

Investor Obligations for Human Rights

Introduction

The winds of change have clearly blown onto investment treaties as reform has become the ‘mot du jour’ when discussing these treaties. UNCITRAL, ICSID, and the OECD, among others, are now devoting significant efforts to reforming and reworking international investment treaties.¹ However, for the most part, reform efforts are confined to the procedural elements of the treaties only, not on the substantive elements.²

This is somewhat surprising given that there has been considerable notice that IIAs suffer from asymmetries stemming from their substantive provisions.³ These asymmetries arise because the substantive content of IIAs is primarily devoted to outlining the standards of treatment host states must accord to foreign investors, without imposing corresponding obligations on investors. As a result, IIAs protect investors’ rights, including their human rights,⁴ but are silent when investors impinge on the rights, including the human rights, of a state’s nationals.

At the same time, globally, there has been a populist rise against globalization, which, in part, is directed as a backlash against the power of the might of the corporation. Discontent with globalization has contributed to fostering a general sentiment that businesses owe responsibilities to society that are ill defined by the law. Such responsibilities include paying fair taxes, not acting corruptly, and not damaging or destroying human rights or the environment, among others.⁵ In some of these areas, a host of norms have begun to crystallize which better define these responsibilities, particularly in relation to business responsibilities for human rights. While such responsibilities are couched mainly in soft law at the international level, these responsibilities are gradually being hardened and are beginning to define societal expectations of business vis-à-vis human rights. Given these developments, IIAs are seemingly now at odds with contemporary practice defining business responsibility in these areas.

One way to correct both some of the inherent asymmetries of IIAs and the misalignment between IIA practice and contemporary practice for business responsibility for human rights is to reform the substantive provisions of IIAs to include provisions on investor obligations for human rights. These provisions could be used to help IIAs better align with societal expectations of business as well as work towards contextualizing other IIA provisions to ensure these provisions are interpreted in a more balanced manner. Indeed, there are several developments that suggest that states and tribunals are gradually beginning to see the merit in this approach.

This article argues that reform of IIAs is incomplete without recognizing that investors should have human rights obligations as well. It makes this argument in six parts. In Part I, it discusses the growing societal awareness of the need for corporate responsibility. In particular, it focuses on the emerging norm of corporate responsibility for human rights and how it is shaping the business and human rights movement. Part II then moves to explore the existing

¹ UNCITRAL, *Possible reform of investor-State dispute settlement (ISDS) - Note by the Secretariat*, A/CN.9/WG.III/WP.149 (5 Sept 2018); ICSID, *Proposals for Amendment of the ICSID Rules — Working Paper* (2 Aug 2018); OECD, *Investment Treaties: The Quest for Balance – Summary* (14 Mar 2016).

² See e.g. the work of UNCITRAL (n 1) and ICSID (n 1).

³ Frank J. Garcia et al., ‘Reforming the International Investment Regime: Lessons from International Trade Law’ (2015) 18:4 JIEL 861, 869; Zeng Huaqun, ‘Balance, Sustainable Development and Integration: Innovative Path for BIT Practice’ (2014) 17 JIEL 299, 308.

⁴ See e.g. *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Award (15 Dec 2014).

⁵ See generally Barnali Choudhury & Martin Petrin, *Corporate Duties to the Public* (CUP, 2019).

relationship between international investment law and human rights. It finds that international investment law has, for the most part, been reluctant to include human rights issues within its ambit despite the many impacts foreign investment has had on human rights. On this basis, it concludes that international investment law does not align with the progress in the business and human rights arena. In Part III, the article explores existing investor obligations in IIAs, focusing on both treaty and non-treaty sources of these obligations. Part IV then moves to examine entrypoints for including investor obligations in international investment law while Part V discusses the broader values of including investor obligations in IIAs. Part VI concludes.

I. Businesses and the Social Licence to Operate

Public trust in business is declining.⁶ This is a result of, for example, businesses avoiding paying tax, such as Starbucks paying only minimal tax in the U.K.;⁷ engaging in corruption, such as Siemens paying 1.6 billion in bribes or Petrobras diverting bribed funds to fund electoral campaigns;⁸ and destroying the environment, such as BP's Deepwater Horizon spill.⁹ In part, this outrage stems from corporate abuses impeding the 'licence' that exists between society and business allowing them to operate.¹⁰ As even businesses are slowly beginning to realize, failing to consider public issues may ultimately result in businesses losing the licence given to them by society to operate.¹¹

One particular area in which the social licence to operate has been giving rise to norms dictating corporate responsibilities is in relation to human rights. As the UN Special Rapporteur on Business and Human Rights has observed, businesses have a 'baseline responsibility to respect human rights', a responsibility which is defined by social expectations or the 'social licence to operate'.¹²

The idea that businesses should respect human rights has now become a well-defined global expectation. It arises from a long history of international initiatives attempting to articulate global norms for business responsibility for human rights¹³ and is espoused most definitively in the *UN Guiding Principles for Business and Human Rights* (UNGPs).¹⁴ Since the promulgation of the UNGPs, the norm has been reflected in international initiatives such as the UN Global Compact and the OECD Guidelines for Multinational Enterprises;¹⁵ in the

⁶ Edelman, '2018 Edelman Trust Barometer Global Report' (2018) 38, 43; Eduardo Porter, 'The Spreading Scourge of Corporate Corruption', *New York Times* (New York, 10 July 2012).

⁷ Simon Neville and agencies, 'Starbucks "pays £8.6m tax on £3bn sales"', *The Guardian* (London, 15 October 2012); Madison Marriage, 'Starbucks' European unit paid 2.8% UK tax last year', *Financial Times* (London, 18 Sept 2018).

⁸ Hartmut Berghoff, 'Organised irresponsibility'? The Siemens corruption scandal of the 1990s and 2000s' (2018) 60:3 *Business History* 423; Jonathan Watts, 'Operation Car Wash: Is this the biggest corruption scandal in history?', *The Guardian* (London, 1 Jun 2017).

⁹ Paul Courson, 'Public perception of BP affected spill response, Allen says,' *CNN* (Washington, 28 Sept 2010).

¹⁰ Alexander Dahlsrud, 'How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions' (2008) 15 *Corp. Soc. Responsible Environmental Management* 1.

¹¹ Andrew R. Sorkin, 'BlackRock's message: contribute to society, or risk losing our support,' *New York Times* (New York, 15 Jan. 2018).

¹² UN Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights – Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie, U.N. Doc. A/HRC/8/5 (7 April 2008), para. 54.

¹³ See, e.g., ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1978) 17 I.L.M. 422; Commission on Transnational Corporations, *Draft United Nations Code of Conduct on Transnational Corporations* (1983), art. 13.

¹⁴ UN Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, HR/PUB/11/04 (2011), Guiding Principle 11.

¹⁵ UN Global Compact (1999); OECD Guidelines for Multinational Enterprises (2000).

lending documents of international financial institutions;¹⁶ in several states' domestic laws;¹⁷ and in the proposed Business and Human Rights Treaty.¹⁸

The UNGPs define the corporate responsibility to respect as entailing businesses refraining from infringing on the human rights of others, addressing adverse human rights impacts,¹⁹ refraining from causing or contributing to adverse human rights impacts, and preventing or mitigating operations-related adverse human rights impacts by engaging in human rights due diligence.²⁰ Moreover, the UN Office of High Commission on Human Rights has explained that the corporate responsibility to respect human rights is not voluntary, despite not being a legal obligation, but rather 'a global expectation of all companies'.²¹

The corporate responsibility to respect human rights has therefore evolved, at best, into a global norm, and, at least, a global expectation. In either case, society is no longer prepared to view corporate action that harms human rights as 'business as usual'.

II. IIAs and Human Rights

While the business and human rights movement has been shaping global expectations of corporate conduct vis-à-vis human rights, international investment law has been, for the most part, quiet on this issue. In part, this may be because international law tends to view human rights as being the primary purview of states, a view that has been replicated in IIAs.²² To be sure, human rights obligations, whether articulated in treaty, custom, or general principles, are generally directed at states and it is states who bear the obligation to respect, protect, and fulfil these human rights obligations.²³ International law therefore would suggest that foreign investors or corporations are not *directly* responsible for international human rights obligations.²⁴ Yet, as part of their obligation to protect, states have a duty to prevent corporations and other non-state actors from violating human rights and for providing remedies when those preventative measures fail.²⁵ Thus, while eschewing direct responsibilities for

¹⁶ See e.g., European Investment Bank, *Environmental and Social Handbook* (2013); IFC, 'International Finance Corporation's Policy on Environmental and Social Sustainability' (1 Jan 2012).

¹⁷ See e.g., Assemblée Nationale, *Proposition De Loi Relative Au Devoir De Vigilance Des Sociétés Mères Et Des Entreprises Donneuses D'ordre* (21 Feb 2017); Swiss Coalition for Corporate Justice, 'The Initiative' (2015).

¹⁸ *Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises*, OEIGWG Chairmanship Revised Draft (July 2019). This international treaty, currently being negotiated, would impose binding legal obligations on transnational corporations for breaches of human rights. See also Part V(A), below.

¹⁹ UN Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, HR/PUB/11/04 (2011), Guiding Principle 11.

²⁰ *ibid* Guiding Principle 13.

²¹ UN Human Rights Office of the High Commissioner, 'Frequently Asked Questions about The Guiding Principles on Business and Human Rights' (2014), 9. The UN stipulates that this responsibility can be enforced through domestic law, binding contractual commitments, and in the 'court of public opinion'.

²² UN Human Rights Council, *Resolution 8/7 - Mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/Res/8/7 (18 June 2008)

²³ Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary: Second Edition* (CUP, 2014), 280

²⁴ UN Human Rights Committee, *General Comment No. 31[80] - Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 8.

²⁵ *ibid*; de Schutter (n 23) 436.

corporations and foreign investors, international law supports state measures, such as in IIAs, that ensure private actors do not violate human rights obligations.²⁶

However, despite this support in international law, IIAs have tended not to include human rights issues within their ambit, in part, because international investment and international human rights law are often viewed as disparate areas of the law.²⁷ This has enabled international investment law to develop as a self-contained regime, adopting *lex specialis* to determine its own control mechanisms to ensure the application of its norms, and with a propensity to negate or downplay other international law norms – such as human rights – that belong to the general international legal order.²⁸

The fragmentation of international investment law from international law has resulted in IIAs posing a special challenge to the business and human rights problem. As the UN Special Rapporteur on Business and Human Rights has observed, the expanding legal rights of firms and foreign investors have created ‘instances of imbalances between firms and States that may be detrimental to human rights’ since IIAs enable ‘investors to take host States to binding international arbitration...for...damages resulting from...legislation to improve domestic social and environmental standards’.²⁹

There are numerous examples of the ‘instances of imbalances’ that are detrimental to human rights to which the Special Rapporteur alludes. Investors have used investment arbitration to challenge a state’s racial discrimination redress policies;³⁰ measures used to address the human rights implications arising out of a financial crisis;³¹ measures designed to ensure citizens’ right to water;³² measures used to reduce citizens’ tobacco consumption;³³ measures designed to protect indigenous rights;³⁴ measures intended to protect cultural rights;³⁵

²⁶ See e.g., UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’, UN Doc E/C.12/GC/24 (10 August 2017), para 14; UN Committee on Economic, Social and Cultural Rights, ‘Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights’, UN Doc. E/C.12/2011/1 (20 May 2011), para 5.

²⁷ Pierre-Marie Dupuy, ‘Unification Rather Than Fragmentation of International Law?: The Case of International Investment Law and Human Rights Law’, in Pierre-Marie Dupuy et al.(eds), *Human Rights in International Investment Law and Arbitration* (OUP, 2009) 46.

²⁸ Pierre-Marie Dupuy, ‘A Doctrinal Debate in the Globalisation Era: On the ‘Fragmentation’ of International Law’ (2007) 1 *European J of Legal Studies* 1; International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 58th Sess., U.N. Doc. A/61/10 (2007).

²⁹ UN Human Rights Council (n 22) para. 12.

³⁰ *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award (2010).

³¹ See, e.g., *El Paso Energy International Company v. The Argentine Republic*, Award, ICSID Case No. ARB/03/15, para. 665 (31 Oct 2011); *BG Group Plc. v. The Republic of Argentina*, Final Award, UNCITRAL, para. 59 (24 Dec 2007); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, Decision on Liability, ICSID Case No. ARB/02/1 (3 Oct 2006).

³² See, e.g., *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, Award, ICSID Case No. ARB/07/26 (8 Dec 2016); *SAUR International SA v Argentine Republic*, Decision on Jurisdiction and Liability, ICSID Case No ARB/04/4, para. 330 (6 Jun 2012); *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. and The Argentine Republic*, ICSID Case No. ARB/03/19; *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic*, ICSID Case No ARB/03/17, Decision on Liability (30 July 2010).

³³ *Philip Morris Brands Sàrl, et al. v. Uruguay*, Award, ICSID Case No. ARB/10/7 (8 July 2016); *Philip Morris Asia Limited v. The Commonwealth of Australia*, Award on Jurisdiction and Admissibility, UNCITRAL, PCA Case No. 2012-12, (17 Dec 2015).

³⁴ *Glamis Gold, Ltd. v. United States of America*, Award, (8 June 2009); *Bear Creek Mining Corporation v. Republic of Peru*, Award, ICSID Case No. ARB/14/2, (30 Nov 2017)

³⁵ *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, ICSID Case No. ARB/05/8 (11 Sept 2007)

and measures designed to protect public health.³⁶ Investors have also relied on investment arbitration to challenge state environmental measures.³⁷

The effect of these investment arbitrations on human rights is myriad. For instance, they have forced states to choose between their investment treaty commitments and their human rights commitments. As one tribunal has noted, states' human rights and investment treaty obligations are not 'mutually exclusive' therefore they must respect both sets of obligations.³⁸ Yet when states are confronted with new situations – such as in a financial crisis or upon becoming aware of a new health peril – it may need to enact new regulations which can impede investors' rights. In these instances, states must choose whether to regulate to protect human rights or interfere with investors' rights and risk an adverse, and often costly, arbitral award.

In addition, investment arbitrations challenging state measures designed to protect human rights may be problematic for human rights even if the investment arbitration is never initiated. Rather, the 'threat' of an investment arbitration may be sufficient to deter states from enacting public interest regulations.³⁹ Known as 'regulatory chill', there have been several known instances of states either delaying or failing to enact public interest regulation in order to prevent investment arbitrations. For instance, New Zealand delayed the introduction of its tobacco plain packaging laws until Philip Morris' arbitration on the same issue with Australia was decided,⁴⁰ while Indonesia prevented its new environmental laws banning open pit mining from applying to foreign investors when the investors threatened investment arbitration.⁴¹

Moreover, investment arbitrations challenging human rights measures may be problematic in instances when the investment arbitration is used as a shield rather than a sword. That is, unlike regulatory chill, where the threat of an investment arbitration thwarts governmental practice, the investor uses investment arbitration as a strategy to delay or discourage regulation either in the defendant state or in a third state.⁴² Investors may also use investment arbitrations to prompt undisclosed settlements from the state⁴³ or to obtain 'significant adjustment of the regulatory framework to the benefit of the investor'.⁴⁴

In short, international investment law raises challenges for state protection of human rights from the acts of foreign investors. Moreover, despite international law supporting the

³⁶ See e.g. *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (3 Aug 2005); *Chemtura Corporation v. Government of Canada*, Award (2 Aug 2010).

³⁷ See e.g. *Bilcon of Delaware et al v. Government of Canada*, Award, PCA Case No. 2009-04 (17 Mar 2015); *Crystalex International Corporation v. Venezuela*, Award, ICSID Case No. ARB(AF)/11/2 (4 Apr 2016); *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6 (2009).

³⁸ *Suez v. Argentina*, ICSID Case No ARB/03/17 (n 32) para. 240; *Suez and Vivendi v. Argentina*, ICSID Case No. ARB/03/19 (n 32) para. 262.

³⁹ See Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown & Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (CUP, 2011) 606.

⁴⁰ Eric Crosbie & George Thomson, 'Why did it take 53 months for NZ to introduce plain cigarette packs?', *Noted* (14 June 2018); Tariana Turia, 'Government moves forward with plain packaging of tobacco products', New Zealand Government media release (19 Feb 2013).

⁴¹ Stuart G. Gross, 'Inordinate chill: BITS, non-NAFTA MITS, and host-state regulatory freedom: An Indonesian case study', (2003) 24 *Michigan J. of Int'l. L.* 893; Kyla Tienhaara, 'What You Don't Know Can Hurt You: Investor-State Disputes and the Environment' (2006) 6 *Global Environmental Politics* 73.

⁴² Krzysztof J. Pelc, 'What Explains the Low Success Rate of Investor-State Disputes?' (2017) 71:3 *Int'l Org.* 559; Joachim Pohl, 'Societal benefits and costs of International Investment Agreements: A Critical Review Of Aspects and Available Empirical Evidence' (2018) OECD Working Papers on International Investment, 65.

⁴³ Emilie Hafner-Burton et al., 'Against international settlement? The social cost of secrecy in international adjudication' (2016) 26 *ILAR Working Paper*, 46.

⁴⁴ Robert Howse, 'International Investment Law and Arbitration: A Conceptual Framework' (2017) *IILJ Working Paper* 2017/1, 60.

enactment of measures within IIAs that would address or mitigate this challenge, most IIAs are bereft of such measures. The developments in the business and human right movement are therefore not being reflected in international investment law.

III. Investor Obligations

One approach to replicating the progress made in the business and human rights movement in international investment law is to introduce human rights obligations for investors in IIAs. At present, most IIAs are silent on the issue of investor obligations, albeit with a few exceptions. Yet investor obligations need not arise only out of IIAs. Both domestic law and international law impose obligations that may create obligations for investors in the international investment law context. The following sections examine first, investor obligations that are being inserted into IIAs, and second, non-treaty obligations that may give rise to investor obligations.

A. *Investor Obligations in IIAs*

Although most of the over 3,000 IIAs do not contain investor obligations, there is a small, but growing number of new generation IIAs that are beginning to do so. These IIAs contain investor obligations pertaining to corporate social responsibility, human rights, labour, the environment, corporate governance, and anti-corruption.

1. Corporate Social Responsibility

Several recent IIAs include investor obligations by way of corporate social responsibility (CSR) provisions. In some instances, the provisions are included in the preambles of the treaties while in others they form discrete provisions.⁴⁵ Yet regardless of where they appear, their content is curiously similar. In most instances, the provisions specify a soft standard, such as ‘encouraging’ enterprises or having investors ‘endeavour’ to incorporate CSR standards. Thus, the Canada-Burkina Faso BIT stipulates that states ‘should encourage enterprises operating within its territory or subject to its jurisdiction to incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies’.⁴⁶ Similarly, the India-Belarus BIT specifies that investors ‘shall endeavor to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies’.⁴⁷

Nevertheless, some variances exist. Thus, the Switzerland-China FTA acknowledges the importance of CSR for sustainable development;⁴⁸ the Austria-Nigeria BIT expresses ‘belief that responsible corporate behaviour can contribute to mutual confidence between enterprises and host countries’;⁴⁹ and the Iran-Slovakia BIT specifies that investors ‘should strive to make the maximum feasible contributions’ to the host state’s sustainable development through appropriate levels of socially responsible practices.⁵⁰

⁴⁵ See e.g. China - Switzerland FTA (2013), pmbl; EU-Moldova BIT (2014), art. 35.

⁴⁶ Canada-Burkina Faso BIT, art. 16 (2015). See also Pacific Agreement on Closer Economic Relations Plus (2017), art. 5(2).

⁴⁷ India-Belarus BIT (2018), art. 12. See also Argentina - Japan BIT (2018), art. 17; Australia-Hong Kong FTA (2019), art. 16.

⁴⁸ China - Switzerland FTA (2013), pmbl.

⁴⁹ Austria-Nigeria BIT (2013), pmbl.

⁵⁰ Iran-Slovakia BIT (2016), art. 10(3).

Other treaties define CSR in terms of international instruments such as the OECD Guidelines on Multinational Enterprises or the UN Global Compact.⁵¹ Several IIAs also reference international CSR initiatives such as the OECD Guidelines for Multinational Enterprises,⁵² the UN Global Compact,⁵³ the ILO Tripartite Declaration,⁵⁴ and the UN Guiding Principles on Business and Human Rights.⁵⁵

Despite the varied wording used in IIAs, investor obligations for CSR remain mainly ‘soft’, non-binding obligations. However, some IIAs have worked to increase the stringency of these obligations. For instance, the Morocco-Nigeria BIT specifies, under the heading ‘Corporate Social Responsibility’, that investors *shall* uphold human rights in the host state, act in accordance with core labour standards, and not manage or operate investments in ‘a manner that circumvents international environmental, labour and human rights obligations’.⁵⁶ Similarly, the draft Pan Africa Investment Code denotes, in a CSR provision, that investors shall ‘ensure that they do not conflict with the social and economic development objectives of host States’ and contribute to the host state’s economic, social and environmental progress.⁵⁷

The Brazil-Malawi BIT takes an even stricter approach, specifying that investors ‘shall strive to achieve the highest possible level of contribution to the sustainable development of the Host Party and the local community’ by adopting socially responsible practices.⁵⁸ It then details the means by which this contribution can be made, including, among others, strengthening local capacity building through close cooperation with the local community, developing human capital, and refraining from seeking or accepting exemptions that are not established in the host state’s legislation relating to environment, health, etc.⁵⁹

2. Human Rights

Several IIAs impose investor obligations for human rights, although in some cases, these are tied to CSR provisions.⁶⁰ Thus, as seen above, the Morocco-Nigeria BIT ties CSR to human rights by requiring investors to uphold human rights and refrain from circumventing human rights obligations.⁶¹ Similarly, some Brazilian IIAs require investors, in connection with CSR duties, to develop best efforts to ‘respect the human rights of those involved in the companies’ activities, consistent with the international obligations and commitments of the Host Party’.⁶²

Other IIAs choose to impose discrete human rights obligations on investors. For instance, the Economic Community of Western African States (ECOWAS) Supplementary Act on Common Investment Rules for the Community stipulates that investors shall uphold human rights in the workplace and in the community and shall manage and operate their investments

⁵¹ Brazil - Chile BIT (2015), art. 15; Austria-Nigeria BIT (2013), pmbi.

⁵² See e.g. EU-Canada Comprehensive Economic and Trade Agreement (2016), pmbi and art. 22.3; Netherlands - United Arab Emirates BIT (2013), art. 2(3); Colombia Model BIT (2017), 11.

⁵³ See e.g., Austria-Nigeria BIT (2013), pmbi; Free Trade Agreement Between the EFTA States and Georgia (2016), pmbi.

⁵⁴ See eg. EU-Ukraine BIT, art. 422; EU-Moldova BIT (2014), art. 35.

⁵⁵ See e.g. Netherlands Model Investment Agreement (2018), art. 7.

⁵⁶ Morocco - Nigeria BIT (2016), art. 18.

⁵⁷ African Union Commission, Draft Pan African Investment Code (2016), art. 22 (2) and (3).

⁵⁸ Brazil-Malawi BIT (2015), art. 9.

⁵⁹ *ibid* art. 9(2).

⁶⁰ See e.g., Canada-Burkina Faso BIT(2015), art. 16; Morocco - Nigeria BIT (2016), art. 18.

⁶¹ Morocco - Nigeria BIT (2016), art. 18.

⁶² Brazil-Malawi BIT (2015), art. 9. See also Brazil-Mozambique BIT (2010), art. 10 (2010).

without breaching or circumventing human rights.⁶³ It further requires investors to refrain from, either complicitly or with the assistance of others, violating human rights in times of peace or during socio-political upheaval.⁶⁴

Similarly, the draft Pan African Investment Code establishes human rights-related principles, with which investors should comply. Two of these principles are that investors should support and respect human rights and ensure that they are not complicit in human rights abuses.⁶⁵

Some treaties even specify how the investor's human rights obligations can be enforced. Thus, certain IIAs stipulate that *home* states can hold investors civilly liable for any acts relating to their investment in the *host* state that causes significant damage, injuries or loss of life.⁶⁶ The home state is therefore obliged to provide the forum adjudicating the investor's failure to adhere to its obligations.

3. Other Investor Obligations

IIAs also feature other types of investor obligations, which are related to the protection of human rights. For instance, one IIA prohibits investors from disturbing public order or morals while several IIAs require investors to promote sustainable development.⁶⁷ A number of IIAs further contain investor obligations relating to labour. While investor obligations relating to labour may be subsumed under investor CSR obligations, some treaties have included specific provisions designed to create discrete investor labour obligations. Thus IIAs stipulate that investors shall respect labour rights;⁶⁸ shall act in accordance with labour standards and not operate investments in a way that circumvents labour standards;⁶⁹ and refrain from managing or operating investments in a manner that circumvents international labour obligations.⁷⁰

Several IIAs additionally contain investor obligations relating to the environment. To be sure, CSR-related investor obligations may already encapsulate include investor obligations relating to the environment. A good example of this is found in the EFTA-Central American States BIT, which encourages CSR and 'cooperation between enterprises in relation to goods, services and technologies' that is 'beneficial to the environment'.⁷¹ However, some of the investor obligations specifically relating to the environment are worth noting. Thus, treaties require investors to protect the environment and to remediate environmental damage;⁷² to engage in environment impact assessments;⁷³ to maintain an environmental management system;⁷⁴ to promote and finance transfers or access to environmentally sound technologies

⁶³ Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (2008), art. 14(2) [hereinafter 'ECOWAS']. See also Southern African Development Community, SADC Model Bilateral Investment Treaty Template with Commentary (2012), art. 15.1 [hereinafter 'SADC Model BIT'].

⁶⁴ ECOWAS (n 63) art. 14(3).

⁶⁵ Draft Pan African Investment Code (n 57) art. 24(a) and (b).

⁶⁶ Morocco-Nigeria BIT (2016), art. 20; ECOWAS (n 63) art. 17; SADC Model BIT (n 63) art. 17.1; Indian Model BIT (2016), art. 13.

⁶⁷ Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (1981), art. 9; Morocco-Nigeria BIT (2016), art. 24(1); Brazil - Peru ETEA (2016), art. 2.13(2)(a).

⁶⁸ Draft Pan African Investment Code (n 57) art. 20(1)(e).

⁶⁹ ECOWAS (n 63) art. 14; Morocco - Nigeria BIT (2016), art. 18 (3) and (4); SADC Model BIT (n 63) art. 15.2

⁷⁰ Morocco - Nigeria BIT (2016), art. 18(4); SADC Model BIT (n 63) art. 15.3

⁷¹ EFTA-Central American States BIT (2015), art. 9.7

⁷² Draft Pan African Investment Code (n 57) art. 37(3).

⁷³ ECOWAS (n 63) art. 12(1); SADC Model BIT (n 63) art. 13

⁷⁴ Morocco - Nigeria BIT (2016), art. 18(1); SADC Model BIT (n 63) art. 14

and know-how;⁷⁵ and to refrain from exploiting or using local natural resources to the detriment of the rights and interests of the host State.⁷⁶

Corporate governance is another area that is represented by investor obligations. Several IIAs recognize the links between good corporate governance and responsible corporate practice. These IIAs encourage enterprises to observe internationally recognized guidelines and principles relating to the importance of good corporate governance as a means of achieving sustainable development⁷⁷ or to develop best efforts to maintain, develop and apply good practices of corporate governance.⁷⁸ Other treaties focus on corporate governance alone requiring investors to apply national, and internationally accepted, standards of corporate governance;⁷⁹ to establish and maintain, where appropriate, local community liaison processes;⁸⁰ and to make public investment contracts or agreements signed with the host state.⁸¹ Relatedly, some IIAs specifically require that investors comply with host state laws⁸² and prevents them from initiating a dispute settlement claim if they fail to do so.⁸³

The Draft Pan African Investment Code, however, goes even farther in defining investor obligations relating to corporate governance. The Code requires investors to treat shareholders equitably, to encourage ‘co-operation between corporations and stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises’, to disclose material matters relating to the corporation including its financial situation and its environmental risks, and to provide information on human resource policies.⁸⁴

Finally, a number of IIAs feature anti-corruption obligations for investors. For instance, IIAs specify that investors should ‘adhere to UN anti-corruption efforts;⁸⁵ refrain from engaging in corruption or being complicit in corrupt acts;⁸⁶ and refrain from ‘trying to achieve gains through unlawful means’.⁸⁷ However, unlike many other investor obligations, failure to adhere to anti-corruption obligations may result in tangible repercussions for the investor. The ECOWAS, for instance, classes corruption acts as criminal offences and requires states to prosecute offending investors.⁸⁸ Several IIAs also treat evidence of investor corruption as a bar to initiating dispute settlement and prohibit investors who have engaged in corrupt activities from initiating investment arbitrations.⁸⁹

4. Defining Investor Obligations for Human Rights

⁷⁵ Draft Pan African Investment Code (n 57) art. 30(1).

⁷⁶ *ibid* art. 23.

⁷⁷ China - Switzerland FTA (2013), pmbi; EFTA-Central American States BIT (2015), pmbi.

⁷⁸ Brazil-Malawi BIT (2015), art. 9(2)(f).

⁷⁹ Iran - Slovakia BIT (2016), art. 10(3); Morocco - Nigeria BIT (2016), art. 19(1)(a); Draft Pan African Investment Code (n 57) art. 19(1); ECOWAS (n 63) art. 15(1); SADC Model BIT (n 63) art. 16.1

⁸⁰ Morocco - Nigeria BIT (2016), Art. 19(1)(b); ECOWAS (n 63) art. 15(3).

⁸¹ ECOWAS (n 63) art. 15(2).

⁸² India-Belarus, art. 11(i); SADC Model BIT (n 63) art. 11

⁸³ Iran-Slovakia BIT (2016), art. 14(2).

⁸⁴ Draft Pan African Investment Code (n 57) art. 19 (3).

⁸⁵ Austria-Nigeria BIT (2013), pmbi

⁸⁶ See e.g., India-Belarus BIT (2018), art. 11(ii); Morocco - Nigeria BIT, art. 17 (2) and (3); ECOWAS (n 63) art. 13; SADC Model BIT (n 63, art. 10

⁸⁷ Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (1981), art. 9.

⁸⁸ ECOWAS (n 63) art. 15.

⁸⁹ See, e.g. India-Belarus (2018), art. 13.3; Iran-Slovakia BIT (2016), art. 14(2); EU-Canada Comprehensive Economic and Trade Agreement (2016), art. 8.18(3).

Drawing from the various existing investor obligations, it becomes apparent that some of these obligations could easily transpose the business and human rights developments into IIAs. Following the UNGPs, these obligations would have to tread the fine line between legally binding obligations and social expectations, meaning that the wording of such provisions would be less stringent. Thus, investors could be ‘expected’ to respect human rights in the host state and refrain from managing or operating their investments in a manner that circumvents international human rights standards; to engage in ongoing human rights due diligence for their investment; and to remediate any human rights violations. However, to ensure that the provision is not entirely toothless, it could be complemented with a stipulation that failure to adhere to any of the outlined responsibilities would prevent an investor from initiating an investment arbitration.

Alternatively, states can move beyond the current state of progress for business and human rights developments by imposing more stringent investor obligations for human rights in IIAs. In such a case, in the sample provision above, the word ‘shall’ would replace ‘expected’, thereby obliging investors to adhere to the outlined responsibilities, while investors would continue to be barred from investment arbitration if they violated any of the provision’s requirements. In addition, IIAs could stipulate that investor obligations for human right provisions could be enforced by way of counterclaims.

B. Non-Treaty Sources of Investor Obligations

In addition to specific provisions in IIAs, investor obligations for human rights, and related issues, may be found in other sources as well. For instance, in *Urbaser v. Argentina*, the tribunal held that since a bilateral investment treaty was not a ‘closed system’, international law in general could govern matters in the dispute.⁹⁰ Its conclusion was buttressed by a treaty provision specifying that matters in dispute could be governed by international law and by reference to applicable rules of international law in the ICSID convention.⁹¹ Accordingly, the tribunal drew from a number of sources of international law to determine whether the investor had an obligation to guarantee the human right to water, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and other international human rights treaties.⁹² While in this particular dispute, the tribunal did not find that an investor had an obligation to guarantee the human right to water,⁹³ it observed that such an obligation could originate in domestic law, or in a contract or other legal relationship.⁹⁴ It further concluded that international law would support the finding that an investor had an obligation where there was ‘an obligation to abstain, like a prohibition to commit acts violating human rights’.⁹⁵ On this understanding, investor obligations could arise from acts recognized by international law as *jus cogens* or *erga omnes*.⁹⁶

The tribunal in *World Duty Free v. Kenya* also turned to international law to assess whether the investor had an obligation to refrain from obtaining a contract by corruption.⁹⁷

⁹⁰ *Urbaser v. Argentina* (n 32) para. 1191-2.

⁹¹ *ibid* para. 1192 and 1202. See also *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 Mar. 1965, 4 ILM 524 (1965) [hereinafter ICSID Convention], art. 42(1).

⁹² *Urbaser v. Argentina* (n 32) para. 1196-98.

⁹³ *ibid* para. 1207-1210.

⁹⁴ *ibid* para. 1210.

⁹⁵ *ibid*

⁹⁶ *David R. Aven and Others v. Republic of Costa Rica*, Award, ICSID Case No. UNCT/15/3 (18 Sept 2018), para. 738

⁹⁷ *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006).

Drawing from the United Nations Convention against Corruption and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, among others, the tribunal concluded that acts of corruption were against international public policy and therefore could not be countenanced by the tribunal.⁹⁸

Beyond general international law, tribunals have also found that other treaty provisions, beyond investor obligation provisions in IIAs, can give rise to investor obligations. In *Aven v. Costa Rica*, the tribunal was tasked with determining whether the investor had an obligation not to cause environmental damage. In concluding that investors could be subject to environmental claims, the tribunal relied on both the integration of environmental law into international law as well as numerous references to the importance of environmental protection in the treaty.⁹⁹

A third source for investor obligations, besides investor obligation provisions in treaties, is domestic law. Tribunals have found investor obligations in contract law,¹⁰⁰ under state public policy,¹⁰¹ in tort law,¹⁰² in domestic prohibitions against corruption;¹⁰³ and in environmental law,¹⁰⁴ among others.

Some tribunals have also found that investors have a general obligation to comply with host state laws, regardless of whether this is specified in the treaty.¹⁰⁵ As the *Cortec v. Kenya* tribunal noted, ‘the text and purpose of the BIT and the ICSID Convention are not consistent with holding host governments financially responsible for investments created in defiance of their laws’.¹⁰⁶ In that arbitration, having found that the investor had failed to complete an environmental impact assessment required by Kenyan law, the *Cortec* tribunal concluded that this failure precluded the investor from being able to initiate an investment arbitration.¹⁰⁷

IV. Entrypoints for Investor Obligations

Once a source for an investor obligation has been identified, there are a number of different ways in which these obligations can enter into an investment arbitration to enable the tribunal to consider the merits of the obligation. One obvious entrypoint is if the treaty provides for consideration of such an obligation. Thus, some treaties enable tribunals to consider any failures of investor obligations to off-set or mitigate damage awards rendered by the investor’s failure.¹⁰⁸ The Dutch Model BIT even provides that in determining compensation for an award,

⁹⁸ *ibid* para. 157. See also *Inceysa Vallisoletana, SL v Republic of El Salvador*, ICSID No ARB/03/26, Award (2 Aug 2006), para. 245-252

⁹⁹ *Aven v. Costa Rica* (n 96), para. 737-739.

¹⁰⁰ *Burlington Resources Inc. v. Republic of Ecuador*, Decision On Counterclaims, ICSID Case No. ARB/08/5 (7 Feb 2017).

¹⁰¹ *World Duty v. Kenya* (n 97) para. 179.

¹⁰² *Burlington Resources v. Ecuador* (n 100) para. 74.

¹⁰³ *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013), para. 290–1, 389

¹⁰⁴ *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Interim Decision on The Environmental Counterclaim (11 Aug 2015), para. 321.

¹⁰⁵ See e.g. *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (19 Apr 2009), para. 101; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008), paras 138–9; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227, Final Award (18 July 2014), paras 1349–52.

¹⁰⁶ *Cortec Mining Kenya Ltd et al. v. Kenya*, Award, ICSID Case No. ARB/15/29 (22 Oct 2018), para. 333.

¹⁰⁷ *Ibid.* at para. 365

¹⁰⁸ See e.g. SADC Model BIT (n 63), art.19.1; ECOWAS (n 63) art.18(2),

tribunals may consider investor non-compliance with commitments under the UN Guiding Principles on Businesses and Human Rights and the OECD Guidelines for Multinational Enterprises.¹⁰⁹ Conversely, the ECOWAS provides that investor obligations relating to human rights can be prosecuted in front of a specially established tribunal or, if relevant to the issues, to be considered in an investor-arbitration claim while the Colombia Model BIT bars investor access to arbitration if the investor fails to comply with human rights or environmental provisions of international instruments.¹¹⁰

However, most IIAs do not make any explicit provision for the consideration of investor obligations. In these instances, tribunals can still consider issues of investor obligations in counterclaims, as jurisdictional issues, as matters of admissibility, or at the merits stage.

A. *Counterclaims*

Counterclaims are new claims, separate from the principal claim, which are linked to the principal claim.¹¹¹ They can be an entrypoint for investor obligations by acting as the basis for a state's counterclaim. Although counterclaims are generally permitted by most arbitral rules,¹¹² some tribunals have struggled to determine whether to accept a counterclaim.¹¹³ This is not surprising as counterclaims, appear at first glance, counterintuitive to investment arbitration, which is an asymmetric system that is principally directed at allowing investors to protect their rights.¹¹⁴ As an investor has argued, counterclaims 'run counter to the object and purpose of treaty arbitration, which is to grant the investors a one-sided right of quasi-judicial review of national regulatory action'.¹¹⁵

Yet tribunals can accept counterclaims if two preconditions, consent and connection, are met.¹¹⁶ First, is the issue of consent. This issue is tied to a tribunal's jurisdiction as a tribunal will only have jurisdiction over a legal dispute arising directly out of an investment if the parties have consented to submit such a dispute to arbitration.¹¹⁷ Since in most instances, investors do not consent to counterclaims, tribunals have focused on dispute resolution provisions in the IIA to determine whether consent has been obtained. For instance, where the treaty's dispute resolution provision contains open-ended language – such as consent being granted for 'any legal dispute', for disputes 'in connection with investments' or for consent for 'each party' to resort to arbitration – tribunals have found that investors consented to the counterclaim.¹¹⁸ Similarly, where treaties provide consent to submit disputes to arbitration under the auspices

¹⁰⁹ Netherlands Model Investment Agreement (2018), art. 23.

¹¹⁰ ECOWAS (n 63) art. 18(3); Colombia Model BIT (2017), 11.

¹¹¹ ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counterclaims, Order of 17 December 1997, I.C.J. Reports 1997, p. 243, para. 27.

¹¹² See e.g. ICSID Convention (n 91) art 46; UNCITRAL, UNCITRAL Arbitration Rules, art. 21(3)(2013); International Court of Arbitration, Rules of Arbitration, art. 5 (2017); Stockholm Chamber of Commerce, Arbitration Rules, Art. 9(1)(iii) (2017).

¹¹³ See, e.g., *Spyridon Roussalis v. Romania*, Award, ICSID Case No. ARB/06/1, paras. 868, 871 (7 Dec 2011); *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB/06/4, para. 333 (15 April 2016); *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB(AF)/12/5, para. 627 (22 Aug 2016).

¹¹⁴ Arnaud de Nanteuil, 'Counterclaims in Investment Arbitration: Old Questions, New Answers?' (2018) 17:2 *The Law & Practice of International Courts and Tribunals* 374, 376.

¹¹⁵ *Urbaser v. Argentina* (n 32) para. 1120.

¹¹⁶ *Metal-Tech v Uzbekistan* (n 103) para. 407; *2 Antoine Goetz et al. v. Republic of Burundi*, ICSID Case No. ARB/95/3, para. 275 (10 Feb 1999); *De Nanteuil* (n 114) 377.

¹¹⁷ *Metal-Tech v Uzbekistan* (n 103) 408; ICSID, ICSID Convention, Regulations and Rules (2006), art. 25.

¹¹⁸ See eg. *Metal-Tech v Uzbekistan* (n 103) para. 410; *Urbaser v. Argentina* (n 32) para. 1143; *Al-Warraq v. Indonesia* (n 4) para. 661.

of ICSID, tribunals have located consent in article 46 of the ICSID Convention which specifically allows for counterclaims.¹¹⁹ Conversely, where the dispute resolution provision is worded narrowly, such as granting consent for ‘disputes... concerning an obligation of the [state]’ or giving consent for disputes to be submitted by investors, tribunals have not found consent.¹²⁰

The second requirement for a counterclaim is that there is a connection between the principal claim and the counterclaim. As the ICSID Convention provides, the counterclaim should arise ‘directly out of the subject-matter of the dispute’.¹²¹ Moreover, the connection between the primary and counterclaim can be either legal or factual in nature.¹²² For instance, in *Urbaser*, the tribunal concluded that both a factual and legal connection was present because both the primary claim and the counterclaim related to the same investment and both claims were based on the same IIA.¹²³

In disputes involving treaties with a broadly worded dispute resolution, states have been, recently, successful in initiating counterclaims for investor obligations, particularly those relating to human rights or environmental obligations. In *Urbaser*, the tribunal accepted the state’s counterclaim that the investor bore an obligation to guarantee the human right to water, since both consent – a broadly worded treaty – and connection were present.¹²⁴ Similarly, in *Aven*, the tribunal accepted the state’s counterclaim that the works undertaken by the investor “caused considerable environmental damage” which they should repair and restore.¹²⁵ Having found that the dispute resolution provision was broadly worded and that there were not any substantive reasons for exempting investors from claims for breaching obligations to comply with host state measures designed to protect the environment, the tribunal accepted the state’s counterclaim.¹²⁶

While the states in *Urbaser* and *Aven* were both ultimately unsuccessful on the merits of their counterclaims, Ecuador has been more successful in relation to two related arbitrations involving counterclaims. In both *Burlington Resources Inc. v. Ecuador*,¹²⁷ and *Perenco v. Ecuador*¹²⁸, Ecuador counterclaimed against the investors, consortium partners, alleging that they had breached environmental obligations. In *Burlington Resources*, the tribunal indicated that the investor and the state had entered into an agreement which provided for arbitration in case of a dispute as well as for counterclaims.¹²⁹ As a result, the investor did not challenge the tribunal’s jurisdiction over the counterclaim. Curiously, *Perenco* also did not challenge the tribunal’s jurisdiction over Ecuador’s counterclaim.¹³⁰

In considering the merits of the counterclaim, the *Burlington Resources* tribunal engaged in a thorough review of the investor’s oilfields, classified each site and ruled on any contamination claimed at each site.¹³¹ Ultimately, it awarded the state 41.7 M in damages. Similarly, the *Perenco* tribunal found that the investor’s conduct was troubling and one that

¹¹⁹ *Goetz v. Burundi* (n 116) para. 278.

¹²⁰ *Spyridon v. Romania*, Award (n 113, at para. 869; *Vestey Group v. Venezuela* (n 113) para. 333; *Rusoro Mining Ltd v. Venezuela* (note 113) para. 627.

¹²¹ ICSID Convention (n 91) art. 46.

¹²² *Urbaser v. Argentina* (n 32, para. 1151)

¹²³ *ibid*

¹²⁴ *ibid* para. 1143 and 1151.

¹²⁵ *Aven v. Costa Rica* (n 96), Counter-Memorial, para. 648-657 (8 Apr 2016).

¹²⁶ *ibid* para. 739-742.

¹²⁷ *Burlington Resources v. Ecuador* (n 100).

¹²⁸ *Perenco v. Ecuador* (n 104).

¹²⁹ *Burlington Resources v. Ecuador* (n 100) para. 60-61.

¹³⁰ *Perenco v. Ecuador* (n 104), Decision on Claimant’s Application for Dismissal of Respondent’s Counter-claims (18 Aug 2017), para. 34.

¹³¹ *Burlington Resources v. Ecuador* (n 100) para. 889.

did not “paint a picture of a responsible environmental steward,” ultimately awarding Ecuador 54.4 M for its counterclaim.¹³²

Given the growing acceptance by tribunals of counterclaims in conjunction with investor obligations, it seems likely that counterclaims are poised to become an increasing gateway for investor obligations. Indeed, the utility of counterclaims for enforcing investor obligations is being underlined by IIAs that specifically make provision for tribunals to consider counterclaims. These treaties typically specify that a state can initiate a counterclaim and that the subject of the counterclaim may involve claims that the investor has not fulfilled its obligations under the treaty.¹³³ In other words, in arbitrations under these treaties not only will the investor not be able to challenge the tribunal’s jurisdiction over a state’s counterclaim, but the investor obligation basis for the counterclaim is confirmed as well.

B. Jurisdiction

A second entrypoint for investor obligations is via jurisdictional claims. For instance, in determining whether it had jurisdiction over the dispute, tribunals have considered whether investors have acted in accordance with the host state’s laws, even if the treaty does not specifically stipulate such a requirement.¹³⁴ Generally, tribunals have concluded that they will not exercise jurisdiction over investments made in an illegal manner.¹³⁵ As the *Hamester* tribunal has noted, investments will not be protected if they have been created in violation of national or international principles of good faith, through corruption or fraud, or by misusing the ICSID’s system of investment protection.¹³⁶

However, some tribunals have found that ‘not every trivial, minor contravention of the law should lead to a refusal of jurisdiction’.¹³⁷ Rather, the tribunal’s determination must be guided by proportionality and an investor will only be denied jurisdiction to bring its claim when the investor’s ‘noncompliance with a law ... results in a compromise of a correspondingly significant interest of the Host State’.¹³⁸

Following this notion of being guided by proportionality, the *Cortec v. Kenya* tribunal considered whether an investor’s failure to obtain a legally required environmental licence should act as a bar to its assuming jurisdiction over the dispute. Drawing from the test established in *Kim v. Uzbekistan*, the tribunal took a tripartite approach. First, it assessed the significance of the obligation with which the investor is alleged not to comply;¹³⁹ second, it

¹³² Perenco v. Ecuador (n 104) para. 447; Perenco v. Ecuador, Damages Award (27 Sept 2019), para. 899.

¹³³ Treaty Establishing the Common Market for Eastern and Southern Africa (1994, amended 2009), art. 28(9); Indian Model BIT, art. 14.11.

¹³⁴ See eg. *Cortec v. Kenya* (n 106); *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award (30 Mar 2015); *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction (8 Mar 2017); *Gustav F W Hamester GmbH & Co KG v Ghana*, ICSID Case No ARB/07/24, Award (18 June 2010).

¹³⁵ *Inceysa v. El Salvador* (n 98) para. 257; *Hamester v Ghana* (n 134) para. 123-124; *Niko Resources (Bangladesh) Ltd v People’s Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, Bangladesh Oil Gas And Mineral Corporation*, ICSID Case No ARB/10/11 and ICSID Case No ARB/10/18, Decision on Jurisdiction (19 August 2013), paras 431–3.

¹³⁶ *Hamester v Ghana* (n 134) para. 123

¹³⁷ *Mamidoil v. Albania* (n 134) 483.

¹³⁸ *Kim v. Uzbekistan* (n 134) para. 413.

¹³⁹ *Cortec v. Kenya* (n 106) para 344; *Kim v. Uzbekistan* (n 134) para. 406

assessed the seriousness of the investor's conduct,¹⁴⁰ and third, it determined whether the investor's conduct and the law involved compromised a significant interest of the Host State.¹⁴¹

The *Cortec* tribunal found that the investor's conduct met each of the three elements of the *Kim* test. First, it found that the environmental licence with which the investor failed to comply was of 'fundamental importance in an environmentally vulnerable area'.¹⁴² Second, it concluded that the investor's conduct showed "serious disrespect" for the state's environmental policies.¹⁴³ Finally, the tribunal concluded that the investor's failure to obtain the licence was significantly prejudicial to the host country interests and, accordingly, the proportionate response was to deny the investor protection under the treaty.¹⁴⁴

Overall, from these investment arbitration awards, it appears clear that a tribunal likely would refrain from exercising jurisdiction over an investment created in violation of human rights laws. More controversial, however, is the jurisprudence established by *Cortec*, that an investor's failure to adhere to pre-establishment legal requirements could bar a tribunal's jurisdiction. Following *Cortec*, a tribunal could arguably deny jurisdiction to claims being brought by an investor who had failed to adhere to a state's domestic human right laws on the understanding that protection of human rights is significant, that this is an important interest to the host state, and that an investor's failure to adhere to that obligation is serious. A good example of the application of *Cortec* might have arisen in *Piero Foresti v. South Africa*, where the state's divestiture requirements to historically disadvantaged South Africans was significant and an important interest to the host state while the investor's failure to accord with the requirement was arguably serious.¹⁴⁵

C. Admissibility

A third entrypoint for investor obligations is via admissibility claims. While investment arbitration often has difficulty distinguishing between jurisdiction and admissibility of claims, treating them as if they were in the twilight zone,¹⁴⁶ international law clearly distinguishes between the two.¹⁴⁷ Put succinctly, jurisdiction is the power of the tribunal to hear the case whereas admissibility is whether the case is, in and of itself, defective.¹⁴⁸ Accordingly, where an admissibility claim is made, the tribunal may have jurisdiction, but could not exercise that jurisdiction in favour of the claim.¹⁴⁹ Nevertheless, as admissibility lacks a foundational basis

¹⁴⁰ *Cortec v. Kenya* (n 106) para. 347; *Kim v. Uzbekistan* (n 134) para. 407

¹⁴¹ *Cortec v. Kenya* (n 106) para. 351; *Kim v. Uzbekistan* (n 134) para. 408.

¹⁴² *Cortec v. Kenya* (n 106) para. 346.

¹⁴³ *ibid* para. 349.

¹⁴⁴ *ibid* para. 362 and 365.

¹⁴⁵ *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award (4 Aug 2010). The dispute was settled before it proceeded to a consideration on its merits.

¹⁴⁶ Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen, et al (eds), *Global Reflections on International Law, Commerce and Dispute Resolution - Liber Amicorum in honour of Robert Briner* (ICC Publishing, 2005) 601.

¹⁴⁷ See e.g. Michael Waibel, 'Investment Arbitration: Jurisdiction and Admissibility', Cambridge Legal Studies Research Paper Series, Paper No 9/2014 (2017); Jorge E. Viñuales, 'Investor Diligence in Investment Arbitration: Sources and Arguments' (2017) 32 ICSID Rev. 346.

¹⁴⁸ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion of Keith Hight (8 May 2000), para. 58.

¹⁴⁹ *Copper Mesa Mining Corporation v. Republic of Ecuador*, Award, PCA No. 2012-2 (15 Mar 2016), para. 5.62.

in arbitral rules, it is not surprising that tribunals treat issues of jurisdiction and admissibility interchangeably.¹⁵⁰

In any case, some tribunals have turned to admissibility claims to import investor obligations onto investors. In particular, tribunals have been reluctant to find investors claims admissible where they have engaged in fraud or forgery. Thus, the tribunal ruled that the investor's claim was not admissible in *Plama v. Bulgaria*, where the investment had resulted from the investor's 'deliberate concealment amounting to fraud'.¹⁵¹ Similarly, in *Churchill Mining v. Indonesia*, the tribunal held that claims arising from rights based on fraud or forgery were inadmissible.¹⁵² In addition, in *Al Warraq v. Indonesia*, the tribunal found that the investor's claim to fair and equitable treatment was rendered inadmissible by the six types of fraud in which the investor had engaged.¹⁵³ In *Plama*, the tribunal found that the inadmissibility of the investor's claims were because its acts were contrary to international public policy, good faith, and inconsistent with the clean hands doctrine.¹⁵⁴ Conversely, in *Churchill Mining*, the tribunal relied only on the notion of the investor's acts being contrary to international public policy,¹⁵⁵ whereas in *Al Warraq*, the tribunal relied only on the clean hands doctrine to support its conclusion of inadmissibility.¹⁵⁶

In *Copper Mesa v Ecuador*, the tribunal also relied on admissibility. Finding that the investor was involved in 'recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands',¹⁵⁷ it found that this conduct should be considered as a matter of admissibility, not jurisdiction.¹⁵⁸ However, the tribunal determined that this conduct, which the state had framed in terms of 'unclean hands', would not make the claim inadmissible.¹⁵⁹ Instead, it decided to consider the conduct as part of the merits of the dispute.

Taking into account these investment arbitrations, admissibility should be, arguably, one of the strongest entry points for human rights-related investor obligations. The obligation not to harm human rights is sufficiently well-established such that an investor act to that effect, if properly evidenced, should be considered contrary to international public policy. Curiously, however, the *Copper Mesa* tribunal chose not to rule the investor's claim inadmissible, despite clear evidence that the investor was harming the host state's citizens' human rights. This may suggest that tribunals set a high bar for inadmissibility of claims that would prevent human rights-related investor obligations from being considered.

D. Merits

¹⁵⁰ Christer Soderlund & Elena Burova, 'Is There Such a Thing as Admissibility in Investment Arbitration?' (2018) 33:2 ICSID Rev. 525, 526-7; Viñuales (n 147) 358; Patrick Dumberry, 'State of Confusion: The Doctrine of "Clean Hands" In Investment Arbitration after the Yukos Award' (2016)17 Journal of World Investment & Trade 229.

¹⁵¹ *Plama Consortium v. Bulgaria* (n 105) para. 135.

¹⁵² *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (6 Dec 2016), para. 507-508.

¹⁵³ *Al Warraq v. Indonesia* (n 4) para. 634-646.

¹⁵⁴ *Plama Consortium v. Bulgaria* (n 105) para. 143-44.

¹⁵⁵ *Churchill Mining v. Indonesia* (n 152) para. 507-508.

¹⁵⁶ *Al Warraq v. Indonesia* (n 4) para. 646.

¹⁵⁷ *Copper Mesa v. Ecuador* (n 149) para. 6.99.

¹⁵⁸ *ibid* para. 5.62.

¹⁵⁹ *ibid* para. 5.65.

A fourth entrypoint for investor obligations is at the merits stage of the arbitration, which may – as seen in *Copper Mesa* – encompass, admissibility issues in some instances. Some tribunals have even sought to distinguish investor obligations that arise at the time of the initial investment from those that arise post-establishment of the investment, arguing that initial investment investor obligations should be treated as jurisdictional issues, while post-establishment obligations should be treated at the merits phase.¹⁶⁰ Thus, in *Yukos*,¹⁶¹ the tribunal found that the investor was only obliged to refrain from illegal and bad conduct at the time of *making* the investment, not for conduct post-establishment.¹⁶² This differentiation was justified by the tribunal since it concluded that the host state could correct and sanction the investor’s post-establishment illegal conduct.¹⁶³

Nevertheless, other tribunals have considered investor obligations, whether at the time of the making of the investment or a later date, as an issue for consideration during the merits phase. In particular, some tribunals have found that bad investor conduct can result in contributory negligence. Thus, in *Yukos*, the tribunal found that the investor’s abuse of low tax regions resulted in it being contributorily negligent for 25 percent of its injury.¹⁶⁴

Similarly, in *Copper Mesa*, the tribunal classified the investor’s conduct in using armed men to perpetuate violence on protesters as issues of causation and contributory fault that should be considered at the merits of the dispute. The tribunal found that this approach would be more ‘legally appropriate’ than having the claim dismissed for being inadmissible.¹⁶⁵ In the end, the tribunal concluded that the investor had contributed to its own injury in the amount of 30 percent.¹⁶⁶

In other instances, tribunals have examined investor obligations to adhere to the domestic law as part of the context in assessing treaty breaches. Thus in *Genin v. Estonia*, where the investor failed to provide information as required by the state’s banking laws leading to the state revoking the investor’s licence, the tribunal found that the revocation of the licence needed to be contextualized in light of the investor’s conduct.¹⁶⁷ Having found that the investor was obliged to provide the required information, the tribunal concluded that the state’s revocation of the investor’s licence did not amount to a breach of the treaty.¹⁶⁸

While the approach of the *Genin* tribunal is to be applauded for bringing the investor’s obligation into the broader context of considering whether a treaty breach has ensued, from the perspective of considering human-rights related investor obligations, the *Copper Mesa* approach seems problematic. Using an investor’s breach of human rights obligations as a method to discount a damage award seems to underemphasize the overarching importance of human rights. Moreover, by characterizing an investor’s breach of human rights as negligence, as the *Copper Mesa* tribunal did, it equates human rights breaches with investor negligence such as abusing low tax regions, failing to secure the state’s consent for a transfer of rights, or

¹⁶⁰ *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award, (16 Aug 2007), para. 344-45; *Hamester v Ghana* (n 134) para. 129.

¹⁶¹ *Hulley Enterprises (Cyprus) Limited v Russia*, UNCITRAL, PCA Case No AA 226, Final Award (18 July 2014), para 1360. See also *Yukos v Russia* (n 105); *Veteran Petroleum Limited (Cyprus) v Russia*, UNCITRAL, PCA Case No AA 228, Final Award (18 July 2014).

¹⁶² *Hulley v. Russia* (note 161 at 1354-55).

¹⁶³ *ibid* 1355.

¹⁶⁴ *ibid* para. 1634, 1637.

¹⁶⁵ *Copper Mesa v. Ecuador* (n 149) para. 5.65

¹⁶⁶ *ibid* para. 6.102.

¹⁶⁷ *Alex Genin, Eastern Credit Limited, Inc & AS Baltoil v The Republic of Estonia*, ICSID Case No ARB/99/2, Award (25 June 2001), para. 351-365.

¹⁶⁸ *ibid* para. 370-373.

paying for property without legal protection.¹⁶⁹ This seems to discount the human dignity element inherent in human rights.

E. Summary

The entrypoints for human rights related investor obligations in an investment arbitration appear to be numerous. For a state that has proper human rights legislation in place that is applicable to businesses, investor failure to adhere to those laws should easily allow investor obligations to be considered as both counterclaims and as jurisdictional claims. The more difficult issue is where to consider investor acts that have not respected human rights but where domestic law is silent on the matter. In these scenarios, where there is clear evidence that an investor has acted contrary to international human rights obligations, any investor claim arising from these facts should be deemed inadmissible, on the ground that such an act is contrary to international public policy. To treat such a scenario in any other way, such as by framing it as contributory negligence, cheapens the global standard of human rights protection.

V. The Value of Inserting Investor Obligations

Beyond aligning international recognition of business responsibilities for human rights with international investment law, introducing obligations for investors into IIAs entails wider implications both for the business and human rights movement as well as international investment law. These implications reach both the business and human rights movement as well as the international investment arena by reinforcing and strengthening norms in the former and by addressing the asymmetry of the regime in the latter.

A. ‘Hardening’ BHR soft law responsibilities

One of the key values of inserting human rights obligations for investors into IIAs is that it works to reinforce and strengthen the norms dictated by the UN Guiding Principles on Business and Human Rights, which remain non-binding and non-enforceable. States and scholars have criticized the UNGPs for their voluntary nature, noting that they fall short in addressing businesses’ lack of accountability for human rights violations.¹⁷⁰ In fact, because norms for business responsibilities for human rights have not been transformed into legally binding obligations, some states are in the process of trying to conclude a legally binding instrument on business and human rights.¹⁷¹

While a dedicated business and human rights treaty would rectify the gaps in the UNGPs, the outcomes from the treaty process are far from certain. One of the principal problems with the treaty is that several states, home to the world’s largest corporations, will not be a party to the treaty.¹⁷² The lack of involvement of so many key states means that

¹⁶⁹ Yukos v. Russia (n 126); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 Oct 2012), para. 687; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004), para. 242-3.

¹⁷⁰ See e.g. Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council, *Transnational Corporations and Human Rights* (Sep. 2013); David Bilchitz, *The Necessity for a Business and Human Rights Treaty*, 7 (Nov. 30, 2014).

¹⁷¹ Legally Binding Instrument (n 18).

¹⁷² States that formally opposed the business and human rights treaty process include Austria, France, Germany, Ireland, Italy, Japan, the UK, and the US, among others. See Business & Human Rights Resource Centre, ‘UN

governance gaps will persist and that several of the world's largest and most prominent businesses will continue not to be held accountable for human rights breaches. In addition, the process for concluding the treaty is notoriously slow. The first draft of the treaty was revealed four years after the process began and the current draft still appears to be a work in progress.¹⁷³ There remains, therefore, a considerable time lag before the treaty comes into effect, if ever.

Conversely, reading in investor obligations for human rights into international investment law can begin immediately. In particular, states can bring counterclaims enforcing human rights obligations found in domestic law in ensuing arbitrations. Moreover, such issues can be considered at the jurisdictional or merits phase or as a claim of inadmissibility. Through these mechanisms, investor obligations for human rights can be enforced straightaway, via investment arbitration, without requiring any additional tools.

States can also insert such obligations in their IIAs when concluding new treaties or by terminating existing treaties in order to conclude new ones.¹⁷⁴ While concluding new IIAs requires considerable effort, it is still less effort than that required by the BHR treaty which, as a multilateral treaty, requires the consensus of myriad states as opposed to consent from two states in the case of a bilateral investment treaty or a handful of states in the case of a preferential or regional trade agreement.

Of course, including investor obligations for human rights in international investment law would still leave governance gaps since international investment law does not offer a multilateral approach to governing foreign investment. There is also concern that investment arbitrators, who would be tasked with considering such obligation, are not required to possess any particular expertise in human rights law. As a result, as the *Copper Mesa* tribunal's approach evidences, tribunals may not adequately consider human rights issues. Nevertheless, in the interim, while the world works towards 'hardening' business responsibility for human rights through other means, including such obligations offers an easier and immediate step towards making business responsibilities for human rights binding and enforceable.

B. Contextualizing IIAs

A second value of introducing investor obligations for human rights is in helping to right the asymmetric nature of international investment law that offers investors rights but not obligations. Including these obligations may also influence investor behaviour, improve the quality of the investments being made, and help promote sustainable development.¹⁷⁵ Use of investor obligations for human rights may also work towards promoting the development aspects of IIAs, which possess cogent elements of economic and sustainable development alongside investor protection.

However, it is unlikely that introducing investor obligations, in and of itself, will be enough to adequately address the asymmetries of international investment law. Rather, as a

Human Rights Council Sessions', <https://www.business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions> (Jun. 2014).

¹⁷³ Ecuador began the treaty process in 2014 and the first draft was revealed in 2018.

¹⁷⁴ UNCTAD, 'International Investment Policymaking in Transition: Challenges and Opportunities Of Treaty Renewal IIA - Issues Note No. 4' (2013) 3.

¹⁷⁵ IISD, 'Harnessing Investment for Sustainable Development: Inclusion of investor obligations and corporate accountability provisions in trade and investment agreements' (9 Jan 2018) 6.

commentator has argued, introducing investor obligations may work towards ‘a change in mindset’ that enables treaties to be ‘interpreted in a more balanced manner’.¹⁷⁶

International investment law has viewed IIAs mainly as vehicles only for protecting investor interests,¹⁷⁷ despite the fact that the treaties refer to economic development being the ultimate object of such treaties.¹⁷⁸ This had led tribunals to downplay, or in some instances ignore altogether, state attempts to fulfil development objectives, particularly human rights objectives.¹⁷⁹ This has occurred despite the Vienna Convention on the Law of Treaties specifying that treaties should be interpreted against the background of “relevant rules of international law applicable in the relations between the parties”,¹⁸⁰ meaning that tribunals should be interpreting IIAs against the background of states’ human rights obligations found in other elements of international law.

However, introducing investor obligations for human rights can be used to reinforce the idea that human rights norms form part of the context in which foreign investments operate. In this way, it reiterates the notion espoused in customary international law of systemic integration and can be used to remind tribunals that foreign investment law does not operate in a closed system.¹⁸¹ Contextualizing human rights in IIA interpretation can, for example, facilitate a tribunal’s selection of the ordinary meaning that should be given to treaty terms, help identify the materials which the tribunal should take into account in the treaty’s interpretation, and promote tribunal interpretations in light of contemporary surroundings and developments.¹⁸²

One particular use for context in interpretation will arise when tribunals are tasked with interpreting IIA provisions that are drafted ambiguously or with open-ended wordings. By using investor obligations for human rights as part of the context for interpreting such provisions, tribunals are less likely to interpret such provisions only in light of investor protection goals. This should result in more balanced interpretations.

Some tribunals have already relied upon on a contextual approach to interpretation. In *Al Tamimi v. Oman*, the tribunal interpreted the minimum standard of treatment standard in light of the importance of environmental protection, drawing from other provisions in the treaty that underlined the importance of environmental concerns.¹⁸³ The tribunal concluded that in determining a breach of the minimum standard of treatment, it should be ‘guided by the forceful defence of environmental regulation and protection’ language in the treaty.¹⁸⁴ Similarly, in

¹⁷⁶ Viñuales (n 147) 368.

¹⁷⁷ See e.g. Kenneth J. Vandeveld, ‘Treaty Interpretation from a Negotiator’s Perspective’ (1989) 21 VJTL 281, 299; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 Aug 2004), para. 81.

¹⁷⁸ ICSID Convention (n 91) preamble; OECD, *Resolution of the Council on the Draft Convention on the Protection of Foreign Property*, OECD/LEGAL/0084, Annex (1967); *Convention Establishing the Multilateral Guarantee Agency*, 1508 UNTS 99 (11 Oct 1985).

¹⁷⁹ See, e.g., *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 121; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (17 Jan 2007), para. 79; *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Award (14 Jul 2006), para. 261.

¹⁸⁰ *Vienna Convention on the Law of Treaties*, art. 31(3)(c), May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331.

¹⁸¹ See e.g., *LaGrand Judgment (Germany v. United States of America)*, ICJ Reports 466 (27 June 2001), para. 99.

¹⁸² UNCTAD, ‘Fair and Equitable Treatment’, UNCTAD Series on Issues in International Investment Agreements II (2012), 12; Fulvio Maria Palombino, *Fair and Equitable Treatment and the Fabric of General Principles* (T.M.C. Asser Press, 2018) 20.

¹⁸³ *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 Nov 2015). para. 387-390.

¹⁸⁴ *ibid* para. 389.

Aven v. Costa Rica, the tribunal interpreted the fair and equitable treatment and the prohibition on expropriation provisions in light of an environment-related provision in the treaty.¹⁸⁵ The tribunal held that the environment-related provision subordinated the rights of investors to the state's right to ensure the investment attended to environmental concerns, as long as the state's actions were fair and non-discriminatory in nature.¹⁸⁶

The true value of inserting investor obligations for human rights into international investment law may not come, therefore, solely from holding investors to account. Rather, introducing such obligations may also reduce the inherent asymmetries in the treaties and promote tribunal interpretations of such treaties in line with broader goals.

VI. Conclusion

International investment law must change in order to retain its legitimacy. The procedural tweaks being suggested by the leading arbitral institutions to reform the law is a good first step, albeit an insufficient one. Without making substantive changes to the law as well, international investment law remains unbalanced and disjointed from its original goals of using foreign investment to promote state development.

Introducing investor obligations for human rights into international investment law, whether by including such provisions in treaty or by including them as part of the tribunal's tools for interpretation, is one further step towards re-righting the imbalances in international investment law. Not only does it promote more balanced interpretations of IIAs, but it also better aligns international investment law with society's expectations for businesses, which is necessary for businesses' (including foreign investors) social licence to operate.

Introducing investor obligations for human rights, by itself, however will not be enough to balance international investment law. More substantive and procedural changes are needed to address the inherent asymmetries in this system of law. It is hoped that alongside the procedural reforms being proposed by the arbitral institutions, introducing investor obligations for human rights will, at least, tilt the balance in the right direction.

¹⁸⁵ *Aven v. Costa Rica* (n 96).

¹⁸⁶ *ibid* para. 412.