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# Theorizing Responsibility in the Investor State Dispute Resolution System

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# ARTICLES

# THEORIZING RESPONSIBILITY IN THE INVESTOR STATE DISPUTE RESOLUTION SYSTEM

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## INTRODUCTION

The Investor-State Dispute System ("ISDS") permits investors to sue states when their investments are injured.[1] The system was designed to protect investors and impose responsibilities on states; it is uncontroversial to say that the ISDS system is one-sided.[2] But a chorus of voices is now asking: should investors have responsibilities too?[3] The narrative is one of

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[1] In order to sue, the host and home states must be party to an applicable investment treaty, and the claimant must meet the definition of investor. *See 2012 U.S. Model Bilateral Investment Treaty*, U.S. TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [https://perma.cc/YY46-QWUK] (last visited May 25, 2022).

[2] James Crawford, *Treaty and Contract in Investment Arbitration*, 24 ARB. INT'L 351, 364 (2008) ("[T]he treaty commitments of the host State towards the investor are unilateral, and . . . the agreement to arbitrate, though it incorporates by reference the jurisdictional requirements of the BIT, does not incorporate its substantive provisions nor does it make them applicable bilaterally."). *See also* Howard Mann, *The Right of States to Regulate and International Investment Law*, INT'L INST. SUSTAINABLE DEV., 2, https://www.yumpu.com/en/document/view/22577605/the-right-of-states-to-regulate-and-international-investment-law [https://perma.cc/ULL8-7XJG] (last visited May 25, 2022) ("IIAs have become a charter of rights for foreign investors . . . ."); ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT: ESSAYS IN HONOUR OF MUTHUCUMARASWAMY SORNARAJAH 116 (C.L. Lim ed., Cambridge University Press 2016) ("States assume wide-ranging responsibilities under investment treaties."); Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1 144, Award (Dec. 7, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0723.pdf [https://perma.cc/K3Y2-FN6J].

[3] For a multi-voiced assessment of investor responsibility, see James Gathii & Sergio Puig, *Introduction to the Symposium on Investor Responsibility: The Next*

injustice, driven by the perception that states have signed on to a system that has left them with large financial exposure to investors.[4] This viewpoint has been reinforced, in the eyes of some, by the influence of big business, and by state losses on sensitive matters of public policy, particularly in matters of health, human rights, and the environment.[5] Perhaps unsurprisingly, there is growing interest in exploring how investment law can be used not simply to protect investors, but also to address the grievances of all parties affected by investments in a more equitable manner.[6]

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*Frontier in International Investment Law*, 113 AJIL UNBOUND 1, 1 (2019); Kate Miles, *Investor-State Dispute Settlement: Conflict, Convergence, and Future Directions*, *in* 7 EUR. Y.B. INT'L ECON. L. 273, 273 (Marc Bungenberg et al. eds., 2016); Stephan W. Schill, *In Defense of International Investment Law*, *in* 7 EUR. Y.B. INT'L ECON. L. 309 (Marc Bungenberg et al. eds., 2016); Int'l Labour Organization [ILO], Rafael Peels et al., *Corporate Social Responsibility in International Trade and Investment Agreements: Implications for States, Businesses, and Workers*, at 18, ILO Research Paper No. 13, April 2016, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_476193.pdf [https://perma.cc/4P4T-4QJK]; Wolfgang Alschner & Elisabeth Tuerk, *The Role of International Investment Agreements in Fostering Sustainable Development*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 217–31 (Freya Baetens ed., 2013).

[4] *See generally* Steven R. Ratner, *Survey Article: Global Investment Rules as a Site for Moral Inquiry*, 27 J. POL. PHIL. 107 (2019). *See also* KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 133–34 (2013); Nitish Monebhurrun, *Essay on Unequal Treaties and Modernity Through the Example of Bilateral Investment Treaties*, 11 BRAZILIAN J. INT'L L. 203, 204 (2014).

[5] *See, e.g.*, Adam H. Bradlow, *Human Rights Impact Litigation in ISDS: A Proposal for Enabling Private Parties to Bring Human Rights Claims Through Investor-State Dispute Settlement Mechanisms*, 43 YALE J. INT'L L. 355, 356 (2017) (discussing how Ethyl Corp. v. Gov't of Canada demonstrates a private company's ability to stymie human rights through ISDS mechanisms (Ethyl Corp. v. Gov't of Canada, Award on Jurisdiction, ¶ 5 (June 24, 1998), 38 I.L.M. 708–31 (1999), https://www.italaw.com/sites/default/files/case-documents/ita0300_0.pdf)). However, there are counterexamples, where major corporations have lost to host states. *See, e.g.*, Sergio Puig & Anton Strezhnev, *The David Effect and ISDS*, 28 EUR. J. INT'L L. 731, 731–33 (2017) (discussing Philip Morris Asia Limited v. The Commonwealth of Australia, no. 2012-12 PCA Case Repository ¶¶ 7.15–7.17 (Nov. 12, 2012), https://www.italaw.com/sites/default/files/case-documents/ita0665.pdf).

[6] The commentary to the model SADC treaty is revelatory with regards to this perception:

> [T]here have been several instances where arbitral tribunals have examined the preamble of a given treaty and found only references to the promotion of investment and the provision of investor rights under the treaty. As a result, the preamble has been held to establish a presumption that the sole purpose of the treaty is the protection of the investor in order, presumably, to attract higher levels of investment. This has led to several instances where arbitrators have specifically held that this creates a

This Article seeks to clarify why, where, and how obligations on investors are emerging in the international dispute resolution system. It maps what "responsibilities" means in ISDS and distinguishes such responsibilities from burdens, obligations, accountability, and Corporate Social Responsibility ("CSR"). In addition, it explores those to whom investor responsibilities are owed, including host states and specially affected groups. Although there are only two parties to each dispute, there are many duty holders and constituencies in investor-state arbitration. The analysis in this Article demonstrates that the most common way of imposing obligations on investors is actually to burden an investor's ability to access ISDS. Drawing from relational contract theory, this Article argues that relational responsibility and home state responsibility are more valuable lenses through which to think systematically about the responsibilities of non-state actors.

## I. MAPPING RESPONSIBILITY

The ISDS system permits investors to sue states for the violation of certain treaty protections, but not the converse.[7] International investment agreements ("IIAs"), including Bilateral Investment Treaties ("BITs"), Multilateral Investment Treaties ("MITs"), and Free Trade Agreements ("FTAs") with Investor Protection Provisions vary in their terms, but the theory has always been that, in exchange for encouraging cross-border investment activities that ultimately spur economic growth,[8]

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> presumption in favour of broader over narrower rights for the investor, fewer and more limited rights for government regulatory activity in relation to an investment, and an overall presumption of investor-friendly interpretations.

SOUTH AFR. DEV. CMTY., SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY 5 (2012) [hereinafter SADC MODEL BIT], https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf [https://perma.cc/4YZ5-RQLE].

[7] Investment treaties do not generally permit states to initiate suit, with an exception for counterclaims as discussed *infra* notes 161–70. *But see* Eric De Brabandere, *(Re)Calibration, Standard-Setting and the Shaping of Investment Law and Arbitration*, 59 B.C. L. REV. 2607, 2612–13 (2018) (noting that the objectives of IIAs are typically the promotion and protection of investments—many IIA's are called "Protection Agreements").

[8] *See, e.g.*, Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, LSE RSCH. ONLINE 1, 1 (2005); Lisa Sachs & Lise Johnson, *Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities* 2 (Columbia Ctr. on Sustainable Inv., Working Paper, 2019),

investors must be given special protections.[9] An analogy can be drawn to the field of human rights advocacy: individuals can sue the state for human rights violations, but the converse is not true.[10] Although the odd proposal has been made to "flip" the system, and permit states or other interest groups to sue investors, this idea remains an outlier.[11] The one-sided nature of both systems is firmly entrenched: they are meant to protect individuals and corporations against state power.

The idea of "responsibility" is a fundamental one in international law,[12] but the conversation about investor responsibilities maps onto existing frameworks only in part. For states, the concept of responsibility is highly developed: if a host state breaches a provision of a BIT to which it is a party, it may be found responsible under the Articles of State Responsibility on Internationally Wrongful Acts ("ARSIWA") and incur an

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https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1074&context=sustainable_investment_staffpubs [https://perma.cc/AM64-MWT3].

[9] *See* JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 97 n.177 (Hague Academy of International Law 2011) (citing DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION 26, 30 (2007)); UNITED NATIONS CONF. ON TRADE AND DEV., THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES 1–2 (2009), http://unctad.org/en/docs/diaeia20095_en.pdf [https://perma.cc/PH69-C8HM].

[10] However, an important difference exists between the human rights and international investment systems: the requirement to exhaust local remedies. This rule limits a state's exposure to an international suit because it gives it an opportunity to cure the problem or provide a remedy at the domestic level first. *See, e.g.*, Sachs & Johnson, *supra* note 8, at 6; *see also* Kathryn Gordon et al., *Investors Rights and Human Rights—Interactions Under Investment Treaty Law*, LSE HUM. RTS. (Sept. 22, 2014), http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/investors-rights-and-human-rights-interactions-under-investment-treaty-law-by-kathryn-gordon-joachim-pohl-and-marie-bouchard/ [https://perma.cc/3MQE-5TKW] (arguing that the right to be free from arbitrary deprivation of property and to equal protection under the law is similar in human rights and investment law); Gathii & Puig, *supra* note 3, at 1 (noting that human rights systems are also unable to check misconduct by business actors).

[11] *See, e.g.*, DISCUSSION PAPER: A NEW, CLIMATE-FRIENDLY APPROACH TO TRADE, SIERRA CLUB 6 (2016), https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/climate-friendly-trade-model.pdf [https://perma.cc/EV4X-EULH] (proposing a new model that would allow public interest groups and communities to initiate dispute settlement against investors who fail to comply with new obligations as well as give governments the power to enforce these obligations in domestic courts). *See also infra* notes 161–72 and accompanying text (discussing counterclaims).

[12] *The Responsibility of States,* ENCYC. BRITTANICA, https://www.britannica.com/topic/international-law/States-in-international-law [https://perma.cc/3FSU-YLA7] (last visited May 25, 2022).

obligation to make full reparations.[13] As the commentaries note: "for the purposes of these articles, international responsibility results exclusively from a wrongful act contrary to international law."[14] The breach of investment treaties, customary international law standards, or investment contracts can trigger such responsibility.[15] In addition, secondary rules are applied to determine whether conduct can be attributed to a state; whether the financial obligations of states should be limited where an investor is found to be contributorily negligent; or whether excuses, such as "necessity," are proven.[16]

However, the ARSIWA are limited to state responsibility, and leave aside the responsibility of other non-state actors without prejudice.[17] While the International Law Commission ("ILC") produced articles on the Responsibility of International Organizations that were also commended to states by the General Assembly, their status remains open to debate.[18] Individual responsibility in the criminal sphere has developed dramatically through the establishment of international criminal courts,[19] but recognition that the law imposes obligations on individuals to refrain from certain international crimes has not been extended to

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[13] *See* JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 101 (Cambridge University Press 2013); *see also* Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *with Commentaries*, Rep. on the Work of Its Fifty-third Session, U.N. Doc. A/56/10, at 119 (2001) [hereinafter *RWISA*], https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [https://perma.cc/UZ7R-CAHB]. *See generally* U.N. Secretary-General, *Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals, and Other Bodies*, U.N. Doc A/71/80 (April 21, 2016) [hereinafter *ARSIWA*]. Arbitral tribunals are the institutions that cite to the Articles on State Responsibility most frequently.

[14] *See RWISA*, *supra* note 13, at 32.

[15] For a discussion on investment contracts, see generally Jean Ho, *The Creation of Elusive Investor Responsibility*, 113 AJIL UNBOUND 10 (2019).

[16] *See* Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AM. J. INT'L L. 447, 491–93 (2012).

[17] *ARSIWA*, *supra* note 13, at Art. 58.

[18] *See generally* Int'l Law Comm'n, Draft Articles on Responsibility of International Organizations, Rep. of the on the Work of its Sixty Third Session, U.N. Doc. A/66/10 (2011); *see also* Mirka Möldner, *Responsibility of International Organizations–Introducing the ILC's DARIO,* 16 MAX PLANCK UNYB, 281, 327 (2012) (noting the embryonic stage of DARIO).

[19] Edoardo Greppi, *The Evolution of Individual Criminal Responsibility Under International Law*, 81 INT'L REV. RED CROSS 531, 542–43 (1999).

the imposition of responsibility on other non-state actors generally.[20]

Although the outcry for investor responsibilities has intensified, the idea is not new.[21] The issue was famously raised in the 2007 *Mitchell v. Democratic Republic of Congo* annulment award, a case involving the alleged expropriation of a law firm in the Democratic Republic of the Congo, where the International Center on Settlement of Investment Disputes ("ICSID") tribunal controversially held that the practice of law did not make a "contribution to the economic development of the host State"[22] and hence was not a qualified "investment."[23] Here, the concept of investor responsibility was folded into the definition of investment itself by requiring an investor to support the host state's economic development.[24] Since then, a new generation of investment treaties, reform efforts at ICSID and UNCITRAL, and developments in the neighboring fields of CSR[25] and business and

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[20] Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 452, 467 (2001) [hereinafter *Corporations and Human Rights*].

[21] *See, e.g.*, *id.* at 466–67.

[22] Mitchell v. Democratic Republic of the Congo*,* ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, ¶ 30 (Nov. 1, 2006). The tribunal used the traditional *Salini* conditions for the definition of investment: "contributions," "certain duration" and "a participation in the risk," while reasserting the importance of this fourth principle of economic development. *Id.* ¶ 27; Walid Ben Hamida, *Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control*—Ad Hoc Committee's Decision in Patrick Mitchell v. Democratic Republic of Congo, 24 J. INT'L ARB. 287, 290 (2007) (detailling the conditions from Salini v. Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001)). For commentary, see generally Hamida, *supra*. *See also* Malaysian Historical Salvors Sdn. Bhd. v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 16 (2009).

[23] *See, e.g.*, Omar E. García-Bolívar, *Defining an ICSID Investment: Why Economic Development Should be the Core Element*, INT'L. INST. SUSTAINABLE DEV., (Apr. 13, 2012), https://www.iisd.org/itn/2012/04/13/defining-an-icsid-investment-why-economic-development-should-be-the-core-element/ [https://perma.cc/3GSG-73FE] (arguing for the inclusion of the "economic development" factor). *Cf.* Quiborax S.A. v. Plurinational State of Bolivia*,* ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 220 (Sept. 27, 2007) (refusing to require economic development to obtain arbitral jurisdiction).

[24] *See generally* Mitchell, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award.

[25] CSR has been defined as a

> [C]ontainer concept that entails various dimensions, amongst others, the development of codes of conduct and the establishment of monitoring mechanisms to review compliance with these, due diligence with regard to sustainable development impacts of supply chains activities, revision of

human rights ("BHR")[26] have moved the needle on what can and should be expected of investors in exchange for their right to sue. Today, companies might be expected to engage in environmentally sound practices, promote human rights, or contribute to sustainable development to even be considered an "investor."[27] Thus, the slow march toward investor responsibilities has begun.

The use of the word "responsibility," however, tends to obscure, rather than clarify, developments in the highly decentralized system of investor-state arbitration. Rather than reflecting the international concept of legal responsibility, which applies to the consequences flowing from a state's wrongful act,[28] proposals for investor responsibilities are connected with particular values. These include:[29]

- ensuring equality of parties before the law;
- balancing private rights with public power;
- providing a market advantage to the "right sort" of investor—that is, investors that contribute to sustainable development;

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> purchasing and pricing practices . . . or cooperation activities to improve the capacity of suppliers . . . .

Rafael Peels et al., *Corporate Social Responsibility (CSR) in International Trade and Investment Agreements: Implications for States, Businesses and Workers*, THE GLOB. LAB. UNIV. 3 (Apr. 29, 2016), https://www.global-labour-university.org/fileadmin/GLU_conference_2015/papers/Peels_et_al.pdf [https://perma.cc/2JBR-MWS3]. *See also* Mark Anner et al., *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. POL. J. 1, 2 (2013).

[26] *See* Anil Yilmaz-Vastardis, *Is International Investment Law Moving the Ball Forward on IHRL Obligations for Business Enterprises?*, EJIL: TALK (May 15, 2017), https://www.ejiltalk.org/is-international-investment-law-moving-the-ball-forward-on-ihrl-obligations-for-business-enterprises/ [https://perma.cc/U23A-PTJD].

> In CSR, the emphasis is on decision-making by the companies themselves, not on regulation of their activities by the State or legal liability. . . . Instead, BHR assesses corporate behavior in the light of generally accepted human rights standards enshrined in fundamental international treaties, and is more focused on holding companies accountable for harm rather than on positive recognition of the role which a business can play in advocating and protecting human rights.

Valeriia Poiedynok, *"Corporate Social Responsibility" and "Business and Human Rights": Correlation of Concepts*, 8 L. UKR. 132, 144 (2019) (Ukr.).

[27] *See generally* Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV. (May–June 2019), https://hbr.org/2019/05/the-investor-revolution [https://perma.cc/VDG9-A4VL]; BETTINA REINBOTH & NIKOLAJ HALKJAER PEDERSEN, PRINCIPLES FOR RESP. INV., WHY AND HOW INVESTORS SHOULD ACT ON HUMAN RIGHTS (2020), https://www.unpri.org/download?ac=11953 [https://perma.cc/U4HZ-HTY5].

[28] *See* discussion on *ARSIWA*, *supra* note 13.

[29] *Id.*

- decreasing frivolous cases and making the adjudication process more efficient;
- ensuring the integrity of the international arbitral process;
- promoting transparency;
- vindicating the rights and interests of affected third parties;
- increasing avenues for access to justice;
- efficiently deterring violations of economic and social rights by private actors; and
- promoting the domestic rule of law.

While some of these values may be considered moral or social responsibilities, few fit into traditional categories of *legal* responsibilities.

This disconnect is due in part to the fact that as non-state actors, investors do not retain "personhood" in the traditional sense. However, the status quo is controversial: Patrick Dunberry and Érik Labelle-Eastaugh have argued that corporate investors should be considered subjects because modern investment treaties give them rights and the possibility of commencing direct claims against a state before an international tribunal.[30] Moreover, it has also been argued that the preoccupation with state responsibility has led to the over-protection of businesses.[31] Investors—typically corporations—do not have legal personality on the international plane like states or international organizations ("IOs"), and therefore, their responsibility has been predominantly regulated by national laws.[32] Certainly investors that are owned or controlled by states are brought under the umbrella of state responsibility through the rules of attribution;[33] however, much, if

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[30] *See* Patrick Dumberry & Érik Labelle-Eastaugh, *Non-state Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor–State Arbitration*, *in* PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 360, 362–66 (Jean d'Aspremont ed., 2011). *See also* Jean d'Aspremont, *Introduction: Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *in* PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM, MULTIPLE PERSPECTIVE ON NON-STATE ACTORS IN INTERNATIONAL LAW 1, 2 (Jean d'Aspremont ed., 2011) ("A preliminary conceptual difficulty: the impossibility of a formal ascertainment of authors and addressees of international legal rules."); Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 812–16 (2002).

[31] Gathii & Puig, *supra* note 3, at 1.

[32] *See generally* PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW (2d ed. 2007).

[33] The ICJ held that the conduct of a private actor can be attributed to the state when it is performed by an agent or organ of the state, acting under the state's direction or control, performing "elements of the governmental authority," or adopted by the state. Case Concerning Application of the Convention on the

not most, corporate activity falls outside the scope of the traditional framework of state responsibility.[34] This has stymied a move away from the statuses of particular actors towards the functions they play.[35] The reality is that there are multiple constituencies involved in investments. The diagram below depicts the relationships between the investor, the body politic, the home state—the state in which the investor is domiciled—and the host state—the state in which the investment takes place.


Figure 1: Relations in the International Investment Regime[36]

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Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 414 (Feb. 26) (finding that articles 4 and 8 of the Articles codify customary international law).

[34] *See* Rachel Brewster & Philip J. Stern, *Introduction to the Proceedings of the Seminar on Corporations and International Law*, 28 DUKE J. COMP. & INT'L L. 413, 413 (2018) (noting that corporations are "jurisdictionally ambiguous and spatially diffuse").

[35] *See generally* Jan Klabbers, *The Concept of Legal Personality*, 11 IUS GENTIUM 35 (2005); *see also* Reparation for Injuries Suffered in Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 178–88 (Apr. 11) (discussing the "requirements of international life"); *see also* Prosecutor v. New T.V. S.A.L., Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 80 (Oct. 2, 2014).

[36] This Diagram was inspired by Prof. Eva van der Zee's presentation at the ESIL Conference on Socially Responsible Investing at the Universita Cattolica, Lisbon (slide on file with author).

Modern treaties rarely place direct obligations on investors, rather they make hortatory and non-binding references in the treaty preambles to CSR and goals of sustainable development or environmental protection. However, these treaties are largely devoted to protecting investors rather than placing obligations on them.[37] Some recent treaties, such as the Comprehensive Economic and Trade Agreement ("CETA"), have moved the conversation forward by limiting investor access to ISDS if there is "fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process."[38] However, this provision applies only to the establishment phase and not to later conduct.[39] Despite the rhetoric of investor responsibilities, the trend is to limit access to ISDS rather than to impose "responsibilities."[40] As a result, the ARSIWA framework has not meaningfully advanced the discussion about the content or consequences of a breach of so-called investor responsibilities.

Two other types of responsibility are thus important to explore: the first of which, Relational Responsibility, looks at relations beyond the investor and the host state to incorporate the long term relationship between body politic of the host state, the investor, and specially affected communities—such as, for example, indigenous groups.[41] This view of responsibility both expands the set of relevant actors and suggests that a broader set of responsibilities than those owed by the host state to the investor

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[37] *See* Andrea K. Bjorklund, *Sustainable Development and International Investment Law*, *in* RESEARCH HANDBOOK ON ENVIRONMENT AND INVESTMENT LAW 38, 38 (Kate Miles ed., 2019).

[38] Comprehensive Economic and Trade Agreement art. 8.18, Can.-European Union, Oct. 30, 2016, GOV'T OF CAN. [hereinafter CETA], https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/08.aspx?lang=eng [https://perma.cc/XG34-NPQS] ("For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.").

[39] *Id.*

[40] Lian-Ying Tan & Amal Bouchenaki, *Limiting Investor Access to Investment Arbitration: A Solution without a Problem?*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 250, 308 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

[41] Valentina Vadi, *Natural Resources and Indigenous Cultural Heritage in International Investment Law and Arbitration*, *in* RESEARCH HANDBOOK ON ENVIRONMENT AND INTERNATIONAL INVESTMENT LAW 464, 464 (Kate Miles ed., 2019) ("Many of the estimated 370 million indigenous peoples around the world have lost, or are under imminent threat of losing, their ancestral lands because of the exploitation of natural resources.").

are required.[42] Relational Responsibility takes a holistic approach to responsibilities, both local and global, and moves beyond an *inter-partes* model in which the sole or primary focus is on the litigating parties.

In contrast, Home State Responsibility increases the focus on the responsibility of the state of incorporation of the investor, particularly with regards to investor oversight. In the inception of the investor-state system, Home State Responsibility was never considered.[43] Today, however, legislation has become a common tool for states to impose greater regulation on corporations operating abroad and spur changes in private behavior.[44] Professor Andrea Bjorklund observes that home states have been reluctant to impose obligations on investors acting abroad because it effectively requires states themselves to ensure they have a strong domestic law framework to hold investors accountable.[45] This same reluctance may carry over to the UN Guiding Principles on Business and Human Rights, and its hesitant approach to extraterritorial jurisdiction.[46]

The Parts that follow outline the sources and dynamics of current efforts to introduce investor obligations into the ISDS system, while developing the alternative lenses of Relational and Home State Responsibility.

## II. SOURCES OF OBLIGATIONS: TREATIES, DOMESTIC LAW, PROCEDURAL RULES

A prevalent way in which the asymmetry between investors and states in investment protection agreements is being addressed is by redefining key provisions in treaties. A recent example of this is the elimination or redefinition of the Fair and Equitable Treatment ("FET") clause in recent treaties, which has limited the types of injury that can trigger ISDS claims.[47] As discussed below,

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[42] *See id.* at 464–65.

[43] *See* Genevieve LeBaron & Andreas Rühmkorf, *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance*, 8 GLOB. POL'Y 15, 15 (2017) (U.K.).

[44] *See id*. at 17.

[45] Bjorklund, *supra* note 37, at 52.

[46] U.N. HUMAN RIGHTS OFF. OF THE HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK 3 (2011) [hereinafter UN GUIDING PRINCIPLES], https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf [https://perma.cc/HP94-PJ96].

[47] Kathryn Gordon & Joachim Pohl, *Investment Treaties Over Time – Treaty Practice and Interpretation in a Changing World* 12, 37–38 (OECD Publ'g, Working

the definition of "investment" itself can have a large impact on whether a particular cross-border transaction can trigger an ITA claim because it will determine which foreign capital flows are covered.[48] However, the narrowing of substantive protections does not correspond with an affirmative obligation or responsibility, as such, but rather with the imposition of conditions of access. In other words, limiting access to arbitration rather than imposing direct obligations has been a prevalent strategy for handling investor responsibilities.

Some groundbreaking new model treaties are, however, exploring the direct responsibility framework, including the model BIT by the South African Development Community (SADC),[49] the India Model BIT,[50] the Morocco-Nigeria BIT,[51] and the Pacific Alliance.[52] Although none are yet in force at the time of this

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Paper no. 2015/02, 2015), http://www.oecd.org/investment/investment-policy/WP-2015-02.pdf [https://perma.cc/84FD-WU3L]. *See generally* Katarina Chovancová, *The Fair and Equitable Treatment and its Current Status in International Investment Law*, 6 Y.B. INT'L ARB. & ADR 171, 179 (2019).

[48] *See* Mitchell v. Democratic Republic of the Congo*,* ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, ¶ 38 (Nov. 1, 2006). Controversially, the annulment tribunal focused on the fourth element of the *Salini* test: contribution to the economic development of the host state, and determined that Mitchell's legal services were the "investment" to be evaluated under the convention and not the economic investment of establishing a practice in the DRC. *Id.* ¶ 25. Subsequently, tribunals have expressed concern about measuring this requirement. *See* Quiborax S.A. v. Plurinational State of Bolivia*,* ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶¶ 218–21 (Sept. 27, 2007) (citing LESI S.p.A. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3, Decision on Jurisdiction, ¶ 72 (July 12, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0456_0.pdf).

[49] *See* SADC MODEL BIT, *supra* note 6, at 8.

[50] INDIA DEP'T ECON. AFF., MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY (Jan. 14, 2016) [hereinafter INDIAN MODEL BIT], https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf [https://perma.cc/BA7Q-WYWH].

[51] U.N. Conference on Trade and Development, Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Morocco-Nigeria, Dec. 3, 2016 [hereinafter Morocco-Nigeria BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download [https://perma.cc/R7FC-ENHR].

[52] Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 28.23, Feb. 3, 2016, N.Z. FOREIGN AFF. AND TRADE [hereinafter Pacific Alliance], https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf [https://perma.cc/E3G9-Q2MA].

Article's writing, these provide examples of the direct responsibility model.[53]

### *A. Obligations that Limit the Primary Obligation of the State by Treaty: Narrowing the Definition of Investor & Investment*

The most direct way to impose responsibilities on investors is through the primary rules, particularly defined treaty terms. There are three main models of the investment definition, each of which impacts access to ISDS: the "open-ended" asset-based definition characteristic of old-generation treaties, which defines an investment as "every kind of asset" and gives tribunals great discretion to determine what constitutes an investment because it includes a non-exclusive list of assets that may qualify;[54] the "closed" asset-based model, which often lists the "commitment of capital or other resources" alongside other characteristics, such as "expectation of profit" and assumption of risk;[55] and the most restrictive, the "enterprise-based" definition,[56] which includes only instruments of an enterprise "established or acquired in accordance with the laws of the Host State."[57] Unsurprisingly, new model BITs that seek to rebalance investor responsibilities have advocated the narrower definitions of investment.[58]

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[53] *See supra* notes 48–50 and accompanying text.

[54] The open-ended definition has been the subject of criticism, on the basis that "it allows for the most expansive interpretation by tribunals of what that definition encompasses, since the list that follows is merely indicative. This definition is therefore the least predictable for host states. This increases the risks of being sued." NATHALIE BERNASCONI-OSTERWALDER & HOWARD MANN, INT'L. INST. SUSTAINABLE DEV., A RESPONSE TO THE EUROPEAN COMMISSION'S DECEMBER 2013 DOCUMENT "INVESTMENT PROVISIONS IN THE EU-CANADA FREE TRADE AGREEMENT (CETA)" 12 (2014), https://www.iisd.org/system/files/publications/reponse_eu_ceta.pdf [https://perma.cc/2ANN-LWFC].

[55] *See* MAHNAZ MALIK, INT'L. INST. SUSTAINABLE DEV., BULLETIN #1: DEFINITION OF INVESTMENT IN INTERNATIONAL INVESTMENT AGREEMENTS 3–14 (2009), iisd.org/system/files/publications/best_practices_bulletin_1.pdf [https://perma.cc/V3BP-5WZS]. This model provides an exhaustive list of situations that constitute an investment. *See* BERNASCONI-OSTERWALDER & MANN, *supra* note 54, at 11.

[56] *See* SADC MODEL BIT, *supra* note 6, at 9.

[57] *Id.*

[58] The proposed definition in SADC Article 2 is as follows:

> Investment means *an enterprise* within the territory of one State Party established, acquired or expanded by an investor of the other State Party, including through the constitution, maintenance or acquisition of a juridical person or the acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise is *established or acquired in accordance with the laws of the Host State*[; and

Importantly, the principle behind these narrower definitions of investment is to balance the private rights of the investor with the public power of the host state. States are using treaties to reassert their right to regulate, and by linking the definition of investment to other goals, for example, treaties are increasingly making reference to environmental protection and development,[59] and CSR.[60] However, sometimes these references are in the preamble, and thus non-binding—as such, they are better viewed as a normative step towards imposing obligations on non-state actors via treaties, rather than as responsibilities per se.[61]

There are differing degrees of obligations in current treaty practice. The 2019 Netherlands Model BIT provides in Article seven, Section one, 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."[62] In contrast, the Canada-Peru FTA is a more typical example, which states:

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> [registered] [approved] [recognized] in accordance with the legal requirements of the Host State].

*Id.* (emphasis added). Note, however, that this treaty is not binding but rather serves as a text that can be used in negotiations. *See also* INDIAN MODEL BIT, *supra* note 50 (Art. 1.6 of India's new model BIT also provides that " 'Investment' means an Enterprise in the Host State, constituted, organised and operated in compliance with the Law of the Host State and owned or controlled in good faith by an Investor."). *See generally* Aniruddha Rajput, *Protection of Foreign Investment in India and International Rule of Law: Rise or Decline?* (KFG, Working Paper No. 10, 2017), https://ssrn.com/abstract=3135261. *See also* Huan Qi, *The Definition of Investment and its Development: for the Reference of the Future BIT between China and Canada*, 45 REVUE JURIDIQUE THEMIS 541, 553–54 (2011) (Fr.) (providing typical cases such as Article 1139 of the NAFTA, the 2003 Canada FIPA, and the Mexico Model BIT).

[59] *See generally* Aniruddha Rajput, *Defining "Investment"– A Developmental Perspective*, 2 INDIAN J. ARB. L. 12 (2013) (India). *See also* U.N. CONF. ON TRADE AND DEV., WORLD INVESTMENT REPORT 2018: INVESTMENT AND NEW INDUSTRIAL POLICIES, at 80, U.N. Sales No. E.18.II.D.4 (2018), https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf [https://perma.cc/CL5P-3ADJ].

[60] *See, e.g.*, *Draft Agreement between the Kingdom of Norway and for the Promotion and Protection of Investments,* REGJERINGEN.NO (May 2015), https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf [https://perma.cc/X26F-2CCF] (referencing CSR in the preamble).

[61] *See id.*

[62] U.N. Conference on Trade and Development, *Netherlands Model Investment Agreement* (Mar. 22, 2019) [hereinafter *Netherlands Model Investment Agreement*], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download [https://perma.cc/QSH4-PHPT] (emphasis added). Similarly, the Morocco-Nigeria BIT (signed but not yet in force) will require investors to apply, alongside the host state, the precautionary principle; maintain an environmental management system and uphold human rights in accordance with core labor and environmental standards as well as labor and human rights obligations; not engage

> Each Party *should* encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies.[63]

There is a changing culture with regards to the rights of third parties against businesses.[64] Treaties are, with increasing frequency, making reference to the non-binding OECD Guidelines[65] and the UN Global Compact,[66] and calling on contracting states to promote compliance with international and national human rights and environmental standards.[67] Moshe Hirsch reports a gradual increase in references to human rights in bilateral and multinational treaties and arbitral awards.[68]

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in corruption, meet or exceed national and international standards of corporate governance; and operate through high levels of corporate governance. *See generally* Morocco-Nigeria BIT, *supra* note 51. For commentary *see* Tarcisio Gazzini, *Nigeria and Morocco Move Towards a "New Generation" of Bilateral Investment Treaties,* EJIL: TALK! (May 8, 2017), https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/ [https://perma.cc/C8ZP-4D9C].

[63] *Free Trade Agreement Between Canada and the Republic of Peru*, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/626/download [https://perma.cc/57AZ-3WUV] (last modified Nov. 28, 2016) (emphasis added).

[64] COLUMBIA CTR. ON SUSTAINABLE INV., IMPACTS OF THE INTERNATIONAL INVESTMENT REGIME ON ACCESS TO JUSTICE 14–15, 18, 20 (2018), https://www.ohchr.org/Documents/Issues/Business/CCSI_UNWGBHR_InternationalInvestmentRegime.pdf [https://perma.cc/SE6Y-3CZK].

[65] Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Republic of Tajikistan, Austria-Taj., December 15, 2010, PERMANENT CT. ARB., https://docs.pca-cpa.org/2016/01/Austria-Tajikistan-BIT-2010.pdf [https://perma.cc/H8WR-UMB8] (last visited Sep. 11, 2021).

[66] Free Trade Agreement Between the Republic of Colombia and the EFTA States preamble, November 25, 2008, ORG. AM. STATES, http://www.sice.oas.org/Trade/COL_EFTA/Final_Texts_e/ftacolombia.pdf [https://perma.cc/N23J-4NQV].

[67] EU-CARIFORUM Economic Partnership Agreement, Oct. 30, 2008, 2008 O.J. (L 289) 1. *See also* CETA, *supra* note 38 (The preamble "[e]ncourag[es] enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct.").

[68] Moshe Hirsch, *Social Movements, Reframing Investment Relations, and Enhancing the Application of Human Rights Norms in International Investment Law*, 34 LEIDEN J. INT'L L. 127, 130–31 (2021).

Significantly, the UN Guiding Principles—perhaps the most influential instrument in the field—has not been directly referenced by treaties, although it enjoys great support with regards to the elaboration of corporate responsibility for human rights abuses and access to justice for victims.[69]

### *B. Obligations Imposed by Domestic Law*

#### 1. Host State

Some host states with strong regulatory environments have righted perceived imbalances in power by requiring investors to conform with local laws, pass screening tests, and make commitments with regards to human rights, the environment, and labor.[70] Indeed, domestic laws have imposed "responsibilities" on investors of both the substantive and procedural kind.[71] Because ICSID Art. 42 permits tribunals to use the law of the contracting state in the absence of other rules, clauses in treaties that state the investment must be in accordance with host state law can be used by respondent states to argue that investments do not qualify for IIA protection.[72] In addition, domestic laws can create a market advantage for certain kinds of investments, such as those that contribute to sustainable development goals, thereby giving host states considerable latitude in how they regulate incoming investments.[73]

Elevating the host state has the effect of empowering domestic jurisdictions to play a larger role in regulating and resolving investment disputes. It underscores the importance of conforming with host state law, even when this conformation is not explicitly required by the treaty. In the 2018 award in *Cortec Mining v. Kenya*, for example, the question was whether the claimant committed a serious violation of host state law when making an

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[69] *See generally* UN GUIDING PRINCIPLES, *supra* note 46.

[70] *See, e.g.*, *Netherlands Model Investment Agreement*, *supra* note 62, at art. 7.

[71] Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361, 388 (2018) (discussing domestic investment courts).

[72] Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 42, Aug. 27, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, https://heinonline-org.jerome.stjohns.edu/HOL/Page?collection=ustreaties&handle=hein.ustreaties/ust017001&page=1270&size=2&set_as_cursor=0.

[73] U.N. CONF. ON TRADE AND DEV., WORLD INVESTMENT REPORT 2020: INTERNATIONAL PRODUCTION BEYOND THE PANDEMIC, at 214, U.N. Sales No. E.20.II.D.23 (2020), https://unctad.org/system/files/official-document/wir2020_en.pdf [https://perma.cc/CK7P-RUA2].

investment by obtaining a mining license without conducting an environmental impact assessment.[74] Denying jurisdiction, the tribunal wrote:

> [T]he Claimants' failure to comply with the legislature's regulatory regime governing the Mrima Hill forest and nature reserve, and the Claimants' failure to obtain an EIA license . . . constituted violations of Kenyan law that, in terms of international law, warrant the proportionate response of a denial of treaty protection under the BIT and the ICSID Convention. [75]

Investment treaties, such as the SADC Model BIT and the Indian Model BIT, recommend the exhaustion of local remedies before initiating arbitration.[76] This trend is relatively novel, the vast majority of investment treaties neither require nor waive the exhaustion of administrative or judicial remedies before the initiation of proceedings. However, New Zealand signed side-agreements with countries party to the CPTPP that either completely restrict access to ISDS, or put conditions on access by, for example, requiring investors to make written requests for consultations and negotiations, and resolve the dispute amicably by non-binding third-party procedures.[77] Obligations to comply with domestic provisions or initiate dispute resolution in domestic venues first, however, are not properly considered "responsibilities" as such, but rather encumbrances on an investor's right of access.[78]

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[74] Cortec Mining Kenya Ltd. v. Republic of Kenya, ICSID Case No. ARB/15/29, Award ¶ 1 (Oct. 22, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw10051.pdf [https://perma.cc/DA6J-TAV2].

[75] *Id.* ¶ 365. *See also* Lorenzo Cotula & James T. Gathii, *Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya*, 113 AM. J. INT'L L., 574, 574 (2019).

[76] *See* SADC MODEL BIT, *supra* note 6, at 52, 56–57 (Articles 28.4 and 29.4(b)(ii) require investors to demonstrate they have exhausted local remedies, rather than permitting them a "fork-in-the-road."). *See also* INDIAN MODEL BIT, *supra* note 50, at Art. 14.3.

[77] *See* Pacific Alliance, *supra* note 52. *See also* MARTIN DIETRICH BRAUCH, INT'L INST. SUSTAINABLE DEV., *EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL INVESTMENT LAW: IISD BEST PRACTICES SERIES–JANUARY 2017,* at 7–23 (2017), https://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf [https://perma.cc/M88H-QLYF].

[78] Unlike in property law where encumbrances restrict an owner's ability to transfer title to a property or negatively affect its value, here I mean the burdens on procedural rights of access to particular dispute resolution processes.

2. Home State

While host state regulation over investments has increased, home state regulation of investors operating in cross-border economic activities has not moved forward to the same degree. This is because home states typically seek to protect the assets of their MNE's investing abroad, and reduce restrictions on foreign affiliates operating in host countries.[79] Indeed, home states have typically not wanted to assume obligations concerning the behavior of MNEs.[80] Although states have increasingly become both home and host countries, and hence respondents in investment disputes, they have become more sensitive to the various political and economic concerns involving investor responsibilities.[81] This is clearly one of the most important frontiers in righting asymmetries in investor responsibility. However, in addition to home state hesitancy about better regulation, two obstacles remain: first, due to the high thresholds for attribution under the ARSIWA, the acts of transnational corporations ("TNCs") operating abroad are not usually attributable to home states unless the corporation is a state-owned entity.[82] Second, extraterritorial regulation continues to spark concerns, despite the considerable interest in the home state model.[83]

The beginnings of this direction are apparent in existing instruments. As Jennifer Zerk notes, The Guiding Principles on Business and Human Rights ("UNGPs") take the position that: "States are not [at present] generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction."[84]

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[79] Olivier de Schutter, *Sovereignty-Plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations*, *in* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 245, 283 (Pieter H.F. Bekker et al. eds., 2010).

[80] *Id.* at 273.

[81] *Id.*

[82] *Id.* at 272–73.

[83] *See Id.*; *see also* SIGRUN SKOGLY, BEYOND NATIONAL BORDERS: STATES' HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION 66 (2006). For a critical response, see generally Claire Methven O'Brien, *The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal*, 3 BUS. & HUM. RTS. J. 47 (2018).

[84] JENNIFER ZERK, CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES: TOWARDS A FAIRER AND MORE EFFECTIVE SYSTEM OF DOMESTIC LAW REMEDIES 55 (2013), https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/

However, homes states should nevertheless "set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."[85] The Maastricht Principles go a step further and provide that States have an obligation to monitor TNCs domiciled in their jurisdiction and refrain from supporting them whenever they are involved in human rights violations in the territory of third states.[86] In the same vein, Article 20 of the Morocco-Nigeria BIT states investors "shall be subject to civil actions for liability in the judicial process 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."[87]

Typically, the state of incorporation is the state most capable of regulating a corporation because it is closest to the decision-making node. That ISDS provided no primary provisions for home state responsibility in its initial conception was a substantial oversight, although it was due in part to its commercial origins.[88] Recent literature has emphasized the obligations of home states to prevent extraterritorial human rights abuses by TNCs.[89] However, even before the thornier issues regarding the extraterritorial application of treaties are broached, it is important to indicate that states can choose to regulate the activities of businesses abroad through domestic regulation. For example, the Foreign Corrupt Practices Act ("FCPA") provides that anyone with a certain degree of connection to the United States can be prosecuted for bribery, whether committed in the United States or abroad.[90]

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StudyDomesticeLawRemedies.pdf [https://perma.cc/8S38-E3TN].

[85] *Id.*

[86] *See* ETO CONSORTIUM, MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 9 (2013), https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 [https://perma.cc/6AWS-K5HP]. See, in particular, principle 11 on the topic of State responsibility. *Id.* at 7 ("State responsibility is engaged as a result of conduct attributable to a State, acting separately or jointly with other States or entities, that constitutes a breach of its international human rights obligations whether within its territory or extraterritorially.").

[87] Morocco-Nigeria BIT, *supra* note 51, at art. 20.

[88] *See supra* notes 7–9, 83–85 and accompanying text.

[89] O'Brien, *supra* note 83, at 51.

[90] Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m(b), 78dd-1(a), 78dd-2(a), 78dd-3(a) (2018).

### *C. Responsibilities Towards the Claim: Procedural Rules and Responsibilities*

A third set of obligations can be identified through procedures. Increasingly, rules in arbitral fora have become an important source of investor obligations, and these are properly viewed not as obligations towards the investor or state, but towards the resolution of the claim itself.[91] Rules involving disclosure of third-party funding for example, may require investors to reveal certain facts or backers that illuminate motives and interests in their cases.[92] Similarly, security for cost orders, which can be ordered by a tribunal in cases where the recovery of a potential claim is at risk, places certain obligations on claimants and states, in the event of a counter-claim.[93] Like domestic pleading requirements that burden a plaintiff's right of access to a courthouse, or impose certain conditions on access,[94] the values behind these reforms include efficiency, strengthening the legitimacy of the arbitral process, and tapping into the broader move towards transparency in investor/state arbitration.[95]

The concept of responsibilities in ISDS has been employed to suggest that access to dispute resolution mechanisms under ISDS should be limited to certain types of investors or require the absence or presence of certain types of practices.[96] In other words, investors may not be eligible to bring a claim to a particular forum or even be successful in bringing their claims if they have engaged in activities like corruption. In these situations, the label responsibility is typically not connected to the breach of an international obligation but is rather connected to limits placed on the use of a

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[91] *See generally* Comm'n on Int'l Trade Law, Annotated Provisional Agenda of the Fifty-Second Session, U.N. Doc. A/CN.9/962 (2019).

[92] Brooke Guven & Lise Johnson, *The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement* 12 (Columbia Ctr. on Sustainable Inv., Working Paper, 2019), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1007&context=sustainable_investment_staffpubs [https://perma.cc/4LAW-9YZR].

[93] *Id.* at 40.

[94] Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA L. REV. 1767, 1768–69 (2014) (discussing changes to the FRCP).

[95] De Brabandere, *supra* note 7, at 2630 (discussing the Mauritius Convention and the UNCITRAL rules on Transparency).

[96] Stephan Schill, *Access to Justice in Investment Dispute Settlement*, KLUWER ARB. BLOG (Feb. 10, 2020), http://arbitrationblog.kluwerarbitration.com/2020/02/10/access-to-justice-in-investment-dispute-settlement/ [https://perma.cc/BXY7-CTEZ].

particular forum.[97] *World Duty Free Co. v. Kenya* illustrates this scenario.[98] Here, a British company built and operated duty-free shops at airports in Nairobi and Mombassa.[99] The contract was made possible by a $2 million bribe that the company had paid to the Kenyan president.[100] Because the company's investment had originated with this corrupt act—contrary to Kenyan law—the Tribunal found that there could be no basis for a valid claim.[101]

Tribunals have also denied claims at the jurisdiction stage, on the merits, and at the damages stage, where investors have acted illegally.[102] Although the reasoning of most awards to date have not been based on substantive treaty terms, some new treaties make these doctrines explicit. For example, CETA expressly provides that an investor cannot submit a claim to arbitration if its investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.[103]

The ISDS system is not alone in placing conditions of access on investors. Sustainable development funds, political risk insurance policies, and procurement rules reflect similar concerns.[104] For example, while an investor need not purchase political risk insurance, certain underwriting conditions must be met if it chooses to.[105] Similarly, in order to earn the label of a sustainable development fund, investors must demonstrate practices that comply with the goals of good governance and social and environmental development.[106] Interestingly, Sovereign

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[97] UNITED NATIONS CONF. ON TRADE AND DEV., REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT: IN SEARCH OF A ROADMAP 7 (2013), https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf [https://perma.cc/H7WL-N8PC].

[98] *See generally* World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, (Oct. 4, 2006).

[99] *Id.* ¶ 62.

[100] *Id.* ¶ 66.

[101] *Id.* ¶185.

[102] *See* discussion on unclean hands, *infra* notes 146–49 and accompanying text.

[103] CETA, *supra* note 38, at 53.

[104] Thanks to Harlan Cohen for this insight.

[105] Pammela S. Quinn, *Regulation in the Shadows of Private Law*, 28 DUKE J. COMP. & INT'L L. 327, 342–50 (2018) (discussing the regulatory properties of political risk insurance).

[106] The UN Principles for Responsible Investment define responsible investment as: "an approach to investing that aims to incorporate environmental, social and governance (ESG) factors into investment decisions to better manage risk and generate sustainable, long-term" results. *Why We're Here*, PRINCIPLES RESPONSIBLE INV., http://10.unpri.org/why-were-here/ [https://perma.cc/8TV8-P6GZ] (last visited Aug. 23, 2021).

Wealth Funds are widely viewed as first movers in this area, and the Norwegian Pension Fund, in particualr, is raising the bar on socially responsible investing, given its widespread investment portfolio, public visibility, long-term horizons, and size.[107] Public procurement processes have likewise developed as alternate regulatory mechanisms: market incentives have merged with otherwise voluntary norms.[108]

The requirements for disclosure of third-party funding is perhaps the most significant example of new procedural rules that impose disclosure obligations on investors.[109] Due to the sharp increase in litigation funded by parties who have no pre-existing interest in the litigation, concerns have been expressed that third-party funders like banks, institutional investors, or companies might gain excessive control over the arbitral process, leading to frivolous claims and discouragement of settlements.[110] Moreover, the process has also led to conflicts of interest between arbitrators and third-party funders, due to lack of disclosure.[111] As a result, at the time of writing, the UNCITRAL Working Group III is considering whether to regulate or prohibit third-party funding altogether.[112]

Some arbitrators have also linked the absence of transparency to decisions reducing costs. In *Bear Creek Mining Corp. v. Peru*, a

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[107] Xenia Karametaxas, *Funding the Future: Sovereign Wealth Funds as Promoters of Intergenerational Equity*, *in* INTERGENERATIONAL EQUITY 179, 189–90 (Thomas Cottier et al. ed., 2019).

[108] Christopher McCrudden, *Corporate Social Responsibility and Public Procurement* 1, 3 (Univ. of Oxford Fac. of L., Working Paper No. 9/2006, 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=899686 [https://perma.cc/6RHE-SEHM].

[109] *See generally* Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011). Rupert Jackson defined third party funding as: "[t]he funding of litigation by a party who has no pre-existing interest in the litigation, usually on the basis that (i) the funder will be paid out of the proceeds of any amounts recovered as a consequence of the litigation, often as a percentage of the recovery sum; and (ii) the funder is not entitled to payment should the claim fail." RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: PRELIMINARY REPORT viii (2009), https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf [https://perma.cc/Y469-YGWB].

[110] Comm. on Int'l Trade Law, Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session, U.N. Doc. A/CN.9/935, ¶ 89 (2018) [hereinafter ISDS Working Group Report].

[111] *See, e.g.*, Comm. on Int'l Trade Law, Report of the ICCA-Queen-Mary Task Force on Third-Party Funding in International Arbitration, U.N. Doc. A/CN.9/935, at 82–83 (2018).

[112] For a discussion of proposed regulations, see generally UNCITRAL, *Third-Party Funding*, https://uncitral.un.org/en/thirdpartyfunding [https://perma.cc/347R-GR2F] (last visited Oct. 21, 2021).

case involving the expropriation of a mining project, Philippe Sands noted in his separate, partially dissenting opinion, that the claimant was partially responsible for the harms caused, including the failure to obtain a "social license."[113] Sands also accused the claimant of subterfuge, noted the claimant's lack of transparency with regards to filing for permits and not disclosing its identity, and concluded damages for the claimant should be reduced due to its contributions to the social unrest.[114] In so doing, he linked a violation of procedural burdens to a secondary rule of international law: the availability of compensation.[115]

Security for costs is also an area where investor responsibilities are being imposed.[116] Broadly speaking, allocation of costs has come up in various reform contexts because the three main costs involved in ISDS—arbitrator's fees, administrative fees, and representation fees—are estimated to average eighty-two percent of the total cost of a case.[117] Some agreements have used costs as a method of dissuading investors from bringing spurious claims. The Trans-Pacific Partnership ("TPP"), for instance, allows tribunals to award costs and attorney's fees in the case of frivolous claims.[118] More significantly, however, are new rules on security for costs, which make the right of a claimant to proceed on a claim conditional on provision of partial security to guarantee the substantive claims in the proceedings.[119] For example, the new Vienna Rules authorize tribunals to order security for costs as an interim measure if the respondent can show that the

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[113] Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Partial Dissenting Opinion, ¶ 3 (Nov. 30, 2017). Sands defined social license as "the necessary understanding between the Project's proponents and those living in the communities most likely to be affected by it, whether directly or indirectly." *Id.* ¶ 6.

[114] *Id.*

[115] *Id.* ¶ 9.

[116] Security for costs has also come up in the UNCITRAL Working Groups. *See* ISDS Working Group Report, *supra* note 110, ¶ 92.

[117] *See, e.g.*, ISDS Costs–How Much and Who Pays?, ISDS BLOG (Nov. 19, 2015), http://isdsblog.com/2015/11/19/isds-costs-how-much-and-who-pays/ [https://perma.cc/YAV6-RXDK]; David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* 3 (OECD, Working Paper No. 2012/03, 2012), http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf [https://perma.cc/M635-U4SM].

[118] Trans-Pacific Partnership Agreement art. 9.29.4, Feb. 4, 2016, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf [https://perma.cc/LAJ8-KY2F].

[119] *See generally* Christine Sim, *Security for Costs in Investor-State Arbitration*, 33 ARB. INT'L 427, 428 (2017).

recoverability of a potential claim for costs is at risk.[120] This rule is extremely important for respondent states that are facing claims by investors who are at risk of bankruptcy. Moreover, it is a reform being touted to improve investor-state responsibility by ensuring "equal access to justice."[121]

In the first analysis, therefore, we can identify three sources of investor obligations:

(1) Responsibilities Imposed by Treaty: For example, definition of investment, whereby a limited definition is intended to restrict access to ISDS tribunals;

(2) Responsibilities Imposed by Domestic Law: For example, national law requirement to conduct an environmental impact assessment, to consult with particular communities, or to act in accordance with host state law. This is the key source of Home State Responsibility;

(3) Responsibilities Imposed as a Result of Procedures: For example, tribunal-imposed requirement to disclose third-party funding.[122]

### *D. Relational Responsibility*

Another set of questions that is relevant in the move towards investor responsibility, is to whom a particular responsibility is owed. One innovation of ISDS has been to extend the responsibility of the host state to the investor, in that investors have the right to invoke a treaty breach directly.[123] However, the dispute resolution process can extend far beyond that: the body politic and specially affected communities such as indigenous groups may, depending on the nature of the investment and claim, also have a relationship to the investor.[124] The relational lens takes as its first proposition "that every transaction is embedded in complex relations between both the parties and between the

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[120] *See, e.g.*, *Rules of Arbitration and Mediation of the Vienna International Arbitral Center,* VIENNA INT'L ARB. CTR., (Jan. 1, 2018), https://www.viac.eu/en/arbitration/content/vienna-rules-2018-online [https://perma.cc/6TXK-ZBJA]. *See also* Lisa Beisteiner, *New Vienna Rules: Where do you stand on Security for Costs?*, KLUWER ARB. BLOG (Apr. 7, 2018), http://arbitrationblog.kluwerarbitration.com/2018/04/07/new-vienna-rules-where-do-you-stand-on-security-for-costs/ [https://perma.cc/USS6-USWH].

[121] Sim, *supra* note 119, at 427.

[122] *See supra* Part II, A–C.

[123] *The Basics: Frequently Asked Questions About ISDS*, BILATERALS http://isds.bilaterals.org/the-basics [https://perma.cc/6XZV-QYGC] (last visited July 18, 2021).

[124] *See supra* Part I, Figure 1.

parties and the norms of society or the larger body politic."[125] The preceding discussion has illustrated that it is rare for investment treaties themselves to specifically identify responsibilities owed to parties other than the investor.[126] Moreover, it is not clear that the body politic of either the home or host state can properly be considered an intended third party beneficiary of investment treaties.[127] However, there are opportunities to embed responsibilities reflecting human rights obligations, environmental due diligence, and other types of social responsibilities in the underlying concession agreements or investment contracts. This would give voice to a new network of norms and relationships.

Relational contract theory is a useful vehicle through which to assess investments because it emphasizes the long term, dynamic nature of relationships.[128] A key tenet of relational contract theory is that the contracts are not static; rather contracts grow and change.[129] In the context of ISDS specifically, the relational approach "highlight[s] all the normative and distributive consequences of foreign investment projects," such as "the multiplicity of rights and obligations at stake."[130] In many instances, "[i]n relational terms, foreign investor rights, states' right to regulate, and local entitlements are often in tension."[131] In the classical approach to responsibility, states have responsibilities towards other states, and it is the breach of those

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[125] Jared Wessel, *Relational Contract Theory and Treaty Interpretation: End-Game Treaties v. Dynamic Obligations*, 60 N.Y.U. ANN. SURV. AM. L. 149, 152 (2004).

[126] *But see* Morocco-Nigeria BIT, *supra* note 51 (describing a new generation of investment treaties, such as the Morocco-Nigeria BIT, in which this is not the case).

[127] *See* Wessel, *supra* note 125, at 152.

[128] "[R]elational contract theory is characterized by a general movement away from the notion of consent as the binding force and principal source of legal obligation stemming from a contract." *Id*. at 154. Ian Macneil, one of the key relational contract theorists, took issue with the classical contract law approach and emphasis on objective manifestations of assent, and instead argued that contracts are co-operative. "The first thing to note about contract is the fact that it concerns social behaviour. . . . The next thing to note is that the kind of social behaviour involved is co-operative social behaviour, behaviour characterized by willingness and ability to work with others. . . . contract involves people affirmatively working together." IAN R. MACNEIL, CONTRACTS: INSTRUMENTS FOR SOCIAL COOPERATION, EAST AFRICA 14 (1968).

[129] Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. L. REV. 805, 805 (2000).

[130] Nicolás M. Perrone, *The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime*, 113 AJIL UNBOUND 16, 16 (2019).

[131] *Id*.

obligations that can lead to international responsibility.[132] Both the home state and host state are juridically equal; neither the investor nor the population of the host state is specifically considered. However, the ARSIWA are not restricted to bilateral relationships. As the commentaries make clear: "[t]hey apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole."[133]

From a relational standpoint, states and investors may have multiple duties, including to the body politic and to specially affected groups.[134] For example, if a state is found responsible to another state, a bilateral relation underpins that responsibility. In some instances, however, such duties may also apply to corporations. In the well-known *Urbaser* decision, involving a water concession agreement in Argentina, the tribunal discussed the ICESCR and the International Labor Organization ("ILO") Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy, and wrote: "the human right for everyone's dignity and [the right to] adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights."[135] It then went on to distinguish between the duty of compliance, which falls on states, and the duty of performance which does not fall on a corporation.[136] The tribunal concluded that: "the investor's obligation to ensure the population's access to water is not based on international law. This obligation is framed by the legal and regulatory environment under which the investor is admitted to operate on the basis of the BIT and the host State's

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[132] *ARSIWA*, *supra* note 13, at 31.

[133] *Id.* at 32.

[134] Nicolás M. Perrone, *The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?,* 7 TRANSNAT'L L. THEORY 383, 383 (2016). *See generally* FAROUK EL-HOSSENY, CIVIL SOCIETY IN INVESTMENT TREATY ARBITRATION: STATUS AND PROSPECTS (2018).

[135] Urbaser S.A. v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶ 1199 (Aug. 12, 2010).

[136] *Id.* ¶ 1208.

> The human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company providing the contractually required service. Such obligation would have to be distinct from the State's responsibility to serve its population with drinking water and sewage services.

*Id.*

laws."[137] As such, it acknowledged a relational approach, although one grounded in treaty and host state law.

Nonetheless, it has also been observed that "arbitrators may not actually be considering the population of the host state as a party or actor whose interests and rights are to be taken into account. Rather, they see the host state government as representing its population."[138] Consequently, "[t]his conflation may create a distance that makes the preference in [the] valuation of investor's rights even stronger [ ] and . . . permits arbitrators to shift the issue of responsibility to give effect to the relevant human rights onto the host state government."[139] Moreover, the human rights of host-state populations have been addressed only infrequently, and then framed as aspirational and potential gains, compared with the rights of investors, which are conceived by tribunals as endowments that have been lost.[140]

Where relational responsibilities arise, investors may have a duty to consult. This derives from the concept of the "social license" and from certain treaty obligations relevant to indigenous peoples.[141] The duty to consult was an important issue in the recent *Bear Creek* case, where Philippe Sands wrote, "[i]t is blindingly obvious that the viability and success of a project such as this, located in the community of the Aymara peoples, a group of interconnected communities, was necessarily dependent on local support."[142] Making specific emphasis on the applicability of ILO Convention 169, he then concluded that Article 15 of the Convention, related to consultation requirements, was an applicable rule of international law that the Tribunal should have

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[137] *Id.* ¶ 1209.

[138] Tomer Broude & Caroline Henckels, *Not All Rights are Created Equal: A Loss-Gain Frame of Investor Rights and Human Rights* 18 (Leiden J. Int'l L., Working Paper No. 3546321, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3546321 [https://perma.cc/933B-SD5M].

[139] *Id.*

[140] *See id.* at 19.

[141] This has been defined as a mechanical adherence to regulatory procedures. *See* Alonso Gurmendi, *Indigenous "Social License" in Investment Projects: A Pending Challenge in ISDS*, OPINIO JURIS (Apr. 8, 2019), http://opiniojuris.org/2019/04/08/indigenous-social-license-in-investment-projects-a-pending-challenge-in-isds/ [https://perma.cc/PZ43-QVSX]. On the duty to consult, see Articles 32 and 6 of ILO convention 169. Int'l Labour Org. [ILO], *Convention C169- Indigenous and Tribal Peoples Convention*, at art. 6, art. 32 (June 7, 1989), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314 [https://perma.cc/S6C7-G5E3].

[142] Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Partial Dissenting Opinion, ¶ 6 (Sep. 12, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw10107.pdf [https://perma.cc/DL32-44WW].

taken into consideration to determine whether Bear Creek had "carried out its obligation to give effect to the aspirations of the Aymara peoples in an appropriate manner."[143] As Jesse Coleman and others have argued, this decision is emblematic of tensions between human rights holders, human rights obligations, and international investment law:

> Investors who have failed to meaningfully engage communities, and even those who have acted in breach of domestic law, have been awarded considerable sums of money at the expense of states and their taxpayers—while states have been reprimanded for not doing enough to protect investors in the context of citizen protests.[144]

A number of equitable doctrines reflect the relational approach to responsibility. For example, the "clean hands" doctrine provides that "a party to a dispute cannot ask for an equitable reparation to the other if it is itself in violation of a principle of equity."[145] The doctrine has been used by states to have a claim deemed inadmissible or to counter potential liability in the context of a suit brought by an investor against a state.[146] It does not exist as a matter of treaty law, but rather as an equitable doctrine applied by arbitral tribunals. Some tribunals have applied the clean hands doctrine to reject jurisdiction over a dispute, where the investment is premised upon illegal activity.[147] In other contexts, tribunals have "fined" the investor for bringing a claim against the state knowing that it was doing so with unclean

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[143] *Id.* ¶ 11.

[144] Jesse Coleman et al., *Human Rights Law and the Investment Treaty Regime* 3 (Columbia Ctr on Sustainable Inv., Working Paper, 2019), https://ccsi.columbia.edu/sites/default/files/content/docs/Coleman-Cordes-and-Johnson-Human-Rights-Law-and-the-Investment-Treaty-Regime.pdf [https://perma.cc/9AVK-632L].

[145] Nitish Monebhurran, *Mapping the Duties of Private Companies in International Investment Law*, 14 BRAZILIAN J. INT'L L. 50, 61 (2017) (Braz.). *See also* Copper Mesa Mining Corp v. Ecuador, PCA Case No. 2012-2, Award, ¶¶ 5.39–5.4 (UNCITRAL Arbitration Trib. 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf [https://perma.cc/WPY4-J568].

[146] *See, e.g.*, Niko Resources v. Bangladesh, ICSID Case No. ARB/10/11, Decision on Jurisdiction, ¶ 481 (Aug. 19, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw7344.pdf [https://perma.cc/5822-SHKQ]. *But see* Monebhurran, *supra* note 145, at 61–62 (criticizing the applicability of the three elements identified by the *Niko Resources* tribunal). *See also* William Curtley & Thomas Davis, *Cleansing the (Un)clean: The Ongoing Saga of the Clean Hands Doctrine*, KLUWER ARB. BLOG (Sept. 8, 2018), http://arbitrationblog.kluwerarbitration.com/2018/09/08/cleansing-the-unclean-the-ongoing-saga-of-the-clean-hands-doctrine/ [https://perma.cc/FD2C-B592].

[147] *See* Niko Resources v. Bangladesh, ICSID Case No. ARB/10/11, Decision on Jurisdiction, ¶ 482 (Aug. 19, 2013).

hands.[148] In other circumstances, tribunals have examined the merits of the dispute in light of the unclean hands of the investor. *Al-Warraq v. Indonesia* employs this strategy: the investor claimed that the Indonesian bank had unlawfully expropriated funds surrounding a government bailout.[149] Ultimately, the investor was convicted under Indonesian law of corruption and money laundering and, as the tribunal noted, was aware of the expropriation and therefore negligent in supervising the bank's funds.[150] Similarly, in *Copper Mesa Mining Corp. v. Ecuador*, the tribunal noted the investor's "own contributory negligent acts and omissions and unclean hands" in deciding that one of the alleged violations was partly its fault.[151] Here, the tribunal noted that these were overt actions on behalf of the investor that contributed to its culpability, calling its actions a "premediated, disguised and well-funded plan[ ] to take the law into its own hands."[152] Accordingly, the tribunal reduced the amount of damages owed to the investor.[153] Arbitrators have also policed behavior by allocating costs for arbitrators and lawyers and assigning institutional fees.[154] Nonetheless, not all tribunals have been willing to read-in investor obligations through reference to domestic laws or treaty preambles. For example, the panel in

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[148] *See* Agata Zwolankiewicz, *The Principle of Clean Hands in International Investment Arbitration: What is the Extent of Investment Protection in Investor-State Disputes?*, 3 J. INST. TRANSNAT'L ARB. 4, 19–20 (2021); Marcin Kałduński, *Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration*, 4 POLISH REV. INT'L & EUR. L. 69, 93–95 (2015) (Pol.).

[149] Hesham T.M. Al-Warraq v. Indon., Final Award, ¶¶ 523–39 (UNCITRAL Arbitration Trib. 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf [https://perma.cc/Y7NY-3YE2].

[150] *Id.* ¶¶ 631–48.

[151] *See* Copper Mesa Mining Corp. v. Ecuador, PCA Case No. 2012-2, Award, ¶ 6.97 (UNCITRAL Arbitration Trib. 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf [https://perma.cc/U3KN-V9AC]. *See also* Bear Creek Mining v. Peru, ICSID Case No. ARB/14/21, Partial Dissenting Opinion ¶¶ 4, 35–40 (Sep. 12, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw10107.pdf [https://perma.cc/F38U-DJPE].

[152] *See* Copper Mesa Mining Corp. v. Ecuador, PCA Case No. 2012-2, Award, ¶ 6.99 (UNCITRAL Arbitration Trib. 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf [https://perma.cc/B8XB-G8C9].

[153] *Id.* ¶¶ 7.30–32.

[154] For example, in the Plama Consortium ICSID award, the tribunal penalized the claimant who was declared guilty of fraudulent misrepresentation in obtaining the investment in Bulgaria by imposing all of the fees and expenses of the Tribunal and ICSID's administrative charges plus reasonable legal fees and other costs. *See* Plarna Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, ¶¶ 321–24 (Aug. 27, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf [https://perma.cc/V7LF-6Y2G].

*Fakes v. Turkey* stated that whether "an investment might be 'legal' or 'illegal,' [or] made in 'good faith' or not, it nonetheless remains an investment."[155] The usefulness of judicially applied doctrines, such as unclean hands, may thus be limited, particularly for developing countries who do not have the resources to effectively fight MNCs.[156]

Counterclaims have also been discussed as a way of overcoming the deficiencies in the current "all-or-nothing" approach to the system.[157] Many IIAs permit States to assert counterclaims if they relate to the same subject matter, although sometimes the claims are excluded by virtue of the relevant dispute resolution clause.[158] Moreover, there have been several high-profile cases involving counterclaims on environmental matters involving the right to water. In *Perenco v. Ecuador*[159] and *Burlington v. Ecuador,*[160] both involving parties who were partners in an oil drilling consortium,[161] a counterclaim against Burlington for violating environmental laws and spilling oil, resulted in an award of $41 million for Ecuador.[162] In *Urbaser v. Argentina*, discussed *supra*, Argentina filed a $190 million counterclaim under a Spanish-Argentinian BIT based on human rights, alleging investors had violated the right of access to water.[163] Although the counterclaim was unsuccessful, the award has paved the way towards permitting human rights considerations as the basis of a host state counterclaim.[164]

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[155] Saba Fakes v. Republic of Turkey, ICSID Case No ARB/07/20, Award, ¶ 112 (July 14, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0314.pdf [https://perma.cc/HE5E-U5T3].

[156] *See* Mavluda Sattorova, *Investor Responsibilities from a Host State Perspective: Qualitative Data and Proposals for Treaty Reform*, 113 AJIL UNBOUND 22, 24 (2019).

[157] JOSE DANIEL AMADO ET AL., ARBITRATING THE CONDUCT OF INTERNATIONAL INVESTORS 116 (2018).

[158] *See id.* at 117 n.32.

[159] Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Award, (Sep. 27, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10837.pdf [https://perma.cc/PLT7-JNRU].

[160] Burlington Res. Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims, (Feb. 7, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw8206.pdf [https://perma.cc/F96Q-9ZPG].

[161] *Id.* ¶¶ 44–45.

[162] *Id.* ¶ 1075.

[163] Urbaser S.A. v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶¶ 36, 1156–57, 1165 (Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf [https://perma.cc/5BWP-F65M].

[164] *Id.* ¶ 1233.

As a generalized tool, however, counterclaims will only address investor obligations at the margins.[165] The amount of the counterclaim will be relevant as an initial matter, as states cannot normally have a higher claim than the claimant. Further, the state may not have standing to bring a claim if it is not privy to the agreement allegedly breached.[166] Moreover, some states, like Canada, have raised concerns as to whether international tribunals are best placed to deal with counterclaims based on what are essentially domestic legal issues.[167] Whether counterclaims are a viable option, therefore, depends very much on the underlying jurisdictional clause, and on a complex set of fact specific matters that will vary with the claim.

## CONCLUSION

At this time of system maturation, states are using multilateral fora and treaty processes to define new rules of engagement in the ISDS system. In parallel, important developments are influencing the values and framing of the system for the next generation. Since dissatisfaction with the status quo has come primarily from respondents—namely host states[168]—it is unsurprising that the procedural and substantive reforms are resulting in narrower access to dispute resolution processes and the increased policing of investor behavior. Importantly, it also suggests that it is no longer tenable to leave third parties who are harmed by investment projects without some access to process and remedies.[169] This is particularly relevant for

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[165] As Amado writes, "[c]ounterclaims are in any event limited in their usefulness. They are by definition *ex post facto* remedies whereby affected parties may only obtain redress if the host State halts the investment activity, and thus the harming conduct. No redress is offered unless and until the investor brings a claim . . . ." AMADO ET AL., *supra* note 157, at 118.

[166] *Id.* at 117.

[167] *See* Anthea Roberts & Zeineb Bouraoui, *UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims*, EJIL:TALK! (Jun. 6, 2018), https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/ [https://perma.cc/K64K-RAAS] (describing that Canada raised concerns that counterclaims threaten the legitimacy of the system and take issues away from domestic courts which are better equipped to handle domestic law issues).

[168] Daniel Behn, *Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-Of-The-Art*, 36 GEO. J. INT'L L. 363, 364 (2015).

[169] *See, e.g.*, LORENZO COTULA & MIKA SCHRODER, INT'L INST. FOR ENV'T AND DEV., COMMUNITY PERSPECTIVES IN INVESTOR-STATE ARBITRATION 32 (2017), https://pubs.iied.org/pdfs/12603IIED.pdf [https://perma.cc/G6MC-S5V6].

indigenous peoples.[170] These different vantage points of the law, including non-anthropomorphic and inter-generational conceptions of duties, are expanding the conversation about which duties are owed by investors, and to whom.

The terrain has become complicated. On one level, it is possible to identify the emergence of procedural and substantive burdens on investors, which either limit the responsibility of states, or are factored into reducing remedies that might be owed to investors. On a different plane, however, we see that many so-called responsibilities, are in fact conditions of access for investors with regard to their ability to bring a claim before a particular set of dispute resolution mechanisms. The use of the term "responsibility" in the context of ISDS reforms has not clarified efforts to impose obligations on investors.[171] This is because the asymmetry in obligations is rarely understood to be a breach of an international obligation by a subject of international law, as the term responsibility is traditionally understood.[172] The time is ripe for this systemic evaluation of responsibility: the ISDS system is a novel one in the international arena, with its decentralized decision-making processes and potential for large impact on core issues in domestic public law.

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[170] Terri Hansen, *How the Iroquois Great Law of Peace Shaped U.S. Democracy*, PBS (Dec. 17, 2018), https://www.pbs.org/native-america/blogs/native-voices/how-the-iroquois-great-law-of-peace-shaped-us-democracy/ [https://perma.cc/Y3V4-5VK8] (explaining that the Iroquois Great Law of Peace, for example, provides that the effects of a given act must be considered with regards to their effect on the seventh generation).

[171] Yulia Levashova, *Imposing Conditions on Investor Protection: A Role of Investor's Due Diligence*, KLUWER ARB. BLOG (June 20, 2019), http://arbitrationblog.kluwerarbitration.com/2019/06/20/imposing-conditions-on-investor-protection-a-role-of-investors-due-diligence/ [https://perma.cc/QM5K-Y5QU].

[172] Investor-led initiatives illustrate this disconnect. For example, consider the use of the word "responsibilities" in the context of the UN Principles of Responsible Investment. *See, e.g.*, *What are the Principles for Responsible Investment?*, PRINCIPLES RESPONSIBLE INV., https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment [https://perma.cc/2MGJ-DSYC] (last visited Aug. 23, 2021).