Institut suisse de droit comparé
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Swiss Institute of Comparative Law

E-Avis ISDC 2023

LEGAL OPINION ON INVESTOR OBLIGATIONS

Canada, European Union, Japan, Netherlands, and United States of America

Current to: 14.06.2023

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E-Avis ISDC
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Recommended citation: K. Nadakavukaren / R. Polanco Lazo, Legal opinion on investor obligations, current to : 14.06.2023, *E-Avis ISDC 2023* (www.isdc.ch)

EXECUTIVE SUMMARY

The question of investor obligations is vigorously discussed within the investment law community as newer treaties are being drafted to redress the perceived asymmetries in the system of investor-host state relations. The expansion of treaty language to include acknowledgments of state interests in protecting the environment and human rights, as well as in combatting corruption, is notable. This language, however, is mainly directed at the State Parties. Despite calls for "investor obligations," there are few clear demands appearing in international investment agreements that demand action by investors.

There are few provisions labeled "investor obligations," but a variety of provisions are appearing that direct State Parties to control investors. We see four main types of provisions that may oblige investors: legality provisions; provisions asking for responsible business conduct (or corporate social responsibility); provisions on investor liability; and provisions with information requirements. Few of these, however, directly bind investors to act.

Human rights provisions in the IIAs studied are mainly oriented toward State Parties and are largely hortatory or best-efforts. The human rights provisions we studied are mainly general reaffirmations of the importance of "human rights," although some treaties mention particular groups or rights. There are numerous non-derogation provisions and recognitions of the legitimacy of regulating to protect human rights, which will have impacts on the investor's ability to launch a successful claim against a host. The rare human rights obligation found is that of the Netherlands' Model BIT, which makes adherence to corporate social responsibility mandatory for investors.

Environmental protection provisions are widely found throughout IIAs but are again rarely directed toward investors. State Parties are given policy flexibility to protect their environments through non-derogation provisions, general exceptions, defining of "legitimate policy" to include environmental protection, and the use of sustainable development and responsible business conduct provisions. Similar to references to human rights, the provisions are largely hortatory. The Model BITs of Canada (FIPA) and the Netherlands, however, contain binding language in responsible business conduct provisions that would oblige investors to adhere to the host's environmental laws.

Combatting corruption is an important goal of the international community and one that has gained attention in the investment context. The refusal to find jurisdiction over investments made through corrupt dealings is widespread among tribunals, and an increase in provisions limiting the scope of treaty protections will solidify this trend. There are, however, few positive obligations on investors to avoid corruption found in the studied IIAs. Many of the agreements have extensive sections on the State Parties' obligations to combat corruption. For investors, the foreclosing of dispute settlement procedures in case of corrupt investments may have the practical effect of prohibiting corruption, but that remains conjecture.

Counterclaims are another area of widely varying ideas in the investment law community. Numerous tribunal decisions on different aspects of counterclaims highlight the importance clear IIA language could have on a host's ability to bring a counterclaim against an investor's claim against it. However, here, too, there is a paucity of findings of new developments among the IIAs studied. With the notable exception of CPTPP and the EU-Chile Advanced Framework Agreement, nearly all fail to give hosts a clear right to bring a counterclaim based on an investor's failure to act in accordance with international law.

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I. FACTS

SECO has mentioned as a background document the OECD Working Paper "Business Responsibilities and investment treaties" (2020), in particular Annex A. For that reason, we will refrain from an in-depth discussion about that paper here. However, we mention the provisions cited in that report when they incorporate investor obligations.[1]

II. QUESTIONS

The State Secretariat for Economic Affairs (SECO) has requested a report concerning investor obligations in international investment agreements (IIAs), with a thematic focus on human rights, the environment, corruption (e.g., due diligence obligations for investors), and counterclaims.

SECO is interested in an overview of the developments of the treaty practice, a comparison and assessment of the different provisions, as well as a reference to investor-State dispute settlement (ISDS) decisions in these topics.

For the purpose of this report, SECO has defined certain treaties and model instruments as priorities, namely, the 2016 Comprehensive Economic and Trade Agreement (CETA); the 2016 United States – Mexico – Canada Agreement (USMCA); the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); Canada's Foreign Investment Promotion and Protection Agreement (FIPA) Model (2021); the US Model Bilateral Investment Treaty (2012); and the Netherlands Model Investment Agreement (2019). Japanese treaty practice is also to be surveyed. References to other agreements concluded by the European Union (EU) are welcomed.

A detailed list of the agreements examined in this legal opinion is found in Annex 1. To avoid repetition, for an analysis of CETA and the EU – Japan Economic Partnership (2018), see the EU section. Likewise, for an analysis of the CPTPP, see the Canada section, and for the analysis of the USMCA, see the US section.

III. ANALYSIS

1. General Overview of Investor Obligations in IIAs

International investment agreements are "international conventions," or "treaties," as defined by the Vienna Convention on the Law of Treaties: written agreements between States.[2] As such, these agreements bind the (State) Parties to the agreement to fulfill the obligations set out therein. *Pacta sunt servanda* – underlain by the concept of good faith – is the basic rule that governments must follow in this respect.

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1 David Gaukrodger (2021), "Business responsibilities and investment treaties", OECD Working Papers on International Investment, No. 2021/02, OECD Publishing, Paris, https://doi.org/10.1787/4a6f4f17-en.

2 Vienna Convention on the Law of Treaties, Art. 2(1).

Most treaties contain rights and obligations of states, and the deeply established principle of such rights and obligations is that they are limited to the State Parties to the treaty.[3] The principle of *pacta tertiis nee nocent nee prosunt* ("a treaty binds the parties and only the parties") is firmly established.[4] There are exceptions to this principle; both, however, are dependent on the assent of the non-Party.

One exception is that a treaty may create benefits for another State, group of states, or international organization. For such Third Party benefits, there is a presumption that the beneficiary will agree to them, such that silence can be implied to indicate a non-Party's assent to receiving the benefit from the treaty.[5]

International law takes a different approach to Third Party obligations. Such are only binding if two conditions exist. First, the treaty Parties must "intend the provision to be the means of establishing the obligation."[6] That is, the treaty itself is meant to be the origin of the obligation, not merely a recording of an obligation arising elsewhere. Second, the Third Party must explicitly agree to be bound by the obligation (i.e., it "expressly accepts that obligation in writing"[7]).

There is significant discussion in the literature on treaty law of the characterization of benefits and obligations and the resulting requirements of assent, particularly in the context of treaties offering both rights and obligations to a third party.[8] These discussions, however, are not relevant to the questions presented here. More relevant, perhaps, are the discussions on the permissibility of revoking third-party benefits: a commonly drawn conclusion from the Permanent Court of International Justice's decision in the *Case of the Free Zones of Upper Savoy and the District of Gex* is that third-party benefits may not be eliminated by the treaty Parties without the consent of the third party.[9]

1.1. Investment Treaties as Offering Benefits to Individuals (Rather than to States)

Unlike most international treaties, IIAs traditionally contain substantive and procedural provisions that are enforceable by either the State parties or by private persons (generally by nationals of the State Parties). The invocation of the rights offered to the investor may be made by an investor of one Party bringing a dispute against the other Party for that Party's alleged violation of a treaty provision.

This means that the provisions of international treaty law are not necessarily applicable. Indeed, the debate over whether the general rules of international treaty law, whether as customary or as treaty law, apply to state-individual relationships was fierce, and ultimately, the International Law Commission set it aside for purposes of the Vienna Convention discussions.[10] It may be noted, however, that the Commission members opposed including any clear statement on the status of the

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3 For a discussion of third-party rights and obligations under the Vienna Convention on the Law of Treaties, see Malgosia Fitzmaurice, Third Parties and the Law of Treaties, in J.A. Frowein and R. Wolfrum, eds., 6 Max Planck Yearbook of United Nations Law 37-137, esp. 44-46 (2002).

4 VCLT Art. 34.

5 VCLT Art. 36(1). The following paragraph allows treaty Parties to set out specific assent procedures as conditions if they so wish. VCLT Art. 36(2).

6 VCLT Art. 35.

7 VCLT Art. 35.

8 E.g., Fitzmaurice at 52-55 (citing also Sinclair, Chinkin, and Kelsen)

9 PCIJ Ser. A/B, No. 48. But see Fitzmaurice at 87-91 (arguing that the Court in fact treated Switzerland as a contracting party to the agreement).

10 See Egon Schwelb, the Law of Treaties and Human Rights, 16:1 Archiv des Völkerrechts 1, 6-14 (1973) (recounting the disagreement between, inter alia, Waldock and Ago over the question of whether treaties offering benefits to individuals would be covered by the draft on the law of treaties).

individual in the law on treaties, but they did seem to agree that treaties could be drafted so as to afford individuals rights.[11] The same cannot be said for the status of obligations on individuals, as the suggestions made for the recognition of the individual's position in treaty law as regards "rights and obligations" failed to gain acceptance.[12]

1.2. Demands for Investor Obligations in IIAs

The appearance of such obligations in model language and treaty texts has been encouraged by the work of international intergovernmental and non-governmental organizations. A main actor in this area has been the UNCTAD, whose Investment Policy Framework for Sustainable Development (2015) suggests several ways that governments can consider when drafting and negotiating IIAs in order to align these agreements with sustainable development objectives.[13] The International Institute for Sustainable Development (IISD) also has formulated policy guidance for governments that includes referring to investor obligations in IIAs. That NGOs' model texts were among the earliest to include such language.[14]

1.3. Duties of Investors

The international treaty law context notwithstanding, the lack of investor obligations in IIAs offering investors the benefit of access to processes to enforce protections is criticized by some observers as "imbalanced." Indeed, this imbalance is one of the reasons behind the backlash against IIAs, prompting calls for a rebalancing of the international investment law by the insertion of investor obligations into these treaties. Few academic studies have addressed this issue, but their number has increased in recent years.[15]

Immediately following, we discuss in more detail provisions on legality applicable pre- or post-establishment, responsible business conduct/corporate social responsibility (CSR),

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11 Schwelb, supra n. 10 at 11.

12 Id.

13 UNCTAD, Investment Policy Framework for Sustainable Development (2015), pp. 77-78, available at: https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf (26.05.2023).

14 See IISD, Model International Investment Agreement for the Promotion of Sustainable Development (IIAPSD) (2004); Howard Mann, Konrad von Moltke, Luke Eric Peterson, and Aaron Cosbey, Model International Agreement on Investment for Sustainable Development (IAISD) (IISD, 2005). See particularly Mann et al. at 9-11 (Part 3: Obligations and Duties of Investors and Investments).

15 See: Crina Baltag, Riddhi Joshi, and Kabir Duggal (2023), "Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?", ICSID Review - Foreign Investment Law Journal, 7 March 2023, https://doi.org/10.1093/icsidreview/siac031; Nicolas Bueno, Anil Yilmaz Vastardis, and Isidore Ngueuleu Djeuga (2023), "Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses", The Journal of World Investment & Trade 24 N° 2, pp. 179-216. https://doi.org/10.1163/22119000-12340278; Ted Gleason (2021), "Examining Host-State Counterclaims for Environmental Damage in Investor-State Dispute Settlement from Human Rights and Transnational Public Policy Perspectives", International Environmental Agreements: Politics, Law and Economics 21 N° 3, pp. 427-44, https://doi.org/10.1007/s10784-020-09519-y; Markus Krajewski (2020), "A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application" 5 Business and Human Rights Journal, pp. 105-129, https://doi:10.1017/bhj.2019.29; and Nathalie Bernasconi-Osterwalder (2020), "Inclusion of Investor Obligations and Corporate Accountability Provisions in Investment Agreements", in Handbook of International Investment Law and Policy (Julien Chaisse, Leïla Choukroune, and Sufian Jusoh, eds.), Springer, pp. 1-20. https://doi.org/10.1007/978-981-13-5744-2_56-1.

investor/investment liability, and information provision requirements. Questions of corruption provisions are taken up with the legality discussions. Following this, we look at human rights and environmental provisions, assessing the extent to which they obligate investors to behave in certain ways. The issue of counterclaims is, as we see it, a matter of the consequences, and therefore discussed in those sections.

1.4. Conditions on Entry

a) Legality

Traditional investment agreements oblige to ensure the protection of nationals of the other treaty Party/Parties once an investment has been placed in the territory of the host. Investor protections, that is, are post-establishment obligations. Only very few investment treaties have pre-establishment obligations on state parties.

With no treaty limitations on their sovereign prerogative to admit investments, host states can – and frequently do – condition investor entry on certain behavioral or structural requirements. While pre-entry conditions generally are rarely set forth explicitly in traditional bilateral agreements, many do specify that investors must legally ("in accordance with host state law") establish an investment for the protections of the treaty to apply.[16] Such wording may be found in provisions on "admission and protection" of investments or in the definition of investment. These provisions ensure that hosts can limit their obligations regarding those commercial activities or sectors that are unwanted or otherwise restricted. Although pre-entry legality conditions could be invoked to question the existence of an investment once it is placed, we do not consider these *ex-ante* obligations further.

b) Legality and corruption

The legality provisions have gained attention in recent years thanks to their application to charges of corruption in the establishment of investments. Numerous tribunals have found that if the investor engages in, for example, fraud[17] or bribery[18] to establish a project, the investment itself may be considered void or not covered due to the violation of the legality condition. As the tribunal in *Inceysa* v. *El Salvador* explained, "it is clear [from the treaty text on legality] … that any investment made against the laws of El Salvador is outside the protection of the Agreement and, therefore, from the competence of this Arbitral Tribunal."[19]

While not all tribunals will hold illegal investments unprotectable if there is no reference to legality in the text[20], the increased visibility of the "corruption defense" cases before international arbitration tribunals in the past years underscores a trend that even absent explicit wording in IIAs, investors are

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16 Jarrett, Puig, and Ratner speak of "in conformity" provisions. Martin Jarrett, Sergio Puig, and Stephen Ratner, Toward Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals, Journal of Int'l Dispute Settlement 1, 5 (2021).

17 E.g., Inceysa Vallisoletana v. Republic of El Salvador, ICSID Case No. ARB/03/26 (award of 2 August 2006).

18 E.g., World Duty Free Company v. Republic of Kenya, ICSID Case No. ARB/00/7 (Award, 4 October 2006).

19 Award (English), para. 203. See also Fynerdale Holdings v. Czech Republic (2021) (legality clause is a jurisdictional requirement).

20 E.g., Saba Fakes v. Turkey (2010) (ICSID Convention does not have a legality requirement for the definition of "investment", so tribunal will not read one in); Tethyan Copper v. Pakistan (2017) (preambular language referring to legality is not binding).

being held to at least minimal behavioral standards with respect to establishing a covered investment even absent explicit wording in IIAs.

Newer language in IIAs referring to corruption would largely duplicate the results of the legality clause in the case of corruption upon entry but would make clear that investors engaging in corruption upon entry would not fall within the scope of the Agreement's provisions or dispute settlement mechanisms.

1.5. Conditions on operation

a) Legality

Tribunal approaches to illegality once an investment is made typically differ from the approach to illegality in making the investment. Once an investment is legally placed, it is presumptively covered by the treaty protections. The consequences of illegality (including corruption) would affect the tribunal's determination of whether a violation had occurred and/or the amount of compensation due.

Although the investor, like every person in the host territory, is bound by the host's laws, in some newer treaty texts, the State Parties are creating "investor obligation" provisions that place legality requirements on them for the operation of their investment. Examples of such include Article 7(1) of the Netherlands Model BIT (2019), holding that "[i]nvestors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws." Likewise, according to Article 9 of the Democratic Republic of the Congo-Rwanda BIT (2021), "Investors and their investments must comply with all applicable national laws and regulations of the Host State". Similar examples of such provisions are found in other BITs,[21] regional agreements,[22] and Model IIAs.[23] The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (AfCFTA) stipulates investors' mandatory compliance with both national and international law.[24]

Besides general post-establishment legality clauses, some treaties include commitments to comply with specific domestic laws, like compliance with tax laws and timely payment of tax liabilities,[25] an

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21 Brazil-India BIT (2020), Art. 11 a); India-Kyrgyzstan BIT (2019), Art. 11(i); India-Taiwan Province of China BIT (2018), Art. 11(a); Intra-MERCOSUR Investment Facilitation Protocol (2017), Art. 13.1. A similar example is found in the Iran-Slovakia BIT (2016): under Art. 1.2, the investment shall be "made and maintained in accordance with the laws of the Host State and in good faith". According to Bernasconi (supra n. 15), the term "maintained" indicates that this obligation extends to both the making and the operation of the investment. Unless otherwise mentioned, all these BITs, model IIAs and regional instruments are available at the Electronic Database of Investment Treaties (EDIT), https://edit.wti.org/app.php/document/investment-treaty/search (26.05.2023).

22 Chapter 9 of the Pacific Agreement on Closer Economic Relations (PACER) Plus (2017), Art. 5 (1); SADC Model BIT (2012), Art. 11. Likewise, according to the Common Market for Eastern and Southern Africa (COMESA) Investment Agreement (2007), Art. 13, entitled "Investor Obligation", COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made.

23 India Model BIT (2015), Art. 11(i), requires investors and their investments to comply with the law before and after establishment. IISD Model IIA (2005), Art. 11(A)(C) states that investments are subject to the laws and regulations of the host state, striving to contribute to its development objectives.

24 Protocol of the AfCFTA on Investment (2023), Art. 32.

25 Brazil-India BIT (2020), Art. 11 c); India-Kyrgyzstan BIT (2019), Art. 11(iii); India-Taiwan Province of China BIT (2018), Art. 11(c); Intra-MERCOSUR Investment Facilitation Protocol (2017), Art. 13.1; India Model BIT (2015), Art. 11(iii). A similar provision is found in some IIAs when dealing with the transfer of funds. See, for example Colombia-Venezuela BIT (2023), Art. 9.b; Colombia-Spain BIT (2021), Art. 10.2.e.ii;

obligation not to engage in bribery or corruption,[26] a requirement to conduct social or environmental impact assessments (at a pre-establishment stage),[27] or minimum standards/post-establishment obligations to uphold environmental, labor, security, social and human rights.[28]

Provisions concerning the environment or natural resources are further developed in a few agreements, including the obligation to maintain an environmental management system that complies with recognized international standards and good business practices,[29] or explicit obligations to not exploit or use local natural resources to the detriment of the rights and interests of the host state,[30] avoiding land grabbing practices and respecting the rights of local populations.[31]

These provisions may be found to contain positive investor obligations that, if violated, will make the claim inadmissible. Such was the case in *Al-Warraq* v. *Indonesia*.[32] There, the tribunal found that the investor's claims were inadmissible since it had engaged in fraudulent banking transactions, in violation of the relevant IIA's legality clause.[33] The tribunal stated that the treaty imposes a "*positive obligation on investors* to respect the law of the host State**"**, and that the treaty provision makes the violation of domestic law a matter of international law binding on the investor in the same manner as would an umbrella clause.[34] The tribunal then relied on the "clean hands" doctrine to declare the claim inadmissible.[35]

Georgia-Japan BIT (2021), Art. 14.3(a); Israel-United Arab Emirates BIT (2020), Art. 7.3(a); Brazil-India BIT (2020), Art. 9.4.

26 Protocol of the AFCFTA on Investment (2023), Art. 37; Democratic Republic of the Congo-Rwanda BIT (2021), Art. 12; Brazil-India BIT (2020), Art. 11 b); India-Kyrgyzstan BIT (2019), Art. 11(ii); ECOWAS Common Investment Code (2018), Art. 38; India-Taiwan Province of China BIT (2018), Art. 11(b); Intra-MERCOSUR Investment Facilitation Protocol (2017), Art. 13.1; Morocco-Nigeria BIT (2016), Art. 17; Draft Pan-African Investment Code (2016), Art. 21; India Model BIT (2015), Art. 11(ii); SADC Model BIT (2012), Art. 10; ECOWAS Supplementary Act on Investments (2008), Art. 13; IISD Model IIA (2005), Art. 13; IISD Model IIA (2004), Part 3.

27 Protocol of the AFCFTA on Investment (2023), Art. 34(1); Democratic Republic of the Congo-Rwanda BIT (2021), Art. 15; ECOWAS Common Investment Code (2018), Art. 27; Morocco-Nigeria BIT (2016), Art. 14; Draft Pan-African Investment Code (2016), Art. 37(4); SADC Model BIT (2012), Art. 13; ECOWAS Supplementary Act on Investments (2008), Art. 12; IISD Model IIA (2005), Art. 12; IISD Model IIA (2004), Part 3.

28 Protocol of the AFCFTA on Investment (2023), Art. 33; Democratic Republic of the Congo-Rwanda BIT (2021), Art. 18; ECOWAS Common Investment Code (2018), Art. 27; Morocco-Nigeria BIT (2016), Art. 18; Draft Pan-African Investment Code (2016), Art. 37(3); SADC Model BIT (2012), Art. 15; ECOWAS Supplementary Act on Investments (2008), Art. 14. These provisions are also included in the IISD Model IIA (2005), Art. 14; IISD Model IIA (2004), Part 3.

29 Democratic Republic of the Congo-Rwanda BIT (2021), Art. 16; SADC Model BIT (2012), Art. 14.

30 Protocol of the AFCFTA on Investment (2023), Art. 34(2).

31 Draft Pan-African Investment Code (2016), Art. 23.

32 Hesham Talaat M. Al-Warraq v. The Republic of Indonesia (Al-Warraq v. Indonesia), Final Award dated 15 December 2014, available at: https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf (26.05.2023).

33 OIC Agreement, Art. 9: "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."

34 Al-Warraq, para. 663.

35 Al-Warraq, para. 646.

b) Responsible business conduct/Corporate social responsibility (CSR) provisions

Provisions on investor obligations may call for investors to be good corporate citizens, attending to the environment and social well-being of the local community. These provisions specify which business conduct rules to obey and may or may not be labeled as corporate governance,[36] corporate social responsibility (CSR),[37] responsible business conduct (RBC),[38] or a combination[39].

While some IIAs call on "internationally accepted standards"[40], others may refer to the United Nations Guiding Principles on Business and Human Rights (UNGP),[41] ILO Tripartite Declaration on Multinational Enterprises and Social Policy, [42] the OECD Guidelines for Multinational Enterprises,[43] or to internal policies supported by the parties.[44] They may also be ambivalent as to who (the investor or the state) is obliged to do anything, requiring investments to "meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices".[45]

Many of these texts, moreover, are programmatic and not mandatory.[46] Such provisions encourage the investor to try to achieve certain goals, but do not clearly make non-achievement actionable.

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36 See for example, Morocco-Nigeria BIT (2016), Art. 19; Democratic Republic of the Congo–Rwanda BIT (2021), Art. 10; SADC Model BIT (2012), Art. 16.

37 The Democratic Republic of the Congo-Rwanda BIT (2021) contains a broad spectrum of mandatory provisions, including Art. 10 on "corporate governance", Art. 13 on "commercial ethics and human rights", and Art. 14 on "corporate social responsibility". Similar provisions are included in Draft Pan-African Investment Code (2016), Arts. 19, 22 and 24; Article 18(1) of the Model BIT of Belgium and Luxembourg (2019), requires investors to "act in accordance with internationally accepted standards applicable to foreign investors to which the Contracting Parties are a party".

38 EU-Chile Advanced Framework Agreement (2022), Art. 10.23. ECOWAS Common Investment Code (2018), Art. 34, includes mandatory provisions on corporate governance and RBC.

39 Italy Model BIT (2022), Art. 19; BLEU Model BIT (2019), Art. 18.

40 Morocco-Nigeria BIT (2016), Art. 19: investments are to "meet or exceed national and internationally accepted standards of corporate governance for the sector involved […]"; Democratic Republic of the Congo–Rwanda BIT (2021), Art. 10: Corporate Governance Framework "(1) Investors and their investments must meet or exceed nationally and internationally accepted standards of corporate governance in their industry, including transparency and accounting practices." Similar provisions are included in the India Model BIT (2015), Art. 12; and the ECOWAS Supplementary Act on Investments (2008), Arts. 15 and 16; IISD Model IIA (2005), Art. 15; IISD Model IIA (2004), Part 3.

41 Democratic Republic of the Congo-Rwanda BIT (2021), Art. 13: Commercial Ethics and Human Rights "(1) Investors and their Investments shall comply with the UN Guiding Principles on Business and Human Rights and make modifications as necessary for local circumstances".

42 IISD Model IIA (2005), Art. 16.

43 See, for example, Italy Model BIT (2022), Art. 19; Brazil–United Arab Emirates BIT (2019), Art. 15.1; Argentina–United Arab Emirates BIT (2018), Art. 17; Brazil–Ethiopia BIT (2018), Art. 14.1; Netherlands–United Arab Emirates BIT (2013), Art. 2.3; IISD Model IIA (2005), Preamble; the IISD Model IIA (2005), Art. 16.

44 Brazil-India BIT (2020), Art. 12.

45 Morocco-Nigeria BIT (2016), Art. 19.

46 For example, Intra-MERCOSUR Investment Facilitation Protocol (2017), Art. 14 provides that investors and their investments will "strive to achieve the highest possible level of contribution to the sustainable development of the Host State Party and the local community, through the adoption of a high degree of socially responsible practices". Similarly, the African Union's Draft PAIC (2016), Art. 24 requires that some principles should govern compliance by investors with business ethics and human rights. Under Indian BITs with Kyrgyzstan (2019) and Taiwan (2018), Art. 12, investors and their enterprises operating shall endeavour to voluntarily incorporate internationally recognized CSR standards in their practices and internal policies, on issues such as labour, the environment, human rights, community relations and

Finally, not all business conduct provisions are "*investor* obligations," putting the duty to act on the host state. These provisions require the State Parties to encourage good corporate practices.[47]

As responsible business conduct is the focus of the OECD Working Paper (2020), we will refrain from an in-depth discussion here. We mention such provisions when they incorporate the other investor obligations, however.

c) Investment liability provisions

These are clauses directed to guarantee investors' responsibility for corruption, damage, or injuries in the host state, produced in connection with their investments.[48] Such clauses are basically ones requiring the host state to ensure the availability of legal recourse for civil actions against the investor by the host state itself, a private person, or an organization. The implementation of these provisions is also aimed at the abrogation of the investor's treaty rights, either because the definition of investment requires it to be made in accordance with domestic law (being a corrupted investment, it is no longer a covered investment),[49] or because those rights are explicitly rescinded in the treaty.[50] According to one agreement, an ISDS tribunal seized of a dispute shall determine whether a breach of investor's obligations, if proven, is materially relevant to the issues before it and, if so, what mitigating or countervailing effects this might have on the merits of a claim or on the damages or interest awarded in the event of an award. [51]

In some cases, the consequences of the investor's liability are stated to be the possibility that the host may bring a counterclaim under the treaty, or institute proceedings against an investor or his investment before the host state's courts for failure to comply with their obligations under the treaty.[52] In another, it is explicitly excluded that a State Party (home or host state) could be held liable for violations of the legislation of the host state party by an investor.[53]

In at least one case, investors' and investments' liability are subject to civil actions in their Home State for the acts, decisions, or omissions made in the Home State in relation to the Investment where such

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anti-corruption. The Protocol of the AfCFTA on Investment (2023), uses hortatory language concerning CSR obligations (Art. 38) but mandatory wording regarding corporate governance provisions (Art. 39).

47 Chapter 9 of the PACER Plus (2017), Art. 5(2), for instance, says: "The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party." A similar provision is found in Italy Model BIT (2022), Art. 19.

48 For example, both the IISD Model IAISD and the SADC Model BIT stipulate that investors shall be liable in their home state for acts or decisions made in relation to the investment when they lead to significant damage, personal injuries or loss of life in the host state. See also Democratic Republic of the Congo-Rwanda BIT (2021), Art. 19.

49 Southern African Development Community (SADC), SADC Model Bilateral Investment Treaty Template with Commentary, p. 32.

50 IISD Model IIA (2005), Art. 18 c). The same consequence is foreseen if the investor persistently fails to comply with its obligations in a manner that circumvents international environmental, labour, human rights, or corporate governance obligations to which the host state and/or home state are parties. See also IIS Model IIA (2004), Part 3; ECOWAS Supplementary Act on Investments (2008), Arts. 17 and 18.

51 Democratic Republic of the Congo-Rwanda BIT (2021), Art. 19(3).

52 Democratic Republic of the Congo-Rwanda BIT (2021), Arts. 19(4) and 20; ECOWAS Supplementary Act on Investments (2008), Art. 18(5).

53 Intra-MERCOSUR Investment Facilitation Protocol (2017), Art. 13.2.

acts, decisions, or omissions lead to significant damage, personal injuries or loss of life in the host state.[54]

d) Information requirements

Some IIAs introduce the investor obligation of providing information to the host state's government for statistical or other regulatory purposes and may give the host state a right to ask for information about its governance history or practices. Host states may make the information provided available to the public in the community where the investment may be located, subject to the protection of confidential business information and to other applicable domestic laws. The consequences of a violation may include the disqualification of the project as an "investment." [55]

In some treaties, it is stipulated that such information requirements could also be for the purpose of making a decision with respect to that investment[56] (for example, for admission purposes). Another example of pre-establishment investor obligations includes placing investors under an obligation to provide timely, complete, and accurate responses to public authorities involved in reviewing an investment.[57]

1.6. Special provisions

Looking globally, there are different types of investor obligations currently contained in IIAs, many of which are not widely adopted. As they may indicate directions of future development, we briefly mention them.

a) Post-establishment compliance with values

As explained, some IIAs include provisions explicitly requiring investors and their investments to comply with the host state's laws after the establishment.

An interesting variation is the compliance with "socio-political" goals. In such provisions, investors (and investments) are obliged to respect the national values as well as the laws.[58] A noteworthy aspect of

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54 SADC Model BIT (2012), Art. 17.

55 For example, according to Morocco-Nigeria BIT (2016), Art. 21; SADC Model BIT (2012), Art. 12; and IISD Model BIT (IAISD, Art. 28), the state that host states additionally have the right to seek information in their home state about a potential investor, its corporate governance history, and its practices.

56 Democratic Republic of the Congo-Rwanda BIT (2021), Art. 17(1); Brazil-India BIT (2020), Art. 11 d); India-Kyrgyzstan BIT (2019), Art. 11(iv); India-Taiwan Province of China BIT (2018), Art. 11 (d); India Model BIT (2015), Art. 11(iv); ECOWAS Supplementary Act on Investments (2008), Art. 11(4).

57 IISD Model IIA (2004), Part. 3; IISD Model IIA (2005), Art. 11(D).

58 Democratic Republic of the Congo-Rwanda BIT (2021) Art. 11. Sociopolitical Obligations: (1) Investors and their investments must comply with sociopolitical obligations, including: (a) respect for national sovereignty and compliance with national laws, regulations and administrative practices; (b) respect for sociocultural values; (c) non-interference in internal political affairs; and (d) non-interference in intergovernmental relations; (2) Investors and their investments must not influence or attempt to influence the appointment of the person holding public office or financing political parties. (3) Investors and their investments shall not engage in any act that is likely to be prejudicial to public policy, morality or the public interest, Investors shall not engage in restrictive practices and attempt to make gains by illegal means.
A similar wording is also found in the Protocol of the AFCFTA on Investment (2023), Art. 36; and the Draft Pan-African Investment Code (2016), Art. 20.

such obligations is the negative character of the obligation. The investor is under a duty to refrain from interference in the host's policymaking.[59]

Another variation is the compliance with a very broad notion of transparency. For example, in the SADC model treaty, there are additional obligations to make public all contracts related to the establishment or right to operate an investment in the host state, including taxes, royalties, and all related payments.[60]

b) Compliance with additional tax obligations

Besides complying with tax laws and paying tax liabilities, a couple of agreements stipulate that investors must provide transfer pricing documentation that verifies that the conditions in its controlled transactions for the relevant tax year are consistent with the arm's length principle, and that investors and their investments shall provide the financial information required by the Member State to ensure compliance with the applicable laws.[61]

Additionally, the ECOWAS Common Investment Code provides that investors and their investments shall conduct their operations in a manner that fully complies with all applicable tax laws and international standards relating to ensuring tax benefits are not reduced through base erosion and profit-shifting (BEPS) practices. [62]

c) Protection of indigenous peoples and local communities

The recently agreed Protocol on Investment to the Agreement Establishing the AfCFTA includes a novel provision on investor obligations concerning indigenous peoples and local communities, establishing that investors and their investments shall respect the rights and dignity of indigenous peoples and local communities in accordance with relevant domestic laws and regulations, international law, norms, and best practices, including the right of indigenous peoples, and local communities where applicable, to free, prior and informed consent and to participate in the benefit of the investment. Additionally, investors and their investments shall respect legitimate tenure rights to land, water, fisheries, and forests in accordance with relevant laws and regulations.[63]

1.7. Legal Character of Investor "Obligations"

Although referred to as "investor obligations," treaty language referring to investors is often hortatory. The use of "reaffirming," "recognizing," "shall strive to," and similar phrases places investors under – at most – a duty of conduct rather than a duty of result. In fact, it is not clear that tribunals would find a binding obligation even of conduct. [64]

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59 A similar obligation is included in Brazil-India BIT (2020), Art. 12.2 (k); and Intra-MERCOSUR Investment Facilitation Protocol (2017), Art. 14.2(k).

60 SADC Model BIT (2012), Art. 18.

61 Protocol of the AFCFTA on Investment (2023), Art. 40; ECOWAS Common Investment Code (2018), Art. 42 and 44.

62 ECOWAS Common Investment Code (2018), Art. 44.

63 Protocol of the AFCFTA on Investment (2023), At. 36.

64 Although we have not found any cases directly referring to investors' obligations, awards in other ISDS cases have dealt with this issue. For example, Nations Energy v. Panama Award finds that the BIT's phrasing "shall try to accord" does not have the same meaning as "shall accord," considering that the State parties intended to limit the mandatory nature of the provision. Nations Energy, Inc. and others v. Republic of Panama, ICSID Case No. ARB/06/19, Award, 24 November 2010, paras. 472-478. Similarly,

Moreover, some provisions proffered as investor obligations are actually State Party obligations. Treaty language may refer to values to be furthered but place the duty to act on the host state. This is particularly true of language regarding human rights, environmental protection, and labor standards, although responsible business conduct is also sometimes framed as a State Party obligation rather than requiring any positive action of the investor.

1.8. Where Investor Obligation Provisions are Found

a) Within the Treaty

The placement of investor obligations within the text of IIAs varies. The majority of provisions labeled "investor obligations" (or similar wording) are placed in dedicated provisions in the main text of the agreement. However, some references are in the Preambles (particularly concerning environmental and human rights) and/or in dispute settlement provisions (in the case of counterclaims).

b) Geographically

Of the jurisdictions examined particularly, only the model IIA of the Netherlands members contains an investor obligation provision.

Investor obligation provisions are found in a few agreements concluded by non-European countries, particularly from Asia, Africa, and South America.[65] They are also found in other IIAs from those regions, connected to regional economic integration efforts.[66] They have become particularly common in African regional instruments like the Common Market for Eastern and Southern Africa (COMESA) Investment Agreement (2007), the Economic Community of West African States (ECOWAS) Common Investment Code (2018), the 2016 African Union Draft Pan-African Investment Code (PAIC), and the ECOWAS Supplementary Act on Investments (2008), also include provisions on investor's post-establishment obligations. They are also reportedly included in the Protocol on Investment to the Agreement Establishing the AfCFTA, which was adopted on 19 February 2023 by the African Union Heads of State.[67]

They are also present in some model IIAs of developing or emerging economies, including India and the Southern African Development Community (SADC), of developed countries (Belgium-Luxembourg,

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Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic and BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. Argentine Republic, ICSID Case No. ARB/03/13 & ARB/04/8, Decision on Preliminary Objections, 27 July 2006, para. 133, holds that a provision using "should" is not equal to that attributed to a similarly-worded BIT provision using the word "shall".

65 Examples of these agreements include: the Democratic Republic of the Congo-Rwanda BIT (2021), Brazil-India BIT (2020), India-Kyrgyzstan BIT (2019), India-Taiwan BIT (2018), Morocco-Nigeria BIT (2016), and Iran-Slovakia BIT (2016).

66 See for example the Intra-MERCOSUR Investment Facilitation Protocol (2017); the Pacific Agreement on Closer Economic Relations (PACER) Plus (2017), and the 1981 Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (OIC Agreement).

67 The Protocol is not yet officially published, but a text is available online. Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment, Draft (January 2023), available at: https://www.bilaterals.org/IMG/pdf/en_-_draft_protocol_of_the_afcfta_on_investment.pdf (26.05.2023)

Italy, and Netherlands), and in the proposals of the International Institute for Sustainable Development (IISD).[68]

1.9. Consequences of Violations of Investor Obligation Provisions

The treaties containing investor obligations approach the consequences of investor violations of such provisions differently, and the lack of arbitral practice leaves many questions regarding the effects open. The following sketches out some possibilities without the pretense of comprehensiveness and with the caveat that the details of any particular case might influence any probable outcome.

First, as stated above, any legality obligations will likely have an impact on the jurisdiction of the tribunal or on the admissibility of the original claim. Where investor obligations are made preconditions of an investor's access to investor-State dispute settlement, a violation of such a condition may be characterized as a limitation on the host's consent. The consequence would be to restrict the investor's ability to force a host state into arbitration under the treaty, and the result would be the dismissal of any investor claims and a resulting inability to receive compensation for the host's alleged treaty violation.

In the absence of clear post-establishment obligations of legality, tribunals will treat allegations of illicit behavior on the part of the investor as a part of the merits claims. Where proven, the tribunal will generally take the investor's acts into account when characterizing the host's alleged violation of the treaty. Thus, in *Azinian v. Mexico*, the tribunal looked at the investors' misrepresentations to a municipal council to find that local courts' decisions could not be said to be arbitrary or malicious.[69] In contrast, in *Cortec Mining v. Kenya*, the tribunal found that the claimant's failure to comply with basic statutory requirements was a serious breach of the "investors" obligations, and had to evaluate whether this conduct resulted in a compromise of a significant interest of the host state. The Tribunal found that the claimants had used the assistance of a questionable intermediary, "to by-pass statutory requirements and obtain a purported mining licence … despite such non-compliance", concluding that it was "a serious matter" that "showed serious disrespect for the fundamental public policies of the host country in relation to the environment" and constituted "a serious breach of the 'investors' obligations."[70]

Similar results would be expected from the denial of benefits provisions of IIAs that restrict the host's obligation to protect an investor due to an investor's post-establishment behavior. Traditionally aiming to permit the host to avoid protecting non-Party nationals under the treaty, the content of newer "denial of benefits" provisions may also extend to limiting host protection obligations or the right of the investor to invoke dispute settlement procedures where the investor's post-establishment behavior violates national law or policy. Such provisions reinforce the existing national law obligations on investors not to violate laws (including not to circumvent any sanctions regimes) but generally impose, if at all, only indirect positive obligations on the investor.

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68 E.g., Italy Model BIT (2022); Model BIT of Belgium and Luxembourg (2019); the Netherlands Model BIT (2019); the India Model BIT (2015); the Southern African Development Community (SADC) Model BIT (2012); and the IISD model IIAs: IIAPSD (2004) and IAISD (2005).

69 Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2, Award, para. 103, available at: https://www.italaw.com/sites/default/files/case-documents/ita0057.pdf (05.06.2023).

70 Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29, Award, paras. 348-351, available at: https://www.italaw.com/sites/default/files/case-documents/italaw10051.pdf (05.06.2023).

Finally, where investor obligations are stand-alone provisions of a treaty (i.e., alongside host state protection obligations), a violation of such may be approached as a complete bar to protection or (as post-establishment legality is today) be taken into account when determining the conformity of the host's behavior with the treaty protections and/or in the amount of compensation awarded.

1.10. Obligations of Investors in Selected IIAs

Regardless of the typology described above, the large majority of IIAs do not include explicit obligations of investors post-establishment. A detailed analysis of the defined priority agreements and countries follows in the next sections of this report.

a) European Union's Treaty Practice

The European Union's IIAs do not contain many positive post-establishment obligations on investors. The exceptions are found in the area of provision of information for reporting/statistical purposes, where the EU-New Zealand and EU-Chile agreements contain language requiring investors to respond to host requests for information as exceptions to the non-discrimination rules.

i. CETA (2016)

CETA does not has an explicit provision on general investor's obligations.

ii. Other EU IIAs

Other IIAs concluded by the EU after CETA do not have explicit provisions on general investor's obligations but may contain the obligation to provide statistical information or information for "other regulatory" purposes.

These provisions are set forth less as "obligations" as exceptions to the host's national treatment and most-favored-nation obligations:

Article 10.11 EU-New Zealand Agreement[71]

> *Information requirements*
>
> *Notwithstanding Articles 10.6 (National treatment) and 10.7 (Most-favoured-nation treatment), a Party may require an investor of the other Party or its covered enterprise to provide information concerning that covered enterprise solely for information or statistical purposes. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor or the covered enterprise. Nothing in this Article shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.*

b) United States Treaty Practice

The United States does not demand significant positive post-establishment obligations on investors. Exceptionally, there are information requirements (obligations to comply with requests), and in the USMCA, the investor will be held to the obligation to comply with any new regulations, including the possibility of in-territory residency.

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[71] The "non-conforming measures" provision of the EU Chile Interim Agreement has very similar language.

i. US Model BIT (2012)

No investor obligations.

ii. USMCA (2020)

There are no clear positive investor obligations set forth in the USMCA chapter 14 on investment, but the host is given the right to have (or to impose) "formalities" such as on the investor's residency or the investment's legality.

The information requirement is textually similar to that in the European agreements, with an exception to the host's non-discrimination obligations to allow it to demand the investor provide information for statistical or regulatory purposes.

> *Article 14.13. Special Formalities and Information Requirements*
>
> *1. Nothing in Article 14.4 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that these formalities do not materially impair the protections afforded by the Party to investors of another Party and covered investments pursuant to this Chapter.*
>
> *2. Notwithstanding Article 14.4 (National Treatment) and Article 14.5 (Most-Favored-Nation Treatment), a Party may require an investor of another Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor or its covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.*

c) Canada's Treaty Practice

Beyond the CETA, current Canadian investment agreements have clear positive investor obligations only on legality and on the provision of information.

i. Canada Model FIPA (2021)

> Article 16. Responsible Business Conduct
>
> *1. The Parties reaffirm that **investors and their investments shall comply with domestic laws and regulations of the host State**, including laws and regulations on human rights, the rights of Indigenous peoples, gender equality, environmental protection and labour.*
>
> *2. Each Party reaffirms the importance of internationally recognized standards, guidelines and principles of responsible business conduct that have been endorsed or are supported by that Party, including the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights, and shall encourage investors and enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate these standards, guidelines and principles into their business practices and internal policies. These standards, guidelines and principles address areas such as labour, environment, gender equality, human rights, community relations and anti-corruption.*
>
> *3. Each Party should encourage investors or enterprises operating within its territory to undertake and maintain meaningful engagement and dialogue, in accordance with international responsible business conduct standards, guidelines and principles that have been endorsed or are supported by that Party, with Indigenous peoples and local communities.*

ii. CPTPP

There are no clear positive investor obligations set forth in the CPTPP chapter 9 on investment, but the host is given the right to have (or to impose) "formalities" such as on the investor's residency or the investment's legality.

The information requirement is similar to that in the European and US agreements, with an exception to the host's non-discrimination obligations, allowing the demand that the investor provides information for statistical or regulatory purposes.

> *Article 9.14. Special Formalities and Information Requirements*
>
> *1. Nothing in Article 9.4 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with a covered investment, such as a* ***residency requirement*** *for registration or a requirement that* ***a covered investment be legally constituted under the laws or regulations of the Party****, provided that these formalities do not materially impair the protections afforded by the Party to investors of another Party and covered investments pursuant to this Chapter.*
>
> *2. Notwithstanding Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment), a Party may require an investor of another Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.*

d) Netherlands Model BIT (2019)

The Netherlands refers to operational legality, corporate social responsibility, and investor liability in its 2019 Model BIT. The CSR obligations include the suggestion of UNGP, OECD Guidelines, and the European Recommendation as the standards, and there is a specific reference to the "importance of" due diligence processes. The violation of the provision, moreover, is specified as being something the tribunal "is expected to take into account" in the compensation award. The softness of the language throughout the article is notable, even though the legality provision is mandatory.

> *Article 7. Corporate Social Responsibility*
>
> *1****. Investors and their investments shall comply with domestic laws and regulations of the host state****, including laws and regulations on human rights, environmental protection and labor laws.*
>
> *2. The Contracting Parties reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business.*
>
> *3. The Contracting Parties reaffirm the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment.*
>
> *4. Investors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.*
>
> *5. The Contracting Parties express their commitment to the international framework on Business and Human Rights, such as the United Nations Guiding Principles on Business and*

Human Rights and the OECD Guidelines for Multinational Enterprises, and commit to strengthen this framework.

Article 23. Behavior of the Investor

Without prejudice to national administrative or criminal law procedures, ***a Tribunal, in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments*** *under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.*

e) Japan's Treaty Practice

Japan has greatly increased its engagement with the investment treaty system in the last decade. Nevertheless, few of its IIAs contain any positive post-establishment obligations on investors. The exceptions are found in the area of provision of information for reporting/statistical purposes, where the RCEP and the bilateral agreements with Australia, Israel, and Uruguay contain nearly identical language requiring investors to respond to host requests for information as exceptions to the non-discrimination rules. The RCEP, for example, provides:

Article 10.10. Special Formalities and Disclosure of Information

2. Notwithstanding Article 10.3 (National Treatment) and Article 10.4 (Most-Favoured-Nation Treatment), a Party may require an investor of another Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect, to the extent possible, any confidential information which has been provided from any disclosure that would prejudice the legitimate commercial interests or the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its laws and regulations.[72]

2. Human Rights Obligations in IIAs

2.1. General Overview

Human rights treaties impose legal obligations on state parties. The extension of human rights obligations to corporations (let alone to natural persons whose actions are not attributable to the state) has not gained firm acceptance in international law, although there is discussion in the literature on this topic.[73]

In IIAs, human rights were first referred to in preambular language. Their further spread is slow, and still mainly implicit in, for example, provisions on sustainable development, and responsible corporate behavior (as corporate social responsibility). Labor protections, clearly related to human rights, are also present in some agreements, but as labor protections are (at best) a narrow subcategory of human rights, their mention was not the focus of our search.

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72 Similar provisions are included in the Australia-Japan EPA (2014), Art. 14.7(2); Japan-Uruguay BIT (2015), Art. 12(2); and Israel-Japan BIT (2010), Art. 10(2).

73 See among others, Krajewski (supra n. 15); René Wolfsteller and Yingru Li, "Business and Human Rights Regulation After the UN Guiding Principles: Accountability, Governance, Effectiveness". Hum Rights Rev 23, 1–17 (2022). https://doi.org/10.1007/s12142-022-00656-2; and Andreas Kulick, Corporate Human Rights?, European Journal of International Law, Volume 32, Issue 2, May 2021, Pages 537–570, https://doi.org/10.1093/ejil/chab040.

Perhaps because they are relatively rare, those IIA texts that do mention human rights often refer to them generically (i.e., to "human rights"). Rarely, specific human rights are highlighted. In particular, we detected references to indigenous peoples' rights and the rights of women/gender equality in Canada's Model BIT. IIAs, particularly those of the EU, may also combine references to human rights with the mention of democracy and the rule of law. There are also isolated instances of obligations on the State Parties to ensure transparent and participatory processes and to encourage investors to engage in stakeholder discussions.

2.2. Legal Character

Human rights obligations in IIAs are duties mainly directed at the State Parties to the agreement. They are generally hortatory, whether because they are preambular or because they are programmatic.

Generally, obligations on investors relating to human rights are at most indirect and implied, through responsible business conduct provisions or sustainable development provisions referring to "social" development.

The exception to the above are provisions on denial of benefits that tie human rights violations to threats to international peace and security. Such provisions are binding on investors, and their violation can lead to the legitimate withdrawal of any treaty protections.[74]

2.3. Where provisions are found

a) In the treaty

Affirmations of recognition of human rights are often found in Preambles, as are statements underlining the right of states to regulate.

Separate provisions on human rights obligations are rare in the main body of existing treaty texts, but references to human rights obligations are increasingly common within multi-purpose provisions: found, for example, in denial of benefits clauses (where they may be tied to the denial of benefits on the grounds of "international peace and security") or included in provisions on sustainable development or corporate behavior.

Finally, one might imply human rights obligations by the existence of either host commitments to sustainable development or to responsible business conduct. In our view, these are not clearly human rights obligations and therefore are discussed separately.

b) Geographically

Human rights provisions are found broadly in new IIAs. The EU seems to lead in the attention to human rights, but Canada's texts are noteworthy as mentioning specific vulnerabilities (indigenous peoples, gender) in its treaties.

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[74] Denial of benefits provisions are largely considered to be a jurisdictional issue in ISDS case law. See, for example, Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para. 130-144; and Pac Rim Cayman LLC. v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012, paras. 4.3, 4.4, 4.66, 4.67, 4.72-4.90.

2.4. Consequences of Violation

As noted above, there are few clear investor obligations to uphold human rights in existing IIAs. There is also no generalized recognition among international lawyers of a non-state investor's international law responsibility to adhere to human rights, whether enumerated in treaty provisions or even those considered *jus cogens*.

That said, there are a few ISDS cases in which tribunals have addressed investors' "human rights" violations and two that have specifically found that investors may be held liable for the violation of human rights (although there was no violation found in either case on the facts). In the *Urbaser v. Argentina* case, Argentina brought a counterclaim against the investor on the basis of Urbaser's violations of the population's right to water. The tribunal there was "reluctant" to accept the investor's "principled" limitation of human rights obligations to states[75], saying that this position is obsolete: "While such principle had its importance in the past, it has lost its impact and relevance in similar terms and conditions as this applies to individuals."[76] It bases its view on the reciprocal nature of rights and obligations: if investors can glean rights from international law, they can have obligations under international law. Despite this, the tribunal ultimately finds that any specific human rights obligations an investor would have to positively "perform" must arise from the national legal requirements or concession contract; only negative duties (those prohibiting violations of rights) can be taken from international law.[77] In *Aven v. Costa Rica*, the tribunal approved the *Urbaser* tribunal's approach to tying international obligations to investors.[78]

If a tribunal decides not to delve deeply into the question of the general applicability of human rights obligations to investors, one can assume that to the extent that a denial of benefits clause on the grounds of violations of human rights violations is invoked defensively by a host state, a tribunal that found of a violation of the rights of individuals due to an investor's actions would declare this to be a bar to jurisdiction or admissibility.[79]

If binding treaty language tying the investor to adhering to human rights does not exist, the legal consequences of an investor infringing on a person's (or a group's) human rights are unlikely to act as a jurisdictional barrier to bringing a claim. It may, however, influence the success of any claims the investor has against the host state – either because the host can rely on the upholding of human rights as a justification for its actions (such as would be the case if there are general exceptions available) or because the tribunal must interpret the State obligation provisions in light of the provision's context. In this case, language regarding non-derogation, responsible business conduct/corporate social responsibility, or even sustainable development might be sources of interpretive impulses. The non-bindingness of these provisions, therefore, might have an impact on the determination of whether the host breached its own investment protection obligations or on the amount it must compensate the investor.

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75 Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, Award, 8 December 2016, para. 1193, available at: https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf (09.06.2023).

76 Urbaser, para. 1194.

77 Generally, Urbaser, para. 1205-1210.

78 David R. Aven and others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 738, available at: https://www.italaw.com/sites/default/files/case-documents/italaw9955_0.pdf (09.06.2023).

79 Because non-States are not bound by human rights treaties, there may be arbitrators that would not consider it legally possible to have an investor "violate" a human rights obligation. Those arbitrators may, however, be willing to declare a claim inadmissible on the grounds of the investor's abusive conduct toward an individual or group.

2.5. Human Rights Obligations of Investors in Selected IIAs

a) European Union's Treaty Practice

The European Union's treaties include references to human rights in the Preamble. The typical language is that of "reaffirming" their attachment to the Universal Declaration of Human Rights. Some IIAs also add a paragraph "recognizing the importance of" human rights (and other values such as democracy and the rule of law) for furthering international economic interactions.

i. *CETA (2016)*

The Preamble and the treaty provisions take up human rights specifically, with two paragraphs in the Preamble ("reaffirming" and "recognizing") and a special note in an Annex to the denial of benefits provision, to subsume human rights violations as issues of international peace and security.

> *Preamble*
>
> *REAFFIRMING their strong attachment to democracy and to fundamental rights as laid down in The Universal Declaration of Human Rights, done at Paris on 10 December 1948, and sharing the view that the proliferation of weapons of mass destruction poses a major threat to international security;*
>
> *RECOGNISING the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation;*
>
> *Article 8.16. Denial of Benefits*
>
> *A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if:*
> *[…]*
> *(b) the denying Party adopts or maintains a measure with respect to the third country that:*
> *(i) relates to the maintenance of international peace and security; and*
> *(ii) prohibits transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.*
>
> *ANNEX 8-E. JOINT DECLARATION ON ARTICLES 8.16, 9.8, AND 28.6*
> *With respect to Articles 8.16, 9.8 (Denial of benefits) and 28.6 (National security), the Parties confirm their understanding that measures that are 'related to the maintenance of international peace and security' include the protection of human rights.*

ii. *Other EU IIAs*

Several EU IIAs have identical preambular language to reaffirm the Parties' commitment to the principles of the Universal Declaration on Human Rights.

The 2020 EU-UK Trade and Cooperation Agreement (TCA) has a different general reference to "human rights", but rather than pointing to the Universal Declaration of Human Rights (UDHR), the Parties refer to democratic principles, nuclear proliferation, and climate change in the Preamble. The same treaty has two provisions in the body of the text specifically dedicated to the "Protection of Human Rights and Fundamental Freedoms" and "Democracy, Rule of Law and Human Rights." Both of these provisions are directed toward the State Parties rather than the investor, essentially setting out the basis for understanding the agreement as a whole.

Preamble

1. REAFFIRMING their commitment to democratic principles, to the rule of law, to human rights, to countering proliferation of weapons of mass destruction and to the fight against climate change, which constitute essential elements of this and supplementing agreements

Article 524. Protection of Human Rights and Fundamental Freedoms

1. The cooperation provided for in this Parts based on the Parties' and Member States'™ long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically.

2. Nothing in this Part modifies the obligation to respect fundamental rights and legal principles as reflected, in particular, in the European Convention on Human Rights and, in the case of the Union and its Member States, in the Charter of Fundamental Rights of the European Union.

Article 763. Democracy, Rule of Law and Human Rights

1. The Parties shall continue to uphold the shared values and principles of democracy, the rule of law, and respect for human rights, which underpin their domestic and international policies. In that regard, the Parties reaffirm their respect for the Universal Declaration of Human Rights and the international human rights treaties to which they are parties.

2. The Parties shall promote such shared values and principles in international forums. The Parties shall cooperate in promoting those values and principles, including with or in third countries.

The texts of the EU-Organisation of African, Caribbean and Pacific States (OACPS) Africa and Pacific Regional Protocols, set forth a different approach to attending to human rights in investment agreements than other IIAs. In those texts, the procedural rights of non-parties are promoted by the Parties' agreement to engage in transparent and participatory law-making. For example, the Africa Regional Protocol's Article 13 (Investment) says:

> *2. The Parties agree to facilitate investment through legislation, regulation and policies, which they shall develop in a transparent manner, encouraging public-private dialogue and providing all stakeholders with the opportunity to participate.*

The same agreement's provision on the "Blue Economy" also looks to a palette of goals to improve living standards, mentioning food security, climate change resilience, and job creation.[80] This is similar to Article 15 (Investment) of the Pacific Regional Protocol, which specifically mentions the need to "facilitate[e] investments through an appropriate intervention mix, with particular attention to youth and women".[81]

Further references to the need of the State Parties to attend to the needs of specific groups are found in the EU-New Zealand FTA, where the rights (including the cultural rights) and practices of the Maori are given particular attention.

b) United States Treaty Practice

The United States IIA practice is thin on human rights protections. The interest in human rights may be implied through corporate social responsibility, but even those are explicitly hortatory, and directed to the State Parties rather than the investor.

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80 EU-OACPS Partnership Agreement (2021), Africa Regional Protocol, Art. 19.

81 EU-OACPS Partnership Agreement (2021), Pacific Regional Protocol, Art. 15.3.

i. USMCA (2020)

The USMCA investment provisions apply only (and in a limited manner) between the United States and Mexico. There are no human rights obligations for either investors or the State Parties. The provision on corporate social responsibility mentions the possibility of investors incorporating standards of human rights into their business practices but does not go further than that.

There is, however, an exception in Chapter 32 on Indigenous people's rights that applies to investments.

> *Article 32.5. Indigenous Peoples Rights*
>
> *Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment, this Agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples.*[82]

ii. US Model BIT (2012)

The US Model BIT of 2012 does not include preambular reference to or provisions on human rights.

c) Canada's Treaty Practice

Canada's existing treaties do not consistently have provisions on human rights, although non-derogation provisions (titled "Health, Safety and Environmental Measures") exist in many. These are soft statements directed to the State Parties, stating that it would be "inappropriate to encourage" investors by relaxing health and safety standards and permitting state-to-state consultations if one of the hosts would do so.[83]

There is also a general exceptions provision that allows treaty parties to regulate in the interest of human life or health. The provision, however, does not mention "human rights" and is presumably limited to measures relevant to health and safety, narrowly defined.

Some of the newer treaties have a "Corporate Social Responsibility" provision. The Canada-Senegal BIT, for example, has a typical provision, aimed at the treaty parties and is purely hortatory ("should encourage").[84]

i. CPTPP

The CPTPP does not include a preambular reference to or provisions on human rights.

There is a provision (Art. 9.17) on Corporate Social Responsibility, but this is only an affirmation of the Parties belief that it is important to encourage corporations "to voluntarily" adhere to corporate social responsibility standards.

ii. Canada Model FIPA (2021)

The Canadian Model BIT, the Foreign Investment Protection Act (FIPA) of 2021, gives significantly more attention to human rights than Canada's body of treaties. In particular, the FIPA expands its terms to explicitly refer to the rights of indigenous peoples and, to a lesser extent, gender equality.

The FIPA Preamble is noticeably longer than the traditional Canadian BIT, and even though the term "human rights" is absent, it explicitly refers to certain human rights. In particular, the model reaffirms

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82 Footnote omitted.

83 Canada-Senegal BIT (2014), Art. 15.

84 Canada-Senegal BIT (2014), Art. 16.

"the importance of promoting" a number of third-generation rights: "cultural identity," "cultural diversity," "gender equality," "rights of Indigenous peoples," and "inclusive trade."

> *Preamble: (…)*
>
> *Reaffirming the importance of promoting responsible business conduct, cultural identity and diversity, environmental protection and conservation, gender equality, the rights of Indigenous peoples, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving the Party's right to regulate in the public interest;*

Within the body of the treaty, the FIPA continues to have a non-derogation provision that is similar to the existing ones but sets forth "rights of Indigenous peoples" explicitly.[85]

The provision on Responsible Business Conduct (Article 16), too, is both more specific and stronger than corresponding Corporate Social Responsibility provisions in its existing BITs. The FIPA text, for example, specifies the principles that may be endorsed by a treaty party, including the UNGP and the OECD Guidelines. The specificity is also in the orientation of the laws to be followed. These include a general reference to "human rights" but also to "rights of Indigenous peoples" and "gender equality."

The obligatory nature is heightened, too. The Canadian Model FIPA (2021) mandates ("shall") the parties to promote ("encourage") enterprises to adopt these (Art. 16.2) and to undertake stakeholder dialogues (Art. 16.3), and to cooperate on further promotion of responsible business conduct (Art. 16.4).

> *Article 16. Responsible Business Conduct*
>
> *1. The Parties reaffirm that investors and their investments shall comply with domestic laws and regulations of the host State, including laws and regulations on human rights, the rights of Indigenous peoples, gender equality, environmental protection and labour.*
>
> *2. Each Party reaffirms the importance of internationally recognized standards, guidelines and principles of responsible business conduct that have been endorsed or are supported by that Party, including the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights, and shall encourage investors and enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate these standards, guidelines and principles into their business practices and internal policies. These standards, guidelines and principles address areas such as labour, environment, gender equality, human rights, community relations and anti-corruption.*
>
> *3. Each Party should encourage investors or enterprises operating within its territory to undertake and maintain meaningful engagement and dialogue, in accordance with international responsible business conduct standards, guidelines and principles that have been endorsed or are supported by that Party, with Indigenous peoples and local communities.*
>
> *4. The Parties shall cooperate on and facilitate joint initiatives to promote responsible business conduct.*

d) Netherlands Model BIT (2019)

The Dutch model BIT emphasizes more strongly than many IIAs the obligation of the *investor* (rather than the State Parties) to comply with human rights laws. The legality provision is set forth in an article titled "Corporate Social Responsibility," but sets a firm obligation on the investor:

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[85] Canada Model FIPA (2021), Art. 4.

Article 7. Corporate Social Responsibility

*1. Investors and their investments **shall comply** with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws.*

The consequences of a violation of this provision are also set forth clearly: the taking into account of such violation by the tribunal in the calculation of the compensation (and any domestic proceedings resulting from the violation). The Model's Article 23 states:

Article 23. Behavior of the Investor

Without prejudice to national administrative or criminal law procedures, a Tribunal, in deciding on the amount of compensation, is expected to take into account non- compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.

In addition to being binding on the investor, the Model also sets out firmer human rights-oriented obligations on the State Parties than most IIAs. Rather than asking the States to encourage compliance with responsible business conduct principles, the Dutch model requires the State Parties ("must") to ensure remedies are available in cases where investors have abused human rights. In the article titled "Rule of Law," the wording is as follows:

Article 5. Rule of Law

3. As part of their duty to protect against business-related human rights abuse, the Contracting Parties must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. These mechanisms should be fair, impartial, independent, transparent and based on the rule of law.

In addition, while the "Sustainable Development" provision (article 6) "reaffirms" existing commitments to human rights, it additionally requires ("shall") them to expand their binding labor rights obligations:

Article 6. Sustainable Development

6. Within the scope and application of this Agreement, the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of environmental protection, labor standards and the protection of human rights to which they are party, such as the Paris Agreement, the fundamental ILO Conventions and the Universal Declaration of Human Rights. Furthermore, each Contracting Party shall continue to make sustained efforts towards ratifying the fundamental ILO Conventions that it has not yet ratified.

e) Japan's Treaty Practice

Japan has taken a minimal approach to human rights obligations, with no firm obligations on either the investor or on the State Parties. Instead, Japan uses a denial of benefits provision that focuses mainly on the third-party nature of corporate investors. For such investors, the host may – but does not require – refuse to extend treaty protections if it has sanctions in place based on international peace and security, "including the protection of human rights." The Japan-United Kingdom CEPA (2020) says:

Article 8.13. Denial of Benefits

A Party may deny the benefits of this Section to an entrepreneur of the other Party that is a juridical person of the other Party and to its covered enterprise if that juridical person is

owned or controlled by a natural or juridical person of a third country and the denying Party adopts or maintains measures with respect to the third country that:

(a) are related to the maintenance of international peace and security, including the protection of human rights; (…)

3. Investor Environmental Obligations in Selected IIAs

3.1. General Overview

The negative impacts some investments had on the environment formed some of the first grounds for concern among the observers of the system. Early cases on indirect expropriation and fair and equitable treatment attracted particular attention when tribunals declared that hosts had to attend to investor expectations even when addressing environmental protection.[86] Where pollution or ecosystem destruction was the focus of much of the early discussion of environment and investment, the increasing awareness of climate change has added to the scope of environmental issues that treaties now may seek to address.

Generally speaking, most IIAs from prior to 2010 make no references to the environment at all, whether in the preamble or in the body of provisions. Some from the early 2000s do refer to the environment specifically, for example, as a State Party's "legitimate policy objective" to be pursued under the "right to regulate,"[87] and indirect references to the environment can be implied in references (in preambular language) to "sustainable development". [88]

By the mid-2010s, environmental issues were more in the focus of IIA drafters. References remain mainly indirect as part of "sustainable development" and hortatory (as preambular or as grounds for the State Parties to avoid their investor protection obligations.

Today, explicit uses of "environment," where they exist, are mainly found as one of a set of "legitimate policy" objectives a State may have. These appear in provisions on the "right to regulate" as well as in explanations of how to determine whether a host measure is an "indirect expropriation." General exceptions clauses, too, may refer to plant and animal life or health, which can be indirectly read as environmental protection. In any of these provisions, it is a *right* of the state – *not a duty* of the state – to regulate for the purposes of environmental protection.

Reference may be made in non-derogation clauses to environmental laws. These provisions either prohibit or discourage State Parties from offering investors relaxed environmental standards as an incentive to invest.

Many more environmental protection provisions are implied by references to "sustainable development." Often part of Preambles, Party commitments to sustainable development presumable include attention to balancing environmental impacts with the economic and social impacts of investments.

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86 Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2020, available at: https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf (09.06.2023).

87 E.g., Turkey-Viet Nam BIT (2014), Art. 4; Greece-United Arab Emirates BIT (2014), Art. 12; and Georgia-Switzerland BIT (2014), Art. 9.

88 E.g., Canada-Peru BIT (2006); Denmark-Indonesia BIT (2007); Kuwait-Lao People's Democratic Republic BIT (2008); Finland-Nepal BIT (2009); and Austria-Kazakhstan BIT (2010).

Even though IIAs increasingly include environmental provisions, environmental obligations directed at investors are scarce, mostly as part of CSR or RBC provisions.

3.2. Legal Character

References to environmental protection and climate change are overwhelmingly directed at State Parties rather than investors and are either hortatory/programmatic or discretionary (i.e., as permissible grounds on which to derogate from the treaty protections offered investors).

3.3. Where provisions are found

a) In the treaty

References to environmental protection are mainly found in preambles, provisions on non-derogation, and in general exceptions. Some legality provisions will also specify the investor's obligation to adhere to environmental laws. Finally, environmental concerns may be implied in preambular language on sustainable development and in body provisions on responsible business conduct or corporate social responsibility.

b) Geographically

Environment provisions are found broadly in new IIAs. The EU seems to lead in the number of treaties, including references to the environment or sustainable development, but under the Netherlands Model BIT (2019), USMCA (2020), and the Canadian Model FIPA (2021), the State Parties are to encourage all investors and enterprises operating within its jurisdiction to incorporate CSR or RBC standards on environmental issues.

The Dutch Model BIT seems to lead in the legal strength of the commitments among the agreements studied - it is the only one that includes an investor's liability rule in the Home State. It reaffirms the importance of investors conducting a due diligence process to identify, prevent, mitigate, and account for their investment's environmental risks and impacts.

c) Special Typologies

Besides the provisions discussed below, other examples of environmental obligations are particularly intriguing. The EU-OACPS Partnership Agreement (2021) African Protocol has an elaborate section concerning the "blue economy" in which the environmental health of the oceans is set forth within a network of related concerns (EU-OACPS Partnership Agreement, Art. 19).

3.4. Consequences of Violation

As noted above, there are few clear investor obligations to protect the environment in existing IIAs. Unlike the case with human rights, in the context of environmental protection provisions, there is less of a question of whether a non-state investor may have an international law responsibility to adhere to treaty provisions because environmental law references in several IIAs that relate to investors are linked to *national* environmental standards or to the domestic implementation of international standards.[89] Moreover, the ISDS case of *Aven v. Costa Rica* extended the *Urbaser* logic of investor

[89] See for example, treaties concluded by the Belgium–Luxembourg Economic Union (BLEU), like BLEU-Madagascar BIT (2005), Art. 5; BLEU-Colombia BIT (2009), Art. VII; and BLEU-Montenegro BIT (2010), Art. 5.

human rights obligations to environmental obligations, adding that imposing such an obligation: "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."[90]

One can assume that to the extent that a legality clause requires the investor to comply with all – or specifically environmental - host state laws, a tribunal that found an investor's actions did violate the law would declare this to be a bar to jurisdiction or admissibility. (If there were a reference to specific multilateral environmental agreements, the questions regarding investor responsibility for adhering to international treaty standards may lead tribunals to opt for a determination of inadmissibility.)

If binding treaty language tying the investor to adhering to environmental protection does not exist, the legal consequences of an investor damaging the environment are unlikely to act as a jurisdictional barrier to bringing a claim. Tribunals taking a strictly legal approach may also reject any host arguments on investor obligations. Even the hortatory language directed to a host state may, however, influence the success of any claims the investor has against the host state – either because the host can rely on the upholding of "plant or animal life or health" (or similar language) as a justification for its actions (such as would be the case if there are general exceptions available) or because the tribunal must interpret the State obligation provisions in light of the provision's context. In this case, language regarding non-derogation, responsible business conduct/corporate social responsibility, or sustainable development might be sources of interpretive impulses. Regardless of the non-bindingness of these provisions, they might accordingly have impacts on the determination of whether the host breached its own investment protection obligations or on the amount it must compensate the investor.

In *Lopez-Goyne* v. *Nicaragua*, the tribunal held that environmental provisions do not themselves directly lay down environmental obligations for investors. "They are mere 'safeguard clauses,' the purpose of which is to allow States to pursue and enforce their environmental policies without the risk of their actions in furtherance of those policies being held to breach their obligations towards investors under the Treaty."[91] In *Aven*, the tribunal reached a similar conclusion noting that the environmental provisions of the underlying treaty "do not – in and of themselves – impose any affirmative obligation upon investors. Nor do they provide that any violation of state-enacted environmental regulations will amount to a breach of the Treaty, which could be the basis of a counterclaim."[92]

3.5. Environmental Obligations of Investors in Selected IIAs

a) European Union's Treaty Practice

The European Union has paid significant attention to environmental protection as a general matter and climate change in particular. Therefore, EU IIAs contain numerous references to environmental issues both in the preambles and in the texts.

i. *CETA (2016)*

The CETA contains no direct obligations on State Parties or investors to protect the environment. It does mention "environment" a number of times, each time directed to the State Parties. The Preamble affirms environmental protection as a legitimate policy objective for the Parties and the need to

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90 Aven, para. 738.

91 The Lopez-Goyne Family Trust and Others v. The Republic of Nicaragua, ICSID Case No. ARB/17/44, Award (1 March 2023), para. 601, available at: https://www.italaw.com/sites/default/files/case-documents/italaw171121.pdf (12.06.2023).

92 Aven, para. 743.

promote sustainable development while respecting environmental protection. The Preamble also suggests a commitment to non-derogation, but as preambular language, this is hortatory.

Environmental protection laws are then referred to in the treaty text as grounds for the State Parties to avoid the treaty's other obligations. The right to regulate to protect the environment is repeated in both the Market Access provision (Art. 8.4) and in the investment protection section on regulatory measures (Art. 8.9), where the preambular language on "legitimate policy objectives" is again set out as including "the protection […] of the environment." The nature of environmental protection as a legitimate area of state regulation is underscored by the reference to the environment in the explanatory language on indirect expropriation. Annex 8-A (Expropriation) confirms that "non-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."

ii. *Other EU IIAs*

Despite the EU's emphasis on environmental issues, there are still few clear positive obligations on either State Parties or investors regarding environmental protection. Most references are to the protection of the environment as one of the "legitimate policy objectives" to which the right to regulate applies or as grounds for one of the general exceptions. The EU-Japan Economic Partnership Agreement (2018), for example, has a provision on Scope that states:

> *2. For the purposes of this Chapter, the Parties affirm their right to adopt within their territories regulatory measures necessary 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.*

In the context of the general exceptions, environmental protection is explicitly incorporated as included in the grounds of protection of "human, animal or plant life or health."[93] This may be found within a separate provision on general exceptions or as a qualification to the national treatment obligation[94].

In the EU's IIAs that are part of broader economic cooperation agreements, environmental considerations may play a more prominent role in other sections of the overall legal framework. For example, the EU-Singapore FFTA (2018) Chapter 12 has a strict non-derogation clause and a right to regulate. While there is also hortatory language, Article 12.2 (Right to Regulate and Levels of Protection) mandates ("shall") that the Parties "continue to improve" environmental protection laws and "strive" to promote high levels of such protection. The non-derogation provision of Article 12.12 (Upholding Levels of Protection) puts an obligation on State Parties to not only not weaken environmental protections to encourage investment, but also an obligation ("shall not fail to") to enforce its environmental protection laws (at least to the extent the failure to enforce could affect investment).

The newest EU treaties go very far in recognizing environmental concerns (as well as human rights). For example, the EU-UK Trade and Cooperation Agreement (TCA) contains a broad-ranging preamble, underscoring the Parties' commitments to making their economic cooperation compatible with other values (ranging from climate change and cultural diversity to animal welfare). Sustainable development and climate change feature prominently, with the objectives of the various parts mentioning environmental sustainability and environmental protection.

Interesting additions to the EU's practice include TCA Article 391 (Non-regression from Levels of Protection). This is, again, a right to set levels of protection for the environment and climate as "it

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93 EU-Japan EPA (2018), Art. 8.3.2(b), footnote 1.

94 EU-Singapore Investment Protection Agreement (2019), Art. 2.3.3.

deems appropriate" and to consequently adjust its regulations to that level. It also makes explicit reference to international "climate principles" as developed through the Rio Declaration on Environment and Development, the United Nations Framework Convention on Climate Change (UNFCC), and the Convention on Biological Diversity.[95] The Agreement also sets out a "rebalancing" provision to allow the Parties to consult on measures either take in pursuance of its own level of environmental protection.[96] Along the same line, the EU-Angola Sustainable Investment Facilitation Agreement (IFA) also makes explicit reference to the UNFCCC and the CBD,[97] as well as to the Montreal Protocol on Substances that Deplete the Ozone Layer, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[98] In contrast, the EU-New Zealand FTA (2022) only refers to multilateral environmental agreements (MEAs) in general terms.[99]

While the EU-China Comprehensive Agreement on Investment (CAI) has a "subsection" dedicated to Investment and Environment with a right to regulate and a non-derogation obligation ("A Party shall not waive"), the remainder of the provision is more programmatic, with the Parties' recognition or duty to "strive to" maintain strong environmental protections.[100]

Likewise, the EU-OACPS Partnership Agreement (2021) and its protocols, have environmental obligations, but only directed to States, including commitments concerning climate change (Art. 57) and sustainable energy (African Protocol, Art. 24; Caribbean Protocol, Art. 18).

Still, all these environmental commitments could only indirectly be assumed as investors' obligations, in as much as they have to comply with State laws and international commitments concerning the environment or natural resources.

b) United States Treaty Practice

US investment-treaty practice had traditionally placed limited attention on environmental issues, as reflected in the US Model BIT 2012. That changed with the Trans-Pacific Partnership (TPP) negotiation, which included an important number of environmental provisions. After the US withdrawal from that agreement in January 2017, it was the USMCA (2020) that reflected the change already undertaken during TPP negotiations, giving more prominence to environmental provisions. These clauses, however, continue not to place direct obligations on investors. Non-derogation clauses and reaffirmations of the right to regulate provide room for the host to enforce and enact environmental protections. This reduces the opportunity for investors to make claims about violations of their legitimate expectations.

i. US Model BIT (2012)

The 2012 Model BIT includes a reference to the environment in the preamble. It also has a provision that excludes measures "necessary to protect human, animal, or plant life or health" or "related to the conservation of living or non-living exhaustible natural resources" from performance requirement commitments. (Art. 8).

The treaty also considers a commitment not to waive, derogate or otherwise fail to enforce domestic environmental standards as a way of encouraging foreign investment, and reaffirming the State's right

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95 EU-UK TCA (2020), Article 393. EU-China CAI (2021), Art. 1 also uses an approach of specifying international legal instruments as the basis for the Parties' agreement on principles of sustainable development, but its focus is more on labor rights.

96 EU-UK TCA (2020), Article 411.

97 The same happens in the EU -Chile Interim Agreement (2022), Arts. 26.10 and 26.13.

98 EU-Angola IFA (2022), Arts. 5.4-5.6.

99 EU-New Zealand FTA (2022), Art. 19.5.

100 EU-China CAI (2021), Subsection 2, Art. 2.

to adopt measures that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns (Art. 12). In the same line, Annex B stipulates that except in rare circumstances, non-discriminatory regulatory actions by a State that are designed and applied to protect legitimate public welfare objectives, such as the environment, do not constitute indirect expropriations.

ii. USMCA (2020)

As the US Model BIT's approach, the USMCA includes preambular references to the environment, as well as an explanatory note excluding non-discriminatory environmental measures from the scope of indirect expropriation (Annex 14-B) and a non-derogation from enforcement provision (Art. 24.4.3). It also reaffirms the State's right to regulate and to establish its own level of protection: the State may "adopt measures that it considers appropriate to ensure that investment is undertaken in a manner sensitive to environmental concerns" (Arts. 14.16 and 24.3).

Building on TPP environmental provisions, USMCA makes detailed references to seven multilateral environmental agreements and commits the State Parties to implement those they have agreed to. The named agreements are: the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (Art. 24.9); the 1978 Protocol Relating to the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL) (Art. 24.10); the 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention); the 1980 Convention on the Conservation of Antarctic Marine Living Resources; the 1946 International Convention for the Regulation of Whaling; and the 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission.[101] That the commitment to these agreements is clearly intended to bind the State Parties rather than investors is apparent from the treaty language that specifies that any claims brought on the basis of the host's failure to implement the environmental requirements should be tied to the investment.[102] That the host's action will be presumed to affect investment[103] does not reduce the clear focus of the provision as the basis for an investor's claim against the host (i.e., a host obligation) rather than as an obligation of the investor.

USMCA includes a general exceptions clause that explicitly broadens the intended interpretation of the WTO/GATT language of "human, animal, or plant life or health" used to mean "environmental measures" (Art. 32.1.3). The same provision also includes an exception for measures "relating to the conservation of living and non-living exhaustible natural resources."

Finally, the USMCA includes provisions on CSR and RBC, according to which States "recognize the importance" of promoting corporate social responsibility and responsible business conduct, following best practices and internationally recognized standards (like the OECD Guidelines for Multinational Enterprises), addressing several areas including the environment (Arts. 14.17 and 24.13).

c) Canada's Treaty Practice

Similar to the US, Canadian treaty practice prior to the TPP negotiation placed limited attention on environmental issues. The ultimately concluded Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) then included an important number of environmental provisions, and this increased interest in the environment is reflected in the subsequent Model FIPA (2021).

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101 USMCA, Arts. 1.3 and 24.8.

102 USMCA, Art. 24.8, fn 6 (there is also language of "a Party's compliance with its respective obligations").

103 USMCA, Art. 24.4.1, fn 5; and Art. 24.8, fn 7.

i. CPTPP (2018)

The CPTPP includes environmental provisions that fit the "traditional" Canadian investment treaty-making and the US Model BIT (2012), both in the preamble as well as in the main Chapter 9 (Investment) text. Such provisions include the exclusion of measures "necessary to protect human, animal, or plant life or health" or "related to the conservation of living or non-living exhaustible natural resources" from performance requirement commitments (Art. 9.10), the reaffirmation of the State's right to establish its own level of protection adopt measures that it considers appropriate to ensure that investment is undertaken in a manner sensitive to environmental concerns (Art. 9.16), and a definition of indirect expropriation that excludes non-discriminatory environmental measures from its scope of indirect expropriation (Annex 9-B). There is also a very soft provision ("encourage") directed at the State Parties to have businesses "voluntarily" adopt corporate social responsibility practices (Art. 9.17).

In CPTPP Chapter 20, further provisions that are applicable to the investment chapter address the State Parties' rights related to environmental standards. There is a non-derogation commitment to not lower environmental standards or fail to effectively enforce its environmental laws (Arts. 20.4 and 20.6) that underlines a Party's right to establish both protection levels and priorities in environmental protection (Art. 20.3.3). The general exceptions provision copies WTO/GATT language as well as clarifies that this means "environmental measures" (Art. 29.1).

The CPTPP also reaffirms the States' commitments to implement several multilateral environmental agreements, like the Montreal Protocol on Substances that Deplete the Ozone Layer (Art. 20.5), the MARPOL Protocol (Art. 20.6), and CITES (Art. 20.17).

ii. Canada Model FIPA (2021)

The Canadian Model FIPA (2021) largely omits firm investor obligations on the environment but does contain an unusually strong provision on Responsible Business Conduct. In fact, Article 16.1 is functionally a legality provision, setting out that "investors and investments shall comply with domestic laws and regulations of the host State, including laws and regulations on […] environmental protection."

The rest of the FIPA has a mix of host State-oriented provisions, mainly related to rights to regulate in the interests of environmental protection: preambular language "reaffirming the importance of promoting […] environmental protection and conservation, […] sustainable development […], as well as the importance of preserving the Party's right to regulate in the public interest". These ideas are also in the provisions of the main text: a right to regulate in Article 3 (with "protection of the environment and addressing climate change" defined to be within the "legitimate policy objectives"), a non-derogation provision that provides for State-State consultations if a Party considers the provision violated in Article 4, a definition of "indirect expropriation" that excludes general non-discriminatory measures taken for an environmental protection purpose, "even if it has an effect equivalent to direct expropriation" (Article 9). The responsible business conduct provision (Article 16), aside from its first paragraph, is aimed at the State Parties, encouraging them to push investors ("should encourage") to accept international guidelines and standards and promising that they will cooperate further on the issue.

d) Japan's Treaty Practice

Japanese IIAs contain no investor obligations to protect the environment. The environmental provisions, while in some cases extensive, are State Party oriented, largely hortatory, and offer the state discretionary use of rules to promote environmental protection rather than mandate State action.

References to environmental protection are often found in the preamble[104] and in the main text of the treaty in the form of non-derogation provisions,[105] general exceptions for measures "necessary to protect human, animal, or plant life or health,"[106] and limits on the scope of measures that can be considered indirect expropriation: "Non-discriminatory regulatory actions by a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as […] the environment, do not constitute expropriation, except in rare circumstances".[107]

The Japan-UK CEPA also affirms the State's right to regulate or to adopt within their territories regulatory measures necessary to achieve legitimate policy objectives (with the inclusion of the protection of the environment as such a "legitimate policy").[108] It recognizes the importance of specified MEAs for investment purposes, listing CITES,[109] the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, and the 1995 Agreement for the Implementation of the Provisions of the UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.[110] The agreement also indicates the important role of investment in ensuring the conservation and sustainable management of natural resources, like forests, fisheries, and aquaculture.[111]

e) Netherlands Model BIT (2019)

The Dutch Model BIT (2019) contains one provision directly obliging investors to protect the environment: an unusually strong responsible business conduct article. The remaining environmental provisions, while numerous, are State-oriented, largely hortatory, and offer the state discretionary use of rules to promote environmental protection rather than mandate State action.

The Model BIT contains in its Article 7 (as part of the Corporate Social Responsibility provisions) that the investor and the investment "shall comply" with the host's environmental protection laws.[112] There is also an investor's liability rule subjecting them to the Home State's jurisdiction for damages caused in the host state:

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104 Bahrain-Japan BIT (2022); Georgia-Japan BIT (2021); Japan-UK CEPA (2020); Japan-Morocco BIT (2020); Argentina-Japan BIT (2018); Japan-Jordan BIT (2018); Japan-UAE BIT (2018); Armenia-Japan BIT (2018); Israel-Japan BIT (2017); Japan-Kenya BIT (2016); Japan-Oman BIT (2015); Japan-Ukraine BIT (2015); Japan-Uruguay BIT (2015); Japan-Kazakhstan BIT (2014); Japan-Myanmar BIT (2013); Japan-Mozambique BIT (2013).

105 Bahrain-Japan BIT (2022), Art. 24; Georgia-Japan BIT (2021), Art. 20; Japan-UK CEPA (2020), Art. 16.2.2; Japan-Morocco BIT (2020), Art. 19; Argentina-Japan BIT (2018), Art. 22; Japan-Jordan BIT (2018), Art. 20; Japan-UAE BIT (2018); Armenia-Japan BIT (2018), Art. 21; Israel-Japan BIT (2017), Art. 20; Japan-Kenya BIT (2016), Art. 22; Japan-Oman BIT (2015), Art. 22; Japan-Mongolia EPA (2015), Art. 10.17; Japan-Uruguay BIT (2015), Art. 27; Japan-Kazakhstan BIT (2014), Art. 24; Japan-Myanmar BIT (2013), Art. 25; Japan-Mozambique BIT (2013), Art. 24.

106 Bahrain-Japan BIT (2022), Art. 18.1; Georgia-Japan BIT (2021), Art. 15.1; Japan UK CEPA (2020), Art. 8.3; Japan-Morocco BIT (2020), Art. 21; Japan-Jordan BIT (2018), Art. 15; Armenia-Japan BIT (2018), Art. 16; Israel-Japan BIT (2017), Art. 15; Iran-Japan BIT (2016), Art. 13; Japan-Mongolia EPA (2015), Art. 1.10; Japan-Uruguay BIT (2015), Art. 22; Australia-Japan EPA (2014) Art. 14.15; Japan-Myanmar BIT (2013), Art. 19; Japan-Mozambique BIT (2013), Art. 18.

107 Georgia-Japan BIT (2021), Art. 11.4; Japan-Morocco BIT (2020), Annex; Argentina-Japan BIT (2018), Art. 11.

108 Japan-UK CEPA (2020), Arts. 8.1 and 16.2.

109 Japan-UK CEPA (2020), Art. 16.6.

110 Japan-UK CEPA (2020), Art. 16.8.

111 Japan-UK CEPA (2020), Arts. 16.7 and 16.8.

112 Netherlands Model BIT (2019), Art. 7.1.

> *"Investors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state."*[113]

The remaining language is directed to the State Parties and hortatory. Both the Preamble and Article 2.2 set out a right to regulate that includes "environmental protection" as legitimate policies for the host state's actions. The sustainable development provisions of Article 6 have various links to environmental concerns, too, again targeting the States rather than the investor directly. Specifically, there is a non-derogation provision (Article 6.4) and a clause to ensure that investment laws and policies provide for and encourage high levels of environmental protection (Art. 6.2). Finally, Article 12 limits the scope of environmental measures that can be considered indirect expropriation.

Within the CSR provisions, the State Parties "reaffirm the importance of investors voluntary internalization of recognized CSR principles" (naming the UNGP, the OECD Guidelines and Recommendation CM/REC(2016))[114] and of the importance of investors "conducting a due diligence process to identify, prevent, mitigate and account for the environmental risks and impacts of their investment."

4. Corruption Provisions in IIAs

4.1. General Overview

In the past two decades, there has been an increasing number of IIAs incorporating anti-corruption provisions (according to EDIT, since 2000, at least 66 BITs have included such clauses). Only the provisions, including CSR corruption commitments include investors' obligations in this regard (which are largely indirectly binding to them).

4.2. Legal Character

Growing out of the experiences with allegations of corruption under traditional IIAs, many of the explicit provisions are mandatory conditions for the investor to claim the protections of the treaty.

4.3. Where they are found

a) In treaties

These anti-corruption provisions are either part of corporate social responsibility clauses (encouraging investors to voluntarily comply with CSR anti-corruption commitments), or separate "carve-out" clauses, imposing direct obligations on investors by denying substantive treaty protection or access to arbitration if their investments were obtained through corruption.[115]

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113 Netherlands Model BIT (2019), Art. 7.6.

114 Netherlands Model BIT (2019), Art. 7.2.

115 Yueming Yan, Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance, Journal of International Economic Law, Volume 23, Issue 4, December 2020, pp. 989–1013, https://doi.org/10.1093/jiel/jgaa026.

b) Geographically

In the treaties that have been selected as the subject of this report, we find anti-corruption provisions in the agreements concluded by the EU, the USMCA, the CPTPP, Canada, and Netherlands Model IIAs, as well as in recent Japanese investment treaty practice. Besides them, according to EDIT, we find such provisions in agreements concluded by Argentina, Bahrain, Brazil, India, Iraq, and Singapore, as well as in IISD and India Model IIAs.

4.4. Consequences of Violation

To the extent that corruption provisions are part of the scope provision, a violation would result in the investor not being recognized as covered by the treaty at all. As a reference within a responsible business conduct provision, it is likely that an investor's engaging in corrupt behavior would affect the tribunal's determination of whether a violation occurred, the amount of compensation (if any) a host would have to pay the investor in the case of the host's own violations of the IIA. It might also, however, have the effect of a tribunal declaring a case inadmissible on the basis of a "clean hands" argument.

An anti-corruption provision in the dispute settlement provisions of an IIA would foreclose the investor from bringing a dispute but would not necessarily exclude said investor from the protections of the treaty altogether.

4.5. Corruption Provisions in Selected IIAs

a) European Union's Treaty Practice

When including anti-corruption provisions, EU IIAs partially follow the typology described above, including "carve out" clauses, as well as provisions calling for coordinated anti-corruption policies, or direct commitments to fight corruption.

i. CETA (2016)

The CETA's language is clear that an investor is precluded from using the IIA provisions as a basis for a dispute settlement claim against the host if the investment was established through corruption. Found in the provision on "Scope," the CETA's text reads:

> *"an investor may not submit a claim if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process."*[116]

This would have a jurisdictional effect on dispute settlement but appears to leave the protections of the agreement otherwise intact (which might leave State-to-State dispute settlement a possibility).

ii. Other EU IIAs

The EU's new IIAs lend substantial attention to unlawful activities, including corruption and money laundering. However, most of the language is solely directed to the State Parties.

For investors, only two of the EU IIAs have investor obligations regarding corruption. In both the EU-Vietnam Investment Protection Agreement (IPA)[117] and the EU-Chile Advanced Framework

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116 CETA (2016) Article 8.18.3.

117 EU-Vietnam IPA (2019), Art. 3.27.2.

Agreement, corruption is relevant if it is a part of the making of the investment. Corruption "carve out" clauses are found within the scope provisions. The almost identical language of each is as follows:

> *2. For greater certainty, a claimant shall not submit a claim under this Section if its investment has been made through fraudulent misrepresentation, concealment, corruption or conduct amounting to an abuse of process.*[118]

This would have a jurisdictional effect on dispute settlement but appears to leave the protections of the agreement otherwise intact (which might leave State-to-State dispute settlement a possibility).

b) United States Treaty Practice

i. US Model BIT (2012)

The US Model BIT of 2012 includes no provisions or references to corruption or bribery, whether in the preamble or in the main text.

No prior US BITs include such provisions either, although dedicated provisions or chapters on the topic have been included in trade agreements with investment chapters since 2003 (in the Singapore-US FTA).

ii. USMCA (2020)

The USMCA lends substantial attention to the need to eliminate bribery and corruption in investment as part of its preamble, as aspects of several provisions in the main text of the agreement, and even includes a dedicated chapter (Chapter 27) to combatting corruption. However, the language is solely directed to the State Parties.[119]

There are no investor obligations specifically regarding corruption in the USMCA.

c) Canada's Treaty Practice

In recent years, Canadian IIAs have regularly included CSR anti-corruption provisions, both in BITs (since the 2013 Benin-Canada BIT) and in FTAs with investment chapters (since the 2008 FTAs with Colombia and Peru)

i. CPTPP (2018)

Besides including a preambular reference to corruption, the CPTPP also includes corruption provisions in the investment chapter. However, the agreement has an anti-corruption section (Section C) that reaffirms States' adherence to the 2007 Asia-Pacific Economic Cooperation (APEC) Conduct Principles for Public Officials, and encourages observance of the 2007 APEC Code of Conduct for Business, the ratification or accession to the UNCAC (Art. 26.6), the OECD Anti-bribery Convention (Art. 26.7.1), and the IACAC (Art. 26.11). Like the USMCA, the section also includes provisions establishing State commitments to adopt or maintain legislative and other measures to establish several corruption acts as criminal offenses under its law (Art. 26.7); promoting integrity among public officials (Art. 26.8); the participation of private sector and civil society in preventing and combatting corruption (Art. 26.10); and the application and enforcement of anticorruption laws (Art. 26.9).[120]

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118 EU-Vietnam IPA (2019), Art. 3.27.2. Article 10.29 of the Chile Agreement uses "may" rather than "shall."

119 It is noteworthy that the inter-State dispute settlement mechanism explicitly applies to the anti-corruption chapter (Art. 27.8).

120 It is noteworthy that the inter-State dispute settlement mechanism explicitly applies to the anti-corruption section (Art. 26.12).

ii. Canada Model FIPA (2021)

The Canadian Model FIPA reaffirms Parties' adherence to various anti-corruption instruments in its Article 16 on Responsible Business Conduct.[121] However, the language is solely directed to the State Parties.[122]

There are no investor obligations specifically regarding corruption in the FIPA, but the legality provision of 16.1 ("investors and investments shall comply with domestic laws") – even in the absence of a specific reference to, for example, "corruption" or "bribery," would extend to such acts. Therefore, this is an indirect obligation on investors to avoid corrupt activities during the investment operation.

d) Japan's Treaty Practice

Japanese investment-treaty practice is consistent with that of most other studied jurisdictions. It includes provisions on measures against corruption that only binds State Parties to act to combat corruption.

There are no investor obligations specifically regarding corruption in Japan's IIAs.

That said, some recent Japanese IIAs include strong State commitments concerning corruption, which could have an impact on investors who engage in corruption during the operation of the investment. For example, under Bahrain – Japan BIT (2022):

> *Each Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations.*[123]

Under RCEP (2020), similar language exists[124], but the commitment is excluded from state-to-state dispute settlement.

The Japan-UK CEPA (2020), in its Article 17.9, reaffirms the obligations included in multilateral agreements against corruption (both at OECD and UN levels):

> *Anti-Corruption*
>
> The Parties affirm their resolve to eliminate bribery and corruption in international trade and investment. Recognising the need to build integrity within both the public and private sectors and that each sector has complementary responsibilities in this regard, the Parties affirm their adherence to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, done at Paris on 17 December 1997, and the United Nations Convention against Corruption, adopted at New York on 31 October 2003.

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121 CPTPP, Art. 16.2.

122 It is noteworthy that the inter-State dispute settlement mechanism explicitly applies to the anti-corruption chapter (Art. 27.8).

123 Bahrain-Japan BIT (2022), Art. 9. A similar provision is included in Georgia-Japan BIT (2021), Art. 9; Japan-Morocco BIT (2020), Art. 7; Argentina-Japan BIT (2018), Art. 9; Japan-Jordan BIT (2018), Art. 9; Japan-UAE BIT (2018), Art. 10; Armenia-Japan BIT (2018), Art. 10; Japan-Oman BIT (2015), Art. 8; Japan-Ukraine BIT (2015), Art. 11; Japan-Uruguay BIT (2015), Art. 14; Japan-Mongolia EPA (2015), Art. 11; Japan-Kazakhstan BIT (2014), Art. 10; Japan-Myanmar BIT (2013), Art. 11; and Japan-Mozambique BIT (2013), Art. 10.

124 A similar provision is included in Japan-Mongolia EPA (2015), Art. 1.7.

e) Netherlands Model BIT (2019)

The Netherlands Model BIT addresses investor obligations regarding corruption by limiting its scope. Article 16(2) mandates an ISDS tribunal to decline jurisdiction when the investment has been made in circumstances akin to corruption:

> *Article 16. Scope of Application*
>
> *1. The Tribunal shall decline jurisdiction if the investment has been made through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process.*

5. Counterclaims in IIAs

5.1. General Overview

The one-sided claims structure of ISDS is a source of much comment among the critics of the investment system. Indeed, with the lack of direct investor obligations in the traditional IIA text, even language in dispute settlement provisions that does not specify whether both investors and the host state may bring a claim could be understood to apply – by necessity - only to investors.[125] Beyond the treaty structure, the fact that host states have jurisdiction over persons and activities taking place within their borders gives them clear competence to bring claims against investors within their own court systems. Therefore, a failure to permit a host's claim in ISDS does not mean that the state cannot hold the investor to account for breaches of its laws or other obligations – it just eliminates ISDS as the instrument through which it can do so.

In the absence of direct language stating that a host may – or may not - bring a counterclaim issue (like in either ICSID or UNCITRAL Arbitration Rules)[126], the question has arisen whether a host facing a complaint by an investor may do so in an ISDS proceeding.

The availability of a host's counterclaim possibility will rest in part on the underlying IIA (or contract) and in part on the tribunal's own position on how to address counterclaims.[127] While relatively few BITs seem to contain provisions addressing counterclaims,[128] those that do state that the host may *not* bring counterclaims to requests for compensation based on an investor's possible indemnification or compensation from an insurance policy. Few mention counterclaims as a positive right of hosts.

Thus, the answer to the question of when hosts may bring a counterclaim generally will rest with tribunals. The tribunal approaches taken so far, however, are diverse.

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125 See also Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Award, paras. 1059-1067 (21 July 2017) (explaining that a "counterclaim" must have a substantive basis in the IIA, lacking which it is simply a defense), available at: https://www.italaw.com/sites/default/files/case-documents/italaw9235.pdf (12.06.2023).

126 Ted Gleason, Examining host-State counterclaims for environmental damage in investor-State dispute settlement from human rights and transnational public policy perspectives, Int Environ Agreements (2021) 21:427, at 432-439, https://doi.org/10.1007/s10784-020-09519-y.

127 Id.

128 According to EDIT, at least 189 BITs and 64 other IIAs include counterclaim provisions, starting in the case of the BITs with the US treaties with Egypt and Cameroon (both from 1986) and in the case of FTAs, with NAFTA (1992).

The so-called "ipso facto" approach was followed by the tribunal in *Goetz* v. *Burundi II*, whereby consent to ICSID jurisdiction gives consent to counterclaims.[129] On the other hand, the *Karkey v Pakistan* tribunal pointed to the ICSID's structure as a forum for investor claims and determined counterclaims outside of its jurisdiction.[130] *Spyridon Roussalis* v. *Romania* determined similarly that a lack of investor obligations in the relevant instrument of protection will prevent the tribunal from having jurisdiction over counterclaims if the applicable law is that of the IIA.[131] The decision notes:

> *[…] Indeed, in order to extend the competence of a tribunal to a State counterclaim, "the arbitration agreement should refer to disputes that can also be brought under domestic law for counterclaims to be within the tribunal's jurisdiction" (P. Lalive and L. Halonen, "On the availability of Counterclaims in Investment treaty Arbitration," Czech yearbook of international law, 2011, p.141, n°7.19).*[132]

The *Metal-Tech v. Uzbekistan* tribunal put out a two-element test for jurisdiction over counterclaims – a connection between the host's counterclaim and the investor's claims on the one hand and the consent of both disputing parties to arbitrate over the counterclaim.[133]

The *Saluka v. Czech Republic* tribunal set out an approach that admitted the possibility for a counterclaim in general, but that required a link between the counterclaim and the main complaints: "a legitimate counterclaim must have a close connexion with the primary claim to which it is a response."[134] This reasoning appears in numerous other decisions, even when one cannot ignore the variations on the strength of the connection needed for demonstrating the counterclaim should be heard (e.g., "direct"[135] or "close"[136]), and the reluctance of tribunals to hear counterclaims based on local law.[137] In the end, to allow a counterclaim, there must be a clear violation on the part of the investor of a mandatory obligation.

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129 Antoine Goetz & Consorts et SA Affinage des M. Etaux v. Republique du Burundi, ICSID Case No. ARB/01/2, Award, para. 279 (21 June 2012), available at: https://www.italaw.com/sites/default/files/case-documents/italaw1086.pdf (12.06.2023).

130 Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, Award at para. 1015 (22 August 2017), available at: https://www.italaw.com/sites/default/files/case-documents/italaw9767.pdf (12.06.2023).

131 Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award (7 December 2011) at para. 871, available at: https://www.italaw.com/sites/default/files/case-documents/ita0723.pdf (12.06.2023).

132 Id.

133 Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award (4 October 2013), paras. 407-413.

134 Saluka Investments B.V. v. The Czech Republic, Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004), para. 67, available at: https://www.italaw.com/sites/default/files/case-documents/ita0739.pdf (12.06.2023).

135 E.g., Metal-Tech v. Uzbekistan, para. 407; *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea,* ICSID Case No. ARB/14/22, Award (18 May 2022) (redacted) para. 1095 (using ICSID Convention Article 25's « directly out of » language to find counterclaim within its jurisdiction), available at: https://www.italaw.com/sites/default/files/case-documents/italaw170322.pdf (12.06.2023).

136 E.g., Saluka, paras. 27, 61-63, 67 an 76.

137 E.g., Sergei Paushok, CJSC Golden East Company and CJSCVostokneftegaz Company v. The Government of Mongolia, Award on Jurisdiction and Liability (28 April 2011) paras. 694-697, available at: https://www.italaw.com/sites/default/files/case-documents/ita0622.pdf (12.06.2023); Oxus Gold plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat, Final Award (17 December 2015), para. 939, available at: https://www.italaw.com/sites/default/files/case-documents/italaw7238_2.pdf (12.06.2023); Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016),

Of particular relevance to the question of investor obligations and counterclaims, there is some indication that tribunals appear willing to apply a more lenient standard in accepting jurisdiction over counterclaims that are based on the investor's violations of the rights of persons or environmental damage. For example, in *Urbaser* v. *Argentina,* the tribunal found that it had jurisdiction to deal with the respondent's counterclaims regarding the violation of human rights. The arbitrators rejected the view that the asymmetric nature of the BIT means that the BIT does not provide any right of the host state, noting that there are procedural rights[138] and, correspondingly, does not impose any obligation upon the investor. *Urbaser's* reasoning was adopted and expanded in *Aven* v. *Costa Rica,* and the tribunal noted that "This trend is likely to continue and shows that investment tribunals are ready to hear counterclaims when dealing with investor wrongdoing."[139] (Note that finding jurisdiction over the counterclaims does not mean counterclaims are ultimately upheld.)

On the other hand, a number of tribunals have found that a lack of jurisdiction over the investor's claim results in a lack of jurisdiction over counterclaims.[140] Thus, where an investor's claim is tainted by corruption, the tribunal's lack of jurisdiction will also prevent any counterclaims. The *Metal-Tech*, *Fraport v. Philippines II*, and *Spentex v. Uzbekistan* all rejected jurisdiction over counterclaims on this basis.

The more recent *BSG Resources v. Guinea* award finds jurisdiction over the counterclaim but declares the host's counterclaim inadmissible due to its officials' involvement in the corruption and the failure to prosecute any of the alleged crimes.[141] The tribunal's discussion of the admissibility of the counterclaim underlines that, unlike the jurisdictional question, admissibility decisions on claims and counterclaims can diverge. The corruption element, however, continues to influence the Parties' ability to rely on the treaty's benefits:

> *1103. The counterclaims seek relief for the harm caused to the State by the Claimants' corrupt practices. The legal framework discussed in connection with the admissibility of the claims is thus equally relevant in the present context. Hence, the Tribunal refers to its developments dealing with Guinean and international law governing corruption. In respect of the facts underlying the counterclaims, it recalls that passive corruption as well as passive trading of influence are prohibited as a matter of Guinean and international law. […]*
>
> *1104. It goes without saying that the inadmissibility of claims does not automatically lead to a finding of inadmissibility of counterclaims. However, here the harm caused by the Claimants' actions would not have occurred if the Guinean state officials in charge of making the controversial decisions […] had not been on the receiving end of the corruption scheme. Had they resisted the corruption attempts, […] the damage for which the counterclaims seek reparation would never have been inflicted.*
>
> *[…]*
>
> *1110. […] The Tribunal further notes that the Respondent concedes that general principles of international law, […] which all bar claims resulting out of the Claimant's own wrongful acts, aim at sanctioning fraudulent or deceitful conduct and render claims inadmissible. In application of these legal norms and considering the facts at issue, the counterclaims must also be held inadmissible.*

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para. 628, available at: https://www.italaw.com/sites/default/files/case-documents/italaw7507.pdf (12.06.2023).

138 Urbaser, para. 1184.

139 Aven para. 699 (footnote omitted).

140 Muhammet ÇAP Sehil Insaat Endustri ve Ticaret Ltd. Sti v. Turkmenistan, ICSID Case No. ARB/12/6, Decision on Respondent's Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty (13 February 2015), available at https://www.italaw.com/sites/default/files/case-documents/italaw4163.pdf (12.06.2023).

141 BSG Resources Limited, para. 1110.

5.2. Legal Character

Most counterclaim provisions are jurisdictional in nature, meaning that they will be determinative of whether a tribunal may hear a claim brought by the host in response to a complaint by the investor. If a treaty gives a positive right to make a counterclaim, the provision would be seen as discretionary – within the jurisdiction of the tribunal, but invocable rather than mandatory. Where tribunals have discussed whether to allow counterclaims to be brought (in the absence of a clear provision prohibiting them), they have sometimes been found to have the character simply of a claim that a legal obligation owed by the investor was breached.

5.3. Where counterclaim provisions are found

a) In treaties

References to counterclaims are generally found in the dispute settlement provisions of IIAs.

b) Geographically

In the treaties selected as the subject of this report, we find counterclaim provisions in the agreements concluded by the EU, the USMCA, the CPTPP, Canada Model FIPA, and the recent Japanese investment treaty practice. Besides them, according to EDIT, we find such provisions in agreements concluded by Albania, Argentina, Armenia, Australia, Austria, Bahrain, Belarus, BLEU, Bosnia and Herzegovina, Chile, Colombia, Croatia, Denmark, India, Israel, Kazakhstan, Korea, Kuwait, Mexico, Nicaragua, Panama, and Sweden, as well as in the IISD Model IIA (2005).

5.4. Consequences of Violation

In their current form, counterclaim provisions prevent the host from invoking the fact that an investor can recover losses from an insurance or indemnity contract. Where tribunals have permitted counterclaims (in the absence of a clear provision prohibiting them), they have the consequence of being a potential offset to any compensation the host would owe the investor. The explicit allowance of counterclaims in the newer treaty texts set forth below would presumably permit the Host to ask for damages for investor violations.

5.5. Counterclaim Provisions in Selected IIAs

a) European Union's Treaty Practice

The European Union's approach to counterclaims is to prevent the host from using a counterclaim in the case of indemnification or compensation from an insurance (guarantee) policy. However, most of these treaties do not have a detailed regulation of counterclaims, which is merely mentioned in the provisions concerning compensation in investor-state dispute settlement.

i. CETA (2016)

CETA Article 8.40 only mentions the unavailability of counterclaims in cases of indemnification and compensation:

> *Indemnification or other Compensation*
>
> *A respondent shall not assert, and the Tribunal shall not accept a defence, **counterclaim**, right of setoff, or similar assertion, that an investor or, as applicable, a locally established*

enterprise, has received or will receive indemnification or other compensation pursuant to an insurance or guarantee contract in respect of all or part of the compensation sought in a dispute initiated pursuant to this Section.

There is no other reference to the host's right to bring a counterclaim on the basis of an investor's violation of obligations.

ii. Other EU IIAs

Most EU IIAs mention the unavailability of counterclaims in cases of indemnification and compensation. The wording is very similar in all IIAs reviewed to that of the EU-Singapore IPA:

Article 3.20. Indemnification or other Compensation

The respondent may not assert, and the Tribunal shall not accept, as a defence, ***counterclaim****, right of set-off, or for any other reason, that the claimant has received or will receive indemnification or other compensation, pursuant to an insurance or guarantee contract, for all or part of the damages sought in a dispute initiated under this Section.*

However, the recently concluded EU-Chile Advanced Framework Agreement (2022) includes a specific provision on the host's right to bring a counterclaim on the basis of an investor's violation of obligations. In this case, the respondent State can bring a counterclaim on the basis of an investor's failure to comply with an international obligation applicable in the territories of both Parties, arising in connection with the factual basis of the claim:

Article 10.30

Counterclaims

1. The respondent may submit a counterclaim on the basis of an investor's failure to comply with an international obligation applicable in the territories of both Parties, arising in connection with the factual basis of the claim.

2. The counterclaim shall be submitted no later than in the Respondent's counter-memorial or statement of defence, or at a later stage in the proceedings if the Tribunal decides that the delay was justified under the circumstances.

3. For greater certainty, claimant's consent to the procedures under this Section includes the submission of counterclaims by the respondent.[142]

b) United States Treaty Practice

i. USMCA (2020)

The USMCA only mentions the unavailability of counterclaims in cases of indemnification and compensation:

Article 14.D.7. Conduct of the Arbitration

8. A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason, that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

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142 In footnotes 26 and 27 of this provision, the parties clarify that the obligations referred to shall be based on legal commitments that the Parties have consented to. The Joint Council/Committee shall, at the request of a Party, issue binding interpretations to clarify the scope of international obligations that are referred to in Article 10.30.

There is no other reference to the host's right to bring a counterclaim on the basis of an investor's violation of obligations.

ii. Model BIT (2012)

The United States Model BIT approach to counterclaims is to prevent the host from using a counterclaim in the case of indemnification or compensation from an insurance (guarantee) policy.

> *Article 28. Conduct of the Arbitration*
>
> *7. A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.*

There is no other reference to the host's right to bring a counterclaim on the basis of an investor's violation of obligations.

c) Canada's Treaty Practice

i. CPTPP (2018)

The CPTPP is one of the few IIAs reviewed with language clearly permitting a host state to raise a counterclaim in investor-State arbitration. Article 9.19 (Submission of a Claim to Arbitration) provides that

> *2. When the claimant submits a claim pursuant to paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B) or 1(b)(i)(C), the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant. [footnote omitted]*

This language is accompanied by a further provision stipulating the prohibition on the use of counterclaims on the basis of indemnification of the investor by an insurance or guarantee contract.[143]

ii. Canada Model FIPA (2021)

The Canadian approach to counterclaims is to prevent the host from using a counterclaim in the case of indemnification or compensation from an insurance (guarantee) policy.

> *Article 44. Receipts Under Insurance or Guarantee Contracts*
>
> *In an arbitration under this Section, a respondent Party may not assert as a defence,* ***counterclaim****, right of set-off, or otherwise, that the claimant has received or will receive, under an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.*

There is no other reference to the host's right to bring a counterclaim on the basis of an investor's violation of obligations.

d) Netherlands Model Treaty

Netherlands Model BIT does not include any provision on counterclaims.

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143 CPTPP (2018), Article 9.23.

e) Japan's Treaty Practice

Japan's approach to counterclaims is to prevent the host from using a counterclaim in the case of indemnification or compensation from an insurance (guarantee) policy. The language of the Bahrain-Japan BIT (2022) is a typical example:

> *Article 16. Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party*
>
> *13. In an arbitration under this Article, the disputing Party shall not assert, as a defence, counterclaim, right of setoff or otherwise, that the disputing investor has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.*

There is no other reference to the host's right to bring a counterclaim on the basis of an investor's violation of obligations.

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Annex A: Treaties analyzed in this legal report

A. Comprehensive Economic and Trade Agreement (CETA)

B. Other agreements concluded by the European Union (EU). We have considered as relevant EU investment treaty practice, all IIAs signed or concluded by the EU after CETA with investment chapters or sections, namely:
   - EU-Angola Sustainable Investment Facilitation Agreement (2022)[144]
   - EU-Organisation of African, Caribbean, and Pacific States Partnership (OACPS) Agreement (2021)[145]
   - China-EU Comprehensive Agreement on Investment (2021)[146]
   - EU-United Kingdom Trade and Cooperation Agreement (2020)
   - EU-Vietnam FTA and Investment Protection Agreement (2019)
   - EU-Singapore FTA and Investment Protection Agreement (2018)
   - EU-Japan Economic Partnership (2018)
   - Free Trade Agreement Between the European Union and New Zealand (2022)[147]
   - Interim Trade Agreement Between the European Union and the Republic of Chile (2022) [148]
   - EU-Chile Advanced Framework Agreement (2022)[149]

C. United States–Mexico–Canada Agreement (USMCA)

D. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

E. Canada's Foreign Investment Promotion and Protection Agreement (FIPA) Model (2021)

F. U.S. Model Bilateral Investment Treaty (2012)

G. Netherlands Model Investment Agreement (2019),

H. Japanese treaty practice. We have considered as relevant Japanese investment treaty practice, all IIAs signed or concluded by Japan in the past ten years, namely:
   - Bahrain-Japan BIT (2022)
   - Georgia-Japan BIT (2021)
   - Regional Comprehensive Economic Partnership Agreement-RCEP (2020)
   - Japan-United Kingdom CEPA (2020)
   - Japan-Morocco BIT (2020)

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144 Draft text made public on 18.11.2022, available at: https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a17ccfe1-ce36-428f-bc7f-76bcb902c36a/details?download=true (29.03.2023)

145 Negotiated Agreement text initialled by EU OACPS chief negotiators (15.04.2021), made public on 15.04.2022, available at: https://international-partnerships.ec.europa.eu/system/files/2021-04/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf (29.03.2023)

146 EU-China Agreement in principle, made public on 30 December 2020, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en (29.03.2023).

147 EU-New Zealand: Text of the agreement, concluded on 30 June 2022 (not signed yet), available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en (10.05.2023).

148 EU-Chile Interim Trade Agreement, concluded on 9 December 2022 (not signed yet), available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en (10.05.2023).

149 EU-Chile Advanced Framework Agreement, partially concluded on 9 December 2022 (not signed yet), available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en (10.05.2023).

- Argentina-Japan BIT (2018)
- Japan-Jordan BIT (2018)
- Japan-United Arab Emirates BIT (2018)
- Armenia-Japan BIT (2018)
- Israel-Japan BIT (2017)
- Japan-Kenya BIT (2016)
- Iran, Islamic Republic of-Japan BIT (2016)
- Trans-Pacific Partnership (TPP) (2016)
- Japan-Oman BIT (2015)
- Japan-Mongolia EPA (2015)
- Japan-Ukraine BIT (2015)
- Japan-Uruguay BIT (2015)
- Japan-Kazakhstan BIT (2014)
- Australia-Japan EPA (2014)
- Japan-Myanmar BIT (2013)
- Japan-Mozambique BIT (2013)
- Japan-Saudi Arabia BIT (2013)