ICTSD

International Centre for Trade and Sustainable Development

WORLD ECONOMIC FORUM

COMMITTED TO IMPROVING THE STATE OF THE WORLD

The E15 Initiative

STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM FOR SUSTAINABLE DEVELOPMENT

Extending Responsibilities in International Investment Law

Gabriel Bottini

September 2015

E15 Task Force on Investment Policy

Think Piece

ACKNOWLEDGMENTS

Published by

International Centre for Trade and Sustainable Development (ICTSD)
7 Chemin de Balexert, 1219 Geneva, Switzerland
Tel: +41 22 917 8492 – E-mail: ictsd@ictsd.ch – Website: www.ictsd.org
Publisher and Chief Executive: Ricardo Meléndez-Ortiz

World Economic Forum
91-93 route de la Capite, 1223 Cologny/Geneva, Switzerland
Tel: +41 22 869 1212 – E-mail: contact@weforum.org – Website: www.weforum.org
Co-Publisher and Managing Director: Richard Samans

Acknowledgments

This paper has been produced under the E15Initiative (E15). Implemented jointly by the International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum, the E15 convenes world-class experts and institutions to generate strategic analysis and recommendations for government, business and civil society geared towards strengthening the global trade and investment system for sustainable development.

For more information on the E15, please visit www.e15initiative.org/

Gabriel Bottini is Adjunct Professor of Public International Law, University of Buenos Aires. He would like to acknowledge insightful comments from James Lockett, Federico Ortino, Rodrigo Polanco, and Stephan Schill on an earlier version of this think piece.

With the support of:

And ICTSD's Core and Thematic Donors:

Citation: Bottini, Gabriel. *Extending Responsibilities in International Investment Law.* E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015. www.e15initiative.org/

ISSN 2313-3805

ABSTRACT

International investment agreements (IIAs) are typically one-way instruments, in that they basically establish obligations for host states and not for investors. These obligations can be far-reaching in their implications, and they are accompanied by strong dispute resolution mechanisms in case of alleged breach. Thus, IIAs can considerably limit host states' regulatory powers within their own territories with respect to critical activities. The fact that IIAs directly grant protected investors certain rights under international law is nowadays generally accepted. Thus, there would seem to be no legal impediment for these treaties to provide for investor obligations as well. Rather, the absence of these obligations appears more related to the origins and evolution of modern IIAs. However, aside from the general absence of investor obligations in the treaties, IIAs do not provide for any mechanism that could make such related entities liable for any illegality committed in relation to the investment in question, leaving this issue to the domestic laws of the host state. This think-piece focuses on the distinctive absence of investor obligations in modern IIAs by suggesting alternatives under which such obligations may be introduced—either directly or indirectly—and enforced. Turning IIAs into more balanced instruments—that is, providing for rights and obligations of investors, and for duties and regulatory powers of host states—could potentially address some of these concerns. The inclusion of investor obligations would also allow the use of IIAs as tools to further international public interests other than investment promotion, in cooperation with other international regimes.

CONTENTS

LIST OF ABBREVIATIONS

BIT	bilateral investment treaty
ICJ	International Court of Justice
IIA	international investment agreement
IISD Model	International Institute for Sustainable Development Model
MNE	multinational enterprise
US	United States

INTRODUCTION

International investment agreements (IIAs), and in particular bilateral investment treaties (BITs), are typically one-way instruments, in that they basically establish obligations for host states and not for investors. These obligations can be far-reaching in their implications, potentially affecting some core state functions relating to fundamental public interest issues. And they are accompanied by strong dispute resolution mechanisms in case of alleged breach. Thus, IIAs can considerably limit host states' regulatory powers within their own territories with respect to critical activities, to the extent foreign investors are involved, without imposing virtually any obligations upon the latter. At best, IIAs condition the exercise by foreign investors of certain rights upon compliance with national law. The reasons for this state of affairs do not appear to be strictly legal. The fact that IIAs directly grant protected investors certain rights under international law is nowadays generally accepted. Thus, there would seem to be no legal impediment for these treaties to provide for investor obligations as well. Rather, the absence of these obligations appears more related to the origins and evolution of modern IIAs. Investment protection became the almost exclusive concern for purposes of treaty drafting, arguably on the assumption that foreign investments are anyway subject to obligations stemming from national law.[1]

Other more specific aspects also have to be considered in relation to investor obligations (or rather lack thereof) under current IIAs. Mainly due to the broad definition of protected investments under these treaties—plus the interpretation given to the relevant provisions by arbitral tribunals—the number of potentially protected investors with respect to the same investment is considerable. Although this may vary greatly depending on the applicable IIA provisions and nationality issues, more than one related entity forming a corporate chain may be entitled to bring claims, even for the same loss. However, aside from the general absence of investor obligations in the treaties, IIAs do not provide for any mechanism that could make such related entities liable for any illegality committed in relation to the investment in question, leaving this issue to the domestic laws of the host state. In other words, while more than one (generally foreign) corporate vehicle may be entitled to claim for the same investment under one or several IIAs, generally only the local vehicle may be held liable for illegalities committed in the host state's territory in relation to this investment (and then, only under national law since IIAs frequently do not contain any autonomous obligations for investors). Further, though domestic courts and enforcement mechanisms remain available, host states will generally not be able to use the dispute resolution mechanism in IIAs against the local vehicle (or, due to prevailing views on the scope of investment tribunals' jurisdiction, even to submit counterclaims against protected investors).

It may be argued that, whatever the contents of IIAs, foreign investors, including of course multinational enterprises (MNEs), are in any case subject to a host of responsibilities under international law and national law. International law provisions may refer to issues such as human rights, respect for the environment, workers' rights, corruption and money laundering, and so on. National law generally includes similar issues—often with more detailed regulations—plus contractual obligations assumed with respect to the specific investment, corporate and financial law regulations, consumer protection laws, and the full panoply of national regulations. And given that provisions in IIAs establishing the applicable law in investment disputes frequently include national and international law, as well as the treaty, the referred to obligations somehow find their way into a multifaceted international investment law. This approach has several limitations, however. On many issues, it is far from clear to what extent international law establishes obligations directly applicable to private actors such as cross-border investors or MNEs, rather than only to states. As to national law obligations, disputes under IIAs are often characterized as "treaty claims". In the context of these claims, the chance for the respondent state to successfully invoke the breach of obligations stemming from national law—including any contract involved—either as an autonomous defence[2] or as a basis for a counterclaim,[3] can be considerably limited.

This think-piece focuses on the distinctive absence of investor obligations in modern IIAs by suggesting alternatives under which such obligations may be introduced—either directly or indirectly—and enforced. This would involve a step towards levelling the playing field of investment arbitration. In theory, both investors and states may derive rights and obligations from IIAs, and both may be given the option of enforcing at least some of them through international arbitration. National law would, of course, continue to regulate foreign investments, and both investors and host states would always be entitled to bring their claims at the

1 While IIAs probably do not add much in terms of substantive law to what most national legal systems already provide as to protection of private property, it is often argued that international protection is important because the host state can always change its laws. And Investor-State Dispute Settlement (ISDS) provides an impartial alternative to sometimes suspect national courts. But if this is so, why should host states not have the option, as do foreign investors, of bringing their own claims before arbitral tribunals?

2 The respondent state will, of course, always be able to argue that a certain national law provision that is being invoked in a treaty claim—as a source of legitimate expectations or otherwise—does not have the scope advanced by the claimant. However, basing an independent defence against a treaty claim on national law, even if the latter is part of the applicable law, is more problematic under investment tribunals' current views.

3 The difficulty with counterclaims in treaty arbitration is not related to procedural reasons or to the lack of tribunals' power to hear them, since the most widely used arbitration rules generally provide for counterclaims. Rather, the problem mostly lies in standing and cause of action issues, that is, i) bringing a counterclaim against someone who is not formally bound by the obligations applicable to the investment, and ii) the absence of investor obligations in the IIA, in circumstances in which contract claims (including counterclaims) are excluded.

national level. But maintaining over the national regimes—in principle open to all concerned—a system that grants rights, including access to a specialized jurisdiction, to only one of the parties of the investment relationship and imposes obligations only upon the other, inevitably contributes to the current challenges to the legitimacy of international investment law. Turning IIAs into more balanced instruments—that is, providing for rights and obligations of investors, and for duties and regulatory powers of host states—could potentially address some of these concerns. The inclusion of investor obligations would also allow the use of IIAs as tools to further international public interests other than investment promotion, in cooperation with other international regimes.

Specialists in the field are slowly becoming interested and writing about investor obligations under modern IIAs. Theoretical contributions on the issue remain rather limited, however. More importantly, developments in treaty-making incorporating these obligations are scarce. As with other issues, current negotiations of several "mega-regional" IIAs provide a unique opportunity to rethink the issue of investor (and possibly home country) responsibilities. And even if the mega-regionals finally do not go far in including investor obligations, they may foster negotiations and renegotiations of other IIAs—not least BITs between developed and developing states—where the issue may be addressed.

Section 1 discusses extending obligations in IIAs from a *ratione personae* point of view, not least to covered investors (and possibly related entities) and home countries. Section 2 considers expanding the scope of IIAs from a *ratione materiae* perspective, either by directly including new obligations in the treaty texts or by referencing other instruments (either binding or non-binding). It also considers ways to actually enforce any investor obligations to be created, mainly using the dispute settlement mechanisms already in place. Section 3 analyzes policy options in relation to "legality clauses", that is, provisions in IIAs requiring foreign investors to comply with the law of the host state.

EXPANDING THE SCOPE *RATIONE PERSONAE* OF OBLIGATIONS UNDER IIAS

IIAs, and in particular the interpretation given to certain provisions, have allowed a remarkable expansion of potential beneficiaries of rights and/or interests over the same investment. Although the relevant provisions vary, a common definition of the term investment in IIAs refers to "every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation: … (b) a company or shares of stock or other interests in a company or interests in the assets thereof" (Argentina–United States BIT, Article I.1). These non-exhaustive definitions have generally been interpreted broadly by investment tribunals. In particular as regards companies and their shareholders, this has meant that virtually any legal entity in a (sometimes long) string of companies may have standing to claim with respect to the same investment, provided it holds the nationality of a state with which the host state has concluded an IIA. It is not the purpose here to discuss all the complexities resulting from this state of affairs—including the possibility of double recovery, inconsistent outcomes, and so on. Although there have been some suggestions—searching for a "cut-off" point based upon the scope of the host state's consent (Enron I Jurisdictional Decision) or of ways to "coordinate the different proceedings" (Schreuer 2005)—there is no generally accepted conceptual approach to the possibility of overlapping claims by entities forming the same corporate chain.[4]

Simply put, the theory as to shareholder claims is that shareholders hold a protected investment under the IIA—that is, the shareholding, either direct or through other intermediary companies, and perhaps other interests in the local company. Thus, they can bring claims against measures affecting their investments. Whether shareholders can claim directly for injuries to the companies' assets has recently come into question in the jurisdictional decision in *Poštová Banka v. Greece*.[5] But even this case suggested that shareholders can claim for losses to their shareholdings resulting from measures directed against the company's assets. In addition, since in theory foreign shareholders invoke their own rights and, further, are generally neither parties to the relevant contracts nor the addressees of the local regulations, they are generally deemed not bound by the obligations (legal or contractual) applicable to the local company. For example, this is one of the arguments on which investment tribunals rely to deny relevance to forum selection clauses in contracts: given that the shareholder has not signed the contract, it is not bound by the (often local) contractual forum and is free to have recourse to international arbitration.

4 This includes overlapping claims brought by foreign shareholders before arbitral tribunals and by the local company before a national regulator or court. Here, arbitral tribunals have suggested that, once the arbitral award has been rendered, "able government negotiators" (*Enron* and *Sempra* cases) or the intervening national court (*inter alia,* the Tribunals in the cases of CME, *Lauder*, and *Daimler*) will be able to effectively deal with any consequences of such overlaps.

5 Somewhat similar views have been expressed by the *El Paso v. Argentina* Tribunal, which observed that a shareholder should not be allowed to simultaneously claim "for the loss of value of its shares in the companies and for the prejudice suffered by the latter", as this would amount to double recovery.

The upshot is that, on the one hand, IIAs, as interpreted by investment tribunals, entitle foreign shareholders to bring claims in respect of measures taken against the company in which they hold shares. Investment tribunals have, mostly on the basis of the wide definition of the term investment in IIAs, essentially "lifted the veil" in the interest of shareholders (albeit without expressly applying the "lifting of the veil" concept). In the *Barcelona Traction* case the International Court of Justice (ICJ), referring first to municipal law, found that "the process of 'lifting the corporate veil' or 'disregarding the legal entity' [had] been found justified and equitable in certain circumstances or for certain purposes." The legal entity could not "be treated as an absolute," in particular when there is a need to "provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it." The referred to process of lifting the veil, moreover, in the court's view may "play a similar role in international law."

On the other hand, no lifting or piercing of the corporate veil (or substantively similar concepts, such as taking into account the fact that the foreign investor and the local company form part of the same group of companies) is generally accepted to allow host states to invoke the local company's obligations vis-à-vis arbitral claims by its shareholders. Different from enforcement of rights and interests, when it comes to the local company's obligations, privity aspects tend to be strictly observed. In the case of *El Paso v. Argentina*, for example, the tribunal concluded that the local companies' consent to the challenged measures could not affect the shareholder's own right under the IIA to bring claims against the same measures. Further, while under IIAs, shareholders' rights in relation to the company and its assets have been deemed to be considerable, their liability remains virtually non-existent. However, under most national legal systems as well as under general international law (as per the views of the ICJ in *Barcelona Traction*), shareholders' limited liability has as a corollary that their "rights in relation to the company and its assets remain limited." While it may be argued that one of the goals of IIAs is precisely to expand foreign investors'—including shareholders'—substantive and procedural rights under international law, it is far from clear that IIAs intend to, at the same time, allow foreign investors to be confronted with practically none of the obligations applicable to the investment when pursuing their claims. Further, while host states will generally be able to invoke the local company's obligations before national courts against this company itself, if the latter becomes insolvent only the shareholders will be able to enforce their claims. Thus, it is suggested considering the following.

- Providing in IIAs for the possibility of the respondent state to invoke, as defences, instances of non-compliance with obligations related to the investment involved in the claim, even if the claimant itself is not formally bound by these obligations as a matter of contract/national law.
- Providing in IIAs for the possibility of the respondent state to bring counterclaims,[6] before arbitral tribunals, based upon the breaches of obligations related to the investment involved in the claim, even if the claimant itself is not formally bound by these obligations as a matter of contract/national law.[7]

Admittedly, if only the first suggestion is implemented, IIAs would not serve as a tool to hold companies accountable in case of events causing massive damage (such as industrial disasters and the like) or of substantial failures to carry out large investment plans. But if host states were able to more effectively invoke non-compliances with investment-related obligations at least as defences, arbitral tribunals could for example rely on these defences as a total or partial set-off against treaty claims. This risk could become a not insignificant incentive for foreign investors to make sure that the local vehicle generally fulfils its obligations.

As to the second suggestion, certain treaty claims are sometimes brought by "shell" or "mailbox" companies. If both the claimant and the local company have no significant assets, the host state may well end up without any effective remedy, even if the applicable IIA provides for counterclaims in the terms suggested here. This may be the case even if the claimant's controlling entities do have assets, given that these entities may often have the choice of which corporate vehicle forming the corporate chain will actually bring the claim. In light of this, an option would be to:

- Include in IIAs provisions allowing the host state to execute a favourable decision in a counterclaim on assets owned by the claimant's controllers and/or by companies wholly owned by the claimant, provided that i) the latter has failed to honour an arbitral award against it; ii) the entity who owns the assets upon which execution is sought is somehow linked to the investment in question; and iii) the execution in the terms suggested here is not contrary to the law applicable in the jurisdiction where execution is sought.

A potential obstacle to this alternative is that the home state of the entity against which execution is sought may not be a party to the IIA applied in the arbitration (or otherwise not bound by the applicable arbitration rules). However, IIAs can provide for the consent of the investor to these kind of measures whenever it brings a treaty claim,

6 The right of host states to bring independent claims can also be considered. This, however, could involve a claim against an investor who has taken no prior action under the relevant treaty and who may be only remotely connected to the investment. Thus, this possibility would probably make more sense in the context of a (future) multilateral IIA or a mega-regional, perhaps with a different dispute resolution system including an appeals mechanism or permanent body of some sort.

7 These two suggestions have to be considered in conjunction with the discussion in Section 3, as to the obligations the breach of which may be invoked by host states against treaty claims.

should the need arise. This, in addition to the fact that the proposed execution measures would be pursued against the claimant's controllers or other closely related entities, would presumably make it easier for the judicial authorities of the state where execution is sought to consider granting such measures.

Finally, IIAs can provide for a series of home state rights and obligations, so far not generally included in these treaties. As proposed in the 2005 International Institute for Sustainable Development model (IISD Model), these may include assisting developing and least developed states in promoting foreign investment, providing information relative to the investor or the investment to the host State—not least in the context of proceedings against the investor in the latter's courts or of counterclaims before arbitral tribunals—and ensuring that their legal systems allow for claims relating to investor liability for damages in the host state.

EXPANDING THE SCOPE *RATIONE MATERIAE* OF OBLIGATIONS UNDER IIAS

Leaving aside legality clauses, to be discussed in the next section, as already noted, IIAs typically contain obligations only for the host state, not for the protected investors. Due to their international character, these obligations are, in principle, governed by international law (ICJ, *Reparation for Injuries*). But there is yet another aspect to be considered here, in addition to the absence of obligations for investors in the text of the IIAs themselves, which affects the ability of host states to raise breaches by the investor of investment-related obligations in arbitration proceedings. One of the fundamental concepts of modern international investment law is the distinction between contract claims and treaty claims. In the now famous words of the Vivendi v. Argentina First Annulment Committee, "whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract." In fact, investment claims nowadays largely proceed on the theory that "rights and obligations deriving from the BIT have an independent basis from rights and obligations deriving from the contract, and may as such, in principle, not be affected by contractual provisions dealing only with contractual rights and obligations" (*Abaclat et al. v. Argentina*).

Investment tribunals generally seem to agree that contract claims and treaty claims are "juridically" and "analytically distinct", subject to different "legal standards". These two kinds of claims are "different things, responding to different tests, subject to different rules" (*Duke v. Ecuador*). The idea of "independence of treaty claims and contract claims" has allowed investment tribunals hearing treaty claims to disregard jurisdictional objections based upon contractual provisions, as well as merits defences based upon contractual or national law provisions (in this latter case, the principles in Article 27 of the Vienna Convention on the Law of the Treaties and in Article 3 of the ILC Articles on State Responsibility are also invoked). These notions have had other concrete consequences as well. Investment tribunals have, for example, so far not accepted counterclaims by states, generally on jurisdictional grounds. To the extent the tribunal's jurisdiction is based on the "treaty" rather than "contractual" basis of the claim, and given that IIAs normally contain obligations only for the host state, a counterclaim by the latter invoking contractual and/or national law provisions is considered inadmissible and would need to be addressed in separate national proceedings or pursuant to contract.

At the same time, however, investment tribunals generally acknowledge that treaty and contract claims may "perfectly coincide", that they may "arise out of the same facts", or at least that "the factual basis of the two types of claims may to a large extent coincide." To this one should add the impact of the notion of investors' "legitimate expectations". This concept has been described as "the dominant element" of the fair and equitable treatment standard, under which states assume "an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations" (*Saluka v. The Czech Republic*). According to these views, the fair and equitable treatment standard—which itself has become the dominant standard of treatment—requires host states to assure "the stability of the law and the observance of legal obligations" (*Sempra v. Argentina*). In light of current decisions, commentators have suggested that "some tribunals have considered any breach of contract to be a violation of the fair and equitable treatment standard" (Sasson 2010).

Thus, the resulting position may be briefly described in general terms as follows.

- IIAs establish upon host states (arguably exacting) international obligations to protect the covered investments and investors, that is, the standards of treatment.
- IIAs do not contain provisions requiring these investors to respect human rights, workers' rights, the environment, or other similar public interest issues (or, indeed, practically any other obligation for that matter).
- Under IIAs, investors generally bring "treaty claims", so host states cannot raise contractual or national law aspects as autonomous defences against these claims,

either for jurisdiction or merits purposes. Nor can host states file counterclaims against "treaty claims".

- "Treaty claims" can coincide with "contract claims" as to their factual basis, and host states are required to respect investors' legitimate expectations, which largely coincide with respect for the contract and national law obligations binding upon the host state. Investors can thus present claims for damages that, are, from a substantive point of view, based upon these latter obligations.

In terms of policy options, in considering the introduction in IIAs of investor obligations it is suggested that i) public interest issues under general international law, such as human rights and environmental protection, and ii) obligations under contracts and generally under national law specifically applying to the investment in question, be considered separately. The reason for this is mainly that the nature and scope—*ratione personae and ratione materiae*—of the obligations involved are different (although, of course, some overlaps exist), as well as the instruments that contain them. Further, the existing institutions that deal with the two kinds of obligations are (mostly) international in nature in respect of the first category and national as to the second category. Therefore, one may want to regulate differently the relationship between these institutions and arbitral proceedings under IIAs.

Regarding public interest issues under general international law, ongoing and future IIAs negotiations should consider the following.

- Including clear statements in the preambles of IIAs on the need for investments and investors to respect human rights, workers' rights, social standards, respect the environment and generally contribute to sustainable development, among other similar issues.

- Including provisions in IIAs directly establishing obligations upon investors to comply with such issues. This can be done either by directly setting out the contents of the obligations in the text of the IIA, or by incorporating, by reference, provisions contained in other international instruments (such as human rights treaties, International Labour Organization Conventions, and so on), even non-binding ones (such as the OECD Guidelines for Multinational Enterprises, United Nations Guiding Principles on Business and Human Rights, and so on, thereby "hardening" these instruments). Incorporation by reference in this field has been criticized as possibly leading to unreflective application of a host of different provisions, created in contexts not alike investment law (Nowrot 2015). This, however, depends on whether incorporation is done carefully enough, although attempting to incorporate into IIAs relatively self-contained regimes with numerous provisions may slow down negotiations.

- Including in IIAs a requirement for investment tribunals to take into account the referred to issues in resolving investment disputes, either in the dispute settlement provisions, including in particular the governing law clause, or even in the provisions defining the standards of treatment.

As to enforcement, host states should be entitled to raise breaches of these obligations as merits or damages defences, as proposed in the IISD Model, but perhaps not to directly bring IIA claims or counterclaims based on those breaches. Otherwise, investment tribunals could turn into institutions having as one of their main functions penalizing human rights, environmental and other such violations, for which other better-equipped institutions exist. However, it is important that investment tribunals be expressly required to take into account these obligations. Human rights issues, for instance, could weigh heavily both in analyzing the investor's conduct—that is, whether the investor has in any way violated human rights—and the host state's treatment of the investor—whether this state's conduct is consistent with its investment law obligations in light of human rights obligations with which it also had to comply. In order to assess whether the adoption of a given host state's measures was fair and equitable, for example, it may be relevant to consider to what extent the measures, while perhaps having certain undesirable effects on foreign investors, also related to human rights obligations that required the host state to take certain actions. In the end, it may not be enough for investment tribunals to simply note that the host state has to comply with all its international obligations. A comprehensive view of all applicable international obligations is necessary, not least when the host state measure is being assessed under standards of treatment that relate to notions of reasonableness, fairness, and non-arbitrariness.

With respect to contractual and national law obligations specifically applying to the investment, IIAs could provide for the right of host states to submit counterclaims against treaty claims, based upon any breach of contractual or national law obligations applicable to the investment involved in the claim, even if the claimant is not formally a party to such obligations.

CLARIFYING THE SCOPE OF LEGALITY CLAUSES IN IIAS

IIAs often contain provisions requiring investors and investments to comply with the laws and regulations of the host state, so-called "legality" or "compliance" clauses. These clauses are normally included in the provisions defining the covered investments or the standards of treatment. Hence, they have generally not been interpreted as incorporating by reference all national law obligations applicable to the investment, in a way that would allow host states to freely rely on these obligations i) as defences against treaty claims, or ii) as the basis of counterclaims. Rather, they are seen as providing a specific jurisdictional or merits defence against a treaty claim in certain instances of serious violation of the host state's law.

Further, even in the absence of legality clauses, it is generally recognized that corruption and other serious forms of illegality are against national and international public order, and do not deserve protection under IIAs. But while this notion is largely uncontroversial, the manner in which certain specific aspects of legality clauses and, more generally, illegalities committed by investors should be treated by investment tribunals is far from clear. Admittedly, this is true as to several issues in investment arbitration. The importance of the fight against illegal investments, however, requires a clear message from the international community that such practices are unacceptable. International investment law can make a contribution in this regard by clarifying the scope and effects of legality clauses in IIAs. Aspects to be considered here include the following.

- In light of existing legality clauses, it is often debated whether illegalities affect the investment tribunal's jurisdiction or only the admissibility or merits of the claims. IIAs could provide guidance as to which illegalities will cause an investment tribunal not to hear the merits. Certain serious illegalities, including corruption, which are increasingly seen as affecting international public order, should probably be an obstacle to investment tribunals' jurisdiction or at least to the admissibility of the claims. As to less serious illegalities, their impact could be considered in passing upon the merits of the claims.

- A distinction is sometimes proposed as to the effects of illegality, whether it was committed upon making the investment or subsequently. In the case of corruption and other serious illegalities, the need for this distinction is perhaps questionable. Still, investment tribunals could be granted discretion as to whether to affirm jurisdiction in cases where the illegality was committed after the investment was made (and hence may have, for example, already generated benefits for the host state). It should be recalled, nonetheless, that investors whose investments have been found "illegal" by an international tribunal will generally still be able to bring suit before any competent local courts.

- Certain arbitral decisions have sought to restrict the scope of legality clauses to the breach of specific types of national law provisions. The Tribunal in *Saba Fakes v. Turkey*, for instance, posited "it would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws that are unrelated to the very nature of investment regulation." This approach appears unsound. IIAs and investment tribunals may draw distinctions in terms of the legal consequences depending on the seriousness or timing of the breach, the nature of the rules that have been violated, and so on. Certain minor violations of non-fundamental norms may have no appreciable impact on the outcome of investment claims or be left to national authorities to deal with. Under legality clauses, however, investment tribunals should be entitled to consider all kinds of illegalities, whenever committed during the life of the investment, if respect for the host state law is to be taken seriously.

- IIAs should clarify the relationship between investment arbitrations and local criminal proceedings investigating illegalities related to the investment. A finding of illegality by an investment tribunal should not depend on a prior criminal conviction. Investment tribunals are not criminal courts, which apply different rules and standards. Further, investment tribunals do not have to decide whether a person is guilty of a crime or not for purposes of criminal law. Rather, investment tribunals determine whether a breach of national law has been committed in relation to the investment, and what consequence should follow as to its jurisdiction or the merits of the claim.

CONCLUSION

The absence of investor obligations in IIAs is a salient feature of modern international investment law. The imbalance in the text of the treaties is undisputable: investors are accorded strong protections, backed by relatively powerful dispute resolution mechanisms, but no obligation is created for them. It is sometimes argued that this imbalance is in the nature of investment protection treaties, which seek to promote flows of private investment. These flows will be encouraged, it is further argued, if prospective investors are directly granted international law rights, which cannot be modified by opportunistic host states after the investment is made, and if these rights can be enforced by international tribunals, which are not subject to undue interference. Yet, first, given that foreign investment will nevertheless be subject to national law and national courts—at least through the local vehicle—the inclusion of investor obligations in IIAs should not detract from these treaties' alleged investment promotion effect. On the contrary, investors should be comforted by the prospect that at least some of the investment-related obligations may be subject to international law and institutions, should the host state opt to take its grievances to the international plane. Second, challenges to the international regime of investment protection's legitimacy are manifold, and may deserve several different responses dealing with institutional, procedural, and substantive aspects. Still, introducing certain changes that may make the system work not only to protect investors' rights but the rights of (at least) both parties to the investment relationship, seems like one of the obvious places to start. If IIAs and investment tribunals are said to be more adequate to deal with foreign investment issues, why should they not be equally open to both investors and host states?

This think piece has made certain proposals for the introduction of investor obligations in IIAs. For this purpose, the suggestion is to differentiate between public interest issues under general international law and obligations specifically assumed with respect to the relevant investment. As to the first category, these issues should increasingly find their way into the texts of IIAs. Further, they should be introduced in a way that effectively requires investment tribunals to take them into account in resolving investment disputes. The current position is unsatisfactory: while at least some of these public interest obligations may be said to already form part of the applicable law—through the reference to international law in governing law provisions—their impact has so far been negligible. Claims having as a fundamental basis the breach of such public interest obligations, however, should be left to the international institutions created for that purpose. Regarding the second category, the basic proposal here is to allow (but not require) host states to bring counterclaims before investment treaty tribunals, based upon the breach of investment-related obligations.[8] To the extent IIAs allow foreign investors not to be constrained by jurisdictional and privity issues stemming from national law, the present proposals seek to place host states on an equal footing. In the end, for a variety of reasons, host states may prefer not to bring their claims before investment tribunals. Yet the fact that they may effectively do so, could contribute both to foreign investors' compliance with their obligations and, more generally, to international investment law's legitimacy.

8 This proposal does not necessarily mean that such claims are not possible under existing IIAs. But they would require certain interpretations that investment tribunals have so far not generally adopted.

REFERENCES

Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5. Decision on Jurisdiction and Admissibility of 4 Aug. 2011, http://www.italaw.com/sites/default/files/case-documents/ita0236.pdf.

Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3. Decision on Annulment of 3 July 2002, http://www.italaw.com/sites/default/files/case-documents/ita0210.pdf.

Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19. Award of 18 Aug. 2008, http://www.italaw.com/sites/default/files/case-documents/ita0256.pdf.

El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15. Award of 31 Oct. 2011, http://www.italaw.com/sites/default/files/case-documents/ita0270.pdf.

Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3. Decision on Jurisdiction of 14 Jan. 2004, http://www.italaw.com/sites/default/files/case-documents/ita0290.pdf.

Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3. Award of 22 May 2007, http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf.

IISD Model (International Agreement on Investment for Sustainable Development). 2005. https://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf.

International Court of Justice. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962*). Judgment of 5 Feb. 1970, http://www.icj-cij.org/docket/files/50/5387.pdf.

International Court of Justice. *Reparation for Injuries Suffered in the Service of the United Nations.* Advisory Opinion of 11 April 1949, http://www.icj-cij.org/docket/files/4/1835.pdf.

Nowrot, K. 2015. "Obligations of Investors." In *International Investment Law. A Handbook*, Marc Bungenberg, Jorn Griebel, Stephan Hobe and August Reinisch (eds.), C. H. Beck, Hart, Nomos, pp. 1154–85.

Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8. Award of 9 April 2015, http://www.italaw.com/sites/default/files/case-documents/italaw4238.pdf.

Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20. Award of 14 July 2010, http://www.italaw.com/sites/default/files/case-documents/ita0314.pdf.

Saluka Investments B.V. v. The Czech Republic, UNCITRAL. Partial Award of 17 March 2006, http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf.

Sasson, M. 2010. *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law.* Kluwer Law International.

Schreuer, C. 2005. *Shareholder Protection in International Investment Law.* TDM 3, www.transnational-dispute-management.com.

Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16. Award of 28 Sep. 2007, http://www.italaw.com/sites/default/files/case-documents/ita0770.pdf.

Implemented jointly by ICTSD and the World Economic Forum, the E15Initiative convenes world-class experts and institutions to generate strategic analysis and recommendations for government, business, and civil society geared towards strengthening the global trade and investment system for sustainable development.

ICTSD

International Centre for Trade
and Sustainable Development

WORLD
ECONOMIC
FORUM

COMMITTED TO
IMPROVING THE STATE
OF THE WORLD