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Introduction

Corporate Responsibility and the 'One-Sidedness' of Investment Law

1.1 Introduction: Protection of Transnational Corporations in International Law

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

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

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

[3] Jaworek and Kuzel, 'Transnational Corporations in the World Economy', 58.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[14] Toope, *Mixed International Arbitration*, 89.

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

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

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

[18] Franck, 'Legitimacy Crisis in Investment Treaty Arbitration', 1538.

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

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

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

1.2 Environmental and Human Rights Impact of TNC Activities

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

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

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

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

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

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

[25] Giuliani and Macchi, 'Multinational Corporations' Economic and Human Rights Impacts', 487–492.

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

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

[26] Zomorrodi and Zhou, 'Impact of FDI', 4.

[27] Blanton and Blanton, 'Sectoral Analysis of Human Rights and FDI', 469–493.

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

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

[30] Wälde and Kolo, 'Environmental Regulation, Investment Protection', 815.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[45] Kinnear, 'ICSID in the Twenty-First Century', 424.

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

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

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

In this sense, the IIA-based dispute settlement mechanism is structurally similar to international human rights courts such as the ECtHR[49] and the Inter-American Court of Human Rights (IACtHR).[50] However, investment disputes are distinguished from human rights cases for the following reasons.[51] While human rights treaties, as well as national

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

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

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

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

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

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

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

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

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

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

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

[52] Gourgourinis, 'Nature of Investor's Rights under Investment Treaties'.

[53] Roberts, 'Clash of Paradigms', 71–72.

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

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

[56] Sauvant and Ünüvar, 'Can Host Countries Have Legitimate Expectations?', 1.

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

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issue.[58] Several countries, in their submissions at the UNCITRAL ISDS reform discussions, raised the issue of imbalance in the current IIA-based arbitration system and called for the incorporation of the principle of the protection of responsible and sustainable investment in the reform process.[59] Outside UNCITRAL, institutions and intergovernmental organisations have expressed support for the equality of parties in international investment tribunals[60] and the incorporation of 'development-oriented investor obligations' in future IIAs.[61]

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

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

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

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

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

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

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

[63] Nowrot, 'Obligation of Investors', 1160.

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It should be noted that, since the beginning of the twenty-first century, the IIA regime has experienced a shift towards greater recognition of the regulatory power of the host states and international fields of law outside the regime (external international norms)[64] in both IIA-making (see Chapter 2, Section 2.3.1) and investment arbitration cases.[65] It has been observed that this shift was necessary 'for its survival', amidst growing concerns and discontent over the impact of the current IIA regime on public interests,[66] which was caused by dramatic increase in the number of investment arbitration cases, including some high-profile cases involving environmental and human rights issues.[67]

Currently, as discussed above, the issue of investor responsibility has also attracted growing criticism and concern. States and scholars increasingly see the protection and promotion of foreign investment not as the end itself, but as a means to realise the objectives of sustainable

[64] In this study, the term 'norms' refers to a broad concept that operates at a high level of generality, covering both legally binding and non-binding laws, rules and principles. See Toope, 'Formality and Informality', 107.

[65] For example, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, para. 106; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 78; *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012–06, Award, 27 June 2016, para. 244; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August 2010, paras. 137–138; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paras. 301–307 (Arbitrator Gary Born dissented); *Aven* Award, paras. 423, 441–446, 585. See also Viñuales, *Foreign Investment and the Environment*, 9–23 (explaining the signs of changing relationship between environmental law and investment law); Joshi and Gurpur, 'The Silent Spring of Human Rights', 561–563; Baltag and Dautaj, 'Investors, States, and Arbitrators', 13–45; McLachlan, 'The Principle of Systemic Integration'; French, 'Treaty Interpretation and the Incorporation'.

[66] Danic, 'Droit international des investissements', 533. See also Rolland and Trubek, 'Legal Innovation in Investment Law', 381–431; Simma, 'Foreign Investment Arbitration'; McLachlan, 'Investment Treaties and General International Law'; Langford and Behn, 'Managing Backlash'.

[67] For example, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1; *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009–23; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7; *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6; *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12; *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31. According to Langford and Behn, among the 389 finally resolved investment arbitration cases (as of 1 August 2017), 84 are classified as 'cases raising public interest concerns or arousing public interest'. Langford and Behn, 'Managing Backlash', 576–577.

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development,[68] for which responsible investment is a necessary element.[69] This suggests that the issue of investor responsibility in the IIA regime must also be addressed for its sustainable operation. However, as discussed in Chapter 2, Section 2.3.2, recognition of investor responsibilities in the text of IIAs remains exceptional. Although there are recent cases where environmental and human rights concerns relating to the investor's conduct have resulted in a loss of protection or discounted compensation,[70] the host state's counterclaims raised in *IIA-based* arbitration cases have rarely succeeded (see Chapter 5, Section 5.1).

1.5 Aims and Scope of This Study

1.5.1 Exploring the Unexhausted Potential of the Current Framework

Against this background, this study aims to explore ways of materialising investors' environmental and human rights responsibilities in the current framework of the IIA-based dispute settlement mechanism. As noted, environmental degradation almost always affects the local people, and therefore has serious human rights implications. Based on this recognition, this study stands on the premise that the act of placing and reflecting environmental responsibility on investors in the IIA regime should be grounded in the need of those who have allegedly incurred damages due to a TNC's conduct (the victims), yet have neither standing nor the right to intervene in the proceedings.

Nevertheless, this study does not offer direct solutions for redressing harm done to the victims of the investor's misconduct. It does not provide a comprehensive analysis of the means to regulate and enforce TNC responsibility in international and domestic fora, nor does it present a reform proposal for the IIA regime to enable victims to directly sue

[68] For example, UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of South Africa, Note by the Secretariat', 17 July 2019, UN Doc. A/CN.9/WG.III/WP.176, para. 16; van Aaken and Lehmann, 'Sustainable Development and International Investment Law', 330–333; Muchlinski, 'Towards a Coherent International Investment System', 415–418; Schill and Djanic, 'International Investment Law and Community Interests', 232.

[69] Principles for Responsible Investment, 'Investing with SDG Outcomes: A Five-Part Framework', 2020, available at: www.unpri.org/download?ac=10795 (accessed 15 December 2021).

[70] For example, *Aven v. Costa Rica*; *Copper Mesa v. Ecuador*; *Al Tamimi v. Oman*. For further cases, see Chapter 6.

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investors in the IIA-based dispute settlement mechanism (this issue is discussed in Chapter 7, Section 7.5).

Rather, this study is based on the following premises. First, to the extent that the dispute settlement mechanism under existing IIAs continues to be utilised by investors, there is considerable demand to explore ways in which the current mechanism can operate as a system to advance responsible investment. Although several countries have begun to terminate or withdraw from IIAs,[71] the existence of a constituency with an interest in investment arbitration in private legal practices and arbitration institutions may make it difficult for many governments to utilise this option.[72]

Second, establishing perfect symmetry as well as a mechanism in which victims may directly pursue their claims by drastic reform of IIA-based dispute settlement mechanisms remains a distant possibility. Notably, neither the existing IIAs that provide the structure for investment courts nor the current discussions on the MIC[73] have taken concrete steps to address the asymmetry issue,[74] even though this issue is recognised by Working Group III.[75] Nor do they accord legal standing

[71] In their 2017 work, Haftel and Thompson observed that close to 200 IIAs, among nearly 3,000, have been renegotiated since the 1990s. Haftel and Thompson, 'When Do States Renegotiate Investment Agreements?', 26. For the states that began to terminate their IIAs, see Lim, Ho and Paparinskis, *International Investment Law and Arbitration*, 478–479; Schill, 'Reforming Investor-State Dispute Settlement', 653; Gathii, 'Understanding Tanzania's Termination'. Following the *Achmea* judgment (Case C-284/16, *Slovak Republic v. Achmea BV* [2018] ECLI:EU:C:2018:158), the EU member states started terminating their intra-EU BITs (Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT, OJ L 169, 29.5.2020, pp. 1–41). On the other hand, Ecuador re-signed the ICSID Convention on 23 June 2021.

[72] St John, *The Rise of Investor-State Arbitration*, 240–241.

[73] UNCITRAL, 'Initial Draft on Standing Multilateral Mechanism: The Selection and Appointment of ISDS Tribunal Members and Related Matters, Note by the Secretariat', September 2021, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/standing_multilateral_mechanism_-_selection_and_appointment_of_isds_tribunal_members_and_related_matters__0.pdf (accessed 15 December 2021). This identifies 'counterclaims' as one of the reform solutions that the Working Group 'may wish to consider incorporating' in the discussions about 'procedural rules reform' (para. 67).

[74] See Perrone, 'Taking Local Expectations Seriously', 125; Porterfield, 'Exhaustion of Local Remedies', 12; Kang, 'Innovative but Insufficient?'.

[75] UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Multiple Proceedings and Counterclaims, Note by the Secretariat', 22 January 2020, A/CN.9/WG.III/WP.193, paras. 38–41; UN General Assembly, 'Report of Working Group III

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to third persons so that they may participate in the proceedings, despite the fact that the EU, in its submission on 24 January 2019 at the UNCITRAL ISDS reform discussions proposing the MIC, stated that 'third parties, for example representatives of communities affected by the dispute, [should] be permitted to participate in investment disputes'.[76] Therefore, South Africa, in her submission at the UNCITRAL ISDS reform discussions, claimed that while the establishment of the MIC 'may bring institutional improvements', such improvements do not solve 'the systemic issues', including the absence of corresponding investor-responsibility obligations.[77] State attitudes towards this issue will vary depending on several factors, including the degree of confidence in their own judiciary and the prospect of enforcing domestic judgments against investors' assets.[78] Fundamentally, whether the creation of an international forum to pursue the responsibility of TNCs should be sought through ISDS reform discussions is a contested question (see Chapter 7, Section 7.5). Finally, any consideration for reforming the current regime towards more symmetry should be based on a careful assessment of what can be done within the current framework of IIA-based dispute settlement mechanisms.

Therefore, it is time to reconsider the potential of the current regime. This study is motivated by the belief that methods to pursue and reflect investor responsibility in the current IIA regime exist but have not been fully utilised. At the same time, an examination of the potential in the current regime will also reveal what remains as its insurmountable limitations, which will inform the directions for reforming the current IIA-based dispute settlement mechanism.

(Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session (New York, 1–5 April 2019)', 9 April 2019, UN Doc. A/CN.9/970, paras. 35–36.

[76] UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the European Union and Its Member States', 24 January 2019, UN Doc. A/CN.9/WG.III/WP.159/Add.1, para. 29. See also UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Standing Multilateral Mechanism: Selection and Appointment of ISDS, Note by the Secretariat', para. 67, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/standing_multilateral_mechanism_-_selection_and_appointment_of_isds_tribunal_members_and_related_matters__0.pdf.

[77] UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of South Africa, Note by the Secretariat', 17 July 2019, UN Doc. A/CN.9/WG.III/WP.176, para. 78. See also Arcuri and Violi, 'Human Rights and Investor-State Dispute Settlement', 590; Choudhury, 'Investor Obligations for Human Rights', 83.

[78] For a general observation of the states' positions, see Roberts, 'Incremental, Systemic and Paradigmatic Reform', 411–423.

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1.5.2 *Investors' Environmental and Human Rights Responsibilities*

This study primarily focuses on situations in which investors' conduct results in environmental threat or damage in the host state's territory. However, the inseparable link between environmental protection and human rights protection, as discussed in Section 1.2, makes it necessary to examine human rights that are affected by environmental degradation.[79] It would be impossible to provide an exhaustive list of human rights that are affected by environmental degradation. Rights that are frequently raised and discussed in connection with environmental harm include the right to life; the right to health,[80] which extends to the right to safe and potable water, adequate nutrition, and sanitation;[81] property rights;[82] and the rights of indigenous peoples.[83] Environmental degradation, in itself, may be understood as constituting a violation of 'a right to a healthy environment', which was recently recognised in a UN Human Rights Council resolution.[84] Civil and political rights[85] can be equally

[79] The other dimension of the link between environmental and human rights protection, i.e. human rights as a means to achieve environmental ends, falls outside the scope of this study. For this dimension, see UN General Assembly, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment, Submitted to the 37th Session of the Council (26 February–23 March 2018)', 24 January 2018, UN Doc. A/HRC/37/59, para. 4; De Jonge, *Transnational Corporations and International Law*, 189; Anderson, 'Human Rights Approaches to Environmental Protection', 2.

[80] For example, Constitution of the World Health Organization, signed 22 July 1946, entered into force 7 April 1948; Article 12 of the International Covenant on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights, 16 December 1966, in force 3 January 1976, 993 UNTS 3, OASTS 36).

[81] See United Nations, Committee on Economic, Social and Cultural Rights, UN ESCOR, 22nd session, 'The Right to the Highest Attainable Standard of Health', UN Doc. E.C.12/2000/4, ICESR General Comment 14 (2000); Kinney, 'The International Human Right to Health', 1468.

[82] For example, Article 17 of the Universal Declaration of Human Rights (UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)).

[83] For example, UN General Assembly, 'United Nations Declaration on the Rights of Indigenous Peoples', 2 October 2007, UN Doc. A/RES/61/295 (UNDRIP).

[84] UN Human Rights Council, 'Resolution on the Human Right to a Safe, Clean, Healthy and Sustainable Environment', 8 October 2021, UN Doc. A/HRC/48/L.23/Rev.1. For the unsettled status of the right to a healthy environment in international law, see e.g. Knox and Pejan, 'Introduction', 1–2; Knox, 'Human Rights, Environmental Protection', 519–524; Ong, 'Locating the "Environment"', 192; Merrills, 'Environmental Rights'; Loucaides, 'Environmental Protection'; Boyle, 'Human Rights and the Environment', 626–633; Churchill, 'Environmental Rights in Existing Human Rights Treaties'.

[85] International Covenant on Civil and Political Rights, 16 December 1966, in force 23 March 1976, 999 UNTS 171.

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affected, as serious environmental degradation often causes conflict between project operators and the affected community,[86] and is 'frequently accompanied by repression of activists and denial of access to information'.[87] When examining investors' environmental responsibility in investor–state disputes, the pertinent question is whether the right is recognised and potentially actionable under the international and domestic laws relevant to the dispute.[88]

1.5.3 Conceptual Clarifications: TNCs, Investors, and FDI

Some clarifications on the scope of this study need to be made. First, definitional issues concerning TNCs need to be clarified. As Ruggie observes, there is 'no legally precise and universally accepted definition of the multinational enterprise'.[89] TNCs are sometimes distinguished from multinational corporations in that while the former are 'enterprises owned and controlled by entities or persons from one country but operating across national borders', the latter are 'those owned and controlled by entities or persons from more than one country'.[90] Despite the lack of precision in meaning,[91] it is clear that both terms involve an element of control of entities by foreign nationals,[92] and this element is crucial for the purposes of this study, which focuses on FDI, rather than

86 Cotula and Perrone, 'Investors' International Law and Its Asymmetries', 83 (observing that many investment disputes arise from 'tensions between foreign investors and local communities').

87 Anderson, 'Human Rights Approaches to Environmental Protection', 5. Cf. Ratner, 'Corporations and Human Rights', 492–493 (identifying the rights whose protection is 'within the unique province of states' such as the presumption of innocence).

88 For example, In *South American Silver v. Bolivia*, Bolivia asserted that the development of the claimant's mining project was a threat to the indigenous communities' right to a healthy environment, citing Articles 25 and 29(1) of the UNDRIP. *South American Silver Limited v. Bolivia*, Respondent Counter-Memorial, 31 March 2015, paras. 320–324.

89 Ruggie, 'Multinationals as Global Institution', 318; Kerbrat observes that the absence of a precise definition of multinational enterprises is a result of an intentional choice to avoid stalemate of negotiations in search of a definition. Kerbrat, 'Manifestations de la notion d'entreprise multinationale', 62–65.

90 Muchlinski, *Multinational Enterprises and the Law*, 6. See Weissbrodt and Kruger, 'Norms on the Responsibilities of Transnational Corporations', 90; Sauvant, 'Negotiations of the United Nations Code of Conduct', 16.

91 Dubin, 'Entreprise multinationale', 15.

92 Baez, Dearing, Delatour and Dixon, 'Multinational Enterprises and Human Rights', 191; Bantekas, 'Corporate Social Responsibility in International Law', 312; Vagts, 'The Multinational Enterprise', 792; Wildhaber, 'Some Aspects of the Transnational Corporation', 80–81.

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foreign portfolio investment (FPI) (see below). Therefore, in this study, it suffices to adopt a brief and general (i.e. regardless of legal forms) definition of TNCs given by the United Nations Conference on Trade and Development (UNCTAD): TNCs are 'incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates'.[93]

Secondly, throughout the text, the term 'investors' refers to all kinds of foreign investors including, but not limited to, TNCs. Nevertheless, some parts of this study offer analyses that apply specifically to TNCs when discussing, for example: (a) particular difficulties of regulating TNCs within the domestic legal framework (Chapter 2, Section 2.1.1); (b) jurisprudence of the US Alien Tort Statute (ATS) on the treatment of TNCs (Chapter 2, Section 2.1.3); (c) legal implications of internal regulations, global codes of conduct and non-financial reports published by TNCs (Chapter 2, Section 2.2.3 and Chapter 5, Section 5.4); and (d) admissibility of counterclaims against a parent company (Chapter 4, Section 4.4.2).

Thirdly, foreign investment takes the form of both FDI and FPI. However, given that the principal focus of this study is investor responsibility for environmental and human rights harm caused in the territory of the host state, the analyses focus on FDI, which 'usually involve [s] a control position by the foreign investor',[94] rather than FPI, which is a short-term investment seeking the maximum return for a given level of risk.[95]

1.6 Structure of the Book

This book consists of six chapters. This introductory chapter sets the background of this study. Chapter 2 examines the current situation concerning the codification, recognition, and implementation of corporate responsibility both in and outside the IIA regime, focusing on environmental and human rights responsibilities. The first part of Chapter 2

[93] UNCTAD, 'World Investment Report 2002: Transnational Corporations and Export Competitiveness', 12 June 2003, UNCTAD/WIR/2002, 291.
[94] Goldstein, Razin and Tong, 'Liquidity, Institutional Quality'.
[95] See UNCTAD, 'Comprehensive Study of the Interrelationship between Foreign Direct Investment (FDI) and Foreign Portfolio Investment (FPI): A Staff Paper Prepared by the UNCTAD Secretariat', 23 June 1999, UNCTAD/GDS/DFSB/5; Evans, 'Foreign Portfolio and Direct Investment'; Goldstein and Razin, 'Foreign Direct Investment vs Foreign Portfolio Investment', 3.

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discusses certain challenges in regulating and pursuing the responsibility of TNCs' conduct in domestic legal orders. It then proceeds to note a general lack of international mechanisms for holding TNCs responsible for their conduct. This is done through the examination of: (a) the paucity of international (both customary and treaty) law that provides binding obligations of juridical persons as well as a lack of enforcement mechanisms; (b) the recent developments towards establishing binding international human rights obligations of corporations; and (c) the development of 'soft law' instruments to advance the concept of corporate responsibility, including those developed by private initiatives. The second part of this chapter examines the recognition of investor responsibility in the text of IIAs and model IIAs. The examination relies on a dataset of 1,000 randomly selected IIAs and model IIAs (IIA dataset, see Section 1.7). The analysis reveals that, while there is a clear tendency in IIAs that have been signed or adopted since the first decade of the twenty-first century for a greater recognition of sovereign rights to regulate, the number of IIAs that incorporate the concept of investor responsibility is still limited. However, it also reveals that in the recent IIAs that were signed or adopted in the second decade of the twenty-first century, there has been an observable trend to include provisions on investor obligations and corporate social responsibility (CSR).

Chapters 3–5 discuss counterclaims by the host state. Chapter 3 first examines the benefits and obstacles of the use of counterclaims by comparing their use with the option of pursuing investors' legal responsibility through the host state's own courts. It then proceeds to address a question which has been relatively unexamined: Given the existence of the interests of victims as third persons to the dispute, is the host state in the right position to pursue compensation for damages suffered by victims? Based on the assessments of (a) the state's obligation to protect against human rights abuses by private persons and (b) the *parens patriae* doctrine developed in international and certain domestic jurisprudence, it is concluded that the host state has the right to pursue investors' responsibility in its own right and on behalf of victims. Reflecting the premise of this study that any attempt to materialise environmental responsibility of investors in the IIA-based dispute settlement mechanism should consider the interests of victims, it then proceeds to examine whether there are circumstances in which the admissibility of such counterclaims should be denied in light of the victims' due process rights. This question is answered in the positive, and the factors that make the counterclaim inadmissible on this ground are identified.

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Chapter 4 clarifies the requirements of jurisdiction and admissibility for filing counterclaims. After arguing that the determinative element for the parties' consent to counterclaims is the scope of investment disputes given in the relevant IIA, it confirms, through the analysis of the IIA dataset, that the content is actually given under the majority of IIAs. It then examines questions of admissibility, focusing on the requirement of a close connection between the principal claim and the counterclaim and the issue of a parent company's liability under a counterclaim that is based on alleged damage caused by its local subsidiary.

Chapter 5 addresses the application of domestic laws, international norms, voluntary standards, and CSR commitments to the determination of merits and remedy of counterclaims, as well as the consequences of such application. It starts by examining certain controversies over the application of domestic law in investment arbitration to conclude that none of these constitutes an obstacle to its application for the determination of counterclaims. It then argues for an approach that respects domestic jurisprudence on legal questions and the use of experts to address the concerns over the lack of expertise of the tribunal in domestic law. The chapter then proceeds to examine counterclaims based on the investor's international responsibility. Based on the examination of recent cases in which such counterclaims did not succeed on their merits,[96] it is concluded that the host state's failure to identify 'secondary rules' that determine the consequences of the investors' asserted breach of international law has been an obstacle to such counterclaims. It then examines the role of domestic law in this situation. Referring to the analysis of the case law of certain jurisdictions, particularly that under the US ATS, it demonstrates that domestic law may determine a remedy for the violation of international environmental and human rights law by corporations, even in the absence of implementing legislation in the host state. Lastly, the chapter examines the potential role of CSR commitments in pursuing counterclaims, which has significant implications in situations where there is a gap between stated voluntary commitments by the investor and local standards. It discusses the possibility that the investor's breach of the former may give rise to legal responsibility in the framework of domestic law, in particular through civil tort law, thereby providing a ground for a counterclaim.

[96] *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016; *Aven* Award.

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Chapter 6 discusses ways of reflecting investors' environmental and human rights responsibility in the assessment of the investor's principal claims. It examines the grounds on which investors' environmental misconduct during the operation of its investment (performance-phase misconduct) leads to a limitation of investment protection in the jurisdictional and merits phases, as well as a reduction in the amount of compensation awarded to the investor. First, it argues that, although it is possible for the host state to contest the admissibility of the investor's claim based on its performance-phase misconduct in limited circumstances, the assessment should be done at the merits phase, where the impact of such conduct is considered together with the host state's conduct and other circumstances of the case. In the merits phase, it discusses the impact of the investor's performance-phase misconduct on an assessment of the protection of the investor's legitimate expectations. The analysis seeks to reflect the interests of victims in this assessment by examining the role that the concept of 'social licence to operate' (SLO), which is based on the perceptions of local stakeholders, may play in this context. Specifically, it argues that the loss of an SLO brought about by the investor's conduct may, in certain circumstances, reduce the grounds for protecting the investor's legitimate expectations. It then discusses ways to address the risk of abusing the SLO in balancing this context. At the remedy phase, this chapter examines contributory fault as a concept that may reflect investor misconduct in a direct and value-based manner, and discusses selected questions on its application.

As noted, the examination of the potential in the current regime also reveals its limitations. On this basis, Chapter 7 concludes this study by examining how the analysis presented in this text may inform discussions on the reform of the IIA regime. To incorporate the interests of victims in the dispute settlement mechanism, it specifically proposes a mechanism for encouraging third parties' participation in investor–state mediation.

1.7 Methodology

The primary research orientation employed in this study is literature-based. Analysis of different ways of reflecting corporate responsibility in the IIA-based dispute settlement mechanism is largely based on a qualitative review of primary sources (e.g. reported cases, arbitral awards, reports and other documents issued by intergovernmental and non-governmental organisations) and scholarly works as secondary sources. It engages in a review of jurisprudence of investment law as well as

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international hard and soft law instruments concerning corporate environmental and human rights responsibility, which are the main focus of this study. This study also draws on research and jurisprudence in other areas of international law, bearing in mind the possible different applications and interpretations of similar rules and concepts deriving from differences in practices and objectives between these areas of law.[97] Jurisprudence and works on domestic law in certain countries are also employed.

This study also employs a quantitative data analysis based on a set of 1,000 IIAs and model IIAs (collectively, 'IIAs')[98] which were randomly selected from the UNCTAD International Investment Agreements Navigator.[99] The sample of data covers IIAs signed from 1965 to 2019 (see Appendix). The collected IIAs are classified according to the date of signature into the following periods: (a) –1999 (370 IIAs), (b) 2000–2009 (335 IIAs), (c) 2010–2019 (295 IIAs), with the aim of investigating the changes in the practice of IIA-making. The results of the data analysis are primarily employed to: confirm the general trend in the practice towards greater deference to the host states' rights to regulate, since the first decade of the twenty-first century (Chapter 2, Section 2.3); corroborate the remaining paucity of recognition of investor responsibility in IIAs and the emerging trend towards such recognition (Chapter 2, Section 2.3); discuss the jurisdiction of counterclaims under the current IIA regime (Chapter 4, Section 4.3). The IIA dataset includes one IIA and one model IIA that were terminated and replaced respectively (see Appendix); however, this does not materially affect the findings of the data analysis.

1.8 Conclusion

The current IIA regime is asymmetric. Pursuing investors' responsibility in an international dispute settlement forum, which requires *both* concluding a multilateral agreement of universal membership that provides business obligations *and* establishing an international court or tribunal

[97] *MOX Plant Case* (*Ireland v. the United Kingdom)*, Request for Provisional Measures Order, 3 December 2001, ITLOS Reports 2001, para. 51.

[98] According to UNCTAD World Investment Report 2021, as of the end of 2020, there are 3,360 IIAs, amongst of which at least 2,646 IIAs are in force. UNCTAD, World Investment Report 2021, 21 June 2021, UNCTAD/WIR/2021, at 122.

[99] Available at: https://investmentpolicy.unctad.org/international-investment-agreements.

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that enjoys mandatory jurisdiction over investors, is a distant possibility. The story of resistance to efforts to place human rights obligations on business since the 1970s (see Chapter 2, Section 2.2.2.1) alone would suffice to indicate that this will be (to say the least) a difficult and lengthy process. Meanwhile, current IIA-based dispute settlement mechanisms are heavily utilised,[100] despite growing concerns over the 'one-sidedness' of the IIA regime.

The current IIA-based dispute settlement mechanisms have the potential to correct asymmetry by reflecting investor responsibility, which has not been fully exhausted. What is needed is the reassessment of the unexhausted potential to realise these possibilities. At the same time, when investors' environmental responsibility is at issue, the asymmetry is not just an issue of inequity between the host state and the investor, but an issue of loss and injury suffered by the victims. The analysis should therefore seek to reconceptualise the asymmetry issue to reflect the interests and perceptions of the victims.

[100] According to the UNCTAD World Investment Report 2021, '[m]ost of the 68 publicly known ISDS cases initiated in 2020 were brought under IIAs signed before the turn of the century' (xii).

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