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# INTRODUCTION TO THE SYMPOSIUM ON INVESTOR RESPONSIBILITY: THE NEXT FRONTIER IN INTERNATIONAL INVESTMENT LAW

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This symposium focuses on the fact that investors enjoy a suite of rights and privileges without corresponding responsibilities in international investment law. The international investment regime is designed to redress the mistreatment of foreign investors, not foreign investor wrongdoing. Human rights systems, including regional courts, increasingly serve as a check on state misconduct, but consistently are unable to remedy abuses at the hands of business actors. Despite some progress, imposing responsibility on corporations for human rights abuses in foreign courts also remains elusive. When states have tried to use arbitration to challenge the misconduct of foreign investors within host states, investor-state arbitration tribunals have ignored these claims or have failed to find legal bases for *investor responsibility*. Is there a more promising future on the horizon for lawyers and advocates dissatisfied with the perceived imbalance between the rights conferred and the duties assigned to transnational corporations in today's interconnected world? This symposium looks at the possibilities and limits that currently exist under the investor-state dispute settlement (ISDS) regime in its controversial yet changing context.[1]

The symposium is timely, and it may serve to inspire ideas for the incremental, systemic, or paradigmatic reforms of international investment law aimed, in part, at averting investor over-protection.[2] Reformists advocate the replacement of older investment treaties with newer ones containing numerous carve-outs for host state regulation, the replacement of confidential proceedings between disputing parties with transparent ones that give a voice to interested nondisputing parties, and the replacement of ad hoc arbitration with standing investment courts. Yet international investment law's propensity toward overprotection of businesses stems from its preoccupation with *state responsibility*—not the (mis)behavior of powerful actors more generally. This can result in investors benefitting from the protection of international law against host state mistreatment, while largely evading responsibility for their misconduct towards the host state or local communities therein, including vulnerable and/or marginalized groups such as indigenous peoples.

To some extent, current reforms treat the symptoms but not the cause of this disenchantment with international investment law. Perhaps the time has come to stop tweaking the level and mode of investor protection, and to firmly recenter the reformist agenda to include investor responsibility. In many domains, including the business and human rights context, key actors are now focusing on a remedy previously referred to as the "forgotten pillar."[3] In fact, a group of lawyers and scholars is currently working on a document titled Rules on Business

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[1] Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AJIL 361 (2018).

[2] Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AJIL 410 (2018).

[3] Lorna McGregor, *Activating the Third Pillar of the UNGPs on Access to an Effective Remedy*, EJIL: TALK! (Nov. 23, 2018).

and Human Rights Arbitration.[4] Yet, in international investment law, how to create an international remedy against transnational businesses is just emerging as a scholarly debate.

The emergence of a debate about investor responsibility as a prominent dimension of international investment law is attributable to at least three recent developments. The first is the appearance of provisions in newer investment treaties demanding that investors respect human rights, protect the environment, and act in a socially responsible manner when operating in the host state.[5] The second is the growth of counterclaims by respondent host states in ISDS, seeking rulings from tribunals on the claimant investors' responsibility under domestic or international law.[6] The third stimulus has been the adoption of Resolution 26/9 by the United Nations Human Rights Council "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[7] The convergence of these three developments presents an ideal opportunity to seriously identify the challenges and possibilities of investor responsibility, as six authors do in this symposium.

Andrew Sanger from Cambridge University explains how the law makes corporate responsibility for human rights abuses in domestic courts so elusive.[8] Focusing on the U.S. federal courts, he shows that Alien Tort Statute litigation is now more precarious than ever before. While the situation seems more encouraging in English courts, English judges are reluctant to extend responsibility to parent corporations for harm caused by the operations of foreign subsidiaries. As he explains, the overall picture appears to be one of deference to the corporation and its atomized form, with the goal of promoting foreign investment.

Jean Ho from the National University of Singapore takes the discussion to the international plane.[9] She explains how international investment law is designed to redress mistreatment by host states of foreign investors, while consistently failing to rectify investor misconduct in host states. She argues that unless and until investor responsibility is integrated into international investment law reform, the overprotection of investors that has resulted in an accountability gap will continue to undermine its legitimacy.

Nicolás Perrone from Durham Law School proposes a relational approach to overcome the structural limitations of international investment law.[10] This approach requires us to revisit how we define and govern the relationship between *all* of the stakeholders involved in and affected by foreign investment projects. Perrone shows how, contrary to a relational perspective, recent awards in ISDS continue to render invisible local communities and their rightful aspirations. By looking at many foreign investment disputes, he shows how local communities have a lot at stake but have remained almost invisible to the international investment regime, apart from the ability to submit amicus curiae briefs. Like Perrone, Mavluda Sattorova from the University of Liverpool argues for a fundamental reframing of the objectives of international investment law to overcome the existing resistance to incorporating investor obligations in new and amended treaties.[11] Her study is based on qualitative data and explains the concerns that are triggered when investors challenge regulations using ISDS.

[4] *The Hague Rules on Business and Human Rights Arbitration*., Center for International Legal Cooperation.

[5] *See, e.g.*, Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria art. 18, Dec. 3, 2016.

[6] Urbaser v. Arg., ICSID Case No. ARB/07/26, Award, paras. 1199-1210 (Dec. 8, 2016).

[7] Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/RES/26/9(June 26, 2014).

[8] Andrew Sanger, *Transnational Corporate Responsibility in Domestic Courts: Still out of Reach?*, 113 AJIL Unbound 4 (2019).

[9] Jean Ho, *The Creation of Elusive Investor Responsibility*, 113 AJIL Unbound 10 (2019).

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

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

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On a more hopeful note, Jackson Shaw Kern, an Ethiopian practitioner and commentator based in Washington, DC explains that the founders of the modern era of international investment arbitration never intended to build a one-way street.[12] In this sense, to seek a regime of investor responsibility may not be to reach toward a new frontier so much as to return to its original nature. Tomoko Ishikawa from Nagoya University identifies how the admission of counterclaims in certain circumstances may help international investment law to advance the rule of law on several counts.[13] She argues that counterclaims in investment arbitration may promote accountability to the law, access to justice, and fairness in the application of the law.

Overall, the symposium offers a provocative yet necessary perspective. An international law-based system that makes investors more accountable for their actions can be achieved, but not without overcoming significant challenges. The symposium aims to start a productive conversation about ways to make investment law more effective at holding states and other actors more accountable. It also seeks to advance a broader endeavor—one in which the privileges under international law come with corresponding responsibilities that can be legally enforced.

[12] Jackson Shaw Kern, *Investor Responsibility as Familiar Frontier*, 113 AJIL UNBOUND 28 (2019).

[13] Tomoko Ishikawa, *Counterclaims and the Rule of Law in Investment Arbitration*, 113 AJIL UNBOUND 33 (2019).

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