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Investor Obligations in International Investment Law

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Executive Summary

There is increasing consensus about the unequal nature of the international foreign investment regime as it exists today. Foreign investment has been seen as beneficial to both investors and host States because it may enable the latter to develop their economies through foreign investment. However, when it comes to resolving international investment disputes, countries can be at a disadvantage. An increasing number of decisions by international arbitral tribunals have found that host States failed to provide protection to their investors, in accordance with the standards set out in their investment treaties or agreements. These awards can be punitive, especially for developing countries, as in some instances, the monetary value of these awards can have a sizeable impact on the national budget. Compliance with these awards could lead to changes in the allocation of domestic resources of host States and challenge their capacity to achieve some of their policy objectives.

Against this background, this report outlines the concerns that developing countries have, describes developments in the case law, and proposes policy responses available to States. It focuses on the different ways in which investors have been held accountable for their obligations. It does this by first looking at the legal framework for investor obligations. The broad takeaways from that section are that certain States increasingly subject investors to high standards of obligations by adopting strict treaty language and establishing accountability mechanisms in the event of treaty violations. This is seen in some of the agreements signed by African States and in some developing countries in Asia. This is in contrast with the approach under the United States-Mexico-Canada Agreement (USMCA), where investor protections take priority.

This is followed by a discussion of the trends in case law, with tribunals often arriving at inconsistent decisions. In cases involving environmental law issues, numerous decisions demonstrate that States can successfully file counterclaims. This also shows another trend, where States have increasingly responded to claims brought by investors with counterclaims whether under an enabling treaty provision or under general international law. There has also been a decision that holds that the rights of the investors take precedence. In investor-State disputes involving human rights, some

tribunals have been more open to considering human rights concerns in their decisions to hold the investors liable. Overall, this is arguably a mixed bag.

In light of the inconsistent approach that tribunals have followed when interpreting obligations of investors, the onus is on States to find other avenues to ensure that investors comply with obligations owed under investment treaties. Multilateral reform efforts, such as those under the United Nations Commission on International Trade Law (UNCITRAL) Working Group III have largely focused on the procedural aspects of Investor-State Dispute Settlement (ISDS) rather than substantive aspects. This limits the ability of such reforms to fundamentally re-orient the international investment regime.

Therefore, States must adjust their treaty and domestic policy choices to better reflect their desired risk tolerance. While developing States in particular may be cautious to adjust their investment regimes as generally net capital importers, the evidence suggests that the link between the signing of investment treaties, the attraction of foreign investment, and economic growth is tenuous at best. States should be more emboldened. This report outlines a range of substantive policy options adopted by some States in their treaty policy.

I. Introduction

Amid the broader legitimacy crisis affecting the international investment regime, an emerging area of interest is the recognition of investor obligations by States, especially by developing countries and investment tribunals.[1] The international investment regime has traditionally centred on the rights accorded to foreign investors enshrined in international investment agreements (IIAs).[2] The purpose of these instruments is to protect foreign investors against non-commercial risks in host States. Investors' rights have been upheld, with increasing frequency, by investment tribunals through investor-State dispute settlement (ISDS) mechanisms, especially to the disadvantage of developing countries.

In 2016, *Urbaser v. Argentina* was the first decision to consider that foreign investors may have certain obligations owed to their host States under international law.[3] In that case, the arbitrators defined those obligations broadly, leaving room for interpretation by future tribunals and States. In response, the asymmetry in the rights of foreign investors without clear corresponding obligations to their host States as a counterweight has led some States to consider rebalancing their relationship with foreign investors in the international investment regime. This imbalance has drawn criticism in the academic literature, particularly with respect to labour rights,[4] human rights,[5] the

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[1] See generally Michael Waibel and others (eds.), *The Backlash Against Investment Arbitration. Perceptions and Reality* (Kluwer Law International, 2010); United Nations Commission on International Trade Law (UNCITRAL), "Possible reform of investor-State dispute settlement (ISDS)", Working Group III, 2017 to present: Investor-State Dispute Settlement Reform (2024). Available from www.uncitral.org.

[2] Such as fair and equitable standards, full protection and security, protection from arbitrary or discriminatory measures, national treatment, most-favoured-nation treatment, umbrella clause, right to effective means (to assert claims and enforce rights), transfer of funds, among others. See generally Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd ed. (Oxford University Press, 2022).

[3] *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, paras. 1199–1210.

[4] For example, Valentina Cagnin, "Investor-State Dispute Settlement (ISDS) from a Labour Law Perspective", *European Labor Law Journal*, Vol. 8, No. 3 (2017), pp. 217-31; International Labour Organization (ILO), Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements (2017).

[5] For example, Eric De Brabandere, "Human Rights and International Investment Law", in Markus Krajewski and Rhea Tamara Hoffmann (eds.), *Research Handbook on Foreign Direct Investment* (Cheltenham, Edward Elgar, 2019), pp. 619-45.

environment,[6] and anti-corruption.[7] A balanced regime should preserve the host States' ability to regulate without breaching their obligations under international investment law while granting foreign investors predictability of the legal regimes of the host State that may affect their investment.

Since *Urbaser,* several other decisions have directly addressed environmental or human rights issues in their rulings. Some cases have established a clear pattern of receptivity by investment tribunals to counterclaims submitted by host States based on environmental law and in a couple of cases the tribunals even ruled in favour of those counterclaims. However, the jurisprudence is inconsistent, as in *Eco Oro v. Colombia* and *Red Eagle v. Colombia*.[8] The tribunal in *Eco Oro v. Colombia* departed from previous similar cases which ruled in favour of environmental law-based legal defences and ruled in favour of the investor. Most recently, in 2024, the tribunal in *Red Eagle v. Colombia* departed from the reasoning in *Eco Oro.* This inconsistency in the tribunals demonstrates the unpredictability of investment tribunal rulings. This is further exemplified when comparing *Bear Creek Mining Corp v. Republic of Peru*[9] and *Alverez y Martin Corporation v. Panama.*[10] These are the two main cases in which investment tribunals address human rights issues, specifically, indigenous rights. Yet despite the fact that two cases were decided only a year apart from each other and that they dealt with almost identical issues the two tribunals came to entirely different conclusions. All the cases analysed in conjunction demonstrate that a major shift has occurred in recent years with tribunals ruling in favour of host State counterclaims based on environmental and human rights law. However, these cases also clearly demonstrate that the content

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[6] For example, Robert-Cuendet, "Protection of the Environment and International Investment Law" in Markus Krajewski and Rhea Tamara Hoffmann (eds.), *Research Handbook on Foreign Direct Investment* (Cheltenham, Edward Elgar, 2019), pp.596-618.

[7] For example, Yan Yueming, "Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance", *Journal of International Economic Law*, Vol. 23, No. 4 (2020), pp. 989–1013; Stefan Mbiyavanga, "Combatting Corruption Through International Investment Treaty Law", *Journal of Anti-Corruption Law,* Vol. 1, No. 2 (2017), pp. 132–50.

[8] *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41), Award, 9 September 2021; *Red Eagle Exploration Limited v. Republic of Colombia* (ICSID Case No. ARB/18/12), Award, 23 February 2024.

[9] *Bear Creek Mining Corporation v. Republic of Peru* (ICSID Case No. ARB/14/21), Award, 30 November 2017.

[10] *Alvarez y Marín Corporación S.A. and others v. Republic of Panama* (ICSID Case No. ARB/15/14), Award, 30 September 2018.

of the rulings is very difficult to predict, is often entirely irreconcilable with past rulings, and in many ways, each tribunal comes to its ultimate decision entirely on new grounds.

Empirically, only a minority of IIAs contain clauses on investor obligations. Only 65 IIAs of the estimated 3,000 IIAs address the conduct of foreign investors to varying degrees.[11] 23 agreements contain clauses that directly impose binding obligations on foreign investors while the rest have indirect obligations for States to encourage responsible business conduct by foreign investors. African States were the first to include investor obligations in their treaty practice.[12] The 2012 Southern African Development Community was the first model IIA to explicitly incorporate investor obligations. The 2016 Pan-African Investment Code (PAIC) also included enforcement mechanisms. These IIAs represent 'new-generation IIAs' and reflect the growing concerns of States vis-à-vis the conduct of foreign investors.

The international investment regime is particularly concerning to developing countries. Developing countries, as historical capital importers, have disproportionately been respondents in investment tribunals.[13] For instance, more than 40 cases were brought against the Government of Argentina in response to emergency measures taken to deal with its 2001 financial crisis.[14] Between 1987 and 2022, investors from just five developed countries initiated almost half of the 1,257 publicly known investment arbitration cases.[15] About 80 per cent of investment arbitration cases in 2022 were brought under 'old-generation' IIAs signed before 2000, demonstrating the long tail of

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[11] World Trade Institute (WTI), Electronic Database of Investment Treaties. Available from https://edit.wti.org/document/investment-treaty/search; United Nations Trade and Development (UNCTAD), International Investment Agreements Navigator. Available from https://investmentpolicy.unctad.org/international-investment-agreements.

[12] Babatunde Fagbohunlu and Inyene Robert, "Standards of Protection and the Obligations of the Investor", *Global Arbitration Review*, 17 October 2023. Available from https://globalarbitrationreview.com/guide/the-guide-telecoms-arbitrations/second-edition/article/standards-of-protection-and-the-obligations-of-the-investor.

[13] United Nations Office of the High Commissioner for Human Rights (OHCHR), "Reforming International Investment Agreements", p. 1. Though this dynamic has changed in recent decades; see Gus Van Harten and Dayna Nadine Scott, "Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada", *Journal of International Dispute Settlement* (2016).

[14] Lucy Reed, "Scorecard of Investment Treaty Cases Against Argentina Since 2001", Kluwer Arbitration Blog, 2 March 2009. Available from http://arbitrationblog.kluwerarbitration.com/2009/03/02/scorecard-of-investment-treaty-cases-against-argentina-since-2001/..

[15] The United States, the Netherlands, the United Kingdom, Germany and Spain. UNCTAD, *World Investment Report 2023*, p. 20.

potential exposure to investment claims.[16] Further, awards are becoming larger and more common, and tribunals do not take into account contextual factors, disproportionately affecting developing countries.[17] Further, developing countries are severely underrepresented in investment arbitration panels.[18] This has spurred interest in reforming the international investment regime, with developing countries taking the lead in the development of the practice of putting obligations on foreign investors.

The international investment regime can be reformed in a range of different ways. There are numerous avenues for procedural and substantive reform for States that wish to impose stronger forms of obligations on foreign investors. The United Nations Commission on International Trade Law's (UNCITRAL) Working Group III (WG III) has the mandate to consider procedural and other cross-cutting issues to reform ISDS.[19] The United Nations Trade and Development (UNCTAD) has also launched a Multi-Stakeholder Platform on IIA Reform. For substantive reforms, the potential areas include the multilateral level, bilateral treaty level and domestic law. An example of multilateral reform includes the proposal for a Multilateral Investment Court by the European Union (EU), currently being discussed in UNCITRAL WG III. [20] At the treaty level, some States in Africa, Asia, Europe and the Americas have amended their treaty policy to impose stronger forms of obligations on foreign investors.[21] In addition to incorporating these standards into treaties, there are also investment screening mechanisms, such as the one adopted by the European Union. This is addressed below.

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[16] *Ibid*.

[17] Jonathan Bonnitcha and Sarah Brewin, "Compensation Under Investment Treaties: What Are the Problems and What Can Be Done?", IISD Policy Brief (December 2020). See for example: Transnational Law Institute (TNI), *When Arbitrators Reward Mining Corporations' Human Rights Abuses: Copper Mesa vs Ecuador.* Available from https://www.tni.org/files/copper-mesa-vs-ecuador.pdf.

[18] Andrea Bjorklund and others, "The Diversity Deficit in International Investment Arbitration", *Journal of World Investment & Trade*, Vol. 21 (2020), pp. 410-440.

[19] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session, UN Doc A/CN.9/930/Rev.1 (19 December 2017).

[20] See Jesse Coleman and others, "Third Party Rights in Investor-State Dispute Settlement: Options for Reform" (15 July 2019); United Nations (UN) Human Rights Committee (HRC), General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para. 8 (26 May 2004); UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 24 : On State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, E/C.12/GC/24, para. 14 (10 August 2017). See also UN Global Compact; ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; and ISO 14001.

[21] See for example, the discussion on the African approach to investor obligation standards, discussed below.

At the domestic level, States can also create and enforce obligations on foreign investors in their jurisdictions, as well as require the exhaustion of local remedies. These reforms should focus on the protection of the most vulnerable countries and populations impacted by investments covered by international investment law.[22] Potential avenues for reform by States are evaluated in this paper.

This report first outlines key instruments and different approaches that some States across Africa, Asia, Europe and the Americas have taken to reform the international investment regime in relation to investor obligations. Second, it charts the trends arising from investment tribunals following *Urbaser* across environmental and human rights cases. Third, it describes and evaluates the reform efforts at the multilateral level. Finally, it summarises and evaluates avenues for policy reform by States.

[22] James T Gathii and Sergio Puig, "The West and the Unravelling of the Economic World Order: Thoughts from a Global South Perspective", in David Sloss (ed.), *Is the International Legal Order Unravelling* (Oxford University Press, 2022).

II. The Legal Framework for Investor Obligations

The purpose of this section is to provide an overview of the legal framework pertaining to investor obligations. Each subsection has been structured to first look at the legal instrument that places the highest standard of obligation upon investors – if there is one – followed by instruments that place progressively less stringent standards.

In Asia, there is no multilateral legal instrument that subjects States or their investors to a binding obligation to protect the environment, labour and human rights. Naturally, in this instance, different States and their investors will have to abide by obligations laid down in more specific instruments, such as bilateral investment treaties (BITs). This is also the case in Europe, but the European Parliament recently adopted the Corporate Sustainability Due Diligence Directive (CSDDD), by virtue of which large companies with significant activities in the European Union have to conduct human rights and environmental due diligence in their operations. Member States now have two years to introduce these obligations into their domestic laws.[23]

The overarching observation is that regulatory sovereignty is the primary consideration in determining the standards of investor obligations. This is reflected either in the form of an explicit provision pertaining to the right to regulate, or the requirement that investments comply with the laws of the host State. Some States incorporate standards set out in soft law instruments, while others do not. Only the legal instruments that are applicable in Africa establish a mechanism for accountability in the event of non-compliance with different investor's obligations. Despite the emphasis on regulatory sovereignty in the developed world as well, the United States-Mexico-Canada Agreement (USMCA) is one instrument that stipulates that measures taken to ensure that investments operate in an environmentally sensitive manner have to be consistent with other provisions pertaining to investment protection,[24] suggesting that a hierarchy exists where investment protection supersedes the right to regulate in the public interest. This is in direct contrast to the framing of obligations under the Investment Protocol to

[23] "Corporate Sustainability Due Diligence", European Commission. Available from https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en.
[24] US-Mexico-Canada Agreement, chapter 14, article 14.16.

the Agreement Establishing the African Continental Free Trade Area (AfCFTA),[25] as will be seen below. This is one example of the differing approaches of the developed and developing world.

This section looks at Africa; it also considers Asia, Europe and the Americas because each of these regions is composed of both developed and developing countries, which will help determine intra-regional trends, if and where they exist.

A. Africa

The Supplementary Act on Investments adopted by the Economic Community of West African States (ECOWAS) in 2008 prescribes a high standard of obligations for investors. This was followed by the Common Investments Code in 2018. The purpose of both these instruments was to promote sustainable development and a common market for investments in the region. The Act contains a fairly comprehensive list of obligations that investors are to abide by. Investors are to comply with the laws of the host States.[26] They also have to comply with environmental obligations in the form of a pre-establishment impact assessment.[27] Additionally, they are to uphold human rights in the workplace and the community.[28] Insofar as all of these obligations are concerned, it is instructive to note that all these provisions contain the terms *shall* or *will*, so as to designate their binding nature. However, there are also other matters in which investors are not held to the same standard. Accordingly, the provision pertaining to corporate social responsibility (CSR) stipulates that apart from an indicative list of CSR obligations that both parties agree to abide by, both parties must endeavour to apply a higher level of CSR standards where they increase.[29] Another indication of substantive obligations is reflected in the fact that investors would be subject to civil liability under the host State's judicial system.[30]

[25] Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area, article 25(2).
[26] Economic Community of West African States Supplementary Act on Investments 2008, article 11.
[27] *Ibid.*, at article 12.
[28] (n 26) at article 14(2).
[29] (n 26) at article 16(2): "[…] not encourage investment by relaxing or waiving domestic standards, or compliance with environment, labour and consumer protection laws and international minimum standards".
[30] (n 26) at article 17.

This set of obligations was built up by the Common Investments Code to create a robust framework that investors must comply with. In the environmental sphere, investors are to make reports of the environmental impact assessment available to the affected communities;[31] take measures for restoration where damage is caused to the environment, including payment of adequate compensation to affected parties;[32] apply the precautionary principle and take mitigating action in relation to any investment.[33] There are also other obligations that can be grouped under different clusters such as development, consumer protection, etc. Arguably, in this instance, the fact that the host State has jurisdiction and that investors can be subject to civil liability is a fairly comprehensive mechanism to ensure that obligations framed in binding language actually translate into investors' conduct in the real world.

On the other hand, there are other multilateral instruments that govern investment protection that do not place such obligations. Adopted in February 2023 with the objective to promote and protect intra-African investments, the Investment Protocol to the AfCFTA[34] establishes the right to regulate for each State party to pursue public policy objectives.[35] Measures taken by a State party in order to comply with its international obligations under other agreements would not qualify as a breach of that State's obligations under this Protocol.[36] This would suggest that the right to regulate supersedes obligations that host States owe to investors. Parties are also obligated to comply with a minimum standard of environmental and labour protections. Additionally, investments will not be encouraged by relaxing domestic regulatory standards.[37]

Regional variations in terms of the standards of obligations are also reflected in frameworks that are applicable in different parts of the continent. The 2012 Southern Africa Development Community Model Bilateral Investment Treaty establishes that

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[31] Economic Community of West African States Common Investments Code 2019, article 27(1)(d).
[32] *Ibid*., at article 27(1)(e).
[33] (n 31) at article 27(1)(c).
[34] Hamed el Kady and others, "The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area", IISD Investment Treaty News, 1 July 2023. Available from https://www.iisd.org/itn/en/2023/07/01/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent/.
[35] (n 25) at article 24(1).
[36] *Ibid*., at article 24(2).
[37] (n 25) at article 25(2).

investors must conduct a pre-establishment environmental impact assessment.[38] In the post-establishment phase, they have the explicit duty to respect human rights and that they shall act in accordance with core labour standards as required by the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights of Work.[39] However, investors are subject to civil liability in their home States for measures that lead to significant damage, loss of life or personal injury in the host State.[40] Article 17.2 on the other hand makes it obligatory for the home State to ensure that its legal systems do not prevent or unduly restrict the bringing of court actions before domestic courts relating to the civil liability of investors for damages resulting from acts performed by investors in relation to their investments in the territory of the host State.[41] The import of the provision is that the home State is obligated to restrict the use of jurisdictional constraints as per the *forum non conveniens* rule, to the effect that the host States or their nationals may be allowed to sue in the home State for acts of the investors.[42] This is a mechanism to ensure accountability.[43]

These different agreements coexist with intra-Africa BITs. The most prominent of these is arguably the Nigeria-Morocco BIT that was adopted in 2016 because it is regarded to have struck a balance between the obligations and the rights of the host States. With specific regard to human rights and environmental obligations for investors, it codifies the precautionary principle and also lays down the requirement to conduct a pre-establishment environmental impact assessment.[44] It recognises that it is inappropriate to encourage investment by weakening or reducing the protection accorded under domestic labour laws, and also domestic public health and safety standards.[45] This language clearly does not hold States up to a binding standard, and the threshold of recognition is low. On the other hand, it also stipulates that investors and investments *shall* uphold human rights in the host State.[46] Although this is binding language, it

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[38] Southern African Development Community Model Bilateral Investment Treaty 2012, article 13.1.
[39] *Ibid*., at article 15.2.
[40] (n 38) at article 17.1.
[41] Ibid. at article 17.2.
[42] South African Development Community, SADC Model Bilateral Investment Treaty Template with Commentary (July 2012). p 38. Available from https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf.
[43] (n 38) at article 17.1.
[44] Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and Government of the Federal Republic of Nigeria 2016, article 14(1).
[45] *Ibid*., at article 15(2).
[46] (n 44) at article 18(2).

defers to the laws of the host State, and so, there is scope that under domestic law these standards are not adequate, thereby allowing investors a workaround.[47] It also makes a reference to the ILO Declaration on Fundamental Principles of Rights and Work's core labour standards concerning the freedom of association, the elimination of forced labour, the abolition of child labour and the elimination of discrimination in the workplace, which is an instrument of soft law. Another similarity is that the liability of the investor arises in the home state.[48] This means that there is no independent mechanism to ensure that investors will comply with their obligations. This is not covered by the dispute settlement provisions.

It is also important to note that a good number of intra-Africa BITs do not contain provisions pertaining to investor obligations. The Benin-Ghana BIT, for instance, does not contain any provisions about health, labour standards, the environment or corporate social responsibility. This is also the case with the Ghana-Guinea BIT and the Gambia-Guinea BIT – all three countries are members of the ECOWAS community. Nigeria's agreements with developed countries such as the United Kingdom, Switzerland and Germany do not contain explicit provisions that address investors' obligations. This is arguably one of the factors that could exacerbate the asymmetry between the countries involved.

To sum up, there are different kinds of legal instruments that currently govern the investment protection framework in Africa, and all of them establish different levels of investor obligations. There are multilateral agreements such as the ECOWAS agreement and the Investment Protocol to the AfCFTA that bind investors to an arguably high standard of obligations but currently do not establish a mechanism for investor accountability in the event of a violation. Some African States place a lower standard of investor obligations in their BITs compared to the multilateral agreements that they are a part of.

[47] (n 44) at article 15(2).
[48] (n 44) at article 20.

B. Asia

In the Asian context, it is important to look at the investment protection regime of China as it is a major economic power in the region. It presently has 107 bilateral investment treaties in force.[49] While each of these treaties was not specifically looked at, the first thing that stands out is that most of the treaties do not contain stipulations for investors to comply with environmental and human rights obligations.

In order to determine whether or not regional trends or divergences exist, it is important to take note of agreements that other countries are part of. The Comprehensive Economic Partnership Agreement (CEPA) between Indonesia and Korea contains provisions that pertain to both trade and investment. It lays down that parties should not derogate from environmental measures as an encouragement for the establishment, acquisition or expansion of investments in their territory.[50] It also stipulates the indirect obligation to voluntarily incorporate internationally recognised standards and principles of corporate social responsibility.[51] Again, the language of the provisions cannot be construed to be legally binding, but the fact that it exists in the first place points to an intra-regional variation. The Singapore-Sri Lanka Free Trade Agreement (FTA) stipulates that parties can adopt measures that prescribe special formalities in connection with an investment.[52] This arguably means that for an investment to be valid, it has to comply with the laws of the host State. Additionally, the aforementioned provisions of the CEPA pertaining to the environment and corporate social responsibility are also found in the Nigeria-Singapore BIT,[53] perhaps signalling a greater tendency amongst some developing States to place more emphasis on compliance with domestic regulatory standards.

The EU–Singapore FTA references a voluntary incorporation of corporate social responsibility standards from soft law instruments such as the Organisation for

[49] China, International Investment Agreement Navigator, UNCTAD Investment Policy Hub. Available from https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china.
[50] Indonesia-Korea Comprehensive Economic Partnership Agreement, article 7.16.
[51] *Ibid.*, at article 7.18.
[52] Free Trade Agreement Between the Democratic Socialist Republic of Sri Lanka and the Republic of Singapore 2018, article 10.
[53] Investment Promotion and Protection Agreement Between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore 2016, article 10.

Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises and the United Nations (UN) Global Compact.[54] There is no stipulation of what these practices entail, in their substance. The text of the OECD Guidelines contains provisions pertaining to both the environment and human rights. It lays down the following human rights obligations:

States are conferred the duty to protect and respect human rights. This involves –

- The obligation to avoid causing or contributing to adverse human rights impacts through their activities.
- To prevent or mitigate adverse impacts; and
- To carry out due diligence that is appropriate to the size of the enterprise, amongst other obligations.[55]

With regard to the environment, the following are some of the investors' obligations:

- To establish and maintain a system of environment management.
- To conduct meaningful engagement with stakeholders.
- To maintain contingency plans for preventing, mitigating and controlling serious environmental and health damage from their operations, amongst other obligations.[56]

Although the language of the provisions in these guidelines appears to be stricter so as to induce that States and also their enterprises have binding obligations, the language of the provisions in the agreements themselves is clearly less strict. For example, the EU-Singapore FTA stipulates that parties should only *refer* to internationally accepted guidelines such as the OECD Guidelines.[57] This gives State parties and the enterprises therefrom the leeway to work around these obligations. The argument in support of soft

[54] Free Trade Agreement Between the European Union and the Republic of Singapore 2019, article 12.11.
[55] Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct, chapter IV. Available from https://read.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en#page27..
[56] *Ibid.*, chapter VI.
[57] (n 54).

law instruments and CSR initiatives is that the absence of legally binding language makes it easier for all stakeholders to achieve consensus and that they also represent a stepping stone towards more robust legal standards.[58] However, in their present formulation, the use of phrases such as *voluntarily incorporate* and terms such as *refer* clearly imply that investors can take measures that do not meet these standards without any legal consequences, in the absence of a mechanism to ensure accountability. Other agreements entered into by non-Asian State parties also contain references to these soft law instruments, and so, this is arguably a trend that is global in nature.

The aforementioned examination points to a variation in the inclusion of environmental and human rights obligations in treaties that different Asian countries are parties to. On the one hand, agreements that China is a party to, including the recent 2023 China-Angola BIT, do not have provisions that address the same. On the other hand, treaties that countries such as Indonesia and Singapore are party to, contain such obligations. A popular mechanism of addressing these issues is via the inclusion of a clause that pertains to CSR. However, none of these provisions contain any binding language, and there are no mechanisms to ensure investor accountability in the event that they do not meet such standards.

This is also evident in some of the agreements that India is presently a party to. The investment treaty framework that India follows is slightly peculiar and therefore, needs to be contextualised. In 2011, two cases, *White Industries* and *Cairn Energy* were decided in favour of the investor over India.[59] India then sought to reform its investment treaties, adopting a new Model BIT, and starting the termination of a majority of its treaties that were in force at the time.[60] Presently, it has eight BITs in

[58] Nicolas Bueno, Anil Yilmaz Vastardis and Isidore Ngueuleu Djeuga, "Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses"', *Journal of World Investment and Trade* (2023), p. 179, 194.
[59] *White Industries Australia Limited v. The Republic of India*, Final award, IIC 529 (2011), 30th November 2011, Arbitration; *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India (I)*, PCA Case No. 2016-7.
[60] Arush Khanna, "Why India Needs a Forward-Looking Approach to Bilateral Investment Treaties" *Indian Express*, February 10, 2024. Available from https://indianexpress.com/article/opinion/columns/why-india-needs-a-forward-looking-approach-to-bilateral-investment-treaties-9153783/.

force, and three signed, but not in force.[61] The text of the Model BIT is incorporated into each of the treaties that have been signed after the adoption of the Model. Investors are liable to comply with the laws pertaining to the environment, human rights, and labour as they are applicable in India, where the latter is the host State.[62] Against this background, this seems to be a mechanism in which the State exercises its right to regulate, especially where this has not been expressly stipulated in the treaty.

The Brazil-India BIT lays down that investors shall be liable to comply with the laws of the host State as regards taxation and all laws in connection with the investment.[63] There is no stipulation to comply with human rights and environmental laws, but this can be read into the provision pertaining to CSR, where investors are to strive to comply with the voluntary principles of contribution to environmental progress and to respect the human rights of those involved in the activities of the company.[64] A similar provision is also present in the BIT concluded with Kyrgyzstan.[65] However, neither of these agreements are presently in force – they have only been signed.[66] The BIT concluded with Belarus, which is in force, contains a similarly worded provision.[67] The BIT with Lithuania entered into force before the Indian Model BIT, and this is presumably the reason that it does not have the same provision. This is also the case with the BIT with the Philippines. On the other hand, however, the BIT with Colombia entered into force in 2018, but it does not contain the aforementioned text of the Model BIT.

Only the BIT with Brazil refers to respect for internationally recognised human rights,[68] whereas all other agreements address investor obligations pertaining to human rights and the environment through compliance with the local laws of the host State. There is

[61] India, International Investment Agreement Navigator, UNCTAD Investment Policy Hub. Available from https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india.
[62] Model Text for the Indian Bilateral Investment Treaty, article 12.1. Available from https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/Model-Text-for-the-Indian-Bilateral-Investment-Treaty.pdf.
[63] Investment Cooperation and Facilitation Treaty Between the Federative Republic of Brazil and the Republic of India 2020, article 11(a).
[64] *Ibid*., at article 12.2(b).
[65] Bilateral Investment Treaty Between the Government of the Kyrgyz Republic and the Government of the Republic of India 2019, article 12.
[66] *Ibid*.; (n 63).
[67] Treaty Between the Republic of Belarus and the Republic of India on Investments 2018, article 12.
[68] (n 63).

no reference to soft law instruments that we have seen in earlier instances. Therefore, this points to another intra-regional variation in the mechanism through which compliance with investor obligations is secured. Developing countries are arguably more likely to put emphasis on compliance with host State laws than their developed counterparts, although this is a universal feature of investment treaties. However, none of these treaties establish a mechanism for accountability in the event of a violation of investor obligations pertaining specifically to human rights and the environment. Treaties provide for the submission of disputes to arbitral tribunals in the event of a violation of the treaties by either party.[69]

To sum up, one regular feature of these legal instruments is the requirement for investors to comply with the laws of the host State in the establishment and operation of their investments. Some agreements also stipulate that human rights and environmental obligations have to be recognised. This is also a feature of the treaties that are concluded in the African region, and so, is a mechanism for developing countries to retain sovereignty over their regulatory domains. In terms of an intra-regional variation, the spectrum ranges from instances in which there are no environmental or human rights obligations on the one hand – such as China – to instances in which the right to regulate is implicitly mentioned – such as India – on the other. States also stipulate incorporating standards established by soft law instruments.

C. Europe and the Americas

To keep this overview as succinct as possible, different countries or blocs in the West have been grouped together. As we have seen earlier, the EU-Singapore FTA stipulates that investors from both parties should *refer* to soft law instruments in their performance of investor obligations, that arise from the provision pertaining to CSR.[70] While the EU as a bloc did not have a BIT with the UK, there are other treaties in force concluded between the UK and specific Member States of the EU. The EU-UK Trade and Cooperation Agreement, which was adopted in the context of the UK leaving the European Union is perhaps best known for doing away with an ISDS mechanism and

[69] *Ibid*., at article 19; (n 67) at article 16.
[70] (n 54).

replacing it with a State-State arbitration mechanism instead. However, insofar as investor obligations are concerned, the parties reiterate their commitment to invest in a manner that promotes sustainable development in its environmental dimensions.[71] There is also the recognition of the role of trade in CSR objectives and a reference to the aforementioned soft law instruments such as the OECD Guidelines and others such as the UN Global Compact.[72]

The absence of the ISDS mechanism in this agreement differentiates it from other agreements concluded with third States such as Canada and China. However, the latter agreement – the EU-China Comprehensive Agreement on Investment – also includes a CSR clause that refers to the aforementioned soft law instruments.[73] This agreement never came into force, because the EU Parliament voted to freeze its ratification in May 2021.[74] It is instructive to note that, in the agreements that actually contain the obligations, the latter are all indirect. It is, therefore, the responsibility of the States to encourage their investors to comply with these obligations, which effectively means that there are no international binding obligations on investors. Therefore, there are few similarities and few differences in the agreements that the EU has carried out with third States. There is no possibility of comparing these standards with intra-EU standards, because of the agreement between EU Member States to terminate all intra-EU BITs.[75]

The UK–Japan Comprehensive Economic Partnership Agreement also contains investor obligations in the form of a recognition of international labour standards and conventions and a recognition of the importance of multilateral environmental agreements.[76] The latter involves a reaffirmation of the commitment to implement such agreements to which it is a party, into its domestic legislations. Significantly, it also

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[71] Trade and Cooperation Agreement between the European Union and the United Kingdom 2020, Preamble.
[72] *Ibid*., at article 406(2)(b).
[73] EU-China Comprehensive Agreement on Investment 2020, section IV, article 2.
[74] Lily McElwee, "The Rise and Demise of the EU-China Investment Agreement: Takeaways for the Future of German Debate on China", Centre for Strategic and Environmental Studies, 20 March 2023. Available from https://www.csis.org/analysis/rise-and-demise-eu-china-investment-agreement-takeaways-future-german-debate-china.
[75] "EU Member States Sign an Agreement for the Termination of Intra-EU Bilateral Investment Treaties", European Commission, 5 May 2020. Available from https://finance.ec.europa.eu/publications/eu-member-states-sign-agreement-termination-intra-eu-bilateral-investment-treaties_en.
[76] The Agreement Between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership, article 16.4(1).

contains a provision pertaining to the right to regulate, which allows each party to determine its sustainable development policies and priorities – which means that each party can determine its own level of environmental protection.[77] The inclusion of this provision arguably demonstrates that this concern cuts across the developed-developing country binary as well. However, parties are only to strive to provide high levels of protection, so, there is no binding obligation to do so.

The EU's economic relations with South and Central American countries are governed by FTAs that are currently in force. There is an FTA between the EU and Colombia and Peru, which was signed in 2012.[78] It mirrors the language in earlier treaties that we have looked at and includes a separate chapter on Trade and Sustainable Development. It recognises the right of each party to adopt policies in accordance with its own levels of environmental and labour protection.[79] Additionally, parties are to promote investment in environmental goods and services.[80] Thirdly, parties are obligated not to reduce their standards of environmental and labour protections as a means of promoting investment.[81] Although Ecuador became a party to this agreement in 2017[82], the future of Ecuador's participation in the agreement is uncertain. This is because the President of Ecuador established an investment treaties audit Commission as a response to multiple adverse findings by investment tribunals and also because the government had been sued by investors twenty-four times up until that point. This necessitated a cost-benefit analysis of the treaties that were in force at the time. The Commission was to assess whether the treaties had helped to attract investment to Ecuador. It recommended the termination of all of the treaties.[83] In 2024, the citizens of Ecuador voted in a

[77] *Ibid.,* at article 16.2 (1).
[78] "The European Union and Peru", Delegation of the European Union to Peru, 29 July 2021. Available from https://www.eeas.europa.eu/peru/european-union-and-peru_en?s=162#.
[79] Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the Other Part, Article 268. Available from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2012:354:FULL.
[80] ibid at article 271(2).
[81] (n 79) at article 277(1).
[82] "Andean Community", European Commission. Available from https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/andean-community_en.
[83] Cecilia Olivet, "Why Did Ecuador Terminate All of Its Bilateral Investment Treaties?", Transnational Institute, 25 May 2017.

referendum to avoid using ISDS mechanisms for the settlement of investment disputes[84], signalling a maintenance of the adopted policy.

With Bolivia, on the other hand, the EU does not have either a trade agreement or an investment treaty. Trade relations between the EU and Bolivia are partially governed by the Generalised System of Preferences Plus, which allows Bolivia duty-free access to European markets for a number of products.[85] The BIT between Bolivia and the Belgium-Luxembourg Economic Union stands terminated.[86]

The USMCA contains investor obligations in the form of a provision pertaining to CSR. The structure of this clause mirrors the different CSR provisions we have looked at earlier, and therefore, privileges the voluntary incorporation of these standards by investors of all parties.[87] Additionally, parties have the authority to adopt measures that are necessary to ensure that investments are undertaken in a manner sensitive to the environment or other regulatory objectives. However, such measures cannot be inconsistent with the other provisions in the investment chapter.[88] A provision to this effect was also present in the North American Free Trade Agreement (NAFTA), its predecessor. This last stipulation points to one difference in these provisions – while the earlier agreements that have been considered stipulate a right to regulate consistent with international standards and commitments under different instruments, there is no reference to how this right is to be balanced against investor protections, so as to determine what takes precedence. In the USMCA, on the other hand, such measures still have to be consistent with other investment protection provisions and cannot supersede them.

It is also relevant to note that the investor-state dispute settlement regime of the USMCA applies differently with regard to Canada and Mexico. Canada is not a party

[84] "Ecuador Referendum Rules Out ISDS Return, Underlining Public Support for a Sustainable Path", IISD, 22 April 2024. Available from https://www.iisd.org/articles/statement/ecuador-referendum-rules-out-isds-return-underlining-public-support-sustainable.
[85] "The European Union and Bolivia", Delegation of the European Union to Bolivia, 27 July 2021. Available from https://www.eeas.europa.eu/bolivia/european-union-and-bolivia_en?s=159.
[86] Bolivia, International Investment Agreement Navigator, UNCTAD Investment Policy Hub. Available from https://investmentpolicy.unctad.org/international-investment-agreements/countries/24/bolivia-plurinational-state-of.
[87] (n 24), at article 14.17.
[88] (n 24).

to the dispute settlement chapter of the Agreement. In effect, in disputes between the US and Canada, investors from the former will be able to bring claims via investment arbitration for three more years, after which they will have to approach courts in Canada.[89] On the other hand, in disputes between the US and Mexico, claimants are obligated to bring claims in local courts before they can resort to investment arbitration. Canada can still be a party to ISDS proceedings through other legal instruments such as the Trans-Pacific Partnership (TPP), to which Mexico is also a party.[90] Canada's decision to not be a party to Chapter 14 under the new Agreement is attributed to multiple factors. It was the most frequently sued country under NAFTA Chapter 11, although no claimant was successful in pursuing a Chapter 11 claim against the US. Secondly, the availability of ISDS under TPP for disputes with Mexico could have guided the decision to not become a party to chapter 14 of USMCA.[91]

Legal instruments concluded between Latin American countries also include stipulations of direct and indirect investor obligations. Agreements that have the former, such as the Brazil-Ecuador BIT do so through the inclusion of a CSR clause, that includes language that mirrors other provisions that have been looked at.[92] There are other agreements such as the Argentina-Chile FTA that contain separate chapters on labour and the environment. Each of these chapters has a CSR clause. Additionally, there is a right-to-regulate clause that stipulates that the standard of protection provided by domestic labour and environmental regulations shall not be lowered so as to encourage investment.[93] This does not subject the parties to rigorous standards of obligations.

To sum up, intra-regional variations in Europe and the Americas range from the UK-Japan Agreement that recognises the right of countries to determine their own standards of environmental protection on the one hand to ensuring regulatory measures do not

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[89] Nathalie Bernasconi-Osterwalder, "USMCA Curbs How Much Investors Can Sue Countries – Sort Of", IISD, 2 October 2018. Available from https://www.iisd.org/articles/usmca-investors.

[90] Jenna Anne de Jong, "Major Changes in Investor-State Dispute Settlement in new United States-Mexico-Canada Agreement", Norton Rose Fulbright, October 2018. Available from https://www.nortonrosefulbright.com/en/knowledge/publications/91d41adf/major-changes-for-investor-state-dispute-settlement-in-new-united-states-mexico-canada-agreement.

[91] *Ibid.*

[92] Cooperation and Investment Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Ecuador 2019, article 14.2.

[93] Trade Agreement Between the Argentine Republic and the Republic of Chile 2017, article 8.14.

contradict investment protection provisions on the other. Treaty language continues to be non-binding, thereby allowing States to exercise discretion in regulating investments so as to protect the environment or uphold labour or human rights standards. The phrasing of provisions in agreements between Latin American countries reflects this, signalling that a premium is placed on regulatory sovereignty irrespective of where one is on the spectrum of development. Therefore, some issues cut across the developed-developing binary, while others support a distinction between the two.

D. Conclusion on Regional Approaches to Investor Obligations

The examination of the prevalent legal framework in the four regions under consideration demonstrates that standards of obligations that are placed on investors with regard to issues such as the environment and human rights will be determined by the amount of leeway that States hope to possess to regulate the same. Within each region, variations amongst these standards exist, so as to show that no clear generalisation can be made about each of them. Moreover, individual States take different approaches as compared to the blocs that they are part of. This was demonstrated by some of the Member States of the ECOWAS.

The standards of investor obligations range from high – where the right to regulate takes precedence over standards of investment protection – to low – where the latter takes precedence over the former. Instruments are also structured in different ways – some have an explicit provision that lays down the right to regulate for host States, while others have separate chapters dealing with issues such as the environment and human rights, that stipulate that such a right exists. Another popular mechanism to establish investor obligations is by including a provision that pertains to CSR, though it has largely remained voluntary in nature. Lastly, while it is difficult to make generalisations about developed and developing countries having different approaches to investor obligations, there are examples that point in this direction. So, while some of the legal instruments applicable in Africa stipulate that the right to regulate takes precedence over investment protection, the USMCA stipulates a reverse order of hierarchy.

III. Trends in Case Law since 2016

There is a recurring pattern in many ISDS proceedings between investors and their host States in cases involving environmental issues. Host States defend potential claims by claiming that the action in question is a valid exercise of their right to pass regulations to address societal concerns such as human rights or environmental issues. Tribunals on the other hand consistently find that host States are in breach of their obligations. Table 1 outlines the investment cases which demonstrate the shift in how tribunals have ruled on environmental and human rights-related investment cases.

Table 1: Cases analysed

Year of Award	*Short Name*	*Outcome*
2012	*SAUR International v. Argentina*	An investment case that defined the traditional approach tribunals have taken where the interest of investors trumps any arguments by the host State based on sustainable development, environmental law, or human rights.
2016	*Urbaser (Spain) v. Argentina*	An investment case addressing environmental issues in which the tribunal ruled in favour of Urbaser. The first time a tribunal agreed to hear an environmental law-based counterclaim by a host State against investors for environmental damages.
2017	*Burlington Resources (US) v. Ecuador*	An investment case addressing environmental issues in which the tribunal ruled in favour of Ecuador. It, alongside *Perenco v. Ecuador*, which was filed in response to the same dispute, is the first case in which a tribunal ruled in favour of a host State's counterclaim based on environmental law.

2017	*Bear Creek (Canada) v. Peru*	An investment case addressing human rights issues in which the tribunal ruled in favour of Bear Creek. This was the first time a member of a tribunal had incorporated human rights law in their dissent of a ruling.
2017	*David Aven (US) v. Costa Rica*	An investment case addressing environmental issues in which the tribunal ruled in favour of David Aven. A tribunal again agreed to hear an environmental law-based counterclaim by a host State against investors for environmental damages.
2018	*South American Silver (Bermuda, UK) v. Bolivia*	An investment case addressing environmental issues in which the tribunal ruled in favour of South American Silver. In this case, the tribunal ruled that host States may not implement environmental policies that negatively impact the interests of investors without providing compensation.
2018	*Alvarez y Marin Corporacion (Netherlands) v. Panama*	An investment case addressing human rights issues in which the tribunal ruled in favour of Panama. This was the first time a tribunal had ruled in favour of a host State's counterclaim, which was based on human rights law.
2021	*Eco Oro (Canada) v. Colombia*	An investment case addressing environmental issues in which the tribunal ruled in favour of Eco Oro. The tribunal ruled that host States may pass policies that negatively impact the rights of investors. However, the tribunal ruled against Colombia as they ruled that any environmental policies that impact investors' rights must not be arbitrary, and environmental protections found in FTA do not apply to arbitrary, discriminatory, or disguised measures.

2021	*Perenco (France) v. Ecuador*	An investment case addressing environmental issues in which the tribunal ruled in favour of Ecuador. It, alongside *Burlington Resources v. Ecuador*, was filed in response to the same dispute, and is the first case in which a tribunal ruled in favour of a host State's counterclaim based on environmental law.
2024	*Red Eagle (Canada) v. Colombia*	An investment case addressing environmental issues in which the tribunal ruled in favour of Colombia. This case affirmed the precedent that environmental cases may supersede investment protections if implemented in accordance with international law in direct contrast to the ruling of Eco Oro.

This recurring pattern was first exemplified in *SAUR International v. Argentina* in 2012, where the tribunal stated: "The fundamental right to water and the right of the investor to benefit from the [instrument] operate on different levels: in its sovereignty, the public administration has special powers to guarantee the enjoyment of the fundamental right to water; but the exercise of these powers is not absolute and must, on the contrary, be combined with respect for the rights and guarantees granted to the foreign investor under the [instrument]."[94] This defines the traditional approach tribunals have taken where the interest of the foreign investor trumped any arguments by the host State based on sustainable development, environmental law, or human rights. For decades, it appeared that any case in which a host State attempted to defend its actions, which the investors considered to be in violation of the host State's obligations, was fated to result in the host State's loss.

However, in recent years, host States have successfully used defences in ISDS proceedings based on environmental or human rights law. This shift started in Latin America, aligning with the approach Latin American BITs have taken on environmental and human rights standards. As previously stated, Latin American BITs frequently use

[94] Crina Baltag, Riddhi Joshi and Kabir Duggal, "Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?", *ICSID Review* (2023), p. 381, 421.

non-binding language in their treaties when addressing environmental, labour, or human rights concerns. This approach established the right of those States to pass regulations which address these concerns even if these regulations impact investments. Thus, it follows that the cases where tribunals have ruled most progressively on environmental or human rights concerns would concern Latin American countries. This monumental shift in the approach of tribunals towards environmental rights began in 2016 with the landmark decision in Urbaser v. Argentina.[95]

A. Trends in Cases Involving Environmental Issues

Urbaser v. Argentina was the first time a tribunal agreed to hear an environmental rights-based counterclaim in the proceedings. The tribunal's decision to accept jurisdiction over the counterclaim resulted from the neutral language in the dispute settlement clause in the Spain-Argentina BIT[96] and the clear connection between the claimant's claims and the counterclaim.[97] The tribunal found that, "It is certain and indisputable that the BIT's main and manifestly prevailing focus is on several standards of protection for the investor's rights and interests [...] there is no provision stating that the [...] host-State would not have any rights under the BIT."[98] This was a major shift as, in the past tribunals had required that counterclaims must be closely affiliated with the underlying claims. This approach was most clearly established in S*aluka v. Czech Republic*,[99] where the tribunal determined that a mere factual connection was insufficient for the tribunal to claim jurisdiction over a counterclaim. While the tribunal in *Urbaser* ultimately dismissed the counterclaim, its willingness to accept jurisdiction has set a precedent in investment arbitration; but the case's implications do not end there. The tribunal also rejected the claimant's argument that BITs are a closed system and held that it may consider external sources of law, such as human rights obligations. The claimant's arguments that they, as non-state actors, are not bound by human rights obligations under the BIT were also dismissed, with the tribunal stating that because

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[95] (n 3).
[96]Agreement for the Promotion and Reciprocal Protection of Investments Between the Republic of Argentina and the Kingdom of Spain.
[97] (n 3).
[98] Ted Gleason, "Examining Host State Counterclaims for Environmental Damage in Investor-State Dispute Settlement from Human Rights and Transnational Public Policy Perspectives", *International Environmental Agreements: Politics, Law and Economics,* Vol. 21 (2021).
[99] *Saluka Investments B.V. v. Czech Republic* (2004), Decision on Jurisdiction over Czech Republic's Counterclaim.

corporations are recipients of rights under BITs, they are bound by international law. The tribunal specifically referenced the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural which establish the existence of a human right to water.[100] This opens the door for future tribunals to consider counterclaims based on external sources of law.

David Aven v. Costa Rica[101] continued to recognise counterclaims based on external sources of law. This case revolved around a dispute under the Dominican Republic-Central America-United States Free Trade Agreement,[102] under which several investors took action after their real estate development project had been suspended by the host State due to environmental reasons. Costa Rica suspended the project because it was necessary to protect the environment and comply with its obligations under domestic and international law. The tribunal found evidence that the environmental law used in Costa Rica's defence applied to the real estate site and would be negatively impacted if the development continued.[103] The tribunal then found that the claimants had failed to disclose that the real estate site included environmentally sensitive areas and that the claimants needed to demonstrate that the real estate construction would not harm these areas.[104] The tribunal concluded, however, that investors' rights under the FTA were not completely subordinate to the right of Costa Rica to ensure that any investments carried out were sufficiently sensitive to environmental concerns.[105] Instead, the tribunal ruled that any actions taken by host States needed to be in line with the principles of international law including the obligation to act in good faith.[106] Lastly, the tribunal ruled that States could bring counterclaims against investors for environmental damages, indicating that investors are obligated to comply with the environmental laws of host States.[107] This case further exemplified the evolution of tribunals allowing and accepting counterclaims against investors based on environmental law.

[100] (n 3).
[101] *David R. Aven and others v. Republic of Costa Rica* (2018), ICSID Case Number UNCT 15/13.
[102] The Dominican Republic-Central America-United States Free Trade Agreement, 2004.
[103] (n 101) at para. 143.
[104] *Ibid.*, at para. 703.
[105] (n 101) at para. 585.
[106] *Ibid.*, at para. 412.
[107] (n 101) at para. 734.

Burlington Resources Inc. v. Ecuador[108] and *Perenco v. Ecuador*,[109] unlike the previously analysed cases, resulted in the tribunals being more permissive to both hearing and ruling in favour of counterclaims based on environmental law. *Burlington Resources Inc. v. Ecuador* and *Perenco v. Ecuador* arose in response to Ecuador's decision to implement a 99% extraordinary profits tax on oil companies. The new tax applied to Burlington and Perenco, who jointly invested in an oil exploration in Ecuador. Both companies refused to pay, and Ecuador seized both companies. Burlington and Perenco separately filed arbitration claims, under the US-Ecuador[110] and France-Ecuador BIT,[111] respectively, and claimed that Ecuador had violated its obligations by expropriating their property and had violated the fair and equitable treatment (FET) standard present in both BITs. Ecuador brought counterclaims against both companies, seeking to hold each company jointly and severally liable for environmental damages. This resulted in the first successfully filed counterclaim against an investor for environmental damage. The tribunals in these cases were aware of the significance of their rulings as demonstrated by the tribunal in *Perenco* following clarification: "proper environmental stewardship has assumed great importance in today's world. The tribunal agrees that if a legal relationship between an investor and the State permits the filing of a claim by the State for environmental damage caused by the investor's activities and such a claim is substantiated, the State is entitled to full reparation by the requirements of the applicable law."[112] However, a more recent case shows that tribunals do not always incorporate environmental law in their decisions and, in some cases, can even roll back progress.

The 2021 *Eco Oro Minerals Corp. v. Colombia*[113] case arose out of a decision by Colombia to prohibit mining in the area for which Eco Oro Minerals Corp had previously acquired a mining permit. Eco Oro had also entered a mining concession contract with Colombia and applied for an environmental risk assessment for the area. Initially, even though the area that Eco Oro was planning on mining had been in

[108] *Burlington Resources Inc. V. Republic of Ecuador* (2017), ICSID Case No. ARB/08/5.
[109] *Perenco Ecuador Ltd. v. Republic of Ecuador* (2019), ICSID Case No. ARB/08/6.
[110] Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment 1993.
[111] Agreement Between the Government of the French Republic and the Government of the Republic of Ecuador on the Reciprocal Protection and Encouragement of Investments 1994.
[112] (n 109) at para. 60.
[113] (n 8).

protected areas, there had been a special exception. However, these exceptions were struck down by the Colombian Constitutional Court in 2016, and Eco Oro filed a request for arbitration under the Canada-Colombia FTA. Eco Oro claimed that the measure taken by Colombia was an illegal indirect expropriation of their investment and that Colombia had failed to provide the minimum standard of treatment required under the FTA in question. Colombia, in response, argued that its actions to prohibit mining in environmentally sensitive areas in which Eco Oro had a mining permit were a legitimate exercise of its policy powers. Colombia's argument was based on the Expropriation Annex in the Canada-Colombia FTA,[114] which stated, "Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example health, safety, and the protection of the environment, do not constitute indirect expropriation." The tribunal held that Colombia's actions were a lawful exercise of its policy powers and were not an expropriation under the FTA. This was a major shift as it departed from *South American Silver v. Bolivia* in 2013, where the tribunal rejected a similar argument by Bolivia.[115]

In *South American Silver v. Bolivia*,[116] Bolivia revoked a mining permit that had been acquired to protect the rights of indigenous people in the area. Bolivia argued that its decision to revoke the mining licence was an example of a lawful exercise of its policy powers. The tribunal in *South American Silver* rejected Bolivia's argument and instead determined that Bolivia had committed unlawful expropriation based on the fact that no compensation for the permit had been paid to the investor. Yet despite this prior ruling which dealt with a similar set of circumstances, the tribunal in *Eco Oro* ruled differently. However, the tribunal in *Eco Oro* still ultimately ruled in the investor's favour as the tribunal determined that Colombia had failed to meet the minimum standards of treatment under the FTA and had acted arbitrarily.[117] Lastly, the tribunal rejected Colombia's argument that its actions were protected under the general exception provision in the FTA which provided an exception for measures "necessary

[114] Free Trade Agreement Between Canada and the Republic of Colombia 2008 at Annex 811(2)(b).
[115] *South American Silver Limited v. Bolivia* (2018), PCA Case No. 2013-15.
[116] *Ibid.*
[117] (n 8) at paras. 815-821.

to protect human, animal, or plant life or health and for the conservation of living or non-living exhaustible natural resources."[118]

The *Eco Oro* tribunal rejected this argument and held that these exceptions did not apply to arbitrary, unjustifiably discriminatory measures or disguised restrictions on international investment. The tribunal determined that if the exceptions present in the FTA were meant to exclude liability for compensation, it would have been more explicitly drafted as doing so.[119] The tribunal found that Colombia was liable for compensation for the investment regardless of whether the environmental exception in the FTA had been applied. This interpretation, however, is inconsistent with Article XX of the General Agreement on Tariffs and Trade (GATT) [120], on which the environmental exception in the Canada-Colombia FTA is based. In the Canada-Colombia FTA, if an established exception to a violation is upheld, then the State in question has no obligation to either change the measure or compensate the investor. In doing so, the tribunal effectively ruled that environmental protections or exceptions established to protect the environment do not trump the interests of investors. The fact that the tribunal in *Eco Oro* ruled in favour of investors' rights at the expense of the environmental protection measures established in the Canada-Colombia FTA was heavily criticised in a partial dissent written by Professor Philippe Sands. Professor Sands criticised the rest of the tribunal for the approach they took in analysing the FTA and criticised how the majority applied the fair and equitable treatment standard in the case. He argued that the standard of treatment that should have been applied in this case is the minimum standard of treatment as stipulated in the Canada-Colombia Free Trade Agreement as well as under customary international law. Professor Sands criticised how the majority did not accurately apply the minimum standards of treatment in this case, as the majority did not adequately consider what actions qualified as a breach of the minimum standard of treatment and incorrectly interpreted the role of legitimate expectations within the minimum standards of treatment. In doing so, Professor Sands argued that the majority did not respect the specific language and intent found in the FTA, and thereby undermined the environmental rights the treaty provided for.[121]

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[118] (n 114) at article 2201(3).
[119] (n 8) at para. 829.
[120] General Agreement on Tariffs and Trade 1947, Article XX.
[121] (n 8), Partial Dissent of Professor Philippe Sands QC.

The International Centre for Settlement of Investment Disputes (ICSID) tribunal in this year's *Red Eagle Exploration Limited. v. Republic of Colombia* case which dealt with a very similar issue to the conflict in *Eco Oro* came to a conclusion more in line with Professor Sands' dissent and the other more environmentally conscious rulings that have been previously discussed.

Red Eagle Exploration Limited v. Republic of Colombia[122] is a 2024 ICSID case that was filed by Red Eagle against Colombia based on the Colombia-Canada Free Trade Agreement.[123] The dispute in this case arose when in 2010 Colombia's Constitutional Court instituted a mining ban in the páramos ecological area due to the fact that these areas are a critical water supply for Colombia.[124] This ban directly adversely affected Red Eagle's previously purchased mining concessions in the páramos area. Ultimately, the tribunal ruled in favour of Colombia while affirming that measures undertaken by States for the purpose of protecting environmental conservation are legitimate and should be upheld in international arbitration as long as they are applied in a non-discriminatory, non-arbitrary, and proportionate manner. The tribunal ruled that Colombia had not violated the alleged reasonable expectation standard, had not acted with a lack of transparency, or in a discriminatory, disproportionate, or arbitrary manner.[125] The tribunal also concluded that Colombia's actions in the case were not a violation of the Minimum Standard of Treatment established in the Colombia-Canada Free Trade Agreement or had indirectly expropriated Red Eagle's mining concession as Red Eagle had alleged.[126] Instead, the tribunal affirmed that due to the fact that Red Eagle had purchased the mining concessions while aware that mining in the páramos area was prohibited the advancement of Red Eagle's mining project was similarly prohibited. As the tribunal determined that due to the prohibition Red Eagle had never legally acquired the rights in the first place, Colombia was simply enforcing the established mining prohibition. Ultimately the tribunal affirmed that Colombia's actions which were taken in order to protect the páramos were legitimate as these measures were in line with Colombia's duty to protect both its environment and critical water

[122] *Red Eagle Exploration Limited v. Republic of Colombia* [2024] Award.
[123] Colombia-Canada Free Trade Agreement, 2008.
[124] (n 122) at para. 1.
[125] (n 122) at para. 283.
[126] *Ibid.*, at para. 397.

sources. The tribunal noted the inherent government challenges in balancing both economic and environmental interests. Yet the tribunal determined that the environmental regulations passed by Colombia were both reasonable and proportionate to the objectives that they were implemented to achieve.[127] Overall this case helped reinforce the precedent established in previous cases that environmental protections if implemented correctly supersede the rights of investors which was in direct contrast to the ultimate ruling in the *Eco Oro* case.

In conclusion, the cases above outline several major developments and trends in ISDS proceedings since 2016. The tribunal in the *Urbaser v. Argentina*[128] held that ISDS tribunals will now consider counterclaims based on environmental law provisions in the relevant investment agreement and no longer consider investment arbitration to be separated from other sources of law, such as international human rights law or environmental law. The tribunal in the *David Aven v. Costa Rica* case for the first time ruled that the rights of investors have no priority over the right of States to pass environmental protection laws, that States could bring counterclaims against States for environmental damages, and investors are obligated to comply with the environmental laws of host States. *Burlington Resources Inc. v. Ecuador*[129] and *Perenco v. Ecuador*[130] demonstrated that host States can successfully file counterclaims against an investor for environmental damage. In *Eco Oro v. Colombia*,[131] the tribunal established that an investment is not required to be legal for the investor's right to be enforceable under the relevant investment treaties. Yet, while the tribunal in *Eco Oro* concluded that environmental protections or exceptions established to protect the environment do not trump the interests of investors, this ruling was directly contradicted in the *Red Eagle v. Colombia case*, as in *Red Eagle* the tribunal determined that environmental protections superseded investment protections as long as they were implemented in compliance with international law. While the previously described developments constitute significant shifts in ISDS proceedings, the rise of environmental counterclaims represents the most noteworthy change.

[127] *Ibid.*
[128] (n 3)
[129] (n 108).
[130] (n 109).
[131] (n 8).

Further, these environmental-related investment cases also demonstrate the rise in tribunals upholding jurisdiction over counterclaims based on international environmental and human rights law. The tribunals in the *Urbaser*[132] and *David Aven*[133] cases held that since corporations have rights under international law, they may also have corresponding obligations.[134] The tribunals in these cases determined that BITs were not isolated from international law but instead that international law, including environmental and human rights law, applied to BITs. This is a significant shift as counterclaims based on international environmental law have been relatively effective at holding investors accountable for actions that have resulted in environmental damages, as demonstrated in the *Burlington Resources*[135] and *Perenco*[136] cases. When asserting a counterclaim, whether the latter is enabled by a treaty provision or under general international law, the *onus* remains with the host State to respond to a claim with a counterclaim in a particular dispute. Overall, environmental-based counterclaims are significant since they can be used as a way to balance the asymmetries in the investment dispute regime.

B. Cases Involving Human Rights Issues

There has also been a major trend of investment tribunals choosing to incorporate human rights law in their rulings. This shift occurred with the 2017 *Bear Creek Mining Corp v. Republic of Peru* case[137] which arose from a dispute involving a Canadian mining company that had obtained a license to acquire, own, and operate mining concessions. The Peruvian Government revoked the license when the local community opposed the concessions. In response, Bear Creek Mining Corp filed an arbitration claim against Peru for indirect expropriation of their investment under the Peru-Canada FTA.[138] Peru argued that the tribunal had no jurisdiction to adjudicate the case because

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[132] (n 3).
[133] (n 101).
[134] Ted Gleason, "Examining Host State Counterclaims for Environmental Damage in Investor-State Dispute Settlement from Human Rights and Transnational Public Policy Perspectives", *International Environmental Agreements: Politics, Law and Economics,* Vol. 21 (2021). Available from link.springer.com/article/10.1007/s10784-020-09519-y#citeas.
[135] (n 108).
[136] (n 109).
[137] (n 9) at para. 1.
[138] Free Trade Agreement Between Canada and the Republic of Peru 2009.

Bear Creek Mining Corp violated Peruvian law to obtain the permit.[139] To assess whether the alleged illegal conduct by Bear Creek barred their investment claims, the tribunal analysed the FTA to determine if the FTA had established that all investments must be legal under domestic law to qualify as an investment under it. The tribunal concluded that because the FTA did not contain any provisions that required the investment to be made in accordance with law or a good faith requirement, the FTA did not require investments to be legal in order to qualify under the FTA.[140] The tribunal then moved on to determine if Peru's actions constituted an indirect expropriation.[141] The tribunal found that it did because Peru's actions had an economic impact on the investment, violated the investor's reasonable expectations, and the measure was not legally justifiable.[142] Notably, one of the main reasons Peru alleged that the mining company's actions were illegal was its relationship with the local community in the area they wished to mine. Peru argued that the mining company "lacked a social license to build and operate in Peru and that the investor had contributed to the social unrest" and decided to prohibit mining in the area.[143] The tribunal held that Peru had not met its burden to show a causal link between the social unrest and the investor's operations and dismissed all illegality-related arguments. In his partial dissent, Professor Philippe Sands observed that the rights of the local communities in the mining area should be considered and that "a possible explanation for the adverse responses of certain communities to the investor's project could be that the Investor did not engage the trust of all potentially affected communities and that even if the Investor was on notice of those numerous communities, it failed to take the appropriate steps to address the concerns of those communities."[144] This demonstrates some appetite by tribunal members to consider human rights when determining the lawfulness of a concession. This shift exemplified by one tribunal member in this case was reflected in the entire decision of the next case which dealt with human rights.

Alverez y Martin Corporation v. Panama involved a dispute between a group of real estate investors from the Netherlands and Costa Rica against Panama.[145] The investors

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[139] (n 9) at para. 288.
[140] *Ibid.*, at para. 328.
[141] (n 9) at para. 429.
[142] *Ibid.,* at para. 375.
[143] (n 9) at para. 328.
[144] *Ibid*., Partial dissenting opinion.
[145] (n 10).

had obtained land to develop a tourism project. Since much of the land acquired by the investors was on indigenous-protected land, third-party ownership was restricted and could only occur under limited circumstances. Specifically, private ownership of the land should have existed before the indigenous-protected reserve was created and the indigenous communities had the right of first refusal to purchase the land, and a third party may purchase lands only when the indigenous community did not want them. As none of these qualifications were met for half of the land purchased by the investors, the investors initiated ICSID proceedings under the Netherlands-Panama BIT[146] and the Central American-Panama FTA,[147] respectively. The investor argued that Panama had "(i) expropriated their investment without compensation, without cause of public utility and respect for due process, (ii) did not treat them fairly and equitably, and (iii) did not give their investment full protection and security."[148]

Panama argued that the claimants had illegally acquired the land through an irregular and fraudulent process.[149] It pointed out that a legality requirement for the investment is necessary for an investment to be valid under public international law. Though neither treaty included provisions establishing a legality requirement, the tribunal held that a legality requirement is an inherent part of what defines a protected investment and that this was breached.[150] The tribunal determined that neither the investors nor the investment qualified for protection under the relevant treaties or international law[151] and that the investors had acquired the property in direct violation of the special relevant regime that protected the rights of indigenous people.[152] The tribunal further established that due to the existence of the special legal regime, a higher standard of due diligence was expected from investors.[153] As the investors had not met these requirements, such as allowing indigenous people the right of first refusal to purchase the lands, the transaction was void. The tribunal's ruling establishing both a legality requirement for investors and the statement that a higher level of due diligence was required of investors

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[146] Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Panama and the Kingdom of the Netherlands 2000.
[147] Free Trade Agreement Between Central America and Panama 2002.
[148] (n 10) at para. 18.
[149] *Ibid*., at para. 106.
[150] (n 10) at para. 398.
[151] *Ibid.,* at para. 115.
[152] (n 10) at para. 18.
[153] *Ibid.,* at para. 388.

when dealing with special legal regimes that are established to protect indigenous rights are positive findings in direct contradiction to *Bear Creek*.

In conclusion, *Bear Creek Mining Corp v. Republic of Peru* and *Alverez y Martin Corporation v. Panama* demonstrate a major split between tribunals on whether there is an obligation for investments to be legal for the investor's right to be enforceable and whether the rights of indigenous people are relevant to determining whether an appropriation is lawful. While these two tribunals arrived at opposite conclusions, when analysed together, they seem to indicate that tribunals are more willing to incorporate human rights law in investment disputes. The ruling in *Alvarez* would seem to indicate the start of a trend of tribunals taking indigenous rights into account.

IV. Procedural Reform by States

As shown in the relatively limited and inconsistent developments in investment tribunals, to effectively rebalance the asymmetries in the international investment regime, States must attempt to reform the procedural and substantive international investment regime rules. At a procedural level, the State-led UNCITRAL WG III has been considering reforms to ISDS since 2015. Phases 1 and 2 of the Working Group confirmed that reform of the international investment regime was desirable.[154] Now in Phase 3, the Working Group works to develop solutions to be recommended to the Commission. It is expected to consider cross-cutting themes, such as the exhaustion of local remedies, third-party participation by the public and local communities, investor obligations and counterclaims, regulatory chill, and damages.[155] However, the Working Group has excluded, among others, the direct relationship of international investment law to environmental degradation, climate change, and human rights.

More specifically, the Working Group has focused on the procedural aspects of ISDS,[156] and as such its approach falls far short of fundamentally re-orienting substantive international investment law rules.[157] Some commentators consider that these reform processes do not address the market failures that arise from the incentive structure of the international investment regime to allow investors to externalise the massive environmental, human rights, and other costs associated with their investments.[158] Others consider that the outcome will re-legitimise or retrench the current international investment regime, instead of fundamentally transforming it.[159] In terms of the substantive obligations on foreign investors, it is clear that States must pursue reform in their treaty practice.

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[154] UNCITRAL, Report of the United Nations Commission on International Trade Law on the Work of Its Fiftieth Session (New York, 3–21 July 2017), UN Doc A/72/17, para. 264.
[155] UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session (New York, 1–5 April 2019), UN Doc A/CN.9/970, paras. 36–37.
[156] *Ibid.*
[157] James T Gathii, Harrizon Otieno Mbori, "Reform and Retrenchment in International Investment Law: Introduction to a Special Issue", *Journal of World Investment and Trade*, Vol. 24 (2023), p. 536.
[158] Lorenzo Cotula, "International Investment Law and Climate Change: Reframing the ISDS Reform Agenda", *Journal of World Investment and Trade*, Vol. 24 (2023), p. 766.
[159] Jane Kelsey and Kinda Mohamadieh, "UNCITRAL Fiddles while Countries Burn", Third World Network & Friedrich Ebert Stiftung Study, September 2021; Gathii and Mbori (n 157), pp. 544-556.

While States can and should participate in multilateral reform processes, for the purpose of imposing obligations on foreign investors, they can and should reform their own treaty practice.

V. Avenues for Substantive Reform by States

It can be argued that States should be cautious in reforming their international investment law obligations considering the risks of being perceived as less attractive jurisdictions for foreign investment. However, a survey of in-house lawyers of large US companies has shown that the presence of investment treaties is rarely a relevant consideration when considering foreign investment projects.[160] Further, signing investment treaties most likely does not cause a country to receive more foreign investment.[161] Even then, the statistical link between receiving foreign investment and spurring economic growth is also tenuous.[162] The experience of Bolivia is helpful in this regard. Despite withdrawing from the ICSID Convention in 2007, renationalising natural resources, and restructuring its domestic regulatory framework (including passing legislation on investment promotion, state-owned enterprises, and conciliation and arbitration), Bolivia maintained its FDI attractiveness and has even increased FDI inflows.[163] This evidence suggests States should be more emboldened to reform their international investment policy to better reflect their desired risk tolerance without fearing the perceived downstream consequences of receiving less FDI and hampering economic growth.

As described in Part II above, States around the world have experimented with different mechanisms in their treaty policy, which are outlined and evaluated below.

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[160] Jason W. Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence", *Virginia Journal of International Law,* Vol. 51 (2010), p. 397.
[161] *Ibid.*
[162] Maria Carkovic and Ross Levine, "Does Foreign Direct Investment Accelerate Economic Growth?", in *Does Foreign Direct Investment Promote Development?,* T. Moran, E.M. Graham and M. Blomström, eds. (Washington, DC, Peterson Institute for International Economics, 2005); Joachim Pohl, "Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence", OECD Working Papers on International Investment 2018/01. Available from https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en.
[163] See comments of Pablo Menacho, "Meeting Report: Reshaping Investment Law and Policy to Support the 2030 Development Agenda", 10th Annual Forum of Development Country Investment Negotiators (2016). Available from https://www.iisd.org/system/files/meterial/10th-annual-forum-report-en.pdf.

A. Treaty References to International Instruments

Treaties can refer to international instruments, both as a source of investor obligations and to guide treaty interpretations to better reflect developmental intentions.[164] Examples of such instruments include:

- UN Universal Declaration of Human Rights (1948);
- ILO Declaration on Fundamental Principles and Rights at Work (1998);
- ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2017);
- UN Convention against Corruption (2003); and
- UN Guiding Principles on Business and Human Rights (2011).

B. Treaties Can Create Investor Obligations

IIAs can create different levels of investor obligations. Indirect investor responsibilities only require States to encourage investors to voluntarily incorporate investor responsibilities on labour and human rights, environment, and others.[165] These kinds of provisions represent the lowest ambition and do not create binding obligations on investor conduct.

In terms of direct investor obligations, a lower ambition provision is to require foreign investors to exert 'best efforts' to respect human rights.[166] These create a weak obligation on foreign investors as they enable investors to self-regulate how they and their investments will comply with such responsibilities. The highest standard of investor obligations imposes binding obligations, such as environmental impact assessments and ongoing human rights obligations.[167]

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[164] Barnali Choudhury, "Investor Obligations for Human Rights", *ICSID Review - Foreign Investment Law Journal,* Vol. 35 (2020), pp. 82-104.
[165] See Section II above.
[166] See for example Investment Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Malawi, art. 9.2.
[167] (n 44) at art. 18; (n 26) at art. 14.

C. Requiring Compliance with Domestic Laws and Regulations as a Pre-Requisite to Investment Protection

IIAs can require foreign investors to comply with domestic laws and regulations of the host States, highlighting domestic human rights, labour, and environmental laws.[168] The IIA may include provisions that condition investment protection and access to arbitration on the observation by investors of their obligations.[169] This would also limit arbitration costs for an otherwise respondent State. While IIAs may not need to explicitly require investments to be made in accordance with domestic law to deny access to ISDS,[170] for the avoidance of doubt, these provisions elevate the applicable domestic law to the treaty level and can be included to reinforce their relevance before investment tribunals.[171]

However, to avoid abuse, the standard required for a violation should be clear and set at a high bar, for example, for serious human rights violations, environmental damage, money laundering, or corruption, among others.[172] Practically, this would also enable arbitration panels to rely on decisions of a host State's domestic institutions or international human rights courts and avoid empowering arbitral panels to decide issues such as human rights or criminality.[173]

D. Consideration of Investor Violations in the Merits and Awards Phase

As an alternative to limiting investment protection and making access to arbitration conditional on meeting the investor's obligations, some IIAs instruct accounting for human rights violations during the merits or awards phase when calculating damages.[174]

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[168] The Netherlands Model BIT, art. 7.1.
[169] Colombia Model BIT, art. [XX] – Denial of Benefits.
[170] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 19 April 2009, CL-27, para. 101.
[171] Markus Krajewski, "A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty Making and Treaty-Application", *Business and Human Rights Journal,* Vol. 5 (2020), pp. 105–29; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, para. 321.
[172] (n 169) at art. [XX] – Denial of Benefits.
[173] See comments of Daniel Felipe García Clavijo, "Meeting Report: Reshaping Investment Law and Policy to Support the 2030 Development Agenda", Tenth Annual Forum of Developing Country Investment Negotiators (2016).
[174] The Netherlands Model BIT, art. 23; see for example *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA 2012–2, Award (15 March 2016), paras. 6.97–6.99, 6.133; (n 8) at para. 39.

This approach does consider the investor's obligations but does not prevent cases from going to the merits phase or reduce arbitration costs on States. It also raises questions as to whether it is appropriate to only consider fundamental breaches in human rights at the awards stage.[175]

E. Exceptions Provisions

Some treaties exclude certain measures, such as legitimate public welfare objectives, public health, public morals, and the environment, from the scope of investment arbitration.[176] While the case law in *Eco Oro* and *Red Eagle* has inconsistently upheld these provisions,[177] these must be included to preserve sensitive regulatory space and to raise in the event of a dispute. As noted by the tribunal in *Eco Oro*, for the exceptions provision to exclude liability for compensation, it should be explicitly drafted to do so.[178] Further, it remains unclear whether an exceptions provision cast so broad as to include arbitrary, unjustifiably discriminatory measures or disguised restrictions, would be enforceable. Such a provision might be seen as cutting across the purpose of BITs as a means of investment protection.

F. Counterclaims by the Host State

As described in Section III above, an emerging trend is that States are making counterclaims against foreign investors for the failure of the latter to meet their obligations.[179] Some new-generation IIAs contain provisions that enable States to make a counterclaim attached to the investor's claim,[180] and others enable a State to initiate a claim against a foreign investor.[181] To rebalance the asymmetries in the investment

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[175] Lorenzo Cotula and Terrence Neal, "UNCITRAL Working Group III: Can Reforming Procedures Rebalance Investor Rights and Obligations", Investment Policy Brief, No. 15 (Geneva, South Centre, 2019), p. 3.
[176] China-Australia FTA, article 9.11; General Agreement on Tariffs and Trade (GATT), art. XX.
[177] See Section III above.
[178] (n 8) at para. 829.
[179]United Nations Economic Commission for Africa, *Towards a Common Investment Area in the African Continental Free Trade Area: Levelling the Playing Field for Intra-African Investment* (2021), ch. 3, p. 131. See for example *Urbaser v. Argentina* (n 3), *Aven v. Costa Rica* (n 101*), Burlington Resources Inc. v. Ecuador* (n 108), *Perenco v. Ecuador* (n 109).
[180] ICSID Convention, art. 46.
[181] Investment Agreement for the COMESA (Common Market for Eastern and Southern Africa) Common Investment Area (CCIA), art. 36.7.

dispute regime, States can further negotiate counterclaim provisions in their treaty policy and bring counterclaims, under those provisions or in general international law, where investors have not met their obligations in their investment projects. While counterclaims covered under the jurisdictional clause of the relevant IIA can be an effective enforcement mechanism on investors, States can use domestic mechanisms to enforce investor obligations in the first instance.

G. Enforcement by the Home State

Most ambitiously, some treaties stipulate that both the host State *and the home State* can hold investors civilly liable domestically for any acts relating to their investment in the host State that cause significant damage, injuries, or loss of life.[182] While host States continue to have jurisdiction, these provisions enable the home State to enforce its domestic law over its national activity in the host State.[183] However, this relies on the home State's willingness to bring a claim against its own investor. This is a radical development and challenges the fundamental dynamic that investors are not parties to the treaty.

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[182] Netherlands Model Investment Agreement, art. 7.4.

[183] United Nations Environment Programme (UNEP) and Institute for Sustainable Development (IISD), A Sustainability Toolkit for Trade Negotiators: 5.3.1 Investor Obligations (2016). Available from https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-3-investor-and-home-state-obligations/5-3-1-investor-obligations/.

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