

2018

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Recommended Citation

Klara Polackova Van der Ploeg, *Protection of Regulatory Autonomy and Investor Obligations: Latest Trends in Investment Treaty Design*, 51 INT'L L. 109 (2018)
<https://scholar.smu.edu/til/vol51/iss1/7>

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Protection of Regulatory Autonomy and Investor Obligations: Latest Trends in Investment Treaty Design

KLARA POLACKOVA VAN DER PLOEG¹

I. Investment Treaties: A Regulatory Straitjacket?

The scope of states' power to regulate in the public interest, within the normative context of an applicable investment protection treaty, has been the central issue of recent investor-state arbitration cases. This essentially conceptual issue has important practical consequences. By imposing on host states wide-ranging obligations for particular treatment of qualifying foreign investors, investment treaties inherently curtail host states' regulatory space. Many regulatory actions that would have been permissible under a state's municipal law may constitute violations of applicable investment treaties, for which the state may be held internationally responsible and liable to provide sizable financial compensation to foreign investors.

The characteristic feature of cases centered around the scope of states' regulatory autonomy is the elemental tension between investment guarantees and a conflicting public interest which the host state aspires to protect. The most notable of the recent arbitral decisions are the *Philip Morris* tobacco packaging cases,² in which the tobacco giant challenged, unsuccessfully, the Australian and Uruguayan measures on tobacco packaging.³ Australia and Uruguay introduced the tobacco packaging requirements to protect public health through health warnings and reduction in appeal; however, Philip Morris challenged the measures as interfering with its property and trademark rights protected by the applicable investment treaties.⁴

While the investment aspect of the *Philip Morris* saga seems dormant for the time being, the issue of regulation in the public interest remains at the forefront of the international investment law agenda and a core question of

1. The Graduate Institute of International and Development Studies. Research funding for this Article was provided by the Swiss National Science Foundation, Project No. PIGEPI-164860.

2. *Philip Morris Asia Ltd. v. Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, *Award on Jurisdiction and Admissibility* (Dec. 17, 2015); *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/07, *Award* (July 8, 2016).

3. *Id.* While the tribunal in the Australian proceedings dismissed the case on jurisdiction, the tribunal in the Uruguay case rejected all of Philip Morris' claims on merits.

4. *Id.*

many ongoing investor-state arbitrations.⁵ The pending case of *Gabriel Resources v. Romania* is a pertinent example.⁶ The Romanian government, regulators, and the Parliament have refused to approve the highly controversial U.S. \$2 billion dollar Rosia Montana mining project because of its anticipated environmental and societal impacts.⁷ The foreign investor alleges that the refusal amounted to a violation of the fair and equitable treatment standard guaranteed under the applicable investment treaties and has initiated arbitral proceedings to recover losses allegedly incurred.⁸

Another apposite example is the *Vattenfall v. Germany* case and its investor-state arbitration component brought under the Energy Charter Treaty (the “ECT”).⁹ Invoking the protection of public health and the environment, the German government decided to stop the production of nuclear energy in the country and to close down all nuclear power plants. Vattenfall companies have asserted that the discontinuation of Vattenfall power plants amounted to violations of the ECT and have reportedly been claiming €4.7 billion as compensation for losses allegedly suffered.¹⁰

II. Controversy of Investment Treaties and Investor-State Dispute Settlement

The *Philip Morris*, *Gabriel Resources*, and *Vattenfall* cases have taken place against the background of a broader debate on the legitimacy and acceptable parameters of international investment protection and investor-state dispute settlement (“ISDS”). ISDS has been an exceptionally vibrant area of international dispute settlement over the last twenty-five years. However, investment treaties and ISDS have been attracting growing concerns among

5. See generally AIKATERINI TITI, *THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW* (2014); REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME (Andreas Kulick ed., 2016); STEFFEN HINDELANG & MARKUS KRAJEWSKI, *SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED* (2016); Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VAND. J. TRANSNAT'L L. 355 (2017); PEDRO J. MARTINEZ-FRAGA & C. RYAN REETZ, *PUBLIC PURPOSE IN INTERNATIONAL LAW: RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL ERA* (2015).

6. *Gabriel Res. Ltd. v. Romania*, ICSID Case No. ARB/15/31, *Pending*, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/15/31>.

7. See, e.g., James Wilson, *Gold explorer Gabriel Resources seeks arbitration with Romania*, FINANCIAL TIMES (Jan. 20, 2015), <https://www.ft.com/content/81da52ae-a094-11e4-8ad8-00144feab7de>.

8. Press Release, *Gabriel Res.*, *Gabriel Files for Int'l Arbitration Against Rom.* (July 21, 2015), <http://www.italaw.com/sites/default/files/case-documents/italaw7870.pdf>.

9. *Vattenfall AB v. German Federal Republic*, ICSID Case No. ARB/12/12, *Pending*, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/12/12>.

10. Tom Jones, *German Court Rules on Nuclear Phase-out as Vattenfall Award Draws Near*, GLOBAL ARBITRATION REVIEW, <http://globalarbitrationreview.com/article/1078505/german-court-rules-on-nuclear-phase-out-as-vattenfall-award-draws-near> (last updated Dec. 8, 2016).

states and the general public.¹¹ Investment disputes have been putting under scrutiny states' general regulatory measures and measures taken in the public interest.¹² The amounts of damages that arbitral tribunals have awarded regularly exceeded one billion dollars.¹³ Arbitral tribunals have also tended to prioritize investment protection over other considerations and policy objectives, such as the environment, public health, human rights, labor standards, and financial stability.

Fairly or not, investment treaties, and ISDS in particular, have grown to be viewed in many corners as flawed—biased—in favor of investors and unacceptably encroaching upon the legitimate uses of states' regulatory power—resulting in a legitimacy crisis of this body of law.¹⁴ Tellingly, the European Commission has characterized ISDS as “outdated”¹⁵ and, citing a lack of trust in the use of investor-state arbitration to settle investment disputes, has been promoting a different model of investor-dispute settlement in its recent negotiations.¹⁶

11. See, e.g., *Investor-state Dispute Settlement: The Arbitration Game*, THE ECONOMIST (Oct. 11, 2014), <http://www.economist.com/news/finance-and-economics/21623756-governments-are-sourcing-treaties-protect-foreign-investors-arbitration>; Frank Mulder, et al., *Schiedsgerichte—Die Kläger-Clique*, SPIEGEL ONLINE (Apr. 16, 2016), <http://www.spiegel.de/wirtschaft/soziales/tuip-schiedsgericht-streit-die-meisten-klaeger-kommen-aus-europa-a-1084640.html>; Jonathan Weisman, *Trans-Pacific Partnership Seen as Door for Foreign Suits Against U.S.*, THE NEW YORK TIMES, (Mar. 25, 2015), <https://www.nytimes.com/2015/03/26/business/trans-pacific-partnership-seen-as-door-for-foreign-suits-against-us.html>; Alan Beattie, *Arbitration on Trial: the US and UK's Fear of the Supranational*, FINANCIAL TIMES (May 2, 2017), <https://www.ft.com/content/e607c6b2-28f5-11e7-bc4b-5528796fe35c?mhq5j=E3>.

12. United Nations Conference on Trade and Development (UNCTAD), *Investor-State Dispute Settlement: Review of Developments in 2016*, 5 (Issue 1) (May 2017).

13. See, e.g., *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, *Award* (Oct. 5, 2012) (US \$1.77 billion plus interest awarded); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, *Award* (Apr. 4, 2016) (US \$1.2 billion plus interest awarded); *Venezuela Holdings BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, *Award* (Oct. 9, 2014) (US \$1.6 billion awarded; an annulment tribunal, however, reduced the amount of damages by US \$1.41 billion on Mar. 9, 2017). Note the outlier of the Yukos awards, in which the arbitral tribunals awarded total damages to the claimants (shareholders of the Yukos Oil Company) of more than US \$50 billion. *Hulley Enterprises Ltd. v. Russian Federation*, UNCITRAL, PCA Case No. AA 226, *Final Award* (July 18, 2014); *Yukos Universal Ltd. v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, *Final Award* (July 18, 2014); *Veteran Petroleum Ltd. v. Russian Federation*, UNCITRAL, PCA No. AA 228, *Final Award* (July 18, 2014).

14. See, e.g., *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* (Michael Waibel et al ed., 2010); *REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME* (Andreas Kulick ed., 2016).

15. Press Release, European Comm'n, E.U. and U.S. Publish TTIP State of Play Assessment, ¶ 4 (Jan. 17, 2017), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1613>.

16. Concept Paper, European Comm'n, *Investment in TTIP and beyond—the path for reform* (2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF; Douglas Thomson, *EU says “ISDS is dead” ahead of Japan trade deal*, GLOBAL ARBITRATION REVIEW, <http://globalarbitrationreview.com/article/1144114/eu-says-%E2%80%9Cisds-is-dead%E2%80%9D-ahead-of-japan-trade-deal> (last updated July 6, 2017).

III. Re-Calibration of International Investment Law

Against the background of what has often been described as the backlash against investment arbitration, arbitral tribunals have been becoming more sensitive to host states' legitimate public policy objectives and more willing to balance investor protection with other interests.¹⁷ The *Philip Morris v. Uruguay* award, which upheld the legality of two tobacco-control measures enacted by the Uruguayan government for the purpose of protecting public health, provides an instructive example of investment tribunals' ability and willingness to give appropriate weight to sovereign regulatory goals.¹⁸

States have sought to intervene in the practice of investment arbitration on the level of applicable treaty norms themselves. Indeed, the wording of specific treaty provisions has been a key factor in case outcomes.¹⁹ Older investment treaties have, on their face, prioritized investor protection over other considerations (in contrast to the declared objective of protection of investments to facilitate economic cooperation and prosperity, they would regularly lack any explicit reference to other values and interests),²⁰ and this textual absence would then provide the basis for arbitral decision-making taking place principally around the single axis of investment protection.

Some states, including South Africa, Indonesia, Bolivia, Ecuador, and Venezuela, have gone so far as to cancel (some of) their investment treaties without any replacement.²¹ Other states have been seeking to recalibrate the balance between investor and state interests through novel treaty provisions, which would provide an explicit basis for a more balanced understanding of investment protection and a more nuanced arbitral approach in future cases.²²

IV. Treaty Provisions Protecting Host States' Regulatory Autonomy

In their recently negotiated treaties, states have firstly sought to safeguard host states' regulatory autonomy and legitimate regulatory space by narrowing down and particularizing treaty guarantees, and by limiting the opportunities for broad interpretation of any protections granted by arbitral tribunals. The new types of provisions have most frequently included: (i) an

17. See David Schneiderman, *Legitimacy and Reflexivity in International Investment Arbitration: A New Self Restraint?* Vol. 2 J. OF INT'L DISP. SETTLEMENT NO. 2 (2011) (testing adaptation of arbitral tribunals to legitimation concerns).

18. Tania Voon & Andrew Mitchell, *Philip Morris vs. Tobacco Control: Two Wins for Public Health, but Uncertainty Remains*, COLUMBIA FDI PERSPECTIVES (2016), 2.

19. See, e.g., Investor-State Dispute Settlement: Review of Developments in 2016, *supra* note 12, 1; Bradley J. Condon, *Treaty Structure and Public Interest Regulation in International Economic Law*, 17 J. INT'L ECON. L. 333 (2014).

20. See, e.g., Agreement on Encouragement and Reciprocal Invs., Neth.-Arg., Oct. 20, 1992.

21. See *International Investment Agreements*, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA> (last visited Sept. 20, 2017).

22. See Concept Paper, *supra* note 16.

explicit confirmation of the host state's right to regulate; (ii) more precise definitions of protected investments (for example, excluding specific assets, such as sovereign bonds, from the definition of investment) and standards of treatment (such as fair and equitable treatment and indirect expropriation); (iii) affirmations of other (non-investment) values and concerns, such as the protection of labor rights and the environment; (iv) general exceptions clauses, removing specific policy areas or measures, such as the protection of human rights, the environment, and essential security interests, from the scope of the treaty; (v) more precise dispute settlement clauses, regulating (and thus limiting) access to ISDS (for example, by making only some treaty provisions subject to ISDS or by excluding certain policy areas from ISDS); (vi) provisions curbing arbitral tribunals' power to interpret the investment treaty; and (vii) provisions on joint interpretations of the treaty by the treaty parties, which are binding on arbitral tribunals.

The recently signed Comprehensive Economic and Trade Agreement between Canada and the European Union ("CETA")²³ provides an example of these innovations in investment treaty design. It explicitly reaffirms the state parties' right to regulate for legitimate policy objectives, "such as the protection of public health, safety, the environment or public morals, social or consumer protection, or the promotion and protection of cultural diversity" (and in some detail elaborates the implications of this right).²⁴ It explicitly excludes commercial contracts for the sale of goods or services from the scope of the covered investments.²⁵ With respect to the standards of treatment, the treaty particularizes the scope of the fair and equitable treatment standard and provides a mechanism for the treaty party review of its content;²⁶ it specifies (and comparatively limits) the conditions for compensable indirect expropriation,²⁷ articulates precise terms for calculation of compensation for expropriation, and excludes limitations on intellectual property rights consistent with the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement from the scope of expropriation standard;²⁸ it stipulates permissible regulatory restrictions on the guarantee of free transfers relating to a covered investment;²⁹ and the most-favored-nation treatment standard explicitly excludes dispute settlement from its scope.³⁰ Particular measures are entirely removed from the treaty protections.³¹ The settlement of investor-state disputes is not entrusted to *ad hoc* arbitral tribunals; instead, the treaty establishes a standing "Tribunal."³² The dispute settlement clauses prevent duplicate proceedings

23. Comprehensive Trade and Economic Agreement, Can.-E.U., Oct. 30, 2016.

24. *Id.* at Art. 8.9.

25. *Id.* at Art. 8.1.

26. *Id.* at Art. 8.10.

27. *Id.* at Annex 8-A.

28. *Id.* at Art. 8.12.

29. *Id.* at Art. 8.13.3.

30. *Id.* at Art. 8.7.4.

31. *Id.* at Art. 8.14.

32. *Id.* at Art. 8.27.

and frivolous and surprise claims,³³ preclude investor claims if the respective investment was made through “misrepresentation, concealment, corruption, or conduct amounting to an abuse of process,”³⁴ and limit the scope of permissible claims for violations of the standards of treatment relating to the restructuring of public debt.³⁵ The treaty provides for a broad appeals mechanism,³⁶ and entirely removes the determination of the legality of a host state measure under the host state’s domestic law from the Tribunal’s jurisdiction.³⁷ The treaty also establishes the ‘Joint Committee,’ a body comprised of representatives of the European Union and Canada, to provide binding interpretations of the treaty.³⁸

Similar provisions may be found in the China-Australia Free Trade Agreement (“ChAFTA”), which entered into force on December 20, 2015;³⁹ the bilateral investment treaty (“BIT”) between Canada and Mongolia, which entered into force on February 24, 2017;⁴⁰ and other treaties.⁴¹

V. Treaty Provisions on Investor Obligations

In some recent investment treaties and model BITs, states have adopted yet another strategy for rekindling the relationship between investors and (host) states: the imposition of obligations on investors. This innovation is a remarkable development from the perspective of international law structures and treaty design. Historically, investment treaties have stipulated obligations only for the treaty’s state parties, but not for investors. This normative asymmetry matched the treaties’ original purpose of regulating the relationship between developed and developing states.⁴² However, as the dominant axis of the perceived operation (and assessment) of investment

33. *Id.* at Arts. 8.22, 8.24, 8.32-33.

34. *Id.* at Art. 8.18.3.

35. *Id.* at Annex 8-B.

36. *Id.* at Art. 8.28.

37. *Id.* at Art. 8.31.2.

38. *Id.* at Arts. 8.31.3 & 26.1.

39. Free Trade Agreement, Austl.-China, June 16, 2015; see Anthea Roberts & Richard Braddock, *Protecting Public Welfare Regulation Through Joint Treaty Party Control: a ChAFTA Innovation*, COLUMBIA FDI PERSPECTIVES (2016).

40. Agreement for the Promotion and Protection of Invs., Canada-Mongolia, Sept. 8, 2016, Arts. 16–17.

41. Reciprocal Inv. Promotion and Protection Agreement, Morocco-Nigeria, Preamble, Dec. 3, 2016 [hereinafter Morocco-Nigeria BIT], Arts. 6(3), 12–13, 23; Inv. Agreement, H.K.-China-Chile, Nov. 18, 2016, Arts. 15(1) & 18; The Reciprocal Promotion and Protection of Invs., Argentina-Qatar, Nov. 6, 2016, Art. 10; Inv. Promotion and Protection Agreement, Nigeria-Singapore, Nov. 4, 2016, Art. 28; Agreement Concerning the Reciprocal Promotion and Protection of Invs., Rwanda-Turkey, Nov. 3, 2016, Art. 5; Agreement on the Reciprocal Promotion and Protection of Invs., Rwanda-Morocco, Oct. 19, 2016, Art. 2(5).

42. KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT, AND THE SAFEGUARDING OF CAPITAL* (Cambridge University Press 2013); Lauge N. Skovgaard Poulsen, *BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES* (2015).

treaties shifted from the inter-state relationship of developed and developing states to the relationship between investors and host states, the one-sided nature of investment treaties has grown to be considered a structural flaw.⁴³

While the imposition of obligations on investors—private or non-state entities—through treaties could be seen as problematic from the perspective of some basic categories of international law,⁴⁴ states, other stakeholders, and scholars have considered investment treaties to be an entirely suitable vehicle for imposing such obligations.⁴⁵ Western states seem to be more reluctant to include investor obligations in their treaties, and such obligations have to date mostly appeared in African treaties. Nevertheless, this reluctance seems to originate in policy rather than legal concerns: the states hesitate to subject the conduct of their investors to arbitral or other review rather than consider it legally impossible to stipulate obligations for investors in an investment treaty.

The treaties involving investor obligations most frequently stipulate: (i) the obligation to comply with the host state's law;⁴⁶ (ii) the prohibition against corruption;⁴⁷ (iii) the obligation to seek implementation of internationally recognized standards of corporate social responsibility;⁴⁸ and (iv) reporting obligations.⁴⁹ The provisions explicitly address the investor or its local corporate vehicle and are formulated in the language of obligation, stating that the investor and/or the local vehicle "shall" or "shall not" engage in a particular conduct.

43. See, e.g., Patrick Dumberry & Gabrielle Dumas-Aubin, *How to Impose Human Rights Obligations under Investment Treaties? Pragmatic Guidelines for the Amendment of BITs*, 4 YEARBOOK ON INT'L INV. L. & POLICY 14 (2011).

44. See Klara Polackova Van der Ploeg, *Treaty Obligations of Collective Non-State Entities: The Case of the Deep Seabed Regime*, NON-STATE ACTORS AND INT'L OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT (James Summers & Alex Gough eds., 2018) (discussion of the international law issues on another example of treaty obligations on non-state entities).

45. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 25-26 (2nd ed. 2012); Dumberry & Dumas-Aubin, *supra* note 43; UNCTAD, *Investment Policy Framework for Sustainable Dev.*, U.N. Doc. UNCTAD/DIAE/PCB/2015/5, 77 (2015) (referring to Investment Agreement for the Common Market for Eastern and Southern Africa Common Inv. Area (May 23, 2007) [hereinafter COMESA Investment Agreement], Art. 13 as an example of investor obligation).

46. Economic Community of West African States Supplementary Act A/SA.3/12/08, Dec. 19, 2008 [hereinafter ECOWAS Supplementary Act], Arts. 11(2) & 14(2); Morocco-Nigeria BIT, *supra* note 41, Art. 24(1); Southern African Dev. Cmty. Protocol on Foreign Inv., Aug. 18, 2006 [hereinafter SADC Protocol], Annex 1, Art. 10; COMESA Investment Agreement, *supra* note 45, Art. 13; India Model BIT (2015), Art. 11(i).

47. ECOWAS Supplementary Act, *supra* note 46, Art. 13; Morocco-Nigeria BIT, *supra* note 41, Art. 17; India Model BIT, *supra* note 46, Art. 11(ii).

48. ECOWAS Supplementary Act, *supra* note 46, Art. 16; Inv. Cooperation & Facilitation Agreement, Braz.-Malawi, June 25, 2015, Art. 9; Morocco-Nigeria BIT, *supra* note 41, Art. 19; India Model BIT, *supra* note 46, Art. 12.

49. ECOWAS Supplementary Act, *supra* note 46, Art. 11(4); Morocco-Nigeria BIT, *supra* note 41, Art. 21; India Model BIT, *supra* note 46, Art. 11(iv).

Several treaties contain even more elaborate provisions on investor obligations, such as the 2008 Economic Community of West African States (“ECOWAS”) Supplementary Act, which entered into force on January 19, 2009.⁵⁰ In its third chapter entitled ‘Obligations and Duties of Investors and Investments,’ the Act imposes further obligations on ‘Investors’ and ‘Investments’ (defined, e.g., as a “company” or “a corporate entity constituted or organized under the applicable law of any ECOWAS Member State”⁵¹ and intended to cover the foreign investors’ local corporate vehicle). Prior to establishment, the Investors and Investments are required to carry out environmental and social impact assessments, while applying the precautionary principle.⁵² Post-establishment, the Investors and Investments must comply with extensive social impact, labor and human rights obligations,⁵³ and corporate governance requirements.⁵⁴ Furthermore, the Investors are liable for any damages caused.⁵⁵ Specifically, the ECOWAS Supplementary Act obliges the Investors and Investments to “uphold human rights in the workplace and in the community in which they are located;”⁵⁶ not to be complicit in violations of human rights by others;⁵⁷ and to “act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work, 1998.”⁵⁸ Similar provisions may also be found in the 2016 Morocco-Nigeria BIT⁵⁹ and in the 2012 Southern African Development Community (“SADC”) Model BIT.⁶⁰

The imposition of obligations on investors through investment treaties has been championed by some influential non-governmental organizations active in the investment policy area, most prominently the International Institute for Sustainable Development (“IISD”). The IISD has been highly successful in its advocacy efforts, with the ECOWAS Supplementary Act essentially following verbatim the IISD Model International Agreement on Investment for Sustainable Development, introduced in 2005.⁶¹ The IISD’s affiliates were also involved in the formulation of other instruments, such as the 2012 SADC Model BIT.⁶²

50. ECOWAS Supplementary Act, *supra* note 46.

51. *Id.* at Art. 1(a) & (c).

52. *Id.* at Art. 12.

53. *Id.* at Art. 14.

54. *Id.* at Art. 15.

55. *Id.* at Art. 17.

56. *Id.* at Art. 14(2).

57. *Id.* at Art. 14(3).

58. *Id.* at Art. 14(4).

59. Morocco-Nigeria BIT, *supra* note 41, Arts. 14–15, 18–20.

60. SADC Protocol, *supra* note 46.

61. *IISD Model International Agreement on Investment for Sustainable Development*, IISD (Apr. 2005), https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf.

62. For example, see Howard Mann, *The SADC MODEL BIT Template: Investment for Sustainable Development*, IISD (Oct. 30, 2012), <https://www.iisd.org/itm/2012/10/30/the-sadc-model-bit-template-investment-for-sustainable-development>, for an article by Mann, the

In contrast to the human rights field, where efforts to introduce international norms imposing binding human rights obligations on businesses have been highly controversial and to date largely unsuccessful,⁶³ the advocacy campaign for articulation of international obligations on corporations in investment treaties has not met with the same resistance. Indeed, some international organizations, in particular the United Nations Conference on Trade and Development (“UNCTAD”) and the Commonwealth, have been recommending the inclusion of investor obligations in investment treaties to address the problem of imbalance in the rights and obligations of investors and states under these instruments.⁶⁴ The ambition to rebalance the rights and obligations of states and investors through treaty design is also apparent in the very language of some treaties.⁶⁵

As the inclusion of provisions setting forth obligations for investors is a recent phenomenon, there is only limited experience with the operation of these rules. Generally speaking, the provisions on investor obligations provide a legal basis for host state claims against investors. The availability of investor-state arbitration for enforcement of investor obligations, however, does not follow as a matter of course. The investment treaty’s dispute settlement clause and the procedural rules must be broad enough to allow for the presentation of claims against the investor, either in the form of: (i) arbitral proceedings initiated by the host state against the investor; or (ii) the host state’s counterclaim in arbitral proceedings initiated against the host state by the investor.

The ECOWAS Supplementary Act or the Morocco-Nigeria BIT contain broad dispute settlement clauses capable of sustaining both a claim and a counterclaim against an investor for a violation of its obligation under the treaty.⁶⁶ Other treaties, such as the Common Market for Eastern and Southern Africa (“COMESA”) Investment Agreement, might contain more narrowly worded dispute-settlement provisions and may limit arbitral jurisdiction over alleged violations of investor obligations to counterclaims

Senior International Law Advisor to IISD, who referred to himself as a consultant to the SADC Secretariat and Member States on the development of the SADC Model BIT.

63. Cf. U.N. Human Rights Office of the High Comm’r, Guiding Principles on Bus. & Human Rights, U.N. Doc. HR/PUB/11/04 (2011) and U.N. Human Rights Council Res. 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).

64. UNCTAD, *supra* note 45, at 6, 8, 19, 28, 49, 72, 77–78, 85, 154; *Commonwealth to Launch Guide on Investment Agreements*, THE COMMONWEALTH, <http://thecommonwealth.org/media/press-release/commonwealth-launch-guide-investment-agreements> (last updated Oct. 22, 2012); J. Anthony VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries*, 252–407.

65. For example, the Morocco-Nigeria BIT, *supra* note 41, Preamble declares to seek “an overall balance of the rights and obligations among the State Parties, the investors, and the investments under this Agreement.”

66. ECOWAS Supplementary Act, *supra* note 46, Art. 33(1); Morocco-Nigeria BIT, *supra* note 41, Art. 27.

or defenses on merits.⁶⁷ The most frequently used arbitral rules, the International Centre for Settlement of Investment Disputes (“ICSID”) and the United Nations Commission on International Trade Law (“UNCITRAL”) rules, do not present any difficulty in this respect, as they are indifferent with respect to the identity of the claimant party and both allow for counterclaims.⁶⁸

Each of the procedural avenues nevertheless poses potential issues. Counterclaims must generally be sufficiently connected to the investor claim. In case the violation of the investor obligation is unrelated to the substance of the investor’s claim, arbitral tribunals have regularly refused to hear the counterclaim.⁶⁹ That said, the special provision in the COMESA Investment Agreement arguably modifies this general rule.⁷⁰ With respect to the possibility to initiate investment arbitration proceedings against investors, the most difficult issue relates to the existence of the agreement to arbitrate. This classic arbitral doctrine requires both parties to the arbitral proceedings to consent to the arbitral tribunal’s jurisdiction. In a treaty context, the arbitral practice has construed the arbitration agreement to be formed in two steps: (i) the host state presents its binding offer to arbitrate in the dispute settlement provision of the investment treaty; and (ii) the investor accepts this offer at the latest in its request for arbitration, thereby perfecting the arbitration agreement. In proceedings initiated by the host state, the investor’s written consent (*e.g.*, required by the ICSID Convention) would be missing.⁷¹

When investment arbitration is unavailable, the enforcement of investor obligations would be limited to other judicial fora, such as domestic or regional courts (if possible under the applicable procedural rules). Notably, under some of the investment treaties discussed, certain types of claims against investors are reserved for a specific forum, as is the case with civil liability claims under the ECOWAS Supplementary Act and the 2016 Morocco-Nigeria BIT, which are reserved for the courts of the investor’s home state.⁷²

VI. Conclusion: The New Generation of Investment Protection Treaties

The reformation of investment treaties to explicitly guarantee states’ regulatory autonomy and respect not only for investment protection, but

67. COMESA Investment Agreement, *supra* note 45, Art. 28(9).

68. ICSID Convention, Article 46; ICSID Arbitration Rules, Art. 40; UNCITRAL Arbitration Rules, Article 19(3).

69. *Cf.* Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, *Award*, ¶ 1151 (Dec. 8, 2016) (The tribunal considered sufficient a factual link of the principal claim and the counterclaim relating to the same investment and the same concession.).

70. COMESA Investment Agreement, *supra* note 45, Art. 28.

71. ICSID Convention, Art. 25.

72. ECOWAS Supplementary Act, *supra* note 46, Art. 17; Morocco-Nigeria BIT, *supra* note 41, Art. 20.

also for other public interests, will necessarily alter the operation of these treaties and the output of ISDS. Arbitral tribunals will be forced to engage with the diverging protected values, as the treaty language now makes it clear that the investment framework involves regard of interests beyond investment protection. Still, the new treaty provisions might not in themselves resolve all criticism of ISDS, as the complaints have also involved the more general arbitral competence to review governmental policies as such and the lack of arbitral deference in doing so.

The imposition of binding obligations on investors further changes the investment treaties' dynamics by effectively getting away from the normative asymmetry of investment treaties. While previously investors may have had obligations under investment contracts or domestic laws, they now have obligations directly under international law. The investor rights and investor obligations coming from the same normative source will presumably make it easier to assert investor responsibility for any non-compliance. The provisions on investor obligations will no doubt also affect the interpretation of investor rights under the treaties. Whether states will employ these provisions to act on the offensive rather than only the defensive in ISDS or whether they will prefer dealing with investor non-compliance domestically remains to be seen. Nevertheless, investment treaties have now become—somewhat paradoxically—the first international law instruments to explicitly set forth binding labor and human rights obligations on corporations.