Chapter 11.
The Theoretical Perspective: Individuals in International Law

Because foreign investors are natural or private legal persons, the encountered investor obligations prompt the question of how they relate to the role of the individual in international law more generally. Chapter 11 will outline how one could appreciate investor obligations from this, more theoretical, perspective. It will concentrate on a few general lines without claiming to be exhaustive in its interpretation.

Firstly, it will show that investor obligations bring about individual international responsibility – which international law does not provide for in other branches except for international criminal law (I.). One can understand this development as constituting a phenomenon of Global Administrative Law (II.). At the same time, one may also understand investor obligations as an example of how international law centres increasingly more on the individual instead than on the state as the decisive subject. This has been a long-standing development, especially fuelled by human rights and international criminal law. Investor obligations contribute to this trend – although in a more pragmatic, less value-based manner than for example human rights do (III.).

I. Construing international responsibility of foreign investors

As seen, direct and indirect obligations place legal consequences on investors who breach them. It is possible to understand this effect as a new form of individual international responsibility of foreign investors.

As a first step, this Section will briefly explain the concept of international responsibility as developed for states and in international criminal law (1.). Then, it will outline how one can conceptualise investor obligations to conform with the concept of responsibility (2.). Finally, it will highlight that investors' responsibility does not exclude that states are also responsible for the same public interest violation. Instead, implementing shared responsibility is possible (3.).

1. The concept of international responsibility

The concept of international responsibility is best established with regard to states. The ILC Articles on State Responsibility have codified the established customary law.[1] Therein, the ILC distinguishes between primary and secondary rules.[2] Primary rules are the substantive standards that states have to comply with. They follow from international treaties, customary law and general principles of law. Secondary rules regulate circumstances under which a primary rule is breached, for example rules on attribution of conduct[3] and circumstances precluding wrongfulness.[4] They also determine the consequences for such a breach, namely, cessation of the wrongful act, non-repetition and reparation.[5] Hence, 'international responsibility' means that a state faces the described consequences for an attributable breach of a primary rule.[6]

For example: A state may violate the prohibition of the use of force in Art 2 (4) UN-Charter. The prohibition itself is the primary rule. The ILC Articles contain the secondary rules which define if certain conduct is attributable to the state and hence qualify as relevant to determine the violation of Art 2 (4) UN-Charter. If a breach can be established, said

1 UNGA 'Responsibility of States for Internationally Wrongful Acts' UN Doc A/RES/56/83 (12 December 2001). The Articles do not address rules of international responsibility applicable to private actors. Yet, they indicate that such rules may exist as a separate normative category in Art 58 which states that the Articles 'are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State', see Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 152–153. On the international responsibility of international organisations that is not investigated here any further and which follows the same general lines as the responsibility of states see ILC 'Draft Articles on the Responsibility of International Organizations' (2011) ‹http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf› accessed 7 December 2021.

2 On this terminology see ILC 'Report of the International Law Commission on the Work of Its Twenty-Second Session, 4 May-10 July 1970' UN Doc A/8010/Rev.1, 306; James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 64–66; Jean d'Aspremont and others, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62(1) Netherlands International Law Review 49, 51.

3 Art 4–11 UNGA 'Articles on State Responsibility' (n 1).

4 Art 20–27 ibid.

5 Art 28–39 ibid.

6 Art 1–3 ibid.

secondary rules require to cease the attack against the other state, prohibit its repetition and order reparation.

While the concept of international responsibility can also apply to individuals, it is much less established and fleshed out as a rule of international law in this regard.[7] The main reason for this is that directly applicable obligations exist only exceptionally.[8] By and large, there are thus no primary rules on which secondary rules for individuals could build on. International criminal law shows that where such primary rules exist, secondary rules are necessary to apply the primary rules properly. For example, the Rome Statute defines secondary rules on attribution such as on aiding and abetting,[9] and on consequences for breaches of international crimes: individual penalties, enforceable by domestic or international criminal courts.[10] Another, rather specific example from the international law of the sea are contracts that private corporations and the International Seabed Authority conclude for activities in the Area.[11] They are governed by international law[12] – thus create primary rules of that character directly applicable to contractors – and contain secondary rules, for example on consequences in case contractors breach the contract.[13]

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7 Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111(3) Yale Law Journal 443, 491–492 notes that '[i]nternational law approaches to individual responsibility have not benefited from the sort of systematic, academic examination provided by the International Law Commission with respect to state responsibility' despite that it does exist in international criminal law; Christian Tomuschat, 'The Responsibility of Other Entities: Private Individuals' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 317 observes that 'international civil responsibility of private individuals […] is not a well-defined and generally accepted concept'; d'Aspremont and others (n 2) 53–54 consider international responsibility of non-state actors to be 'a thorny issue' for which, in a mainstream perspective, a 'tailored framework' does not exist.

8 See Chapter 2.IV.

9 Art 25 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute).

10 Art 77–80 ibid.

11 Art 153 (3) United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS).

12 Annex III, Art 21 (1) ibid.

13 See Annex III, Art 22 ibid on the 'responsibility or liability' of the contractor. For a discussion how these law of the sea rules indicate an individual international responsibility, see Markos Karavias, 'Corporations and Responsibility Under International Law' in Photini Pazartzis and Panos Merkouris (eds), *Permutations of Responsibility in International Law* (Brill Nijhoff 2019) 59–63.

To prepare for the analysis of investors' responsibility, it is useful to make the structural similarities of state and individual criminal responsibility visible, focusing on their most relevant aspects for the present purpose:

- Primary rules:
  - For states: Their international obligations as enshrined in treaties, customary law and general principles;
  - For individuals: International crimes as recognised in international treaties and customary law.
- Secondary rules, attribution:
  - For states: Mainly conduct by their organs, but also for example individual conduct effectively controlled by states (Art 4–11 ILC Articles on State Responsibility);
  - For individuals: Principles such as committing, ordering or aiding and abetting a crime (i.e. Art 25 Rome Statute).
- Secondary rules, consequences of breaches:
  - For states: Cessation of the breach, non-repetition, reparation, the latter consisting of restitution, compensation and satisfaction (Art 28–39 ILC Articles on State Responsibility);
  - For individuals: Individual penalties, including imprisonment and fines (Art 77–80 Rome Statute).

2. Individual investor responsibility

Investor obligations give rise to a concept of individual international responsibility along similar lines as described in the previous Section.

The obligations constitute the primary rules. They define the substantive standards of conduct towards the public interest that investors must follow. Functionally, they are similar to the international obligations of states and the prohibited crimes under international criminal law.

In a next step, core findings of this study can be understood as constituting secondary norms on the consequences of breaching investor obligations. One can interpret the different sanctions that direct and indirect investor obligations bring about as different forms of secondary rules. This means that one can model them within the frame of responsibility as follows:

- Primary rules: investor obligations;
- Secondary rules on consequences:

- In case of direct obligations: Cessation of the breach, non-repetition and compensation,
- In case of indirect obligations: Complete or partial deprivation of investor rights.

In this view, direct obligations accrue a responsibility similar to the one encountered by states – but with a strong emphasis on compensation as the primary relief sought in arbitral practice. Investors' individual responsibility is a corollary of establishing symmetrical IIAs. Just as states can be responsible for breaching investment law, so can investors.

If indirect obligations can be conceived as leading to international responsibility is less obvious. It is correct that indirect obligations only incidentally address the wrongful conduct of investors and do not embody the similar value judgment of 'right and wrong' as direct obligations do.[14] Yet, indirect obligations are no different in bringing about a legal consequence for a breach, but this legal consequence functions differently. Due to indirect obligations' partially compulsory nature,[15] states cannot demand the cessation of the breach, non-repetition and compensation. *These* secondary rules do not apply. Nevertheless, the study has shown that investors face legal consequences with regard to their rights by forfeiting investment protection. This sanction can be understood as a *different* applicable secondary rule as presented above.

It also appears adequate to frame both types of legal consequences in these terms of international responsibility: This reflects that direct and indirect obligations fulfil similar functions in rebalancing investment law and steering investors' behaviour – as demonstrated in Chapter 9 and Chapter 10. Because indirect obligations deprive investors of protection *automatically*, they may hold investors responsible even more effectively than direct obligations. What is more, tribunals have also understood indirect obligations as giving rise to investors' responsibility.[16] As seen, a certain standard can also operate as a direct and indirect obligation simultaneously,[17] which means that both types of secondary rules apply.

Because of these dual types of consequences, investor obligations follow different rules of responsibility than those which apply to states and to in-

14 This is why Jean Ho, 'The Creation of Elusive Investor Responsibility' (2019) 113 AJIL Unbound 10, 12–13 regards examples of what this book defines as indirect obligations as contributing to an 'elusive investor responsibility'.

15 See Chapter 6.II.

16 See for example Chapter 7 n 143, 209 and 219.

17 See Chapter 6.VI.

dividuals under international criminal law. Rather, investment law appears to bring about its very own regime of responsibility.[18] One could describe it as a new and specific form of international civil responsibility or liability of private actors.[19]

It makes sense that investor obligations build a stand-alone regime of responsibility. Secondary rules embody value judgments. Thus, one cannot simply transfer the rules of state or individual criminal responsibility to investor obligations. This can be illustrated through the example of rules on attribution of conduct to states. These rules draw the line between the private and the public sphere. By that, they recognise the autonomy of persons as acting on their own and as not being associated or identical with public authority.[20] This telos does not apply if one wishes to determine if a certain conduct should be attributed to the foreign investor or another private actor.[21] Similarly, an analogy to international criminal law does

18 For a different view that more categorically distinguishes what is coined as direct and indirect international investor obligations here, see Karsten Nowrot, 'Obligations of Investors' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos 2015) para 31.

19 It is an individual international responsibility in a particular context – the international regulation of foreign investment – which fits well with the conceptualisation by Karavias (n 13) 65 that 'corporations as addressees [and] bearers of international responsibility' should be considered mindful of their functions in particular contexts; cf on civil international responsibility concepts Tomuschat, 'Responsibility' (n 7) 318–325 who translates the concepts of primary and secondary rules established in the law of state responsibility and examines if and how they apply to possible obligations of individuals in the law of international organisations, international criminal law and international treaties on nuclear energy and on environmental protection; Andrew Clapham, 'The Role of the Individual in International Law' (2010) 21(1) European Journal of International Law 25, 30 who proposes to recognise that individuals have 'civil law international obligations' with corresponding international responsibility; Peters (n 1) 152–164 who reflects on the 'international non-criminal responsibility of the individual', in particular analysing international nuclear and environmental liability treaties; d'Aspremont and others (n 2) 54 who consider the responsibility of non-state actors as an alternative model to the mainstream framework focused on state responsibility. See also the elaborate model of secondary rules for corporations suggested by Ratner (n 7) 497–511, 518–524.

20 ILC 'Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) II(2) Yearbook of the International Law Commission, 31 (53rd session of the International Law Commission, 23 April-1 June and 2 July 2001), Chapter II para 2.

21 cf the critical remarks on analogies to rules of state responsibility by d'Aspremont and others (n 2) 58–59; more open to analogies in this regard Ratner (n 7) 495.

not appear to fit here either. The quite differentiated rules of attribution that are, for example, enshrined in the Rome Statute revolve around the question of personal guilt. They appear inadequate for investor obligations which are concerned with the role of economic actors in the host state's society.

This reflection on the concept of 'responsibility' allows for further insights. By and large, rules on attribution are a missing piece in the encountered practice that Parts I and II have studied. IIAs and tribunals rarely address the question of which conduct is attributable to investors to determine if they violated an investor obligation. Only some tribunals elaborated on aspects that could imply attribution. For example, some tribunals required investors to breach domestic law in bad faith or negligently[22] – which one could understand as a criterion of fault. Such rules on attribution need to be concretised further.

3. Shared responsibility between states and investors

Modelling a new form of investor responsibility also helps to understand how investor misconduct relates to the obligations of states.

In particular, it alleviates the concern that investor obligations could release states from their own obligations towards the public interest. Outside of investment law, scholars have been reluctant to accept international obligations directly applicable to private actors for this reason: Arguably, to the extent the private actor is bound, they would free the state from corresponding obligations or at least provide a basis for an abusive excuse and neglect of obligations.[23] Following this scholarly opinion, for example, a state which is party to a human rights treaty which contains environ-

22 See for example Chapter 7.I.2.c); see also Martin Jarrett, Sergio Puig and Steven R Ratner, 'Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals' (2021) Journal of International Dispute Settlement 1, 20 who discuss if investors (*in personam* claims) or the investment (*in rem* claims) should be the respondent of counterclaims, effectively reflecting on the adequate rules of attribution.

23 For example, scholars rejected individual duties in human rights law because states could invoke them to justify their own violations of human rights, see for example 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.

mental obligations for private actors could blame these private actors for environmental pollution, and decide to abstain from acting itself.

However, investor obligations bring about investors' responsibility without foreclosing the host state's responsibility at the same time. States remain bound by their obligations to protect the public interest. Herein, investor obligations affirm the UN Guiding Principles on Business and Human Rights' main observation that states are the principal guardians of the public interest.[24]

The principle of shared responsibility allows for such harmonisation of investor and state obligations. It expresses that two subjects are separately responsible for the same harmful outcome. It follows the underlying idea that there is no reason why the duty of one subject to protect a certain right should excuse another subject for breaches of obligations in the same matter.[25] It has been applied in other areas of international law for sharing responsibilities of states and private actors.[26]

For example, an IIA could contain an investor obligation to respect the human rights of others under the ECHR. In this hypothetical scenario, investors would harm the local population's health by causing pollution. Subject to the IIA, investors would be internationally responsible for violating the right to physical integrity under Art 8 ECHR. At the same time, the host state has an own obligation under Art 8 ECHR to protect the local population. It failed to do so and thus is internationally responsible for this breach. Irrespective of the investor's misconduct, inhabitants could file a claim against the state before the ECtHR. Hence, investors and the state

24 UN Human Rights Council 'Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc HRC/RES/17/4 (2011), 3–4.

25 Ratner (n 7) 493 with reference to Joseph Raz, *The Morality of Freedom* (Clarendon Press 1988) 182–186.

26 For example, the rules on activities in the Area under chapter XI of UNCLOS. In an advisory opinion of 2011, the International Tribunal for the Law of the Sea elaborated in detail on the responsibilities of states and private commercial operators in exploring and exploiting the deep seabed and their relation to another under this chapter, see *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion, 1 February 2011) ITLOS Rep 2011, paras 199–205 in which the Tribunal found 'parallel liability' of the private contractor's violation of rules applying to deep-seabed mining and the sponsoring state for its own violations that to a substantial extent consist in due diligence obligations towards the contractor's actions; see also d'Aspremont and others (n 2) 56–64 who consider the concept of shared responsibility as found in the law of the sea and identify recurring legal questions.

are subject to a shared international responsibility. In addition, the state could become responsible for breaching an investor right if it then reacts disproportionately against the polluting investors.

This example shows that the concept of investors' (potentially shared) international responsibility leads to adequate results.[27] Shared responsibility reflects that investors and host states face autonomous international obligations – with separate and specific legal consequences.

II. Responsibility as an aspect of Global Administrative Law

That investors face international responsibility through IIAs can be understood as an expression of Global Administrative Law. This Section will start by shortly explaining the main idea of this school of thought (1.). Then, it will show that investor obligations with their very different sources from domestic and international law can be understood to form part of a 'global administrative space' (2) and that they follow functions and principles of administrative law (3.).

1. The idea of Global Administrative Law

Global Administrative Law[28] is a theory which postulates that administration is no longer something exclusive to the state and its domestic legal

27 In the same vein see for example Arne Vandenbogaerde, *Towards Shared Accountability in International Human Rights Law* (Intersentia 2016) 273–274; for a contrary position see Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (Cambridge University Press 2021) 37–38 on the danger that states could 'try shifting their responsibility to corporations and vice versa' and thus calls for clearly defining who bears 'primary responsibility' (37). However, shared responsibility as understood here does not allow for mutual exculpations. Rather, each subject retains its own international responsibility – for example, in case of states for not observing due diligence towards private actors – measured against the international standard of, for example, human rights.

28 The term is used here as defined by scholars of the New York University, see Benedict Kingsbury and others, 'Foreword: Global Governance as Administration – National and Transnational Approaches to Global and Administrative Law' (2005) 68(3 & 4) Law and Contemporary Problems 1. It has roots in earlier writings on international administrative law, for example by Lorenz von Stein, 'Einige Bemerkungen über das internationale Verwaltungsrecht' (1882) 6(2) Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen

system. Rather, it describes the existence of global governance. It is comprised by procedures and institutions which include actors other than the state and make rules that have a regulatory effect on potentially everyone's behaviour.[29] These rules would penetrate the traditional divide between national and international law – instead forming an overarching 'global administrative space'.[30]

An often-mentioned example of Global Administrative Law is rule-making by international institutions such as the International Organisation for Standardisation (ISO). As a private international organisation, it creates technical standards for products, services and systems. They are highly relevant even for sensitive areas such as food safety which used to be the regulatory prerogative of states. These standards have a strong impact on every-day products and are, for example, taken up by national legislation – even though states did not create them. The interaction of ISO standards and national legislation constitutes a global administrative space.[31]

Global Administrative Law studies these institutions and processes. One of its core findings is that these increasingly follow principles of (classic state) administrative law. In turn, global rule-making and its outcome are also tested against principles encountered in domestic public law,

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Reich 395; Paul S Reinsch, 'International Administrative Law and National Sovereignty' (1909) 3(1) American Journal of International Law 1; Philip C Jessup, *Transnational Law* (Yale University Press 1956); for an analysis of the various streams of Global Administrative Law scholarship see Lorenzo Casini, 'Global Administrative Law Scholarship' in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2016).

29 On private rule-making see for example Jürgen Friedrich, 'Legal Challenges of Non-Binding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries' in Armin v Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) in the context of the FAO; Fabrizio Cafaggi, 'Transnational Private Regulation: Regulating Global Private Regulators' in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2016).

30 Kingsbury and others (n 28) 3; Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20(1) European Journal of International Law 23, 24; see also more generally the overview by Sabino Cassese and Elisa D'Alterio, 'Introduction: The Development of Global Administrative Law' in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2016) 3–9.

31 On ISO as an example of Global Administrative Law see Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3) Law and Contemporary Problems 15, 22–24.

for example, the principles of legality, proportionality and transparency.[32] These may serve as 'legal tools capable of taming and framing global governance.'[33] In the above-mentioned example, one could study if the ISO observes principles such as proportionality, and hold the ISO accountable if it, for example, acts disproportionately.

Even without appreciating investor obligations, investment law represents one example which has been identified as a form of Global Administrative Law.[34] In this view, investment law restrains states in their sovereignty. On the substantive level, investor rights discipline states through balancing investors' interests with the public interest.[35] Considering enforcement, tribunals allow for individual remedies by the investor against the state similar to domestic administrative courts.[36]

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32 Kingsbury and others (n 28) 3; Kingsbury (n 30) 31–33; Cassese and D'Alterio (n 30) 3–9; Richard B Stewart, 'The Normative Dimensions and Performance of Global Administrative Law' (2015) 13(2) International Journal of Constitutional Law 499, 500–506; for a critical reflection on general principles and values that Global Administrative Law may entail see Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17(1) European Journal of International Law 187, 195–214.

33 Lorenzo Casini, 'Beyond Drip-Painting? Ten Years of GAL and the Emergence of a Global Administration' (2015) 13(2) International Journal of Constitutional Law 473, 473.

34 Gus van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17(1) European Journal of International Law 121, 148–149; Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 45, 71 who consider investment law to be a part of the states' administrative law systems and to follow public law principles. See also Daniel Kalderimis, 'Investment Treaty Arbitration as Global Administrative Law: What This Might Mean in Practice' in Chester Brown (ed), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 155 who observes that investment treaty law follows a public law paradigm, calling for more transparency; Stephan W Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52(1) Virginia Journal of International Law 57, 71–85 who elaborates on the hybrid nature of investment law which combines traditions of commercial arbitration with principles and functions of public law; Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press 2012) 81–85 on the administrative review that investment tribunals provide.

35 van Harten and Loughlin (n 34) 146–147.

36 ibid, 127–139.

2. Investor obligations as part of global administrative space

Investor obligations qualify as phenomena of Global Administrative Law too. The fact that private actors become direct addressees of global regulation constitutes a key feature of Global Administrative Law.[37] In this regard, *Kingsbury*, *Krisch* and *Stewart* have observed: '[T]he real addressees of […] global regulatory regimes are now increasingly the same as in domestic law: namely, individuals […] and collective entities like corporations […].'[38] Investor obligations do precisely that. They set standards of conduct that directly address foreign investors instead of focussing on the relations between states.

The notion of a 'global administrative space' describes rather well the many different sources on which investor obligations have drawn to define their content. To recall, they do not only create novel standards but also build on states' international obligations, soft law and domestic law. Two constellations are particularly indicative of Global Administrative Law: Investor obligations overcome the distinction between domestic and international law while IIAs internationalise domestic standards.[39] In doing so they further expand investment law's 'hybrid foundations'.[40] What is more, some obligations provide standards with legal effects that have not been created by states. Recurrently, the analysis has encountered obligations which build on CSR and other soft law[41] – hence, on norms also created by corporations and other private institutions.

Furthermore, as Chapter 10 has shown, investor obligations can exert an international regulatory effect independent of domestic activities by the host state. It is such processes beyond traditional regulation by the sovereign state that Global Administrative Law describes. Functionally, to regulate the behaviour of foreign investors by balancing their economic freedoms with the public interest is the ambit of administrative law.

Notwithstanding, the values and rights that investor obligations aim to protect remain hard to define with precision. Due to a lack of awareness that investor obligations have already been established to a considerable degree, it is still open for discussion how investors' economic freedoms

37 Kingsbury, Krisch and Stewart (n 31) 23–25.
38 ibid, 23–24.
39 See for example Chapter 3.V, Chapter 3.VI, Chapter 7.I.2 and Chapter 7.II.5.
40 Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2004) 74(1) British Yearbook of International Law 151.
41 See for example Chapter 3.III and Chapter 7.II.3.

should be balanced with any duties towards the public interest. This is a question for the states to decide by concretising investor obligation clauses in IIAs and interpreting the identified existing mechanisms of investor obligations.

And investor obligations remain disparate and contested in their doctrinal mechanisms so far. There is not one regulatory agency, one administrative court or even a collective and coordinated effort of states to create and flesh out investor obligations. Rather, many different actors engage in creating and applying investor obligations, sometimes even only implicitly: Primarily states in drafting and concluding new IIAs, arbitral tribunals (without a coordinating appellate instance or a doctrine of precedent) and in addition scholars and institutions like UNCTAD who reflect on investment law reform. Such decentral law-making decoupled from classic state legislation and treaty-making is, however, precisely characteristic for rule-making in the global administrative space. It is thus fair to say that investor obligations are Global Administrative Law in the – chaotic and decentral – making.

However, in contrast to Global Administrative Law approaches, this book has methodologically focussed on the traditional sources of international and domestic law. It laid out that investor obligations *do* conform with international law's canonical sources as reflected in Art 38 (1) ICJ-Statute. They constitute binding rules of public international law. Thus, international investor obligations as depicted here are *not* private rules. In addition, investors do not create the obligations, instead states do so by concluding respective IIAs.[42]

In addition, investor obligations are not *global*. The reason is that they arise only between the parties of IIAs and foreign investors of the corresponding nationalities. Hence, they do not comprehensively cover all foreign investment in a host state. Their reach is more limited than, for example, the mentioned ISO standards.

42 cf Schmidt-Aßmann, 'The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship' (2008) 9(11) German Law Journal 2061, 2067–2068 who highlights that states still remain the most important regulators in matters of administration. On the interest in private actors and international organisations as regulators, see for example Kingsbury, Krisch and Stewart (n 31) 18–19.

3. Following administrative law functions and principles

Investor obligations also reinforce administrative or public law as the field's dominant paradigm in line with Global Administrative Law.

As to which 'paradigms' investment law follows has been intensively discussed. To think in paradigms means to understand which values structurally affect investment law, and which principles it should follow. The field originally developed out of ideas of commercial arbitration which favoured a private law paradigm – the delineating of private risks and interests. Especially the right to regulate-debate has shown that investment law has increasingly adopted a paradigm of (international) public law: Investor rights entail the balancing of private interests of investors with the public interest.[43]

In line with Global Administrative Law, investor obligations strongly support a public law paradigm. Chapter 9.II.3 has shed light on a new, 'public' role of investors from which is expected to contribute actively to the public interest. Chapter 9.III has shown that investor obligations turn the field into a 'sustainable investment law'. These developments follow structures of domestic administrative law. They embody the setting of public obligations and defining how the host state should develop – towards an economy in harmony with society and the environment.

In an institutional perspective, investment tribunals take over functions additional to the challenging of host state regulation.[44] As they apply investor obligations, they become more general fora which comprehensively address disputes arising out of a foreign investment.[45] Then, investment tribunals can be seen as institutions beyond the state, exerting judicial powers over general matters of public administration.[46]

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43 See Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107(1) American Journal of International Law 45, 45–75; for a support of the public law paradigm see only Harten (n 34).

44 Roberts (n 43) 45–46.

45 cf the juxtaposition by Mark W Friedman and Ina C Popova, 'Can State Counterclaims Salvage Investment Arbitration?' (2014) 8(2) World Arbitration & Mediation Review 139, 169.

46 That the perspective of Global Administrative Law is overly limited to administration instead of appreciating the legislative and judiciary functions as well, is rightly observed by Armin v Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' in Armin v Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 16; Kulick (n 34) 84.

The study has also shown that investor obligations apply principles of domestic public law.[47] In particular, all obligations entailed a weighing and balancing between public and private interests which resemble the proportionality principle.[48] Another good example is the requirement to comply with domestic and international law which follows an underlying understanding that investments should be legal – implying the principle of legality that Global Administrative Law has studied in other contexts.

III. Individual responsibility as a fundamental value?

Global Administrative Law offers a perspective that is external to international law and observes how investor obligations contribute to global governance. But investor obligations also prompt asking how they relate to general developments within international law.

This Section will analyse how they stand to international law's shift from the state to the individual. In the last hundred years, international law has developed from an inter-state character to a legal order which centres on the individual as a subject (1.). In part, investor obligations reflect this development because they bring about individual responsibility (2.). However, they do so in a less value-based manner than other areas of international law, for example compared to human rights and criminal law. Instead, they realise such individual positions in a more pragmatic way (3.).

1. The idea of individual international law

The role of the individual in international law has changed over time. By and large, until the early 20th century, only the state was considered the subject of international rights and obligations. Individuals were mediatised by the state of their nationality. Indirectly, states could, at their discretion, defend their nationals' interests through diplomatic protection.[49]

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47 Supported and demanded for example by Stephan W Schill, 'International Investment Law and Comparative Public Law – an Introduction' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 10–37; Schill, 'Enhancing' (n 34) 85–102.

48 See only Chapter 9.II.

49 For a viewpoint from general international law see Antônio AC Trindade, 'The Historical Recovery of the Human Person as Subject of the Law of Nations'

In the last hundred years, international law has changed substantially in this matter as individuals have moved into its centre. In particular, as states created international human rights, they acknowledged that individuals are subjects of international law, too. Increasingly, international law has awarded individual rights to them. They are not mediatised by the state anymore but rather are the respective right's bearers. Thus, they can themselves invoke a violation without depending on the state, and international law has increasingly provided procedures for them to do so. This shift towards the (direct) recognition of the individual is still ongoing.[50]

The awarding of individual rights has emerged from a growing consensus on fundamental human values: to guarantee human dignity, freedom and equality.[51] To that end, individual rights embody an emancipatory potential because they understand individuals as persons empowered to actively defend themselves.[52] But even beyond human rights, many other areas have accepted individual rights, such as international humanitarian, environmental protection and labour law.[53] Investment law is another often-mentioned example because of its awarding of individual investor *rights*.[54] Constitutional theories of international law have given these indi-

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(2012) 1(3) Cambridge Journal of International and Comparative Law 8, 20–21; for the investment law context see also Chapter 2.IV and Chapter 6.VIII.

50 See for example Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 53–55 who considers the increasing role of investment arbitration as evidence for an increasing recognition of the individual as the bearer of international rights accompanied with sanctions, building on an understanding of law based on *Austin* and *Kelsen*; Ratner (n 7) 475–488 on the recognition of international human rights and international criminal law which reflects that corporations may have directly applicable international rights and obligations; Gerhard Hafner, 'The Emancipation of the Individual from the State Under International Law' (2011) 358 Recueil des Cours 263, 315–436 with the more nuanced observation that the emancipation of the individual as a subject of international law depends on the particular applicable legal regime and that international law is subject to a state- and an individual-oriented trend at the same time; Peters (n 1) 194–471, 526 mapping the many different individual legal positions in international law 'beyond human rights' and identifying the individual as the primary international legal person.

51 For a particularly strong representation of a value-based approach see Trindade (n 49) 48–49.

52 Peters (n 1) 536–541.

53 See the comprehensive analysis by ibid.

54 José E Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9(1) Santa Clara Journal of International Law 1, 1–35; Stephan W Schill, 'Cross-Regime Harmonization Through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights'

vidual rights a prominent role. In their view, the status of the individual as a subject that enjoys rights constitutes an important constitutional principle itself.[55]

In contrast to rights, individuals do not have many directly applicable obligations under international law as seen.[56] Nevertheless, many proponents of individual rights have also demanded the creation of comprehensive individual obligations. Often, they bring forward similar fundamental reasons: Some perceive that individuals who enjoy protection should also be accountable under international law.[57] Others argue that individuals are the real, original subjects of international law, and hence should also be subject to obligations.[58] Some follow the same from a constitutional

(2012) 27(1) ICSID Review 87, 91; Tillmann R Braun, *Ausprägungen der Globalisierung: Der Investor als partielles Subjekt im Internationalen Investitionsrecht: Qualität und Grenzen dieser Wirkungseinheit* (Nomos 2012) 266–268; Laurence B de Chazournes and Brian McGarry, 'What Roles Can Constitutional Law Play in Investment Arbitration?' (2014) 15(5–6) Journal of World Investment & Trade 862, 883; Peters (n 1) 282–338; on the controversy if investor rights are individual in character see already Chapter 3.VII.2.b).

55 See for example Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250(VI) Recueil des Cours 217, 242–243, 285–301 who reflects on how individual human rights have entered as a community interest into the traditionally bilateral international law, elaborating *inter alia* on how they express themselves as *ius cogens* and obligations *erga omnes*; Andreas L Paulus, *Die internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (C.H. Beck 2001) 254–260 who acknowledges a minimum consensus on (practical) human rights as a common value of the international community notwithstanding the debate on universalism versus regionalism.

56 See Chapter 2.IV.

57 See for example Trindade (n 49) 14–16, 29–31, 50–57.

58 See for example Hersch Lauterpacht, 'The Subjects of the Law of Nations' in Elihu Lauterpacht (ed), *International Law Being the Collected Papers of Hersch Lauterpacht*, vol 3 The Law of Peace Parts II-VI (Cambridge University Press 1977) 487–533; Hersch Lauterpacht, 'State Sovereignty and Human Rights' in Elihu Lauterpacht (ed), *International Law Being the Collected Papers of Hersch Lauterpacht*, vol 3 The Law of Peace Parts II-VI (Cambridge University Press 1977) 426–430 who understands international law as a system that bases on the individual, not on states, but which needs practical realisation in a world dominated by states, for example by the recognition of individual obligations; Peters (n 1) 538, 541, 551–555 argues that already today the individual is the 'natural subject of international law'.

understanding of international law as a system, for example building on human rights.[59]

2. Investor obligations as individual international law

Investor obligations contribute to further the development of international law with the individual as its central subject. Investment law may serve as a case study of a field which not only accords individual rights but also obligations.

Of course, direct obligations are most relevant in this regard. Construed similarly to obligations in international criminal law, they turn investment law into a new field of international law with directly applicable obligations. Importantly, these obligations have a much broader substantive scope than international criminal law. They are not limited to the gravest atrocities but cover how every day business activity affects public goods and individual rights.

At first glance, indirect obligations appear to conform less with the described calls for individual obligations because they form part of investor rights. However, such a perspective would be too formalistic. Rather, this Chapter's insight that both direct and indirect obligations bring about a specific new form of international investor responsibility is decisive. As it is a form of *individual* responsibility, also indirect obligations represent means to sanction investors' misconduct. They serve as a potential model for sanctioning private actors in other fields of international law with legal force.

Investor obligations' new emphasis on the individual becomes even clearer if one reflects on investment law's history. As seen, neither direct nor indirect obligations existed as part of its predecessor: the law of aliens and diplomatic protection.[60] It appears that the newly-created ambit of individual rights in IIAs was a fertile ground for the delayed establishment of obligations. The analysis has also pointed out that investor obligations

59 See for example Ernst-Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law* (Bloomsbury Publishing 2017) 3–75, 147–219, 233–372 who envisages a system of multilevel-governance including individual rights and accountability based on human rights.

60 See Chapter 2.V.1 and Chapter 6.VIII.

build more broadly on increased expectations from corporations in society.[61]

Moreover, in some cases, investor obligations even directly individualise existing international obligations of states. A number of investor obligations studied define their content by referring to these external obligations that originally addressed the state.[62] Herein, the IIA serves as a vehicle for making a certain norm directly applicable to individuals by taking away their mediatisation by the state. For example, an IIA which contains an obligation that requires investors to abide by the ICCPR makes the ICCPR directly applicable to this extent – and thus brings about a feature that international human rights law has not developed so far on its own.

3. More pragmatic, less value-oriented

At the same time, there are some reservations against reading investor obligations as contributing to international law's development to place the individual at its centre.

Firstly, investment law conserves states' pivotal importance because foreign investors' nationality remains decisive. Investors only enjoy rights and, increasingly, obligations if they have the nationality of a state that is party to an IIA and, conversely, operate in the territory of another state party. Hence, investor obligations still give substantial weight to territory and nationality as core elements of state sovereignty.[63]

Similarly, investor obligations exclude civil society from participating in the legal relationship they bring about. As seen, investors owe direct obligations to the host state.[64] And it is only the host state which can enforce them through counterclaims.[65] As indirect obligations are intertwined with investor rights, they only relate to the host state as well. When breached, they deprive the investor of protection from the host state. Hence, the actual victims of violations have no say. They do not appear

61 See Chapter 9.II.3.
62 See for example Chapter 3.II and Chapter 7.I.3.
63 In the same vein Barnali Choudhury, 'Investor Obligations for Human Rights' (2020) 35(1–2) ICSID Review 82, 101 who highlights that investor human rights obligations would still 'leave governance gaps since international investment law does not offer a multilateral approach to governing foreign investment.'
64 See Chapter 3.VII.3.
65 See Chapter 4.

as the corresponding right bearers and cannot enforce a violation of an investor obligation. In short, they remain mediatised by the host state.[66]

Furthermore, there is an even more fundamental reservation: investor obligations' relative character. They do not share the multilateral and communal nature of many other individual norms of international law. Branches such as international human rights, criminal, environmental law and labour law embody objective standards of community interests beyond the *quid pro quo* constellation of IIAs.[67] For this reason, these norms often constitute *erga omnes* obligations, meaning that states may invoke them against other states without having suffered any harm themselves.[68]

In contrast, investor obligations form part of IIAs that are often bilateral in nature.[69] Even where they start to develop in plurilateral settings, they follow a reciprocal logic: IIAs' primary purpose is not to create companies' international responsibility. They exist to attract investors by granting

66 In the same vein Silvia Steininger, 'The Role of Human Rights in Investment Law and Arbitration, State Obligations, Corporate Responsibility and Community Empowerment' in Ilias Bantekas and Michael A Stein (eds), *The Cambridge Companion to Business & Human Rights Law* (Cambridge University Press 2021) 422–423; 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 67–71; for a discussion of the potentials of host citizen-investor disputes see Martin Jarrett, 'A New Frontier in International Investment Law: Adjudication of Host Citizen-Investor Disputes?' (2021) 81(4) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 969, 972–999; for a consideration that the host state can act as *parens patriae* on behalf of human rights victims, see Tomoko Ishikawa, 'Counterclaims in Investment Arbitration: Is the Host State the Right Claimant?' in Jean Ho and Mavluda Sattorova (eds), *Investors' International Law* (Hart 2021) 205–211.

67 On the communal and multilateral character see Simma (n 55) 256–287; Paulus (n 55) 250–284.

68 They are owed 'towards the international community as a whole', see *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase)* (Judgment) [1970] ICJ Rep 3, para 33; see further Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law' (1999) 281 Recueil des Cours 9, 82–84; generally on doctrinal manifestations see Simma (n 55) 285–321.

69 The bilateral character of most international investment law in the context of global public goods is also highlighted by 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) 38; it forms part of the criticism of investor obligations by Braun (n 54) 201.

them international protection. Even if, as seen, the choice of who should be attracted is becoming more selective, as the field adopts the concept of sustainable development,[70] international investor rights and obligations remain the result of an inter-state bargain to foster state parties' development. Consequently, they are less value-oriented in the way they centre on the individual than the other described branches of international law such as human rights norms which aim to realise freedom, equality and dignity as common overarching values.

The findings on investor obligations' regulatory potential in Chapter 10 point in the same direction. In contrast to criminal law, they do not serve as an instrument to answer and punish investor misconduct unconditionally. Rather, they may operate as a sophisticated tool that incentivises proper behaviour – a rather pragmatic approach to the protection of public interest.

Nevertheless, investor obligations may still play an important role in international law's shift towards the individual. It should be appreciated that investment law has already gone a long way from its original focus on protecting investors. Investor obligations contribute to the 'generalisation of international investment law'[71] which may transform investment law into a more value-based field in the long term. The bilateral or plurilateral settings of IIAs and investment arbitration allow for quick and decentral developments. Therefore, investment law may even provide a useful testing field for creating a new form of individual obligations and responsibility – and in that regard inspire other areas of international law.

70 See Chapter 9.III.

71 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).