



# Columbia Center on Sustainable Investment

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## Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

Editor-in-Chief: Karl P. Sauvant ([karlsauvant@gmail.com](mailto:karlsauvant@gmail.com))

Managing Editor: Chioma Menankiti ([clm2249@columbia.edu](mailto:clm2249@columbia.edu))

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### **How can governments and investors successfully invoke positive human rights obligations in international investment law and arbitration?**

by

Nicolò Andreotti\*

Positive obligations are a key feature of international human rights law. They require states not only to refrain from violating human rights treaties, but also to undertake concrete steps to realize them. Examples of positive obligations are contained in the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR), the European Convention on Human Rights (ECHR) and the Inter-American Convention on Human Rights (IACHR). As for the former, the Committee on Economic, Social and Cultural Rights has made it clear that, under the Covenant, states are under a set of obligations that include ensuring access to the human right to water ([General Comment No. 15, 2002](#)) or land ([General Comment No. 26, 2022](#)). Such obligations are not conducive to the realization of the rights enshrined in the Covenant; rather, they are inextricable components for the fulfilment of states' obligations under the Covenant.

By the same token, the European Court of Human Rights and the Inter-American Court of Human Rights have clarified that states have positive obligations, for instance, toward climate change (e.g., [Klimaseniorinnen v. Switzerland](#)) or environment-related issues (e.g., in [La Oroya v. Peru](#)).

This *Perspective* therefore focuses on the implications that positive obligations, stemming from human rights law, may have for international investment law and arbitration and how states and investors can invoke them.

First, human rights treaties, and the obligations therein, may be applicable in investment arbitration essentially in two ways, namely as part of the law relevant in treaty interpretation through [Article 31\(3\)\(c\) of the Vienna Convention on the Law of Treaties](#), or directly as part of the applicable law. In this latter respect, Article 42 of the ICSID Convention prescribes, for example, that tribunals apply “such rules of international law applicable as between the parties”. It follows that, when argued by the disputing parties, arbitral tribunals can—and should—consider states' obligations under human rights law, when applicable, in investor-state dispute-settlement proceedings.

Hence, positive obligations serve as a basis for the conceptualization of a duty to regulate in international investment law, that is, the state's obligation to adopt certain measures in fulfillment of its obligations under international human rights law, as argued in an earlier [Perspective](#). Contrary to the *right* to regulate, the *duty* to regulate implies that states are under an obligation (and not “only” have a right) to act because, otherwise, they would be in breach of other international obligations they have assumed. This duty to regulate may have two implications for investment proceedings:

- For investors: when states do not correctly and sufficiently implement their human rights obligations, and this has a detrimental impact on their assets, states can be held liable also under investment law. Arbitral practice in this regard seems to have confirmed that certain investment standards (first and foremost fair and equitable treatment and full protection and security), coupled with external human rights obligations, require states to guarantee a secure physical environment against, for example, environment-related weather conditions or climate change (e.g., [Peter Allard v. Barbados](#)). In this light, positive obligations stemming from, for example, the right to a healthy environment, may be invoked by investors to substantiate their claims. To succeed, however, investors must prove that environmental damage occurred in the case, that it negatively impacted their investments and that it was caused by the action or inaction of the state.
- For states: the duty to regulate does not act as a sword but as a shield. In this regard, it may be argued that a state may not be held liable under investment law in cases where it adopts measures to comply with its positive obligations under human rights law. Unfortunately, arbitral practice is not coherent in this respect. While some tribunals, when interpreting investment standards, have recognized the relevance of human rights obligations stemming from, for instance, the ECHR or the ICESCR (e.g., [Tulip v. Turkey](#), [Urbaser v. Argentina](#)), they have held that this does not protect states from having to pay compensation to investors (e.g., [Azurix v. Argentina](#), [Impregilo v. Argentina](#), [Glencore v. Bolivia](#)). To succeed in this defense, states may argue that their positive obligations under human rights law form an integral part of the framework in which investors' legitimate expectations need to be considered. Therefore, investors should have expected that the state would comply with its duties to fulfil, for example, the right to life, to land or to water.

Clearly, a state's duty to regulate is not an unlimited power capable of disregarding previous commitments to investors. On the contrary, it must be balanced with the other criteria normally utilized to identify, for example, cases of indirect expropriation or breaches of fair and equitable treatment.

Overall, relying on positive human rights obligations may open up interesting possibilities for both investors and states. Furthermore, the recognition of the concept of the duty to regulate stemming from those obligations may contribute to enforcing human rights obligations in investment arbitration.

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\* Nicolò Andreotti ([nicolo.andreotti.2@phd.unipd.it](mailto:nicolo.andreotti.2@phd.unipd.it)) is a PhD Candidate in International Law, University of Padua, Italy. The author wishes to thank Ucheora Onwuamaegbu, Federico Ortino and an anonymous peer reviewer for their helpful peer reviews.

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For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Charles Denis, at [cd3427@columbia.edu](mailto:cd3427@columbia.edu).

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