Fairness as Balance: Investor Obligations and Investment Treaty Reform

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Abstract

The normative asymmetry between the rights and obligations of investors and host states under investment treaties has been a key reason for the treaties' common characterization as "unbalanced". While initially a description of a justified treaty design, imbalance has since become a central component of the legitimacy challenges to the investment treaty regime: a normative demand of the treaties' realignment. Identifying the imbalance critiques of investment treaties as fairness-based critiques concerning the distributive implications of investment treaties, the article considers to what extent including provisions on investor conduct in investment treaties may address the concerns about potential unfairness in the allocation of rights and obligations under these treaties. In particular, the article argues that understanding the imbalance critiques as concerns of distributive justice enables the assessment of investment treaty design innovations and the alternative ways in which these instruments could be structured to produce different distributive outcomes.

Keywords: *investment treaties; investment agreements; justice; legitimacy; investor rights and obligations.*

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1. Introduction

Most international lawyers conventionally associate the notion of fairness in the context of international investment law as implicating the 'fair and equitable treatment' (FET) standard—one of the substantive standards of protection of investments guaranteed by investment treaties.[2] Considerations of fairness in international investment law would accordingly focus on the scope of the FET standard and the question of whether the investor and its investment received fair (and equitable) treatment as required by this standard by the state in which the investment was made (the host state); vast literature and jurisprudence explore this issue.[3]

However, such understanding is too limited, given that considerations of fairness

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[2] Tellingly (and somewhat disappointingly), the international investment law panel during the main program of the 2023 Annual Conference of the European Society of International Law, entitled "The Law of Investments: Is this still Fairness?", explored (and was framed as such in the call for papers) the scope of the FET and whether it is "really fair".

[3] See Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2022), 186ff and the sources cited therein.

and justice have been essential components in critiques of the investment treaty regime and discussions of its reform.[4] Public discourse on investment treaties (fueled by, although by no means limited to, the sustained activity of a range of NGOs[5] and critical legal scholarship[6] who continue to powerfully challenge the portrayal of investment treaties as technical instruments of low politics and instead emphasize the distributive effects and social impacts of investment treaties and investment arbitration awards) and the current legitimacy crisis of the investment treaty regime fundamentally engage issues of political and moral philosophy; and any investment treaty reform will need to be sensitive to these issues if it is to succeed.[7]

To contribute to this special issue on "Pursuing Fairness in Times of Crisis: Reflections on the Future of International Economic Law", this article builds on the existing literature exploring broader notions of fairness in international investment law[8] and focuses on a particular aspect of the critique of investment treaties and a potential mitigation of the issue at heart of these critiques: the characterization of investment treaties as "unbalanced" and the extent to which treaty-based investor obligations could address this imbalance.

The discussion, which draws on notions of political and moral philosophy but is firmly based in the field of international law, will proceed in five steps. First, the article explores the characterization of investment treaties as unbalanced and identifies the normative asymmetry between the rights and obligations of investors and host states under these treaties as a central component of the contemporary legitimacy crisis and critiques of investment treaties. The article then traces the shift in the characterization of investment treaties as unbalanced away from a description of a justified treaty design, and instead toward a normative critique and demand for the treaties' realignment. Next, the article frames the imbalance critiques of investment treaties as fairness-based critiques relating to the distributive implications of investment treaties before proceeding to consider if, and if so to what extent, including provisions on investor conduct in investment treaties may address the (unfair) imbalance in the allocation of rights and obligations between host states and investors. The article argues that understanding the imbalance critiques as concerns of distributive justice enables to assess investment treaty design innovations and the alternative ways in which these instruments could be

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[4] Frank Garcia et al., "Reforming the International Investment Regime: Lessons from International Trade Law," *Journal of International Economic Law* 18, no. 4 (December 2015): 861–92.

[5] Most prominent among these are Columbia Center on Sustainable Investment (CCSI), International Institute for Sustainable Development (IISD), and Corporate Europe Observatory.

[6] David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (London: Palgrave Macmillan UK, 2013); M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015); Celine Yan Wang, "Mine-Golia: Integrated Perspectives on the History and Prospects of International Investment Law and the Investor-State Dispute Settlement Regime," *New York University Journal of International Law and Politics* 53 (2021): 631–87, 641–46.

[7] See also Garcia et al., "Reforming the International Investment Regime", 876; Gus Van Harten and Anil Yilmaz Vastardis, "Special Issue: Critiques of Investment Arbitration Reform," Journal of World Investment and Trade 24 (June 23, 2023): 363–71.

[8] Garcia et al., "Reforming the International Investment Regime"; Steven Ratner, "International Investment Law through the Lens of Global Justice," *Journal of International Economic Law* 20, no. 4 (December 1, 2017): 747–75; Johannes Kniess, "Must We Protect Foreign Investors?," *Moral Philosophy and Politics* 5, no. 2 (October 1, 2018): 205–25; Oisin Suttle, "Justice and Authority in Investment Protection," *Law and Development Review* 15, no. 2 (June 1, 2022): 257–82.

structured to produce different distributive outcomes.[9]

2. Unbalanced investment treaties

The investment treaty regime has been targeted by sustained legitimacy challenges for some 20 years now,[10] ever since the boom of investor-state arbitration in the 1990s and early 2000s drew attention and controversy to these previously little-known treaties.[11] In the context of the ongoing debate about their merits and perils, investment treaties and investment arbitration (which exemplifies both a feature of investment treaties and a procedure that amplifies the treaties' other features) have been described or critiqued using different adjectives: asymmetrical,[12] non-reciprocal,[13] biased,[14] one-sided,[15] even exploitative or dismissive of victims.[16]

However, one of the most common characterizations of the of investment treaty regime has been that of being 'unbalanced'.[17] Commentators, states, international organizations and other stakeholders have considered this imbalance to encompass different issues. Some have focused on the power imbalance between the treaty parties: home and host states, developed and developing states, capital-exporting and capital-importing states, arguing that the power imbalance determines the negotiation dynamics and consequently the investment treaties' substantive content.[18] Others have emphasized

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[9] See Kniess, "Must We Protect".

[10] See, e.g., Susan Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions," *Fordham Law Review* 73, no. 4 (March 1, 2005): 1521–1626; Michael Waibel et al., eds., *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer, 2010); Susan Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions," *Fordham Law Review* 73, no. 4 (March 1, 2005): 1521–1626; David Schneiderman, "International Investment Law's Unending Legitimation Project," *Loyola University Chicago Law Journal* 49, no. 2 (January 1, 2017): 229; Garcia et al., "Reforming the International Investment Regime", 863.

[11] Jonathan Bonnitcha, Lauge Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford, New York: Oxford University Press, 2017), 1; Klara Polackova Van der Ploeg, "Investor Obligations: Transformative and Regressive Impacts of the Business and Human Rights Framework," *Business and Human Rights Journal, First View*, May 24, 2024, section III.

[12] Garcia et al., "Reforming the International Investment Regime".

[13] Gus Van Harten, "Five Justifications for Investment Treaties: A Critical Discussion," *Trade, Law and Development* 2, no. 1 (2010): 19–58.

[14] Robin Broad, "Corporate Bias in the World Bank Group's International Centre for Settlement of Investment Disputes: A Case Study of a Global Mining Corporation Suing El Salvador," *University of Pennsylvania Journal of International Law* 36, no. 4 (January 1, 2015): 851.

[15] A. Claire Cutler and David Lark, "The Hidden Costs of Law in the Governance of Global Supply Chains: The Turn to Arbitration," *Review of International Political Economy* 29, no. 3 (May 4, 2022): 719–48.

[16] Public Statement on the International Investment Regime https://www.bilaterals.org/IMG/pdf/Public_Statement.pdf - previously available at http://www.osgoode.yorku.ca/public_statement/.

[17] See, e.g. Mohammad Hamdy, "Redesign as Reform: A Critique of the Design of Bilateral Investment Treaties," *Georgetown Journal of International Law* 51 (2020): 255–322; Garcia et al., "Reforming the International Investment Regime"; Barnali Choudhury, "Investor Obligations for Human Rights," *ICSID Review - Foreign Investment Law Journal* 35, no. 1–2 (May 1, 2020): 82–104; Kinda Mohamadieh, "Investment Governance to Reverse Unjustified Privileging of Investors," *Development* 64, no. 1 (June 1, 2021): 82–92.

[18] Thomas Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1998), 438–73; M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010), 35, 473.

the (first- and second-generation)[19] investment treaties characteristic prioritization of the protection of investor property and other economic rights over the realization of public interest and thus the one-sided nature of protected interests under these instruments.[20] Yet others have emphasized the treaties' preoccupation with "economic" interests and goals to the detriment of "non-economic" ones.[21] Finally, commentators and stakeholders have criticized investment treaties for the deep asymmetry between the rights and obligations of investors and host states under investment treaties—on one hand the wide-ranging rights for foreign investors and on the other obligations for host states.[22]

3. From description to normative demand

Modern bilateral investment treaties (BITs) emerged in the late 1950's in the context of the Western capital-exporting states' concern about the risk of nationalizations and other governmental interferences with investments made by their nationals in developing countries.[23] As newly independent states sought to exercise sovereignty over economic matters, Western investors grew to consider the protections against expropriations in existing international law to be inadequate. Drawing on the heritage of the international law on protection of nationals abroad, investment treaties were to provide for new, comprehensive protection of foreign investors' property and other economic interests in international law to counter the plenary powers of the host state.[24] Investment treaties accordingly focused on host state's conduct, committing host states to complying with the defined standards of investment protection (e.g., fair and equitable treatment, protection against unlawful expropriation, most-favored-nation treatment and so on), and as such allocated rights and obligations between the parties to the international investment relationship in a one-sided manner, imposing obligations exclusively on the host states.[25]

While "imbalance" of investment treaties on account of the normative asymmetry between the rights and obligations of investors and host states had initially simply described the particular treaty design,[26] it has since become a central component

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[19] See Krista Nadakavukaren Schefer, *International Investment Law: Texts, Cases and Materials,* 3rd edn. (Cheltenham: Edward Elgar, 2020) 35–36.
[20] See Hamdy, "Redesign as Reform", 315–17.
[21] Ibid, 317–18.
[22] Steffen Hindelang and Markus Krajewski, eds., *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford, New York: Oxford University Press, 2016); Niccolò Zugliani, "Balancing the Protection of Foreign Investors and States Responses in the Post-Pandemic World," *ICSID Review* 38, no. 1 (January 12, 2023): 243–49. For an alternative reading of the imbalance discourse, see Hamdy, "Redesign as Reform", 314–18.
[23] See, e.g., Dolzer et al., "Principles", 1–10.
[24] Kniess, "Must We Protect", 207.
[25] Dolzer at al., "Principles", 1–10; Vaughan Lowe, "Book Review of Commentaries on Selected Model Investment Treaties / Edited by Chester Brown. ISBN 978-0-19-964519-0, 180.00," *ICSID Review* 30, no. 1 (February 1, 2015): 275–77, 276. Business groups in fact made significant effort to thwart any attempt at introducing corporate international legal obligations across post-WWII lawmaking processes. Nicolás Perrone, "Bridging the Gap between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment," *Business and Human Rights Journal* 7, no. 3 (October 2022): 375–96.
[26] Garcia et al., "Reforming the International Investment Regime", 870.

of the legitimacy challenges to the investment treaty regime.[27] Since the mid-2000s, investment treaties have become increasingly more controversial. Through the treaties' expansive interpretations, arbitral tribunals have found violations of the standards of protection by states around the world, often for taking general, non-discriminatory, good faith measures in the public interest, such as for the protection of health, the environment, human and workers' rights, or in situations of economic crises,[28] ordering states to pay vast sums in compensation to investors.[29] Even when host states have successfully defended the claims brought against them by investors, the cost to public budgets has been significant and regulatory chill real.[30] The economic rationale conventionally used to justify the existence of investment treaties—that these treaties are essential to host states' ability to attract foreign investment and to benefit from the prosperity it brings with it—did not seem to hold empirically The asymmetry built into the treaties' normative design by allocating rights to foreign investors and obligations to host states—and the arbitral tribunals' expansive interpretation of this asymmetry[31]— has come under scrutiny,[32] not least as significant negative effects of investor conduct on local populations and the environment have become more publicly known,[33] and visions of how investment treaties should operate and what kinds of foreign investments they should protect have shifted.[34]

In its initial formulation, as developed within the mainstream international investment law discourse, this imbalance critique focused on seeking a robust explanation as to why the radical asymmetry in the allocation of rights and obligations under investment treaties continued to be justified (given the outcomes of the investment treaty regime). However, over time, the scholarship on the investment treaty regime and its effects has grown more diverse and richer, debates about the regime's legitimacy have become more developed, and the imbalance critique has thickened. Critical legal scholarship has insisted on broader appreciation of investment treaties as institutions

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[27] See note 22.

[28] See examples in Choudhury, "Investor Obligations", 86.

[29] See, e.g., Jonathan Bonnitcha et al., "Damages and ISDS Reform: Between Procedure and Substance," *Journal of International Dispute Settlement* 14, no. 2 (2023): 213–41.

[30] See, e.g., Eric Crosbie and George Thomson, "Regulatory Chills: Tobacco Industry Legal Threats and the Politics of Tobacco Standardised Packaging in New Zealand," *The New Zealand Medical Journal* 131, no. 1473 (April 13, 2018): 25–41; Penelope Milsom et al., "Do International Trade and Investment Agreements Generate Regulatory Chill in Public Health Policymaking? A Case Study of Nutrition and Alcohol Policy in South Africa," *Globalization and Health* 17, no. 1 (September 6, 2021): 104.

[31] See, e.g., Gus Van Harten, "Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010," *European Journal of International Law* 29, no. 2 (July 23, 2018): 507–49.

[32] See, e.g., Gus Van Harten, "Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010," *European Journal of International Law* 29, no. 2 (July 23, 2018): 507–49; Joost Pauwelyn, "At the Edge of Chaos?: Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed," *ICSID Review* 29, no. 2 (May 1, 2014): 372–418, 386; Joost Pauwelyn, "Rational Design or Accidental Evolution? The Emergence of International Investment Law," in *Foundations of International Investment Law: Bringing Theory Into Practice*, ed. Zachary Douglas, Joost Pauwelyn, and Jorge Viñuales (Oxford: Oxford University Press, 2014), 11–43.

[33] Tien Dat Hoang, "Reassessing Environmental Protection in International Investment Agreements: The Case of Vietnam," *Review of European, Comparative & International Environmental Law* (2024).

[34] Anne van Aaken, "Investment Law in the Twenty-First Century: Things Will Have to Change in Order to Remain the Same," *Journal of International Economic Law* 26, no. 1 (March 2023): 166–76; Bonnitcha et al., "Political Economy", 257–60.

distributing significant benefits and burdens, while questioning the parameters of this distribution.[35] Human rights perspectives have not only challenged the investment treaties' focus on purely economic matters to the detriment of human rights (and other public interest) protection,[36] but have also contributed to a disaggregation of the originally monolithic understanding of the host state, bringing attention to the multiplicity of interests and rights involved in the making and operation of foreign investments in the host states, such as the human and environmental rights of (the members of) local communities and indigenous peoples.[37] The business and human rights discourse has amplified the imbalance critique by accusing investment treaties not only of preventing states from regulating for the protection of human rights and the environment but also of failing adequately constrain corporate conduct detrimental to human rights,[38] and in fact "facilitating" and "incentivizing" irresponsible conduct by investors.[39]

The notion of imbalance has consequently developed along two key axes. First, what may have initially been simply a descriptive characterization of a treaty design has turned into a critique and a normative demand for correction. Second, the concept has expanded in its relational dimension towards a more complex understanding of imbalance as concerning not only the investors, home states and host state but also other entities—stakeholders—the needs and priorities of which may not be aligned with those of the host state's government of the day or its individual officials who represent the 'host state', such as (members of) the general public, local communities, and indigenous peoples. Imbalance has become a concept about not only the relationship between investors and host states but also about the relationships between host states and other entities and between investors and other entities.

4. Imbalance as unfairness

In a 2015 book review, Vaughan Lowe argued that "it made no sense to criticize a BIT for being an unbalanced instrument favouring investors at the expense of host States",[40] because "one of the main functions of a BIT [was] to operate as a counterweight to the plenary sovereign powers of the host State."[41] In his view, "BITs

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[35] See note 6.

[36] Bruno Simma, "Foreign Investment Arbitration: A Place for Human Rights?," *International & Comparative Law Quarterly* 60, no. 3 (July 2011): 573–96.

[37] Nicolás Perrone, "The 'Invisible' Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime," *AJIL Unbound* 113 (2019): 16–21.

[38] See, e.g., Surya Deva, "International Investment Agreements and Human Rights: Assessing the Role of the UN's Business and Human Rights Regulatory Initiatives," in *Handbook of International Investment Law and Policy*, ed. Julien Chaisse, Leïla Choukroune, and Sufian Jusoh (Springer Singapore, 2021); Nicolas Bueno, Anil Yilmaz Vastardis, and Isidore Ngueuleu Djeuga, "Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses," *The Journal of World Investment & Trade* 24, no. 2 (January 20, 2023): 179–216.

[39] Human Rights Council, "Human rights-compatible international investment agreements. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises', A/76/238 (27 July 2021), paras 3 and 74. The Working Group's report outlines the concerns regarding investment treaties under the headings of: (i) regulatory constraints; (ii) investors' rights without obligations; and (iii) privileged access to remedy for investors. Ibid, paras 15–27.

[40] Lowe, "Book Review", 276.

[41] Ibid.

may be criticized on the ground that they provide too little or too much of a counterweight, or on the ground that their procedures are ineffective or deficient: but to criticize a BIT on the ground that it only gives rights to investors is like criticizing a screwdriver for only being useful for attaching screws."[42] However, this argument could no longer dispel the imbalance critiques. Critics have grown to portray investment treaties as conferring unduly privileged, overly broad legal protections on investors and investments,[43] while operating as essentially blind to illegal or harmful investor conduct in the host state. As Van Harten and Yilmaz Vastardis note, "[e]ven actors central to the functioning of the investment arbitration regime, and often profiting from it, now accept a need for change."[44]

The earlier, endogenous formulation of the imbalance critique regarding the allocation of rights and obligations under investment treaties was typically presented in relatively formal terms: commentators wondered whether it was appropriate to have a legal regime in which one actor, the host state, bore all the obligations and the other, the investor, benefited from all the rights. The treaties' one-sided rights-obligations structure, in particular as interpreted by arbitral tribunals, seemed in tension with some basic notions of fairness, such as equality, impartiality, an absence of favoritism, and so on. Were host states and investors in fact not given an equal opportunity in the context of investment arbitration?

Although regularly presented in essentially procedural terms, this imbalance critique has been triggered by the increasingly controversial effects of the investment treaty regime and actually relates to investment treaties' distributive effects.[45] While the investment treaty regime is normally understood to be about property and other economic rights, it is really a regime of liability rules[46] with significant socio-economic repercussions (distributive implications). The questions about the allocation of rights and obligations between investors and host states indeed imply that the imbalance in this allocation has (also) produced the treaties' current effects, and a rearrangement might therefore lead to different, preferable distributive outcomes.

The concerns regarding the imbalance in the rights and obligations of investors and host states may usefully be described using Rawls's theory of justice as fairness, and particularly his differentiation principle.[47] Investment treaties may be characterized as

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[42] Id.

[43] See, e.g., Human Rights Council, "Human rights-compatible international investment agreements", para 3; Waibel et al (2010), note 59; Suzanne Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 *Journal of International Economic Law* 1037; Jean Kalicki and Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Leiden: Brill Nijhoff, 2015); UNCTAD, 'World Investment Forum 2014: Investing in Sustainable Development. IIA Conference – 16 October 2014. Technical Summary, Prepared by the UNCTAD Secretariat', https://worldinvestmentforum.unctad.org/wp-content/uploads/2014/11/Summary_UNCTAD-secretariat_IIA_WIF-2014.pdf (accessed 28 June 2022); OECD, 'Investment Treaties: The Quest for Balance—Summary' (14 March 2016), https://www.oecd.org/daf/inv/investment-policy/OECD-investment-treaties-2016-summary.pdf (accessed 28 June 2022).

[44] Gus Van Harten and Anil Yilmaz Vastardis, "Special Issue: Critiques of Investment Arbitration Reform," *Journal of World Investment and Trade* 24 (June 23, 2023): 363–71, 363.

[45] Hamdy, "Redesign as Reform", 315–16.

[46] Oisin Suttle, "Justice and Authority in Investment Protection," *Law and Development Review* 15, no. 2 (June 1, 2022): 257–82, 260.

[47] There is a disagreement in the literature as to the differentiation principle applies only in domestic (intra-state) context or also in international relations (see Garcia et al., "Reforming the International Investment

social institutions, which allocate rights, privileges, opportunities, burdens and resources (in Rawlsian terms social primary goods, which are valuable in their own right and for a range of uses).[48] Given their distributive effects, principles of fairness (as the principles of distributive justice) apply to investment treaties and require that everyone must be treated equally; if there is to be any inequality (differentiation), it needs to be for the benefit of all (the differentiation principle). The normative asymmetry between the rights and obligations of investors and host states is obviously an instance of inequality. Commentators may disagree with Rawls's standard of the necessary benefit for all; however, the differentiation principle is arguably grounded in a well-observed human need for unequal treatment to be justified[49]—a need that has manifested in the context of the endogenous imbalance critique in the questions about the continuing merits of the inequality in the rights-obligations structure.

As with any question of moral and political philosophy, consensus is lacking as to what distributional fairness means in international economic regulation.[50] However, as Suttle notes, "questions of social and global distributive justice are a necessary, if implicit, premise of international investment law"[51] and of decisions on how the values involved (such as economic growth, private property, legitimate expectations, democracy, human rights, environmental protection. etc.) "should be balanced against one another."[52] Given that the imbalance critiques are in essence about fairness or justice in the foreign investment context, they invite a (re)consideration of what constitutes a fair distribution of the benefits and burdens of foreign investment.[53]

While the endogenous imbalance critique has focused on fairness in the investor-host state relationship, investment treaties have distributive implications also between states and within host states.[54] Consequently, these implications raise additional issues of fairness in the relationships between the host states and intra-state social groups, between investors and local communities, as well as among different groups within the host state. Later iterations of the imbalance critique have emphasized the social and environmental costs and harms regularly associated with the operation of foreign investments; the general disregard of such harms and interests of local communities in investment arbitration proceedings (in which investors would regularly be able to reap the benefits attained also by committing such harms, for example to the local environment); and the inability of affected communities to hold investors accountable for human rights abuses and environmental pollution.[55]

Literature exploring issues of political and moral philosophy involved in investment treaties has explored the justified scope of investor rights,[56] host states'

Regime", 876) - a point which does need to be resolved here.

[48] This discussion draws on Garcia et al., "Reforming the International Investment Regime", 876ff.

[49] See Kniess, "Must We Protect", 222.

[50] Thomas Nagel, "The Problem of Global Justice," *Philosophy & Public Affairs* 33, no. 2 (2005): 113–47; Oisin Suttle, "Equality in Global Commerce: Towards a Political Theory of International Economic Law," *European Journal of International Law* 25, no. 4 (November 1, 2014): 1043–70.

[51] Suttle, "Justice and Authority", 257.

[52] Ibid, 257–58.

[53] Kniess, "Must We Protect", 206.

[54] Ibid, 213.

[55] Ibid, para 3.

[56] Kniess 215-22; Aaron James, "Investor Rights as Nonsense—on Stilts," in *Just Financial Markets? Finance in a Just Society*, ed. Lisa Herzog (Oxford University Press, 2017), 205–30.

policy space,[57] as well as balancing of economic and non-economic rights.[58] Almost no attention has been given in this literature to the investment treaties' inability to adequately constrain adverse investor conduct and to hold investors accountable for their misconduct, including any harmed caused to the workers, local communities and the environment in the course of the operation of their investment. However, this feature has become an important element in the perception of these treaties as unbalanced and therefore potentially unfair.

5. Making investment treaties more balanced: investor obligations

The identification of imbalance as a matter of distributive justice gives meaning to the objection to the normative design of investment treaties under which allows the foreign investor to reap comparatively extraordinary benefits under international law, while it remains unaccountable under the instruments for harm and externalities its operations may produce in the host state. It is often submitted that regulation of investor conduct and questions of investor accountability are matters to be properly left to the host state's domestic law. Still, the imbalance critiques have triggered a range of treaty design innovations advocated or implemented in various investment treaty reform initiatives, which have been ongoing since the mid-2010s both within individual states and under the auspices of international organizations.[59]

Investor (mis)conduct had not been a part of the original investment treaty project and BIT programs, which focused on the conduct of host states,[60] and so it featured in the first- and second- generation treaties only to a limited extent in so-called legality and denial of benefits clauses.[61] Some arbitral tribunals have taken investor conduct into consideration when assessing claims against the host state even in the absence of specific treaty language. Most tribunals have nevertheless considered harmful and illegal investor conduct irrelevant from the perspective of the applicable treaties and the standards of protection they afforded to the investor and the investment.[62] However, by drawing attention to instances of adverse social and environmental impacts and espousing the more complex relational matrix involved in foreign investment projects, the imbalance critiques have made investor (mis)conduct a central concern in the perception and assessment of investment treaties.

While investment treaty reforms to date have primarily focused on limiting the scope of investor rights and safeguarding the host state's "right to regulate" in public interest, there have also been attempts to bring considerations of investor (mis)conduct within the investment treaty framework, thereby altering the allocation of rights and

[57] Hamdy, "Redesign as Reform", 314–18.
[58] Ibid.
[59] See, e.g., UNCTAD, *Investment Policy Framework for Sustainable Development* (New York: UNCTAD, 2015); UNCTAD, *UNCTAD's Reform Package for the International Investment Regime* (New York: UNCTAD, 2018); UNCTAD, *International investment agreements: Reform Accelerator* (New York: UNCTAD, 2020); UN Commission on International Trade Law (UNCITRAL),'Working Group III: Investor-State Dispute Settlement Reform', https://uncitral.un.org/en/working_groups/3/investor-state (accessed 24 May 2023). See Van der Ploeg, "Investor Obligations", section IV.
[60] Notes 23-25 and the accompanying text.
[61] See Van der Ploeg, "Investor Obligations", section IV.
[62] See ibid.

obligations among states and investors.[63]

Some scholars have argued that considerations of investor (mis)conduct (co)determine the very content of standards of investment[64] still, some newer investment treaties and reform proposals have also included explicit provisions on investor conduct. These provisions have included (i) a more widespread utilization of legality and denial of benefits clauses; (ii) provisions addressed to the treaty parties concerning the encouragement of investors to adopt internationally recognized standards of corporate social responsibility (CSR) or to take other measures vis-à-vis the investors; as well as (iii) provisions addressed to investors themselves.[65] These investor-addressed provisions have included not only clauses containing ("soft law") recommendations, such as that an investor "should" or "should not" engage in certain actions, but also clauses according to which the "investor" – and where applicable also the "investment" (i.e. the local corporate vehicle) – "shall" or "shall not" engage in particular conduct. Such clauses include stipulations to comply with the host state's law,[66] at times specifically referring to labor and human rights laws;[67] to refrain from corruption and complicity in corruption;[68] to report specified information regarding the investor's operations;[69] and to seek implementation of internationally recognized CSR standards, including those relating to human rights and the environment.[70]

The clauses on investor conduct have distinct legal effects.[71] Legality clauses limit the (subject-matter) scope of the treaty to investments that were established (or even are operated) in accordance with the host state's domestic law, while the denial of benefits clauses are a vehicle to exclude an investment (or a category of investments) from treaty protection. The provisions addressed to states, even if relating to investor conduct, are a classic example of indirect regulation of nonstate conduct, in which an obligation or other normative demand to regulate or to take other measures vis-à-vis investors in their sovereign domain is created as a matter of international law only for states but not for the nonstate entity. Finally, investor-addressed treaty provisions worded in a language of legal obligation impose international legal obligations directly on the investors. Contrary to some pervasive assertions that investment treaties continue to prescribe only rights and no direct obligations for foreign investors (perhaps apart from a few single instances), at least three dozen investment treaties, including

[63] I have written about these issues in more detail in Van der Ploeg, "Investor Obligations", section IV. This section draws on this earlier work.
[64] Sek Lun Cheong, "Human Rights Due Diligence and the Climate Change Dimension: Implications for Investor Responsibility in International Investment Law," *Climate Law* 13 (August 14, 2023): 188–212; Jorge Viñuales, "Investor Diligence in Investment Arbitration: Sources and Arguments," *ICSID Review - Foreign Investment Law Journal* 32, no. 2 (May 1, 2017): 346–70.
[65] For elaboration, see Van der Ploeg, "Investor Obligations", section IV.
[66] E.g., 2006 SADC Protocol, art 10 (in force); 2013 Amended Arab Investment Agreement, art 13 (in force).
[67] 2016 Turkey–Ghana BIT, art 13(1); 2017 Ethiopia–Qatar BIT, art 14.
[68] E.g., 2017 Intra–MERCOSUR Cooperation and Facilitation Investment Protocol (in force), art 14.1; 2017 Argentine–Chile FTA, art 8.15; 2022 Indonesia–Switzerland BIT, art 13.
[69] E.g., Azerbaijan's BITs with Croatia (2007, in force) art 3, Syria (2009, in force) art 3, Serbia (2011, in force) art 3, Czech Republic (2011, in force) art 3, Albania (2012, in force) art 3, San Marino (2015, in force) art 3; 2018 Singapore–Myanmar BIT, art 28.
[70] E.g., 2018 India–Belarus BIT, art 12; 2019 India–Kyrgyzstan BIT, art 12; 2022 Uruguay–Turkey BIT, art 13.
[71] See Van der Ploeg, "Investor Obligations", section IV, for elaboration.

investment treaties already in force, in fact create direct investor obligations.[72]

Understanding the imbalance critiques as concerns of distributive justice enables an assessment of investment treaty design innovations and the alternative ways in which these instruments could be structured to produce different distributive outcomes.[73] The key question in this respect is to what extent do provisions on investor conduct address the fairness-based concerns involved in the imbalance critiques.

All investment treaty provisions on investor conduct in principle attribute a degree of international legal relevance to investor (mis)conduct. By providing avenues for denying or reducing the benefits of investment treaty protection, they may set a valuable limit on what kinds of investments should and will enjoy protection under an investment treaty. However, only investment treaty rules imposing direct investor obligations can regulate investor conduct in a legally binding manner; provide a legal basis for claims against the investor; and structure the key conduct and relationships existent in the context of a foreign investment.[74]

At the moment, the effects of treaty design innovations to bring investor conduct firmly within the investment treaties' purview may be limited, given that most investment treaties currently in existence are older treaties, which do not contain any such provisions. Additionally, under the current dispute settlement arrangements (under which host states are unable to initiate direct claims against investors in treaty-based investment arbitration, and victims of investor misconduct have no standing in the procedure), institutionalized third-party enforcement of investor obligations is also limited at the international level. Introducing investor obligations is in itself not enough to re-balance investment treaties, and investor treaties are also generally not a vehicle to comprehensively regulate investor conduct.[75]

However, provisions on investor conduct represent a clear re-pivot in the normative structuring of the investment treaty relationships. A redistribution of rights and obligations and costs and benefits under investment treaties may facilitate responsible business conduct and make investors accountable for their misconduct, thereby creating more balanced—fairer—investment treaties. The central consideration of the extent to which a treaty clause addresses the fairness-based concerns raised in the imbalance critiques may now guide the design of investor obligations' specific content.

6. Conclusion

Despite being regularly concealed behind technical language, much of the current debate on the legitimacy of the investment treaty regime and its reform has in fact centered on the question of whether investment treaties are—or can be—fair. Notions of fairness have also underpinned certain fundamental critiques of investment treaties and international investment law more broadly. The ability of investment treaties to adequately constrain adverse investor conduct has become an important element in the perception of the treaties as fair. As the eyes of civil society and wider public continue to scrutinize the investment treaty universe, investor treaty obligations may be

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[72] See ibid.
[73] See Kniess, "Must We Protect".
[74] See Van der Ploeg, "Investor Obligations", sections IV and V, for elaboration.
[75] Ibid.

expected to become a necessary component of any successful global investment treaty reform. The conceptualization of the imbalance as a notion of fairness not only sharpens the analysis of the current debate on investment treaties, but also provides a benchmark for assessing specific investment treaty reform initiatives.

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