Chapter 3.
Direct Obligations in Investment Law Practice

Appreciating that direct obligations are possible, but scarce in international law, it is astonishing that they have recently emerged in investment law. Chapter 3 will analyse how they have been introduced in the last years. This development rests on two main pillars.

First, direct obligations appear in several recent IIAs and model BITs of mainly developing countries.[1] The most important examples covered in this Chapter are the 2008 Ghana Model BIT,[2] the 2012 SADC Model BIT Template,[3] the 2016 African Union's Draft Pan-African Investment Code,[4] the 2007 COMESA Investment Agreement,[5] the 2008 ECOWAS Investment Rules,[6] the 2016 Morocco-Nigeria BIT,[7] the 2015 India Model

1 See also the short overview on human rights obligations in recent IIAs by Barnali Choudhury, 'Investor Obligations for Human Rights' (2020) 35(1–2) ICSID Review 82, 88–92.

2 Ghana Model BIT (2008) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2866/download› accessed 7 December 2021 (Ghana Model BIT).

3 Southern African Development Community, Model Bilateral Investment Treaty Template with Commentary (July 2012) ‹https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf› accessed 7 December 2021 (SADC Model BIT).

4 Draft Pan-African Investment Code (26 March 2016) E/ECA/COE/35/18, AU/STC/FMEPI/EXP/18(II) (Draft Pan-African Investment Code).

5 Investment Agreement for the COMESA Common Investment Area (adopted 23 May 2007) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download› accessed 7 December 2021 (COMESA Investment Agreement).

6 ECOWAS Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (adopted 19 December 2008, entered into force 19 January 2009) (ECOWAS Investment Rules).

7 Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (adopted 3 December 2016) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download› accessed 7 December 2021 (Morocco-Nigeria BIT).

BIT,[8] the 2019 Netherlands Model BIT,[9] as well as the 2015 Brazil Model BIT and the resulting Brazilian BITs with other countries.[10] In addition, important institutions have suggested and supported creating direct obligations to reform investment law, for example in the 2015 UNCTAD Investment Policy Framework for Sustainable Development,[11] the 2005 IISD Model International Agreement on Investment for Sustainable Development,[12] the 2017 IISD Sustainability Toolkit for Trade Negotiators[13] and the 2018 Report of the IISD Expert Meeting on Integrating Investor Obli-

8 India Model BIT (28 December 2015) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download› accessed 7 December 2021 (India Model BIT).

9 Netherlands Model BIT (22 March 2019) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download› accessed 7 December 2021 (Netherlands Model BIT).

10 Brazil Model BIT (2015) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download› accessed 7 December 2021 (Brazil Model BIT); Brazil-Angola Investment Cooperation and Facilitation Agreement (adopted 1 April 2015, entered into force 28 July 2017) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4720/download› accessed 7 December 2021 (Brazil-Angola BIT); Brazil-Chile Investment Cooperation and Facilitation Agreement (adopted 24 November 2015) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4712/download› accessed 7 December 2021 (Brazil-Chile BIT); Brazil-Malawi Investment Cooperation and Facilitation Agreement (adopted 25 June 2015) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4715/download› accessed 7 December 2021 (Brazil-Malawi BIT); Brazil-Mexico Investment Cooperation and Facilitation Agreement (adopted 26 May 2015, entered into force 7 October 2018) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4718/download› accessed 7 December 2021 (Brazil-Mexico BIT); Brazil-Mozambique Investment Cooperation and Facilitation Agreement (adopted 30 March 2015) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4717/download› accessed 7 December 2021 (Brazil-Mozambique BIT); Brazil-Peru Economic and Trade Expansion Agreement (adopted 29 April 2016) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5402/download› accessed 7 December 2021 (Brazil-Peru FTA).

11 UNCTAD ‘Investment Policy Framework for Sustainable Development’ UNCTAD/DIAE/PCB/2015/5 (2015).

12 IISD, *Model International Agreement on Investment for Sustainable Development* (2005).

13 IISD, *A Sustainability Toolkit for Trade Negotiators: Trade and Investment as Vehicles for Achieving the 2030 Sustainable Development Agenda* (2017).

gations and Corporate Accountability Provisions in Trade and Investment Agreements.[14]

Second, there are five recent investment arbitration awards that are indicative of the emerging direct obligations. These are the decisions by the UNCITRAL Tribunals in *Al-Warraq v Indonesia*[15] and *Aven v Mexico*[16] and by ICSID Tribunals in *Urbaser v Argentina*,[17] *Burlington v Ecuador*[18] and *Perenco v Ecuador.*[19] In these cases, states counter-sued the investors after the respective investor had filed an investment claim. In these counterclaims, states contended that the investors had violated a direct obligation and claimed compensation from the investors.

Based on these sources, this Chapter will systematise the direct obligations along different techniques for their creation which include:

- the integration of directly applicable international obligations existing outside of international investment law (I.),
- the diversion of international obligations of states to investors (II.),
- the conversion of legally non-binding CSR standards (III.),
- the elevation of domestic investor obligations to substantive international investor obligations (IV.),
- the original creation of direct obligations (V.),
- the application of domestic investor obligations in international investment arbitration (VI.).

Viewed together, these approaches allow to discern a nascent doctrine of direct obligations which this Chapter will appreciate in the last step (VII.).

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14 IISD, *Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements: Report of the Expert Meeting Held in Versoix, Switzerland, January 11–12, 2018* (2018).

15 *Hesham Talaat M. Al-Warraq v The Republic of Indonesia*, Final Award (UNCITRAL, 15 December 2014).

16 *David Aven et al. v The Republic of Costa Rica*, Case No. UNCT/15/3, Final Award (UNCITRAL, 18 September 2018).

17 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016).

18 *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017).

19 *Perenco Ecuador Ltd. v The Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015).

I. Integrating external obligations directly applicable to private actors

Investor obligations could come about by introducing directly applicable international obligations of non-state actors outside of investment law into IIAs and investment arbitration. This approach featured in recent arbitral jurisprudence. This Section will show that as of today, in most cases this concept remains infeasible.

1. Concept

To create direct obligations, IIAs could build on the few existing international obligations that apply directly to foreign investors outside of investment law ('external' obligations). As seen, these are mainly obligations stemming from international criminal law and *ius cogens*.[20] There are two possible means of integration – substantive and procedural.

On a substantive level, an IIA clause may restate or reinforce external obligations. Such a clause can declare them applicable as part of the IIA. It may also modify their content in the process. For example, an IIA clause could reinforce the international obligation of foreign investors not to commit genocide. Then, technically, the IIA creates a new direct obligation the source of which is the IIA as an international treaty. In the example, this obligation exists separately from the prohibition to commit genocide under customary international law.

Alternatively, an IIA could define external obligations as the applicable law in investment arbitration. Here, the integration would operate on a procedural level only: The investment tribunal applies an international norm from a source external to the IIA, for example the above-mentioned customary prohibition to commit genocide. Then, it may serve as basis for a counterclaim by the state against the investor.

Generally, the freedom of states and investors to choose which type of international law is to be the applicable substantive law of an arbitration

20 See Chapter 2.IV.

is widely accepted in the literature[21] and in arbitral decisions[22] – despite the fact that sometimes investment arbitrators appear reluctant to resort to such 'alien' sources.[23] Investment tribunals have already accepted the converse constellation: Investors may base their claims against the host state on international human rights law, provided that the respective jurisdictional clause is broad enough.[24] In ICSID arbitrations, Art 42 (1) ICSID Convention even provides as a residual rule that the tribunal shall apply any relevant international law.[25]

21 Such freedom to decide on the applicable law clause is for example supported by Clara Reiner and Christoph Schreuer, 'Human Rights and International Investment Arbitration' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 84–85; Christoph Schreuer and Ursula Kriebaum, 'From Individual to Community Interest in International Investment Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011) 1093–1094; Pierre-Marie Dupuy and Jorge E Viñuales, 'Human Rights and Investment Disciplines: Integration in Progress' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos 2015) paras 66–74.

22 See for example *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990) para 21; *Phoenix Action, Ltd. v The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) para 78.

23 On this reluctance, described as reticence or *Berührungsangst*, see Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60(3) International & Comparative Law Quarterly 573, 576; cf the empirical analysis suggesting 'significant potential for ICSID tribunals to broaden their perspective by selecting arguments from materials that are related to other areas of international law' by Ole K Fauchald, 'The Legal Reasoning of ICSID Tribunals – an Empirical Analysis' (2008) 19(2) European Journal of International Law 301, 358.

24 *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability (UNCITRAL, 27 October 1989) 203; *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v The Republic of Ecuador*, Interim Award (UNCITRAL, 1 December 2008) paras 209–210; *Toto Costruzioni Generali S.P.A. v Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009) paras 154–168; Dupuy and Viñuales (n 21) paras 60–65.

25 The provision also includes substantive rules of international law, see Emmanuel Gaillard and Yas Banifatemi, 'The Meaning of "And" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18(2) ICSID Review 375, 397; Dupuy and Viñuales (n 21) para 70.

2. The Urbaser v Argentina award[26]

This concept of integrating external obligations into investment law was recently applied and supported in investment arbitration. In an unprecedented manner, the ICSID Tribunal in its 2016 award in *Urbaser v Argentina* held that foreign investors had broad international human rights obligations. These external obligations could serve as a basis for an arbitral counterclaim by the host state.

In this case, the claimants operated water and sewage services in the Area of Greater Buenos Aires which had been privatised by Argentina in the 1990s.[27] The investors contended a violation of various rights under the Spain-Argentina-BIT.[28] They based their claim on the government's conduct in the 2001 Argentinian economic crisis. In their view, Argentina was responsible for the investment's eventual insolvency due to the depreciation of the Argentinian Peso and failed concession tariffs renegotiations.[29]

In the course of the proceedings, Argentina filed a counterclaim based on obligations of the claimants under international human rights law, hence on norms external to the Spain-Argentina-BIT. The state claimed compensation of USD 404.34 million from the investors. Argentina argued that they had violated their human rights obligation to provide access to water to the local population as agreed on in the concession contract. It saw such a violation in the lack of appropriate investment into the water and sewage infrastructure and the insufficient provision of water at

26 This Section 3.I.2 draws on Patrick Abel, 'Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration: Fallacies and Potentials of the 2016 ICSID Urbaser v. Argentina Award' [2018] Brill Open Law 1.

27 *Urbaser v Argentina*, Award (n 17) para 42.

28 Argentina-Spain BIT (adopted 3 October 1991, entered into force 28 September 1992) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/119/download› accessed 7 December 2021 (Argentina-Spain BIT).

29 *Urbaser v Argentina*, Award (n 17) paras 34–35. The Tribunal eventually dismissed the claim. Although it found for a violation of the FET standard due to the too abrupt termination of renegotiation talks by the Argentinian government, it held that Argentina did not cause any damage to the investors by this violation because the investors had already operated at loss without any remaining economic perspective. They could not have hoped for any profit because the contractually promised expansion works into infrastructure had not been undertaken, see *Urbaser v Argentina*, Award (n 17) paras 846–847, 997–1009, 1090–1109.

affordable prices.[30] The reason that Argentina based its counterclaim on an *international* obligation was that the Tribunal had previously rejected to exercise its jurisdiction over domestic Argentinian law.[31] The question thus arose, whether the investors had any such obligation under international human rights law and if so, whether the Tribunal's jurisdiction covered this obligation. The Tribunal elaborated on these general aspects in quite some detail even though it eventually dismissed the counterclaim.

a) Direct obligations in human rights law

To recall, the analysis answered the first question if foreign investors have any binding international human rights obligations by large to the negative.[32] Yet, the Tribunal came to a very different conclusion. It proclaimed the existence of broad negative human rights obligations of corporations. Affirming that corporations can be subjects of international law,[33] it argued that private actors had to abstain from harming human rights of others, including the right to water.[34] It derived this obligation from different treaties and declarations such as the ILO Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy,[35] the UDHR,[36] the ICCPR and ICESCR. The exact scope of this negative obligation remains blurry. But because Argentina contended the violation of a *positive* 'obligation to perform'[37] access to water to the population in Buenos Aires, the Tribunal dismissed the counterclaim. It held that human

30 *Urbaser v Argentina*, Award (n 17) paras 1156–1166.
31 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction (9 December 2012) paras 251–254.
32 See Chapter 2.IV.
33 *Urbaser v Argentina*, Award (n 17) paras 35, 1193–1195.
34 ibid 1195–1198.
35 ILO 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions, (1978) 17 ILM 422 (16 November 1977) ‹www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf› accessed 7 December 2021.
36 UNGA 'Universal Declaration of Human Rights' UN Doc A/RES/217 (III) A (10 December 1948).
37 *Urbaser v Argentina*, Award (n 17) para 1210.

rights law had not established such positive obligations (in contrast to negative duties) for private actors.[38]

The Tribunal's reasoning is hard to sustain. Most notably, it disregards the non-binding character of cited soft-law. States explicitly intended not to produce *legally binding* effect through instruments such as the UDHR and the ILO Tripartite Declaration. Given the lack of status as sources of international law, reflected in Art 38 (1) ICJ-Statute, they cannot by themselves establish an international obligation of investors. Neither did the Tribunal indicate how these non-binding norms could have been transformed to binding rules of international law – a matter controversially discussed on a general level in scholarly writing.[39]

To the extent the Tribunal refers in its reasoning to binding human rights law, namely Art 11 (1) and 12 ICESCR, it misinterprets these provisions. More precisely, it misreads Art 5 (1) ICESCR to render all ICESCR rights directly applicable to non-state actors. This provision reads:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

The mentioning of non-state actors in the provision misled the Tribunal to the conclusion that ICESCR rights directly bound private actors in their relation to another – and that for this reason the right to water covered by Art 11 (1) ICESCR, read in conjunction with Art 5 (1) ICESCR, could be understood as an international obligation of corporations.[40] However,

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38 ibid 1206–1209.

39 On the relationship between soft law and international investment law see Andrea K Bjorklund and August Reinisch (eds), *International Investment Law and Soft Law* (Edward Elgar Publishing 2012). For positions that are more open to accept the Tribunal's findings see Ted Gleason, 'Examining Host-State Counterclaims for Environmental Damage in Investor-State Dispute Settlement from Human Rights and Transnational Public Policy Perspectives' (2021) 21(3) International Environmental Agreements 427, 438–439 who points to transnational public policy; 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) 1841 referring to legal scholarship which accepts that private actors are bound by international human rights law.

40 *Urbaser v Argentina*, Award (n 17) paras 1196–1197. And even if the horizontal effect was established, the Tribunal would have had to elaborate on whether

the clause has a different meaning: it is a provision on the abuse of rights.[41] Similar clauses can be found in Art 5 (1) ICCPR as well as in Art 17 ECHR[42] and Art 29 (a) ACHR,[43] sharing a common origin in Art 30 of the UDHR. The declaration's and treaties' preparatory works show that the parties wanted to rule out the possibility that human rights could be invoked with the sole intention of infringing on the human right of another person. They were particularly concerned that human rights could be interpreted based on extremist and totalitarian ideologies. The purpose of the above clauses is thus to prevent such interpretation. Therefore, they provide interpretive guidance on the scope and *telos* of human rights enshrined in the respective treaty, rather than create obligations.[44]

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the obligation is owed to the home state, host state or other private actors, or perhaps even to all cumulatively. On these different constructions see Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 110–113.

41 See also Edward Guntrip, 'Urbaser v. Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?' [2017] EJIL:Talk! ‹www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/#more-14978› accessed 7 December 2021.

42 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) CETS No 5 (ECHR).

43 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR).

44 This interpretation of the UDHR and the ICCPR clauses is supported for example by Thomas Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations' in Louis Henkin (ed), *The International Bill of Rights* (Columbia University Press 1981) 86–89; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, N.P. Engel 2005) Art 5 paras 1, 510; for the ICESCR for example by Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156, 208; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009) para 3.36; Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 262–267; for a contrary interpretation albeit without detailed argumentation see Upendra Baxi, *The Future of Human Rights* (Oxford University Press 2002) 146. That the *Urbaser v Argentina* Tribunal erred in finding direct human rights obligations is supported for example by Markus Krajewski, 'A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application' (2020) 5(1) Business and Human Rights Journal 105, 124–125; Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (Cambridge University Press 2021) 28.

The Human Rights Committee supported the interpretation presented here for the identical clause in Art 5 (1) ICCPR for example in the communication No 117/1981 of *MA v Italy*. In this case, the petitioners contended that Italy violated their ICCPR rights by convicting them under penal law for reorganising the dissolved fascist party in Italy. The Human Rights Committee dismissed the communication as inadmissible, *inter alia* because the acts leading to the conviction appeared to the Human Rights Committee to be 'of a kind which are removed from the protection of the Covenant by article 5 thereof.'[45] Thus, the petitioners failed to show the possibility of an ICCPR violation which constitutes an admissibility requirement. *Tomuschat* in his individual opinions in *López Burgos v Uruguay* and *Celiberti v Uruguay* understood Art 5 (1) ICCPR in the same manner. The clause prohibited individuals 'from availing themselves of the same rights and freedoms with a view to overthrowing the régime of the rule of law which constitutes the basic philosophy'[46] of the ICCPR. The European Court of Human Rights similarly interpreted and applied Art 17 ECHR as far back as its very first judgment in *Lawless v Ireland*[47] and continues to do so in cases relating to abusive interpretations of ECHR rights. Art 17 ECHR excludes from protection, for example, the promoting of racist ideologies, terrorism and the overthrowing of democracy.[48] Finally, also

45 *M.A. v Italy* Comm No. 117/1981 (Decision on Inadmissibility) UN Doc Supp No 40 (A/39/40) 190 (1981) (UN Human Rights Committee, 21 September 1981) para 13.3.

46 *Sergio Euben Lopez Burgos v Uruguay* Comm No R.12/52 (Individual Opinion of Mr. Christian Tomuschat) UN Doc Supp No 40 (A/36/40) 176 (1981) (UN Human Rights Committee, 29 July 1981); *Lilian Celiberti de Casariego v Uruguay* Comm No. R.13/56 (Individual Opinion of Mr. Christian Tomuschat) UN Doc Supp No 40 (A/36/40) 185 (1981) (UN Human Rights Committee, 29 July 1981).

47 *Case of Lawless v Ireland (No. 3)* App no 332/57, ECHR Series A no 3 (European Court of Human Rights, 1 July 1961) para 7.

48 *Case of United Communist Party of Turkey and Others v Turkey* App no 19392/92, ECHR 1998-I (European Court of Human Rights, 30 January 1998) para 60; *Case of Refah Partisi (the Welfare Party) and Others v Turkey* App no 41340/98, 41342/98, 41343/98, 41344/98, 13.2.2003, ECHR 2003-II 267 (European Court of Human Rights, 13 February 2003) para 99; *Case of Leroy v France* App no 36109/03, ECLI:CE:ECHR:2008:1002JUD003610903 (European Court of Human Rights, 2 October 2008) para 26; *Case of Paksas v Lithuania* App no 34932/04, ECLI:CE:ECHR:2011:0106JUD003493204 (European Court of Human Rights, 6 January 2011) para 87; *Case of Kasymakhunov and Saybatalov v Russia* App no 26261/05, 26377/06, ECLI:CE:ECHR:2013:0314JUD002626105 (European Court of Human Rights, 14 March 2013) paras 103–104; Jochen A Frowein, 'Artikel 17' in Jochen A Frowein and Wolfgang Peukert (eds), *Europäische Menschenrechts-*

the Inter-American Court of Human Rights in an advisory opinion in 1985 briefly affirmed the same understanding for Art 29 (a) ACHR.[49]

b) Mechanics of integrating external obligations

Despite the fact that the Tribunal's award is not compelling on the existence of broad external obligations in human rights law, it is useful to examine how it dealt with the follow-up question: What are the legal mechanisms to integrate external obligations into an IIA? More precisely: How can a state bring it forward as the basis of a counterclaim against investors? The ICSID Tribunal in *Urbaser v Argentina* offered not one but four different explanations:

1. Systemic interpretation of the IIA as enshrined in Art 31 (3) (c) VCLT,[50]
2. IIA clauses on the applicable law in investment arbitration, in the case Art X (5) Spain-Argentina BIT which declared international law applicable,[51]
3. Art 42 (1) ICSID Convention[52] which defines international law to be applicable in investment arbitrations as a residual rule,
4. peremptory norms of general international law (*ius cogens*).[53]

The Tribunal did not put these approaches into any order. To start with the last on the above list, it is inaccurate to consider the concept of *ius cogens* as a means of integrating external direct obligations into an IIA. *Ius cogens* simply refers to the legal character of a norm.[54] It is of supreme hierarchy: States cannot create norms that conflict with *ius cogens*.[55] From

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konvention: EMRK-Kommentar (2nd edn, N.P. Engel 1996) paras 1–4; William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 611–620.

49 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)* OC-5/85 (Advisory Opinion) Inter-American Court of Human Rights Series A No 5 (13 November 1985) para 67.

50 *Urbaser v Argentina*, Award (n 17) para 1200.

51 ibid 1201.

52 ibid 1202.

53 ibid 1203.

54 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, para 83.

55 Art 53 and 64 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT); *Prosecutor v Anto*

this negative effect alone, one cannot follow a positive integration into an IIA as a directly applicable norm.[56]

Art 31 (3) (c) VCLT, the so-called method of systemic interpretation, stipulates that interpreting an international treaty, one shall consider, together with the context, '[a]ny relevant rules of international law applicable in the relations between the parties.' The provision helps aligning IIAs with the protection of public goods and interests reflected in international obligations of the parties. Especially, international human rights can be read into investor rights and justification clauses of IIAs.[57] However, Art 31 (3) (c) VCLT only forms one method of interpretation which must

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Furundžija (Judgement) IT-95–17/1-T (ICTY, 10 December 1998) para 153; for an in-depth analysis of this conflict of norms-effect in the context of other problems and solutions of norm conflicts in international law see Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 98–99.

56 Abel, 'Counterclaims' (n 26) 12–14.

57 The literature is extensive on this matter, see for example Ernst-Ulrich Petersmann, 'Constitutional Theories of International Economic Adjudication and Investor-State Arbitration' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 183 who advocates for interpreting investment law in the light of human rights and principles of justice as part of a constitutional theory of international economic adjudication; Bruno Simma and Theodore Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 705 and Simma, 'Foreign' (n 23) 584–586 arguing that concepts such as legitimate expectations and the police powers doctrine should be read in the light of human rights; Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012) 151–156 who considers general systemic integration as an interpretive technique for example to allow for different treatment of foreign investors; Ursula Kriebaum, 'Foreign Investments & Human Rights: The Actors and Their Different Roles' (2013) 10(1–17) Transnational Dispute Management, 13–14 on how human rights may influence our understanding of investment treaties; Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart Publishing 2016) 210–239 analysing in detail the arbitral and treaty practice on Art 31 (3) (c) VCLT. For general analyses on Art 31 (3) (c) VCLT see for example ILC 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi' UN Doc. A/CN.4/L.682 (13 April 2006), paras 410–480; Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 432–434.

be applied holistically and in concert with the other interpretive rules provided in Art 31 VCLT. The point of departure must always be the actual wording of the provision in question.[58] There is rarely a solid textual basis in IIAs in favour of direct obligations. In the case of *Urbaser v Argentina*, the Spain-Argentina BIT offered no such ground. It appears thus, very hard to read the presence of direct obligations into an IIA given that a majority of states is sceptical about these norms; for this very reason, the ICSID Tribunal in *Blusun v Italy* rejected to consider Art. 19 of the Energy Charter Treaty as an investor obligation to environmental impact assessment (EIA) because the provision 'operates not at the level of individual investors but at the interstate level, as is equally the case with the developing general international law of EIAs'.[59] Therefore, in most cases, systemic interpretation will only have a marginal role to play in bringing about direct obligations.

The only viable concept for integrating a direct obligation was the applicable law clause. In contrast to the approach via Art 31 (3) (c) VCLT, this is a means of *procedurally* integrating an external obligation into an IIA. The applicable law clause in Art X (5) Spain-Argentina-BIT in *Urbaser v Argentina* appeared broad enough to establish the Tribunal's jurisdiction because it explicitly covered international law. The resort to Art 42 (1) ICSID Convention was, therefore, superfluous. This means that the ICSID award in *Urbaser v Argentina* serves as a good example of procedurally integrating a (supposedly existing) external obligation.

c) A desire for direct obligations

All in all, the ICSID award in *Urbaser v Argentina* in its part on counterclaims should be treated with care. Its essential argument that private actors have negative obligations under international human rights law cannot be sustained. Notwithstanding, the Tribunal marks a new approach in the way investment tribunals address international human rights and obligations of investors more broadly. Its willingness to adjudicate on a counterclaim based on a direct obligation towards the public interest is

58 See for example *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* (Advisory Opinion) [1950] ICJ Rep 221, 229.

59 *Blusun S.A, Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No. ARB/14/3, Award (27 December 2016) para 275 on Art 19 of The Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95; generally on this scepticism see above Chapter 1.III.1.

by itself noteworthy. In doing so, it countered perceptions that investment tribunals focus only on the protection of investors. Importantly, even if mistaken in its conclusions, the Tribunal's line of argument draws on general developments in international law – thus displaying that it was more generally influenced by the change of private actors' normative role in international law. Therefore, the award expresses a new attitude by an investment tribunal sympathetic towards the concept of direct obligations.

3. The Aven v Costa Rica award

Furthermore, the 2018 *Aven v Costa Rica* award is another important arbitral award which discussed the integrating of external investor obligations. While this award affirms that such integration is generally possible, it avoids the methodological mistakes of the *Urbaser v Argentina* award.

In *Aven v Costa Rica*, the UNCITRAL Tribunal had to decide on an environmental counterclaim raised by Costa Rica. The claimants developed a tourism project at the Central Pacific Coast. After receiving the required permits and initiating the project, Costa Rica issued several decisions which shut down the investment to protect sensitive wetlands and forest grounds within the project site.[60] The claimants argued that this had completely devalued the investment project in violation of investment protection rules enshrined in the CAFTA-DR.[61]

During the proceedings, Costa Rica raised a counterclaim and demanded compensation from the claimants for damaging the forest in the investment region by constructing roads, excavating ditches, placing culverts and removing the vegetative strata, for increasing soil sedimentation and for filling and draining wetlands.[62] Costa Rica brought forward that the claimants were internationally responsible for violating domestic law, customary international law and CAFTA-DR provisions on environmental protection.[63]

Citing the *Urbaser v Argentina* award, the Tribunal welcomed and affirmed the idea that investors can have international environmental obliga-

60 *Aven v Costa Rica* (n 16) para 6.
61 ibid; see Dominican Republic-Central America FTA (adopted 5 August 2004, entered into force 1 March 2006) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2482/download› accessed 7 December 2021 (CAFTA-DR).
62 *Aven v Costa Rica* (n 16) paras 698–699, 720.
63 ibid 699–700.

tions as subjects of international law, potentially enforceable before investment tribunals:

> […] It is true that the enforcement of environmental law is primarily to the States, but it cannot be admitted that a foreign investor could not be subject to international law obligations in this field, particularly in the light of Articles 10.9.3, 10.11 and 17 of DR-CAFTA.
>
> Under international law of investments, particularly under DR-CAFTA, the investors enjoy by themselves a number of rights both substantive and procedural, including the right to sue directly the host State when it breaches its international obligations on foreign investment (Section A of Article 10 in DR-CAFTA). What about the investor's obligations arising of the investment according to international law? This Tribunal shares the views of *Urbaser* Tribunal that it can no longer be admitted that investors operating internationally are immune from becoming subjects of international law. It is particularly convincing when it comes to rights and obligations that are the concern of all States, as it happens in the protection of the environment. It is pertinent to recall the observation of the International Court of Justice regarding this kind of obligations: 'In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*'.[64]

However, the Tribunal ultimately dismissed the counterclaim, in part because it did not consider that the CAFTA-DR provisions contained environmental obligations *directly applicable* to foreign investors:

> First, the Tribunal believes that the language of articles Article 10.9.3.c and 10.11 seeks to ensure that States retain a significant margin of appreciation in respect of environmental measures in their respective jurisdictions, but they do not -in and of themselves- impose any affirmative obligation upon investors.[65]

It is submitted that the result of the award is correct, but its reasoning remains incomplete.

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64 ibid 738–739.

65 ibid 743; for a contrary position see Prabhash Ranjan, 'Investor Obligations in Investment Treaties: Missing Text or a Matter of Application?' in Jean Ho and Mavluda Sattorova (eds), *Investors' International Law* (Hart 2021) 146 who contends that the Tribunal accepted that the CAFTA-DR imposed direct investor obligations, however without accounting for para 743 of the decision.

On the one hand, the Tribunal is methodologically sound in rejecting the argument that the CAFTA-DR contains international investor obligations. The mechanics of integrating external obligations presented above do not apply here. There is no clause in the CAFTA-DR which incorporates an external international environmental obligation which is directly applicable to investors: Art 10.9 (3) (c) CAFTA-DR states that the obligations on performance requirements 'shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: […] (ii) necessary to protect human, animal, or plant life or health; or (iii) related to the conservation of living and non-living exhaustible natural resources'. Art 10.11 stipulates that nothing in the investment chapter of the CAFTA-DR 'shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.'

Already the wording of both provisions indicates that they safeguard the regulatory leeway of states for environmental protection. The CAFTA-DR only speaks to how states may engage in domestic environmental regulation while at the same time living up to their international investment protection obligations under the treaty.

On the other hand, the Tribunal appears to have overlooked Costa Rica's argument that the claimants had also violated customary international environmental law. Art 10.22 (1) CAFTA-DR, the applicable law clause for the arbitration, states that the tribunal 'shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law' which includes customary international law. If customary environmental obligations directly applicable to investors existed – which, as submitted, they do not, at least in the current state of international law[66] – they could have served as a viable basis for a counterclaim. The Tribunal should have at least elaborated on this aspect.

In addition, it deserves mention that the Tribunal's reference to *erga omnes* obligations in acknowledging individual international subjectivity is misleading. The status of subjectivity and the content of rights and obligations are two separate questions as presented above.[67] As to *erga omnes* obligations, this notion refers to the special status of certain obligations of *states*, namely, that each state owes all other states compliance and is inter-

66 See above Chapter 2.IV.
67 See above Chapter 2.II.

nationally responsible to all states in case of a breach – transferring certain fundamental norms such as human rights from a traditional bilateral to a communal setting.[68] However, the status of *erga omnes* does not mean that private actors are bound to these international obligations as well, as the Tribunal seems to imply. In fact, important human rights obligations considered to exert *erga omnes* effect such as the European Convention on Human Rights require individuals to be victims of human rights violations to raise a human rights claim.[69]

Nonetheless, it is fair to say that the award contributes to recognising that integrating external investor obligations into investment law is, in principle, possible. That the Tribunal affirmed the reasoning in the *Urbaser v Argentina* award is noteworthy on its own as it may contribute to legitimising said reasoning as a *de facto*-precedent.[70] It also shows that the line of reasoning in the *Urbaser v Argentina* award is not exclusive to human rights but can potentially be generalised to cover other aspects of the public interest such as environmental protection.

4. Critique

Other than the awards in *Urbaser v Argentina* and *Aven v Costa Rica*, there is not much material that supports the integrating of external obligations into investment law. This reveals that it is a technique that, by large, may only be relevant in the future – pending the development of international obligations directly applicable to private actors in other areas of international law.[71] Having said that, integrating the few already-existing external

68 Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250(VI) Recueil des Cours 217, 293–295.

69 See Patrick Abel, 'Menschenrechtsschutz durch Individualbeschwerdeverfahren: Ein regionaler Vergleich aus historischer, normativer und faktischer Perspektive' (2013) 51(3) Archiv des Völkerrechts 369, 379–380 with a comparison of the European to the American and African human rights systems, the latter allowing for *actiones populares*.

70 Debadatta Bose, 'David R Aven v Costa Rica: The Confluence of Corporations, Public International Law and International Investment Law' (2020) 35(1–2) ICSID Review 20, 21.

71 This is why Peter Muchlinski, 'The Impact of a Business and Human Rights Treaty on Investment Law and Arbitration' in Surya Deva and David Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017) 367 is interested in the potentials of a new interna-

obligations especially from international criminal law[72] could have merit. They address the gravest forms of injustice that investment law should not neglect. While the great majority of investment activities are unrelated to such atrocities, they may still be relevant in exceptional cases. This is for example evidenced by the recent scholarly interest in the interplay between investment and humanitarian law.[73]

In fact, in the ICSID proceedings in *Foresti et al. v South Africa*, the Tribunal almost would have had to adjudicate on a possible *ius cogens* violation by an investor. In this case, investors filed a claim against South Africa which enacted mineral ownership laws to eliminate the consequences of apartheid. Apartheid is prohibited by *ius cogens*. The parties eventually settled and discontinued the case.[74] Otherwise, likely, the Tribunal would have had to enquire if the investors had acquired property through the support of the apartheid regime. This constellation could have been a chance to integrate the external *ius cogens* prohibition of apartheid. It shows that this technique of integrating direct obligations can be relevant in investment law practice.

II. Diverting international obligations of states

Appreciating that there are only exceptional instances of external obligations of private actors, the analysis now turns to the many international obligations of states. In the last years, investment law practice has proposed to divert these state obligations to investor obligations through IIAs. This Section will trace these suggestions and criticise that state obligations are often not suitable for a simple transfer to investors.

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tional treaty that imposes binding, directly applicable international human rights obligations on corporations.

72 See Chapter 2.IV.

73 The ESIL convened a Colloquium on the topic of 'International Investment Law & the Law of Armed Conflict' in October 2017; from scholarship see only Heather L Bray, 'SOI – Save Our Investments! International Investment Law and International Humanitarian Law' (2013) 14(3) Journal of World Investment & Trade 578; Christoph Schreuer, 'The Protection of Investments in Armed Conflicts' in Freya Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (Cambridge University Press 2013).

74 *Piero Foresti and Others v The Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award (4 August 2010) paras 54–58, 79–82.

1. Concept

The idea of diverting state obligations is to use the fact that state parties to an IIA often have many international obligations on the protection of the public interest, for example enshrined in human rights, labour standards and environmental protection treaties. IIA clauses could create direct obligations and define their content by referring to these obligations of states. Here, the IIA operates as the device that overcomes the lack of direct applicability to non-state actors for the purpose of the IIA. Outside of the investment context, it is a concept which also the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights propose in the business and human rights-debate.[75]

2. IIAs and reform suggestions

So far, no investment tribunal has applied this method of diverting states' international obligations to investors. Rather, the Tribunal in *Aven v Costa Rica* was – rightly – careful in distinguishing a directly applicable external international investor obligation from an international obligation of states. As we have already seen, in this case, Costa Rica raised an environmental counterclaim against the claimants, *inter alia* contending that they had violated environmental obligations under the CAFTA-DR. The Tribunal rejected this counterclaim because the investment protection chapter of the CAFTA-DR only contains environmental provisions related to the regulatory leeway of the host state.[76] In the words of the Tribunal, 'Art 10.9.3.c and 10.11 […] do not -in and of themselves- impose any affirmative obligation upon investors.'[77] Within the terminology of this chapter, these provisions did not divert the international obligations of the host state to the foreign investors.

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75 UN Commission on Human Rights 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) (13 August 2003); for a criticism and contextualisation to international investment law see Muchlinski, 'Impact' (n 71) 364.

76 See above Chapter 3.I.3.

77 *Aven v Costa Rica* (n 16) para 743.

One can find such 'diversion clauses' in several recent IIAs of developing countries. The ECOWAS Investment Rules are a good example. Their Art 13 stipulates:

> (1) Investors and their investments shall prior to the establishment of an investment or afterwards, refrain from involving themselves in corrupt practices as defined in Article 30 of this supplementary Act.
>
> (2) Investors and their investments shall not be complicit in any act described in Paragraph (1) […].

Art 30 – to which Art 13 refers – obliges the state parties to enact and enforce criminal laws in their domestic jurisdiction against corruption as defined therein. Therefore, the reference in Art 13 to Art 30 diverts the international obligations of the state parties created in the latter provision to the investor. It also means that the investor has the international obligation to abstain from such actions irrespective of whether the host state lives up to its obligations in Art 30 and enacted respective domestic law.

Another good example is Art 14 ECOWAS Investment Rules. Its paragraph 2 states:

> Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental and social obligations, to which the host State and/or home State are Parties.

Notable about this provision is not only that it diverts obligations of states to investors but that it goes even further. By pointing to the obligations of both the host state and the home state, it binds investors to the combined highest standard, preventing them from gaining a competitive advantage in a host state with lower standards. In the same vein, Art 18 Morocco-Nigeria BIT imposes post-establishment obligations to 'uphold human rights in the host state' (para 2), to act in accordance with core labour standards enshrined in the 1998 ILO Declaration on Fundamental Principles and Rights of Work (para 3) and not to circumvent international environmental, labour and human rights obligations of the host state or home state (para 4).[78]

78 See for example Niccolò Zugliani, 'Human rights in International Investment Law: The 2016 Morocco-Nigeria Bilateral Investment Treaty' (2019) 68(3) International and Comparative Law Quarterly 761, 766 who stresses that investors must not only respect but also actively uphold human rights while also noting that the provision's 'relevance must not be overestimated' (767); Okechukwu

An example of diverting state obligations without depending on their ratification by one of the IIA's state parties offer Art 14 (4) ECOWAS Investment Rules, Art 15 (2) SADC Model BIT Template and Art 14 (C) IISD Model International Agreement on Investment for Sustainable Development.[79] All three stipulate in a similar way that investors and investments shall act in accordance with fundamental or core labour standards enshrined in the 1998 ILO Declaration on Fundamental Principles and Rights of Work. They set a minimum standard for investors irrespective of the home and host states' own obligations.

Further insightful examples relate to anti-corruption norms. Art 10 SADC Model BIT Template covers a comprehensive anti-corruption obligation for foreign investors. The commentary to the provision states that the language of the obligation is taken from the UN and OECD Conventions on Bribery. The SADC Model BIT Template only added certain language that addresses payments to family members of business associates of an official which was considered to constitute a loophole in the mentioned conventions.[80] Art 15 of the 2003 UN Convention against Corruption[81] and Art 1 of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[82] impose international obligations *on states* to prescribe and enforce criminal legislation against bribes with similar language.

Art 11 of the 2015 India Model BIT[83] even takes over the wording of the UN and OECD Conventions without any change by stipulating:

> The parties reaffirm and recognize that: […] (ii) Investors and their investments shall not, either prior to or after the establishment of

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Ejims, 'The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?' (2019) 34(1) ICSID Review 62, 77 who considers the placing of 'direct obligations on foreign investors […] a novelty and a remarkable trend'; Krajewski (n 44) 114–115 who considers that the provision lacks legal clarity but understands it to at least make the international human rights obligations of Morocco and Nigeria directly applicable to investors.

79 IISD, *Model* (n 12).

80 SADC Model BIT, 32.

81 United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41 (UN Convention against Corruption).

82 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 17 December 1997, entered into force 15 February 1999) 2802 UNTS 225 (OECD Anti-Bribery Convention).

83 India Model BIT.

> an investment, offer, promise or give any undue pecuniary advantage gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of a Party as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage nor shall be complicit in inciting, aiding, abetting, or conspiring to commit such acts.

The chapeau which addresses the state parties favours a reading that understands the provision as a mere interpretive guidance for other articles of the Model BIT. Yet, the chapter that covers Art 11 has the title 'Investor obligations', and number (ii) as well as the Article's other numbers directly address foreign investors with obligatory language. Consequently, one can best understand the provision as creating a direct obligation against bribery that builds on the UN and OECD Conventions. In addition to the India Model BIT, Art 17 (2)-(3) of the Morocco-Nigeria BIT contains similar language.

Apart from these new IIAs, scholars have proposed the diverting of state obligations as a reform option. Some call for making use of international conventions such as the ICCPR, the ICESCR, the ILO Declaration on Fundamental Principles and Rights at Work and the UN Convention against Corruption as treaties that most states have ratified.[84] In addition, they suggest drawing on customary law.[85]

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84 See for example Patrick Dumberry and Gabrielle Dumas-Aubin, 'When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration' (2012) 13 Journal of World Investment & Trade 349, 352–358 who explain that international treaties such as the OECD Anti-Bribery Convention and the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 1 (CEDAW) speak to corporate behaviour; while they do not yet create international obligations directly applicable to corporations, states were free to sign BITs that would impose specific human rights obligations on them.

85 See for example 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) 825 who points to environmental obligations and labour standards under international customary law or accepted as general principles of law.

3. Critique

The greatest advantage of diverting state obligations is that they represent a particularly rich source of binding standards. International treaties and customary law have developed far-reaching obligations of states for the protection of the public interest. IIAs could build on these to create direct obligations in a current state of international law with only few obligations directly applicable to non-state actors. Levelling the international obligations of states and investors appears a feasible reaction to the increasing power that many multinational-enterprises and their investment subsidiaries hold today.

On the other hand, one may oppose the concept of diverting state obligations and argue that there are important reasons why standards for private actors and states should differ. After all, it is solely the state that represents its constituency and is competent to take policy decisions that weigh and balance the different interests of citizens and inhabitants.

This is reflected in the way most international obligations leave states considerable leeway on how to comply with them. Generally, international obligations do not explicitly prescribe how states should act. For example, most obligations do not require the state to take a certain policy action. Rather, they express a certain result the state must accomplish. They leave the selection of means to reach that result to the state. Therein, international obligations provide room for states' internal decision-making processes and account for policy preferences.[86] If one diverted state obligations to investors, this leeway would now be at the disposal of the latter. It would be up to investors to decide on the means to reach the prescribed result of the obligation. But in contrast to states, investors do not provide for internal decision-making processes which represent the interest of the constituency or, for example, follow democratic principles – but rather serve the interests of the investors themselves and their shareholders. Inter-

86 See also the general question how international law should address states' prerogative to regulate private behaviour posed by Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111(3) Yale Law Journal 443, 466. A good example of such leeway are international human rights obligations under the ICESCR: Art 2 (1) requires state parties to take steps to the maximum of their available resources with a view to progressively achieving the full realization of ICESCR rights, see Committee on Economic, Social and Cultural Rights 'General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant)' UN Doc E/1991/23 (14 December 1990), paras 1–14.

national obligations of states have not been created to provide non-state actors with such policy-making power in mind. Consequently, in many instances, the simple diversion of state obligations to investors must be considered ill-placed.

For example: the ICESCR explicitly leaves room for the states to take policy decisions in realising cultural, economic and social rights. They are only subject to certain restrains such as the core minimum standard or the duty to progress according to the abilities of the state. Simply diverting the ICESCR obligations to investors does not answer the question which role private actors should play in the shaping of the cultural, economic and social conditions in society[87] – political questions that states surely do not intend to leave for investors to decide. This shows that it is problematic to analogise and divert state obligations as they might not be suitable to apply to non-state actors.[88] Rather than a simple copy of state obligations, direct obligations must provide further criteria and guidance how exactly investors should behave towards the public interest.

A suggestion in this regard was made by the ICSID Tribunal in its 2016 award in *Urbaser v Argentina* that has been criticised above.[89] It held that private actors must only *abstain from harming* the human rights of others. Positive obligations to fulfil human rights could only follow from a contract with the state.[90] On the one hand, this is a clear-cut pragmatic distinction that relieves foreign investors from providing welfare to citizens, something usually considered a task of the state. On the other hand, it only represents a minimum approach that centres on the defending of freedom of others against investors. Yet, many of the non-binding CSR

87 Ratner (n 86) 493 rightly points out that it is necessary to strike a balance between individual liberties and business interests.

88 Supported for example by 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, 637; Karsten Nowrot, 'Obligations of Investors' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos 2015) para 16; for an opposite view that too quickly suggests to look into the host and home states' international obligations see Todd Weiler, 'Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order' (2004) 27(2) Boston College International and Comparative Law Review 429, 445.

89 See Chapter 3.I.2.

90 *Urbaser v Argentina*, Award (n 17) paras 1110–1120.

norms appeal for a more active role of companies and hence reflect a societal expectation to go beyond this purely negative dimension.[91]

This is not the place to decide on the best approach – rather, the award serves as an example of which types of questions an IIA must answer if it aims to divert international obligations of states to investors.

III. Converting legally non-binding standards

Apart from international obligations of states, CSR norms represent another potentially rich source of direct obligations. This Section will show that new IIAs have started to convert these legally non-binding norms to binding direct obligations – and why the blurring of these different types of norms may prove to be counterproductive.

1. Concept

By their nature, CSR norms are legally non-binding. An IIA may convert such soft law to a direct obligation by conferring the missing binding legal effect for the purpose of the IIA.[92]

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91 For example, Principle 11 of the 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) not only calls on enterprises to 'avoid infringing on the human rights of others' but also to 'address adverse human rights impacts with which they are involved'. Similarly, the OECD Guidelines for Multinational Enterprises contain many active responsibilities, for example to '[c]ontribute to economic, environmental and social progress with a view to achieving sustainable development' or, to give a more specific example, to employ 'training programmes' to '[p]romote awareness of and compliance by workers employed by multinational enterprises with respect to company policies through appropriate dissemination of these policies', see OECD 'Guidelines for Multinational Enterprises' (2011) ‹http://dx.doi.org/10.1787/9789264115415-en› accessed 7 December 2021, 19.

92 This is for example suggested with regard to non-binding standards for the protection of indigenous peoples 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, 407–408; see also Choudhury (n 1) 92 who considers conversion of soft law by proposing that states could provide CSR norms with binding effect for investors by replacing the word 'expected' with the word 'shall' and by explicitly allowing for counterclaims.

Such converting of soft law has to be distinguished from mere references to CSR in some recent IIAs that leave the voluntary character of the norms untouched, as already discussed above. A conversion as understood here requires specific language in an IIA provision that transforms a rule from non-binding into binding.

2. IIAs and reform suggestions

Such language is provided for in several recent IIAs and model BITs of developed and developing countries.

Belgium and Luxembourg introduced the concept of converting CSR standards to direct investor obligations in their recent 2019 Model BIT for the Belgium-Luxembourg Economic Union.[93] Its Art 18 (1) states that '[i]nvestors shall […] act in accordance with internationally accepted standards applicable to foreign investors to which the Contracting Parties are a party.' The term 'shall' indicates that the BIT binds investors to the otherwise non-binding international CSR standards.

Art 15 of the ECOWAS Investment Rules addresses 'corporate governance and practices' and thus refers to non-binding norms of CSR. Art 15 (1) transfers these non-binding norms into legally binding investor obligations by stating that '[i]nvestments shall comply with and maintain national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices.' Although the article's chapeau provides for certain flexibility through stipulating that the paragraphs must be understood to apply '[i]n accordance with the size and nature of an investment', the formulation 'shall' in contrast to 'should' is evidence of a legally binding character.

Art 16 (1) of the SADC Model BIT even goes further by stating that '[i]nvestments shall meet or exceed national and internationally accepted standards of corporate governance […]'. This provision highlights that the respective soft law applies as a binding minimum standard. In the same vein, Art 12 (3) of the 2008 Ghana Model BIT stipulates that foreign investors '[…] shall behave in accordance with relevant guidelines and other internationally accepted standards applicable to foreign investors.'

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93 Belgium-Luxembourg Economic Union Model BIT (28 March 2019) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5854/download› accessed 7 December 2021; in the same vein Krajewski (n 44) 116.

A similar approach features in Art 19 of the 2016 African Union's Draft Pan-African Investment Code that forms part of the Agreement's Chapter 4 titled 'investors [sic!] obligations'. The provision states in paragraph 1 that '[i]nvestments shall meet national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices.' Paragraph 3 further spells out obligations that include 'active co-operation between corporations and stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises' in lit. b as well as the obligation to '[e]nsure that timely and accurate disclosure is made on all material matters regarding a corporation, including […] risks related to environmental liabilities […]' in lit. c.

Even more concrete is the obligation laid down in Art 18 (1) of the Morocco-Nigeria BIT which stipulates that '[c]ompanies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard'. Its Art 19 comprehensively states that '1) In accordance with the size and nature of an investment, a) investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved […]'.

The 2015 Brazil Model BIT offers a nuanced alternative for converting CSR norms into binding international standards. It covers a special provision on CSR in its Art 14. The provision states in paragraph 1 that

> [i]nvestors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article.

Paragraph 2 stipulates that '[t]he investors and their investment shall endeavour to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State receiving the investment:', subsequently listing eleven rules that, for example, call on the investor to '[r]espect the internationally recognized human rights of those involved in the companies' activities' in lit. b. Brazil has adopted this model in several BITs.[94] Sometimes these

94 Art 15 (2) Brazil-Chile BIT; Art 10 Brazil-Angola BIT; Art 9 Brazil-Malawi BIT; Art 13 Brazil-Mexico BIT; Art 10 Brazil-Mozambique BIT; Art 2.13 (2) Brazil-Peru FTA.

treaties' substantive standards go even further. For example, Art 10 Brazil-Angola-BIT provides a longer list of standards than the 2015 Brazil Model BIT, *inter alia* also demanding more explicitly, respect for the environment.[95]

The wording used by the Brazilian BITs indicates a certain conversion of CSR norms by using 'shall', 'deberán'[96] or 'deverão'.[97] Herein, they deviate from the strictly voluntary approach of other IIAs that integrate CSR norms and are careful to use the hortatory expression 'should'.[98] It is also telling that the 2015 Brazil-Colombia-BIT generally follows the 2015 Brazil Model BIT but fails to provide any obligatory language in its Art 13 on Corporate Social Responsibility. Instead, it obliges only the state parties to appeal to investors to comply voluntarily with relevant standards[99] – a sign that, here, Colombia rejected to consent to a provision that would otherwise lead to binding standards for investors.

On the other hand, the Brazil Model BIT does not transform CSR standards to legally binding obligations in a similar extensive manner as the ECOWAS Investment Rules. It does not allow to invoke these obligations in any international dispute settlement procedure but only before domestic courts.[100] What is more, pursuant to the Model BIT, investors must only 'strive' and 'endeavour' to comply with voluntary standards. The most adequate interpretation is that investors have an international due diligence obligation of best effort – an obligation of conduct instead of an obligation of result. Notwithstanding, an obligation of conduct is still a legally binding provision that departs from the purely voluntary

95 Art 10 and Annex II (i) Brazil-Angola BIT; for a broader analysis of the new Brazilian IIA policy, including a comparison to IIAs from other regions, see Geraldo Vidigal and Beatriz Stevens, 'Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?' (2018) 19(3) Journal of World Investment & Trade 475, 477, 505.

96 Art 15 (2) Brazil-Chile BIT; Art 13 (2) Brazil-Mexico BIT.

97 Art 10 Brazil-Angola BIT; Art 10 Brazil-Mozambique BIT.

98 See Chapter 2.V.2.

99 Brazil-Colombia Investment Cooperation and Facilitation Agreement (adopted 9 October 2015) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5765/download› accessed 7 December 2021 (Brazil-Colombia BIT).

100 See further Michelle R Sanchez Badin and Fabio Morosini, 'Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs)' in Fabio Morosini and Michelle R Sanchez (eds), *Reconceptualizing International Investment Law from the Global South* (Cambridge University Press 2018) 231–232.

model of international CSR norms. Therefore, Art 15 of the 2015 Brazil Model BIT and the cited other Brazilian BITs serve as an example of an intermediate and careful approach to the converting of international soft law.[101]

3. Critique

The advantage of converting non-binding international soft law is that it makes use of existing norms that already have private actors as their addressees. It does not face the problems that diverting states' obligations bring about, discussed above.[102] Foreign investors form a sub-category of corporations and hence are mostly already subject to these non-binding rules of soft law. Advocates of this conversion approach consider soft law a rich source of internationally consented standards, best suited as orientation for binding obligations.[103]

However, converting these norms' character is also problematic. It changes the regulatory approach these norms originally follow. Creating soft law such as CSR norms serves a specific strategy: to encourage and compel businesses to voluntarily cooperate with states by aligning their activities with the public interest. Often, there is the underlying political belief that such cooperation is more effective than the imposing and en-

101 The same conclusion is drawn by Jose D Amado, Jackson S Kern and Martin D Rodriguez, *Arbitrating the Conduct of International Investors* (Cambridge University Press 2018) 130; Krajewski (n 44) 116–117. For a contrary assessment see Muchlinski, 'Impact' (n 71) 351–352 who understands the Brazilian provisions as remaining legally non-binding, however without explaining why a best-efforts-obligation lacks legal force even though international law acknowledges the binding character of best-efforts-obligations where they apply to states; Nitish Monebhurrun, 'Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model' (2017) 8(1) Journal of International Dispute Settlement 79, 95–100 who qualifies the provisions as voluntary despite identifying and highlighting the treaty provisions presented here as reflecting a binding best effort obligation; Ranjan (n 65) 131 who considers a lack of specificity to rule out a binding character.

102 The concreteness of non-binding standards is for example highlighted by Foster (n 92) 407–408.

103 For example supported by Patrick Dumberry and Gabrielle Dumas-Aubin, 'How to Impose Human Rights Obligations on Corporations Under Investment Treaties?' (2011–2012) 4 Yearbook on International Investment Law and Policy, 8.

forcing of legal duties.[104] This approach is lost where such norms become obligations that call for compliance independent of investors' will.

This also means that CSR norms were developed for a different, cooperative context. It is quite common that moral or ethical standards demand more from a person than the law does. The latter entails a limitation of freedom and hence require a different weighing and balancing of the positions affected by the norm. Consequently, non-binding standards do not always embody an adequate value judgment that is suitable and directly transferable to a legally binding setting. An emerging international consensus on a CSR standard does not necessarily mean that there is also an emerging consensus on a new *binding* norm.[105]

IV. Elevating domestic investor obligations to international investor obligations

In creating direct obligations, recent investment practice has not stopped at the dualist divide between the national and international legal orders. As this Section will lay out, the UNCITRAL investment Tribunal in *Al-Warraq v Indonesia* and new IIAs have elevated domestic investor obligations to international investor obligations. In comparison to the abovementioned examples, this method, when handled correctly, appears more realistic and capable of introducing obligations to investment law.

1. Concept

IIAs can contain clauses which turn domestic obligations into direct international obligations, for example by drawing on the host state's administrative law or existing domestic contracts with the investor. In such cases, one may speak of an elevation of the domestic investor obligation to an international investor obligation.

The concept of elevating a domestic investor obligation presupposes that one distinguishes between national and international law as different legal

104 cf Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, Oxford University Press 2007) 113–114.

105 On this process ibid, 111–112. Some scholars do not sufficiently distinguish between binding and non-binding norms, for example Weiler (n 88) 445–446.

orders.[106] In such a dualist setting, international obligations of states must be transformed or declared applicable within the domestic legal order to take effect in the latter. An elevation in the present sense operates in the opposite direction: a domestic legal norm is brought into the international legal order. In both cases mentioned, such transformation results in two substantive legal norms that exist independently on the domestic and international level.

One can picture this legal technique as a form of a 'reversed umbrella clause'.[107] Umbrella clauses in IIAs require the host state to protect investors' rights enshrined in investment contracts or otherwise found in the host state's domestic legal order as a matter of international law. They elevate the host state's domestic obligations towards the investor to an international obligation of the state.[108] Elevation as understood here works similarly, only that it operates in the reverse direction by elevating investors' domestic obligations towards the state. With the words of the UNCITRAL Tribunal in *Aven v Costa Rica* in the context of domestic environmental law, elevation means that 'any violation of state-enacted environmental regulations [by the investor] will amount to a breach of the Treaty'.[109] Such elevation must also be distinguished from IIA clauses

106 On dualism see the overview by Pierre-Marie Dupuy, 'International Law and Domestic (Municipal) Law' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (April 2011) paras 4–10 who also points to a (controversial) passage in *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) [1926] PCIJ Rep Series A No 7, 19 which does seem to reflect and illustrate a dualist view on the relation of international and domestic law.

107 Gustavo Laborde, 'The Case for Host State Claims in Investment Arbitration' (2010) 1(1) Journal of International Dispute Settlement 97, 112; cf the reference to umbrella clauses in *Al-Warraq v Indonesia*, Final Award (n 15) para 663.

108 For a general analysis of umbrella clauses see Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 166–178. Sometimes, scholarly writing identifies the imposition of obligations in IIAs but does not comment on its character as an international obligation, see for example Peter Muchlinski, 'Regulating Multinationals: Foreign Investment, Development, and the Balance of Corporate and Home Country Rights and Responsibilities in a Globalizing World' in José E Alvarez and others (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press 2011) 49.

109 *Aven v Costa Rica* (n 16) para 743. The Tribunal rejected that CAFTA-DR contained such a reversed umbrella-clause. On this case and the environmental counterclaim, see above Chapter 3.I.3.

which restate that investors face obligations under the host state's domestic law with declaratory effect only.[110]

Conceptually, it is important to highlight that elevating domestic to international obligations must also be separated from the question of whether domestic obligations are part of the applicable law in an investment arbitration. There is a difference between substance and enforcement. Elevation as understood here operates on the level of substantive international law. It is only the content of such an international obligation which is defined by referring to domestic law. As a corollary, the interpretation of such an international investor obligation follows the rules of Art 31 and 32 of the VCLT. In turn, if an investment tribunal applies domestic obligations in an arbitration, said rules retain their substantive domestic legal character.

Furthermore, elevated investor obligations must be distinguished from the so-called legality clauses in IIAs. These clauses require investors to comply with the host state's domestic law if they want to qualify for protection under the respective IIA. For example, some IIAs contain a provision which defines protected 'foreign investment' as only those investments which comply with domestic law. This means that under these provisions compliance with domestic law forms a requirement of investor rights' substantive scope. Similar provisions exist which require compliance with domestic law as a precondition for access to investment arbitration. All these provisions do not set self-standing obligations on investors – importantly, the state cannot demand compliance and claim compensation in case of non-compliance. Rather, these legality clauses entail *indirect* obligations which will be dealt with at a later stage in Part II of this book.[111]

2. The Al-Warraq v Indonesia award

In the UNCITRAL case of *Al-Warraq v Indonesia*, the Tribunal acknowledged the elevating of a domestic investor obligation.

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110 Yet, especially in policy suggestions, this point is often missed, see for example IISD, *Toolkit* (n 13) para 5.3.1; 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, 164, 174 who follows the umbrella clause-analogy but rather inconsistently considers that the rule still remained domestic in character.

111 See Chapter 7.I.2 and Chapter 7.II.5.

In this case, the claimant conducted an investment in Indonesia as a shareholder of the Indonesian 'Bank Century'. In the course of the global financial crisis of 2008/2009, the bank suffered liquidity problems and received state aid, including a bailout by the Indonesian Central Bank. Following the bailout, Indonesia filed criminal proceedings with several persons involved with Bank Century, including the claimant. The state alleged banking mismanagement, fraud and corruption. Eventually, the claimant was convicted *in absentia*, and his assets were confiscated.[112] In 2011, the claimant instituted an investment arbitration claim under the OIC Investment Agreement[113] and the 2010 UNCITRAL Arbitration Rules. He claimed the violation of a series of investor rights, including the right to adequate protection and security, the protection against expropriation and the FET-right via the MFN-clause.[114]

In the course of the proceedings, Indonesia filed a counterclaim against the investor. The state argued that he unjustly enriched himself in violation of his domestic financial commitments. Indonesia demanded compensation in the amount of the bailout (Rp. 6.7 trillion), alternatively of the sum allegedly stolen by the claimant (USD 360.735.638) or any sum found appropriate by the Tribunal.[115]

The Tribunal found in its 2014 award that, in principle, Indonesia had the right to bring a counterclaim based on the investor's fraudulent behaviour and referred *inter alia* to Art 9 OIC Investment Agreement to that end. This provision stipulates:

> The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.

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112 *Al-Warraq v Indonesia*, Final Award (n 15) paras 73–141.

113 Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (adopted 5 June 1981, entered into force 23 September 1986) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2399/download› accessed 7 December 2021 (OIC Investment Agreement).

114 *Hesham Talaat M. Al-Warraq v The Republic of Indonesia*, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims (UNCITRAL, 21 June 2012) para 46.

115 *Al-Warraq v Indonesia*, Final Award (n 15) para 655.

While there are voices from the time in which the OIC Agreement was created that see in this provision only the declaratory restating of the host state's right to regulate,[116] the Tribunal gave it a much broader meaning in its award. It is useful to quote the exact reasoning of the Tribunal in this regard:

> Article 9 imposes a positive obligation on investors to respect the law of the Host State, as well as public order and morals. An investor of course has a general obligation to obey the law of the host state, but Article 9 raises this obligation from the plane of domestic law (and jurisdiction of domestic Tribunals) to a treaty obligation binding on the investor in an investor state arbitration. An analogy can be drawn with so called 'umbrella clauses' that elevate contractual obligations to the treaty plane. The fact that the Contracting Parties imposed treaty obligations on investors (which the Claimant assented to by accepting the open offer of investment arbitration made by the Respondent in the OIC Agreement) confirms the interpretation […] that permits counterclaims by the respondent state.[117]

Notwithstanding, the Tribunal dismissed Indonesia's counterclaim for more specific reasons: Indonesia had failed to prove the investor's personal liability as it could not distinguish his actions from other parties that were involved in the fraud but were not subject to the counterclaim.[118] What is more, the fraudulent actions had primarily been committed against the private Bank Century. While the Tribunal generally found it possible that Indonesia could subrogate Bank Century's claims, Indonesia had not demonstrated the relevant facts to that end either.[119] The Tribunal further

116 Hasan Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-Operation Among Its Member States: A Study of the Charter, the General Agreement for Economic, Technical and Commercial Co-Operation and the Agreement for Promotion, Protection and Guarantee of Investments Among Member States of the OIC* (Clarendon Press 1987) 149–150 who draws a comparison to established practice in other IIAs at that time. His argument that Art 9 of the OIC Investment Agreement reflects the power of a state to uphold public order implicit in other IIAs is close to the contemporary 'right to regulate' debate and focuses on the state rather than, as the provision's wording indicates, on the investor.

117 *Al-Warraq v Indonesia*, Final Award (n 15) para 663.

118 ibid 669.

119 ibid 670.

added that some of the respondent's actions were subject to a separate dispute resolution clause.[120]

Therefore, even though the counterclaim eventually failed to succeed, this was only for specific factual, rather than fundamental legal reasons. Importantly, the Tribunal in its reasoning explicitly affirmed that the OIC Agreement created an international obligation of the investor. It also acknowledged the possibility to hold him accountable through a counterclaim in investment arbitration. The obligation in Art 9 OIC Investment Agreement conforms with the above-mentioned conceptual observations in that it elevates Indonesian domestic law. It serves to protect the public interest in the form of the rule of law against fraudulent behaviour. What is more, apparently, Art 9 OIC Investment Agreement is not limited to issues of fraud and corruption but elevates any other domestic obligation, potentially including environmental and human rights obligations, for example.

3. IIAs and reform suggestions

Elevating domestic to international investor obligations has some ground in other IIAs as well.

One may even consider if ordinary umbrella clauses – which can be found in many IIAs – may, in certain cases, have the effect of elevating not only the contractual obligations of the state as conventionally thought, but also the investor's obligations. In this regard, the precise wording of the umbrella clause appears relevant. Some explicitly state that the state promises the investors to comply with its contractual obligations as a matter of international law – these clauses clearly do not elevate investors' domestic obligations as they only elaborate on the state. Other umbrella clauses, however, require compliance with investment contracts in general without any language that focusses on the state's actions only. Arguably, these umbrella clauses not only elevate the state's but also the investor's domestic contractual obligations. The ICSID Tribunal in its 2002 Procedural Order No 2 in *SGS v Pakistan* commented in this direction that

> [i]t would be inequitable if, by reason of the invocation of ICSID jurisdiction, the Claimant could on the one hand elevate its side of the dispute to international adjudication and, on the other, preclude the

120 ibid 671.

> Respondent from pursuing its own claim for damages by obtaining a stay of those proceedings for the pendency of the international proceedings, if such international proceedings could not encompass the Respondent's claim.[121]

This idea remains to be tested for concrete IIAs. However, many umbrella clauses may contain language which implies that they should only benefit the foreign investor.

Meanwhile, the approach to elevate domestic obligations has received express attention in new IIAs. For example, Art 11 (1) and (2) of the ECOWAS Investment Rules stipulates that

> Investors and Investments are subject to the laws and regulations of the host State. Investors and investments must comply with the host State measures prescribing the formalities of establishing an investment, and accept host State jurisdiction with respect to the investment.

As a post-establishment obligation, Art 14 (1) separately establishes that

> [i]nvestors or investments shall, in keeping with best practice requirements relating to their activities the size of their investments, strive to comply with on hygiene, security, health and social welfare rules in force in the host country. [sic!]

In the same vein, Art 13 COMESA Investment Agreement lays out that 'investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made.' That this clause has a more extensive meaning than legality clauses becomes clear from Art 28 (9) COMESA Investment Agreement. This provision specifically allows for counterclaims by host states against investors on the ground that the investor 'has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures'.

Similarly, Art 22 of the AU's Draft Pan-African Investment Code stipulates in paragraph 1 that '[i]nvestors shall abide by the laws, regulations, administrative guidelines and policies of the host State.' The 2008 Ghana Model BIT titles its Article 12 'Responsibilities of Nationals and Companies of a Contracting Party in the Territory of the other Contracting

121 *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2 (16 October 2002) para 302.

Party' and provides in paragraph 1 that foreign investors '[…] shall be bound by the laws and regulations in force in the host State, including its laws and regulations on labour, health and the environment.'[122]

Somewhat more ambiguous is the way the 2015 India Model BIT addresses foreign investors' compliance with host state law. Art 11 stipulates:

> The parties reaffirm and recognize that: (i) Investors and their investments shall comply with all laws, regulations, administrative guidelines and policies of a Party concerning the establishment, acquisition, management, operation and disposition of investments. […] (iii) Investors and their investments shall comply with the provisions of law of the Parties concerning taxation, including timely payment of their tax liabilities.

The chapeau favours a reading that the provision merely restates that investors face domestic obligations. But the fact that the subparagraphs only relate to specific domestic laws is a strong argument in favour of understanding the provision as elevating them to international obligations.[123]

Even the Netherlands as a capital exporting state has included a provision which may be read to elevate domestic investor obligations into its new 2019 Model BIT. Art 7 (1) Netherlands Model BIT on corporate social responsibility states:

> Investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws.

Interestingly, in addition, Art 7 (4) Netherlands Model BIT elevates certain domestic obligations that are enacted in the *home* state if their violation causes damages in the host state:

> Investors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to

122 See also Amado, Kern and Rodriguez (n 101) 137–138; on this approach in the broader context of Africa's investment policy, see 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, 434–436.

123 In the same direction, but more cautiously, based on Art 12 India Model BIT see Muchlinski, 'Impact' (n 71) 350; see Krajewski (n 44) 120 who considers an interpretation as presented here to be possible but questions if such an understanding would add any value.

the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.

Furthermore, the obligation to comply with domestic law features prominently in policy suggestions and reform proposals, for example by the IISD. The Institute promoted it already in its 2005 Model International Agreement on Investment for Sustainable Development[124] and includes it as feasible policy options in its 2017 Sustainability Toolkit for Trade Negotiators[125] as well as in expert consultations held in 2018.[126]

4. Critique

Clearly, elevating domestic obligations has the great advantage that these norms are tailored to private actors and comprehensively protect the public interest. They do not face the structural disadvantages of other methods of transforming norms discussed in the previous Sections.

Such combining of international and domestic law is not alien to investment law. Rather, *Douglas* famously identified 'hybrid foundations'[127] as a characteristic of international investment arbitration. For example, the right to FET requires an inquiry into the host state's legal system to assess if the investor's legitimate expectations were violated by a change of the regulatory environment. In addition, one may highlight the role of the previously mentioned umbrella clauses.[128] From the perspective of the state, elevating domestic obligations is a sovereignty-friendly technique of creating direct obligations. It may find political support even from states that are otherwise reluctant to create any international obligations directly applicable to non-state actors.

However, this sovereignty-friendly aspect can be problematic as well. Sometimes, investors want to challenge a certain domestic obligation be-

124 Art 11 IISD, *Model* (n 12).

125 IISD, *Toolkit* (n 13) para 5.3.1, Option 1.

126 Nathalie Bernasconi-Osterwalder and others, *Harnessing Investment for Sustainable Development: Inclusion of Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements* (IISD, 2018) 9–10; IISD, *Obligations* (n 14) 3–4.

127 Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2004) 74(1) British Yearbook of International Law 151.

128 More generally on the role of domestic law in international investment arbitration Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press 2017).

cause they consider it to violate their investor rights under an IIA. There is the danger that the state may counter this claim from the outset, by arguing that said obligation is elevated into an international investor obligation – and that, thus, the investor cannot challenge it. However, it is established that the state cannot bring forward its internal law to justify that it violates its international obligations. This principle is established in Art 27 VCLT and Art 32 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts.[129] This shows that domestic investor obligations cannot be blindly elevated through an IIA so as to immunise the state against respective claims by the investor. The case of *Al-Warraq v Indonesia* is a good example: Indonesia's counterclaim referred to the investor's allegedly fraudulent actions. As such, it was based on the same reason for which the investor claimed that Indonesia had violated the OIC Investment Agreement.

The solution is a contextual interpretation of 'reverse umbrella clauses' based on Art 31 (1) VCLT: Any domestic law that is subject to elevation must itself conform with the investor rights enshrined in the respective IIA. In consequence, elevation never leads to a simple 'copy' of the domestic obligation. It is contingent on compliance with the rest of the IIA. Thus, the Tribunal must question and examine its legality in the process of elevating it.

Already this interpretation detaches the obligation's content from its origins in the host state's domestic legal system. What is more, it is not necessary that the elevated norm stems from the host state's domestic legal order. For example, it is possible to conceive clauses which additionally refer to the home state's domestic law – as proposed in the 2019 Netherlands Model BIT –, the law of a third party of the IIA (in case there are more than two state parties), or even of a third state that is not a party to the IIA. In these cases, the original domestic norm *de facto* exerts an extraterritorial effect. For example, Art 14 (1) Morocco-Nigeria BIT imposes environmental impact assessment obligations that investors must fulfil '[…] as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question.'[130] This shows that elevating domestic obligations does not necessarily mean the taking of the least sovereignty-impairing approach.

129 UNGA 'Responsibility of States for Internationally Wrongful Acts' UN Doc A/RES/56/83 (12 December 2001).

130 Art 14 (1) Morocco-Nigeria BIT.

V. Creating direct obligations de novo

1. Concept

Apart from the discussed different means of resorting to pre-existing norms,[131] there is of course also the option that an IIA creates an entirely new direct obligation – without referring to any other norm to define its content.

2. The Al-Warraq v Indonesia award

A good example of such an original creation can be encountered in the already-mentioned UNCITRAL award in *Al-Warraq v Indonesia*. As shown, the Tribunal found that Art 9 OIC Investment Agreement elevates domestic obligations enshrined in Indonesian law to an international obligation.[132] But the award also held that Art 9 enshrined an additional, original international obligation as will be presented in this paragraph.

It is useful to restate the wording of Art 9 OIC Investment Agreement:

> The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.

Whereas the first half of the first sentence relates to the host state's domestic law, the second half imposes an additional standard by referring to public order, morals and interest. The second sentence then goes even further in proscribing restrictive practices, finishing with another reference to domestic law. One must read these passages between the references to domestic law as additional direct obligations that follow from the IIA itself.

In this vein, the award elaborated on original direct obligations. For example, the Tribunal subsumed the different actions of the investor not only under Indonesian law but also under the autonomous test of preju-

131 cf the general comment on the approach of rule-referencing by Mary Footer, *An Institutional and Normative Analysis of the World Trade Organization* (Nijhoff 2006) 320.

132 See Chapter 3.IV.2.

dice against the public interest, public order and morals.[133] It found, for example that '[t]he Claimant's admission that he undertook the duties on the Board of Commissioners in a major bank without understanding their significance is clearly prejudicial to the public interest prohibited by Article 9.'[134] Unfortunately, the Tribunal failed to clarify the abstract standard against which it measured the claimant's behaviour. Nevertheless, the award is an example for how a tribunal interprets and applies an autonomous direct obligation in an IIA.

3. IIAs and reform suggestions

Original direct obligations can also be found in recent IIAs of developing countries.

For example, the ECOWAS Investment Rules in Chapter III on 'Obligations and Duties of Investors and Investments' create comprehensive original obligations towards the public interest. Art 12 prescribes that investors must conduct a pre-establishment environmental and social impact assessment of the investment. This obligation does not only draw on the respective applicable domestic rules of the host states but provides an additional independent international minimum standard.

Art 14 imposes obligations addressing conduct after the establishment of the investment relating to labour standards and human rights in the workplace. In part, this provision relates both to existing domestic laws and other international obligations that bind states.[135] It also provides for original obligations that do not refer to any other existing norms, for example to 'uphold human rights in the workplace and the community in which they are located'. Further obligations can be found in Art 15 that calls for transparency of the investment contract and for a dialogue and exchange by the investor with the local community.

Chapter III flanks these specific duties with general obligations of conduct in Art 11. It requires investors to 'strive through their management policies and practices, [sic!] to contribute to the development objectives of the host States and the local levels of government where the investment is located' and to provide information to the host state which is required for decision-making and statistical purposes.

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133 See *Al-Warraq v Indonesia*, Final Award (n 15) paras 632, 644–645, 663.
134 ibid 644.
135 See Chapter 3.II and Chapter 3.IV.

A similar comprehensive approach is represented through Art 12–15 SADC Model BIT Template. Art 15 entitled 'Minimum Standards for Human Rights, Environment and Labour', very comprehensively stipulates in its paragraph 1 that '[i]nvestors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located.' This general clause does not draw on pre-existing domestic or international human rights norms. It represents a particularly far-reaching approach to bind foreign investors to an international human rights standard. In similarly broad terms, the AU's Draft Pan-African Investment Code imposes 'socio-political obligations' on investors in its Art 20, including in paragraph 1 obligations to provide '(b) respect for socio-cultural values' and '(e) respect for labour rights'. Art 23 (1) separately addresses the exploitation of natural resources. It prescribes that '[i]nvestors shall not exploit or use local natural resources to the detriment of the rights and interests of the host State.'

Furthermore, a rather particular original obligation can be found in Art 16 COMESA Investment Agreement. The provision contains the right of investors to hire qualified personnel from any country. Yet, it also states that investors 'shall accord a priority to workers who possess the same qualifications and are available in the Member State or any other Member State', hence, to privilege personnel of the local market. That this provision is more than a mere condition for the investor right to freely hire personnel is not only indicated by its wording which indicates a self-standing obligation. Also, Art 28 (9) COMESA Investment Agreement allows for counterclaims on the basis that investors have not fulfilled their obligations under the Agreement. This covers counterclaims based on Art 16.

Another example of a quite specific obligation can be found in Art 12 of the 2008 Ghana Model BIT. It states that foreign investors '[…] shall to the extent possible, encourage human capital formation, local capacity building through close cooperation with the local community, create employment opportunities and facilitate training opportunities for employees, and the transfer of technology.' Although the provision contains a qualification that gives due regard to the foreign investor's capacities, it is drafted in obligatory language. It requires investors to assure that their activities directly benefit local communities.

Furthermore, institutions like the UNCTAD[136] and the IISD also suggest creating new direct obligations. For example, the IISD in its 2017 Sustainability Toolkit for Trade Negotiators highlights the including of investor obligations that 'where necessary, supplement the state parties' domestic laws, to abide by internationally recognized standards on CSR and responsible business conduct, and to go beyond what is already provided for under international legal instruments'[137]. While this proposal leaves the precise standard rather elusive, it is evidence of a call for supplementing available domestic and international rules with new binding international standards. It also shows that the different techniques to create direct obligations studied in the previous Sections can be combined. More specifically, the IISD emphasises obligations to conduct human rights- and environmental impact assessments in the pre- and even the post-establishment phase.[138] This resonates in some of the examples of new IIAs of developing countries presented above.

4. Critique

Creating original direct obligations allows state parties of an IIA to express common values and economic policies. The bilateral setting of BITs is especially prone to flexible inter-party solutions. Naturally, creating new obligations 'from scratch' offers an opportunity to go beyond international standards that states have already created. States may agree on standards bilaterally where there is no multilateral consensus. It is also a simple solution to the various concerns that one may raise against the other techniques for creating direct obligations which this Chapter has pointed out above.

However, as a corollary such provisions are less suitable to interlace with a wider net of international obligations. This is problematic from the perspective of investors because, in the worst-case scenario, they would have to adhere to different and separate international standards (in addition to

136 See for example UNCTAD 'Development Indications of International Investment Agreements, IIA Monitor No. 2' UNCTAD/WEB/ITE/IIA/2007/2 (2007), 6.

137 IISD, *Toolkit* (n 13) para 5.3.1, Option 2; Other, similar suggestions can be found for example in Art 13–15 IISD, *Model* (n 12); IISD, *Obligations* (n 14) 11–12.

138 See for example the emphasis on impact assessment obligations in IISD, *Obligations* (n 14) 11–12.

the domestic ones) depending on the respective jurisdiction within which they operate. This causes higher transaction costs and, potentially, greater legal uncertainty. Yet, states may also wish to avoid that direct obligations build on other international norms. In international trade law, it was for example a strategy of the USA to include self-construed labour standards in FTAs in order not having to refer to ILO Conventions and Declarations.[139] Original investor obligations could serve a similar agenda.

All in all, creating direct obligations anew offers flexible and context-sensitive solutions at the price that the IIA is not embedded in a broader frame of international standards.

VI. Applying domestic obligations in investment arbitration

The previous five Sections described techniques to create substantive direct obligations. As will be laid out in this Section, in the investment awards of *Perenco v Ecuador* and *Burlington v Ecuador*, a different approach featured that does not operate on the substantive level of international law at all: the applying of domestic investor obligations in investment arbitration. In these cases, states filed counterclaims on the ground that the investors had violated domestic law – without an IIA that elevated them into international obligations. These have led to the first successful awards against investors. This Section will explain this approach and the awards in more detail. It will show that applying domestic obligations in investment arbitration is functionally equivalent to creating a substantive international obligation. And it will lay out why this is currently the most promising approach for imposing direct obligations on investors.

1. Concept

To understand this concept, it is necessary to elaborate on how the applicable law in an investment arbitration is determined. It is a characteristic feature of arbitration that the disputing parties can decide on this question by consent in an arbitration agreement. As investors are no parties to IIAs,

139 See on this issue the in-depth analysis by P. Alston, '"Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15(3) European Journal of International Law 457, 479, 499–506 who distinguishes between the different generations of US FTAs.

their consent cannot follow from the IIA itself. Instead, one interprets the arbitration clause in the IIA to form a standing unilateral offer to arbitrate by the IIA's state parties. This offer is directed to foreign investors of the other state party's nationality. If investors file an arbitral claim with reference to this IIA, it implicitly covers their acceptance of the state's standing offer. This concludes the arbitration agreement. Its content is defined by the IIA's arbitration clause; hence, it incorporates the IIA's relevant provisions.[140] This means that the IIA defines which disputes the parties may bring before an investment tribunal and which law may apply.

The approaches vary between IIAs. Sometimes, an IIA enshrines a separate clause that explicitly defines the applicable law in an investment arbitration. Some arbitration clauses are narrow and exclude the application of any law other than the norms of the IIA. For example, Art. 14.D.3 USCMA[141] as well as Art 26 (1) Energy Charter Treaty[142] give a tribunal jurisdiction only for disputes regarding USMCA or Energy Charter Treaty violations, respectively. But there is a substantial number of IIAs that have a much broader arbitration clause. For example, China's Model BIT[143] contains a jurisdictional clause that covers '[a]ny legal dispute […] in connection with an investment […]'.[144] Such clauses also cover domestic investor obligations. What is more, Art 42 (1) ICSID Convention provides that the host state's domestic law is part of the applicable law in an ICSID arbitration as a residual rule.

If an investment tribunal has jurisdiction for disputes on domestic law, in principle, this may cover both domestic investor rights and obligations. In such a case, if the claimant fulfils all other jurisdiction and admissibility

140 This feature of international investment arbitration has been famously coined 'arbitration without privity' by Jan Paulsson, 'Arbitration Without Privity' (1995) 10(2) ICSID Review 232; on consent and its various forms see Dolzer and Schreuer (n 108) 254–260.

141 Agreement between the United States of America, the United Mexican States, and Canada (adopted 30 November 2018, revised 10 December 2019 by the Protocol of Amendment, entered into force 1 July 2020) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6008/download› accessed 7 December 2021 (USMCA).

142 n 59.

143 The text of the current third version of China's Model BIT, adopted in 1998 (a fourth, updated version has been subject to discussions for several years), can be found in a commented version in Wenhua Shan and Norah Gallagher, 'China' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (Oxford University Press 2013) 145–180.

144 ibid, 172.

requirements,[145] investment tribunals may adjudicate on counterclaims based on domestic obligations. This may include matters of the public interest such as domestic human rights, environmental obligations or workers' rights.[146]

Conceptually, it is important to distinguish this constellation from the elevation of domestic to international obligations discussed above.[147] Here, there is no international treaty provision that creates an international obligation of investors by referring to domestic law. It is only on a *procedural level* that the IIA confers on investment tribunals the jurisdiction to apply domestic law without changing these obligations' domestic legal nature. Notwithstanding, the analysis will point out that tribunals will often internationalise these domestic obligations in the course of the proceedings.

2. The Perenco v Ecuador and Burlington v Ecuador awards

Recent investment awards indicate rather well how applying domestic law in investment arbitration can bring about such an internationalising effect. The awards in question are the 2015 ICSID interim decision on the environmental counterclaim in *Perenco Ecuador Ltd. v Ecuador* (*Perenco v Ecuador*) and the 2017 ICSID award on Ecuador's counterclaim in *Burlington Resources Inc. v Ecuador* (*Burlington v Ecuador*). In both cases, the Tribunals applied Ecuadorian environmental law.

These two separate ICSID proceedings against Ecuador essentially derive from the same facts. The investors, Perenco Ecuador Ltd. (Perenco) and Burlington Resources Inc. (Burlington), were engaged as part of a consortium in the Ecuadorian oil industry in the Amazon region. They conducted the investment on the basis of the so-called production-sharing-contracts with the government. These contracts are a form of public-private-partnership undertaken in Ecuador after the country privatised the sector in 1993.[148] When in 2002 the world oil price increased substantially,

145 These will be laid out in more detail in Chapter 4.

146 Supported for example by Schreuer and Kriebaum (n 21) 1094–1095; Tarcisio Gazzini and Yannick Radi, 'Foreign Investment with a Human Face – with Special Reference to Rights of Indigenous Peoples' in Rainer Hofmann and Christian J Tams (eds), *International Investment Law and Its Others* (Nomos 2012) 93; Viñuales (n 57) 103.

147 See Chapter 3.IV.

148 *Perenco Ecuador Ltd. v The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Jurisdiction (30 June 2011) paras 1–14; *Burlington Resources Inc.*

Ecuador changed the agreed distributive scheme for the unexpected surpluses. The government considered that the natural resources' additional value should belong to the state. After the investors refused to pay and negotiations to amend the contract failed, Ecuador eventually seized the investments.[149] Both investors filed separate investment claims, Perenco contending violations of rights under the France-Ecuador-BIT[150] and the applicable investment contracts,[151] Burlington only breaches under the US-Ecuador-BIT.[152]

Key for the present purpose is the fact that in both proceedings Ecuador filed counterclaims for soil and groundwater pollution. The investors had allegedly caused it in the course of producing oil. Ecuador contended the violation of Ecuadorian law, claiming damages of USD 2.797.007.091 from Burlington[153] and USD 2.548.526.259 from Perenco.[154]

In *Burlington v Ecuador*, the Tribunal found Ecuadorian law applicable on the basis of an agreement between Ecuador and Burlington in 2011. In it, the parties agreed on the Tribunal's jurisdiction over the Ecuadorian counterclaims and that Ecuadorian law was applicable in the arbitra-

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v Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) paras 9–15; *Perenco Ecuador Ltd. v The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (12 September 2014) paras 62–80.

149 *Burlington v Ecuador*, Decision on Liability (n 148) paras 25–66; *Perenco v Ecuador*, Decision on Remaining Issues of Jurisdiction and on Liability (n 148) paras 81–214.

150 Accord entre le Gouvernement de la République française et le Gouvernement de la République de l'Équateur sur l'encouragement et la protection réciproques des investissements (adopted 7 September 1994, entered into force 10 June 1996, date of termination 23 May 2018) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1052/download› accessed 7 December 2021 (Ecuador-France BIT).

151 *Perenco v Ecuador*, Decision on Jurisdiction (n 148) paras 15–22.

152 Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (adopted 27 August 1993, entered into force 11 May 1997, date of termination 18 May 2018) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1065/download› accessed 7 December 2021 (Ecuador-US BIT).

153 *Burlington v Ecuador*, Decision on Counterclaims (n 18) para 52. In addition, Ecuador filed a contract claim on infrastructural damage caused by a lack of proper maintaining, which will be left aside in this analysis, see *Burlington v Ecuador*, Decision on Counterclaims (n 18) paras 890–1074.

154 *Perenco v Ecuador*, Interim Decision on the Environmental Counterclaim (n 19) para 36.

tion.[155] This conformed with the arbitration clause in Art VI (1) Ecuador-US-BIT. It conferred jurisdiction on the Tribunal by defining that

> […] an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to […] (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

In contrast, in *Perenco v Ecuador*, the Tribunal was less explicit on its reasons for applying Ecuadorian law.[156] Yet, the France-Ecuador-BIT also covers a broad jurisdiction clause that enabled the Tribunal to apply domestic law. To that end, Art 9 confers jurisdiction on an ICSID Tribunal for '[…] tout différend légal survenant entre cette Partie contractante et un national ou une société de l'autre Partie contractante à propos d'un investissement de ce dernier dans la première.'

In both proceedings, the parties disputed whether the investors were subject to strict- or fault-based liability rules for the causing of environmental damages. It was also contested which party had to bear the onus of proving pollution and causation. It was also controversial which domestic rules applied until 2008 under the applicable Ecuadorian Civil Law code. In addition, in 2008, Ecuador enacted a new Constitution which substantially changed the protection of the environment. The 2008 Constitution gave legal personality to nature itself (the *Pacha Mama*) and instituted a high standard of environmental protection covering fairly detailed provisions. This included that natural resources belonged to the state and a strict-liability system for environmental pollution.[157] The parties disagreed on how the 2008 Constitution related to the Ecuadorian statutory tort law regime for environmental harm. As most of the relevant investment activities had taken place before 2008, the retroactive application of the 2008 Constitution raised another concern. In addition, on a factual level,

155 *Burlington v Ecuador*, Decision on Counterclaims (n 18) paras 60–61, 71–72.

156 *Perenco v Ecuador*, Interim Decision on the Environmental Counterclaim (n 19) paras 36–55; cf 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, 485.

157 On the 2008 Constitution see *Perenco v Ecuador*, Interim Decision on the Environmental Counterclaim (n 19) paras 73–78; *Burlington v Ecuador*, Decision on Counterclaims (n 18) paras 195–216.

the parties were divided if and to which extent environmental and infrastructural damage was actually caused.[158]

The two Tribunals came to different conclusions in their decisions on the respective counterclaim. In its interim decision in *Perenco v Ecuador*, the Tribunal found Ecuadorian statutory law and standards 'as applied "on the ground"'[159] to be the relevant applicable standard.[160] However, the Tribunal did not reach a final decision. Instead, it first criticised the problematic independency and methodology of the parties' experts who were heard in the proceedings. On this basis, it observed that Perenco will likely be liable for environmental harm arising from some of its investment activities. Yet, it held that there was an insufficient factual basis for a final assessment of the issue. Instead, it appointed its own expert to investigate the matter – not without calling on the parties to come to an amicable solution; as the parties could not settle the matter, in 2019, the Tribunal finally ordered Perenco to pay USD 54.539.517 to Ecuador.[161]

The Tribunal in *Burlington v Ecuador* affirmed that the investor had polluted the environment and violated Ecuadorian law.[162] It found Burlington to be liable in the sum of USD 39.199.373.[163]

3. Investment arbitration's internationalising effect

How could such application of *domestic* law represent the setting and enforcing of an *international* direct obligation?

International law may, of course, come to play if the applicable domestic law itself contains norms of international law. That is the case if domestic law transformed or declared international law applicable, or adopts a monistic system.[164] But even more, also the application of purely domestic

158 See the submissions of the parties, summarised in *Perenco v Ecuador*, Interim Decision on the Environmental Counterclaim (n 19) paras 36–55; *Burlington v Ecuador*, Decision on Counterclaims (n 18) paras 52–57.

159 *Perenco v Ecuador*, Interim Decision on the Environmental Counterclaim (n 19) para 352.

160 ibid 321–352.

161 ibid 581–609; *Perenco Ecuador Ltd. v The Republic of Ecuador*, ICSID Case No. ARB/08/6, Award (27 September 2019) para 1023.

162 *Burlington v Ecuador*, Decision on Counterclaims (n 18) paras 234–247.

163 ibid 889.

164 Régis Bismuth, 'Customary Principles Regarding Public Contracts Concluded with Foreigners' in Mathias Audit and Stephan W Schill (eds), *Transnational Law of Public Contracts* (Bruylant 2016) 324; see also *Wena Hotels Limited v Arab*

obligations in an international investment arbitration can bring about, to a certain extent, an *international* standard for investor conduct. One may distinguish three reasons for its internationalising-effect that follow from the peculiarities of investment arbitration as an international adjudicatory proceeding: the joint application of domestic and international law (a), the interpretation of domestic law by an international investment tribunal (b) and the international enforcement of awards (c). As will be shown, the decisions in *Perenco v Ecuador* and *Burlington v Ecuador* represent good examples in this regard.

a) Joint application with international law

Domestic obligations may interact with international law which may change their content. It is not rare that domestic law is applicable in an investment arbitration *together* with international law – this is even the residual rule in ICSID arbitrations pursuant to Art 42 (1) ICSID Convention. If a Tribunal in certain parts of the decision resorts to international law and only in others to domestic law, this may alter the overall result of the legal analysis – juxtaposed to an isolated application of domestic law.

More specifically, domestic obligations may conflict with international law. Scholars and tribunals have extensively discussed this constellation. A prepondering approach accorded international law a corrective function.[165] Others argued that international law always prevails over conflicting domestic law.[166] While this is not the place to engage in this general discussion, it reflects how domestic obligations may change when applied in conjunction with international law in counterclaims.

Republic of Egypt, ICSID Case No. ARB/98/4, Decision (5 February 2002) para 42 in which the Ad-Hoc Committee stressed that Egyptian law contains '[…] a kind of *renvoi* to international law by the very law of the host State' (italics in the original).

165 See the overview in *Antoine Goetz et consorts v République du Burundi (Goetz I)*, ICSID Case No. ARB/95/3, Award (10 February 1999) para 97; Christoph Schreuer, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) Art 42 paras 214–235; for an example of a view that accords international law a corrective function see William M Reisman, 'The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold' (2000) 15(2) ICSID Review 362, 371–381.

166 Prosper Weil, 'The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Menage À Trois' (2000) 15(2) ICSID Review 401, 409.

The award in *Perenco v Ecuador* illustrates this well. The Tribunal indicated that a domestic environmental obligation of the investor could be subject to review if it conforms with the host state's international obligations. It stated that

> […] a State has wide latitude under international law to prescribe and adjust its environmental laws, standards and policies in response to changing views and a deeper understanding of the risks posed by various activities, including those of extractive industries such as oilfields. All of this is beyond any serious dispute and the Tribunal enters into this phase of the proceeding mindful of the fundamental imperatives of the protection of the environment in Ecuador.[167]

The statement seems to imply that the state's latitude – while being wide – has its limits, and that the Tribunal reserves itself to examine if the domestic obligation complies with international law. Notably, the Tribunal gave no relevance to the way the Ecuadorian legal system itself defines the hierarchy between domestic and international law.[168]

b) Interpretation by an investment tribunal

Second, investment tribunals may internationalise domestic obligations in the way they interpret them. International arbitrators work independently and decoupled from the host state's legal system. In the process of interpreting and applying domestic law, they can accord domestic obligations an 'autonomous' international meaning.

From a legal perspective, investment tribunals must endeavour to interpret domestic obligations in line with interpretive rules of the relevant domestic legal order, including relevant domestic case law.[169] On the other

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167 *Perenco v Ecuador*, Interim Decision on the Environmental Counterclaim (n 19) para 35.

168 Schreuer, *ICSID* (n 165) Art 42 para 200.

169 An international tribunal must seek to apply domestic law as understood in the respective domestic legal order, see *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France (France v Brazil)* (Judgment) [1929] PCIJ Rep Series A No 15, 124–125; *Case Concerning the Payment of Various Serbian Loans Issued in France (France v Yugoslavia)* (Judgment) [1929] PCIJ Rep Series A No 20, 46–47; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 53; affirmed in the context of international investment law for example by *Hussein Nuaman Soufraki v The*

hand, however, states created investment tribunals precisely to independently assess the host state's domestic law. This means that investment tribunals have a certain leeway in how they interpret applicable domestic law. They cannot be bound to blindly apply domestic law in line with domestic courts' decisions or the host state government's contentions.

What is more, every norm interpretation and application to concrete facts with at least some discretion entails the creating of a new, more specific norm.[170] From a sociological perspective, investment arbitration takes place in a different institutional and procedural setting than domestic adjudication. Tribunals may interpret the same norms differently than domestic courts. In most cases, international arbiters do not have the same background as national judges. Many tend to private commercial law or public international law approaches because of their professional experience.[171] Likewise, they have not been socialised in the respective host state legal system. Consequently, they do not experience the professional ties or integration into an epistemic community of domestic jurists. And they do not necessarily participate or picture themselves participating in a domestic discourse. This may affect the interpretive process already for epistemological reasons.

To what extent investment arbitration internationalises a domestic investor obligation in this sense depends on the methodology that the arbiters apply in engaging with domestic law. Some adopt a very self-restrained position that aims at reflecting an unchanged understanding of a domestic obligation as it is established in the respective legal system. Other

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United Arab Emirates, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki (5 June 2007) para 96; *Fraport AG Frankfurt Airport Services Worldwide v Republic of Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (23 December 2010) para 236; *Emmis International Holding, B.V. Emmis Radio Operating, B.V. MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v The Republic of Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014) para 175; Hepburn (n 128) 109–110.

170 Hans Kelsen, *Reine Rechtslehre* (Franz Deuticke 1934) 94–99 coins this the 'constitutive function' of the judicial decision.

171 Stephan W Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22(3) European Journal of International Law 875, 888. Generally on sociological insights on international investment law see Moshe Hirsch, 'The Sociology of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 144–148.

arbiters take the position that it is the purpose of investment tribunals to *control* domestic law. Comparisons to the use of domestic law in other questions of investment law come to mind. One may point, for example, to the much-discussed methodology of tribunals in interpreting and applying the FET standard.[172]

The proceedings in *Perenco v Ecuador* and *Burlington v Ecuador* illustrate the different interpretive approaches to domestic law. The Tribunal in *Perenco v Ecuador* interpreted the Ecuadorian constitution very autonomously.[173] It found that the new Ecuadorian Constitution protected the environment more stringently. Nevertheless, it chose not to derive a strict liability standard from it but to apply Ecuadorian statutory law. It held that this statutory law defined the environmental liability of companies more specifically and had been applied consistently without change after the new Ecuadorian Constitution came into effect.[174] It went on that the application of constitutional 'background values' cannot serve as applicable standards 'as a matter of law in an international arbitration', they could not 'be right as a matter of Ecuadorian law or international law' if in domestic practice the state consistently applied statutory regulation with a fault-based liability standard.[175] The Tribunal, thus, appears to have been guided by a diffuse standard of international law in interpreting the 'right' liability standard of Ecuadorian law.

The Tribunal in *Burlington v Ecuador* came to a very different interpretive conclusion. It held that the 2008 Ecuadorian Constitution introduced a strict liability scheme applicable from 2008 onwards.[176] Similarly to the Tribunal in *Perenco v Ecuador*, it rejected to accord retroactive effect to the Constitution.[177] Yet, the Tribunal found that already from at least 2002 until 2008, a strict-based liability regime had anyway been applied.

172 See on the role of domestic law in international investment arbitration in general the extensive analysis and differentiated conclusions in Hepburn (n 128); there specifically on the FET standard on 13–40; on the problem that internationalising the interpretation of domestic law can lead to contradictory decisions which may harm the coherence of a domestic legal system, see Shao (n 110) 175–178.

173 Harrison (n 156) 486–487.

174 *Perenco v Ecuador*, Interim Decision on the Environmental Counterclaim (n 19) paras 321–326.

175 ibid 348.

176 *Burlington v Ecuador*, Decision on Counterclaims (n 18) paras 225–232.

177 ibid 233.

It grounded this interpretation in Ecuadorian domestic jurisprudence[178] and explicitly mentioned that it understood the leading Ecuadorian cases differently than the Tribunal in *Perenco v Ecuador*.[179] In comparison, the Tribunal in *Burlington v Ecuador* shows a slightly more self-restrained approach by sticking more closely to the decisions of Ecuadorian courts.

Read in conjunction, the decisions' explicitly diverging interpretations show that to apply domestic law does not mean that its content is clear and predefined by a domestic legal system. Tribunals can exert substantial interpretive discretion. Practically speaking, this may lead tribunals to construing standards of conduct which are as autonomous as if they had applied an international obligation from the outset.

c) International enforcement

Investment arbitration further internationalises domestic obligations through the award's enforcement. If the counterclaim based on a domestic obligation is successful, the award against the investor is covered by the rules of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or (in case of an ICSID arbitration) the ICSID Convention. Neither the ICSID Convention nor the New York Convention are limited to awards against host states but also apply to awards against investors.[180]

At the time of writing, the New York Convention has 168 state parties. They are obliged to recognise and enforce foreign arbitral awards in their domestic legal system. Only under the narrow grounds of Art V of the New York Convention they may refuse to do so. ICSID awards enjoy an even more effective international enforcement. The currently 156 state

178 ibid 234–247 with reference to *Perenco v Ecuador*, Interim Decision on the Environmental Counterclaim (n 19) fn 881.

179 *Burlington v Ecuador*, Decision on Counterclaims (n 18) para 248.

180 For Art I New York Convention see Bernd Ehle, 'Article I' in Reinmar Wolff (ed), *New York Convention* (C.H. Beck 2012) paras 138–139; for Art 54 ICSID Convention see Schreuer, *ICSID* (n 165) Art 54 para 7; Meg Kinnear and Paul J Le Cannu, 'Concluding Remarks: ICSID and African States Leading International Investment Law Reform' (2019) 34(2) ICSID Review 542, 545; on a general level, in particular on possible obstacles accruing from a commercial reservation by a state under the New York Convention, see Amado, Kern and Rodriguez (n 101) 152–168; more specifically on the consequences of such a cross-border enforcement see Abel, 'Counterclaims' (n 26) 24.

parties of the ICSID Convention are under an international obligation to treat any ICSID award as a decision of a domestic court of the highest instance as stipulated in Art 53 and 54 ICSID Convention – hence must enforce them automatically without further ado. The only possible way of challenging an ICSID award is through the internationalised annulment procedure conducted by an international ad hoc-Committee pursuant to Art 52 ICSID Convention.

Therefore, through the arbitral award, the originally domestic obligation plays part in the international enforcement network. It potentially gives effect to the domestic obligation far beyond the host state's territory – flanked by international obligations of states that are party to the named conventions. Also in this sense, the obligation is thus internationalised.

4. Critique

Applying domestic obligations in investment arbitration shares some of the advantages that elevating domestic to substantive international obligations entails:[181] It is a sovereignty-friendly solution because only standards that the host state enacts in its domestic legal system are applied. This approach may also be more acceptable to many developed states which so far refuse to impose international obligations on enterprises.

Yet, again, it is suggested that an investment tribunal cannot apply domestic investor obligations without reservation but must review their compliance with the state's international investment obligations – a point that follows from the above-mentioned joint application of domestic and international law. Conversely, the degree of internationalisation depends on the doctrinal approach of the respective investment tribunal and may thus differ from case to case. How strong the obligation is internationalised only crystallises in the process of its interpretation and application in the arbitration proceedings and the enforcement stage.

On the other hand, the greatest appeal of applying domestic obligations in investment arbitration is that it currently has a much broader potential scope of application than the other presented approaches. It has already been pointed out that many IIAs provide jurisdiction to apply domestic law. They may, therefore, be particularly prone to apply domestic obliga-

181 See Chapter 3.IV.4.

tions in investment arbitration, subject to fulfilling all other jurisdiction and admissibility requirements.[182]

VII. A nascent doctrine of direct obligations

After the previous six Sections have shed light on different methods of creating direct obligations, this Section will bring these insights together.

The various analysed techniques allow to identify an emerging doctrine of direct obligations in investment law (1.). They prompt two questions about the right construction of the obligations encountered in the analysis. First, who is the bearer of the obligation? It is submitted that the analysed IIA provisions constitute directly applicable obligations in line with this Part's initial hypothesis. Alternative constructions must be rejected, such as to understand them as obligations between the host and the home state (2.). Second, one may ask: To whom do investors owe these obligations? Surprisingly, thus far the investment practice has not reflected on this aspect. It is most convincing to consider the host state as the relevant counterpart (3.). Finally, after having crystallised the shape of the new direct obligations, this Section will discuss how they interact with investor rights. It will show that especially MFN rights bear the risk of undermining them – even though it is more appropriate to interpret them as being compatible (4.).

1. Emerging direct obligations from plural sources

From the rich material studied in the last Sections, one may conclude that direct obligations have emerged in the last years in investment law – not only in the form of important reform suggestions, but even in first existing IIAs and arbitral awards. Although, overall, the relevant IIAs are little in numbers compared to the more than 3000 existing IIAs and despite the fact that most states remain reluctant to adopt binding investor obligations in new IIAs, they do reflect a new qualitative approach. They find support

182 For a full analysis of jurisdiction and admissibility requirements of counterclaims see below Chapter 4. For a criticism that points to states 'becoming increasingly defensive of their domestic jurisdiction over domestic legal issues' see Shao (n 110) 165–168.

not only with developing countries and some developed states but also with important institutions such as UNCTAD.

Moreover, the five awards in *Al-Warraq v Indonesia*, *Aven v Costa Rica*, *Urbaser v Argentina*, *Burlington v Ecuador* and *Perenco v Ecuador* outline that there is a development that goes beyond the creation of new IIAs. These decisions are based on 'conventional' BITs, including treaties to which developed countries are parties, too, namely the US-Argentina BIT, the CAFTA-DR, the US-Ecuador-BIT and the France-Ecuador-BIT.[183] In addition, the new 2019 Netherlands Model BIT contains direct obligations based on domestic obligations enacted in the home and the host state (however, without a possibility to enforce them via ISDS against investors). Thus, they show that there is a basis for integrating direct obligations into already-existing IIAs.

Although the first three mentioned awards eventually dismissed the counterclaims, they contain quite far-reaching reasoning that accepts direct obligations in broad terms. The last two cases, *Burlington v Ecuador* and *Perenco v Ecuador*, even see, for the first time in the history of investment arbitration, investment tribunals awarding damages to a state because the respective investors polluted the environment.

This practice has already developed to a degree that it was possible to systematise the obligations along different techniques for their creation. Each identified approach comes with own advantages and disadvantages. Surely, they differ in the degree they may already be applied under existing IIAs. In international law's present state, solutions that base on domestic obligations are easier to achieve. It is likely that more states support them because they are comparatively sovereignty-friendly.[184]

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183 *Al-Warraq v Indonesia*, Final Award (n 15) forms the exception because it follows from a claim based on the OIC Investment Agreement. cf with the decision of the UNCITRAL Working Group III on the reform of ISDS to 'consider formulating provisions on investor obligations' in IIAs, 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 41.

184 cf the observation of increasingly extensive domestic due diligence obligations of corporations by Eric de Brabandere and Maryse Hazelzet, *Corporate Responsibility and Human Rights – Navigating Between International, Domestic and Self-Regulation* (Grotius Centre Working Paper 2017/056-HRL) 15–19; cf the analysis of plural 'anchors' and 'entry points' in IIAs for investor diligence in investment law by Jorge E. Viñuales, 'Investor Diligence in Investment Arbitration: Sources and Arguments' (2017) 32(2) ICSID Review 346, 351, 355, 367 which follow a similar systematic approach as the findings of this chapter.

2. Construction as directly applicable norms

To identify emerging direct obligations is all the more intriguing if one takes account of the fact that the individual character of investor *rights* remains contested in investment law scholarship. Some argue that these are substantive rights of the home state, only procedurally enforceable by the investor against the host state.[185] One could question the nature of direct obligations in the same manner. Yet, the present findings on obligations strongly indicate that investor obligations must be understood as international norms directly applicable to investors. The two alternative constructions are inadequate, namely: investor obligations as limitations of investor rights (a) and investor obligations as disguised inter-state obligations (b).

a) Limitations of investor rights' scope?

One could argue that the analysed IIA clauses indicative of direct obligations were just a way of simplifying treaty provisions on investor *rights*. Then, one would understand these provisions as only elaborating on investor rights' scope, functionally similar to limitation or justification clauses.

As an example, one may take a provision which prohibits foreign investors to engage in bribery. Following the presented alternative construction, this clause was a way of expressing that the host state did not owe investment protection to foreign investors who have committed bribery. In other words: a corrupt investor could not invoke an investor right like the protection against expropriation against the host state's misconduct.[186]

However, such an interpretation would fall short of reflecting the true extent of the encountered obligations. All of them express a self-standing norm that require foreign investors to act or abstain from acting in a certain manner. Importantly, in most cases the respective IIAs also allowed to bring claims on the basis of these obligations against the investor.

185 For this position see for example *The Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003) para 233; sympathetic is also Eric de Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge University Press 2015) 63–67.

186 cf the similar arguments against directly applicable duties in human rights law in Chapter 2.IV.

Conversely, these provisions must have been meant as true obligations and not as a way of circumscribing investor rights' scope.

b) Inter-state obligations?

If one agrees on the presence of obligations, in a second step, one could put the obligations' addressee in doubt – and contend that they do not constitute obligations of foreign investors, but rather obligations of the *states*.

(1) Obligations of the host state

In this view, one could understand the IIA clauses analysed throughout Chapter 3 as obligations of the host states to enact and enforce domestic legislation to protect the public interest. Following this construction, the above-mentioned anti-bribery clause would constitute an obligation of the host state to enact and enforce domestic anti-bribery laws against foreign investors on its territory.

However, also this interpretation is at odds with the provisions' envisaged role and functioning. As seen, states create them to hold foreign investors accountable for *their* misconduct towards the public interest. Again, one must consider the possibility for the host state to file a counterclaim before domestic courts or investment tribunals based on the violation of these obligations. How should a host state file such a motion if it is the host state itself that is the real addressee of these obligations? Therefore, construing the international obligations as targeting the host state leads to paradoxical and uncompelling results.

(2) Obligations of the home state

Alternatively, one may argue that what seem to be investor obligations are in reality obligations of the foreign investor's *home* state. This line of argument resonates in the complementary discussion on the nature of international investor rights in IIAs. As seen, discussions continue on the

fundamental question if IIAs grant individual rights to foreign investors.[187] Some understand IIAs to only create obligations and rights between the host and the home state. In this view investors represent their home state before investment tribunals only in a procedural capacity.[188] The distinction between these two approaches is not only theoretical but has practical consequences on issues such as the investor's ability to consent to violations or the doctrine of necessity.[189]

Naturally, supporters of the inter-state model will also be hesitant to recognise the concept of direct obligations in IIAs. If one extends their inter-state logic to the encountered obligations, it seems that one would have to understand them as obligations of the home state. Then, it would also be the home state *in the person of the investor of its nationality* which violates an obligation owed to the host state. To take the above-mentioned example: An IIA clause that prohibits investors from engaging in bribery would have to be interpreted as an obligation of the home state to ensure that the foreign investor of its nationality does not engage in such deeds in the territory of the host state. If the investor committed such acts, the home state would be in breach of this obligation.

But this construction is not compelling either. It is not very likely that states would agree to define their own international obligations as dependent on the actions of a private actor outside of their control. Such a construction would be tantamount to a rule that attributes all actions of investors to their home state on the mere basis of nationality. The home

187 Supported for example by *Corn Products International, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (15 January 2008) paras 167–169; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility (UNCITRAL, 30 November 2009) para 551; 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), 95; Douglas (n 127) 183; Kate Parlett, 'The Individual and Structural Change in the International Legal System' (2012) 1(3) Cambridge Journal of International and Comparative Law 60, 69; Peters (n 40) 317.

188 *Loewen v USA* (n 185) para 233; sympathetic is also Brabandere (n 185) 63–67.

189 For a general discussion of these different models see for example Douglas (n 127) 160–184; on the consequences and implications for international responsibility see Martins Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24(2) European Journal of International Law 617, 621–647; Yun-I Kim, 'Investment Law and the Individual' in Marc Bungenberg and others (eds), International Investment Law (Nomos 2015) paras 15–69.

state could be held responsible for extraterritorial actions without even having effective or overall control over the foreign investor – and even the details of these thresholds for attribution of non-state actors' conduct remain controversial in general international law on state responsibility.[190]

In other words, it is significantly harder to construe a state obligation that draws on foreign investors' behaviour than an international right. The former would bring about the home state's international responsibility for conduct outside of its territory. Only the construction of directly applicable investor obligations accurately describes the phenomena encountered in Chapter 3. The Tribunals in *Al-Warraq v Indonesia* and in *Urbaser v Argentina* have explicitly affirmed this.[191]

3. Direct obligations owed to whom?

However, these observations only clarify the bearers of the direct obligations. In turn, it is necessary to appreciate *to whom* investors owe these obligations.[192] Whereas domestic company law traditionally understands corporations as trustees of their shareholders, the matter is different in the present context on obligations towards the public interest. For example, in human rights law, for a long time it has been controversial if human rights obligations should be construed so that the private actor owes them vertically to the state (a concept of fundamental duties[193]) or whether private actors could owe them horizontally to other private actors.[194]

Astonishingly, the material investigated in Chapter 3 does not address this question at all, that is: if the investor owes direct obligations for example to the local population, employees and consumers, or to the host state where it operates. The focus appears to lie on imposing the international obligation on foreign investors as an extraordinary new feature in

190 See only Art 8 ILC 'Articles on State Responsibility with Commentaries' (n 187); James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 141–165.

191 *Al-Warraq v Indonesia*, Final Award (n 15) para 663; *Urbaser v Argentina*, Award (n 17) paras 1193–1195.

192 cf Amado, Kern and Rodriguez (n 101) 125–126.

193 Christian Tomuschat, 'Grundpflichten des Individuums nach Völkerrecht' (1983) 21(3) Archiv des Völkerrechts 289, 302–313; Peters (n 40) 110–113.

194 Distinguished as converse and correlative duties by John H Knox, 'Horizontal Human Rights Law' (2008) 102(1) American Journal of International Law 1, 2; see also Peters (n 40) 99–113.

investment law – without elaborating on the other party that forms part of the legal relationship any obligation brings about.

One could consider that foreign investors owe their obligations to other private actors. In counterclaims, the host state would then make use of a procedural right granted in the IIA to represent these private actors.[195] Direct obligations which draw on other existing norms appear to favour this perspective: those building on international obligations of states, on domestic law and on CSR norms. These norms themselves define between whom they apply. Some construe a relationship between private actors such as, for example, the prohibition to commit international crimes. In the case of domestic law, it depends on the underlying type of obligation, for example if it stems from administrative or civil law.

However, it is more compelling to construe direct obligations as generally owed by the investor to the host state.[196] As IIAs grant investor rights against the host state, it follows investment law's logics to complement this legal relationship with direct obligations. In addition, the role of counterclaims points to a construction in which host states enforce an own right against the investors. Furthermore, in the case of direct obligations that protect public goods such as the environment and the rule of law, it is the only feasible concept – as there is no identifiable individual that may be harmed. But the obligations encountered in Chapter 3 make no difference in their functioning as to which good or interest is protected. Thus, consistency favours applying the same construction for obligations which directly affect third parties and others that protect a public good.

4. Investor rights as challenges for direct obligations

Having established that investment law has given rise to direct obligations of investors owed to the host state, the analysis will now turn to their interaction with investor rights. Of course, direct obligations do not operate in a vacuum. They impair foreign investors' freedom. As a corollary, they may trigger protection enshrined in international human rights (a) as well as MFN- and national treatment rights of investors (b). Especially MFN

195 This corresponds in different facets to the direct claims II and the espousel ('reverse diplomatic protection') models proposed by Amado, Kern and Rodriguez (n 101) 23–24, 42–54.

196 This corresponds to direct claims model III proposed by ibid, 24.

obligations may endanger direct obligations' effectiveness even though it will be shown that, rightly interpreted, they do not contradict another.

a) Human rights of the investor

Direct obligations encroach on foreign investors' international human right to property. Provisions found in regional human rights treaties, such as Art 1 of Protocol I to the ECHR, Art 21 ACHR and Art 14 AfrCHPR, protect this right for natural and private legal persons[197] alike. It cannot make a difference if the state limits this freedom by imposing domestic or international obligations.

However, this observation hardly limits direct obligations' effect. It is well established that encroachments on human rights can be justified. Importantly, all cited regional human rights treaties explicitly allow to limit the freedom of property to protect the 'general interest',[198] the 'interest of society'[199] or the 'interest of public need or […] the general interest of the community',[200] respectively. If the state conforms with the requirements for such a justification such as the principle of proportionality,[201] international human rights do not contradict investment law's new direct obligations but can be interpreted in harmony.[202]

197 For Additional Protocol I to the ECHR, this follows from Art 34 ECHR, for the ACHR from its Art 21. If corporations have human rights under the Banjul Charter is more controversial. Its Art 2 points to individuals as bearers of human rights as a general principle, but the subsequent specific human rights entail also rights of peoples. The question of the personal scope of protection is hard to clarify because persons have locus standi before the African Commission on Human and People's Rights and the African Court of Human and People's Rights even if they do not claim a violation in their own right, see Frans Viljoen, 'Communications Under the African Charter: Procedure and Admissibility' 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) 102–105.

198 Art 1 (2) ECHR.

199 Art 21 (1) ACHR.

200 Art 14 (1) AfrCHPR.

201 On the condition of proportionality see only Olivier D Schutter, *International Human Rights Law: Cases, Materials, Commentary* (2nd edn, Cambridge University Press 2014) 368–380.

202 The relevant interpretive technique is systemic interpretation as enshrined in Art 31 (3) (c) VCLT, discussed above in Chapter 3.I.2.b).

b) MFN- and national treatment rights of the investor

Similar to human rights, national treatment clauses in IIAs most likely do not conflict with direct obligations. One may argue that investors are not treated like national entrepreneurs because only the former face international and domestic obligations. However, one can at least justify such unlike treatment on the basis that foreign investors and national entrepreneurs are not comparable: Foreign investors receive international rights that national entrepreneurs do not have. Considering these international rights and obligations together, the IIA does not leave the investor worse off than national corporations. One may say, therefore, that there is no competitive disadvantage – the central concern that national treatment and MFN rights aim to prevent.[203]

Although they serve a similar purpose, MFN rights are more problematic. Investors may challenge direct obligations by arguing that the host state treats investors of a different nationality more favourably when they are protected by a different IIA not containing any such obligations. In other words: One could say that IIAs without direct obligations necessarily provide more favourable treatment than IIAs with direct obligations. If that were true, the investor could demand the same treatment, effectively negating direct obligations entirely. Consequently, direct obligations could only enter into effect after the host state has included them in all of its IIAs in force. Then, MFN rights would cause an opposite effect on obligations compared to their multilateralisation of investor rights identified by *Schill*.[204]

Indeed, in the case of MFN rights, it is harder to argue against a competitive disadvantage of the investor who is subject to direct obligations. What is more, arbitral tribunals have interpreted MFN obligations broadly in the past, for example as even covering arbitration clauses[205] – an argument that could be extended to direct obligations.

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203 Dolzer and Schreuer (n 108) 198–199, 206–207.

204 Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 121–196.

205 Affirming the application of MFN-obligations to arbitration clauses *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decisión del Tribunal sobre Excepciones a la Jurisdicción (25 January 2000) para 64; *Siemens A.G. v The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004) paras 94–110; *Gas Natural SDG, S.A. v The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions of Jurisdiction (17 June 2005) paras 24–31, 41–49; *Suez,*

However, it is more compelling to deny such a drastic conflict between direct obligations and MFN rights. As both norms form part of the same IIA, Art 31 (1) VCLT requires them to be interpreted in a systematically consistent way. It would run counter to the purpose of direct obligations in a bi- or plurilateral IIA if they would only have effect if contained in all other IIAs of the host state.[206] There is nothing in the wording or purpose of clauses on direct obligations which justifies treating them differently to other IIA provisions – which always reflect a special agreement reached between the parties applicable only *inter se*. What is more, it is too formalistic to understand the inclusion of investor obligations as automatically providing less favourable treatment. Rather, they represent a different *modus* of addressing foreign investors actions. The actual degree of protection granted to the investor by an IIA – the investor's treatment – depends on how one interprets and applies them to the specific facts of a dispute.

Notwithstanding, also because general doctrinal discussions on MFN clauses remain unsettled in many regards,[207] there is a risk that tribunals

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Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v The Argentine Republic, ICSID Case No. ARB/03/19, Decision on Jurisdiction (3 August 2006) paras 52–68; *National Grid PLC v The Argentine Republic*, Decision on Jurisdiction (UNCITRAL, 20 June 2006) paras 79–93; *Impregilo S.p.A. v Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011) paras 79–109; *Hochtief AG v The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011) paras 58–100; rejecting the application of MFN-obligations to arbitration clauses *Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (15 November 2004) paras 102–119; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005) paras 183–227; *Telenor Mobile Communications A.S. v The Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006) paras 90–101; *Vladimir Berschader and Moïse Berschader v The Russian Federation*, SCC Case No 080/2004, Award (21 April 2006) paras 159–208; *Señor Tza Yap Shum v La República del Perú*, ICSID Case No. ARB/07/6, Decisión sobre Jurisdicción y Competencia (19 June 2009) paras 193–220; *Austrian Airlines v The Slovak Republic*, Final Award (UNCITRAL, 9 October 2009) paras 124–140; generally on this controversy see for example Martins Paparinskis, 'MFN Clauses and International Dispute Settlement: Moving Beyond Maffezini and Plama?' (2011) 26(2) ICSID Review 14; Dolzer and Schreuer (n 108) 270–275.

206 On the relation of MFN-clauses and specific arrangements between states see Dolzer and Schreuer (n 108) 207. Similar arguments caused investment tribunals to reject the application of MFN-clauses to the scope of arbitration clauses, see for example *Tza Yap Shum v Peru* (n 205) para 220.

207 Dolzer and Schreuer (n 108) 211–212.

may interpret them in a manner undermining the newly created direct obligations. Therefore, states are best-advised to clarify the respective clauses in IIAs and to revise pre-existing IIAs accordingly.