
Introduction

Corporate Responsibility and the ‘One-Sidedness’ of Investment Law

1.1 Introduction: Protection of Transnational Corporations in International Law

Transnational corporations (TNCs) are dominant driving forces in the global economy. By the early 1970s, they ‘had come to play a central role in the world economy’,¹ and currently occupy roughly one-third of world GDP.² The number of TNCs has dramatically increased due to the internationalisation of small and medium-sized enterprises’ (SMEs) business activities since the late 1970s.³ Meanwhile, large-scale TNCs have assumed as much economic and political power as many states.⁴ TNCs have thus become predominant providers of foreign direct investment (FDI). While sharply contrasting views exist on the relationship between FDI and economic growth in capital-importing countries,⁵ it remains a

¹ United Nations Centre on Transnational Corporations, *The New Code Environment* (1990) ST/CTC/SER.A/16, at 3. See also Hedley, ‘Transnational Corporations and Their Regulation’, 216–218.

² Organisation for Economic Co-operation and Development (OECD), ‘Multinational Enterprises and Global Value Chains: New Insights on the Trade-Investment Nexus’ (2018) available at: <https://doi.org/10.1787/18151965> (accessed 15 December 2021).

³ Jaworek and Kuzel, ‘Transnational Corporations in the World Economy’, 58.

⁴ Dumberry, ‘Entreprise, sujet de droit international?’, 104–105; Steinitz, *Case for an International Court of Civil Justice*, 3; Karavias, *Corporate Obligations Under International Law*, 2.

⁵ There are a large number of empirical studies on this subject that produce inconclusive results. The results differ depending on many factors, including the industrial sectors in which FDI is made, geographical areas, a country’s income levels, and institutional quality. Recent studies include: Baiashvili and Gattini, ‘Impact of FDI on Economic Growth’; Thi-Huyen Dinh, Vo, Vo and Nguyen, ‘Foreign Direct Investment and Economic Growth’.

fact that FDI has become the second largest external source of capital for developing countries, following personal remittances.⁶

In tandem with the dramatic growth of TNCs and FDI, international law has begun to offer strong protection to foreign investors. Traditionally, diplomatic protection was the primary mechanism by which an injury done to a foreign investor could be pursued on the international plane.⁷ Only states could institute the claim, and it was understood that in those claims a home state was asserting its own, rather than the affected investor's, rights.⁸ The protection offered under this mechanism was considered insufficient for foreign investors for a number of reasons. A claim is admissible only when the investor has exhausted the local remedies in the host state.⁹ It is up to the home state of the injured investor to take up its claim,¹⁰ which it may be unwilling to do 'for reasons which have nothing to do with its [the case's] merits'.¹¹ This could also make it unlikely that disputes of concern to SMEs, who have less political influence than large companies, are pursued by the home state.¹² The investor generally has no control over the proceedings,¹³ and the home state may compromise the case for diplomatic or

⁶ OECD, 'Non-ODA Flows to Developing Countries: Foreign Direct Investment', OECD, available at: www.oecd.org/dac/financing-sustainable-development/development-finance-standards/beyond-oda-fdi.htm (accessed 15 December 2021).

⁷ See Vandevelde, 'Sustainable Liberalism', 379–380. There were also claims commissions that authorised individuals to file claims on the international plane, such as the Iran–United States Claims Commission and the United Nations Compensation Commission. However, such tribunals are distinguished from investment treaty arbitration, in that their authority was granted 'only after the fact, and that authority was limited to disputes arising from a distinct period, series of events, or subject matter'. Van Harten and Loughlin, 'Investment Treaty Arbitration', 129.

⁸ *Mavrommatis Palestine Concessions (Greece v. U.K.)* (Objection to the Jurisdiction of the Court) (1924) PCIJ Series A, No. 2, 12.

⁹ Crawford, *Brownlie's Principles of Public International Law*, 690; International Law Commission, 'Preliminary Report on Diplomatic Protection by Mohamed Bennouna, Special Rapporteur', 4 February 1998, UN Doc. A/CN. 4/484, para. 40; Douglas, *The International Law of Investment Claims*, 29, 98; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, para. 22.

¹⁰ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (New Application: 1962) (Preliminary Objections) [1970] ICJ Rep. 3, para. 78.

¹¹ Brierly, *The Law of Nations*, 277. See also Kaufmann-Kohler and Potestà, *Investor-State Dispute Settlement and National Courts*, 18–19.

¹² Puig and Shaffer, 'Imperfect Alternatives', 394; Bronckers, 'Is ISDS Superior to Litigation', 659.

¹³ Dolzer and Schreuer, *Principles of International Investment Law*, 212; Brower and Schill, 'Is Arbitration a Threat or a Boon', 480.

other reasons.¹⁴ Significantly, when the home state is awarded compensation from the defendant state, the home state does not have an international obligation to pass it to those who suffered loss.¹⁵

The advent and rapid development of international investment agreements (IIAs) and investor–state dispute settlement (ISDS) mechanisms (collectively, ‘the IIA regime’)¹⁶ remedied these issues. Under this regime, states submit to investment promotion and protection obligations under IIAs. When a dispute arises between a foreign investor and the host state, the investor, under the majority of the IIAs,¹⁷ may file a case against the host state before an investment arbitration tribunal and (once operational) investment court(s) (collectively, ‘IIA-based dispute settlement mechanisms’), alleging a breach of the IIA and other obligations by the host state. The requirement of exhaustion of local remedies is typically waived in the IIA regime. Investment arbitration liberated investors from international politics and governmental bureaucracy, which had been considered a major flaw in the mechanism of diplomatic protection.¹⁸

Where the host state is found to be liable under the applicable law to the dispute by the tribunal, in the vast majority of cases compensation is ordered as a remedy. The winning party then benefits from the strong enforcement mechanism for pecuniary damages under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)¹⁹ or the Convention on the

¹⁴ Toope, *Mixed International Arbitration*, 89.

¹⁵ Article 19 of the Draft Articles on Diplomatic Protection provides that the state ‘should’ ‘[t]ransfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions’. United Nations General Assembly, ‘Draft Articles on Diplomatic Protection with Commentaries’, 1 May–9 June and 3 July–11 August 2006, 61st Session, Supplement No. 10, 2006, UN Doc. A/61/10. For a criticism of this soft approach, see Gaja, ‘Position of Individuals in International Law’, 13; Pellet, ‘Projet d’articles de la C.D.I.’, 1154.

¹⁶ This study adopts the following definition of the concept of a regime: ‘implicit or explicit principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area’. Krasner, ‘Structural Causes and Regime Consequences’, 1. See also Haas, ‘Why Collaborate?’, 358.

¹⁷ An increasing number of IIAs do not provide investment arbitration. UNCTAD, ‘Taking Stock of IIA Reform: Recent Development, UNCTAD IIA Issue Note’, June 2019, available at: https://unctad.org/system/files/official-document/diaepcbinf2019d5_en.pdf (accessed 15 December 2021).

¹⁸ Franck, ‘Legitimacy Crisis in Investment Treaty Arbitration’, 1538.

¹⁹ The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, DC, 18 March 1965, in force 14 October 1966, 575 UNTS 159.

Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).²⁰ These benefits for investors also generally apply to the investment court system (ICS)²¹ which, in this study, refers to both the mechanisms for investment courts in the recent European Union (EU) IIAs and a Multilateral Investment Court (MIC) that is currently discussed in the ISDS reform discussions in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (UNCITRAL ISDS reform discussions).²²

The IIA-based dispute settlement mechanism has largely replaced diplomatic protection.²³ Although the increase in the number of IIAs has slowed down recently, reflecting the trend of reviewing IIA policies by many countries,²⁴ the dispute settlement mechanism remains the primary forum for investor–state disputes.

1.2 Environmental and Human Rights Impact of TNC Activities

TNCs, thus, enjoy protection from the IIA regime. Meanwhile, the activities of TNCs have impacted the countries in which they operate. The impact of TNC activities varies depending on a range of factors, including the political and social status of the host state,²⁵ types of

²⁰ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, signed on 10 June 1958, entered into force 7 June 1959, 330 UNTS 38.

²¹ The enforceability of the ‘awards’ produced by investment courts through the ICSID Convention remains controversial. See e.g. Kaufmann-Kohler and Potestà, ‘Can the Mauritius Convention Serve’; Reinisch, ‘Will the EU’s Proposal Concerning’; Calamita, ‘Challenge of Establishing a Multilateral Investment Tribunal’.

²² The EU aims to merge the existing plurilateral investment courts into an MIC. Dimitropoulos, ‘Investor-State Dispute Settlement Reform’, 544. For an overview of the ICS, see in particular Bungenberg and Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts*; Kaufmann-Kohler and Potestà, ‘The Composition of a Multilateral Investment Court’.

²³ *CMS v. Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, para. 45. For a list of the diplomatic protection cases in the field of international investment law, see Vandevelde, ‘Sustainable Liberalism’, 379–380. Once an investor has instituted investment arbitration proceedings, the ICSID Convention (Article 27(1)) and many IIAs require the home state of the investor not to exercise diplomatic protection or bring an international claim concerning the same issue against the host state.

²⁴ UNCTAD, ‘The Changing IIA Landscape: New Treaties and Recent Policy Developments’, UNCTAD IIA Issue Note, July 2020, at 1, available at: <https://investmentpolicy.unctad.org/publications/1230/the-changing-ii-landscape-new-treaties-and-recent-policy-developments> (accessed 15 December 2021).

²⁵ Giuliani and Macchi, ‘Multinational Corporations’ Economic and Human Rights Impacts’, 487–492.

technology traded,²⁶ and the sector in which FDI is targeted,²⁷ but none of these factors individually fully explain the impacts they have.²⁸ In many cases, they bring certain benefits to the host state, including greater tax revenue, creation of employment opportunities and skills development, scientific development, transfer of new technologies, and sound management practices through linkages with local firms.²⁹ In the environmental context, it is observed that the prosperity brought by FDI enables the pursuit of ‘higher societal expectations for environmental quality of life’,³⁰ and technological advancement and good practices brought by TNCs may contribute to better environmental protection in the host state.³¹ In the human rights context, it is also argued that TNCs, in particular consumer product firms that are concerned with the cost of negative publicity and consumer protests, can be ‘a powerful lever for improving local human rights conditions’.³²

Conversely, TNCs’ activities have also caused serious environmental degradation and violation of human rights in host states,³³ as illustrated by ample publicised cases.³⁴ The following factors strongly suggest that

²⁶ Zomorodi and Zhou, ‘Impact of FDI’, 4.

²⁷ Blanton and Blanton, ‘Sectoral Analysis of Human Rights and FDI’, 469–493.

²⁸ Giuliani and Macchi, ‘Multinational Corporations’ Economic and Human Rights Impacts’, 500. See also Al Faruque, ‘Mapping the Relationship’, 551; OECD, *FDI Qualities Policy Toolkit: Policies for Improving the Sustainable Development Impacts of Investment*, OECD, 4 November 2021, at 12–13.

²⁹ See e.g. Kusek and Silva, ‘What Matters to Investors in Developing Countries’, 31–33; Kordos and Vojtovic, ‘Transnational Corporations’, 153.

³⁰ Wälde and Kolo, ‘Environmental Regulation, Investment Protection’, 815.

³¹ UNCTAD, ‘Environment, Series on Issues in International Investment Agreements’, United Nations Publications, 2001, UNCTAD/ITE/IIT/23. For the so-called environmental Kuznets curve theory, which posits that economic growth actually and eventually improves host states’ environmental conditions, see e.g. Stern, Common and Barbier, ‘Economic Growth and Environmental Degradation’; Nahman and Antrobus, ‘The Environmental Kuznets Curve’. For the critiques of this theory, see e.g. Andreoni and Levinson, ‘Simple Analytics of the Environmental Kuznets Curve’; Dasgupta, Laplante, Wang and Wheeler, ‘Confronting the Environmental Kuznets Curve’; Deacon and Norman, ‘Does the Environmental Kuznets Curve Describe’.

³² Spar, ‘Foreign Investment and Human Rights’, 69. See also Fry, ‘International Human Rights Law’, 106; De Schutter, ‘Transnational Corporations’, 403–444.

³³ See e.g. Jägers, *Corporate Human Rights Obligations*, chapter I; Weiler, ‘Balancing Human Rights and Investor Protection’, 433; Cazala, ‘Le respect des droits de l’homme’, 334; Márquez, ‘Legal Avenues for Holding Multinational Corporations’, 59–60.

³⁴ For these cases, see e.g. Steinitz, *Case for an International Court of Civil Justice*, chapter 2; Kaeb, ‘Emerging Issues of Human Rights Responsibility’, 327–353. See also UN Human Rights Council, ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples’, 11 August 2016, UN Doc. A/HRC/33/42, para. 26.

the risk of adverse effects caused by TNCs' activities remains high. Well-financed TNCs often invest in large-scale projects that have grave environmental and human rights implications in areas such as waste management, exploration, and exploitation of natural resources and mining. TNCs have also become increasingly involved in the provision of essential infrastructure systems, which was once in the public domain, such as electricity and gas, water and sewage management.³⁵

Amongst various public interest issues concerning TNCs' activities, environmental degradation has attracted particularly significant public attention both within and outside the context of investor-state disputes. The following factors underscore the particular importance of addressing environmental values in the business context. First, environmental degradation caused by TNCs' activities may produce particularly long-term, intergenerational, large-scale, and irreversible damage to the ecosystem of the host state, which may lead to a loss of 'the conditions for a decent, healthy, and secure life'³⁶ and result in 'breakdown of the economic, social and political framework of civilization'.³⁷

Secondly, regardless of whether the emphasis is put on human or non-human aspects of the ecosystem,³⁸ it is undeniable that environmental degradation such as the contamination of water, air, and land; deforestation; pollution; and the destruction of natural resources often has serious human rights implications. Environmental protection and human rights share overlapping societal values, common interests and objectives and are heavily interlinked.³⁹ As Judge Weeramantry stated in

³⁵ Addo, 'Human Rights and Transnational Corporations', 7; Kriebaum, 'Human Rights of the Population of the Host State', 654.

³⁶ Millennium Ecosystem Assessment Board, 'Living Beyond Our Means: Natural Assets and Human Well-being (Statement from the Board)', Millennium Ecosystem Assessment, March 2005, at 3, available at: www.millenniumassessment.org/en/Reports.html# (accessed 15 December 2021). See also Anton and Shelton, *Environmental Protection and Human Rights*, chapter I.

³⁷ World Charter for Nature, G.A. Res. 37/7, UN GAOR, 37th session, Supplement No. 51, 1982, UN Doc. A/37/51, para. 3(a), at 17. See also Millennium Ecosystem Assessment, *Ecosystems and Human Well-being*, 26–27; European Commission et al., 'System of Environmental-Economic Accounting 2012: Experimental Ecosystem Accounting', United Nations, 2014, UN Doc. ST/ESA/STAT/Ser.F/112, at 2.

³⁸ See e.g. Redgwell, 'Life, The Universe and Everything'; Shelton, 'Human Rights, Environmental Rights'; Taylor, 'From Environmental to Ecological Human Rights'.

³⁹ Anderson, 'Human Rights Approaches to Environmental Protection', 2–4; Shelton, 'Human Rights, Environmental Rights', 105; Anton and Shelton, *Environmental Protection and Human Rights*, 119; Morgera, *Corporate Accountability in International Environmental Law*, 49–50.

his separate opinion in the *Gabcíkovo-Nagymaros Project* case, environmental protection is ‘a *sine qua non* for numerous Human Rights’.⁴⁰ The link between environmental protection and human rights is recognised in the Stockholm Declaration,⁴¹ various international human rights treaties,⁴² works by United Nations bodies,⁴³ a factsheet of case law recently published by the European Court of Human Rights (ECtHR),⁴⁴ and in the context of investment arbitration.⁴⁵

The long-term, intergenerational, large-scale, and irreversible nature of environmental damage and its serious human rights implications underscore the importance of addressing corporate environmental responsibilities. In investment arbitration, host states have alleged, in many cases, investors’ misconduct concerning environmental threat or degradation in defence and/or counterclaims.⁴⁶

⁴⁰ *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)* (Merits) (Separate Opinion of Judge Weeramantry) [1997] ICJ Rep. 7, 111.

⁴¹ United Nations, ‘Declaration of the United Nations Conference on the Human Environment’, UN Doc. A/Conf.48/14/Rev.1 (1972) (principle 1).

⁴² For example, Organization of African Unity, African Charter on Human and Peoples’ Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5; Organization of American States, American Convention on Human Rights, 22 November 1969, in force 18 July 1978, 1144 UNTS 123, OASTS 36; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 28 June 1998, in force 30 October 2001, 2161 UNTS 447.

⁴³ UN General Assembly, ‘Human Rights and the Environment’, 19 April 2012, UN Doc. A/HRC/RES/19/10. The reports by the Independent Expert and the Special Rapporteur (since March 2015) are available at: www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx (accessed 15 December 2021). See also UN Human Rights Council, ‘Analytical Study on the Relationship between Human Rights and the Environment’, 16 December 2011, UN Doc. A/HRC/19/34; Office of the United Nations High Commissioner for Human Rights and United Nations Environment Programme, ‘Human Rights and the Environment Rio+20: Joint Report OHCHR and UNEP’, 2012, available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/9970/JointReport_OHCHR_HRE.pdf?sequence=1&isAllowed=y (accessed 15 December 2021).

⁴⁴ European Court of Human Rights, ‘Environment and the European Convention on Human Rights’, European Court of Human Rights, July 2021, available at: www.echr.coe.int/documents/fs_environment_eng.pdf (accessed 15 December 2021).

⁴⁵ Kinnear, ‘ICSID in the Twenty-First Century’, 424.

⁴⁶ Recent cases include *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5; *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6; *David R. Aven and Others v. Republic of Costa Rica (Aven v. Costa Rica)*, ICSID Case No. UNCT/15/3; *Adel A Hamadi Al Tamimi v. Sultanate of Oman (Al Tamimi v. Oman)*, ICSID Case No. ARB/11/33; *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case

1.3 IIA-Based Dispute Settlement as a Forum to Examine States' Responsibility

However, the current IIA-based dispute settlement mechanism is not structured as a system to hold TNCs accountable for their conduct. This is not surprising, given that the IIA regime has developed as a way to redress the imbalance in the bargaining power between host states and foreign investors. This imbalance arises from the fact that in many cases the investor has sunk substantial capital into the host state, which makes it difficult to withdraw or write off a small loss,⁴⁷ and that the state can change 'the playing field on which the investor is operating'.⁴⁸ IIAs have thus developed as instruments that restore the parity between them, by typically providing the host states' obligations without reference to investor obligations (Chapter 2, Section 2.3.2) and by granting investors the right to file their claims against states before IIA-based dispute settlement mechanisms, without according the state the corresponding right (Chapter 3, Section 3.1).

In this sense, the IIA-based dispute settlement mechanism is structurally similar to international human rights courts such as the ECtHR⁴⁹ and the Inter-American Court of Human Rights (IACtHR).⁵⁰ However, investment disputes are distinguished from human rights cases for the following reasons.⁵¹ While human rights treaties, as well as national

No. 2013-15; *Copper Mesa Mining Corporation v. Republic of Ecuador* (Copper Mesa v. Ecuador), PCA No. 2012-2.

⁴⁷ Reisman, 'International Investment Arbitration and ADR', 190–191; Brower and Schill, 'Is Arbitration a Threat or a Boon', 478; Kurtz, 'On Foreign Investor "Privilege"', 315.

⁴⁸ Bjorklund, 'The Role of Counterclaims', 462. See also Foster, 'Investors, States, and Stakeholders', 370–371.

⁴⁹ The European Convention on Human Rights grants corporations the access to the court in cases of violation of their human rights (Article 34). See Motte-Baumvol, 'Le comportement de l'investisseur', 199; Kriebaum, 'Is the European Court of Human Rights an Alternative', 220–228 (also noting the limitation that the ECtHR does not offer protection for indirect damages of shareholders).

⁵⁰ Article 1(2) of the American Convention on Human Rights provides that 'For the purposes of this Convention, "person" means every human being'. In *Titularidad de Derechos de las Personas Jurídicas en el Sistema Interamericano de Derechos Humanos*, Advisory Opinion OC-22/16, 26 February 2016, the IACtHR held that only certain legal entities, that is, 'trade unions, federations and confederations' have rights under the Convention and have the right to petition the Inter-American system in defense of their own rights. van der Heijden et al., '3 Inter-American Court of Human Rights', 38.

⁵¹ Discussion on investment protection and human rights is often made in relation to the question of the nature of investors' rights under IIAs, i.e. whether they are 'derivative' (or 'delegated') or 'direct' rights. See e.g. Douglas, 'Hybrid Foundations of Investment Treaty

constitutions and human rights acts, provide ‘obligations of “integral” character, not dependent on a corresponding performance’,⁵² obligations concerning investment promotion and protection under IIAs are accepted by contracting states as a *quid pro quo* of attracting foreign investments with the expectation that foreign investments bring benefits to their society.⁵³ The Inter-American Court of Human Rights, in *Sawhoyamaxa Indigenous Community v. Paraguay*, noted the difference in nature between the American Convention on Human Rights which ‘stands in a class of its own and that generates rights for individual human beings’ and the relevant IIA (Germany–Paraguay bilateral investment treaty) which ‘depend[s] entirely on reciprocity among States’.⁵⁴ Likewise, in *Theodoros Adamakopoulos and Others v. Cyprus*, Arbitrator Kohen recognised the difference by stating that investors ‘do not have “inherent rights”. . . . Investors’ rights are exclusively based on the will of the Parties of having a mutual exchange of investor protection’.⁵⁵

Given this reciprocity, the expectation on the part of the host state ‘concerning the behaviour of foreign investors within their economies’⁵⁶ should be acknowledged as an element of the protection offered by IIAs. This nature of investors’ rights, together with the potentially grave implications of investor activities for the public interest of the host state justify the approach seeking to materialise investor responsibility in the IIA-based dispute settlement mechanism.

1.4 The Asymmetry Concern: Call for Reform of the Current IIA Regime

The one-sidedness of the IIA-based dispute settlement mechanism has been subject to increasing criticism.⁵⁷ There is a growing body of researches that suggests policy reform of the IIA regime to address this

Arbitration’; Paparinskis, ‘Investment Treaty Arbitration’; De Brabandere, *Investment Treaty Arbitration*, chapter 2.

⁵² Gourgourinis, ‘Nature of Investor’s Rights under Investment Treaties’.

⁵³ Roberts, ‘Clash of Paradigms’, 71–72.

⁵⁴ *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006 (Merits, Reparations and Costs), IACHR Series Case No. 146, para. 140.

⁵⁵ *Theodoros Adamakopoulos and Others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo Kohen, 3 February 2020, para. 59. See also Puma, ‘Human Rights and Investment Law’, 240–241.

⁵⁶ Sauvant and Ünüvar, ‘Can Host Countries Have Legitimate Expectations?’, 1.

⁵⁷ See e.g. Amado, Kern and Rodriguez, *Arbitrating the Conduct of International Investors*, 10–19; Popova and Poon, ‘From Perpetual Respondent to Aspiring Counterclaimant?’.

issue.⁵⁸ Several countries, in their submissions at the UNCITRAL ISDS reform discussions, raised the issue of imbalance in the current IIA-based arbitration system and called for the incorporation of the principle of the protection of responsible and sustainable investment in the reform process.⁵⁹ Outside UNCITRAL, institutions and intergovernmental organisations have expressed support for the equality of parties in international investment tribunals⁶⁰ and the incorporation of ‘development-oriented investor obligations’ in future IIAs.⁶¹

Overall, the one-sidedness of the current IIA-based dispute settlement mechanism has increasingly been recognised as a major issue in the current backlash against the IIA regime that needs to be addressed. There is growing momentum to incorporate and reflect the concept of ‘responsible investment’, which is defined for the purposes of this study as an investment approach that explicitly acknowledges and incorporates environmental, social, and governance (ESG) factors,⁶² in the regime.⁶³

223–224; Schreuer, ‘Why Still ICSID?’, 1; Mbengue, ‘Les obligations des investisseurs étrangers’, 297.

⁵⁸ For example, Arcuri and Montanaro, ‘Justice for All?’, Ho and Sattorova (eds.), *Investors’ International Law*; Gaillard, ‘L’avenir des traités’.

⁵⁹ For example, UNCITRAL, ‘Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Morocco, Note by the Secretariat’, 4 March 2019, UN Doc. A/CN.9/WG.III/WP.161, para. 4; UNCITRAL, ‘Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of South Africa, Note by the Secretariat’, 17 July 2019, UN Doc. A/CN.9/WG.III/WP.176, paras. 34–35; UNCITRAL, ‘Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Mali’, 17 September 2019, UN Doc. A/CN.9/WG.III/WP.181; UNCITRAL, Report of Working Group III (Investor–State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session (Vienna, 29 October–2 November 2018), 6 November 2018, UN Doc. A/CN.9/964, para. 16.

⁶⁰ For example, Institut de Droit International, ‘Eighteenth Commission on Equality of Parties before International Investment Tribunals, Mr Campbell McLachlan, Rapporteur’, 31 August 2019, 18 RES EN, available at: www.idi-iil.org/app/uploads/2019/09/18-RES-EN.pdf (accessed 15 December 2021).

⁶¹ For example, UN Economic Commission for Africa, the African Union, the African Development Bank and UNCTAD, ‘Next Steps for the African Continental Free Trade Area’, September 2019, available at: https://euagenda.eu/upload/publications/aria9_report_en_4sept_fin.pdf (accessed 15 December 2021). AfCFTA has fifty-four signatories (out of fifty-five member states of the African Union) and entered into force on 30 May 2019.

⁶² Principles for Responsible Investment, ‘What Is Responsible Investment?’, available at: www.unpri.org/an-introduction-to-responsible-investment/what-is-responsible-investment/4780.article (accessed 15 December 2021); Cambridge Institute for Sustainability Leadership, ‘What Is Responsible Investment?’, available at: www.cisl.cam.ac.uk/business-action/sustainable-finance/investment-leaders-group/what-is-responsible-investment (accessed 15 December 2021).

⁶³ Nowrot, ‘Obligation of Investors’, 1160.