods and individual rights to be protected is equally comprehensive. They apply the same methods to reform investment law from within: creating new IIA clauses and reinterpreting existing investment law. Both find ground in recent arbitral jurisprudence. The main difference is, of course, that investor obligations focus on a different actor. In other words, they tackle the same concerns from a different angle. Thus, they represent a tool which may complement the strengthening of the right to regulate in rebalancing investment law.[37]

2. Strengthening the right to regulate

However, investor obligations and the right to regulate are not detached from one another. Instead, they interact. This Section will show that imposing investor obligations can expand host states' right to regulate.

First, if an IIA contains indirect investor obligations, the state's regulatory leeway automatically increases. This follows from the way indirect obligations operate. If investors breach them, they forfeit investment protection. They can no longer challenge the host state's actions by invoking investment law.[38]

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36 On systemic interpretation see Chapter 3 n 57.

37 Similarly UNCTAD, *World* (n 32) 126; Hindelang and Krajewski (n 20) 380–381.

38 cf *Ioannis Kardassopoulos v The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007) para 182 which considers investors' actions to be a relevant point of analysis to determine if they enjoy investor rights: '"Protection of investments" under a BIT is obviously not without some limits. It does not extend, for instance, to an investor making an investment in breach of the local laws of the host State. […] This […] relates to the investor's actions in making the investment. It does not allow a State to preclude an investor

For example, an IIA could contain a clause which deprives investors of investment protection if they violate international anti-corruption standards. As seen, a corrupt investor suffers the sanction of losing protection. If the host state now enacts anti-corruption regulation, said investor cannot challenge this regulation anymore by invoking the IIA. In effect, the indirect obligation has increased the host state's right to regulate by freeing it from its international obligations under the IIA.

Second, direct obligations can similarly strengthen host states' right to regulate. This effect follows from the already-mentioned contextual interpretation of IIAs pursuant to Art 31 (1) VCLT:[39] Consistency requires that IIAs cannot simultaneously protect and prohibit the same conduct. This means that investors cannot invoke an investor right when behaving in a way which fails to meet the standard of conduct that direct obligations impose.

To illustrate this with the aforementioned example: Now, the IIA's clause prohibits corruption as a direct obligation. When the investor violates the anti-corruption obligation, the host state can claim compensation under the IIA. At the same time, the IIA allows the host state to take domestic measures against such behaviour. According to Art 31 (1) VCLT the IIA's investor rights have to be interpreted in a way consistent with the anti-corruption obligation. This means that the investor cannot invoke investor rights against the host state's domestic anti-corruption measures. Again, the host state's right to regulate is strengthened compared to an IIA without a direct investor obligation.

Admittedly, these observations only serve as general lines; investor obligations' expanding effect on the right to regulate has limits. The aforementioned examples assume that the investor's violation of such an obligation is clear, and that the host state reacted proportionately. If that is not the case, the assessment may change. In this vein, recurrently, the analysis in Parts I and II has found that investor obligations require a weighing and balancing of the affected interests in a certain dispute. To that end, the obligations often contained qualifications, for example, that the public interest affected must be of a fundamental nature. These qualifying

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from seeking protection under the BIT on the ground that its own actions are illegal under its own laws.' (emphasis in the original); see also Ursula Kriebaum, 'Investment Arbitration – Illegal Investments' in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration* (Stämpfli Verlag 2010) 310.

39 See Chapter 9.II.1 on the effect that contextual interpretation has on the overall architecture of an IIA if it contains investor obligations.

elements provide interpretive flexibility. Therefore, in the aforementioned example, one cannot simply say that the IIA provides states with a *carte blanche* to combat corruption.[40] Indeed, Art 31 (1) VCLT also requires that investor obligations be interpreted in a way consistent with investor rights. Consequently, even if an IIA does contain investor obligations, the IIA still continues to impose disciplines on the host state, related especially to the *manner* the state acts towards the investors.

For example, if the state in the above examples acted disproportionately against corrupt investors – by incarcerating them over an extended period of time without judicial review – it is quite certain that even a breach of anti-corruption investor obligations may not expand the state's right to regulate and enforce said regulation so broadly.

In case of an indirect obligation, the tribunal could find that its sanction does not apply and preserve the investor right. Indeed, this study has provided examples of arbitral jurisprudence in which investors who violated an indirect obligation did not forfeit investment protection if the host state itself committed a wrongdoing.[41] When considering direct obligations, the overall interpretive outcome may change. The tribunal may, for example, consider that both the state and the investor have violated their respective obligations under the IIA.

All in all, it is decisive that investor obligations 'tip the scales' within investment law in favour of the public interest.[42] This opens a regulatory space for the host state while remaining restrained especially in the *manner* in which it acts towards the investors.

3. Limiting the right to regulate

Having pointed out how investor obligations may strengthen host state's right to regulate, this Section will show that they can also limit the latter.

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40 The concern that directly applicable international obligations provide states with such a *carte blanche* features as an argument against directly applicable international obligations in other fields, for example regarding international human rights see Christian Tomuschat, 'Grundpflichten des Individuums nach Völkerrecht' (1983) 21(3) Archiv des Völkerrechts 289, 311–312; Kofi Quashigah, 'Scope of Individual Duties in the African Charter' in Manisuli Ssenyonjo (ed), *The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers 2012) 121–123.

41 See Chapter 7.I.2.b).

42 See Chapter 9.II.1.

The reason is that investor obligations operate on the level of international law, detached from the host state's domestic legal system.

As seen, investor obligations express international standards of conduct for investors. After being agreed upon in an IIA, they cannot be unilaterally changed without abiding by regular treaty amendment procedures. As such, investor obligations represent a form of international regulation for foreign investment. For example, if states include a certain ILO Convention in an IIA as an investor obligation, the Convention becomes a common applicable labour standard. The states cannot unilaterally decide to allow for a lower standard without amending or terminating the treaty.

Furthermore, tribunals may interpret investor obligations autonomously and alter their meaning contrary to states' original expectations. The impairing effect on states' right to regulate is particularly visible where investor obligations draw on domestic law and internationalise it in the process. The awards in *Perenco v Ecuador* and *Burlington v Ecuador* show the different ways in which tribunals may understand even fundamental domestic rules such as constitutions.[43] This effect limits host states' right to regulate in the sense that they cannot oversee how exactly international obligations apply – compared to domestic obligations which are enforced by their courts and executive agencies.

In short, investor obligations also restrict states' sovereignty because states have jointly decided to follow common rules. To create international institutions such as investment tribunals always implies that they work autonomously. Their interpretation of investor obligations may evolve within the boundaries set by international treaty law,[44] 'transferring authority from the national to the international'.[45]

43 See Chapter 3.VI.2.

44 cf Patrick Abel, 'Menschenrechtsschutz durch Individualbeschwerdeverfahren: Ein regionaler Vergleich aus historischer, normativer und faktischer Perspektive' (2013) 51(3) Archiv des Völkerrechts 369, 370–392 on the dynamic role that regional human rights courts play; on the requirements for an evolutive interpretation in the law of treaties see *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, paras 63–71.

45 This expression is borrowed from Jacob K Cogan, 'The Regulatory Turn in International Law' (2011) 52(2) Harvard International Law Journal 321, 362–363.