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Reconciling Investment Protection with the Right to Regulate?

Investor Obligations as a Means of Rebalancing
the Investment Treaty Regime

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Table of contents

Summary	4
Sammanfattning	5
Preface.....	6
Abbreviations	7
1 Introduction.....	8
1.1 Background.....	8
1.2 Purpose and Research Questions.....	14
1.3 Methodology and Materials.....	15
1.4 Delimitations	17
1.5 State of the Art.....	19
1.6 Outline	22
2 Standards of Protection in International Investment Law	24
2.1 Non-Discrimination	25
2.1.1 Most-Favoured-Nation.....	25
2.1.2 National Treatment.....	28
2.2 Fair and Equitable Treatment	30
2.3 Protection against Expropriation	37
2.4 Summary.....	41
3 The Right to Regulate.....	42
3.1 The Right to Regulate and the FET Standard.....	43
3.2 The Right to Regulate and Indirect Expropriation	46
3.3 The Right to Regulate and Public-Interest Provisions	51
3.4 The Right to Regulate as a Legal Power	55
3.5 Interim Conclusions.....	58
4 Investor Obligations through Counterclaims.....	60
4.1 Counterclaims in Investment Arbitration	61
4.2 <i>Urbaser v Argentina</i>	65
4.2.1 The Merits	65
4.2.2 Doctrinal Commentary.....	69
4.2.2.1 Subjectivity of Corporations.....	70
4.2.2.2 Obligations Derived from Soft Law	71
4.2.2.3 Obligations Derived from ‘Abuse of Rights’ Clauses	72
4.3 <i>Aven v Costa Rica</i>	73
4.3.1 The Merits	73
4.3.2 Doctrinal Commentary.....	75

4.4	<i>Al-Warraq v Indonesia</i>	78
4.5	<i>Burlington v Ecuador and Perenco v Ecuador</i>	81
4.5.1	The Merits	82
4.5.2	Doctrinal Commentary	84
4.6	Interim Conclusions.....	86
5	Investor Obligations in the UNCITRAL Reform Process.....	89
5.1	Working Group III and ISDS Reform	90
5.2	Draft Provision 10 on Counterclaims	92
5.3	Interim Conclusions.....	99
6	Final Conclusions	101
6.1	Investor Obligations as a Qualified Mechanism of Reconciliation	101
6.2	Possibilities and Limits in Arbitral Practice	102
6.3	Reform and the Rebalancing of Investment Law	103
	Reference List	105

Summary

International investment law has traditionally been structured around the protection of foreign investors and investments. Through investment treaties, investors are granted substantive rights and procedural standing to bring claims against host states, while obligations are imposed primarily on states. This structure has contributed to concerns that investment law may restrict states' ability to regulate in the public interest, particularly in areas such as public health, environmental protection and human rights. Against this background, this thesis examines whether investor obligations can function as a mechanism for reconciling investment protection with states' right to regulate in the public interest.

The thesis applies a doctrinal legal method, combined with conceptual analysis and reform-oriented evaluation. It first examines how the tension between investment protection and the right to regulate is conceptualised within international investment law. It then analyses selected arbitral awards in which investor obligations and counterclaims have been addressed, focusing on how such obligations have been recognised and applied in practice. Finally, it examines ongoing reform efforts, especially the work of UNCITRAL Working Group III on counterclaims.

The thesis finds that investor obligations constitute a viable mechanism for reconciliation, but only to a limited and conditional extent. Their main significance lies in their ability to bring investor conduct into the same legal framework as investor rights and state regulatory authority. In arbitral practice, investor obligations have been most effective where they are grounded in an express treaty provision or in domestic law capable of being applied by the tribunal. Counterclaims are particularly important because they provide a procedural avenue through which respondent states may invoke investor misconduct within the same proceedings as the investor's claim.

At the same time, investor obligations are not yet a settled or general feature of international investment law. Their effectiveness depends on a sufficiently clear legal basis, consent, jurisdictional and admissibility requirements, and procedural mechanisms capable of giving them practical effect. The reform efforts examined in the thesis confirm this cautious development. UNCITRAL Draft Provision 10 may strengthen the procedural possibility of counterclaims, but it does not itself create substantive investor obligations.

The thesis therefore concludes that investor obligations should be understood as a meaningful but limited reform tool. They do not limit the protective function of investment treaties, nor do they remove the constraints that investment law places on states. However, by allowing investor conduct, public-interest regulation and investment protection to be assessed together, they may contribute to a more balanced investment treaty regime.

Sammanfattning

Den internationella investeringsrätten har traditionellt varit uppbyggd kring skyddet av utländska investerare och investeringar. Genom investeringsavtal tillerkänns investerare materiella rättigheter och processuell behörighet att väcka talan mot värdstater, medan skyldigheter främst åläggs stater. Denna struktur har bidragit till farhågor om att investeringsrätten kan begränsa staters möjligheter att reglera i allmänintresset, särskilt inom områden som folkhälsa, miljöskydd och mänskliga rättigheter. Mot denna bakgrund undersöker uppsatsen om investerarförpliktelser kan fungera som en mekanism för att förena investeringsskyddet med staters rätt att reglera i allmänintresset.

Uppsatsen tillämpar en rättsdogmatisk metod, kombinerad med begreppsanalys och en reforminriktad utvärdering. Den undersöker först hur spänningen mellan investeringsskydd och rätten att reglera conceptualiseras inom den internationella investeringsrätten. Därefter analyseras utvalda skiljedomar där investerarförpliktelser och genkärsmål har behandlats, med fokus på hur sådana förpliktelser har erkänts och tillämpats i praktiken. Slutligen undersöks pågående reformarbete, särskilt arbetet med genkärsmål i UNCITRAL:s arbetsgrupp III.

Uppsatsen kommer fram till att investerarförpliktelser utgör en fungerande mekanism för att förena nämnda intressen, men endast i begränsad utsträckning och under vissa förutsättningar. Deras huvudsakliga betydelse ligger i att investerarens agerande kan föras in i samma rättsliga ramverk som investerarens rättigheter och staters regleringsmakt. I skiljeförfaranden har investerarförpliktelser haft störst betydelse när de har grundats på en uttrycklig bestämmelse i ett investeringsavtal eller i nationell rätt som kan tillämpas av skiljenämnden. Genkärsmål är särskilt betydelsefulla eftersom de utgör en processuell väg genom vilken svarandestater kan åberopa investerarens misskötsamhet inom samma förfarande som investerarens talan.

Samtidigt är investerarförpliktelser ännu inte ett etablerat eller allmänt inslag i internationell investeringsrätt. Deras effektivitet beror på en tillräckligt tydlig rättslig grund, krav på behörighet och tillåtlighet samt processuella mekanismer som kan ge dem praktisk verkan. Det reformarbete som undersöks i uppsatsen bekräftar denna försiktiga utveckling. UNCITRAL:s utkastbestämelse 10 kan stärka den processuella möjligheten till genkärsmål, men skapar i sig inte materiella förpliktelser för investerare.

Uppsatsen drar därför slutsatsen att investerarförpliktelser bör ses som ett meningsfullt men begränsat reformverktyg. De minskar varken investerarskyddet enligt investeringsavtalen eller de begränsningar som investeringsrätten lägger på staterna. Genom att göra det möjligt att bedöma investerarens agerande, staters reglering i allmänintresset och investeringsskyddet tillsammans kan de dock bidra till en mer balanserad investeringsrättslig ordning.

Preface

The time has finally come. During these five adventurous years, with all the different activities I have been involved in and all the places I have been, there are probably too many people to mention and thank properly. Still, here is at least an attempt, working backwards from the present.

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Abbreviations

ACHR	American Convention on Human Rights
ACIA	ASEAN Comprehensive Investment Agreement
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECT	Energy Charter Treaty
EU	European Union
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
GATT 1947	General Agreement on Tariffs and Trade 1947
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IAs	International Investment Agreements
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
LCIA	London Court of International Arbitration
MFN	Most-Favoured-Nation
NAFTA	North American Free Trade Agreement
NT	National Treatment
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
TPP	Trans-Pacific Partnership
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
USMCA	United States–Mexico–Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WG III	UNCITRAL Working Group III on Investor-State Dispute Settlement Reform
WTO	World Trade Organisation

1 Introduction

1.1 Background

Modern international investment law is commonly traced to 1959, when Germany and Pakistan concluded the first bilateral investment treaty (BIT).¹ Since then, international investment agreements (IIAs) have multiplied considerably, particularly in the period following the end of the Cold War,² with the number of BITs quintupling in the 1990s alone.³ However, since the 2010s, there has been a noticeable decline in treaty-making.⁴ In 2017, for the first time, the number of effective treaty terminations exceeded the number of newly concluded treaties.⁵

A recent report by the United Nations Conference on Trade and Development (UNCTAD) states that more than 3,300 IIAs are currently in existence.⁶ As such, they form the cornerstone of modern international investment law and may consist of regular BITs,⁷ sectoral and regional treaties⁸ and investment chapters in free trade agreements (FTAs).⁹ In a few instances, earlier bilateral commercial and trade agreements must also be considered.¹⁰ In essence, IIAs

¹ Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (signed 25 November 1959, entered into force 28 April 1962) (Germany–Pakistan BIT).

² UNCTAD, *World Investment Report 2016: Investor Nationality: Policy Challenges* (United Nations 2016) 101.

³ UNCTAD, ‘Bilateral Investment Treaties 1959–1999’ (14 December 2000) UN Doc UNCTAD/ITE/IIA/2, 1.

⁴ UNCTAD, *World Investment Report 2016* (n 2) 101.

⁵ UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (United Nations 2018) 88.

⁶ UNCTAD, *World Investment Report 2025: International Investment in the Digital Economy* (United Nations 2025) 104.

⁷ See eg Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments (signed 3 October 1991, entered into force 28 September 1992) (Argentina–Spain BIT); Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016) (Morocco–Nigeria BIT).

⁸ See eg Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 (ECT); ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 24 February 2012) (ACIA).

⁹ See eg North American Free Trade Agreement (Canada, Mexico and the United States) (signed 17 December 1992, entered into force 1 January 1994) 32 ILM 289 (1993) (NAFTA), ch 11; Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) [2017] OJ L11/23, ch 8.

¹⁰ Notably, Treaties of Friendship, Commerce and Navigation concluded by the United States with numerous countries, many of which remain in force, often contain provisions affecting foreign investment and may serve as a basis for international claims protecting investor interests. See eg *Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161, concerning the Treaty of Amity, Economic Relations, and

are instruments of international law through which states undertake commitments towards other states regarding the treatment afforded to foreign investors and investments, while also agreeing on mechanisms for the enforcement of those commitments. As reflected in their titles, a central purpose of investment treaties is the protection and promotion of investment.¹¹ However, this description may be incomplete, as the protection afforded to foreign investment under these treaties also serves as a means of promoting economic prosperity and development within the host state.¹² Indeed, many investment treaties expressly recognise the role of foreign investment in advancing economic development,¹³ which is also supported by numerous studies which have demonstrated the beneficial effects of foreign investment on economic development.¹⁴

In addition to the aforementioned types of treaties, there are also a limited number of multilateral treaties, most notably the World Bank's Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),¹⁵ which provides an institutional framework and procedural rules for resolving investment disputes through arbitration and enforcing arbitral awards, commonly referred to as ISDS or Investor-State Dispute Settlement.¹⁶ The creation of ICSID became particularly

Consular Rights between the United States of America and Iran (signed 15 August 1955, entered into force 16 June 1957) 284 UNTS 93.

¹¹ See eg *Siemens AG v Argentine Republic* (Decision on Jurisdiction, 3 August 2004) ICSID Case No ARB/02/8 [82]; Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, Oxford University Press 2021) 1, noting that US BITs generally refer to the 'encouragement' rather than the 'promotion' of investment, although the two terms appear to have the same meaning in practice. While some states have moved away from references to promotion or encouragement in investment treaty titles, UNCTAD has observed that attracting investment remains a policy priority: UNCTAD, *World Investment Report 2019: Special Economic Zones* (United Nations 2019) xii.

¹² See eg *Joseph Charles Lemire v Ukraine* (Decision on Jurisdiction and Liability, 14 January 2010) ICSID Case No ARB/06/18 [272]–[273]; *Saluka Investments BV v Czech Republic* (Partial Award, 17 March 2006) UNCITRAL [300].

¹³ See eg Bilateral Agreement for the Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of the United Arab Emirates (signed 12 November 2017) (Colombia–UAE BIT), preamble; Agreement between the Republic of Guatemala and the Republic of Trinidad and Tobago on the Reciprocal Promotion and Protection of Investments (signed 13 August 2013, entered into force 23 June 2016) (Guatemala–Trinidad and Tobago BIT), preamble.

¹⁴ See Barnali Choudhury, 'International Investment Law and Noneconomic Issues' (2020) 53 *Vanderbilt Journal of Transnational Law* 1, 3, with further references.

¹⁵ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966).

¹⁶ Other institutional arbitral fora include the Permanent Court of Arbitration (PCA), the International Court of Arbitration of the International Chamber of Commerce (ICC), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), all of which administer investor-state arbitration proceedings. Investors may also resort to ad hoc arbitration, which gives the parties greater procedural flexibility, including in the choice of applicable arbitration rules. For this purpose, parties frequently rely on the procedural rules of the United Nations Commission on International Trade Law (UNCITRAL). Awards rendered outside the ICSID Convention may be enforced through the Convention on the Recognition and

significant as, in subsequent decades, an increasing number of bilateral and multilateral investment treaties referred to ICSID as a forum for dispute settlement.¹⁷ From the perspective of member states, a key advantage was that investment disputes would be ‘depoliticised’, avoiding direct confrontation between the investor’s home state and the host state.¹⁸ Although ICSID’s caseload remained modest for its first two decades, it had become the principal forum for investment dispute settlement by the 1990s. Since then, investor–state arbitration has produced an expanding body of decisions, both within the ICSID framework and in other arbitral fora. This development was largely driven by the increasing availability of treaty-based investor–state arbitration.¹⁹

However, the success of investment arbitration has also generated concern and criticism. The growing number of awards rendered by differently constituted tribunals has raised concerns regarding consistency and coherence. Some states have more frequently found themselves as respondents and have come to view the repeated need to defend claims by foreign investors as a significant burden. At the same time, investment law, and investment arbitration in particular, has been criticised for restricting states’ freedom to regulate.²⁰ More specifically, these critics of investment treaty arbitration argue that ISDS allows foreign investors, most commonly multinational corporations, to interfere with a government’s ability to regulate in the public interest. This includes regulation aimed at protecting public health, public policy, safety and the environment. Disputes of this kind concern challenges brought by foreign investors against generally applicable government measures, including legislation, regulations and executive acts.²¹ To a large extent, these concerns can be attributed to the inherent asymmetry of IIAs, which impose obligations on states to protect foreign investments while granting investors

Enforcement of Foreign Arbitral Awards (New York Convention) (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3.

¹⁷ Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022) 11–12.

¹⁸ See Ursula Kriebaum, ‘Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes’ (2018) 33(1) *ICSID Review: Foreign Investment Law Journal* 14.

¹⁹ Dolzer, Kriebaum and Schreuer (n 17) 12–13.

²⁰ *ibid* 13–14.

²¹ Vera Korzun, ‘The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-outs’ (2017) 50 *Vanderbilt Journal of Transnational Law* 355, 358–360. High-profile cases include the tobacco plain packaging disputes, in which Philip Morris challenged public health measures adopted by Australia and Uruguay, and the Vattenfall disputes against Germany, which concerned environmental restrictions on a coal-fired power plant and, later, Germany’s nuclear phase-out, see *Philip Morris Asia Limited v The Commonwealth of Australia* (Award on Jurisdiction and Admissibility, 17 December 2015) UNCITRAL, PCA Case No 2012-12; *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (Award, 8 July 2016) ICSID Case No ARB/10/7; *Vattenfall AB and others v Federal Republic of Germany (I)* (Award, 11 March 2011) ICSID Case No ARB/09/6; *Vattenfall AB and others v Federal Republic of Germany (II)* (Order of the Tribunal Taking Note of the Discontinuance of the Proceeding, 9 November 2021) ICSID Case No ARB/12/12.

procedural standing to bring claims when they consider those obligations to have been breached. Yet this structure is not reciprocal, either substantively or procedurally: (1) investors are traditionally subject to few corresponding obligations, and (2) states have limited avenues to submit claims against investors where their conduct gives rise to legal concern.²²

The growing dissatisfaction with the international investment law regime has led states to take the significant step of terminating, renegotiating, or replacing their BITs.²³ Bolivia, Ecuador and Venezuela went even further by denouncing the ICSID Convention.²⁴ This dissatisfaction has also been reflected in the withdrawal of several states, as well as the EU and Euratom, from the ECT.²⁵ On a broader level, the EU has assumed a leading role in responding to concerns with traditional ISDS and the perceived legitimacy crisis in investment treaty arbitration.²⁶ The European Commission has proposed structural reform of the system, most notably by seeking to replace

²² Bjorklund AK, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17(2) *Lewis & Clark Law Review* 461, 462–464.

²³ Notable examples include Indonesia, India and South Africa, see eg, Ben Bland and Shawn Donnan, 'Indonesia to Terminate More Than 60 Bilateral Investment Treaties' *Financial Times* (26 March 2014) <<https://www.ft.com/content/3755c1b2-b4e2-11e3-af92-00144feabdc0>> accessed 12 May 2026; Nicholas Peacock and Nihal Joseph, 'Mixed Messages to Investors as India Quietly Terminates Bilateral Investment Treaties with 58 Countries' (Herbert Smith Freehills Arbitration Notes, 16 March 2017) <<https://www.hsfkramer.com/notes/arbitration/2017-03/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries>> accessed 12 May 2026; Peter Leon, Jonathan Veeran and Erin Warmington, 'South Africa Declines to Renew Bilateral Investment Treaties with European Union Member States' (Webber Wentzel, 5 October 2012) <<https://www.mondaq.com/southafrica/international-trade-amp-investment/199586/south-africa-declines-to-renew-bilateral-investment-treaties-with-european-union-member-states>> accessed 12 May 2026.

²⁴ Sergey Ripinsky, 'Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve' (Investment Treaty News, 13 April 2012) <<https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>> accessed 11 May 2026; José Carlos Bernal Rivera and Mauricio Viscarra Azuga, 'Life after ICSID: 10th Anniversary of Bolivia's Withdrawal from ICSID' (Kluwer Arbitration Blog, 13 May 2017) <<https://legalblogs.wolterskluwer.com/arbitration-blog/life-after-icsid-10th-anniversary-of-bolivas-withdrawal-from-icsid/>> accessed 11 May 2026. It should be noted, however, that Ecuador rejoined the ICSID Convention in June 2021, more than a decade after denouncing it: ICSID, 'Ecuador Ratifies the ICSID Convention' (ICSID News Release, 7 July 2021) <<https://icsid.worldbank.org/news-and-events/news-releases/ecuador-ratifies-icsid-convention>> accessed 11 May 2026. More recently, in April 2026, Colombia also signalled a possible withdrawal from the investment arbitration system, although no formal denunciation has yet occurred: Felipe Nazar Pagani, Mark Clarke and Charles Newman, 'Colombia's ICSID Threat: What Investors Need to Know' (Akin, 15 April 2026) <<https://www.akingump.com/en/insights/alerts/colombias-icsid-threat-what-investors-need-to-know>> accessed 18 May 2026.

²⁵ European Commission, 'EU Notifies Exit from Energy Charter Treaty and Puts an End to Intra-EU Arbitration Proceedings' (27 June 2024) <https://ec.europa.eu/commis-sion/presscorner/detail/en/ip_24_3513> accessed 12 May 2026.

²⁶ Korzun (n 21) 362.

ISDS with a permanent multilateral two-tier investment court system.²⁷ The EU's agreements with Canada and Vietnam represent early examples of this approach, as they contain provisions enabling investment courts to handle disputes instead of traditional investor-state arbitration.²⁸

Since the middle of the 2010s, several institutional reform efforts have been initiated.²⁹ This has also sparked the emergence of a new generation of IIAs, which seek to address problems associated with older treaties, including broad and unrefined protection standards, insufficient safeguards for regulatory autonomy, and exposure to ISDS claims.³⁰ The most comprehensive multilateral reform effort has been launched within the United Nations Commission on International Trade Law (UNCITRAL), where Working Group III (WG III) has been given a broad mandate to examine and identify pressing issues in ISDS and make recommendations for possible reforms.³¹

However, an important caveat applies to the UNCITRAL reform process. Its mandate is implicitly confined to procedural reform, meaning that broader reform of the substantive rules contained in investment treaties is largely left outside its scope.³² This carve-out, and its interpretation, has been criticised on both normative and legal grounds. Normatively, the concern is that WG III's identified systemic problems cannot be fully addressed without reforming the underlying substantive rules. Legally, it is disputed whether the mandate in fact excludes substantive treaty reform, particularly since the line between procedural and substantive reform is often difficult to sustain.³³

²⁷ European Commission, *Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court* (Concept Paper, 2015).

²⁸ CETA (n 9); Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part (signed 30 June 2019).

²⁹ For example, the ICSID Arbitration Rules 2022 introduced procedural reforms aimed at improving efficiency, transparency and procedural integrity. Comparable developments can also be seen in the UNCITRAL framework, as the UNCITRAL Arbitration Rules 2021 include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Other arbitral institutions, such as the ICC and SCC, have adopted comparable procedural and administrative reforms; see the ICC Rules of Arbitration 2021 and the SCC Arbitration Rules 2023. The SCC Arbitration Rules 2023 also contain specific provisions on investment treaty disputes.

³⁰ UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (United Nations 2015) 124–125; UNCTAD, 'International Investment Agreements Trends: The Increasing Dichotomy between New and Old Treaties' (IIA Issues Note No 2, October 2024) UN Doc UNCTAD/DIAE/PCB/INF/2024/4, 5.

³¹ UNCITRAL, 'Report of the United Nations Commission on International Trade Law, Fiftieth Session (3–21 July 2017)' UN Doc A/72/17, para 264; UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November–1 December 2017)' (19 December 2017) UN Doc A/CN.9/930/Rev.1.

³² Malcolm Langford and others, 'Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions: An Introduction' (2020) 21 *Journal of World Investment & Trade* 167.

³³ See *ibid* with further references.

Nonetheless, the need to address more substantive reforms remain if states are to pursue their ambition of reforming and rebalancing the investment law regime.

While several newer-generation IIAs have begun to incorporate more substantive reforms, initially by recalibrating traditional standards of investor protection and dispute settlement mechanisms, and later through an increasing inclusion of investment cooperation and facilitation provisions,³⁴ these reforms remain largely confined to the traditional ISDS framework. This significantly limits their rebalancing potential, as they largely fail to address the substantive dimension of the regime's asymmetry, namely that obligations continue to fall predominantly on states rather than investors. However, UNCTAD has noted a small but growing share of IIAs containing direct investor obligations, which may offer a more effective tool for rebalancing investors' rights and obligations. Around 10 per cent of treaties signed between 2020 and 2024 include such provisions.³⁵ Investor obligations can cover a wide range of issues, including the environment, labour standards, local communities, anti-corruption, transparent corporate governance practices, and taxation.³⁶ As explored in this thesis, investor obligations may also be derived from sources beyond the applicable treaty itself.

However, imposing obligations on investors may be insufficient unless the second dimension of ISDS asymmetry is also addressed, namely the limited avenues available to states to bring claims against investors. In the past decade, several prominent arbitral awards have demonstrated that counterclaims may provide a procedural avenue through which investor obligations can be invoked and given effect in ISDS proceedings.³⁷ Against this background, some states encouraged UNCITRAL Working Group III to consider counterclaims as a potentially important reform option,³⁸ and the issue was

³⁴ UNCTAD, 'The Reform of International Investment Agreements – State of Play' (IIA Issues Note No 3, December 2025) UN Doc UNCTAD/DIAE/PCB/INF/2026/1, 4.

³⁵ *ibid* 15.

³⁶ See eg Agreement on Investment Cooperation and Facilitation between the Federative Republic of Brazil and the Republic of India (signed 25 January 2020, entered into force 21 December 2025) (Brazil–India BIT); Agreement between the Swiss Federal Council and the Government of the Republic of Indonesia on the Promotion and Reciprocal Protection of Investments (signed 24 May 2022, entered into force 1 August 2024) (Indonesia–Switzerland BIT); Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (adopted 19 February 2023) (AfCFTA Investment Protocol).

³⁷ See eg *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v Argentine Republic* (Award, 8 December 2016) ICSID Case No ARB/07/26; *David R Aven and others v Republic of Costa Rica* (Final Award, 18 September 2018) ICSID Case No UNCT/15/3; *Burlington Resources Inc v Republic of Ecuador* (Decision on Counter-claims, 7 February 2017) ICSID Case No ARB/08/5; *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (Award, 27 September 2019) ICSID Case No ARB/08/6.

³⁸ UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session (New York, 1–5 April 2019)' (United Nations 2019) UN Doc A/CN.9/970, paras 34–35, 74; see submissions from Morocco and South Africa: UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS):

subsequently taken up in the reform process.³⁹ Following several years of work, provisions on counterclaims were included in the Draft provisions on procedural and cross-cutting issues.⁴⁰ These draft provisions form part of the Working Group's ongoing work and are being prepared for possible inclusion in existing and future IIAs to address the resolution of investment disputes between investors and states.⁴¹ In the most recent draft, Draft Provision 10(1)(b) on counterclaims is framed broadly, referring to investor obligations arising not only under the applicable agreement, but also under domestic law, relevant investment contracts, and any other instrument binding on the claimant.⁴²

Building on these developments, the thesis proceeds from the question whether greater recognition of investor obligations, and their invocation through counterclaims, can address the substantive and procedural asymmetry of IIAs and contribute to reconciling investment protection with states' right to regulate in the public interest.

1.2 Purpose and Research Questions

The purpose of this thesis is to examine to what extent a clarification and recognition of investor obligations can function as a means of bridging the gap between investment protection and the right to regulate. The thesis aims to examine the difficulties inherent in balancing these two competing interests, as reflected in the protection of foreign investors' rights and states' regulatory authority. Against this background, investor obligations are explored through arbitral practice and the ongoing reform process within UNCITRAL Working Group III, with particular attention to their invocation through counterclaims as a means of further rebalancing these interests.

To fulfil this purpose, the thesis aims to answer the following main research question:

Submission from the Government of Morocco' (Note by the Secretariat, 4 March 2019) UN Doc A/CN.9/WG.III/WP.161; UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of South Africa' (Note by the Secretariat, 17 July 2019) UN Doc A/CN.9/WG.III/WP.176.

³⁹ UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020)' UN Doc A/CN.9/1044, paras 57–63.

⁴⁰ UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural and Cross-Cutting Issues' (Note by the Secretariat, 26 July 2023) UN Doc A/CN.9/WG.III/WP.231, Draft Provision 11 ('Counterclaims').

⁴¹ *ibid* para 3.

⁴² UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural and Cross-Cutting Issues' (Note by the Secretariat, 30 June 2025) UN Doc A/CN.9/WG.III/WP.253, Draft Provision 10(1)(b).

- To what extent do investor obligations constitute a viable mechanism for reconciling investment protection with states' right to regulate in the public interest in international investment law?

In order to answer the main question, three sub-questions will be examined within the thesis:

- How is the tension between investment protection and the right to regulate conceptualised within international investment law?
- To what extent are investor obligations recognised and applied in arbitral practice, particularly through counterclaims, and what limitations can be identified in their current use?
- How do ongoing reform efforts within UNCITRAL Working Group III address investor obligations, and what role do they assign to them in rebalancing the investment treaty regime?

1.3 Methodology and Materials

This thesis primarily applies a doctrinal legal method.⁴³ This methodological approach is adopted because the research questions concern the interpretation, systematisation and evaluation of rules, principles and concepts within international investment law. Schill and Gülay describe doctrinal analysis as a method concerned with identifying the meaning and normative content of legal rules and principles, their relationship to one another, and the internal functioning of the law. They further explain that doctrinal analysis in international investment law may include black-letter analysis, interpretation, structural analysis and comparative elements.⁴⁴ The thesis therefore relies on primary legal materials, including investment treaties, arbitral awards and arbitration rules, together with relevant secondary literature and other international materials, such as institutional reports and reform documents.

The thesis combines doctrinal analysis of the law as it stands with conceptual analysis and reform-oriented evaluation.⁴⁵ Schill and Gülay distinguish between research into the *lex lata*, which concerns the existing content of legal rights and obligations, and research into the *lex ferenda*, which evaluates deficiencies in the existing regime and considers how the law should be reformed.⁴⁶ This distinction is reflected in the structure of the thesis. The main

⁴³ Stephan W Schill and Kerem Gülay, 'Approaches to Foreign Direct Investment in Legal Research' in Markus Krajewski and Rhea Tamara Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar 2019) 62–64.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ *ibid* 49–50, 52, 55–57.

research question has an overarching evaluative function, as it asks whether investor obligations constitute a viable mechanism for reconciling investment protection with states' right to regulate in the public interest. The first sub-question is addressed through conceptual legal analysis, as it examines how the relationship between investment protection and the right to regulate is understood within international investment law. The second sub-question is primarily concerned with the *lex lata*, as it analyses selected arbitral awards in order to assess how investor obligations and counterclaims have been recognised and applied in existing arbitral practice. The third sub-question then moves towards the *lex ferenda*, as it examines ongoing reform efforts and assesses whether their treatment of investor obligations contributes to re-balancing the investment law regime.

International investment law is grounded in the traditional sources of international law reflected in Article 38(1) of the Statute of the International Court of Justice,⁴⁷ namely international conventions, international custom and general principles of law. Judicial decisions and the writings of highly qualified publicists further operate as subsidiary means for determining rules of law.⁴⁸ Where treaty provisions are analysed, the thesis is guided by the rules of treaty interpretation codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).⁴⁹ At the same time, international investment law displays certain specificities in its particular combination of sources. Schill notes that, in practice, the field is centred on investment treaties as interpreted and applied by investment treaty tribunals. Other sources, such as custom and general principles of law, often operate less as independent bases of obligation and more as means of clarifying and concretising the content of treaty standards.⁵⁰ Arbitral awards are not formal sources of law in the strict sense, but they have significant practical importance, since tribunals frequently rely on earlier awards as persuasive authority when determining the content of investment treaty obligations.⁵¹ Domestic law may also be relevant, not as a source of international law as such, but where it forms part of the applicable law or is relevant to the investor's obligations under host state law.⁵² In addition, soft law instruments, including instruments concerning corporate social responsibility and business and human rights, may influence the

⁴⁷ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.

⁴⁸ *ibid* art 38(1).

⁴⁹ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 31–32.

⁵⁰ Stephan W Schill, 'Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2018) 1099–1100.

⁵¹ *ibid* 1103–1106.

⁵² *ibid* 1097–1098.

interpretation of investment treaty standards and the developing discussion on investor obligations.⁵³

Since the thesis concerns investor obligations, it is also necessary to address the legal position of investors within international investment law. Investors are not states, but international investment law gives private investors, including legal persons, a distinct procedural position through investor-state arbitration and may also confer substantive rights under investment treaties.⁵⁴ This raises the corresponding question of whether investors may also bear obligations under international law. While rights are not logically dependent on duties, the possibility of investor obligations is supported by the broader development in international law whereby non-state actors may, in certain circumstances, be directly bound by international obligations.⁵⁵ However, the imposition of such obligations requires a sufficiently clear legal basis and must respect the principle of legality. For this reason, the thesis treats investor obligations as possible, but not presumed. Their existence and scope must instead be determined by reference to the applicable treaty, domestic law where relevant, general international law, soft law instruments and arbitral practice.⁵⁶

1.4 Delimitations

The thesis does not undertake a separate analysis of human rights provisions, environmental provisions or sustainable development clauses in IIAs in relation to the right to regulate. These provisions are relevant to the thesis only insofar as they illustrate the broader public interests through which the right to regulate is examined within international investment law. Human rights, environmental protection and sustainable development are therefore treated as public-interest objectives that may justify regulatory measures, rather than as independent fields of legal analysis. The same applies to CSR clauses. Although recent treaty practice shows an increasing inclusion of CSR, human rights and investor-responsibility clauses in IIAs, many of these provisions remain framed in soft, best-efforts or hortatory terms.⁵⁷ Their practical legal effect also remains limited, as existing CSR clauses have generally not resulted in effective investor accountability or enforceable obligations within

⁵³ *ibid* 1110–1113.

⁵⁴ Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 282–284, 306–308, 315–317.

⁵⁵ *ibid* 60–63.

⁵⁶ *ibid* 85–89, 343–45.

⁵⁷ Choudhury B, ‘Investor Obligations for Human Rights’ (2020) 35(1–2) *ICSID Review – Foreign Investment Law Journal* 82, 88–90; Markus Krajewski, ‘A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application’ (2020) 5 *Business and Human Rights Journal* 105, 116–117.

the ISDS framework.⁵⁸ For this reason, human rights provisions and CSR clauses in IIAs are addressed only where they are relevant to the thesis' broader analysis of public-interest regulation, investor obligations and reform, rather than as separate categories of treaty provisions.

A further delimitation concerns due diligence. The thesis does not examine due diligence as a general standard of international law, nor human rights and environmental due diligence as a separate business and human rights framework.⁵⁹ The concept is addressed only where it intersects with the thesis' analysis of the right to regulate and investor obligations. In relation to the right to regulate, this is limited to the role of investor knowledge, foreseeability and the reasonableness of legitimate expectations under the FET standard.⁶⁰ In relation to investor obligations, due diligence is not treated as a separate category of obligation. As explained further below, the analysis of arbitral practice is confined to obligations invoked directly against investors through counterclaims. This reflects the more limited role that investor due diligence has so far played in investment arbitration, where it has generally operated as a factor in assessing claims to investment protection rather than as a developed mechanism for investor accountability.⁶¹

The analysis of arbitral practice in Chapter 4 is limited to cases in which investor obligations are invoked directly against the investor through counterclaims, whether the alleged obligation derives from domestic law, the applicable investment treaty or international law.⁶² The chapter therefore excludes cases in which investor conduct is considered only indirectly, for example as a defence to the investor's claim or as a factor affecting jurisdiction, admissibility, liability, causation, quantum or costs.⁶³ This delimitation is justified by the chapter's focus on the recognition and application of investor obligations as obligations of the investor, rather than on the broader effects of investor misconduct within investor-initiated proceedings.

Within this category, the analysis further focuses on awards and decisions in which counterclaims have generated substantive reasoning on investor obligations. Cases where counterclaims were addressed only briefly on the merits,

⁵⁸ Nicolás M Perrone, 'Bridging the Gap between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment' (2022) 7 *Business and Human Rights Journal* 375, 390; Nicolas Bueno, Anil Yilmaz Vastardis and Isidore Ngueuleu Djeuga, 'Investor Human Rights and Environmental Obligations: The Need to Re-design Corporate Social Responsibility Clauses' (2023) 24 *Journal of World Investment & Trade* 179, 204–205.

⁵⁹ Mavluda Sattorova and Jean Ho, 'The Rise of Due Diligence in International Investment Law' (2026) 29(1) *Journal of International Economic Law* 39, 41–43.

⁶⁰ Yulia Levashova, 'The Accountability and Corporate Social Responsibility of Multi-national Corporations for Transgressions in Host States Through International Investment Law' (2018) 14(2) *Utrecht Law Review* 40, 51–53.

⁶¹ Sattorova and Ho (n 59) 56–57.

⁶² Patrick Abel, *International Investor Obligations* (Nomos 2022) 34, 36–38.

⁶³ Peters (n 54) 343–344; Abel (n 62) 34–35.

such as *Genin v Estonia*, *Goetz II*, and *Inmaris v Ukraine*, are therefore not treated as central authorities for that specific analysis.⁶⁴ This does not exclude *Aven v Costa Rica*. Although Costa Rica's environmental counterclaim did not proceed to a full merits assessment, the award remains relevant because the tribunal considered, in principle, whether foreign investors may be subject to environmental obligations capable of being invoked through counterclaims.⁶⁵ *Aven* is therefore examined for its conceptual significance, rather than as an award in which investor obligations were assessed on the merits.

Finally, the thesis does not provide a comprehensive account of all procedural or interpretive mechanisms through which right to regulate in the public-interest may be accommodated in ISDS. Other mechanisms, including amicus curiae submissions, tribunal-appointed experts, transparency reforms, proportionality assessments and broader procedural reforms, are therefore not examined as independent reform paths.⁶⁶ They may be mentioned where necessary to situate the discussion, particularly in relation to the public-interest concerns underlying ISDS reform. The analysis is instead limited to reform efforts that are directly relevant to investor obligations and counterclaims, since these mechanisms correspond to the thesis' central concern with whether obligations can be invoked against investors as a means of rebalancing investment protection and states' right to regulate. The thesis focuses on the ongoing work of UNCITRAL Working Group III, particularly Draft Provision 10 on counterclaims, since this is the institutional reform process most directly connected to the procedural invocation of investor obligations.⁶⁷

1.5 State of the Art

The present thesis is situated within scholarship examining the relationship between investment protection, states' regulatory authority and the reform of international investment law. General works on international investment law, including those by Salacuse and Dolzer, Kriebaum and Schreuer, provide the doctrinal foundation for understanding the structure, standards and dispute settlement mechanisms of the investment treaty regime.⁶⁸ Reform-oriented and methodological scholarship by Schill has further examined the sources,

⁶⁴ *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v Republic of Estonia* (Award, 25 June 2001) ICSID Case No ARB/99/2 [376]–[378]; *Antoine Goetz & Consorts and S.A. Affinage des Métaux v Republic of Burundi* (Award, 21 June 2012) ICSID Case No ARB/01/2 [286]–[287]; *Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine* (Award, 1 March 2012) ICSID Case No ARB/08/8, [431]–[432].

⁶⁵ *Aven v Costa Rica* (Final Award) (n 37), [737]–[747].

⁶⁶ See Stanislava Nedeva, 'The Neglected Public Interest in Investor-State Dispute Settlement: Environmental and Human Rights Considerations' (2024) 33(5) *European Energy and Environmental Law Review* 214, 219–222.

⁶⁷ UNCITRAL, 'Draft Provisions on Procedural and Cross-Cutting Issues' UN Doc A/CN.9/WG.III/WP.253 (n 42) Draft Provision 10.

⁶⁸ Salacuse (n 11); Dolzer, Kriebaum and Schreuer (n 17).

structure and recalibration of international investment law.⁶⁹ Against this background, three more specific strands of literature form the central scholarly foundation of the thesis: the literature on the right to regulate, the literature on investor obligations and counterclaims, and the literature on reform efforts within international investment law.

The first of these strands concerns the right to regulate, which has become a distinct field of scholarly inquiry. Titi and Mouyal have been particularly influential in conceptualising the right to regulate in international investment law, including its relationship to public-interest regulation and human rights.⁷⁰ Later academic and expert work by Levashova, Korzun, Gazzini and Nadakavukaren has further examined the right to regulate through fair and equitable treatment, treaty exceptions and safeguard provisions, public-interest clauses and newer treaty practice.⁷¹ These works show that the right to regulate cannot be understood merely as a political assertion of sovereignty. Rather, it concerns the legal space available to states when exercising regulatory authority within the limits imposed by investment treaties. Giannakopoulos' Hohfeldian approach is also relevant in this respect, since it supports an understanding of the right to regulate as a legal power rather than as a general immunity from international responsibility.⁷²

The second strand concerns investor obligations and counterclaims, which have become increasingly important in discussions on the future of international investment law. Traditional investment law scholarship focused primarily on the rights of foreign investors and the obligations of host states. By contrast, work by Abel, Krajewski, Choudhury, Cotula, Ranjan and Bueno has examined whether investors may also bear obligations under investment treaties, domestic law, international law or soft law instruments.⁷³ This literature directly challenges the traditionally asymmetrical structure of investment law, while also showing that investor obligations require a sufficiently

⁶⁹ Schill and Gülay (n 43); Schill, 'Sources of International Investment Law' (n 50).

⁷⁰ Aikaterini Titi, *The Right to Regulate in International Investment Law* (Nomos 2014); Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Routledge 2016).

⁷¹ Yulia Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment* (Kluwer Law International 2019); Korzun (n 21); Tarcisio Gazzini, 'The Right to Regulate in International Investment Law' in Valentina Vadi and David Collins (eds), *Routledge Handbook on International Economic Law* (Routledge 2025); Krista Nadakavukaren and Rodrigo Polanco Lazo, *Legal Opinion on Right to Regulate in Investment Treaties* (E-Avis ISDC 2023).

⁷² Charalampos Giannakopoulos, 'The Right to Regulate in International Investment Law and the Law of State Responsibility: a Hohfeldian Approach' in Photini Pazartzis and Panos Merkouris (eds), *Permutations of Responsibility in International Law* (Brill Nijhoff 2019).

⁷³ Abel (n 62); Krajewski (n 57); Choudhury, 'Investor Obligations for Human Rights' (n 57); Lorenzo Cotula, 'Human Rights and Investor Obligations in Investor-State Arbitration' (2016) 17 *Journal of World Investment and Trade* 148; Prabhash Ranjan, 'Investor Obligations in Investment Treaties: Missing Text or a Matter of Application?' in Jean Ho and Mavluda Sattorova (eds), *Investors' International Law* (Hart Publishing 2021); Bueno, Vastardis and Djeuga (n 58).

clear legal basis and a procedural mechanism through which they can be invoked. In this respect, counterclaims are particularly important. Bjorklund's work remains central to the discussion of counterclaims as a possible means of rebalancing investment law, while later scholarship by Abel, de Nanteuil, Harrison, Shao, Scherer, Gleason, and Nedumpara and Laddha has examined the conditions under which respondent states may bring counterclaims against investors, especially in relation to environmental harm, human rights and domestic law obligations.⁷⁴ This literature has been shaped by arbitral awards such as *Urbaser v Argentina*, *Aven v Costa Rica*, *Burlington v Ecuador*, *Perenco v Ecuador* and *Al-Warraq v Indonesia*, which have examined, to varying degrees, whether counterclaims may allow tribunals to address investor conduct within the same proceedings as investor claims.⁷⁵ At the same time, the scholarship shows that counterclaims remain legally constrained. The present thesis builds on this literature by examining investor obligations as a possible response to the substantive and procedural asymmetry of the investment treaty regime.

Recent scholarship on due diligence and investor conduct also forms part of this broader development. Sattorova and Ho have examined the rise of investor due diligence in international investment law, while Levashova and Monnheimer have analysed related questions of corporate responsibility and human rights due diligence.⁷⁶ This literature is relevant because it reflects a broader tendency to take investor conduct into account in investment law. However, the present thesis does not treat due diligence as a separate category of investor obligation. The focus is instead on obligations invoked directly against investors through counterclaims.

⁷⁴ Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (n 22); Patrick Abel, 'Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration' (2018) 1 *Brill Open Law* 61; Alain de Nanteuil, 'Counterclaims in Investment Arbitration: Old Questions, New Answers?' (2018) 17 *The Law and Practice of International Courts and Tribunals* 374; James Harrison, 'Environmental Counterclaims in Investor-State Arbitration' (2016) 17 *Journal of World Investment and Trade* 479; Xuan Shao, 'Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law' (2021) 24 *Journal of International Economic Law* 157; Maxi Scherer, Stuart Bruce and Juliane Reschke, 'Environmental Counterclaims in Investment Treaty Arbitration' (2021) 36(2) *ICSID Review – Foreign Investment Law Journal* 413; Ted Gleason, 'Examining Host-State Counterclaims for Environmental Damage in Investor-State Dispute Settlement from Human Rights and Transnational Public Policy Perspectives' (2021) 21 *International Environmental Agreements* 427; Nedumpara J and Laddha A, 'Human Rights and Environmental Counterclaims in Investment Treaty Arbitration' in Chaisse J, Choukroune L and Jusoh S (eds), *Handbook of International Investment Law and Policy* (Springer 2021).

⁷⁵ *Urbaser v Argentina* (Award) (n 37); *Aven v Costa Rica* (Final Award) (n 37); *Burlington v Ecuador* (Decision on Counterclaims) (n 37); *Perenco v Ecuador* (Award) (n 37); *Hesham T M Al-Warraq v Republic of Indonesia* (Final Award, 15 December 2014) UN-CITRAL.

⁷⁶ Sattorova and Ho (n 59); Levashova (n 60); Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (Cambridge University Press 2021).

The third strand concerns ongoing reform efforts in international investment law. The work of UNCITRAL Working Group III has generated significant scholarly attention, including by Langford, Giorgetti, and Guntrip, Paine and Titi.⁷⁷ This literature highlights the difficulty of separating procedural reform from substantive reform. However, while the UNCITRAL reform process has been widely discussed, comparatively limited attention has been given specifically to counterclaim reform as a mechanism for invoking investor obligations. Although the mandate of Working Group III is generally framed around ISDS reform, issues such as counterclaims, damages and the right to regulate demonstrate that procedural mechanisms may have substantive implications. The inclusion of counterclaims in the Draft provisions on procedural and cross-cutting Issues is therefore particularly relevant to the present thesis.⁷⁸ It raises the question whether procedural reform can meaningfully contribute to rebalancing the investment treaty regime where the underlying substantive obligations remain largely centred on states.

Against this background, the contribution of the thesis lies in bringing together the literature on the right to regulate, investor obligations and counterclaims, and ongoing reform efforts in international investment law. While these areas have often been examined separately, the thesis analyses whether investor obligations, when capable of being invoked through counterclaims, can operate as a mechanism for addressing both the substantive and procedural asymmetry of the investment treaty regime. By connecting arbitral practice with the reform process in UNCITRAL Working Group III, the thesis assesses whether such obligations can contribute to reconciling investment protection with states' right to regulate in the public interest.

1.6 Outline

This thesis is structured as follows. Following this introductory chapter, Chapter 2 sets out the main standards of investment protection relevant to the thesis. It begins with the principle of non-discrimination, focusing on most-favoured-nation treatment and national treatment, before turning to fair and equitable treatment and protection against expropriation. The purpose of the chapter is to establish the legal framework within which the tension between investment protection and public-interest regulation arises.

⁷⁷ Langford and others (n 32); Chiara Giorgetti, 'The Transformation of International Organizations: Specialization, New Initiatives, and Working Methods: Some Observations on the Work of UNCITRAL Working Group III' (2023) 26 *Journal of International Economic Law* 40; Eric Guntrip, Joshua Paine and Catharine Titi, 'The Intersection of Substance and Procedure in the Work of UNCITRAL Working Group III: The Questions of Damages, the Right to Regulate and Counterclaims' Academic Forum on ISDS Concept Paper 2025/2 (20 March 2025).

⁷⁸ UNCITRAL, 'Draft Provisions on Procedural and Cross-Cutting Issues' UN Doc A/CN.9/WG.III/WP.253 (n 42) Draft Provision 10.

Chapter 3 examines the right to regulate in international investment law. It analyses how the right to regulate relates to the fair and equitable treatment standard, indirect expropriation and public-interest provisions in investment treaties. The chapter then develops the conceptual framing of the right to regulate as a legal power, before drawing interim conclusions on how the tension between investment protection and regulatory authority should be understood.

Chapter 4 turns to investor obligations and counterclaims. It first introduces counterclaims as a procedural mechanism in investment arbitration. It then analyses selected arbitral awards in which investor obligations and counterclaims have been addressed, including *Urbaser v Argentina*, *Aven v Costa Rica*, *Al-Warraq v Indonesia*, *Burlington v Ecuador* and *Perenco v Ecuador*. The chapter assesses both the possibilities and limits of relying on investor obligations in arbitral practice.

Chapter 5 examines investor obligations in the context of ongoing reform efforts within UNCITRAL Working Group III. It considers how counterclaims have been addressed within the Working Group's reform process and evaluates the role assigned to investor obligations in that context. The chapter assesses whether procedural reform of counterclaims can contribute to rebalancing the investment treaty regime.

Chapter 6 presents the final conclusions. It answers the main research question by assessing whether investor obligations constitute a viable mechanism for reconciling investment protection with states' right to regulate in the public interest. It concludes that investor obligations have meaningful reform potential, but that their effectiveness remains limited and conditional on clearer substantive obligations and procedural mechanisms capable of giving them practical effect.

2 Standards of Protection in International Investment Law

To protect foreign investors against the political risks associated with placing their assets under the jurisdiction of a host state, investment treaties establish obligations concerning the ‘treatment’ that host states must accord to investors and their investments. However, the treaties do not usually define the meaning of ‘treatment’.⁷⁹ In the ICSID case of *Suez and Vivendi v Argentina*, the tribunal defined the meaning of ‘treatment’ as follows: ‘the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.’⁸⁰ In other words, by concluding an investment treaty, a state undertakes commitments regarding how it will treat investors and investments from treaty partners.

Treaty provisions on investor and investment treatment are intended to constrain host state conduct and impose discipline on governmental action. To this end, investment treaties establish standards that host states must respect in their treatment of investors and investments. Failure by a state to comply with these standards constitutes a treaty breach and may engage its international responsibility, including liability to compensate for the harm caused.⁸¹

General treatment standards can be divided into two categories. The first consists of relative standards, which depend on the treatment that the host state accords to other investors or investments. Examples include most-favoured-nation (MFN) treatment and national treatment (NT). The second consists of absolute standards, which apply independently of specified circumstances or of how the host state treats other investors. Examples of absolute standards include guarantees of full protection and security (FPS), fair and equitable treatment (FET), and treatment in accordance with the minimum standard of international law. Whereas relative standards require a comparator for their application, absolute standards operate independently of such comparisons.⁸²

Against this background, this chapter sets out the main standards through which investment treaties protect foreign investors against host-state conduct. The purpose is not to provide an exhaustive account of all investment treaty protections, but to identify those most relevant to the later analysis of the tension between investment protection and the right to regulate. The following section examines the relative standards of MFN and NT, both of which protect against discrimination. Thereafter, the analysis turns to the absolute

⁷⁹ Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, Oxford University Press 2021) 273.

⁸⁰ *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic* (Decision on Jurisdiction, 3 August 2006) ICSID Case No ARB/03/19 [55].

⁸¹ Salacuse (n 79) 273.

⁸² *ibid* 274.

standard of FET, which is the most frequently invoked standard in investment disputes and of considerable practical importance, as a significant number of successful claims in international arbitration are based on violations of the FET standard.⁸³ It should also be noted that provisions in BITs commonly provide for NT and MFN together, and sometimes link MFN to FET.⁸⁴ Finally, this chapter addresses protection against expropriation.

2.1 Non-Discrimination

Non-discrimination clauses try to ensure equality of treatment between foreign investors and their investments, protected under the provisions of a particular IIA, and investors from other countries or local investors of the host state. In essence, the clauses aim to prevent nationality-based discrimination. NT clauses ensure that treaty-protected foreign investments are not discriminated against compared to domestic investors and investments. MFN clauses ensure that treaty parties do not treat treaty-protected foreign investors less favourably than investors from other countries.⁸⁵

The way in which MFN and NT clauses aim to ensure non-discrimination between states reflects the principle of sovereign equality. They prevent state-induced distortions of competitive opportunities that would undermine comparative advantage, free trade and fair competition. The clauses are today widely found in bilateral and multilateral treaties governing the treatment of persons, rights of establishment, trade in goods and services, investments, and the protection of intellectual property rights. The specific subject matter covered by MFN and NT treatment depends on the wording and scope of the relevant treaty.⁸⁶

MFN and NT clauses operate differently in the trade and investment contexts respectively. In the field of foreign investment, both clauses generally apply only after an investment has been admitted. They therefore typically regulate post-investment treatment, except in the relatively rare cases where investment treaties also grant a right of establishment.⁸⁷

2.1.1 Most-Favoured-Nation

⁸³ UNCTAD, World Investment Report 2016: Investor Nationality: Policy Challenges (United Nations 2016) 107; Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022) 186.

⁸⁴ Giorgio Sacerdoti and Niall Moran, 'Non-Discrimination Clauses: Most-Favoured-Nation and National Treatment' in Hélène Ruiz Fabri and Edoardo Stoppioni (eds), *International Investment Law: An Analysis of the Major Decisions* (Hart Publishing 2022) 429.

⁸⁵ *ibid* 427.

⁸⁶ *ibid* 428.

⁸⁷ *ibid* 428.

The MFN clause predates modern bilateral investment treaties as well as the General Agreement on Tariffs and Trade of 1947 (GATT 1947),⁸⁸ where it is found in its first article:

[A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.⁸⁹

This text is worth recalling because its basic elements are also reflected in MFN clauses in IIAs, although commonly in a shortened form, with the term ‘product’ replaced by ‘investor’ or ‘investment’.⁹⁰ The MFN clause is generally relatively simple in its formulation and may be understood as a direct extension of the national treatment standard. It requires a state to accord foreign investors treatment no less favourable than that granted to the most favoured foreign investor. In this sense, the clause seeks both to maximise the level of protection afforded to foreign investors and to harmonise the treatment granted to them.⁹¹

In the International Law Commission (ILC) Draft Articles on Most-Favoured-Nation Clauses,⁹² an MFN clause is defined as ‘a treaty provision whereby a State undertakes the obligation towards another State to accord most favoured nation treatment in an agreed sphere of relations’.⁹³ MFN treatment is further defined as ‘treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State’.⁹⁴ In the *Case Concerning Rights of Nationals of the United States of America in Morocco*, the International Court of Justice (ICJ) held that the intention of an MFN clause is to ‘establish and maintain at all times fundamental equality without discrimination among all of the countries concerned’.⁹⁵

⁸⁸ General Agreement on Tariffs and Trade 1947 (GATT 1947) 55 UNTS 194; Arnaud de Nanteuil, *International Investment Law* (Edward Elgar Publishing 2020) [8.30].

⁸⁹ GATT 1947 (n 88) art I.

⁹⁰ Sacerdoti and Moran (n 84) 428.

⁹¹ de Nanteuil, *International Investment Law* (n 88) para 8.30.

⁹² From now on ‘ILC Draft Articles’.

⁹³ International Law Commission, ‘Draft Articles on Most-Favoured-Nation Clauses with Commentaries’ (1978) II(2) *Yearbook of the International Law Commission* 16, art 4.

⁹⁴ *ibid* art 5.

⁹⁵ *Case Concerning Rights of Nationals of the United States of America in Morocco (France v United States of America)* (Judgment) [1952] ICJ Rep 176, 192.

Unlike other standards of protection that form part of customary international law, MFN treatment is a contingent standard, as it applies only where it is expressly provided for in the relevant treaty.⁹⁶ This is also apparent from the ILC Draft Articles, which provide that ‘nothing in the present articles shall imply that a State is entitled to be accorded most-favoured nation treatment by another State otherwise than on the basis of an international obligation undertaken by the latter State’.⁹⁷

MFN provisions may produce a multilateralising effect, allowing foreign investors to rely on the MFN clause in the primary treaty with the host state, to invoke more favourable provisions contained in treaties between the host state and third states.⁹⁸ The multilateralising effect is what establishes the MFN clause as a relative and dynamic standard, the operation of which depends on the host state’s treaty relations as they evolve over time. Where the host state does not grant any relevant benefit to a third state and its nationals, the clause has no practical effect. However, once such a benefit is conferred on a third state and its investors, it is automatically extended to investors protected under the MFN clause.⁹⁹

Because of the multilateralising effect, questions about the scope of the MFN clause, relating to its potential effect and the possible limits thereof, sometimes arise and often cause controversies regarding its legal implications. This issue arises particularly in investment law, given its strongly bilateral structure, since the clause may require a state to grant an investor treatment that is not provided for in the treaty under which the investor is protected.¹⁰⁰ A particularly controversial example is *Maffezini v Spain*.¹⁰¹ The dispute concerned an Argentine investor who brought an ICSID claim under the Argentina–Spain BIT, despite not complying with the treaty’s requirement to first submit the dispute to Spanish courts and wait 18 months before initiating arbitration. Instead of declaring the claim inadmissible, the tribunal allowed the investor to rely on the treaty’s MFN clause to invoke the more favourable dispute settlement provisions of the Spain–Chile BIT, which required only a six-month waiting period.¹⁰² The award has caused controversy for extending MFN treatment to procedural preconditions for arbitration, although such clauses

⁹⁶ Piero Bernardini, ‘Most-Favoured-Nation Treatment in Investment Law’ in Thomas Cottier and Krista Nadakavukaren Schefer (eds), *Elgar Encyclopedia of International Economic Law* (Edward Elgar Publishing 2017) 199.

⁹⁷ International Law Commission, ‘Draft Articles on Most-Favoured-Nation Clauses’ (n 93) art 7.

⁹⁸ Prabhash Ranjan, ‘Non-Discrimination in International Investment Law’ in Valentina Vadi and David Collins (eds) *Routledge Handbook on International Economic Law* (Routledge 2025) 352.

⁹⁹ Dolzer, Kriebaum and Schreuer (n 83) 265.

¹⁰⁰ de Nanteuil, *International Investment Law* (n 88) para 8.31.

¹⁰¹ *Emilio Agustín Maffezini v Kingdom of Spain* (Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000) ICSID Case No ARB/97/7.

¹⁰² *ibid* [38]–[40], [64].

were traditionally understood as applying primarily to substantive standards of treatment.¹⁰³

An important consequence of the debate over the multilateralising of MFN clauses is that states have begun to reformulate such clauses in more precise terms. This development forms part of the broader process of investment treaty reform undertaken by several states.¹⁰⁴ Newer-generation BITs reveal several trends towards narrowing and clarifying their operation. Some treaties omit the MFN clause altogether, while others recast it as a best endeavours clause, meaning that the state undertakes to seek to accord MFN treatment without assuming an absolute obligation to achieve that result. A further trend is the insertion of a ‘like circumstances’ qualifier, which confines the comparison to investors or investments that are genuinely comparable and may preserve regulatory space where differential treatment is justified by legitimate public welfare objectives. Finally, many newer treaties expressly exclude the use of MFN clauses to import more favourable dispute settlement provisions from third-country treaties, and some go further by also excluding the importation of substantive treaty standards. Together, these developments reflect a broader attempt to prevent expansive interpretations of MFN treatment and reduce the risk of treaty shopping.¹⁰⁵

2.1.2 National Treatment

Like MFN treatment, NT constitutes a central element of the non-discrimination principle in international investment law, prohibiting nationality-based discrimination against foreign investors.¹⁰⁶ NT clauses are intended to ensure a level playing field between foreign investors and their domestic competitors and to prevent protectionist measures by host states in favour of national investors. They require host states to refrain from treating foreign investors less favourably than domestic investors in the enactment and application of laws and regulations. In this way, the protection standard seeks to place foreign investors on an equal footing with nationals. NT is therefore a relative or comparative standard, as the level of protection afforded to foreign investors depends on the treatment granted to domestic investors.¹⁰⁷

National treatment clauses form part of the standard repertoire of investment treaties. They appear in both BITs and multilateral agreements, such as the Energy Charter Treaty (ECT), the North American Free Trade Agreement (NAFTA), and the United States–Mexico–Canada Agreement (USMCA).¹⁰⁸

¹⁰³ de Nanteuil, *International Investment Law* (n 88) para 8.33.

¹⁰⁴ Ranjan (n 98) 354.

¹⁰⁵ *ibid* 355–360.

¹⁰⁶ *ibid* 362.

¹⁰⁷ Dolzer, Kriebaum and Schreuer (n 83) 253.

¹⁰⁸ Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 art 10(3); North American Free Trade Agreement (signed 17

Much of the arbitral case law relates to the national treatment clause in NAFTA, which provides:

Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.¹⁰⁹

In assessing whether the national treatment standard has been respected, tribunals generally follow a three-step approach. First, they determine whether the foreign investor and the domestic investor are in a comparable situation, often described as being in ‘like circumstances’ or a ‘like situation’. Second, the tribunal assesses whether the foreign investor has been accorded treatment that is at least as favourable as that granted to domestic investors. Third, where less favourable treatment is identified, the tribunal considers whether the differential treatment can be justified due to any legitimate purpose. Despite the apparent simplicity of this framework, its application raises complex issues that have not been fully resolved in existing case law.¹¹⁰ Particularly relevant to this thesis is the divergence in how tribunals have reviewed public policy justifications. Some NAFTA tribunals have required the host state to show that the challenged regulatory measure was necessary to achieve the stated public policy objective,¹¹¹ while others have applied a lower threshold, requiring only a rational connection between the measure and that objective.¹¹²

The core of these issues generally lies in the broad interpretation of the clause often adopted by ISDS tribunals.¹¹³ As a result, many states participating in the international investment law framework have increasingly sought to draft NT clauses in more detailed and precise terms, thereby limiting the scope for interpretation and reducing the risk of unanticipated arbitral outcomes. This development also reflects efforts by states to safeguard their regulatory

December 1992, entered into force 1 January 1994) 32 ILM 289 (1993) art 1102; United States–Mexico–Canada Agreement (signed 30 November 2018, entered into force 1 July 2020) art 14.4; Dolzer, Kriebaum and Schreuer (n 83) 254.

¹⁰⁹ NAFTA (n 108) art 1102.

¹¹⁰ See eg *Methanex Corporation v United States of America* (Final Award, 3 August 2005) UNCITRAL IV.B [13]; *United Parcel Service of America Inc v Canada* (Award on the Merits, 24 May 2007) ICSID Case No UNCT/02/1 [83]; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc v Mexico* (Award, 21 November 2007) ICSID Case No ARB(AF)/04/5 [196]; *Bayindir Insaat Turizm Ticaret ve Sanayi AS v Pakistan* (Award, 27 August 2009) ICSID Case No ARB/03/29 [399]; *Olin Holdings Limited v Libya* (Final Award, 25 May 2018) ICSID Case No ARB/13/26 [204]; see also Dolzer, Kriebaum and Schreuer (n 83) 254.

¹¹¹ *SD Myers Inc v Government of Canada* (Partial Award, 13 November 2000) UNCITRAL [250].

¹¹² *GAMI Investments Inc v United Mexican States* (Final Award, 15 November 2004) UNCITRAL [114]; *Pope & Talbot Inc v Government of Canada* (Award on the Merits of Phase 2, 10 April 2001) UNCITRAL [78]–[79].

¹¹³ See awards cited in nn 110–111.

authority.¹¹⁴ Many treaties now expressly require the foreign and domestic comparator to be in ‘like circumstances’ or ‘like situations’, making clear that nationality-based discrimination can only be assessed where investors or investments are genuinely comparable. Some treaties also define what ‘like circumstances’ entails, allowing tribunals to consider factors such as the sector of the investment, the aim of the measure, its effects on local communities or the environment, and the regulatory process applied. This enables greater consideration of whether differential treatment is justified by legitimate public welfare objectives. A further trend concerns the temporal scope of national treatment. While some treaties extend NT protection to the pre-establishment phase, covering matters such as establishment, acquisition and expansion, others retain a post-establishment limitation, under which NT applies only after the investment has been admitted. The latter approach preserves greater host state control over market access, while still protecting admitted foreign investments against less favourable treatment in like circumstances.¹¹⁵

2.2 Fair and Equitable Treatment

FET constitutes one of the most central standards of international protection for foreign investors and their investments.¹¹⁶ FET clauses are frequently found in the majority of the more than 3,300 IIAs currently in existence,¹¹⁷ and even when it is omitted, FET may still apply through the operation of a MFN clause.¹¹⁸ Historically, FET has also played an important role because of its connection to the customary international law minimum standard of treatment of aliens, together with its inclusion in treaties that generally would be regarded as precursors of the present-day investment treaty regime. Given this long history, FET clauses have developed in a wide range of textual variations, the most important distinction being between clauses that define FET autonomously and those that tie it to the customary international law minimum standard.¹¹⁹ However, many tribunals do not attribute much relevance to variations in the phrasing of FET clauses.¹²⁰ Instead, FET is widely

¹¹⁴ Ranjan (n 98) 367.

¹¹⁵ *ibid* 364–366.

¹¹⁶ Stephan W Schill, ‘Landmark Cases on Fair and Equitable Treatment: Empowering and Controlling Arbitrators as Law-Makers’ in Hélène Ruiz Fabri and Edoardo Stoppioni (eds), *International Investment Law: An Analysis of the Major Decisions* (Hart Publishing 2022) 359.

¹¹⁷ UNCTAD, *World Investment Report 2025: International Investment in the Digital Economy* (United Nations 2025) 104; Schill, ‘Landmark Cases on Fair and Equitable Treatment’ (n 116) 359.

¹¹⁸ See eg *Rumeli Telekom AŞ and Telsim Mobil Telekomünikasyon Hizmetleri AŞ v Republic of Kazakhstan* (Award, 29 July 2008) ICSID Case No ARB/05/16 [575]; *Hesham T M Al-Warraq v Republic of Indonesia* (Final Award, 15 December 2014) UNCITRAL [555].

¹¹⁹ Schill, ‘Landmark Cases on Fair and Equitable Treatment’ (n 116) 359.

¹²⁰ See eg *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v Republic of Latvia* (Award, 28 February 2020) ICSID Case No ARB/16/38 [416]; *Murphy Exploration &*

regarded as ‘a legal term of art well known in the field of overseas investment protection’, as stated by judge Rosalyn Higgins in her Separate Opinion in the *Oil Platforms* case.¹²¹

Although FET has sometimes been described as an overarching principle encompassing other treaty standards, it is generally understood as an autonomous standard.¹²² While FET may overlap with other protections, tribunals usually assess it separately.¹²³ This is also evident in cases concerning expropriation, where claimants have sometimes invoked FET as an alternative basis of liability where the requirements for expropriation are difficult to satisfy.¹²⁴ Tribunals have nevertheless emphasised that expropriation and FET remain distinct standards.¹²⁵ The relationship between FET and FPS is less settled: some tribunals have treated FPS as falling within FET,¹²⁶ while others have regarded the two as separate obligations requiring independent assessment.¹²⁷ The tribunal in *Frontier Petroleum v Czech Republic*¹²⁸ distinguished FPS from FET in the following terms:

[F]ull protection and security obliges the host state to provide a legal framework that grants security and protects the investment against adverse action by private persons as well as state organs, whereas fair and equitable treatment consists mainly of an

Production Company International v Republic of Ecuador (Partial Final Award, 6 May 2016) UNCITRAL, PCA Case No 2012-16 [205]–[206].

¹²¹ *Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objections)* (Judgment) [1996] ICJ Rep 803, Separate Opinion of Judge Higgins, 847, 858 [39].

¹²² Dolzer, Kriebaum and Schreuer (n 83) 195.

¹²³ *Plama Consortium Limited v Republic of Bulgaria* (Award, 27 August 2008) ICSID Case No ARB/03/24 [161]–[163], [183]–[184]; *El Paso Energy International Company v The Argentine Republic* (Award, 31 October 2011) ICSID Case No ARB/03/15 [226], [228]–[231].

¹²⁴ *Sempra Energy International v The Argentine Republic* (Award, 28 September 2007) ICSID Case No ARB/02/16 [300]–[301]; *Malicorp Limited v The Arab Republic of Egypt* (Award, 7 February 2011) ICSID Case No ARB/08/18 [124]; *Valores Mundiales, S.L. and Consorcio Andino S.L. v Bolivarian Republic of Venezuela* (Award, 25 July 2017) ICSID Case No ARB/13/11 [523]–[527].

¹²⁵ *Tidewater Investment SRL and Tidewater Caribe, C.A. v The Bolivarian Republic of Venezuela* (Award, 13 March 2015) ICSID Case No ARB/10/5 [150]; *Venezuela Holdings BV and others v Bolivarian Republic of Venezuela* (Award, 9 October 2014) ICSID Case No ARB/07/27 [276].

¹²⁶ *Occidental Exploration and Production Company v The Republic of Ecuador* (Final Award, 1 July 2004) London Court of International Arbitration (LCIA) Case No UN3467 [187]; *Azurix Corp v The Argentine Republic* (Award, 14 July 2006) ICSID Case No ARB/01/12 [408]; *Impregilo SpA v Argentine Republic* (Award, 21 June 2011) ICSID Case No ARB/07/17 [334].

¹²⁷ *Ulysseas Inc v The Republic of Ecuador* (Final Award, 12 June 2012) PCA Case No 2009-19 [271]–[272]; *Franck Charles Arif v Republic of Moldova* (Award, 8 April 2013) ICSID Case No ARB/11/23 [505]; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania* (Award, 30 March 2015) ICSID Case No ARB/11/24 [819]–[820].

¹²⁸ *Frontier Petroleum Services Ltd v The Czech Republic* (Final Award, 12 November 2010) UNCITRAL.

obligation on the host state's part to desist from behaviour that is unfair and inequitable.¹²⁹

For the purposes of this thesis, the distinction between FPS and FET will not be examined in detail. Without taking a position on their precise doctrinal relationship, FPS will be addressed only insofar as it overlaps with FET. The analysis instead focuses on FET, given its central role in disputes concerning investor protection, regulatory autonomy and the possible relevance of investor conduct.¹³⁰

Turning to the wording of selected FET provisions, Article 1105(1) of NAFTA provided as follows:

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.¹³¹

Its successor, the USMCA, uses the following definition:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide:
 - (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; [...]¹³²

The USMCA provides some more substantive details on the meaning of FET, a feature commonly found in more recent treaties.¹³³ An even more restrictive approach to the definition is found in recent treaties negotiated by the European Union (EU). For example, the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States

¹²⁹ *ibid* [296].

¹³⁰ For more on FPS, see Dolzer, Kriebaum and Schreuer (n 83) 230–239.

¹³¹ NAFTA (n 108) art 1105.

¹³² USMCA (n 108) art 14.6.

¹³³ The provision in USMCA resembles the formulation in the US Model BIT of 2012, see United States, *2012 US Model Bilateral Investment Treaty* (US Department of State 2012) ('US Model BIT 2012') art 5.

(CETA), set out the following definition after providing for FET in general terms:

A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.¹³⁴

In FET clauses, the concepts of ‘fair’ and ‘equitable’ are generally not understood as separate elements to be applied independently. Rather, ‘fair and equitable’ is commonly regarded as a single, unified standard. FET is also often combined with other standards in the same treaty provision. In particular, FET and FPS are frequently listed together.¹³⁵

Numerous tribunals have tried to define the FET standard to a more specific meaning, by articulating general definitions or descriptions of the standard.¹³⁶ In *Genin v Estonia* a dispute arose from the withdrawal of a banking licence. The tribunal stated that acts violating the fair and equitable treatment standard ‘would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith’.¹³⁷

The most comprehensive definition of FET was articulated in *Tecmed v Mexico*. The case concerned the withdrawal of a licence for a hazardous waste landfill. In its analysis, the tribunal held that the concept of FET had to be interpreted autonomously, considering the treaty text according to its ordinary meaning, as well as relevant principles of international law and the principle of good faith. The tribunal further noted that the purpose of the standard was to strengthen the security and confidence of foreign investors and thereby promote the efficient use of economic resources, an objective reflected in the treaty’s preamble.¹³⁸ The tribunal defined FET in the following terms:

¹³⁴ Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (signed 30 October 2016, provisionally applied 21 September 2017) art 8.10(2).

¹³⁵ Dolzer, Kriebaum and Schreuer (n 17) 190.

¹³⁶ *ibid* 191.

¹³⁷ *Alex Genin, Eastern Credit Limited, Inc and A.S. Baltoil v Republic of Estonia* (Award, 25 June 2001) ICSID Case No ARB/99/2 [367].

¹³⁸ *Técnicas Medioambientales Tecmed SA v United Mexican States* (Award, 29 May 2003) ICSID Case No ARB(AF)/00/2 [155–156].

The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. . . The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.¹³⁹

This definition was also relied upon by the tribunal in *MTD v Chile*¹⁴⁰ which applied it to a provision in the BIT between Chile and Malaysia requiring that, ‘[i]nvestments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment’.¹⁴¹ The tribunal emphasised that the standard imposes a duty on the host state to adopt proactive conduct towards the investor:

[F]air and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement – “to promote”, “to create”, “to stimulate” – rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors.¹⁴²

The reliance on the *Tecmed* standard was later criticised by the ad hoc committee in the subsequent decision on annulment of the award:

[T]he TECMED Tribunal’s apparent reliance on the foreign investor’s expectations as the source of the host State’s obligations

¹³⁹ *ibid* [154].

¹⁴⁰ *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* (Award, 25 May 2004) ICSID Case No ARB/01/7 [114]–[115].

¹⁴¹ *ibid* [107]; Agreement between the Government of the Republic of Chile and the Government of Malaysia for the Promotion and Protection of Investments (signed 11 November 1992, entered into force 16 June 1995) art 2(2).

¹⁴² *MTD v Chile* (Award) (n 140) [113].

(such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have.¹⁴³

However, the ad hoc committee still upheld the award.¹⁴⁴

The NAFTA case *Waste Management v Mexico* arose from a failed concession for waste disposal and involved several disputes, including the municipality's failure to pay its bills, its failure to respect the exclusivity of the services provided, difficulties relating to a line of credit agreement, and proceedings before Mexican courts.¹⁴⁵ In its award, the tribunal referenced four previous awards and summarised its interpretation of the FET standard under Article 1105 of NAFTA in the following terms:

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.¹⁴⁶

Similar broad definitions have been adopted by other tribunals.¹⁴⁷

In *Glencore v Colombia*, the tribunal indicated that the following factors may amount to violations of the FET standard:

The threshold of propriety required by FET must be determined by the tribunal in light of all the relevant circumstances of the case. To this end, the tribunal must carefully analyse and take into

¹⁴³ *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* (Decision on Annulment, 21 March 2007) ICSID Case No ARB/01/7 [67].

¹⁴⁴ *ibid* [107].

¹⁴⁵ Dolzer, Kriebaum and Schreuer (n 83) 193.

¹⁴⁶ *Waste Management Inc v United Mexican States (No 2)* (Award, 30 April 2004) ICSID Case No ARB(AF)/00/3 [98].

¹⁴⁷ See eg *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (Award, 1 June 2009) ICSID Case No ARB/05/15 [450]; *Cargill Inc v United Mexican States* (Award, 18 September 2009) ICSID Case No ARB(AF)/05/2 [296]; *Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine* (Award, 1 March 2012) ICSID Case No ARB/08/8 [265]; *Marfin Investment Group Holdings SA and Others v Republic of Cyprus* (Award, 26 July 2018) ICSID Case No ARB/13/27 [1211].

consideration all the relevant facts, among them the following factors:

- whether the host State has engaged in harassment, coercion, abuse of power, or other bad-faith conduct against the investor;
- whether the State made specific representations to the investor before the investment was made and then acted contrary to such representations;
- whether the State has respected the principles of due process, consistency, and transparency when adopting the measures at issue;
- whether the State has failed to offer a stable and predictable legal framework, in breach of the investor's legitimate expectations.¹⁴⁸

Other tribunals have also outlined similar categories of host state conduct that may be considered contrary to the FET standard.¹⁴⁹

As Schill argues, FET has become a central standard in the investment treaty regime, largely due to its normative indeterminacy. This has enabled arbitral tribunals to specify and further develop the content of FET clauses and to shape their application to host state conduct. Although tribunals recognised early on that FET was not intended to provide one-sided protection for foreign investors, the broad discretion they have exercised in interpreting and applying the standard has given rise to concerns that arbitral decision-making may unduly constrain legitimate state regulation.¹⁵⁰

Although FET is primarily framed as a standard governing host-state conduct, its application is not entirely separated from the conduct of the investor. As Salacuse emphasises, the question of whether a state has acted fairly and equitably cannot be assessed in the abstract, but must be determined in light of the specific circumstances of the case. In this context, the investor's conduct forms part of the factual background and is therefore a legitimate subject of inquiry. Where an investor has engaged in corrupt practices, acted recklessly or unreasonably, or failed to adequately assess and manage investment risks, its claim that a state measure was unfair or inequitable may carry less weight than that of an investor whose conduct has been honest, prudent and risk-aware.¹⁵¹ This is important for the purposes of this thesis, because it shows that even within a standard primarily designed to protect investors, arbitral

¹⁴⁸ *Glencore International AG and CI Prodeco SA v Republic of Colombia* (Award, 27 August 2019) ICSID Case No ARB/16/6 [1310].

¹⁴⁹ See eg *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (Award, 24 July 2008) ICSID Case No ARB/05/22 [602]; *Rumeli v Kazakhstan* (n 118) [609]; *Siag v Egypt* (n 147) [450]; *Bayindir v Pakistan* (n 110) [178].

¹⁵⁰ Schill, 'Landmark Cases on Fair and Equitable Treatment' (n 116) 379.

¹⁵¹ Salacuse (n 79) 324.

tribunals may take investor conduct into account when assessing the scope and effect of state responsibility.

FET will continue to evolve through ongoing arbitral practice, as the standard is applied to an increasing range of factual situations. In light of the recent shift towards more restrictive formulations of the standard in treaties such as the USMCA and, in particular, CETA, its interpretation may develop in a new direction.¹⁵²

2.3 Protection against Expropriation

The international law rules on the expropriation of foreign-owned property have long been of particular concern to foreign investors. Expropriation constitutes the most far-reaching form of interference with property rights. If an investment is taken without adequate compensation, the investor's expectations are effectively extinguished.¹⁵³ Expropriation has been described as 'the single greatest impairment of the security of an investment. It is an act that eliminates all or substantially all of the value of the investment to the investor. The threat of expropriation was a principal motivating factor in the origin of bilateral investment treaties.'¹⁵⁴ In international investment arbitration, expropriation is often among the issues most frequently contested.¹⁵⁵

In line with the principle of territorial sovereignty, international law has long recognised the host state's right to expropriate foreign-owned property. At the same time, customary international law has imposed certain limits on the exercise of this right. Modern investment treaties likewise accept the right to expropriate in principle, focusing instead on the conditions under which it may be exercised and the consequences that follow. The legality of an expropriation therefore depends on whether these requirements have been satisfied.¹⁵⁶

Almost all investment treaties contain provisions on the expropriation or nationalisation of covered investments. However, these provisions differ in their nature, scope, and the constraints they impose on governmental action. Investment treaties generally employ similar terminology to describe governmental interference with investors' property rights, referring to expropriation, nationalisation, dispossession, or combinations of these terms. Most treaties

¹⁵² See Dolzer, Kriebaum and Schreuer (n 83) 265.

¹⁵³ See *ibid* 146.

¹⁵⁴ Diane A Desierto, 'Expropriation Cases' in Hélène Ruiz Fabri and Edoardo Stoppioni (eds), *International Investment Law: An Analysis of the Major Decisions* (Hart Publishing 2022) 343, quoting KJ Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010) 271.

¹⁵⁵ *ibid* 343.

¹⁵⁶ Dolzer, Kriebaum and Schreuer (n 83) 147.

expressly mention both expropriation and nationalisation.¹⁵⁷ A frequently used example of an expropriation clause is Article 14.8 of USMCA, in language closely resembling Article 1110 of its predecessor NAFTA, which provides:

1. No Party shall expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except:

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2, 3, and 4; and

(d) in accordance with due process of law.¹⁵⁸

Under this article, the terms ‘nationalization’ or ‘expropriation’ cover any forms of expropriation.¹⁵⁹ For the purposes of this thesis, the term ‘expropriation’ will be used to refer generally to all forms of state takings, regardless of how they are described.

All treaty provisions on expropriation share two fundamental features. First, they recognise the right of host states to nationalise, expropriate, or otherwise dispossess an investor of its investment. This reflects the principle that states are tasked with safeguarding the public interest of their citizens and must, where necessary, be able to resort to expropriation to achieve that objective. Second, treaties impose conditions on the exercise of this right. While states retain the authority to expropriate, its lawful exercise under the applicable treaty depends on compliance with specified requirements. Accordingly, most treaties follow a common formulation: they begin by prohibiting the expropriation or nationalisation of investments of investors from the other contracting state, and then set out the circumstances in which such measures are permitted.¹⁶⁰ This is evident in the aforementioned article 14.8 USMCA. Another clear example of this structure is article 13(1) of the ECT, which adopts a similar approach:

¹⁵⁷ Salacuse (n 79) 383.

¹⁵⁸ USMCA (n 108) art 14.8; see also treaties containing similar or identical formulations: Agreement between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments (signed 9 September 2012, entered into force 1 October 2014) (China–Canada BIT) art 10(1); CETA (n 134) art 8.12(1); Trans-Pacific Partnership Agreement (signed 4 February 2016) (TPP) art 9.8(1); Dominican Republic–Central America–United States Free Trade Agreement (signed 5 August 2004, entered into force 1 March 2006) (CAFTA-DR) art 10.7(1); ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 24 February 2012) (ACIA) art 15(1).

¹⁵⁹ Manjiao Chi, *Integrating Sustainable Development in International Investment Law* (Routledge 2017) 43.

¹⁶⁰ Salacuse (n 79) 384.

(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'Expropriation') except where such Expropriation is:

- (a) for a purpose which is in the public interest;
- (b) not discriminatory;
- (c) carried out under due process of law; and
- (d) accompanied by the payment of prompt, adequate and effective compensation.¹⁶¹

To summarise, the expropriation provisions found in most investment treaties provide that an expropriation is lawful only if the following conditions are met:

- (a) it is carried out for a public purpose;
- (b) it is non-discriminatory;
- (c) it is conducted in accordance with due process of law; and
- (d) it is accompanied by the payment of compensation.¹⁶²

Modern treaties concluded in the twenty-first century typically include footnotes or annexes referenced in the expropriation clause that specify how the provision is to be interpreted. Before such directions were introduced, treaties afforded arbitral tribunals considerable discretion in assessing the legality of state conduct and, where expropriation was found, in awarding substantial damages. In response to decisions perceived as based on interpretations not intended by contracting states, governments began incorporating more detailed directions into new treaties in order to preserve their regulatory space.¹⁶³

In Annex 14-B (Expropriation), USMCA provides the following:

The Parties confirm their shared understanding that:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
2. Article 14.8.1 (Expropriation and Compensation) addresses two situations. The first is direct expropriation, in which an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

¹⁶¹ ECT (n 108) art 13(1).

¹⁶² United Nations Conference on Trade and Development (UNCTAD), *Expropriation* (United Nations 2012) 1.

¹⁶³ Salacuse (n 79) 389–390.

3. The second situation addressed by Article 14.8.1 (Expropriation and Compensation) is indirect expropriation, in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, factbased inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred,

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations, and

(iii) the character of the government action, including its object, context, and intent.¹⁶⁴

Building on this definition, the two forms of expropriation can be more precisely distinguished. Direct (or *de jure*) expropriation, as reflected in paragraph 2, entails the formal transfer of title to the asset, whereas indirect (or *de facto*) expropriation, as set out in paragraph 3, encompasses measures that, without formally altering title, have an equivalent effect by depriving the investor of the use, value, or control of the asset.¹⁶⁵ While the concept of direct expropriation is readily apparent from the wording, the scope of indirect expropriation warrants closer examination.

In a 1998 publication by UNCTAD, indirect expropriation was defined as follows: ‘Indirect expropriation occurs when the country takes an action that substantially impairs the value of an investment without necessarily assuming ownership of the investment. Accordingly, indirect expropriation may occur even though the host country disavows any intent to expropriate the investment.’¹⁶⁶

¹⁶⁴ USMCA Annex 14-B. Paragraph 3(b) further provides that ‘[n]on-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.’ This provision is addressed further in section 3.3. See also similar annexes in China–Canada BIT Annex B.10; CETA Annex 8-A; TPP Annex 9-B; CAFTA-DR Annex 10-C; ACIA Annex 2.

¹⁶⁵ See Diego Brian Gosis, ‘III.82 Indirect Expropriation’ in Thomas Cottier and Krista Nadakavukaren Schefer (eds), *Elgar Encyclopedia of International Economic Law* (Edward Elgar Publishing 2017) 544.

¹⁶⁶ United Nations Conference on Trade and Development (UNCTAD), ‘Bilateral Investment Treaties in the Mid-1990s’ (1998) UN Doc UNCTAD/ITE/IIT/7, 66.

The determination of whether an indirect expropriation has occurred requires a case-by-case, fact-specific assessment of the relevant factors associated with the measure in question, typically including: (i) the economic impact of the measure; (ii) the extent to which the measure interferes with distinct, reasonable investment-backed expectations; and (iii) the nature, purpose and character of the measure.¹⁶⁷

The interplay between regulation and indirect expropriation has resulted in indirect expropriations sometimes being referred to as regulatory takings or regulatory expropriations.¹⁶⁸ This, together with the growing convergence of expropriation clauses in IIAs has resulted in the widespread incorporation of strict legality requirements. As a consequence, states may face increasing constraints when adopting regulatory measures, which may sometimes be characterised as indirect expropriation. In arbitral practice, foreign investors frequently invoke indirect expropriation as a basis for claims against host states. In this way, the stringent legality requirements attached to expropriation in IIAs may, in certain circumstances, limit the regulatory space available to states.¹⁶⁹ Therefore, the operation of indirect expropriation is of central importance for understanding the right to regulate in international investment law. This relationship will be further examined in Section 3.2.

2.4 Summary

This chapter has shown that investment protection is structured primarily through obligations imposed on host states. MFN and NT protect investors against discriminatory treatment, while FET and protection against expropriation impose broader constraints on state conduct. These standards play an important role in protecting foreign investors against arbitrary, discriminatory or confiscatory measures. At the same time, their interpretation may affect the regulatory space available to states, particularly where public-interest measures are challenged as breaches of FET or indirect expropriation. The chapter has also shown that recent treaty practice increasingly seeks to clarify and narrow these standards, especially through more precise formulations of MFN, NT, FET and indirect expropriation. This provides the foundation for the following chapter, which examines how the right to regulate has been conceptualised in response to the constraints created by investment protection standards.

¹⁶⁷ United Nations Conference on Trade and Development (UNCTAD), *Expropriation* (United Nations 2012) 62–63.

¹⁶⁸ Gosis (n 165) 544.

¹⁶⁹ Chi (n 159) 45–46.

3 The Right to Regulate

The regulatory authority of states is commonly understood as an inherent attribute of state sovereignty and is recognised in customary international law. Its exercise should be understood broadly, encompassing the actions of a state's legislative, administrative, and judicial organs, and may manifest in various forms, forming part of a state's jurisdictional competence. Sovereignty, however, extends more broadly to encompass the freedom of states to pursue political, economic, legislative, and regulatory activities within their territory.¹⁷⁰

Within international law, sovereignty has internal and external dimensions. The right to regulate is an expression of internal sovereignty. As such, it includes the authority of the state to enact laws that define and maintain public order within its territory. It also serves to protect the public interest of the state's citizens, including, for example, public health and safety. The concept of public interest has thus gained increasing importance in the context of a state's internal sovereignty.¹⁷¹

However, international law, and in particular international investment law, may impose constraints on the regulatory freedom of states. At the same time, the decision to enter into an IIA can itself be understood as an expression of a state's regulatory authority and forms part of its external sovereignty through the conclusion of treaties with other states. While a state's regulatory flexibility is generally broader in the absence of treaty commitments, the conclusion of an IIA reflects a state's choice to structure and limit its regulatory space. Even after assuming international obligations, however, a state retains a degree of discretion in how it regulates, including, in certain circumstances, the ability to terminate a treaty or depart from its obligations.¹⁷²

Nonetheless, the focus here is not on this broader conception of regulatory freedom. In the context of international investment law, the 'right to regulate' has emerged as a more specific, technical concept with a narrower scope, which should be distinguished from the general regulatory capacity discussed above.¹⁷³

¹⁷⁰ Aikaterini Titi, *The Right to Regulate in International Investment Law* (Nomos 2014) 32; Vera Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-outs' (2017) 50 *Vanderbilt Journal of Transnational Law* 355, 373; Berfu Beysulen Angin, 'The Right to Regulate vs Investment Protection: Unveiling the Causes of Imbalance and the Limits of Current Reform Efforts in International Investment Law' (2025) 40(1) *ICSID Review – Foreign Investment Law Journal* 11, 15.

¹⁷¹ Yulia Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment* (Kluwer Law International 2019) 25.

¹⁷² Titi, *The Right to Regulate in International Investment Law* (n 170) 32.

¹⁷³ *ibid* 33.

In the field of international investment law, Aikaterini Titi has defined the right to regulate as ‘the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate’¹⁷⁴ – a definition that has been widely cited in the literature.

Tarcisio Gazzini concludes that this definition gives rise to two main considerations.¹⁷⁵ First, states retain the authority, and in many instances also the obligation,¹⁷⁶ under domestic and international law to regulate.¹⁷⁷ They exercise this authority when pursuing the public interest, whether through the adoption of non-compensable regulatory measures or, in certain cases, measures amounting to indirect expropriation that may require compensation. The central issue therefore lies not in the existence of the right to regulate itself, but in determining where to draw the line between non-compensable regulation and compensable indirect expropriation from the perspective of foreign investors. Second, an exclusive focus on indirect expropriation risks unduly narrowing the analysis. The right to regulate must also be considered in relation to other standards of protection, in particular the obligation to afford FET.¹⁷⁸ Drawing on Gazzini’s conclusion, the following two parts of the chapter will analyse how states can exercise the right to regulate from the standpoint of FET and indirect expropriation.

Thereafter, a section examining treaty provisions on the right to regulate will follow. Finally, Section 3.4 will return to the conceptual basis of the right to regulate, arguing that it should not be reduced to a general immunity from liability or to the absence of a duty to compensate. Instead, it conceptualises the right to regulate as the state’s retained legal power to regulate in the public interest within the limits of international law. This distinction clarifies the relationship between regulatory authority and responsibility, and prepares the ground for Chapter 4’s analysis of investor obligations and counterclaims.

3.1 The Right to Regulate and the FET Standard

¹⁷⁴ *ibid.*

¹⁷⁵ See Tarcisio Gazzini, ‘The Right to Regulate in International Investment Law’ in Valentina Vadi and David Collins (eds), *Routledge Handbook on International Economic Law* (Routledge 2025).

¹⁷⁶ See eg *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v Argentine Republic* (Award, 8 December 2016) ICSID Case No ARB/07/26 [622] (stressing the responsibilities incumbent upon the respondent under its constitution to ensure the population’s health and access to water).

¹⁷⁷ Catharine Titi, *The Right to Regulate in International Investment Law (Revisited)* (International and Comparative Law Research Center 2022) 21–22 (arguing that ‘the question is not, properly speaking, whether the state may or may not regulate, rather it is whether the state by regulating has failed to honour an obligation under an international investment agreement and, if so, whether it needs to compensate the aggrieved investor’).

¹⁷⁸ Gazzini (n 175) 383.

Gazzini argues for understanding the FET standard as closely connected to the right to regulate. As already noted, the central issue is not the existence of this right, but whether it has been exercised in conformity with the requirements of the FET standard.¹⁷⁹ In other words, states must not exceed the limits of their *ordinary regulatory powers* when pursuing the public interest.¹⁸⁰ This assessment is conducted on a case-by-case basis, taking into account all relevant factors, including the effects of the regulatory measure.¹⁸¹ In the following, the relationship between FET and the right to regulate will be analysed by reference to a number of key arbitral awards.

To begin with, the FET standard does not, in itself, preclude states from exercising their right to regulate in a manner consistent with international law. As the tribunal in *Electrabel* observed:

While the investor is promised protection against unfair changes, it is well established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment.¹⁸²

The FET standard governs the manner in which states exercise their regulatory powers. Arbitral tribunals have elaborated its content by relying on criteria that are widely recognised and applied across domestic legal systems. As put by one tribunal, ‘the exercise of [states’] right to regulate and change legislation must not be contrary to the principles of reasonableness, transparency, due process and to the prohibition against discrimination and arbitrariness.’¹⁸³ Several of these criteria are rooted in general principles of law. For instance, principles such as transparency, due process, and the prohibition of discrimination and arbitrariness are widely accepted, and their application is typically straightforward.¹⁸⁴

¹⁷⁹ *ibid* 392.

¹⁸⁰ *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (Award, 8 July 2016) ICSID Case No ARB/10/7 [423].

¹⁸¹ Gazzini (n 175) 392.

¹⁸² *Electrabel SA v Republic of Hungary* (Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012) ICSID Case No ARB/07/19 [7.77].

¹⁸³ *Infracapital FI Sàrl and Infracapital Solar BV v Kingdom of Spain* (Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021) ICSID Case No ARB/16/18 [658]; see also, among many others, *Rumeli Telekom AŞ and Telsim Mobil Telekomünikasyon Hizmetleri AŞ v Republic of Kazakhstan* (Award, 29 July 2008) ICSID Case No ARB/05/16 [609]. For a fuller discussion of the scope and content of the FET standard, see section 2.2.

¹⁸⁴ Gazzini (n 175) 391.

Many tribunals have also insisted on the principle of reasonableness and proportionality to evaluate the measures adopted by the state. The tribunal in the ICSID case of *AES Summit v Hungary* held that:

A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter. Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.¹⁸⁵

Similarly, tribunals have balanced the public interest against the private rights affected and have examined whether less restrictive measures could have achieved the same objective.¹⁸⁶ Some have also held that states must respect investors' legitimate and reasonable expectations arising from specific assurances or representations made by the host state, as opposed to general legislation.¹⁸⁷ At the same time, the doctrine of legitimate expectations does not curtail 'the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.'¹⁸⁸ As the tribunal pointed out in *Sun Reserve v Italy*:

[T]he presence of specific commitments, contractual or otherwise, cannot automatically eliminate or diminish the significance of the host State's regulatory powers for the purposes of its FET obligation under Article 10(1) ECT. Instead, [...] specific commitments only make a difference to the assessment of the investor's knowledge and of the reasonableness and legitimacy of its expectations.¹⁸⁹

Furthermore, in assessing the exercise of regulatory powers in the context of FET claims, tribunals have acknowledged that determinations relating to the public interest fall within the competence of states¹⁹⁰ and have recognised that states enjoy a margin of appreciation in the field of economic regulation.¹⁹¹

¹⁸⁵ *AES Summit Generation Ltd and AES-Tisza Erőmű Kft v Republic of Hungary* (Award, 23 September 2010) ICSID Case No ARB/07/22 [10.3.8]–[10.3.9].

¹⁸⁶ *Cairn Energy plc and Cairn UK Holdings Ltd (CUHL) v Republic of India* (Award, 21 December 2020) PCA Case No 2016-7 [1788].

¹⁸⁷ *Philip Morris v Uruguay* (Award) (n 180) [426]. This position is however unsettled as admitted in *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain* (Award, 16 May 2018) ICSID Case No ARB/14/1 [489]–[490], [504].

¹⁸⁸ *Philip Morris v Uruguay* (Award) (n 180) [422].

¹⁸⁹ *Sun Reserve Luxco Holdings SRL v Italian Republic* (Final Award, 25 March 2020) SCC Case No 132/2016 [703] (citing with approval *Electrabel SA v Hungary*).

¹⁹⁰ *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic* (Award, 27 December 2016) ICSID Case No ARB/14/3 [318].

¹⁹¹ *The PV Investors v Kingdom of Spain* (Final Award, 28 February 2020) PCA Case No 2012-14 [583].

The incorporation of the margin of appreciation doctrine into international investment law has, however, attracted criticism.¹⁹² In Gary Born's Concurring and Dissenting Opinion in *Philip Morris v Uruguay*, the arbitrator rejected the tribunal's reliance on the margin of appreciation doctrine:

I do not believe the “margin of appreciation” adopted by the Tribunal is either mandated or permitted by the BIT or applicable international law. The “margin of appreciation” is a specific legal rule, developed and applied in a particular context, that cannot properly be transplanted to the BIT (or to questions of fair and equitable treatment more generally). There are well-considered legal rules, already applicable to questions of fair and equitable treatment, which serve similar purposes to those of the “margin of appreciation,” but in a more nuanced and balanced manner.¹⁹³

The arbitral practice therefore suggests that FET does not preclude public-interest regulation as such, but subjects the manner in which regulatory powers are exercised to requirements of reasonableness, consistency, proportionality, due process and respect for legitimate expectations.

3.2 The Right to Regulate and Indirect Expropriation

As previously noted, the right to regulate is fundamental, but not without limits. States retain the sovereign authority to enact, amend, or repeal laws and regulations at their discretion, provided that they do not ‘act unfairly, unreasonably or inequitably in the exercise of [their] legislative power.’¹⁹⁴ It follows that, in principle, states are not required to compensate for non-discriminatory regulatory measures adopted for a public purpose and in accordance with due process, even where such measures adversely affect foreign investments.¹⁹⁵ In the leading decision in *Saluka v Czech Republic*, the tribunal held that it is established in international law that ‘[s]tates are not liable to pay compensation to a foreign investor when, in the normal exercise of their

¹⁹² Gazzini (n 175) 393.

¹⁹³ *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (Concurring and Dissenting Opinion of Gary Born, 8 July 2016) ICSID Case No ARB/10/7 [87]. See also his dissenting opinion in *Antaris Solar GmbH and Dr Michael Göde v Czech Republic* (Dissenting Opinion of Gary Born, 2 May 2018) PCA Case No 2014-01 [41]–[55]. For academic discussion, see in particular Julian Arato, ‘The Margin of Appreciation in International Investment Law’ (2014) 54 *Virginia Journal of International Law* 545; Gary Born, Danielle Morris and Stephanie Forrest, ‘“A Margin of Appreciation”: Appreciating Its Irrelevance in International Law’ (2020) 61 *Harvard International Law Journal* 65.

¹⁹⁴ *Parkerings-Compagniet AS v Republic of Lithuania* (Award, 11 September 2007) ICSID Case No ARB/05/8 [332].

¹⁹⁵ See *Methanex Corporation v United States of America* (Final Award, 3 August 2005) UNCITRAL pt IV Ch D [7]; Gazzini (n 175) 386.

regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.’¹⁹⁶ Commonly used expressions such as ‘normal exercise’, ‘ordinary measures’¹⁹⁷ or ‘generally accepted measures of police powers’¹⁹⁸ convey the notion that regulatory powers may be exercised within certain limits without giving rise to an obligation to compensate. The central issue therefore lies in identifying and defining those limits, or put differently, in establishing a stable and predictable legal framework for the protection of foreign investments while maintaining states’ ability to exercise their sovereign powers in pursuit of economic, social, and cultural policies.¹⁹⁹

The central question is whether the host state has crossed the line between non-compensable regulatory measures and compensable indirect expropriation, thereby exceeding the permissible limits of its regulatory authority. Yet, as acknowledged by several tribunals, ‘[t]here is no comprehensive test that may be used to distinguish regulatory expropriation, for which compensation is required, from an exercise of police or regulatory powers, which does not give rise to a duty of compensation.’²⁰⁰ As a consequence:

It thus inevitably falls to the *adjudicator* to determine whether particular conduct by a state “crosses the line” that separates valid regulatory activity from expropriation. Faced with the question of *when, how and at what point an otherwise valid regulation becomes, in fact and effect, an unlawful expropriation*, international tribunals must consider the circumstances in which the question arises.²⁰¹

Although often difficult to define, Gazzini stresses that the distinction between non-compensable regulatory measures and compensable expropriation must be preserved. The importance of establishing this boundary persists even considering increasingly sophisticated provisions on indirect expropriation and general exceptions in IIAs, as discussed in chapter 2.3. In practice, arbitral tribunals have adopted a pragmatic, case-by-case approach, focusing on factors such as the effects of the measure, its purpose, its reasonableness or proportionality, its non-discriminatory nature, or, increasingly, a combination of these elements.²⁰²

¹⁹⁶ *Saluka Investments BV v Czech Republic* (Partial Award, 17 March 2006) UN-CITRAL) [255].

¹⁹⁷ *Mohamed Abdel Raouf Bahgat v Arab Republic of Egypt* (Award, 23 December 2019) PCA Case No 2012-07 [221].

¹⁹⁸ *Magyar Farming Company Ltd Kintyre Kft and Inicia Zrt v Hungary* (Award, 13 November 2019) ICSID Case No ARB/17/27 [366].

¹⁹⁹ Gazzini (n 175) 386–387.

²⁰⁰ *Magyar Farming v Hungary* (n 198) [365] (quoting with approval *Saluka* (n 196) [263]).

²⁰¹ *Saluka* (n 196) [264].

²⁰² Gazzini (n 175) 388.

Tribunals have traditionally placed significant emphasis on the effects of regulatory measures on investors.²⁰³ For instance, many tribunals have held that regulatory measures are compensable where they diminish or eliminate the benefits legitimately expected from the exercise of the relevant rights to such an extent that those rights are rendered ineffective.²⁰⁴ From this perspective, the intent or purpose of the measures becomes irrelevant.²⁰⁵ As expressed by the tribunal in *Santa Elena v Costa Rica*:

Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.²⁰⁶

While the effects of regulatory measures continue to constitute the primary determinant in establishing whether they amount to expropriation, treaties have developed more sophisticated approaches as discussed in section 2.3. Such treaties provide non-exhaustive lists of factors to be taken into account, including:

- (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
- (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
- (iii) the character of the government action.²⁰⁷

Gazzini also addresses how the principle of proportionality, as a general principle of law, has been applied in various ways by tribunals.²⁰⁸ Some have offered little elaboration on the requirement,²⁰⁹ while others have held that the

²⁰³ Gazzini (n 175) 388.

²⁰⁴ *CMS Gas Transmission Company v Argentine Republic* (Award, 12 May 2005) ICSID Case No ARB/01/8 [262] using the term ‘substantial deprivation’; see also *Pope & Talbot Inc. v Government of Canada* (Interim Award, 26 June 2000) UNCITRAL [96].

²⁰⁵ *Patrick Mitchell v Democratic Republic of the Congo* (Decision on Annulment, 1 November 2006) ICSID Case No ARB/99/7 [54] the ad hoc committee accepted that in applying the so-called sole effect doctrine, by which the purpose sought by the state is not taken into account, the Tribunal ‘was merely exercising its freedom of judgment.’

²⁰⁶ *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (Final Award, 17 February 2000) ICSID Case No ARB/96/1 [72].

²⁰⁷ United States, 2012 *US Model Bilateral Investment Treaty* (US Department of State 2012) Annex B; see also Canada, 2021 *Model Foreign Investment Promotion and Protection Agreement* (2021) art 9.3.

²⁰⁸ Gazzini (n 175) 389.

²⁰⁹ *Olympic Entertainment Group AS v Ukraine* (Award, 15 April 2021) PCA Case No 2019-18 [90].

measures in question must be proportionate to ‘the threat to public order to which it purports to respond,’²¹⁰ or ‘the public interest presumably protected’.²¹¹ Tribunals have also looked for ‘a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim of regulatory measures’²¹² or have balanced ‘two competing interests: the degree of the measure’s interference with the right of ownership and the power of the State to adopt its policies’²¹³ in order to determine whether the state’s action was obviously disproportionate to the need being addressed.²¹⁴ In the more recent case of *PL Holdings v Poland*, the tribunal found that in order to comply with the principle of proportionality ‘a measure must (a) be one that is suitable by nature for achieving a legitimate public purpose, (b) be necessary for achieving that purpose in that no less burdensome measure would suffice, and (c) not be excessive in that its advantages are outweighed by its disadvantages.’²¹⁵

Finally, the relationship between a state’s regulatory power and its police powers must be assessed. In recent international investment law, the police powers doctrine has gained broad recognition and is increasingly applied by arbitral tribunals. At the same time, despite the absence of a uniform definition, the doctrine is generally recognised as forming part of customary international law.²¹⁶ Police powers and regulatory powers may appear to be substantially similar, as both denote the boundaries within which a state may exercise its sovereign authority without giving rise to compensation for investors.²¹⁷ In practice, they largely overlap, as confirmed by the tribunal in *Suez and InterAguas v Argentina* which held that the police powers doctrine is ‘a recognition that States have a reasonable right to regulate foreign investments in their territories even if such regulation affects investor property rights.’²¹⁸

State police powers can be understood in both narrow and broad terms. A narrow interpretation limits the ‘public purpose’ of regulatory measures to core state functions such as custody, security, and protection.²¹⁹ Such powers

²¹⁰ *Bahgat v Egypt* (n 197) [230].

²¹¹ *Técnicas Medioambientales Tecmed SA v United Mexican States* (Award, 29 May 2003) ICSID Case No ARB(AF)/00/2 [122].

²¹² *ibid* [122].

²¹³ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic* (Decision on Liability, 3 October 2006) ICSID Case No ARB/02/1 [189].

²¹⁴ *ibid* [195].

²¹⁵ *PL Holdings Sà rl v Republic of Poland* (Partial Award, 28 June 2017) SCC Case No V 2014/163 [355].

²¹⁶ Jorge E Viñuales, ‘Sovereignty in Foreign Investment Law’ in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 328–329.

²¹⁷ *Gazzini* (n 175) 389.

²¹⁸ *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v Argentine Republic* (Decision on Liability, 30 July 2010) ICSID Case No ARB/03/17 [148].

²¹⁹ Manjiao Chi, *Integrating Sustainable Development in International Investment Law* (Routledge 2017) 46.

encompass a range of state actions traditionally regarded as falling within the scope of police powers, including forfeiture or fines imposed to punish or suppress crime, taxation measures affecting property, legislation restricting the use of property in areas such as planning, the environment, safety and health, and measures taken in defence against external threats.²²⁰ Manjiao Chi concludes that, if a narrow understanding is adopted in the drafting of IIAs, nearly all potential cases of indirect expropriation could be regarded as exercises of state regulatory power instead of police powers. This would significantly constrain the state's regulatory powers.²²¹

By contrast, a broad understanding of state police powers suggests that such powers encompass the full scope of a state's regulatory authority, as modern states often extend beyond their traditional functions of custody, security, and protection.²²² Chi argues that, given the increasingly extensive responsibilities of modern states in public governance, a broad understanding of police powers serves to preserve greater regulatory flexibility and policy space in the discharge of those functions. Accordingly, where a state adopts regulatory measures in the ordinary exercise of its functions to protect the environment, public health, national security, or other legitimate public welfare objectives, such measures should be regarded as an exercise of police powers and should not be characterised as indirect expropriation giving rise to an obligation to compensate.²²³

The lack of consensus regarding the precise scope of state police powers gives rise to both normative and practical difficulties in distinguishing between the exercise of police powers and compensable expropriation. If construed too narrowly, the doctrine may fail to protect legitimate public-interest regulation from being characterised as compensable expropriation. Yet if left without sufficient limits, it risks undermining the protection against indirect expropriation. As reflected in the aforementioned case of *Saluka v Czech Republic*, international law has not identified in a comprehensive and definitive manner which regulations are considered permissible and commonly accepted as falling within the police or regulatory powers of states.²²⁴ The central issue is therefore where the boundary should be drawn between non-compensable regulation and compensable interference with property rights. This uncertainty contributes to the constraining effect of indirect expropriation provisions on state regulatory authority.²²⁵

²²⁰ James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 624.

²²¹ Chi (n 219) 46.

²²² UNCTAD, *Expropriation* (United Nations 2012) 79.

²²³ Chi (n 219) 46.

²²⁴ *Saluka* (n 196) [263].

²²⁵ Chi (n 219) 48.

3.3 The Right to Regulate and Public-Interest Provisions

Investment treaties have traditionally been silent on the regulatory powers of states. This has given rise to concern and criticism from states, governmental and non-governmental organisations, and civil society. As a result, calls for more adequate treaty protection of states' regulatory space have intensified and are increasingly reflected in recent treaty practice.²²⁶ Provisions relating to the protection of the environment, public health, and safety represent a typical form of public-interest clause in modern IIAs. Traditionally, however, states have been reluctant to include such provisions in IIAs.²²⁷

One of the earliest provisions of this kind imposes an obligation on states to refrain from relaxing their regulatory standards for the purpose of attracting foreign investment.²²⁸ This approach is illustrated by Article 15 of the Canada–Serbia BIT, which provides that:

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, those measures to encourage the establishment, acquisition, expansion or retention in its territory of an investment of an investor.²²⁹

A public-interest provision may also be incorporated into IIAs as a carve-in exception to substantive protections. In order to address the tension between states' regulatory authority and their obligation to protect foreign investments, some IIAs include such exceptions within expropriation and FET clauses, thereby excluding certain regulatory measures from being characterised as expropriation or as a breach of the FET standard.²³⁰ As already examined in relation to expropriation in Section 2.3, such exceptions are typically included in annexes to the main provisions and generally employ similar language across treaties.²³¹ A typical exception of this kind reads as follows:

For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-

²²⁶ Gazzini (n 175) 397–398.

²²⁷ Chi (n 219) 89, Chi is using the term 'environmental clauses/provisions' to refer to what here is labelled as 'public-interest clauses/provisions'.

²²⁸ Gazzini (n 175) 398.

²²⁹ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments (signed 1 September 2014, entered into force 27 April 2015) (Canada–Serbia BIT) art 15.

²³⁰ Chi (n 219) 90.

²³¹ For the treaty annexes cited in relation to indirect expropriation, see n 164.

discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.²³²

Furthermore, a public-interest provision may also take the form of a stand-alone exception, particularly in IIAs that do not contain a general exceptions clause. Such an exception is specifically intended to preserve states' regulatory authority in adopting measures relating to for example health, safety or the environment. They typically follow one of two models, reflecting either the security exception or the general exceptions approach.

A typical public-interest provision based on the security exception model is found in the 2007 Norwegian Model BIT. Under the heading 'Right to Regulate', Article 12 provides that:

Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns.²³³

Chi points out several distinct features within this provision. First, the phrase 'nothing in this Agreement' indicates that public-interest measures adopted by the contracting states are exempt from all obligations under the IIA. Second, the terms 'adopting, maintaining or enforcing' suggest that the exception applies to both existing and future measures. Third, the wording 'it considers appropriate' points to a self-judging character, affording contracting states a broad margin of appreciation in adopting such measures.²³⁴

A typical example of a public-interest provision based on the general exceptions model is found in Article 10(2) of the 2013 China–Tanzania BIT. The provision appears under the heading 'Health, Safety and Environmental Measures' and provides:

Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or

²³² CETA Annex 8-A para 3.

²³³ Norway, *Model Agreement for the Promotion and Protection of Investments* (2007) (Norwegian Model BIT (2007)) art 12. In its successor, the model agreement also incorporates resource management and labour and human rights considerations; see Norway, *Model Agreement for the Promotion and Protection of Investments* (2015) (Norwegian Model BIT (2015)) art 12.

²³⁴ Chi (n 219) 91–92.

maintaining environmental measures necessary to protect human, animal or plant life or health.²³⁵

Chi observes that the exception exhibits two notable characteristics. First, it does not employ the formulation ‘it considers’, suggesting that it is not intended to be self-judging in nature. Second, the conditions governing its invocation are relatively stringent, requiring that the measure in question is neither arbitrary nor unjustifiable and does not constitute a disguised restriction. These conditions closely mirror those set out in the introductory clause (often referred to as the ‘chapeau’) of Article XX of GATT 1947.²³⁶

Although the protection of public interests has become increasingly prominent in the drafting of IIAs, the relevant provisions remain largely insufficient, ineffective, and fragmented. Different public-interest concerns are typically addressed through separate and dispersed provisions.²³⁷ A rare but increasingly common example of a more ‘general’ public-interest provision can be found in the investment chapter of CETA, which under the heading of ‘Investment and regulatory measures’, provides as follows:

1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve 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.
2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.
3. For greater certainty, a Party's decision not to issue, renew or maintain a subsidy:
 - a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or
 - b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy, does not constitute a breach of the provisions of this Section.
4. For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement where such measure is

²³⁵ Agreement between the Government of the People's Republic of China and the Government of the United Republic of Tanzania concerning the Promotion and Reciprocal Protection of Investments (signed 24 March 2013, entered into force 17 April 2014) (China–Tanzania BIT) art 10(2).

²³⁶ Chi (n 219) 92.

²³⁷ *ibid* 105–106.

necessary in order to comply with international obligations between the Parties or has been ordered by a competent court, administrative tribunal or other competent authority, or requiring that Party to compensate the investor therefor.²³⁸

Chi highlights several notable features of this provision. First, it covers a wide range of public interests, referring to measures aimed at achieving ‘legitimate policy objectives’, including the protection of public health, safety, the environment or public morals, as well as social or consumer protection and the promotion and protection of cultural diversity. Some of these objectives are rarely found in other IIAs. Second, the use of broadly framed and potentially ambiguous terms, such as ‘achieve’, ‘public objectives’, ‘cultural diversity’, and ‘social protection’, allows for flexible and expansive interpretation by host states and arbitral tribunals, thereby supporting a broad scope of regulatory authority. Third, the phrase ‘nothing in this section’ indicates that the provision applies across the entire investment chapter. Fourth, it addresses potential conflicts between obligations under the CETA investment chapter and those arising under other international agreements. Fifth, it clarifies that the mere ‘effect’ or ‘consequence’ of a regulatory measure is neither a sole nor sufficient basis for establishing a breach of the chapter. Finally, the provision expressly incorporates a ‘specific commitment’ requirement, indicating that, in the absence of a specific commitment to the investor, subsidy decisions taken by the state will not constitute a violation. Chi concludes that these features may contribute to preserving the regulatory authority of the contracting states in adopting measures for a broader range of public-interest objectives.²³⁹

Although such provisions reflect a clear treaty-drafting trend towards greater recognition of regulatory autonomy, their practical effect remains uncertain. Public-interest provisions remain varied in form and are often dispersed across different treaty clauses, including preambular provisions, non-derogation clauses, general exceptions, stand-alone right-to-regulate clauses, and carve-ins to standards such as FET and indirect expropriation.²⁴⁰ Moreover, while arbitral tribunals have recognised the right to regulate in a number of decisions, the concept has not been applied consistently, and recognition of the right to regulate does not necessarily lead to a finding in favour of the host state.²⁴¹ The significance of these provisions therefore lies not only in whether they exclude or limit liability, but also in how they may guide the interpretation of substantive standards such as FET and indirect expropriation.

²³⁸ CETA art 8.9; see also Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part (signed 19 October 2018) (EU–Singapore IPA) art 2.2; EU–Vietnam Investment Protection Agreement (n 28) art 2.2.

²³⁹ Chi (n 219) 107.

²⁴⁰ *ibid* 89–92, 105–106.

²⁴¹ Nadakavukaren and Polanco Lazo, *Legal Opinion on Right to Regulate in Investment Treaties* (E-Avis ISDC 2023, current to 28 July 2023) 14–18.

3.4 The Right to Regulate as a Legal Power

The preceding analysis has shown that the right to regulate occupies an important position in international investment law. On the one hand, it has increasingly been relied upon in treaty practice and arbitral argument as a response to expansive interpretations of investment protection standards, particularly in relation to FET and indirect expropriation. On the other hand, while the existence of a state's right to regulate is generally accepted, its precise legal meaning remains contested and undertheorised.²⁴² This is particularly important for the present thesis, since the link between the right to regulate and investor obligations depends on how the right itself is understood.

Titi's conceptualisation²⁴³ is significant in this regard because it separates the state's general regulatory capacity recognised in international law from the right to regulate as a distinct concept within international investment law. The latter does not merely refer to the factual or sovereign ability of a state to legislate. Rather, it concerns the legal possibility of regulating in the public interest despite investment treaty commitments, without necessarily incurring a duty to compensate. This definition captures the central concern addressed in this thesis: how to preserve sufficient regulatory space for states within a legal regime that grants enforceable rights to foreign investors.

However, this definition also creates a difficulty for the argument developed in this thesis. If the right to regulate in international investment law is defined primarily by the absence of a duty to compensate, it becomes harder to connect the concept with investor obligations and counterclaims. The ability to invoke a counterclaim does not necessarily remove the state's breach of an investment obligation, nor does it automatically prevent a duty to compensate from arising. Instead, counterclaims may be applied after the investor's claim has been assessed, allowing the tribunal to take the investor's own conduct into account and to adjust the final allocation of responsibility. The balancing function of investor obligations therefore does not depend on showing that the state never had a duty to compensate. It depends on showing that the investor's rights should not be assessed in isolation from the investor's own possible obligations. This requires a conceptualisation of the right to regulate that distinguishes the state's authority to adopt public-interest regulation from the legal consequences that may follow if such regulation breaches an investment obligation. The question is therefore not only whether regulation gives rise to compensation, but how the state's regulatory authority, the investor's

²⁴² See Nadakavukaren and Polanco Lazo (n 241) 5–7.

²⁴³ See text to n 174, where the right to regulate is defined as 'the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate'.

treaty rights and the investor's own conduct are situated within the same legal framework.

For this reason, Charalampos Giannakopoulos' Hohfeldian analysis offers a useful alternative. He argues that the right to regulate should generally be understood as a Hohfeldian legal power rather than as a claim-right or a general immunity from liability.²⁴⁴ In this view, the right to regulate derives from state sovereignty and jurisdiction, and refers to the state's legal authority to alter legal relations through regulation. This does not mean that the exercise of regulatory power is unlimited. Rather, the state's power to regulate remains subject to the international obligations it has undertaken, including obligations under investment treaties. A state may therefore retain the power to regulate while still breaching an investment treaty if that power is exercised in a manner inconsistent with the applicable treaty standards. The question is therefore not whether the state has the power to regulate, but whether the exercise of that power breaches a primary obligation under international investment law.²⁴⁵

This distinction is important because it separates two issues that are sometimes conflated. The first issue concerns the scope of the state's primary obligations. At this stage, a tribunal must determine whether the state's measure violates the applicable investment treaty, for example by breaching FET or amounting to a compensable expropriation. In the latter context, the issue will often be whether a public-interest measure remains within the state's non-compensable regulatory or police powers, or whether it crosses the threshold into compensable indirect expropriation. If the measure does not breach a primary obligation, the rules of state responsibility are not triggered and no duty to compensate arises. The second issue concerns the consequences that follow once a breach has been established. This belongs to the secondary rules of state responsibility, which regulate the legal consequences of an internationally wrongful act, including reparation and compensation.²⁴⁶ As Giannakopoulos argues, the right to regulate itself forms part of the primary level,

²⁴⁴ Hohfeld distinguishes between four legal relations commonly described as 'rights': claim-rights, privileges, powers and immunities. For present purposes, the relevant distinction is between a claim-right, in the strict sense, which correlates with a duty in another actor; a power, which refers to the legal ability to alter legal relations, for example by creating rights or imposing duties; and an immunity, which denotes freedom from another actor's legal power. See Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16, 30–32, 44–45, 55. For the application of this framework to the right to regulate, see Charalampos Giannakopoulos, 'The Right to Regulate in International Investment Law and the Law of State Responsibility: a Hohfeldian Approach' in Photini Pazartzis and Panos Merkouris (eds), *Permutations of Responsibility in International Law* (Brill Nijhoff 2019) 151–155.

²⁴⁵ Giannakopoulos (n 224) 155–156, 164, 181–182.

²⁴⁶ See International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) arts 1–2, 31 and 34–37. Articles 1 and 2 establish that state responsibility arises where conduct attributable to the state constitutes a breach of an international obligation, while articles 31 and 34–37 concern the obligation to make full reparation, including restitution, compensation and satisfaction.

while compensation belongs to the secondary level. The absence of a duty to compensate therefore cannot be treated as an automatic consequence of the existence of a general right to regulate. It must follow either because the state has not breached an investment obligation in the first place, or because a specific exception, defence or circumstance precluding wrongfulness applies. Such exceptions may, in specific treaties, allow the right to regulate to operate more like an immunity, but this remains treaty-dependent and does not alter the general conceptual point.²⁴⁷

A more persuasive conceptualisation is therefore to understand the right to regulate as the state's retained *legal power* to regulate in the public interest within the limits of international law.²⁴⁸ This approach avoids presenting the right to regulate as a complete answer to investor claims. It also avoids reducing the right to regulate to a mere exception from liability. Instead, it recognises that investment law involves a continuing interaction between the state's regulatory authority and the investor's treaty-based protections.

This reconceptualisation also makes it possible to connect the right to regulate with investor obligations and counterclaims. If the right to regulate is understood as a legal power, investor obligations need not be framed as a mechanism that eliminates the state's duty to compensate. Rather, they may be understood as a mechanism that affects how responsibility and remedies are allocated once a dispute has arisen. In this way, investor obligations contribute to the balancing of investment law not by expanding the state's regulatory power as such, but by ensuring that the legal consequences of regulation are not assessed solely through the lens of investor protection. This should be distinguished from treating investor misconduct merely as a *clean hands* objection²⁴⁹ to the investor's claim. The point is broader: investor obligations may provide an independent legal basis for assessing the investor's conduct and, where the relevant jurisdictional requirements are met, for granting relief to the state through counterclaims.

This is particularly important in disputes involving public interests such as environmental protection, public health or human rights, where an assessment limited to the investor's treaty rights may produce an incomplete account of the dispute. The following chapter therefore examines investor obligations as a complementary mechanism for balancing investment protection with regulatory autonomy, considering how such obligations have been recognised in arbitral practice and whether counterclaims can serve as a viable mechanism for giving them practical effect.

²⁴⁷ Giannakopoulos (n 224) 181–182.

²⁴⁸ See *ibid* 155–156, 184.

²⁴⁹ On the clean hands doctrine in investment arbitration, see *Hesham T M Al-Warraq v Republic of Indonesia* (Final Award, 15 December 2014) UNCITRAL [646], discussed further in Chapter 4.

3.5 Interim Conclusions

The preceding two chapters have examined some of the core standards of investment protection, as well as how the right to regulate is conceptualised within international investment law in relation to those standards. The analysis has shown that the tension between investment protection and the right to regulate should not be understood as a conflict between regulation and investment protection in the abstract. States retain the sovereign authority to regulate in the public interest, including in areas such as public health, environmental protection, and human rights. The central issue is instead how that authority operates within a treaty regime that grants enforceable rights to foreign investors and imposes international obligations on host states. In this sense, the right to regulate does not remove the relevance of investment protection standards. Rather, it operates within and against the limits created by those standards.

This tension is particularly visible in relation to FET and indirect expropriation. Under the FET standard, public-interest regulation is not prohibited as such, but the manner in which regulatory powers are exercised remains subject to requirements such as reasonableness, transparency, due process, consistency, non-discrimination and respect for legitimate expectations. Similarly, in the context of indirect expropriation, the decisive question is not whether the state may regulate, but whether the measure remains within the scope of non-compensable regulation or crosses the threshold into compensable interference with property rights. The police powers doctrine provides an important conceptual tool in this respect, but its precise scope remains uncertain. As a result, the distinction between permissible regulation and compensable interference remains difficult to draw with certainty.

Recent treaty practice reflects an attempt to address this tension more directly. More precise formulations of MFN, NT, FET and indirect expropriation, together with public-interest provisions, general exceptions, non-derogation clauses, carve-ins and right-to-regulate clauses, indicate a broader movement towards preserving regulatory autonomy. However, these drafting techniques do not fully resolve the underlying problem. Their form, placement and legal effect vary considerably, and arbitral practice has not treated the right to regulate in a fully consistent manner. The right to regulate therefore often functions less as a complete defence to liability and more as an interpretive principle that informs the application of investment protection standards.

Against this background, the analysis has developed an additional conceptualisation of the right to regulate as the state's retained legal power to regulate in the public interest within the limits of international law. This conceptualisation does not replace the understanding of the right to regulate as a mechanism for preserving non-compensable regulatory space. Rather, it clarifies

that the right to regulate should not be treated as a general immunity from liability, since a state retains the legal power to regulate even where the exercise of that power breaches an investment treaty and gives rise to compensation. The question is therefore not only whether public-interest regulation avoids or triggers a duty to compensate, but how the state's regulatory authority, the investor's treaty rights and the investor's own conduct are situated within the same legal framework.

This provides the basis for the following chapter, which examines whether investor obligations, when invoked through counterclaims, can affect the allocation of responsibility and remedies and thereby contribute to a more balanced investment regime in practice.

4 Investor Obligations through Counterclaims

A substantial body of scholarly and public debate on the relationship between investment law and the public interest has focused on the right to regulate. While this concept is undoubtedly significant, its reaffirmation or expansion alone does not necessarily ensure that foreign investment operates in the public interest. This limitation stems from the underlying logic of the right to regulate, within which considerations of third-party rights and public goods remain structurally passive. In effect, the public interest is invoked primarily as a defensive justification in response to investor claims, rather than as a basis for imposing proactive obligations on investors themselves. The right to regulate does not articulate any expectation that investors align their conduct with public-interest objectives under international law. Instead, it places the burden entirely on the host state and its domestic legal framework to pursue and enforce such goals. In an increasingly globalised economic environment, however, the practical capacity of host states to regulate foreign investment effectively is often constrained.²⁵⁰

Throughout the twentieth century, scholars have examined how international law can adequately address the diversification of international actors and their interaction with, and potential relativisation of, state sovereignty. International obligations have consistently been central to these debates and remain so today. It has been argued that non-state actors should be subject to legal constraints comparable to those imposed on states where they exercise state-like functions or powers, and more broadly that international rights and accountability should be aligned.²⁵¹

Investment law appears to accentuate the broader absence of international obligations for non-state actors, as it grants investors enforceable rights without imposing corresponding duties. As noted, these rights may also challenge the host state's ability to regulate investor conduct under domestic law. In extreme cases, investment law may shield investors from domestic regulation, even in a globalised context where regulatory capacity is already constrained. From this perspective, reaffirming the host state's right to regulate is important but ultimately insufficient to ensure that foreign investment serves the public interest. This underscores the need to develop international obligations for foreign investors.²⁵²

Before turning to some of the leading cases concerning investor obligations, it is first necessary to examine how such obligations can be introduced in

²⁵⁰ Patrick Abel, *International Investor Obligations* (Nomos 2022) 26.

²⁵¹ *ibid* 31.

²⁵² *ibid* 32–33.

investment arbitration. With few exceptions, this occurs through counterclaims.

4.1 Counterclaims in Investment Arbitration

International investment law has traditionally been oriented towards promoting foreign investment and economic development, and has therefore primarily focused on protecting investors against host states rather than the reverse. In particular, the inclusion of dispute settlement provisions granting investors a right of action against host states has created a framework in which most, if not all, treaty-based claims are initiated by investors. Nevertheless, as a matter of principle, host states are not generally prevented from bringing counterclaims once proceedings have been commenced.²⁵³ In fact, in designing investment arbitration, states drew on the model of commercial arbitration, where counterclaims between private parties are well established.²⁵⁴ This is reflected in the ICSID framework, which expressly permits counterclaims in Article 46 of the ICSID Convention:

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.²⁵⁵

Rule 48 of the ICSID Arbitration Rules contains the corresponding procedural rule.²⁵⁶ Comparable provisions can also be found in the UNCITRAL Arbitration Rules, both in Article 19(3) of the 1976 version and, with revised wording, in Article 21(3) of the 2010 version.²⁵⁷

The use of counterclaims to hold investors accountable in respect of the public interest is not a new feature of IIAs, but instead represents the utilisation of a pre-existing tool for a new purpose.²⁵⁸ A counterclaim does not constitute a defence aimed at dismissing or limiting the investor's claim, but rather

²⁵³ Maxi Scherer, Stuart Bruce and Juliane Reschke, 'Environmental Counterclaims in Investment Treaty Arbitration' (2021) 36(2) *ICSID Review – Foreign Investment Law Journal* 413, 414.

²⁵⁴ Abel, *International Investor Obligations* (n 250) 120.

²⁵⁵ ICSID Convention art 46.

²⁵⁶ ICSID Arbitration Rules (2022) r 48; see also ICC Rules of Arbitration (2021) art 5; SCC Arbitration Rules (2023) art 9(1)(iii).

²⁵⁷ UNCITRAL Arbitration Rules (1976) art 19(3); UNCITRAL Arbitration Rules (2010) art 21(3); see also ICC Rules of Arbitration (2021) art 5; SCC Arbitration Rules (2023) art 9(1)(iii).

²⁵⁸ Abel, *International Investor Obligations* (n 250) 122.

represents an independent and autonomous claim.²⁵⁹ At the same time, it remains linked to the principal claim because it is advanced as a response within the same proceedings.²⁶⁰ As such, counterclaims may broaden the scope of the dispute while also contributing to procedural efficiency.²⁶¹

Although investment arbitration cases involving counterclaims remain relatively limited, host states appear to be increasingly invoking them in an effort to uphold domestic and international standards.²⁶² Arbitral tribunals have reached different conclusions on the legal basis of such counterclaims, although the majority indicate some receptivity to them.²⁶³ However, only a small number of cases have involved a substantive assessment of counterclaims on the merits.²⁶⁴

In light of the emerging practice of employing counterclaims to uphold public interests, it is necessary to briefly examine the jurisdictional and admissibility requirements before turning to an analysis of arbitral practice. As examined, arbitral rules generally permit counterclaims, although some tribunals have encountered difficulties in determining whether to accept them.²⁶⁵ This is unsurprising, given that counterclaims appear, at first glance, at odds with the asymmetric structure of investment arbitration, which is primarily designed to enable investors to vindicate their rights.²⁶⁶ From the perspective of investors, it has been argued that counterclaims ‘run counter to the object and purpose of treaty arbitration, which is to grant the investors a one-sided right of quasi-judicial review of national regulatory action.’²⁶⁷ However, tribunals may accept counterclaims only where the relevant jurisdictional and

²⁵⁹ *David R Aven and others v Republic of Costa Rica* (Final Award, 18 September 2018) ICSID Case No UNCT/15/3 [745].

²⁶⁰ Barnali Choudhury, ‘Investor Obligations for Human Rights’ (2020) 35(1–2) *ICSID Review – Foreign Investment Law Journal* 82, 94.

²⁶¹ Scherer, Bruce and Reschke (n 253) 414.

²⁶² *ibid.*

²⁶³ Bjorklund AK, ‘The Role of Counterclaims in Rebalancing Investment Law’ (2013) 17(2) *Lewis & Clark Law Review* 461.

²⁶⁴ *Hesham T M Al-Warraq v Republic of Indonesia* (Final Award, 15 December 2014) UNCITRAL; *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (Interim Decision on the Environmental Counterclaim, 11 August 2015) ICSID Case No ARB/08/6; *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v Argentine Republic* (Award, 8 December 2016) ICSID Case No ARB/07/26; *Burlington Resources Inc v Republic of Ecuador* (Decision on Counterclaims, 7 February 2017) ICSID Case No ARB/08/5.

²⁶⁵ See eg *Spyridon Roussalis v Romania* (Award, 7 December 2011) ICSID Case No ARB/06/1 [868], [871]; *Vestey Group Ltd v Bolivarian Republic of Venezuela* (Award, 15 April 2016) ICSID Case No ARB/06/4 [333]; *Rusoro Mining Ltd v Bolivarian Republic of Venezuela* (Award, 22 August 2016) ICSID Case No ARB(AF)/12/5 [627].

²⁶⁶ Arnaud de Nanteuil, ‘Counterclaims in Investment Arbitration: Old Questions, New Answers?’ (2018) 17 *The Law and Practice of International Courts and Tribunals* 374, 376.

²⁶⁷ *Urbaser v Argentina* (Award) (n 264) [1120].

admissibility requirements are satisfied. Two requirements are particularly important: consent and connection.²⁶⁸

The issue of consent, which is closely linked to the tribunal's jurisdiction, arises from the principle that a tribunal has jurisdiction over a legal dispute arising directly out of an investment only where the parties have consented to submit that dispute to arbitration.²⁶⁹ As investors typically do not expressly consent to counterclaims, tribunals have focused on dispute settlement provisions in the IIA to determine whether such consent can be inferred. For instance, where these provisions contain broad or open-ended language, such as consent to 'any legal dispute', to disputes 'in connection with investments', or granting 'each party' access to arbitration, tribunals have found that investors have consented to counterclaims.²⁷⁰ Conversely, where the dispute resolution provision is narrowly framed, for example by limiting jurisdiction to disputes concerning breaches of the state's obligations under the treaty or by conferring standing exclusively on investors, tribunals have declined to find that consent has been established.²⁷¹

The second precondition for a counterclaim is the existence of a connection between the principal claim and the counterclaim. As provided in the ICSID Convention, the counterclaim must arise 'directly out of the subject-matter of the dispute'.²⁷² Moreover, this connection may be either factual or legal in nature. For example, in the groundbreaking case of *Urbaser v Argentina*, the tribunal found that both a factual and a legal connection were present, as the principal claim and the counterclaim concerned the same investment and were based on the same IIA.²⁷³

These requirements also show the close relationship between jurisdiction and admissibility in relation to counterclaims. Consent is primarily jurisdictional, since a tribunal cannot determine a counterclaim unless it falls within the parties' consent to arbitration. By contrast, the connection requirement is often treated as going to admissibility, since it concerns whether a counterclaim that is otherwise within the tribunal's jurisdiction is sufficiently related to the principal claim to be heard in the same proceedings. However, the distinction is not always clear in practice, as connection may also affect the assessment of jurisdiction where the tribunal must determine whether the counterclaim falls within the subject matter of the dispute. A counterclaim may also be

²⁶⁸ de Nanteuil, 'Counterclaims in Investment Arbitration' (n 266) 377.

²⁶⁹ Choudhury (n 260) 95.

²⁷⁰ See eg *Metal-Tech Ltd v Republic of Uzbekistan* (Award, 4 October 2013) ICSID Case No ARB/10/3 [410]; *Urbaser v Argentina* (Award) (n 264) [1143]; *Al-Warraq v Indonesia* (Final Award) (n 264) [661].

²⁷¹ See eg *Roussalis v Romania* (n 265) [869]; *Vestey v Venezuela* (n 265) [333]; *Rusoro v Venezuela* (n 265) [627].

²⁷² ICSID Convention art 46.

²⁷³ *Urbaser v Argentina* (Award) (n 264) [1151].

inadmissible where it is introduced too late or would unduly expand the scope of the arbitration.²⁷⁴

In disputes arising under treaties with broadly worded dispute resolution clauses, states have recently succeeded in having tribunals entertain counterclaims based on alleged investor obligations, including obligations relating to host state law, public order, human rights and environmental protection.²⁷⁵ In *Urbaser*, the Tribunal accepted jurisdiction over Argentina's counterclaim, which alleged that the investor bore an obligation to guarantee the human right to water, finding that both consent, based on the broadly worded treaty provision, and the required connection with the principal claim were present.²⁷⁶ Similarly, in *Aven v Costa Rica*, the Tribunal entertained Costa Rica's counterclaim that the investor's activities 'caused considerable environmental damage', which it should repair and restore.²⁷⁷ Having determined that the dispute resolution provision was broadly framed and that there were no substantive grounds for excluding investor liability for breaches of environmental obligations under host state law, the Tribunal accepted the counterclaim.²⁷⁸ In *Al-Warraq v Indonesia*, the Tribunal also accepted jurisdiction over Indonesia's counterclaim, relying on provisions in the applicable investment treaty that permitted counterclaims and imposed obligations on investors to comply with host state law and to refrain from conduct prejudicial to public order, morals or the public interest.²⁷⁹

While the states in *Urbaser*, *Aven* and *Al-Warraq* were ultimately unsuccessful on the merits of their counterclaims, Ecuador has achieved greater success in two related arbitrations involving counterclaims.²⁸⁰ In both *Burlington v Ecuador*²⁸¹ and *Perenco v Ecuador*,²⁸² Ecuador brought counterclaims against the investors, alleging breaches of environmental obligations. In *Burlington*, the tribunal noted that the parties had agreed to arbitration, including the possibility of counterclaims, with the result that the investor did not contest the tribunal's jurisdiction.²⁸³ Similarly, in *Perenco*, the investor did not challenge the tribunal's jurisdiction over Ecuador's counterclaim.²⁸⁴

²⁷⁴ de Nanteuil, 'Counterclaims in Investment Arbitration' (n 266), 378–81, 384–86.

²⁷⁵ Choudhury (n 260) 95.

²⁷⁶ *Urbaser v Argentina* (Award) (n 264) [1143], [1151].

²⁷⁷ *David R Aven and others v Republic of Costa Rica* (Counter-Memorial, 8 April 2016) ICSID Case No UNCT/15/3 [648]–[657].

²⁷⁸ *Aven v Costa Rica* (Final Award) (n 259) [739]–[742].

²⁷⁹ *Al-Warraq v Indonesia* (Final Award) (n 264) [660]–[664].

²⁸⁰ Choudhury (n 260) 96.

²⁸¹ *Burlington v Ecuador* (Decision on Counterclaims) (n 264).

²⁸² *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (Award, 27 September 2019) ICSID Case No ARB/08/6.

²⁸³ *Burlington v Ecuador* (Decision on Counterclaims) (n 264) [60]–[61].

²⁸⁴ *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (Decision on Claimant's Application for Dismissal of Respondent's Counterclaims, 18 August 2017) ICSID Case No ARB/08/6 [34].

Despite these developments, it remains uncertain whether counterclaims can be regarded as a routine feature of investment arbitration. Advancing in this direction requires greater regulatory support to facilitate the evolution of the ISDS system. Accordingly, the future of ISDS and its engagement with the public interest will depend, in part, on ongoing reform efforts to expressly recognise counterclaims.²⁸⁵

However, given the increasing acceptance by tribunals of counterclaims in conjunction with investor obligations, counterclaims appear likely to become an important gateway for the development of such obligations.²⁸⁶ In the following sections, the aforementioned arbitral awards are analysed in turn, with particular attention to their merits. The awards are examined according to the legal basis relied upon for the alleged investor obligations, rather than strictly chronologically.

4.2 *Urbaser v Argentina*

In December 2016, the *Urbaser* award marked a significant development.²⁸⁷ The Tribunal recognised the host state's ability to bring counterclaims not anticipated by the investor, thereby suggesting a more symmetrical structure of BITs, and also affirmed, in an unprecedented manner, the existence of obligations incumbent on investors.²⁸⁸ The tribunal based both acknowledgements on general international law.²⁸⁹ The case examined the relationship between international human rights law, in particular the human right to water, as interpreted through the applicable BIT framework.²⁹⁰

4.2.1 The Merits

In this case, the claimants were engaged in the operation of water and sewage services in the Greater Buenos Aires area, following the privatisation of these services by Argentina in the 1990s.²⁹¹ They alleged violations of several

²⁸⁵ Stanislava Nedeva, 'The Neglected Public Interest in Investor-State Dispute Settlement: Environmental and Human Rights Considerations' (2024) 33(5) *European Energy and Environmental Law Review* 214, 224. These reform efforts are examined in Chapter 5.

²⁸⁶ Choudhury (n 260) 96.

²⁸⁷ *Urbaser v Argentina* (Award) (n 264).

²⁸⁸ *ibid* [1150]; Kevin Crow and Lina Lorenzoni Escobar, 'International Corporate Obligations, Human Rights, and the Urbaser Standard: Breaking New Ground?' (2018) 36(1) *Boston University International Law Journal* 87, 90.

²⁸⁹ *Urbaser v Argentina* (Award) (n 264) [1194], [1210].

²⁹⁰ Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments (signed 3 October 1991, entered into force 28 September 1992) (Argentina–Spain BIT); Crow and Escobar (n 288) 91.

²⁹¹ *Urbaser v Argentina* (Award) (n 264) [42].

provisions of the Spain–Argentina BIT,²⁹² basing their claims on the government’s conduct during the 2001 Argentine economic crisis. In particular, they argued that Argentina was responsible for the investment’s eventual insolvency as a result of the depreciation of the Argentine peso and the failure to renegotiate concession tariffs, alleging breaches of treaty obligations concerning the protection of foreign investments, the prohibition of unjustified or discriminatory measures, FET, and unlawful or uncompensated expropriation.²⁹³

During the proceedings, Argentina advanced a counterclaim based on the claimants’ alleged obligations under international human rights law, that is, norms external to the Spain–Argentina BIT. The state sought compensation of USD 404.34 million, arguing that the investors had breached their obligation to ensure access to water for the local population, as reflected in the concession contract. Argentina primarily based its argument on the investors’ failure to make adequate investments in water and sewage infrastructure and to provide water services at affordable prices.²⁹⁴

Argentina grounded its counterclaim in international law because the Tribunal had previously declined to exercise jurisdiction over domestic Argentine law.²⁹⁵ This raised the question whether the investors were subject to any obligations under international human rights law and, if so, whether such obligations fell within the tribunal’s jurisdiction. Although the Tribunal ultimately dismissed the counterclaim, it addressed these issues in considerable detail.²⁹⁶

The tribunal recognised the existence of broad negative human rights obligations applicable to corporations. In affirming that corporations may be subjects of international law, it reasoned that private actors are required to refrain from infringing the human rights of others, including the right to water.²⁹⁷ In reaching this conclusion, the Tribunal relied on a range of international instruments, including the ILO Tripartite Declaration of Principles concerning

²⁹² Argentina–Spain BIT (n 290).

²⁹³ *Urbaser v Argentina* (Award) (n 264) [34]–[35]. The tribunal ultimately dismissed the claim. Although it found a breach of the FET standard due to the abrupt termination of renegotiation talks by the Argentine government, it concluded that this breach did not cause any compensable harm to the investors. The investment had already been operating at a loss with no realistic economic prospects, and no profit could reasonably have been expected, as the contractually required infrastructure expansion had not been carried out, see *Urbaser v Argentina* (Award) (n 264) [846]–[847], [997]–[1009], [1090]–[1109].

²⁹⁴ *Urbaser v Argentina* (Award) (n 264) [1156]–[1166].

²⁹⁵ *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v Argentine Republic* (Decision on Jurisdiction, 19 December 2012) ICSID Case No ARB/07/26 [251]–[254].

²⁹⁶ Abel, *International Investor Obligations* (n 250) 59.

²⁹⁷ *Urbaser v Argentina* (Award) (n 264) [1193]–[1199].

Multinational Enterprises and Social Policy,²⁹⁸ the UDHR,²⁹⁹ and the IC-CPR³⁰⁰ and ICESCR.³⁰¹ While the precise scope of this negative obligation remains uncertain, Argentina's counterclaim was based on an alleged positive 'obligation to perform'³⁰² in ensuring access to water for the population of Buenos Aires. The tribunal therefore dismissed the counterclaim, holding that international human rights law does not establish such positive obligations for private actors, in contrast to their recognised negative duties.³⁰³ Furthermore, the Tribunal held that international human rights law required Argentina to exercise authority over the concessionaire to ensure access to safe water for its population.³⁰⁴ It also stated that 'the investor's obligation to perform has as its source in domestic law; it does not find its legal ground in general international law.'³⁰⁵ Xuan Shao therefore argues that, although *Urbaser* may appear groundbreaking in recognising international human rights obligations of investors, it ultimately confirms the traditional position that such obligations are implemented through domestic law. In this respect, the recognition of investor obligations under international human rights law in *Urbaser* is more rhetorical than substantive.³⁰⁶

Nevertheless, it remains important to examine how the Tribunal addressed the integration of investor obligations derived from other international law instruments into an IIA as external obligations. More specifically, this raises the question of how a state may rely on such obligations as the basis for a counterclaim against an investor.³⁰⁷ The tribunal outlined four possible bases for such integration:

1. the systemic interpretation of the IIA in accordance with Article 31(3)(c) VCLT;³⁰⁸

²⁹⁸ International Labour Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (adopted 1977, amended 2000, 2006, 2017, 2022).

²⁹⁹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR).

³⁰⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

³⁰¹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

³⁰² *Urbaser v Argentina* (Award) (n 264) [1210].

³⁰³ *ibid* [1206]–[1209].

³⁰⁴ *ibid* [1212]–[1214].

³⁰⁵ *ibid* [1210].

³⁰⁶ Xuan Shao, 'Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law' (2021) 24 *Journal of International Economic Law* 157, 161.

³⁰⁷ Abel, *International Investor Obligations* (n 250) 63.

³⁰⁸ *Urbaser v Argentina* (Award) (n 264) [1200]; VCLT art 31(3)(c) provides that treaty interpretation shall take into account, together with the context, 'any relevant rules of international law applicable in the relations between the parties'.

2. provisions on applicable law within the IIA, in this case Article X(5) of the Spain–Argentina BIT, which provides for the application of international law;³⁰⁹
3. Article 42(1) of the ICSID Convention, which establishes the applicability of international law as a residual rule in investment arbitration; and³¹⁰
4. peremptory norms of general international law (*ius cogens*).³¹¹

Starting with the first basis, Article 31(3)(c) VCLT reflects the so-called method of systemic interpretation.³¹² It provides that when interpreting an international treaty, one shall consider, together with the context, ‘[a]ny relevant rules of international law applicable in the relations between the parties.’³¹³ The provision facilitates the alignment of IIAs with the protection of public goods and interests reflected in the parties’ international obligations. In particular, international human rights norms may be incorporated into the interpretation of investor rights and the justification clauses of IIAs.³¹⁴ However, Article 31(3)(c) VCLT represents only one aspect of the interpretative process and must be considered alongside the other rules contained in Article 31. Interpretation must therefore begin with the ordinary meaning of the provision in question.³¹⁵ There is seldom a clear textual basis in IIAs for the imposition of direct obligations on investors. In *Urbaser*, the Spain–Argentina BIT did not provide such a foundation.³¹⁶ Adler notes that it is therefore difficult to infer the existence of direct obligations from IIAs, particularly given the general reluctance of states to endorse such norms.³¹⁷ Reflecting this, the ICSID tribunal in *Blusun v Italy* declined to interpret Article 19 of the ECT as imposing an obligation on investors to conduct environmental impact assessments (EIAs), noting that the provision ‘operates not at the level of individual investors but at the interstate level, as is equally the case with the

³⁰⁹ *Urbaser v Argentina* (Award) (n 264) [1201]; Argentina–Spain BIT art X(5): ‘[t]he arbitral tribunal shall make its decision on the basis of this Agreement and, where appropriate, on the basis of other treaties in force between the Parties, the domestic law of the Party in whose territory the investment was made, including its norms of private international law, and the general principles of international law.’

³¹⁰ *Urbaser v Argentina* (Award) (n 264) [1202]; ICSID Convention art 42(1) provides that ‘[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.’

³¹¹ *Urbaser v Argentina* (Award) (n 264) [1203].

³¹² Abel, *International Investor Obligations* (n 250) 64.

³¹³ VCLT art 31(3)(c).

³¹⁴ Abel, *International Investor Obligations* (n 250) 64 (with further references).

³¹⁵ See eg *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* (Advisory Opinion) [1950] ICJ Rep 221, 229; Abel, *International Investor Obligations* (n 250) 64.

³¹⁶ Abel, *International Investor Obligations* (n 250) 64.

³¹⁷ *ibid* 64.

developing general international law of EIAs'.³¹⁸ Accordingly, systemic interpretation is likely to play only a limited role in establishing direct obligations in most cases.³¹⁹

According to Patrick Abel, the only apparent avenue for integrating direct obligations lay in the applicable law clause. Unlike the approach based on Article 31(3)(c) VCLT, this mechanism allows for the procedural incorporation of external obligations into an IIA. In *Urbaser*, the applicable law clause in Article X(5) of the Spain–Argentina BIT was sufficiently broad to establish the tribunal's jurisdiction, as it expressly encompassed international law. As a result, recourse to Article 42(1) of the ICSID Convention was unnecessary. The award in *Urbaser* thus provides a clear example of the procedural integration of an external obligation.³²⁰

Finally, it is not accurate to regard the concept of *ius cogens* as a means of integrating external direct obligations into an IIA. Rather, *ius cogens* refers to the hierarchical status of certain norms in international law, from which states may not derogate.³²¹ However, this primarily entails a negative effect, namely the invalidity of conflicting norms, and does not in itself provide a basis for the positive incorporation of such norms into an IIA as directly applicable obligations.³²²

The award therefore illustrates both the potential and the limits of grounding investor obligations in general international law: while the Tribunal accepted the possibility of negative human rights obligations, it refused to derive a positive obligation to guarantee access to water without a clearer legal basis.

4.2.2 Doctrinal Commentary

The tribunal's decision in *Urbaser* has been widely criticised in the literature for treating, as a general principle of law, the existence of human rights obligations incumbent upon investors or corporations under international law.³²³ Critics argue that the Tribunal conflated binding human rights obligations imposed on states with the non-binding responsibilities attributed to investors.

³¹⁸ *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic* (Award, 27 December 2016) ICSID Case No ARB/14/3 [275].

³¹⁹ Abel, *International Investor Obligations* (n 250) 64.

³²⁰ *ibid* 65.

³²¹ VCLT arts 53 and 64.

³²² See Patrick Abel, 'Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration' (2018) 1 *Brill Open Law* 61, 72–74.

³²³ See eg Abel, 'Counterclaims Based on International Human Rights Obligations of Investors' (n 322) 68–83; Crow and Escobar (n 288) 98; Edward Guntrip, 'Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?' (EJIL:Talk!, 10 February 2017) <<https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/#more-14,978>> accessed 21 April 2026.

Moreover, the Tribunal did not explain how such non-binding norms could acquire binding force or be regarded as part of binding international law.³²⁴

4.2.2.1 *Subjectivity of Corporations*

Before assessing that particular critique, it is useful to consider how the Tribunal engaged with the contested question of whether corporations may bear human rights obligations under international law. It rejected earlier arbitral views denying such obligations, considering that view outdated and stating that it had ‘lost its impact and relevance.’³²⁵ Instead, the Tribunal reasoned that since the Spain–Argentina BIT, particularly through its MFN clause, allows investors to invoke rights derived from international law, it would be inconsistent to exclude the possibility that they may also be subject to obligations under that same body of law.³²⁶

Kevin Crow and Lina Lorenzoni Escobar point out that this reasoning rests on the premise that investors operate as subjects of international law when asserting rights under the BIT.³²⁷ The Tribunal further pointed to the growing significance of corporate social responsibility, suggesting that transnational corporations can no longer be regarded as entirely outside the scope of international legal obligations.³²⁸

The Tribunal appeared aware of the difficulties surrounding corporate international subjectivity, yet its use of the concept was not matched by a fully developed analysis.³²⁹ Rather than adopting a clear position, it rejected categorical approaches and suggested that the subjectivity of investors cannot be excluded as a matter of necessity.³³⁰ It did not, however, establish criteria for determining such subjectivity. At the same time, by distinguishing between the State and the corporation as a service provider, the Tribunal implied that a corporation’s functions and purposes shape its international status.³³¹ This contextual approach is further reflected in its reliance on corporate social responsibility.³³²

As concluded by Crow and Lorenzoni Escobar, despite its theoretical shortcomings, which reflect the evolving state of international law in this area, *Urbaser* affirms at least the possibility of a limited and functional form of corporate subjectivity. The Tribunal approached this question by examining

³²⁴ James J Nedumpara and Aditya Laddha, ‘Human Rights and Environmental Counterclaims in Investment Treaty Arbitration’ in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 1841.

³²⁵ *Urbaser v Argentina* (Award) (n 264) [1194]; Crow and Escobar (n 288) 97.

³²⁶ *Urbaser v Argentina* (Award) (n 264) [1194]; Crow and Escobar (n 288) 97.

³²⁷ Crow and Escobar (n 288) 97.

³²⁸ *Urbaser v Argentina* (Award) (n 264) [1195].

³²⁹ Crow and Escobar (n 288) 99.

³³⁰ *Urbaser v Argentina* (Award) (n 264) [1194].

³³¹ *ibid* [1206]–[1207].

³³² *ibid* [1194].

whether corporations may bear human rights obligations under international law through reference to human rights instruments and broader developments in international law. At the same time, its reliance on corporate social responsibility suggests that such standards may inform the interpretation and development of investor obligations.³³³ However, consistent with the need for a clear legal basis, CSR cannot in itself establish binding obligations unless incorporated into an applicable treaty, domestic law, or another relevant legal source.³³⁴

4.2.2.2 *Obligations Derived from Soft Law*

This also further links to the question of whether ‘soft law’ can give rise to obligations. Abel criticises the Tribunal’s reasoning as unclear. He challenges its conclusion that corporations may bear human rights obligations, arguing that international law has not reached this stage. In his view, corporations can only have non-binding responsibilities, and the Tribunal conflated such norms with legally binding human rights obligations.³³⁵ He further notes that the Tribunal overlooks that states, in creating these norms, expressly intended them not to be legally binding. As they do not constitute recognised sources of international law under Article 38(1) of the ICJ Statute,³³⁶ they cannot in themselves establish obligations for investors. Moreover, the Tribunal does not explain how such non-binding norms could acquire binding force or come to reflect binding international law, an issue that remains contested in academic debate.³³⁷ James J. Nedumpara and Aditya Laddha recognise that this criticism carries some weight and that the decision in *Urbaser* may be seen as more progressive than the current state of international law in relation to human rights. Nonetheless, they note that, even prior to *Urbaser*, academic writing in international law had already explored the possibility that corporations and other private actors may be bound by international human rights law.³³⁸

This critique reinforces the central methodological point that soft law may inform the interpretation and development of investor obligations, but cannot

³³³ Crow and Escobar (n 288) 100.

³³⁴ See section 1.3 above on methodology and materials, where investor obligations are treated as possible, but not presumed, and dependent on a sufficiently clear legal basis.

³³⁵ Abel, ‘Counterclaims Based on International Human Rights Obligations of Investors’ (n 322) 78–79.

³³⁶ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 art 38(1); see also 1.3 Methodology and Materials.

³³⁷ Abel, ‘Counterclaims Based on International Human Rights Obligations of Investors’ (n 322) 79.

³³⁸ Nedumpara and Laddha (n 324) 1841; For perspectives that are more receptive to the Tribunal’s findings, see Ted Gleason, ‘Examining Host-State Counterclaims for Environmental Damage in Investor-State Dispute Settlement from Human Rights and Transnational Public Policy Perspectives’ (2021) 21 *International Environmental Agreements* 427, 438–439.

by itself establish binding obligations unless it is incorporated into a recognised legal source.

4.2.2.3 *Obligations Derived from 'Abuse of Rights' Clauses*

Finally, it is necessary to examine how the Tribunal derived investor obligations from international instruments through its interpretation of so-called 'abuse of rights' clauses. It advanced the argument that international human rights treaties may be interpreted as imposing direct obligations on non-state actors. Relying on these clauses, the Tribunal reasoned that such treaties should be read as assigning obligations to both public and private parties.³³⁹ More precisely, it misinterprets Article 5(1) ICESCR by treating Covenant rights as directly applicable to non-state actors. The provision reads:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.³⁴⁰

On this basis, the Tribunal concludes that, when read together with the right to water which falls under article 11(1) ICESCR, the provision may be understood as giving rise to an international obligation on corporations.³⁴¹ Generally speaking, companies would therefore be unable to rely on the rights guaranteed under investment treaties where doing so would result in the destruction of the human rights of others.³⁴²

Despite the Tribunal's firm statement, it remains uncertain whether human rights obligations for private actors can in fact be derived from 'abuse of rights' clauses. While these provisions indicate that individuals should not deliberately use their rights to undermine those of others, there is little evidence that they were intended to create direct obligations. From a systematic perspective, such clauses function instead as a form of forfeiture, excluding harmful conduct from the protection of the relevant human rights norm. They may therefore limit the invocation of rights in certain circumstances, but they do not impose independent obligations on individuals.³⁴³

³³⁹ Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (Cambridge University Press 2021) 27.

³⁴⁰ ICESCR art 5(1).

³⁴¹ *Urbaser v Argentina* (Award) (n 264) [1196]–[1197]; Abel, *International Investor Obligations* (n 250) 60–61, where he notes that even if a horizontal effect were established, the Tribunal would still need to clarify to whom the obligation is owed, whether to the home State, the host State, other private actors, or all of these cumulatively.

³⁴² Monnheimer (n 339) 27.

³⁴³ *ibid* 27–28; see also Edward Guntrip, 'Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?' (EJIL:Talk!, 10 February 2017) <<https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/#more-14,978>> accessed 21 April 2026.

Similar provisions to article 5(1) ICESCR appear in article 5(1) ICCPR, article 17 ECHR³⁴⁴ and article 29(a) ACHR,³⁴⁵ all of which share a common origin in article 30 of the UDHR. The preparatory works of these instruments indicate that the drafters sought to prevent the invocation of human rights with the sole aim of infringing the rights of others. In particular, they were concerned that human rights might be interpreted through extremist or totalitarian ideologies. Accordingly, these clauses are intended to preclude such interpretations. They therefore function as interpretative guidance on the scope and purpose of the rights protected under the relevant treaties, rather than as a basis for imposing obligations.³⁴⁶

However, despite this critique, Ted Gleason notes that in a relatively short period following *Urbaser*, at least one other tribunal has partially followed its approach. In *Aven*, the Tribunal relied on *Urbaser* to suggest that, although the enforcement of environmental law primarily rests with states, it cannot be excluded that foreign investors may also be subject to obligations under international law, particularly in light of the broad language of the applicable investment agreement.³⁴⁷

The debate therefore shows that abuse of rights clauses may restrict the invocation of rights in certain circumstances, but they do not provide a convincing basis for deriving independent human rights obligations for investors.

4.3 *Aven v Costa Rica*

The 2018 *Aven v Costa Rica* award is another significant arbitral decision addressing the integration of external investor obligations.³⁴⁸ While it confirms that such integration is, in principle, possible, it avoids some of the methodological issues discussed in relation to *Urbaser*, while raising others of its own.

4.3.1 The Merits

In *Aven*, the UNCITRAL tribunal was required to rule on an environmental counterclaim brought by Costa Rica under the CAFTA-DR.³⁴⁹ The claimants

³⁴⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 17.

³⁴⁵ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 29(a).

³⁴⁶ Abel, *International Investor Obligations* (n 250) 61, with further references.

³⁴⁷ *Aven v Costa Rica* (Final Award) (n 259) [737]; Gleason (n 338) 434.

³⁴⁸ *Aven v Costa Rica* (Final Award) (n 259).

³⁴⁹ Dominican Republic–Central America–United States Free Trade Agreement (signed 5 August 2004, entered into force 1 March 2006) (CAFTA-DR).

had developed a tourism project on the central Pacific coast. After obtaining the necessary permits and commencing the project, Costa Rica adopted a series of measures that effectively halted the investment in order to protect sensitive wetlands and forest areas within the project site.³⁵⁰

Claims were subsequently brought under Chapter 10 of the CAFTA-DR, which governs investment. They were based primarily on allegations of discriminatory treatment towards Aven, a breach of the FET standard, and the indirect expropriation of his investment without compensation.³⁵¹ Costa Rica argued that, under the CAFTA-DR, investment protection is subordinate to environmental protection, such that Chapter 10 should yield to Chapter 17 on environmental protection, in the event of a conflict between the two. It therefore maintained that its actions were consistent with both domestic and international environmental law.³⁵² During the proceedings, Costa Rica brought a counterclaim, seeking compensation from the claimants for environmental damage in the investment area. This included the construction of roads, excavation of ditches, installation of culverts, removal of vegetation, increased soil sedimentation, and the filling and drainage of wetlands.³⁵³ Costa Rica argued that the claimants were internationally responsible for breaching domestic law, customary international law, and the environmental protection provisions of the CAFTA-DR.³⁵⁴

Referring to *Urbaser*, the Tribunal endorsed and affirmed the view that investors, as subjects of international law, may bear international environmental obligations that can, in principle, be enforced before investment tribunals:

[...] It is true that the enforcement of environmental law is primarily to [sic] the States, but it cannot be admitted that a foreign investor could not be subject to international law obligations in this field, particularly in the light of Articles 10.9.3, 10.11 and 17 of DR-CAFTA.³⁵⁵

...

Under international law of investments, particularly under DR-CAFTA, the investors enjoy by themselves a number of rights both substantive and procedural, including the right to sue directly the host State when it breaches its international obligations on foreign investment (Section A of Article 10 in DR-CAFTA). What about the investor's obligations arising of the investment according to international law? This Tribunal shares the views of

³⁵⁰ *Aven v Costa Rica* (Final Award) (n 259) [6].

³⁵¹ *ibid* [183].

³⁵² *ibid* [389], [392]. Ultimately, the primary claim was dismissed on the merits, and it was held that Costa Rica's actions were not in breach of the provisions of the FTA, *ibid* [668].

³⁵³ *ibid* [698], [720].

³⁵⁴ *ibid* [699]–[700].

³⁵⁵ *ibid* [737].

Urbaser Tribunal that it can no longer be admitted that investors operating internationally are immune from becoming subjects of international law. It is particularly convincing when it comes to rights and obligations that are the concern of all States, as it happens in the protection of the environment. It is pertinent to recall the observation of the International Court of Justice regarding this kind of obligations: “In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.³⁵⁶

However, the Tribunal ultimately rejected the counterclaim, partly on the basis that the CAFTA-DR provisions did not establish environmental obligations directly binding on foreign investors:

First, the Tribunal believes that the language of articles Article 10.9.3.c and 10.11 seeks to ensure that States retain a significant margin of appreciation in respect of environmental measures in their respective jurisdictions, but they do not -in and of themselves- impose any affirmative obligation upon investors.³⁵⁷

The award thus confirms the conceptual possibility of investor obligations in the environmental context, but also demonstrates that such obligations cannot be enforced through counterclaims unless they are grounded in the applicable treaty, domestic law, or another relevant legal source.

4.3.2 Doctrinal Commentary

Abel holds that this result of the award is correct. However, he argues that the reasoning remains incomplete. In this respect, the Tribunal adopts a methodologically sound approach in rejecting the argument that the CAFTA-DR contains international obligations for investors.³⁵⁸ The CAFTA-DR does not contain any provision incorporating external international environmental obligations that are directly applicable to investors. Article 10.9(3)(c) CAFTA-DR provides that the obligations on performance requirements ‘shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: [...] (ii) necessary to protect human, animal, or plant life or health; or (iii) related to the conservation of living and non-living exhaustible natural resources’.³⁵⁹ Likewise, article 10.11 states that nothing in the investment chapter of the CAFTA-DR ‘shall be construed to prevent a

³⁵⁶ *ibid* [738], quoting *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3 [33].

³⁵⁷ *ibid* [743]. For a contrasting position, see Prabhath Ranjan, ‘Investor Obligations in Investment Treaties: Missing Text or a Matter of Application?’ in Jean Ho and Mavluda Sattorova (eds), *Investors’ International Law* (Hart Publishing 2021) 146, who suggests that the Tribunal effectively read direct investor obligations into the CAFTA-DR, without properly addressing para 743 of the award.

³⁵⁸ Abel, *International Investor Obligations* (n 250) 67–68.

³⁵⁹ CAFTA-DR art 10.9(3)(c).

Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.³⁶⁰ Abel points out that the wording of both provisions already indicates that they are intended to preserve the regulatory autonomy of states in matters of environmental protection. In his view, the CAFTA-DR addresses how states may pursue domestic environmental regulation while remaining in compliance with their international investment protection obligations under the treaty.

Conversely, Adler argues that the Tribunal appears to have overlooked Costa Rica's submission that the claimants had also breached customary international environmental law.³⁶¹ Article 10.22(1) CAFTA-DR, the applicable law clause, provides that the tribunal 'shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law',³⁶² which include customary international law. If such customary environmental obligations directly applicable to investors did exist, which he maintains they do not under the current state of international law, they could have formed a viable basis for a counterclaim. Abel adds that, at the very least, the Tribunal ought to have addressed this issue in greater detail.³⁶³

Abel further observes that the Tribunal's reference to *erga omnes* obligations in support of individual international subjectivity is misleading. The notion of *erga omnes* concerns the special status of certain obligations of states, whereby compliance is owed to the international community as a whole and responsibility arises towards all states in the event of a breach. However, this does not entail that such obligations are binding on private actors. Even in the context of core human rights instruments, individuals must qualify as victims of violations in order to bring a claim, which does not support the existence of direct obligations on private parties.³⁶⁴

Nevertheless, Abel notes that it can be argued that the award supports the view that external investor obligations may, in principle, be integrated into investment law.³⁶⁵ The tribunal's endorsement of the reasoning in *Urbaser* is significant in itself, as it may help to reinforce that approach as a *de facto* precedent.³⁶⁶ Finally, Abel concludes that the reasoning in *Urbaser* is not

³⁶⁰ CAFTA-DR art 10.11.

³⁶¹ Abel, *International Investor Obligations* (n 250) 67–68.

³⁶² CAFTA-DR art 10.22(1).

³⁶³ Abel, *International Investor Obligations* (n 250) 68.

³⁶⁴ *ibid* 68–69.

³⁶⁵ *ibid* 69.

³⁶⁶ Debadatta Bose, 'David R Aven v Costa Rica: The Confluence of Corporations, Public International Law and International Investment Law' (2020) 35(1–2) *ICSID Review – Foreign Investment Law Journal* 20, 21; see more on the reliance of arbitral awards in international investment law in 1.3 Methodology and Materials.

limited to human rights, but may be extended to other aspects of the public interest.³⁶⁷

Debadatta Bose similarly argues that *Aven* expands regulatory space for environmental protection, placing investor protections in a subordinate position. This reflects the need to balance states' obligations under general international law, such as environmental protection in *Aven* and human rights in *Urbaser*, with their commitments under international investment law. The case may be described as an 'Urbaser plus', modestly developing the key reasoning of *Urbaser*. Its significance lies in reinforcing a broader trend that investors are not immune from counterclaims based on human rights or environmental concerns. Both *Urbaser* and *Aven* also engage with the question of investors as subjects of international law. However, as Bose emphasises, the significance of *Aven* lies less in resolving corporate subjectivity in the abstract than in showing that obligations may be imposed where a sufficient legal basis exists. The absence of explicit investor obligations in the treaty therefore does not, in itself, preclude counterclaims grounded in other relevant legal sources. Even where such claims are ultimately dismissed, their admissibility signals a growing willingness to address the limits of investment in relation to public-interest concerns, a development the Tribunal itself acknowledges is likely to continue.³⁶⁸

Giovanni Zarra similarly contends that *Urbaser* and *Aven* are significant in challenging the traditional view that investors are not subject to international obligations. However, he finds the distinction between positive and negative obligations unconvincing, as both ultimately require conduct that does not infringe the rights of others. In this sense, the duty to refrain from interference and the duty to act converge in requiring behaviour that avoids prejudice to the enjoyment of rights. From this perspective, human rights norms may have direct effect on individuals and could, in principle, serve as the basis for state claims against investors. Whether such claims fall within the jurisdiction of investment tribunals depends largely on the wording of the applicable treaty, with broader clauses allowing greater flexibility. More importantly, these awards reflect an emerging effort to move beyond an investor-centred interpretation of investment law and towards a more balanced approach that recognises the rights and obligations of both states and investors, with counterclaims playing a potential role in this rebalancing.³⁶⁹

A more sceptical view is advanced by Markus Krajewski, who emphasises the current uncertainty as to whether, and how, tribunals will revisit the question of investor obligations. He also highlights the risk that investment

³⁶⁷ Abel, *International Investor Obligations* (n 250) 69.

³⁶⁸ Bose (n 366) 27–28; *Aven v Costa Rica* (Final Award) (n 259) [697].

³⁶⁹ Giovanni Zarra, 'International Investment Treaties as a Source of Human Rights Obligations for Investors' in Martina Buscemi, Nicole Lazzerini, Laura Magi and Deborah Russo (eds), *Legal Sources in Business and Human Rights* (Brill Nijhoff 2020) 68–69.

tribunals may develop interpretations of human rights law that diverge from the jurisprudence of regional human rights courts and treaty bodies. More broadly, it is often argued that the investment regime is not an appropriate forum for applying or developing human rights obligations of investors, either due to limited expertise or the restricted role of human rights within investment treaties. This, in turn, raises the question of whether treaty reform would provide a more suitable avenue for establishing such obligations.³⁷⁰

Accordingly, *Aven* strengthens the emerging acceptance of investor counterclaims in relation to public-interest concerns, but it also confirms that arbitral receptiveness cannot substitute for a sufficiently clear legal basis.

4.4 *Al-Warraq v Indonesia*

In the 2014 award *Al-Warraq v Indonesia*,³⁷¹ the claimant invested in Indonesia as a shareholder in Bank Century, an Indonesian bank. During the 2008–2009 global financial crisis, the bank encountered liquidity difficulties and received state support, including a bailout from the Indonesian Central Bank. After the bailout, Indonesia initiated criminal proceedings against several individuals connected to Bank Century, including the claimant, alleging banking mismanagement, fraud and corruption. The claimant was ultimately convicted *in absentia*, and his assets were confiscated.³⁷²

In 2011, the claimant initiated arbitration under the OIC Investment Agreement³⁷³ and the 2010 UNCITRAL Arbitration Rules. He alleged breaches of several investor protections, including the right to FPS, protection against unlawful expropriation, and the FET standard, invoked through the MFN clause.³⁷⁴

During the proceedings, Indonesia submitted a counterclaim against the investor, alleging unjust enrichment in breach of his domestic financial obligations. It sought compensation equivalent to the bailout amount (Rp 6.7 trillion), or alternatively the sum allegedly misappropriated by the claimant (USD 360,735,638), or any amount the Tribunal considered appropriate.³⁷⁵

³⁷⁰ Markus Krajewski, ‘A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application’ (2020) 5 *Business and Human Rights Journal* 105, 127–128.

³⁷¹ *Al-Warraq v Indonesia* (Final Award) (n 264).

³⁷² *Al-Warraq v Indonesia* (Final Award) (n 264) [71–141].

³⁷³ Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (OIC Investment Agreement) (adopted 5 June 1981, entered into force 23 September 1986).

³⁷⁴ *Hesham T M Al-Warraq v Republic of Indonesia* (Award on Respondent’s Preliminary Objections to Jurisdiction and Admissibility of the Claims, 21 June 2012) UNCITRAL [46].

³⁷⁵ *Al-Warraq v Indonesia* (Final Award) (n 264) [655].

In its 2014 award, the Tribunal held that Indonesia was, in principle, entitled to bring a counterclaim based on the investor's alleged fraudulent conduct, relying, among other sources, on article 9 of the OIC Investment Agreement.³⁷⁶ This provision states:

The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.³⁷⁷

The Tribunal interpreted this provision broadly, reasoning as follows:

Article 9 imposes a positive obligation on investors to respect the law of the Host State, as well as public order and morals. An investor of course has a general obligation to obey the law of the host state, but Article 9 raises this obligation from the plane of domestic law (and jurisdiction of domestic Tribunals) to a treaty obligation binding on the investor in an investor state arbitration. An analogy can be drawn with so called 'umbrella clauses' that elevate contractual obligations to the treaty plane. The fact that the Contracting Parties imposed treaty obligations on investors (which the Claimant assented to by accepting the open offer of investment arbitration made by the Respondent in the OIC Agreement) confirms the interpretation [...] that permits counterclaims by the respondent state.³⁷⁸

Nevertheless, the Tribunal dismissed Indonesia's counterclaim on more specific grounds. It found that Indonesia had failed to establish the investor's personal liability, as it could not clearly distinguish his conduct from that of other individuals involved in the alleged fraud who were not subject to the counterclaim.³⁷⁹ Moreover, the fraudulent acts were primarily directed against the private entity Bank Century. Although the Tribunal acknowledged that Indonesia might, in principle, subrogate the bank's claims, it had not demonstrated the necessary factual basis to do so.³⁸⁰ The Tribunal also noted that certain aspects of the respondent's claim were governed by a separate dispute resolution clause.³⁸¹

³⁷⁶ *ibid* [659]–[666].

³⁷⁷ OIC Investment Agreement art 9.

³⁷⁸ *Al-Warraq v Indonesia* (Final Award) (n 264) [663]. An umbrella clause is commonly understood as a treaty provision that may elevate contractual or domestic law obligations to the level of international treaty obligations. In *Al-Warraq*, the Tribunal used the analogy to explain how article 9 of the OIC Investment Agreement elevated domestic law obligations into treaty obligations binding on the investor.

³⁷⁹ *ibid* [669].

³⁸⁰ *ibid* [670].

³⁸¹ *ibid* [671].

Abel concludes that, although the counterclaim ultimately failed, this was due to specific factual shortcomings rather than any fundamental legal barrier. Significantly, the Tribunal's reasoning affirmed that the OIC Investment Agreement could give rise to international obligations for the investor and recognised, in principle, the possibility of enforcing such obligations through a counterclaim in investment arbitration. Article 9 of the OIC Investment Agreement reflects this approach by elevating domestic law within the investment framework. It functions to protect the public interest, particularly the rule of law, against fraudulent conduct. Moreover, its scope does not appear to be confined to fraud and corruption, but may extend to other domestic obligations, potentially including those relating to environmental protection and human rights.³⁸²

Another notable aspect of *Al-Warraq* is that the Tribunal relied on the investor obligations in article 9 not only in relation to the counterclaim, but also in assessing the admissibility of the investor's primary claim. This proved decisive, as the Tribunal ultimately declared the claim inadmissible. Unlike many legality clauses in BITs, the formulation of article 9 of the OIC Investment Agreement is not confined to the making of the investment, but extends to the investor's conduct throughout its operation.³⁸³

In applying this provision, the Tribunal emphasised that the claimant had failed to comply with Indonesian law and had acted in a manner prejudicial to the public interest. It pointed in particular to his admission that he had undertaken responsibilities on the board of a major bank without understanding his legal obligations, and found that his conduct contributed to the bank's liquidity crisis and adversely affected the Indonesian financial sector. On this basis, the Tribunal concluded that the claimant had breached article 9 and thereby deprived himself of the protection of the OIC Investment Agreement. The majority accordingly applied the 'clean hands' doctrine, holding that the claimant's conduct during the operational phase rendered his claim inadmissible, even though it had found a breach of the FET standard.³⁸⁴

As Lorenzo Cotula notes, while most BITs do not feature investor obligations clauses, there has been considerable debate as to whether such clauses should be incorporated into investment treaties. The *Al-Warraq* award demonstrates that investor obligations can have real operative effect and may decisively

³⁸² Abel, *International Investor Obligations* (n 250) 87.

³⁸³ Cotula (n 383) 155.

³⁸⁴ *Al-Warraq v Indonesia* (Final Award) (n 264) [644]–[648]. In defining the doctrine, the tribunal referred to James Crawford's observation that the 'clean hands' principle had been invoked in relation to the admissibility of claims before international courts and tribunals. It then relied on Lord Mansfield's formulation in *Holman v Johnson* (1775): 'No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted' [646].

influence the outcome of arbitral proceedings. At the same time, the tribunal's split decision to treat the investor's misconduct as an issue of admissibility highlights a deeper problem of legal uncertainty. In *Al-Warraq*, the tribunal accepted jurisdiction and found a breach of the treaty, yet ultimately declined to grant relief on the basis that the claim was inadmissible due to the investor's own conduct. This illustrates the absence of clear guidance in treaty texts as to the legal consequences of breaches of investor obligations, in particular whether such breaches should affect jurisdiction, admissibility, liability, or the assessment of damages. Greater precision in treaty drafting could therefore enhance legal certainty by clarifying the procedural and substantive effects of investor misconduct.³⁸⁵

On the inadmissibility of the claimant's claim, Abel notes that, aside from relying on pre-existing norms, an IIA may also establish direct obligations independently, without reference to external sources.³⁸⁶ He argues that the Tribunal derived such an obligation from the central part of article 9 of the OIC Investment Agreement: '[t]he investor shall [...] refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from restrictive practices'.³⁸⁷ In his view, this formulation introduces an additional standard, referring to public order, morals and the public interest, which should be understood as creating direct obligations *de novo* under the IIA itself.³⁸⁸

Abel therefore presents the award as an example of how a tribunal may interpret and apply autonomous direct obligations contained in an IIA. On this basis, the Tribunal did not assess the investor's conduct solely by reference to Indonesian law, but also through the separate standard in article 9 concerning acts prejudicial to the public interest, public order and morals. Abel nevertheless criticises the award for failing to define the abstract standard against which the claimant's conduct was measured.³⁸⁹

Al-Warraq therefore provides one of the clearest examples of investor obligations operating within investment arbitration, since the relevant obligations were expressly contained in the applicable investment treaty and were capable of affecting both counterclaims and the admissibility of the investor's own claim.

4.5 *Burlington v Ecuador and Perenco v Ecuador*

³⁸⁵ Cotula (n 383) 155–156.

³⁸⁶ Abel, *International Investor Obligations* (n 250) 92.

³⁸⁷ OIC Investment Agreement art 9.

³⁸⁸ Abel, *International Investor Obligations* (n 250) 92.

³⁸⁹ *ibid* 92–93.

A related perspective on investor obligations can be seen in *Burlington v Ecuador* (2017) and *Perenco v Ecuador* (2019), both of which involved environmental counterclaims grounded in breaches of domestic law.³⁹⁰ The two arbitrations arose from the same governmental measures and are therefore closely interconnected.

4.5.1 The Merits

The investors, Perenco Ecuador Ltd (Perenco) and Burlington Resources Inc (Burlington), operated as part of a consortium in the Ecuadorian oil industry in the Amazon region. Their investments were carried out under so-called production-sharing contracts with the government, a form of public-private partnership introduced following the privatisation of the sector in 1993.³⁹¹ Following a substantial increase in global oil prices in 2002, Ecuador altered the agreed distribution scheme for windfall profits, taking the view that the additional value of natural resources should accrue to the state. After the investors refused to comply and negotiations to amend the contracts failed, Ecuador ultimately seized the investments.³⁹² Both investors initiated separate claims: Perenco alleged violations of the FET standard as well as unlawful expropriation under the France-Ecuador BIT³⁹³ and the applicable investment contracts,³⁹⁴ while Burlington relied solely on breaches of the US-Ecuador BIT,³⁹⁵ namely the umbrella clause and unlawful expropriation.³⁹⁶ In both proceedings, Ecuador submitted counterclaims for soil and groundwater pollution allegedly caused by the investors during oil production. It argued that these actions breached Ecuadorian law and sought damages of USD 2,797,007,091 from Burlington³⁹⁷ and USD 2,548,526,259 from Perenco.³⁹⁸ Crucially, these counterclaims were not factually connected to the investors'

³⁹⁰ *Burlington v Ecuador* (Decision on Counterclaims) (n 264); *Perenco v Ecuador* (Award) (n 282).

³⁹¹ *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (Decision on Jurisdiction, 30 June 2011) ICSID Case No ARB/08/6 [1]–[14]; *Burlington Resources Inc v Republic of Ecuador* (Decision on Liability, 14 December 2012) ICSID Case No ARB/08/5 [9]–[15]; *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014) ICSID Case No ARB/08/6 [62]–[80].

³⁹² *Burlington v Ecuador* (Decision on Liability) (n 391) [25]–[66]; *Perenco v Ecuador* (Decision on Remaining Issues of Jurisdiction and on Liability) (n 391) [62]–[80].

³⁹³ Accord entre le Gouvernement de la République française et le Gouvernement de la République de l'Équateur sur l'encouragement et la protection réciproques des investissements (France-Ecuador BIT) (signed 7 September 1994, entered into force 10 June 1996).

³⁹⁴ *Perenco v Ecuador* (Decision on Jurisdiction) (n 391) [15]–[22].

³⁹⁵ Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (US-Ecuador BIT) (signed 27 August 1993, entered into force 11 May 1997).

³⁹⁶ *Burlington v Ecuador* (Decision on Liability) (n 391) [85], [127].

³⁹⁷ *Burlington v Ecuador* (Decision on Counterclaims) (n 264) [52].

³⁹⁸ *Perenco v Ecuador* (Interim Decision on the Environmental Counterclaim) (n 264) [36].

principal claims. The principal claims arose from Ecuador's fiscal and coercive measures following the oil price spike, whereas the counterclaims concerned alleged environmental harm caused during the operation of the investments. Since the disputing parties nevertheless accepted that the tribunals could hear the environmental counterclaims, this lack of factual connection did not become a contested jurisdictional or admissibility issue.³⁹⁹

In *Burlington*, the Tribunal applied Ecuadorian law on the basis of a 2011 agreement between the parties, in which they accepted the Tribunal's jurisdiction over Ecuador's counterclaims and the applicability of Ecuadorian law to the arbitration.⁴⁰⁰ This approach was consistent with the arbitration clause in article VI(1) of the Ecuador–US BIT, which conferred jurisdiction on the Tribunal by providing that '[...] an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to [...] (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.'⁴⁰¹

In *Perenco*, the Tribunal was less explicit in its reasoning for applying Ecuadorian law. However, the France–Ecuador BIT also contains a broadly framed jurisdiction clause that appears to have supported the Tribunal's reliance on domestic law. In this respect, article 9 confers jurisdiction on an ICSID tribunal for '[...] any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the former.'⁴⁰²

The tribunals nevertheless differed in their interpretation of Ecuadorian law and their treatment of expert evidence. The *Burlington* tribunal was aware of the risk of inconsistent decisions, stressing that, for reasons of legal coherence, contradictory decisions on identical issues should be avoided where possible.⁴⁰³ Despite this caution, inconsistency remained. In its 2019 final award, the *Perenco* tribunal noted that the two tribunals had addressed the issues in significantly different ways, both substantively in relation to Ecuadorian law and technically in their assessment of expert evidence.⁴⁰⁴

A key divergence concerned the applicable standard of liability under Ecuadorian environmental law. The *Perenco* tribunal adopted a fault-based

³⁹⁹ *Burlington v Ecuador* (Decision on Counterclaims) (n 264) [60]–[61]; *Perenco v Ecuador* (Decision on Claimant's Application for Dismissal of Respondent's Counterclaims) (n 284) [34].

⁴⁰⁰ *Burlington v Ecuador* (Decision on Counterclaims) (n 264) [60]–[61], [71]–[72].

⁴⁰¹ US–Ecuador BIT art VI (1).

⁴⁰² France–Ecuador BIT, art 9. Original French: '[...] tout différend légal survenant entre cette Partie contractante et un national ou une société de l'autre Partie contractante à propos d'un investissement de ce dernier dans la première.'

⁴⁰³ *Burlington v Ecuador* (Decision on Counterclaims) (n 264) [69].

⁴⁰⁴ *Perenco v Ecuador* (Award) (n 282) [897].

approach,⁴⁰⁵ while the *Burlington* tribunal found this difficult to accept and held that Ecuadorian courts had established a strict liability regime.⁴⁰⁶ The tribunals also differed in their assessment of environmental damage. *Burlington* relied mainly on sampling conducted by the parties' experts, whereas *Perenco* expressed doubts about both parties' expert evidence and appointed an independent expert.⁴⁰⁷ This led to different outcomes on damages, with the *Perenco* tribunal later treating the USD 39,199,373 awarded in *Burlington*, as merely a 'down payment' towards the total adjusted damages of USD 93,638,890. *Perenco* was therefore ordered to pay the remaining USD 54,439,517 to Ecuador.⁴⁰⁸

These awards demonstrate that domestic environmental obligations may be enforced through investment counterclaims where jurisdiction and applicable law permit, but they also reveal the difficulties that arise when investment tribunals adjudicate complex questions of domestic environmental law.

4.5.2 Doctrinal Commentary

Shao identifies several concerns arising from the two decisions. First, the tribunals' divergent approaches to Ecuadorian law, expert evidence, and the assessment of damages may weaken the credibility of both awards. This is particularly problematic given both the scale of the damages and the public interests involved. More importantly, their conflicting interpretations of Ecuadorian environmental law may disrupt the coherence of the domestic legal order, raising doubts about whether investment tribunals are an appropriate forum for adjudicating environmental and human rights claims based on domestic law. Such inconsistency may also reinforce existing scepticism among states regarding the legitimacy and suitability of investment tribunals in applying domestic law.⁴⁰⁹

Shao suggests that these concerns could be addressed through procedural safeguards. For questions of domestic law, she proposes a mechanism modelled on the EU preliminary reference procedure under article 267 of the TFEU,⁴¹⁰ allowing investment tribunals to seek binding opinions from domestic courts where the parties dispute the content or interpretation of domestic law. This would provide a middle ground between leaving environmental

⁴⁰⁵ *Perenco v Ecuador* (Interim Decision on the Environmental Counterclaim) (n 264) [881].

⁴⁰⁶ *Burlington v Ecuador* (Decision on Counterclaims) (n 264) [248].

⁴⁰⁷ *Perenco v Ecuador* (Decision on Claimant's Application for Dismissal of Respondent's Counterclaims) (n 284) [31]; *Perenco v Ecuador* (Interim Decision on the Environmental Counterclaim) (n 264) [564]–[569].

⁴⁰⁸ *Perenco v Ecuador* (Award) (n 282) [898]–[899].

⁴⁰⁹ Shao (n 306) 176–177.

⁴¹⁰ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47 art 267.

and human rights claims entirely to domestic courts and transferring them fully to investment tribunals, while preserving the coherence of domestic legal orders.⁴¹¹

She also argues that, if states wish to allow such counterclaims, arbitrators should be appointed with relevant expertise in environmental and human rights matters.⁴¹² Finally, given the public interests involved, proceedings should ensure transparency and participation by affected parties. In this respect, she highlights the Hague Arbitration Rules on Business and Human Rights⁴¹³ as a useful model for disputes involving environmental and human rights counterclaims.⁴¹⁴

James Harrison observes that *Perenco* is significant for both international investment law and international environmental law. In particular, the decision illustrates that an investment tribunal may, in principle, accept an environmental counterclaim brought by a state against an investor. The Tribunal recognised that, where the legal relationship between the investor and the state permits a claim for environmental damage caused by the investor's activities, and that claim is substantiated, the state may be entitled to full reparation under the applicable law. Harrison notes that this permissive approach appears to leave room for environmental counterclaims in certain circumstances. However, the decision does not clearly identify what kind of 'legal relationship' justified jurisdiction over the counterclaims in *Perenco*. This uncertainty regarding the source of jurisdiction remains problematic for both states and investors, and would benefit from more explicit treatment in future arbitral decisions.⁴¹⁵

Abel suggests that the application of domestic law in *Perenco* and *Burlington* may, to a certain extent, set and enforce an international standard for investor conduct. This may be clearest where domestic law itself incorporates or gives effect to international law. However, even the application of purely domestic obligations in investment arbitration can have an internationalising effect.⁴¹⁶

In this sense, applying domestic obligations in investment arbitration shares some of the advantages of elevating domestic obligations into substantive international obligations, as seen with the 'umbrella clause' in *Al-Warraq*. It is a sovereignty-friendly solution because the tribunal applies standards enacted by the host state in its own legal system. It may also be more acceptable to states that remain reluctant to impose international obligations directly on enterprises. At the same time, Abel stresses that an investment tribunal cannot

⁴¹¹ Shao (n 306) 177.

⁴¹² *ibid.*

⁴¹³ Hague Rules on Business and Human Rights Arbitration (2019).

⁴¹⁴ Shao (n 306) 177–178.

⁴¹⁵ James Harrison, 'Environmental Counterclaims in Investor-State Arbitration' (2016) 17 *Journal of World Investment and Trade* 479, 485–486.

⁴¹⁶ Abel, *International Investor Obligations* (n 250) 101–102.

apply domestic investor obligations without reservation. It must also review their compatibility with the state's international investment obligations. The degree of internationalisation therefore depends on the doctrinal approach adopted by the tribunal, and may differ from case to case. It only becomes clear through interpretation and application in the arbitration proceedings, as well as at the enforcement stage.⁴¹⁷

The two awards therefore show that counterclaims can give practical effect to investor obligations, but also expose important limitations concerning consistency, expertise, applicable law and the relationship between investment arbitration and domestic legal orders.

4.6 Interim Conclusions

The arbitral practice examined in this chapter shows that investor obligations are increasingly recognised in international investment law, particularly through counterclaims. Counterclaims provide a viable procedural mechanism through which host states may seek to invoke obligations against investors, but their availability depends on the scope of consent as expressed in the applicable treaty language, as well as on the relevant jurisdictional and admissibility requirements, including the required connection with the principal claim. Moreover, the fact that a tribunal may hear a counterclaim does not itself establish the existence of substantive investor obligations. Tribunals must still identify a sufficiently clear source for the obligation relied upon, whether in the applicable treaty, domestic law, general international law, or another relevant legal source.

The clearest examples are found where the applicable treaty or domestic law provides a concrete basis for the obligation. *Al-Warraq* demonstrates the potential significance of express investor obligations in an investment treaty. Article 9 of the OIC Investment Agreement enabled the Tribunal to treat compliance with host state law, public order, morals and the public interest as obligations binding on the investor. Although Indonesia's counterclaim ultimately failed on the facts, the investor's breach of article 9 had operative effect through the inadmissibility of the investor's own claim. The award therefore shows the broader potential of investor obligations to influence arbitral proceedings. When invoked through a counterclaim, they may support jurisdiction over the state's claim; when relied upon in response to the investor's own claim, they may also affect admissibility and the availability of relief.

Burlington and *Perenco* illustrate a related route to investor obligations. Unlike *Al-Warraq*, these awards did not rely on an express treaty clause elevating host state law to the treaty plane. They instead show how domestic public-

⁴¹⁷ Abel, *International Investor Obligations* (n 250) 107–108.

interest standards may be applied directly through counterclaims. Although the obligations at issue were environmental in nature, their significance is broader. They demonstrate that counterclaims may allow host states to invoke domestic public-interest obligations against investors within the arbitral process. The awards are particularly important because Ecuador's counterclaims succeeded in producing monetary relief for environmental harm. At the same time, the divergent approaches taken by the two tribunals reveal important limitations. Their inconsistent treatment of Ecuadorian law, expert evidence and damages demonstrates the difficulties that arise when investment tribunals adjudicate complex questions of domestic law concerning public-interest regulation.

By contrast, *Urbaser* and *Aven* show both the promise and the uncertainty of relying on external international obligations. Both awards indicate that investors cannot be regarded as entirely immune from obligations under international law, particularly in relation to human rights and environmental protection. However, neither case resulted in the successful enforcement of such obligations on the merits. In *Urbaser*, the tribunal accepted the possibility of negative human rights obligations, but rejected the positive obligation to guarantee access to water. In *Aven*, the tribunal accepted that environmental obligations for investors were conceptually possible, but found that the CAFTA-DR did not itself impose affirmative obligations on investors. These cases therefore support the possibility that investor obligations may arise under international law, but also confirm that arbitral receptiveness cannot substitute for a sufficiently clear legal basis.

Overall, arbitral practice recognises investor obligations as possible, but not yet as a settled or general feature of international investment law. Their use through counterclaims remains procedurally dependent on the wording of the applicable treaty, particularly the scope of consent and the required connection between claim and counterclaim. Substantively, they have been applied most concretely where the relevant obligation was grounded in an express treaty provision or in domestic law capable of being applied by the tribunal. Through counterclaims, investor obligations may contribute to a more balanced investment regime by allowing investor conduct to be examined within the same proceedings as investor claims. However, their present role remains limited, fragmented and uncertain. Investor obligations can support the rebalancing of investment law only where they are grounded in a sufficiently clear legal source and accompanied by procedural mechanisms capable of making them effective.

These limitations also point to the importance of ongoing reform efforts. If arbitral practice shows that investor obligations can be invoked through counterclaims only where the procedural and substantive bases are sufficiently clear, then reforms addressing counterclaims become central to assessing whether such obligations can operate more predictably. Chapter 5 therefore

turns to UNCITRAL Working Group III and its draft provision on counter-claims.

5 Investor Obligations in the UNCITRAL Reform Process

UNCITRAL was established by UN General Assembly Resolution 2205 (XXI) in 1966 to promote ‘the progressive harmonization and unification of the law of international trade’.⁴¹⁸ It carries out this mandate by preparing and promoting legislative and non-legislative instruments, including conventions, model laws, legislative guides and model provisions.⁴¹⁹ These instruments are developed through intergovernmental negotiation, with participation by UNCITRAL Member States, non-Member States and invited intergovernmental and non-governmental organisations.⁴²⁰

UNCITRAL’s work is organised at three levels: the Commission, its inter-governmental working groups and the UNCITRAL Secretariat. The working groups undertake much of the substantive development of topics on UNCITRAL’s work programme, while the Secretariat assists the Commission and the working groups in preparing and conducting their work.⁴²¹ In addition to its broader work on trade law, UNCITRAL has played an important role in international arbitration. Since their adoption in 1976, the UNCITRAL Arbitration Rules have been widely used in international arbitration, including in ISDS proceedings.⁴²²

More recently, UNCITRAL has undertaken what is arguably the most ambitious multilateral reform project in the field of ISDS to date. This work has been entrusted to Working Group III (WG III). The Working Group was first tasked with identifying and considering concerns regarding ISDS, before moving on to assess possible reform options and develop draft provisions. These drafts are discussed and negotiated in successive sessions with a view to producing reforms capable of adoption or implementation by states.⁴²³

Against this institutional background, the following section focuses on Working Group III, where UNCITRAL’s current ISDS reform work has been developed. It is within this process that investor obligations have entered the multilateral reform debate, not as independent obligations, but through the

⁴¹⁸ UNGA Res 2205 (XXI) ‘Establishment of the United Nations Commission on International Trade Law’ (17 December 1966) UN Doc A/RES/2205(XXI), section I.

⁴¹⁹ UNGA Res 2205 (XXI), section II, para 8(c); UNCITRAL, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law* (United Nations 2013) paras 1, 32–33, 46.

⁴²⁰ UNCITRAL, *A Guide to UNCITRAL* (n 419) para 1.

⁴²¹ *ibid* paras 10, 16–17, 22–23.

⁴²² Chiara Giorgetti, ‘The Transformation of International Organizations: Specialization, New Initiatives, and Working Methods: Some Observations on the Work of UNCITRAL Working Group III’ (2023) 26 *Journal of International Economic Law* 40, 42.

⁴²³ *ibid* 43–45; UNCITRAL, ‘Report of the United Nations Commission on International Trade Law, Fiftieth Session (3–21 July 2017)’ UN Doc A/72/17, paras 242–264.

procedural question of whether respondent states should be able to rely on such obligations when bringing counterclaims.

5.1 Working Group III and ISDS Reform

In July 2017, the Commission entrusted WG III with ‘a broad mandate to work on the possible reform of investor-State dispute settlement’ and further agreed that ‘broad discretion should be left to the Working Group in discharging its mandate’.⁴²⁴ During the initial discussions, states expressed different views on the possible direction of ISDS reform.⁴²⁵ At the same time, there was broad agreement that the reform process should proceed without prejudging its outcome or excluding particular options. The Commission also recorded a general preference for work to cover ‘the widest range of issues and possible solutions.’⁴²⁶ There was also general support for allowing the Working Group to determine the specific issues to be considered,⁴²⁷ while the process was to remain government led.⁴²⁸ At the same time, some delegations emphasised that ISDS reform should not be confined to procedural issues, but should also encompass broader substantive aspects of IIAs, including states’ right to regulate, FET, expropriation and due process. However, work on substantive standards was regarded as less feasible than reform of procedural aspects.⁴²⁹

This institutional setting is important because the treatment of investor obligations in WG III turns on the distinction between procedural reform and substantive treaty obligations. The distinction between substance and procedure has been a recurring issue in the multilateral reform negotiations. However, disagreement remains as to whether certain matters fall within WG III’s mandate, particularly issues such as damages and compensation, the right to regulate and, for the purposes of this thesis, counterclaims. According to Guntrip, Paine and Titi, whether substantive aspects of investor-State dispute settlement fall within WG III’s mandate depends on the context and, ultimately, on state consent.⁴³⁰

At WG III’s first session devoted to possible ISDS reform, held in November and December 2017, the Working Group acknowledged that ‘critical questions’ concerning reform involved the underlying substantive rules. At the

⁴²⁴ UNCITRAL, ‘Fiftieth Session Report’ UN Doc A/72/17 (n 423) para 264.

⁴²⁵ For the discussions surrounding possible reform, see *ibid* paras 242–264.

⁴²⁶ *ibid* para 254.

⁴²⁷ *ibid* para 254.

⁴²⁸ *ibid* para 250.

⁴²⁹ *ibid* para 257.

⁴³⁰ Eric Guntrip, Joshua Paine and Catharine Titi, ‘The Intersection of Substance and Procedure in the Work of UNCITRAL Working Group III: The Questions of Damages, the Right to Regulate and Counterclaims’ Academic Forum on ISDS Concept Paper 2025/2 (20 March 2025) 1.

same time, it clarified that its mandate was directed primarily at the procedural aspects of dispute settlement, rather than the substantive provisions of investment treaties.⁴³¹ The issue of counterclaims was also discussed in light of this procedural focus. In that context, it was reiterated that the substantive obligations themselves were not the focus of WG III's work, while a distinction was drawn between the obligations contained in investment treaties and the dispute settlement mechanisms through which those obligations are enforced.⁴³²

This procedural understanding was reaffirmed at WG III's Thirty-Fifth Session in April 2018, where it was underlined that the Working Group's mandate was understood to concern the procedural aspects of ISDS rather than the underlying investment protection standards, in order to keep reform 'feasible and achievable'.⁴³³ The same position was reiterated at the Thirty-Seventh Session in April 2019, when WG III considered additional concerns not yet addressed in its deliberations.⁴³⁴ Although regulatory chill was identified as a concern, including the possibility that ISDS or the threat of ISDS could discourage states from regulating in the public interest, WG III agreed not to address it as a separate concern at that stage. Instead, the potential impact of ISDS on states' regulatory policy was to guide the broader reform work.⁴³⁵

Guntrip, Paine and Titi note that, under the original mandate conferred on WG III, substantive standards of investment protection, such as FET and expropriation, have consistently been treated as falling outside its scope, while purely procedural issues relating to dispute settlement clearly fall within it. Counterclaims, however, occupy a grey area between procedure and substance. They concern the procedural ability of a respondent state to bring a claim against an investor, but their operation depends on the existence of substantive obligations capable of supporting such a claim. The extent to which counterclaims fall within WG III's mandate has therefore remained contentious, since procedural rules on counterclaims are likely to be shaped by the form and content of the underlying investor obligations.⁴³⁶

⁴³¹ UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November–1 December 2017)' UN Doc A/CN.9/930/Rev.1, para 20.

⁴³² UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November–1 December 2017): Part II' UN Doc A/CN.9/930/Add.1/Rev.1 paras 3–6.

⁴³³ UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session (New York, 23–27 April 2018)' UN Doc A/CN.9/935 para 18.

⁴³⁴ UNCITRAL, 'Report of 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 26–27.

⁴³⁵ *ibid* paras 36–37.

⁴³⁶ Guntrip, Paine and Titi (n 430) 3, 6.

Against this background, counterclaims are particularly important for the present thesis because they are the point at which investor obligations enter WG III's reform work most directly.

5.2 Draft Provision 10 on Counterclaims

When WG III first considered counterclaims, it reaffirmed the procedural focus of its mandate and noted the distinction between substantive obligations contained in investment treaties and the dispute settlement mechanisms through which those obligations are enforced.⁴³⁷ On that basis, counterclaims were not excluded from the Working Group's work. Rather, they could be considered insofar as they concern the procedural ability of a respondent state to bring a counterclaim, provided that the state can identify an independent legal basis for that claim.⁴³⁸

At WG III's Thirty-Seventh Session in April 2019, the relationship between procedure and substance was addressed more directly in the context of counterclaims. The Working Group considered proposals suggesting that investor obligations warranted further attention and noted that such obligations were closely connected to a state's ability to raise a counterclaim.⁴³⁹ By the Thirty-Ninth Session in October 2020, WG III had drawn a clearer distinction between the procedural dimension of counterclaims and the substantive obligations on which they may be based. The Working Group noted that counterclaims raised two distinct aspects: first, the procedural issues of admissibility and the jurisdiction of tribunals to examine counterclaims, and secondly, the substantive obligations of investors whose breach would form the basis of such counterclaims. On the procedural side, it was emphasised that ISDS reform should not foreclose the possibility of respondent states bringing counterclaims against investors where a legal basis exists. It was also noted that such a framework could allow related claims to be heard together by a tribunal with relevant expertise, thereby avoiding multiple proceedings. Issues of jurisdiction, admissibility and consent to counterclaims were therefore treated as procedural matters capable of falling within the Working Group's mandate.⁴⁴⁰ By contrast, the investor obligations forming the legal basis of counterclaims were characterised as substantive matters outside the mandate. This was because any examination of such obligations would touch upon the

⁴³⁷ UNCITRAL, 'Thirty-Fourth Session Report, Part II' UN Doc A/CN.9/930/Add.1/Rev.1 (n 432) para 6.

⁴³⁸ UNCITRAL, 'Thirty-Fourth Session Report, Part II' UN Doc A/CN.9/930/Add.1/Rev.1 (n 432) para 7.

⁴³⁹ UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Multiple Proceedings and Counterclaims' (Note by the Secretariat, 22 January 2020) UN Doc A/CN.9/WG.III/WP.193 para 40.

⁴⁴⁰ UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020)' UN Doc A/CN.9/1044 paras 57–58.

content of investment treaties and contracts, and potentially also obligations not yet reflected in existing treaties, including those relating to human rights, the environment and corporate social responsibility. At the same time, WG III noted that counterclaims may arise where an investor has breached such obligations. It also observed that investor conduct is often taken into account in the final award, and that any counterclaim mechanism would need to address the required connection between the counterclaim and the investor's claim.⁴⁴¹ In light of this distinction, WG III requested the UNCITRAL Secretariat to continue work on counterclaims with a focus on their procedural aspects. The Secretariat was asked to prepare model clauses addressing consent to counterclaims, tribunal jurisdiction and the conditions of admissibility, including the required factual link with the primary claim. At the same time, WG III acknowledged the relevance of substantive law by suggesting exploratory work on existing sources of investor obligations that could provide the legal basis for counterclaims.⁴⁴²

The tension between procedure and substance in the treatment of counterclaims resurfaced at the Fourth Intersessional Meeting on ISDS Reform, later reported to WG III at its Forty-Second Session in February 2022. Various views were expressed on whether it would be appropriate for WG III to discuss substantive obligations as the legal basis for counterclaims. While some emphasised that the mandate from the Commission focused on procedural aspects of ISDS, and that work on counterclaims should therefore remain procedurally focused, others argued for a broader interpretation of the mandate in order to achieve a more balanced approach.⁴⁴³

WG III subsequently requested the UNCITRAL Secretariat to continue its work on counterclaims with a focus on procedural aspects,⁴⁴⁴ which has since led to the inclusion of a draft provision on counterclaims in the Draft provisions on procedural and cross-cutting issues.⁴⁴⁵ In its first version, it was numbered Draft Provision 11:

1. When a claim is submitted for resolution pursuant to Draft Provisions 3 or 4, the respondent may make a counterclaim:

(a) Arising directly out of the subject matter of the claim;

⁴⁴¹ *ibid* paras 59, 60.

⁴⁴² *ibid* paras 61–63.

⁴⁴³ UNCITRAL, 'Summary of the Inter-Sessional Meeting on Investor-State Dispute Settlement (ISDS) Reform Submitted by the Government of the Republic of Korea' UN Doc A/CN.9/WG.III/WP.214 para 36.

⁴⁴⁴ UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural Reform' (Note by the Secretariat, 11 July 2022) UN Doc A/CN.9/WG.III/WP.219 para 46.

⁴⁴⁵ UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural and Cross-Cutting Issues' (Note by the Secretariat, 26 July 2023) UN Doc A/CN.9/WG.III/WP.231.

(b) In connection with the factual and legal basis of the claim; or

(c) That the claimant has breached its obligations under the Agreement, domestic law, an investment contract or any other instrument binding on the claimant.

2. For the avoidance of doubt, the consent of the respondent to the submission of a claim by the claimant is subject to the condition that the claimant consents to any submission of a counterclaim referred to in paragraph 1.⁴⁴⁶

The annotations to the initial 2023 counterclaim provision pointed out that the investor obligations forming the basis of a counterclaim were not specified, but only indicated where such obligations might be found. The annotations also suggested that WG III may wish to consider whether a substantive provision imposing obligations on investors was needed.⁴⁴⁷ This reflected a broader division within the Working Group. At the Forty-Sixth Session in October 2023, some delegations considered that counterclaims deserved further attention, while others maintained that counterclaims and related issues fell outside WG III's mandate because they addressed substantive obligations and policy choices.⁴⁴⁸ This issue also appeared in state comments submitted in advance of WG III's Forty-Seventh Session in January 2024. Argentina suggested the possible development of a provision on investor obligations, while Colombia called for greater clarity as to the obligations whose breach could give rise to a counterclaim.⁴⁴⁹

The revised version of the draft provisions on procedural and cross-cutting issues was published by the Secretariat in July 2024. In that version, the counterclaim provision retained the same basic structure but was renumbered as Draft Provision 10 and supplemented by a paragraph requiring counterclaims

⁴⁴⁶ *ibid* Draft Provision 11.

⁴⁴⁷ UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Annotations to the Draft Provisions on Procedural and Cross-Cutting Issues' (Note by the Secretariat, 31 July 2023) UN Doc A/CN.9/WG.III/WP.232 para 28.

⁴⁴⁸ UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-sixth session' (Vienna, 9–13 October 2023) UN Doc A/CN.9/1160 para 97.

⁴⁴⁹ Argentina, 'Comentarios de la República Argentina sobre el documento A/CN.9/WG.III/WP.231' (submitted to UNCITRAL Working Group III) 3, comments on Disposición 11 <https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/comentarios_argentina_wp.231.pdf> accessed 21 May 2026: 'With respect to subparagraph 1(c), which allows counterclaims to be brought on the basis of the investor's breach of obligations, it is suggested that consideration be given to the possibility of developing a provision concerning investor obligations' (translation by the author); Colombia, 'Comments from the Republic of Colombia on Draft Provisions on Procedural and Cross-Cutting Issues Prepared by the UNCITRAL Secretariat' (submitted to UNCITRAL Working Group III, 12 January 2024) para 18 <https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/comments_from_colombia_0.pdf> accessed 21 May 2026.

to be made no later than in the statement of defence, unless the delay was justified.⁴⁵⁰

The accompanying annotations again noted that the provision did not itself specify the investor obligations capable of forming the basis of a counterclaim. They also repeated that the Working Group may wish to consider whether a substantive provision imposing obligations on investors was needed.⁴⁵¹ At the Forty-Ninth Session in September 2024, there was nevertheless support for developing Draft Provision 10, with counterclaims described as capable of enhancing procedural efficiency, avoiding multiple proceedings, and addressing the asymmetry between respondent states and claimants. At the same time, concerns were again raised regarding the source and scope of investor obligations capable of providing the legal basis for a counterclaim.⁴⁵²

Writing before the June 2025 revision and the Working Group's Fifty-Third Session, Guntrip, Paine and Titi therefore conclude that, despite resistance from some states, there appeared to be broad acceptance that procedural reforms concerning counterclaims fell within WG III's mandate. At the same time, WG III kept open the possibility of considering substantive provisions that could provide the legal foundation for counterclaims. This remained contested, however, as some states supported including investor obligations within WG III's work, while others resisted any expansion of the mandate beyond its procedural remit.⁴⁵³

Following the Working Group's Forty-Ninth session, disagreement over this revised counterclaim provision continued in written comments. Saudi Arabia objected to Draft Provision 10 in broad terms, arguing that the provision could have a norm-setting effect, that it was unclear whether an investor's submission of a claim should be treated as tacit or implied consent to counterclaims, and that the provision might broaden the power of tribunals to interpret and apply domestic law. Saudi Arabia therefore preferred deleting Draft Provision 10 entirely, or at least limiting it to counterclaims arising directly out of the subject matter of the claim.⁴⁵⁴ ICSID, in more technical comments, observed

⁴⁵⁰ UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural and Cross-Cutting Issues' (Note by the Secretariat, 8 July 2024) UN Doc A/CN.9/WG.III/WP.244, Draft Provision 10; UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Annotations to the Draft Provisions on Procedural and Cross-Cutting Issues' (Note by the Secretariat, 8 July 2024) UN Doc A/CN.9/WG.III/WP.245 para 38.

⁴⁵¹ UNCITRAL, 'Annotations to the Draft Provisions on Procedural and Cross-Cutting Issues' UN Doc A/CN.9/WG.III/WP.245 (n 450) para 38.

⁴⁵² UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-ninth session' (Vienna, 23–27 September 2024) UN Doc A/CN.9/1194 paras 71, 74–77.

⁴⁵³ Guntrip, Paine and Titi (n 430) 8.

⁴⁵⁴ UNCITRAL, 'Compilation of Comments Received on the Draft Provisions on Procedural and Cross-Cutting Issues (A/CN.9/WG.III/WP.244)' (as of 1 April 2025) 39, comments

that counterclaims were already addressed in procedural rules, including Article 46 of the ICSID Convention and ICSID Arbitration Rule 48. However, ICSID also noted that Draft Provision 10 was broader than the ICSID framework because it extended to counterclaims in close connection with the factual or legal basis of the claim.⁴⁵⁵

The most recent Secretariat draft addressing Draft Provision 10 was issued in June 2025. In that draft, Draft Provision 10 on counterclaims was retained in a reformulated version:

1. Where a claim is submitted for resolution, the respondent may make a counterclaim:
 - (a) Arising directly out of the subject matter of the claim or in [close] connection with the factual or legal basis of the claim; and
 - (b) That the claimant has failed to comply with its obligations under the Agreement, domestic law, any relevant investment contract or any other instrument binding on the claimant.
2. The submission of a claim by the claimant constitutes its consent to the submission of any counterclaim by the respondent in accordance with paragraph 1.
3. A counterclaim shall be made no later than in the statement of defence, unless the Tribunal considers that the delay in the submission of the counterclaim was justified under the circumstances.
4. The respondent may not make a counterclaim, which it had initiated in another adjudicatory dispute resolution proceeding. When making a counterclaim, the respondent shall provide a statement that it will not initiate or continue any adjudicatory dispute resolution proceeding regarding the same claim.⁴⁵⁶

The accompanying annotations again highlighted the need to clarify the relationship between the two conditions in paragraph 1, in particular whether the required connection between the counterclaim and the investor's claim should be cumulative with the requirement that the counterclaim be based on the

of Saudi Arabia on Draft Provision 10 <https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/compilation_244_-_1_april.pdf> accessed 21 May 2026.

⁴⁵⁵ UNCITRAL, 'Compilation of Comments Received on the Draft Provisions on Procedural and Cross-Cutting Issues (A/CN.9/WG.III/WP.244)' (as of 1 April 2025) 39, comments of ICSID on Draft Provision 10 <https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/compilation_244_-_1_april.pdf> accessed 21 May 2026..

⁴⁵⁶ UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural and Cross-Cutting Issues' (Note by the Secretariat, 30 June 2025) UN Doc A/CN.9/WG.III/WP.253 Draft Provision 10.

claimant's failure to comply with relevant obligations.⁴⁵⁷ Draft Provision 10 was then considered at the Working Group's Fifty-Third session in January 2026. The subsequent development of Draft Provision 10 is reflected in the report of that session rather than in a new consolidated draft text. Divergent views remained. One view was that Draft Provision 10 could restore balance between investors and states by permitting disputes to be resolved more comprehensively. Another view was that the provision should be more limited, since counterclaims raise questions of consent to jurisdiction and may affect the equality of the parties.⁴⁵⁸ The Working Group therefore considered several proposals concerning the required connection between the counterclaim and the investor's claim. In relation to paragraph 1(a), suggestions included retaining only one of the two connecting bases, making the two bases cumulative by replacing 'or' with 'and', retaining only counterclaims 'arising directly out of the subject matter of the claim', or replacing the reference to a 'close' connection with a 'direct' connection. The approved text retained the two connecting bases in paragraph 1(a) as alternatives, but tightened the second limb by requiring a 'direct connection' with the factual or legal basis of the claim. It also retained the cumulative relationship between paragraph 1(a) and paragraph 1(b), so that a counterclaim must both have the required connection with the claim and concern the claimant's alleged failure to comply with legal obligations to the respondent.⁴⁵⁹

The discussion of paragraph 1(b) again revealed the unresolved relationship between counterclaim procedure and investor obligations. Some delegations suggested deleting the subparagraph on the basis that investor obligations were generally not found in investment treaties. Others considered it necessary to clarify the instruments that could provide the legal basis of a counterclaim. Concerns were also raised that the earlier reference to 'any other instrument binding on the claimant' was too broad and ambiguous.⁴⁶⁰ Domestic law proved especially controversial. Some delegations considered domestic law an important source of obligations for counterclaims, while others objected that domestic law should not fall within the jurisdiction of an international tribunal unless the disputing parties had clearly consented to this.⁴⁶¹ The approved text reflected these concerns by substantially narrowing paragraph 1(b). It removed the earlier list of possible sources, including the express references to domestic law and investment contracts, and reformulated

⁴⁵⁷ UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Annotations to Draft Provisions on Procedural and Cross-Cutting Issues' (Note by the Secretariat, 30 June 2025) UN Doc A/CN.9/WG.III/WP.254 para 48.

⁴⁵⁸ UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fifty-third session' (New York, 12–16 January 2026) UN Doc A/CN.9/1239 paras 10, 15 and 39.

⁴⁵⁹ *ibid* paras 40, 45.

⁴⁶⁰ *ibid* para 41.

⁴⁶¹ *ibid* paras 42–43.

the provision around the claimant's failure to comply with legal obligations owed to the respondent.⁴⁶²

1. Where a claim is submitted for resolution, the respondent may make a counterclaim:

- (a) Arising directly out of the subject matter of the claim or in direct connection with the factual or legal basis of the claim; and
- (b) That the claimant has failed to comply with its legal obligations to the respondent, including under any legally binding instrument to which the respondent is a party.⁴⁶³

Paragraph 2, which provides that the claimant's submission of a claim constitutes consent to the respondent's counterclaim, was also debated. Some delegations expressed concern that consent to counterclaims could not simply be deemed, and that the counterclaim must remain within the scope of the relevant instrument of consent. Others supported the provision because it addressed the recurring jurisdictional obstacle that tribunals may otherwise lack consent over state counterclaims. The Working Group ultimately approved paragraph 2 unchanged, while noting that, because it concerns consent to jurisdiction, it should be formulated as a treaty provision.⁴⁶⁴ Paragraph 3, concerning the time for submitting a counterclaim, was also approved unchanged.⁴⁶⁵

Paragraph 4, which would have required the respondent to waive the right to initiate or continue certain other adjudicatory proceedings after making a counterclaim, was deleted. The Working Group noted several difficulties with the paragraph, including whether it could affect domestic criminal proceedings, how it would apply where a counterclaim was dismissed or withdrawn, and how a state would provide such a waiver in practice. It was agreed instead that Draft Provision 15 on waiver would be developed so as to also address counterclaims.⁴⁶⁶

⁴⁶² A/CN.9/WG.III/WP.253, Draft Provision 10(1)(b); UNCITRAL, 'Fifty-Third Session Report' UN Doc A/CN.9/1239 (n 458) paras 44–45.

⁴⁶³ UNCITRAL, 'Fifty-Third Session Report' UN Doc A/CN.9/1239 (n 458) para 45.

⁴⁶⁴ *ibid* paras 46–47.

⁴⁶⁵ *ibid* para 48.

⁴⁶⁶ *ibid* paras 49–51. See also UNCITRAL, 'Draft Provisions on Procedural and Cross-Cutting Issues' UN Doc A/CN.9/WG.III/WP.253 (n 456) Draft Provision 15, 'Waiver of rights to initiate adjudicatory dispute resolution proceeding', which requires waiver of the right to initiate or continue any other adjudicatory dispute resolution proceeding 'with respect to the same subject matter, including the measure alleged to constitute a breach of the Agreement'.

The result of this drafting process is that Draft Provision 10 does not itself create investor obligations, but strengthens the procedural possibility for states to invoke such obligations where a legal basis can be identified.

5.3 Interim Conclusions

These developments show that UNCITRAL WG III addresses investor obligations indirectly, through the procedural reform of counterclaims. The Working Group has not treated investor obligations as an independent reform objective or as a freestanding substantive code of conduct for investors. Instead, investor obligations enter the reform process as a potential legal foundation for respondent state counterclaims. In this sense, Draft Provision 10 does not itself create investor obligations, but strengthens the procedural possibility for states to invoke such obligations where a legal basis can be identified.

This confirms the dual character of counterclaims within the WG III process. On the one hand, the Working Group has continued to treat counterclaims as a matter capable of procedural reform, particularly in relation to jurisdiction, consent, admissibility, timing and parallel proceedings. On the other hand, the drafting history shows continued caution about using Draft Provision 10 to formulate substantive investor obligations. The revisions made at the Fifty-Third session are especially important in this respect. The narrowing of paragraph 1(b), the deletion of express references to domestic law and investment contracts, and the decision to treat paragraph 2 as treaty language all suggest that WG III remains cautious about relying on procedural reform alone to expand the availability of counterclaims. Instead, the counterclaim mechanism remains tied to the existence of consent, jurisdiction and an identifiable legal obligation owed by the investor.

The rebalancing role assigned to investor obligations is therefore limited but significant. It is limited because Draft Provision 10 does not alter the basic asymmetry of investment treaties by imposing general obligations on investors. Nor does it give states an automatic right to bring counterclaims. A respondent state must still identify a relevant legal obligation owed by the investor, show the required connection between the counterclaim and the investor's claim, and establish that the tribunal has jurisdiction over the counterclaim. However, the role is significant because counterclaims provide a procedural mechanism through which investor conduct can be addressed within the same dispute. This may reduce the one-sided character of ISDS by allowing respondent states not only to defend regulatory measures, but also to invoke investor misconduct where that misconduct has contributed to the dispute or caused harm to the State.

For the purposes of the sub-question, the UNCITRAL reform process therefore suggests a cautious and procedural model of rebalancing. Investor obligations are not placed at the centre of the reform agenda as autonomous substantive duties. Rather, they are treated as legally relevant when they can support state counterclaims within the limits of consent, jurisdiction and the applicable legal framework. This approach may improve the capacity of ISDS to accommodate public-interest concerns and respondent State claims, but it does so without fundamentally transforming the underlying structure of investment protection.

6 Final Conclusions

6.1 Investor Obligations as a Qualified Mechanism of Reconciliation

This thesis set out to examine to what extent investor obligations constitute a viable mechanism for reconciling investment protection with states' right to regulate in the public interest in international investment law. The answer advanced in this thesis is that investor obligations are viable, but only to a limited and conditional extent. They constitute a meaningful mechanism for rebalancing investment law insofar as they allow investor conduct to be brought into the same legal framework as investor rights and state regulatory authority. However, they do not, in their present form, fundamentally transform the structure of international investment law. This conclusion is supported by both arbitral practice and ongoing reform efforts: the former demonstrates the current legal possibilities and limits of investor obligations, while the latter shows the conditions under which they may become a more effective tool for rebalancing the investment treaty regime.

The starting point of the analysis has been that the tension between investment protection and the right to regulate should not be understood as a conflict between regulation and investment protection as such. States retain the sovereign authority to regulate in the public interest, including in areas such as public health, environmental protection, public safety and economic policy. The difficulty lies instead in how that authority operates within a treaty regime that grants enforceable rights to foreign investors and imposes international obligations primarily on host states. In this respect, the right to regulate does not remove the relevance of investment protection standards. It operates within, and is limited by, those standards.

Against this background, investor obligations offer a potential means of addressing one of the central asymmetries of international investment law. Traditional investment treaties have largely been structured around investor rights and state obligations. Even where newer treaties contain more detailed provisions preserving regulatory autonomy, the investor's own conduct often remains only indirectly relevant. Investor obligations respond to this imbalance by making it possible to ask not only whether the state has breached the investor's rights, but also whether the investor has complied with obligations connected to the investment, the host state's legal order, or broader public-interest concerns.

The relevance of investor obligations is therefore more specific. They do not expand the state's right to regulate as such, but instead allow investor conduct to be considered when disputes concerning public-interest regulation are

assessed. Where an investor has breached obligations owed under the applicable treaty, domestic law, an investment contract or another relevant legal source, that conduct may affect how the tribunal evaluates the dispute. In this sense, investor obligations contribute to reconciliation by allowing responsibility to be allocated more appropriately between the state and the investor.

The viability of investor obligations depends on the interaction between substantive obligations and procedural mechanisms. A procedural mechanism such as a counterclaim cannot itself create investor obligations, but it may give effect to obligations grounded in a sufficiently clear legal source. Their effectiveness therefore depends not only on recognising investor obligations in principle, but also on ensuring that they can be invoked in practice.

6.2 Possibilities and Limits in Arbitral Practice

Arbitral practice supports the conclusion that investor obligations are possible within international investment law, but that their present role remains limited and case-specific. The awards examined in this thesis show that investor obligations have been most effective where they are grounded in an express treaty provision or in domestic law capable of being applied by the tribunal. Treaty-based obligations, as illustrated by *Al-Warraq*, may affect the tribunal's assessment of the investor's own claim, while domestic obligations, as illustrated by *Burlington* and *Perenco*, may provide a basis for counterclaims concerning harm to public interests. These examples show that investor obligations can have practical significance where they are connected to a clear legal source and an available procedural mechanism.

At the same time, arbitral practice also reveals the limits of investor obligations as a mechanism of reconciliation. The awards concerning broader international obligations, particularly *Urbaser* and *Aven*, demonstrate that tribunals may be open to the conceptual possibility of investor obligations in areas such as human rights and environmental protection. However, they also confirm that such openness is insufficient without a clear obligation that can be applied in the dispute. Investor obligations therefore remain dependent on the applicable treaty, domestic law, jurisdictional requirements and the tribunal's approach to the relevant source of law.

The significance of arbitral practice is therefore not that it has established investor obligations as a general feature of international investment law. Rather, it shows that investor obligations can contribute to rebalancing in specific circumstances. Their current role is important because it demonstrates the practical possibility of treating investor conduct as legally relevant within ISDS. However, it also confirms that this possibility remains fragmented and uncertain unless supported by clearer substantive obligations and effective procedural mechanisms.

6.3 Reform and the Rebalancing of Investment Law

The reform potential of investor obligations lies in their ability to address both dimensions of the asymmetry identified in this thesis. Substantively, they challenge the traditional structure in which investment treaties confer enforceable rights on investors while placing obligations primarily on states. Procedurally, their invocation through counterclaims may give respondent states a more effective avenue to rely on investor misconduct within the same proceedings as the investor's claim. Investor obligations therefore have particular relevance as a reform tool because they link the substantive question of investor responsibility with the procedural question of how that responsibility can be enforced.

The reform efforts examined in this thesis nevertheless show that this potential is still approached cautiously. UNCITRAL WG III addresses investor obligations indirectly, through the procedural reform of counterclaims. Draft Provision 10 may improve the ability of respondent states to invoke investor obligations where a legal basis already exists, but it does not itself create such obligations. This confirms that the current reform process does not seek to transform investment treaties into fully reciprocal instruments. Rather, it seeks to make space within ISDS for respondent state claims, while leaving the substantive existence and scope of investor obligations to be determined by the applicable treaty, domestic law, investment contract or other relevant legal source.

This cautious approach has both strengths and weaknesses. Its strength is that it offers a practical and legally modest way of improving the balance of ISDS without requiring a complete restructuring of the investment treaty regime. By allowing counterclaims to be heard in appropriate cases, reform can reduce the one-sided character of investor-state arbitration and make investor conduct more visible in disputes involving public-interest regulation. Its weakness is that procedural reform alone cannot resolve the deeper asymmetry of the regime. If investor obligations remain unclear, fragmented or dependent on external sources of law, counterclaims will remain available only in limited circumstances.

The future viability of investor obligations therefore depends on the relationship between substantive clarification and procedural enforceability. Clearer treaty provisions on investor obligations would strengthen their normative basis, while effective counterclaim mechanisms would improve their practical operation. Without both elements, investor obligations risk remaining relevant only in exceptional cases. With both elements, however, they may become a more predictable mechanism for integrating investor responsibility into international investment law.

Investor obligations should therefore be understood as a reform tool with meaningful but limited potential. They do not limit the protective function of investment treaties, nor do they remove the constraints that investment law places on states. Their importance lies instead in their ability to make the investment treaty regime less one-sided by allowing investor conduct to be assessed alongside public-interest regulation and investment protection. To that extent, they can contribute to reconciling investment protection with states' right to regulate in the public interest. At present, however, that contribution remains conditional on clearer substantive obligations and procedural mechanisms capable of giving them effect.

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