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SCHOLARLY ARTICLE

Vulnerability Theory as a Paradigm Shift in International Investment Law: Reimagining the Role of the State

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Abstract

This article argues for a fundamental *raison d'être* reconceptualization of international investment law (IIL) through Martha Fineman's 'vulnerability theory'. The theory helps identify the structural sources of IIL's shortcomings, whilst philosophically challenging the one-sided view that foreign investors are entitled to protections, but are free from obligations *vis-à-vis* the communities affected by their undertakings. Emphasizing the productive power of the state to take positive action that acknowledges ordinary citizens' embeddedness within, and dependence upon, surrounding structures, the vulnerability theory challenges the hegemonic perception of the state as a source of danger – a view which has hitherto undermined both the potency and the enforceability of investor obligations. Used as a heuristic device in studying both IIL's existing structures and the potential avenues for reimagining it, Fineman's theory not only shines a novel light on the foundational premises of IIL, but also grants theoretical traction to existing ideas about improving the system.

Keywords: Community rights; International investment law; Investment arbitration; Investor obligations; Vulnerability theory

I. Introduction

Asymmetries of power between foreign investors, host states and local communities define the international investment law (IIL) regime. The narrative underpinning these asymmetries is the following: a foreign investor arrives in a host state and generates ostensible benefits for the local economy through investing in it.[1] The same investor does, however, also shoulder all the presumed trials and tribulations of having one's capital invested in an unfamiliar land, where it is subject to foreign laws, administrative measures and judicial decisions arbitrarily governed by an unpredictable sovereign.[2] As a result of

[1] See, for example, Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (S-V1) (1 May 1974).

[2] For an exhaustive study of the historic origins of these presumptions and their far-reaching consequences, see Jean Ho, 'International Law's Opportunities for Investor Accountability' in Jean Ho and Mavluda Sattorova (eds.), *Investors' International Law* (London: Bloomsbury Publishing, 2021) 29; Stephan W Schill, Christian J Tams and Rainer

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this discourse, the foreign investor is always presumed to be in a precarious situation *vis-à-vis* the local authorities of the host state.[3] While the historical (in)accuracy[4] of the presumptions leading to this inequitable state of affairs is beyond the scope of this article, its contemporary consequences are at its core.

Whilst IIL has traditionally sought to alleviate this postulated disadvantage of foreign investors, it has overwhelmingly ignored the plight of others.[5] To this day, the foreign investor–host state relationship established under the IIL regime exists in a vacuum, whereby the rights afforded to the foreign investor through international investment agreements (IIAs) lack corresponding obligations of equal strength and enforceability.[6] Although a new generation of investment treaties contain several features that either recognize the state's right to regulate or prescribe investor obligations,[7] the latter remain in the form of soft law provisions, which makes them difficult to enforce.[8] Efforts to include business and human rights[9] or corporate social responsibility (CSR) language in some treaties,[10] despite the noble intentions behind them, have similarly had little *de facto* success in addressing existing grievances. This is chiefly because such efforts are usually packaged in best endeavour clauses.[11] Investor–state dispute settlement (ISDS) tribunals might have become more careful in paying heed to states' regulatory interests in their interpretation of investment treaties,[12] and yet, many third parties, including local populations affected by foreign investors' operations, remain virtually voiceless at all

Hofmann, '*International Investment Law and History*: An Introduction' in Stephan W Schill, Christian J Tams and Rainer Hofmann (eds.), *International Investment Law and History* (Cheltenham: Edward Elgar, 2018) 3; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013).

[3] Nicolás M Perrone, 'Bridging the Gap between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment' (2022) 7 *Business and Human Rights Journal* 375.

[4] There is a growing body of literature that demonstrates the relentless rise of the corporation in the 19th and early 20th centuries. See, for example, Doreen Lustig, *Veiled Power: International Law and the Private Corporation 1885–1981* (Oxford: Oxford University Press, 2020); Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (Leiden: Brill Publishing, 2019); Sundhya Pahuja and Anna Sounders, 'Rival Worlds and the Place of the Corporation in International Law' in Jochen von Bernstorff and Philipp Dann (eds.), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford: Oxford University Press, 2019) 141.

[5] Perrone, note 3, 375.

[6] On the active separation between investor rights and responsibilities, see Surya Deva, 'International Investment Agreements and Human Rights: Assessing the Role of the UN's Business and Human Rights Regulatory Initiatives' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds.), *Handbook of International Investment Law and Policy* (Berlin: Springer, 2021) 1733.

[7] For an overview of recent trends in investment treaty practice that demands more responsible behaviour from foreign investors, see Prabhash Ranjan, 'Investor Obligations in Investment Treaties: Missing Text or a Matter of Application?', *Investors' International Law* in Ho and Sattorova, note 2, 131.

[8] See for example, Article 12 of the Model Indian BIT, Article 12 of the India–Belarus BIT and the India–Taiwan BIT. Article 21 Article 10(3) of the Iran–Slovakia BIT (where the onus is on the investor to incorporate CSR considerations into their practices). In contrast, Article 17 of the Japan–Argentina BIT puts on the contracting states to encourage the foreign investors to do so. See also Ho and Sattorova, note 2, 19.

[9] The Nigeria–Morocco BIT seems to be the only investment treaty to currently impose binding human rights obligations on foreign investors. See also Ranjan, note 7, 140.

[10] Ranjan, note 7, 133.

[11] The 2016 Morocco–Nigeria investment treaty explicitly refers to investor obligations to respect human rights, but this line of thought was not pursued in subsequent treaties entered by these states. See Markus Krajewski, 'A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application' (2020) 5 *Business and Human Rights Journal* 105, 114–116; Barnali Choudhury, 'Investor Obligations for Human Rights' (2020) 35 *ICSID Review* 82.

[12] See, for example, *Cortec Mining v Kenya*, Award, 22 October 2018, ICSID Case No. ARB/15/29, paras 333 and 365; *Burlington v Republic of Ecuador*, Decision on Counterclaims, 7 February 2017, ICSID Case No. ARB/08/5.

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stages of an investment relationship.[13] The consequence is an area of law where, among other controversies, parties harmed by foreign investor undertakings have no international avenue for voicing their grievances, the environment is but a resource to be exploited,[14] and local communities are nothing but an 'absent factor'.[15] As others have put it before, IIL and its fundamental building blocks 'give broad and powerful protection to foreign investors, but not to others, many of whom are far more vulnerable … They write inequality firmly into the law, for countries to observe and respect.'[16]

The time is ripe for a paradigm shift in IIL. At this opportune moment where scholars rally behind describing IIL as 'lopsided investors' international law,'[17] this article seeks to answer the following questions: how can IIL be reconceptualized in a way that shows regard for the grievances of *all* parties whose rights are infringed upon, and holds those responsible for said infringements to account? What role does legal philosophy play in supplying the framework for understanding and reimagining the state's role in IIL? While this article is not the first one to ask these questions, it is in the company of only a few others[18] that have reached beyond the conventional legislative toolbox and called upon the wisdom of legal philosophy to answer them. The authors draw upon Martha Fineman's vulnerability theory[19] (theory or VT) to interrogate IIL's foundational features. While the system primarily addresses the situations where host states unlawfully and arbitrarily interfere with the rights of foreign investors, it is unresponsive to scenarios where foreign investors cause severe environmental damage and risk the health and livelihoods of local communities through their illegal or negligent conduct.[20] By drawing on a theoretical framework that has been developed for a different context and a different legal order, this article hopes to enrich existing IIL debates on the topic.

The article proceeds as follows. Section II provides an overview of the current state of affairs in IIL, focusing on its infamous over-protection of foreign investors in light of existing scholarship. The over-arching critical sentiment is that the system has to do more to address its decades-long ignorance of public concerns and, in some form or shape, reinvent itself. Section III reconstructs Fineman's VT and fleshes out the theory's elements of 'vulnerability', 'dependency', 'resilience' and the 'responsive state' as heuristic devices that can be applied to the IIL context. Section IV uses these tools to reconceptualize the significance of existing proposals for improving the system such as: reimagining the notion of fairness, allowing for prior

[13] Nicolás M Perrone, 'The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?' (2016) 7(3) *Transnational Legal Theory* 383.

[14] Miles, note 2.

[15] Nicolás M Perrone, 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' (2019) 113 *American Journal of International Law Unbound* (*AJIL Unbound*) 16, 20; more broadly, the settlement of business and human rights disputes prompted initiatives such as the Hague Rules on Business and Human Rights Arbitration (12 December 2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf (accessed 8 August 2023).

[16] Gus van Harten, *The Trouble with Foreign Investor Protection* (Oxford: Oxford University Press, 2020) 56; Surya Deva and Tara Van Ho, 'Addressing (In) Equality in Redress: Human Rights-Led Reform of the Investor-State Dispute Settlement Mechanism' (2023) 24:3 *Journal of World Investment and Trade* 398.

[17] Ho and Sattorova, note 2, 20.

[18] See, for example, Kumar Sinha and Pushkar Anand, 'Feminist Overview of International Investment Law: A Preliminary Inquiry' (2021) 24:1 *Journal of International Economic Law* 99.

[19] Martha A Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1.

[20] See Erasmus Institute for Public Knowledge, 'An Open Letter to the Chair of UNCITRAL Working Group III and to All Participating States Concerning the Reform of the Investor State Dispute Settlement: Addressing the Asymmetry of ISDS' (Erasmus University, Rotterdam, 13 February 2019) (where academics are calling on states to disrupt the current state of affairs of 'investors remain[ing] largely unaccountable under international law for any misconduct'), www.eur.nl/en/news/erasmus-institute-public-knowledge (accessed 8 August 2023).

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consultation with local communities and relevant third parties and allocating international responsibilities to foreign investors. Section V concludes with a brief recapitulation of the main arguments.

II. IIL in Crisis

Following an explosion of IIAs and subsequent investor–state dispute settlement cases throughout the 1990s and into the 2000s,[21] IIL emerged as an equally popular and controversial domain. One could argue that its so-called 'legitimacy crisis'[22] began simultaneously with its seemingly unstoppable rise. Indeed, IIL and the ISDS mechanism have been thoroughly analysed and criticised for the past two decades.[23] A wealth of scholarship has shed light on the development of international investment rules and the so-called 'grand bargain' from a historical perspective,[24] offering in-depth accounts of how some of the key institutions driving current practices, such as the International Centre for Settlement of Investment Disputes (ICSID), were founded.[25] The IIA-drafting processes and subsequent arbitral practices have prompted debates on the extent and content of investment protection.[26] At the same time, empirical, interdisciplinary studies have questioned whether IIAs increase foreign direct investment (FDI) in target countries[27] and interrogated the connections between IIL and public law and policy.[28] Other research has examined how, if at all, arbitrators include sustainable development or environmental

[21] van Harten, note 16, 34–55.

[22] The debates concerning ISDS picked up as early as the first NAFTA awards. See Brower II, 'Structure, Legitimacy, and NAFTA's Investment Chapter' (2003) 36 *Vanderbilt Journal of Transnational Law* 37, 75.

[23] See, for example, Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford: Oxford University Press, 2007); Joseph S Nye, 'Multinational Corporations in World Politics' (1974) 53 *Foreign Affairs* 153.

[24] Jeswald W Salacuse and Nicholas P Sullivan, 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain' in Karl Sauvant and Lisa Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford: Oxford University Press, 2009) 109.

[25] Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford: Oxford University Press, 2018).

[26] On why current balancing methods are 'misplaced and short-sighted', see Daria Davitti, 'On Proportionality, Again: Domesticating International Investment Law and Managing Vulnerability' (23 March 2021), https://www.iisd.org/itn/en/2021/03/23/on-proportionality-again-domesticating-international-investment-law-and-managing-vulnerability-daria-davitti/ (accessed 29 July 2022).

[27] Joachim Pohl, 'Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence', OECD Working Papers on International Investment 2018/1, https://www.oecd-ilibrary.org/docserver/e5f85c3d-en.pdf?expires=1638283934&id=id&accname=guest&checksum=FBD63A8997725F76DBE5D47E0F726061 (accessed 29 July 2022); Axel Berger et al, 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box' (2013) 10 *International Economics and Economic Policy* 247; Philip Gunby, Yinghua Jin and W Robert Reed, 'Did FDI Really Cause Chinese Economic Growth? A Meta-Analysis' (2017) 90 *World Development* 242; UNCTAD, 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries' (2009) *UNCTAD Series on International Investment Policies for Development* 15; Jason W Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2011) 51 *Virginia Journal of International Law*, 397; Julian Chaisse and Christian Bellak, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Preliminary Reflections on a New Methodology' (2011) 3:4 *Transnational Corporations Review* 3.

[28] Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge: Cambridge University Press, 2012); Eric de Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge: Cambridge University Press, 2014).

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considerations while interpreting IIAs,[29] or sought to address the role of the state's 'right to regulate' and its countervailing effects on foreign investment protection.[30]

This gradual accumulation of scrutiny has led to a myriad of criticisms against IIL, targeting the vagueness of some of its foundational instruments (IIAs) and the principles found therein (such as that of fair and equitable treatment (FET)),[31] the shortcomings of its dispute settlement method (ISDS),[32] the *ad hoc* nature, as well as the inconsistent, and often unpredictable outcomes produced by the arbitral system,[33] the effects of ISDS claims on efforts of transitional justice[34] and national legislation alongside the so-called 'regulatory chill' these claims create,[35] the lack of transparency in ISDS procedures despite the inherent public character of many foreign investment disputes,[36] IIL's constraints on democratic processes in national systems[37] and IIL's distortive effects on national private law.[38] Last but not least, comprehensive scholarship has drawn attention to the asymmetrical protection offered by IIL,[39] whereby the various treaties effectively reserve the most powerful protections for the least vulnerable actors,[40] while leaving the *most* vulnerable actors out of the equation.

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[29] Diane A Desierto, 'Deciding International Investment Agreement Applicability: The Development Argument in Investment' in Freya Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (Cambridge: Cambridge University Press, 2013) 240.

[30] Catherine Titi, *The Right to Regulate in International Investment Law* (Baden-Baden: Nomos, 2014).

[31] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford: Oxford University Press, 2013); Güneş Ünüvar, 'The Vague Meaning of the Fair and Equitable Treatment Principle in Investment Arbitration and New Generation Clarifications' in Anne Lise Kjaer and Joanna Lam (eds.), *Language and Legal Interpretation in International Law* (Oxford: Oxford University Press, 2022) 271.

[32] Gus Van Harten, 'Is It Time to Redesign or Terminate Investor-State Arbitration?' (11 April 2017), https://www.cigionline.org/articles/it-time-redesign-or-terminate-investor-state-arbitration/ (accessed 29 July 2022).

[33] Margie-Lys Jaime, 'Could an Appellate Review Mechanism 'Fix' the ISDS System?', *Kluwer Arbitration Blog* (11 February 2021), http://arbitrationblog.kluwerarbitration.com/2021/02/11/could-an-appellate-review-mechanism-fix-the-isds-system/ (accessed 29 July 2022); Anna de Luca et al, 'Responding to Incorrect ISDS Decision-Making: Policy Options' (2020) 21 *Journal of World Investment and Trade* 374.

[34] Tara Van Ho, 'Is It Already Too Late for Colombia's Land Restitution Process? The Impact of International Investment Law on Transitional Justice Initiatives' (2016) 5 *International Human Rights Law Review* 60.

[35] Tarald Laudal Berge and Axel Berger, 'Does Investor-State Dispute Settlement Lead to Regulatory Chill? Global Evidence From Environmental Regulation' (2019), https://www.peio.me/wp-content/uploads/2019/01/PEIO12_Paper_78.pdf (accessed 29 July 2022); Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 606.

[36] Joanna Lam and Güneş Ünüvar, 'Transparency and Participatory Aspects of Investor-State Dispute Settlement in the EU 'New Wave' Trade Agreements' (2019) 32 *Leiden Journal of International Law* 781.

[37] Lorenzo Cotula, 'Public Participation and Investment Treaties: Towards a New Settlement?' in Eric De Brabandere, Tarcisio Gazzini and Avidan Kent (eds.), *Public Participation and Foreign Investment Law* (Leiden: Lorenzo Cotula, 'Public Participation and Investment Treaties: Towards a New Settlement?' in Eric De Brabandere, Tarcisio Gazzini and Avidan Kent (eds.), Public Participation and Foreign Investment Law (Leiden: Brill, 2021) 36. David Schneiderman, 'Investing in Democracy: Political Process and International Investment Law' (2010) 60 *University of Toronto Law Journal* 909.

[38] Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113 *American Journal of International Law* 1.

[39] Van Harten, note 16; Leon E Trakman and Muthucumaraswamy Sornarajah, 'A Polemic: The Case For and Against Investment Liberalization' in Leon E Trakman and Nicola Ranieri (eds.), *Regionalism in International Investment Law* (Oxford: Oxford University Press, 2013) 499, 505; Barnali Choudhury, 'Investor Obligations for Human Rights' (2020) *ICSID Review* 1;Gus van Harten, 'Reforming the System of International Investment Dispute Settlement' in Chin L Lim (ed.), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (Cambridge: Cambridge University Press, 2016) 103, 110; Frank J Garcia et al, 'Reforming the International Investment Law Regime: Lessons from International Trade Law' (2015) 18:4 *Journal of International Economic Law* 861, 869.

[40] van Harten, note 16, 56.

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The asymmetry, which is at the heart of the majority of these claims, is symptomatic of the general absence of transnational corporate liability in international law.[41] No international instrument comprehensively regulates corporate behaviour with binding effect, and the current tendency is to leave corporate entities to self-regulation, often through voluntary, soft guidelines.[42] In addition, there appears to be a persistent forum problem: it is unclear where such liability, even if it were to exist, would be pursued. Steinitz calls this the 'problem of the missing forum'[43] – the evident reluctance of domestic courts to decide on matters relating to transnational corporate responsibility[44] as complemented by the absence of an international court or tribunal to address such concerns.[45] The issue of the missing forum is particularly relevant to the field of IIL, as a frequent argument against including investor obligations by those in favour of the *status quo* is that host states, through their sovereign powers, can pursue justice domestically.[46] Yet, such arguments often fail to account for the complexity of corporate structures and the reach of state prerogatives.[47] When host states deal with subsidiaries incorporated in their territories, their reach to parent companies outside their jurisdiction is limited.[48] Sanger convincingly demonstrates the challenges associated with the pursuit of establishing corporate responsibility for human rights abuses in a domestic court setting.[49] Furthermore, some scholars argue that domestic courts' reluctance to hear cases concerning international torts has an inherently political element. For example, US courts have been explicit about their apprehension of the spill-over effects of US courts exercising jurisdiction over foreign companies, as US companies would risk becoming subject to reciprocal judicial scrutiny.[50] In other words, as Grear notes, '[t]he emergent paradigm insists upon the promotion and protection of the collective human rights of global capital in ways that "justify" corporate well-being and dignity even when it entails gross and flagrant violation of human rights of actually existing human beings and communities.'[51]

The argument that host states, or local communities, do not need access to an international remedy is superficial at best. It ignores the limitations imposed by home and host state jurisdictions, the transnational corporate structures and practices about allocation, and the diffusion of corporate liability. The Bhopal gas disaster and the

[41] Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *The Yale Law Journal* 443, 542. See also Ludovica Chiussi, 'The Role of International Investment Law in the Business and Human Rights Legal Process' (2019) 21:1 *International Community Law Review* 35 (on how improving the legitimacy of IIL is being put forward by some scholars as an avenue towards 'giving teeth to corporate human rights accountability').

[42] Tara van Ho, 'The Creation of Elusive Investor Responsibility' (2019) 113 *AJIL Unbound* 10, 13–14.

[43] Maya Steinitz, *The Case for an International Court of Civil Justice* (Cambridge: Cambridge University Press, 2018) 83.

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

[45] Steinitz, note 43, 53.

[46] Gustavo Laborde, 'The Case for Host State Claims in Investment Arbitration' (2010) 1 *Journal of International Dispute Settlement* 97, 98; Mehmet Toral and Thomas Schultz, 'The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations' in Michael Waibel et al (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (The Hague: Wolters Kluwer, 2010) 577.

[47] Sanger, note 44, 4.

[48] Ibid.

[49] See, for example, *Chevron v Ecuador*, UNCITRAL, PCA Case No. 2009–23 and *Shell v Nigeria*, ICSID Case No. ARB/21/7 (examples of investors relying on ISDS to block domestic proceedings mandating that they pay human rights violations-related compensation to local communities).

[50] Ibid.

[51] Anna Grear, 'Embracing Vulnerability: Notes Towards Human Rights for a More-Than-Human World' in Daniel Bedford and Jonathan Herring (eds.), *Embracing Vulnerability: The Challenges and Implications for Law* (London: Routledge, 2020) 3881, 3933.

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subsequent hardships those most affected by its environmental and health-related consequences faced in pursuit of justice is one stark example.[52] Ironically, IIL itself is an attempt to prevent home states from bringing claims against host states on behalf of foreign investors, focusing instead on giving the latter the ability to pursue justice on their own.[53] Yet, this avenue for the independent pursuit of justice is only available to foreign investors, with local communities depending on the initiative of their states for representation.[54] The prospect of state protection, however, is an illusory opportunity as '[f]or most people, the best hope for protection, even if a faint one, lies with the institutions of their own country, the very institutions that ISDS is used to intimidate and constrain.'[55] Given the above-mentioned challenges to the ability of domestic courts to address these issues, even the 'best hope for protection' falls critically short of offering extensive and meaningful protection. Host state law is not a sufficient remedy to vindicate the rights of parties affected by a foreign investment, which is why this article reaches out to legal philosophy to scrutinize the *status quo* and examine the productive potential of international remedies.

III. Vulnerability Theory and International Investment Law

The Liberal Subject in Law versus the Vulnerable Subject in Law

Fineman is a legal theorist and political philosopher whose work has long 'grappled with the limitations of equality',[56] but maintained a practical footing in everyday reality. She formed her VT in response to what she deemed to be misleading libertarian notions of human beings as liberal, autonomous, rational and disembodied actors that desire to be free from state intervention.[57] These perceptions of the individual have a stronghold grip on 'Western thought' and still condition day-to-day law-making.[58] Yet, they are rarely questioned, even though they are far removed from the reality of what it means to be human and navigate the world.[59] To remedy the consequences of these misleading characterizations, Fineman sought to reconceptualize the subject around which the law is built – from what she calls the *liberal* subject to the *vulnerable* subject – one that is universally and inherently vulnerable, forever confined to an embodied and embedded existence.[60] The embodied existence brings with it the challenges of ageing and the possibility of being hurt or falling ill, leading to a life-long 'dependency' on the various social, legal and political institutions within which one is embedded.[61] This dependency, alongside the remaining consequences flowing from the inherent human vulnerability, can manifest at the individual and the collective level, with communities sharing in their common vulnerability.

[52] Jayanth K Krishnan, 'Bhopal in the Federal Courts: How Indian Victims Failed to Get Justice', *Maurer School of Law Digital Repository* (2020), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=3946&context=facpub (accessed 29 July 2022). In international investment arbitration, separate legal identities and corporate veil present a wealth of controversies, including abusive treaty shopping. See, for instance, *KT Asia Investment Group B.V. v Kazakhstan*, ICSID Case No. ARB/09/8.

[53] Ibrahim F I Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 *ICSID Review – Foreign Investment Law Journal* 1, 3.

[54] Perrone, note 15, 18.

[55] van Harten, note 16, 79.

[56] Martha A Fineman, 'Vulnerability and Inevitable Equality' (2017) 4 *Oslo Law Review* 133, 134; see also Fineman, note 19, 1.

[57] See generally John Locke, *Two Treatises of Government* (1689), Ian Shapiro (ed.) (Yale: Yale University Press, 2003).

[58] Ibid.

[59] Fineman, note 19, 1.

[60] Fineman, note 56, 149.

[61] Ibid.

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IIL presents a complex problem for Fineman's theory. Replacing the dominant presumption from liberal legal thought that human beings are rational, disembodied and independent subjects supplants a number of core premises about the individual and the state that are entrenched at every level of legal governance. Although we rarely pay second thought to these premises today, they remain pivotal to IIL and how it interacts with its subjects of interest. For example, the liberal paradigm prefers a 'restrained' state and values liberty above all, meaning that interference with the rights of legal persons such as an investor or an ordinary citizen needs to be limited to the absolute minimum.[62] They are entitled to freedom from state intervention. The role of the state and state-made institutions is to act as guarantors of this 'safe space' as 'in the liberal state it is essential to provide fertile ground for private business enterprise'.[63] Like other state and state-made institutions, IIL also maintains an atmosphere conducive to foreign investment and prosperity by protecting foreign investors from unwarranted interference – the most coveted good of the liberal paradigm. Legal persons have rights they should be able to enjoy free from unjustified intrusion. They are permitted to own property as '[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions'.[64] For the investor, this translates into a series of extensive guarantees and freedom from any (international) obligations. For the ordinary citizen, this translates into the state imposing a lopsided restriction upon itself not to take any positive action on behalf of its citizens – at least not without risking being liable to pay some form of compensation. The result is a system that 'very firmly institute[s] wealth-based inequality under international law.'[65]

Furthermore, the underlying presumption in this hegemonic paradigm is that the state is a source of danger to one's freedom – the liberal subject is at risk due to *state actions* – hence the mitigation of political risk through imposing restrictions on states' regulatory and administrative prerogatives. Paradoxically, the state must also *act* by legislating or signing international agreements to achieve this objective of non-intervention. Because the emphasis is on the possible restrictions of the liberal subject's freedom by the state, the dominant narrative exclusively privileges the host state–investor bilateral relationship, ignoring the interests of all other stakeholders that are *de facto* affected by it. In the vulnerability narrative, however, the emphasis is on the productive power of the state to take positive action that acknowledges ordinary citizens' embeddedness within, and dependence upon, surrounding structures as well as on the state's prerogative to protect them from most sources of harm – where those be *host states* (e.g., inadequate policies failing to protect local communities) or *foreign investors* (e.g., commercial operations harmful to the environment). Thus, rather than be restrained by virtue of being perceived as potentially harmful to the liberal subject's freedom, the state is mandated to be 'responsive' to the natural person's inherent vulnerability.

VT thus recalibrates the liberal paradigm around the natural person, guided by the premise that law should be built around and in service of the inherently vulnerable human being. Reflecting the reality of the human condition, this then becomes a descriptive exercise. The response it mandates, however, is a normative one: namely, that the state engages in the legal construction of institutions that are responsive to human vulnerability and pursues resilience-building policies (often through positive action).[66] In Fineman's

[62] Ranjan, note 7, 132 (explaining how first-generation bilateral international agreements (BITs) favoured a minimalist state).

[63] Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press, 2012) 46.

[64] European Convention of Human Rights (1950), Art 1, Protocol 1.

[65] Van Harten, note 16, 1.

[66] Fineman, note 19, 11.

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words, 'addressing human vulnerability calls into focus what we share as human beings, what we should expect of the laws and the underlying social structures, and relationships that organize society and affect the lives of everyone within society'.[67] This difference in emphasis chiefly affects how the law reads these subjects' interaction with rules, state policies, distributive institutions and systems. Set against the IIL context, it reconceptualizes the reading of the individual and of the community of individuals, alongside the state's responsibilities towards them. Indeed, it is human beings, and human beings alone, whose inherent vulnerability can mandate the responsive and resilience-enhancing state that the theory normatively prescribes. The IIL regime already accepts – albeit through an arbitrary and exclusionary lens – that the vulnerability of legal persons (i.e., foreign investors) can exist and needs to be mitigated. As noted above, this is somewhat ironically the basic premise upon which IIL is built. Assuming that IIL will continue to exist in some shape or form, states can, and most likely will, continue to perpetuate the presumption that investors are vulnerable. However, seen through the VT prism, this would need to happen within the normative constraints prescribed by the theory, whereby investor rights come after those of the individual or the community of individuals whose livelihoods are at risk due to corporate ambition or the inaction, indifference or negligence of the state in responding to such corporate encroachment. The responsive state within IIL would need to not only reimagine human beings and local communities as inherently vulnerable, but also do it in the manner that consciously postulates their well-being, rather than that of the foreign investor, as the primary focal point of any political and legislative action.

Vulnerability Theory as a Heuristic Tool

Fineman's VT is a potent tool for reconceptualising IIL because of its heuristic power in reimagining the world. In Grear's words, the concept of vulnerability 'is invoked and explored precisely in order to open out new possibilities, fresh questions and invigorating avenues of critique in the search for a more substantively just and equal social order'.[68] In addition, unlike politically assigned group vulnerability, which diminishes personal agency, Fineman's vulnerability thesis owns the power to guide the reimagination of existing power structures in a manner interwoven with an ethics of care. It is 'an alternative foundation for political and legal subjectivity'.[69] The theory is not an abstract tool. It is aware of 'the deepening inequalities marking the materiality of the uneven globalized world order', and as other scholars have noted, it carries great 'heuristic utility' by positioning the vulnerable individual as the anchor of a framework that 'pay [s] *explicit* and *sustained theoretical attention* to the precipitous degree of imbalance now characterizing twenty-first century globalization'.[70]

In IIL, there is the critical and pressing task of remedying the imbalance of rights and obligations prescribed by the system. The simple fact is that foreign investors, while enjoying a wealth of privileges extended to them by IIAs, have virtually no *enforceable* obligations to prevent or remedy any harm their actions may cause.[71] The vulnerability paradigm helps to identify the structural sources of IIL's shortcomings and to

[67] Martha A Fineman, 'Vulnerability and Social Justice' (2019) 53 *Valparaiso University Law Review* 341, 342.

[68] Martha A Fineman and Anna Grear, 'Introduction' in Martha A Fineman and Anna Grear (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (London: Routledge, 2013) 4.

[69] Ibid, 3.

[70] Ibid, 23.

[71] Under its Chapter III, 2016 Indian Model BIT prescribes a series of soft obligations. For example, Article 12 provides that investors 'shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility'. Similarly, pursuant to Article 10 of the Iran–Slovakia BIT of 2017, '[i]nvestors

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philosophically challenge the one-sided view that foreign investors are entitled to protections, but are free from obligations *vis-à-vis* the individuals and the communities affected by their undertakings. Looking at IIL through the notion of vulnerability simultaneously interrogates IIL's narrow focus on investor rights and exposes the necessity of attaching responsibilities to said rights in response to the perpetual human vulnerability that is firmly present within the socio-economic sphere of influence created by cross-border capital flows. By exposing the unsustainable consequence of framing rights as contingent upon capital, Fineman's theory can thus weave ethics of care into the fabric of IIL.

Furthermore, the institutional aspect of the vulnerability analysis enables one to capture the 'webs of economic and institutional relationships'[72] that contribute to the striking differences in the level of advantages and disadvantages accrued by different individuals within their lifetime. Our common vulnerability calls for revisiting the role of existing institutions and, where needed, for re-building them based on ethical considerations that highlight human interconnectedness and dependency on our surrounding environment. Applied to the IIL context, the vulnerability thesis allows one to theorize IIL as an asset-conferring regime, which promotes an inequitable vision of not only how economic relationships should be set up, but also how advantages and correlating disadvantages should be distributed. It also exposes the state's complicit role in creating and maintaining the *status quo*, which clashes with the theory's central conceptualization of the state as 'responsive'. After all, it is not only about *whether* a state is responsive, but also about *how* and *to what* it is responsive.

Resilience and the Responsive State

When seeking to address the political repercussions of reframing the *liberal* subject in law as the *vulnerable* subject in law, Fineman poses the following question: '[W]hat should be the political and legal implications of the fact that we are born, live, and die within a fragile materiality that renders all of us constantly susceptible to destructive external forces and internal disintegration?'.[73] The ideas of 'resilience' and the 'responsive state' emerge in her search for an answer and seem curiously relevant to the IIL context, where politics and law converge to regulate investment ventures that, more often than not, have a significant impact on the people and communities around them.[74]

What Fineman calls 'resilience' is one of the consequences of human beings' inherent vulnerability. While our vulnerability is inherent, our resilience is 'the product' of social, legal, economic and political relationships and institutions.[75] These institutional structures in which our lives are embedded induce variance in our resilience levels. In turn, as all human beings are 'embodied and embedded' in the surrounding social and institutional arrangements, those can be re-structured to acknowledge human vulnerability and actively enhance our resilience.[76] The idea of 'resilience' is complementary to, and necessary for, addressing the consequences of human vulnerability. It is also the justification for the 'responsive state', which needs to be motivated by the pursuit of enhancing human

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and investments *should* apply national, and internationally accepted, standards of corporate governance' (emphasis added).

[72] Martha A Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 1, 31.

[73] Fineman, note 19, 12.

[74] It is also these elements of her theory that add to its concreteness and comprehensiveness that make it preferable to other alternative theories to the classical liberal paradigm.

[75] Fineman, note 67, 360–363.

[76] Fineman, note 19, 13.

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resilience.[77] The concept of 'resilience' allows us to scrutinize the effect that the architecture of IIL has on the former's fulfilment, be it positive or negative. Significantly, resilience-pursuing initiatives need not be limited to the individual level, as matters of vulnerability are also relevant at the systemic level, and measures of collective resilience, especially against global phenomena such as the climate crisis, are of monumental importance.

As briefly mentioned above, an important focal point of Fineman's theory is that the state should be 'more responsive to, and responsible for, vulnerability'.[78] The 'state' is an integral component of her theory. She foresees a very active, 'responsive' role for it, in stark contrast to the 'restrained' position it currently occupies in our everyday lives as a corollary to the liberal subject, whose autonomy requires the state to refrain from unnecessary intervention in one's life. As a heuristic device, the 'responsive' state paradigm enables us to see that the 'restrained' state idea resonates with the (investor) rights-based configuration of IIL and the non-interventionist character of IIA-prescribed state obligations. For example, states should refrain from expropriation without compensation, not frustrate investors' legitimate expectations, and avoid arbitrary or unjust interruptions to investors' operational activities. These obligations aim at fostering and ensuring the autonomy of the foreign investor. One could in addition use the 'resilience' idea as a means to argue that the state *actively builds up investor resilience* by responding to the perceived risks to foreign investors' operations. Yet, no similar resilience-building is undertaken with regard to local communities or other stakeholders that might be affected by an investor's undertakings; rather, 'equivalent safeguards [are denied] to those who lack the wealth required to qualify as foreign investors'.[79] The unfortunate consequence is an area of law which is 'fortifying inequality'.[80]

For Fineman, 'the state is theorized as the legitimate governing entity and is tasked with a responsibility to establish and monitor social institutions and relationships that facilitate the acquisition of individual social resilience'.[81] This mandates a more informed institutional focus, where consideration for the individual subject and their vulnerability is complemented by an understanding of their social context.[82] In other words, the theory of vulnerability mandates that an individual's direct and indirect encounters with political and legal institutions involve context sensitivity on the latter's part. In her analysis, Fineman focuses on those institutions created and maintained by the state and argues that they are 'interlocking and overlapping, creating the possibility of layered opportunities and support for individuals, but also containing gaps and potential pitfalls'.[83] In those opportunities for support, the state can provide individuals with 'assets', broadly defined as advantages, coping mechanisms, and resources that 'cushion us when we are facing misfortune, disaster, and violence'.[84] The engagement with the idea of 'assets' permits one to reconceptualize

[77] Ibid, 1.

[78] Ibid, 13.

[79] van Harten, note 16, 4.

[80] Ibid, 3–13; Ivar Alvik, 'The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy' (2020) 31 *European Journal of International Law* 289, 290 (challenging the position that foreign investor 'privilege' is unjustified); Jürgen Kurtz, 'On Foreign Investor 'Privilege' and the Limits of the Law: A Reply to Ivar Alvik' (2020) 31 *European Journal of International Law* 313; Anıl Yılmaz Vastardis, 'Justice Bubbles for the Privileged: A Critique of the Investor-State Dispute Settlement Proposals for the EU's Investment Agreements' (2018) 6:2 *London Review of International Law* 279; Gus van Harten, 'Private Authority and Transnational Governance: The Contours of the International System of Investor Protection' (2004) 12:4 *Review of International Political Economy* 600.

[81] Fineman, note 56, 134.

[82] Ibid.

[83] Fineman, note 19, 13.

[84] Ibid.

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various institutions as 'asset-conferring'. Here, the views of Kirby become relevant. In his words, the fact that the state contributes to the legal existence of asset-conferring institutions through state mechanisms 'places such institutions within the domain of state responsibility'.[85] The assertion of 'state responsibility' in this context differs from the one prevalent in international law, whereby states are held responsible for breaches of their international obligations.[86] Instead, Kirby's and Fineman's references to state responsibility concern its mandate to account for vulnerability in its legal and political regulation of human relationships and actions and to ensure that other, non-state, asset-conferring institutions also do so.[87] As these institutions can 'distribute significant societal goods', the state needs not only to regulate them, but also to remain 'vigilant in ensuring that the distribution of such assets is equitable and fair'.[88] With Fineman's conceptualization of vulnerability, Kirby's observations provide one with 'a vocabulary for arguing that the state should be held accountable for ensuring equality in response to individual and institutional vulnerability'.[89] In other words, the state has an inherent responsibility to undertake positive action to protect individuals from harm, whether it originates from the state or from state-enabled regimes or institutions.

One can unpack the features of IIL as an 'asset-conferring' regime. It is a 'regime' to the extent that it boasts a set of purportedly coherent associated norms and practices. It is 'asset-conferring' to the extent that it is connected to investment capital, its protection, and the social goods that are usually the consequence of foreign investments. It is also a legal institution that is deeply connected to, and dependent upon, the state for its ongoing existence. In the words of Pistor, 'capital's global mobility is a function of a legal support structure that is ultimately backed by states' that 'regularly enforce foreign law in their courts and lend their coercive powers to executing the rulings of foreign courts and arbitration tribunals'.[90] While the bulk of the rights and entitlements of foreign investors originate from national laws through state concessions, investment contracts, operation licenses, and other domestic permits, international law grants foreign investors an additional legal layer of rights and entitlements through IIL. Enabling us to view IIL as an asset-conferring institution under the protection of the state, Fineman's theory also helps us scrutinize how vigilant a particular state is in regulating its practices and ensuring that they live up to the principles of equity and fairness. We are given the theoretical foundations to hold the state accountable for the shape and form of IIL and its effects on human vulnerability. In practical terms, this translates into interrogating the extent to which a state engages in the process of drafting IIAs in a way that holds non-state actors liable for the consequences of their actions through provisions that include investor obligations. Reframing IIL through VT permits questioning the robustness of IIL in ensuring the resilience of the parties affected by state actions or omissions. It also offers a novel theoretical foundation for understanding and reimagining the state's role therein.

Fineman's work on the notions of responsiveness and resilience-building in the context of the responsive state further provides a means of interrogating the practices of increasingly relevant state-like entities, such as the European Union. Even though Fineman's 'state' is responsible for enhancing human resilience, the 'state' within her

[85] Peadar Kirby, *Vulnerability and Violence: The Impact of Globalisation* (London: Pluto Press, 2006) 55.

[86] For a discussion of state responsibility in international law, see René Provost, *State Responsibility in International Law* (New York: Ashgate Publishing, 2002).

[87] Fineman, note 19, 13–15.

[88] Ibid, 15.

[89] Ibid.

[90] Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton: Princeton University Press, 2019) 18.

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theory expands beyond its traditional meaning. In other words, the 'state' she refers to has a broader definition than the *nation-state*: 'an organized and official set of linked institutions that together hold coercive power, including the ability to make and enforce mandatory legal rules', which are 'legitimated by claims to public authority'.[91] Therefore, the state or any other institutional, regional arrangement which can make and enforce laws could be scrutinized for its ability to ensure and improve human resilience and be 'responsive' to human vulnerability. Fineman's expansive notion of 'state' is essential within the IIL context in light of the consolidation of a Union-wide foreign investment policy.[92]

Fineman's vulnerability theory enables reframing the practices of IIL – and the state's role in upholding them – in a way that highlights the mechanisms that perpetuate asymmetries of resilience within the regime. A vulnerability-informed interrogation of IIL refines one's radar for detecting the institutional elements that condition the quality of individuals' existence by enabling or impairing the build-up of their resilience. It not only offers a solid philosophical basis for interrogating IIL's neglectful stance toward human rights (which can be conceptualized as a source of resilience),[93] but also establishes a compelling foundational argument for justifying the demand for immediate change.

IV. Reconceptualizing IIL through Vulnerability Theory

VT can be a valuable heuristic device in scrutinising IIL treaty *design* and *interpretation.* When used in this way, it can help one reflect on a state's commitment to be responsive to an individual and a community's vulnerability through context-sensitive provisions. As noted above, IIAs are excellent examples of states' ability to address the presumed vulnerabilities of foreign investors by incorporating provisions to pre-empt, counter and at times alleviate potential damages to investors' undertakings. The question then is how, when viewed through the VT prism, the state's responsibility to be responsive to an individual's or a community's vulnerability re-shapes what is expected of it in the context of its IIAs. Some newer generation IIAs already include CSR clauses, environment conservation and anti-corruption provisions, as well as transparency and domestic law compliance requirements. These provisions are envisaged as policy responses to the existing criticism levelled against the IIL regime. Observing them through the VT prism would change this focus. Rather than being seen as policies infringing on investors' freedom, they would instead be viewed as tools working towards bolstering individuals' resilience. The same would be true of strengthening states' ability to bring counterclaims on their own or on victims' behalf under a *parens patriae* doctrine.[94] Such an approach would equally find sound justification under VT. Thus, examining IIA features though VT helps reconceptualize them as instruments through which the signatory host state either hinders or bolsters rights-holders' resilience.

[91] Fineman, note 19, 6.

[92] Wenhua Shan and Sheng Zhang, 'The Treaty of Lisbon: Half Way Toward a Common Investment Policy' (2010) 21 *European Journal of International Law* 1049, 1050.

[93] Aysel Küçüksu, 'Fineman in Luxembourg: Empirical Lessons in Asylum Seeker Vulnerability from the CJEU' (2022) *Netherlands Quarterly of Human Rights* 1, 6–7; Fiona De Londras, 'Response: On Some Problems with Rights' in Daniel Bedford and Jonathan Herring (eds.), *Embracing Vulnerability: The Challenge and Implications for Law* (London: Routledge, 2020) 175.

[94] Tomoko Ishikawa, 'Counterclaims in Investment Arbitration: Is the Host State the Right Claimant?' in Ho and Sattorova, note 2, 200. See also James T Gathii and Ibironke Odumosu-Ayanu, 'The Turn to Contractual Responsibility in the Global Extractive Industry' (2016) 1 *Business and Human Rights Journal* 69 (discussing how viewing governments as trustees of local resources can help ensure investments surrounding such resources benefit their public).

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Below, we explore some examples of avenues towards improving investor accountability and join the group of scholarship that interrogates IIL's ongoing reluctance towards giving a voice to currently 'invisible' rights-holders. The objective of this article is not to conduct a comprehensive analysis of what specific investor obligations could look like if devised from a VT perspective – rather, it is to lay down the theoretical groundwork that is necessary to kickstart this process of reimagination. Therefore, we do not claim to offer an exhaustive list of the possible manifestations of VT in treaty design – as this would be a task that goes way beyond the scope of this article. However, we believe that the following examples aptly illustrate how VT can disrupt the dominant paradigms defining the IIL regime and alter the way its chief instruments, in this case IIAs, are understood and built.

VT and the Shortcomings of the Notion of 'Fairness' in IIAs

Fineman's theory can help highlight the variety of ways in which IIL operates with an impoverished notion of what fairness, epitomized by the FET principle, means. We will not scrutinize the different types of violations that are often examined under FET, such as denial of justice, arbitrariness, or frustration of legitimate expectations,[95] but rather focus on the substance of the concept of fairness and identify its implications for all stakeholders.

In light of the guidance offered by VT, we understand fairness to have a strong procedural element: for an act or outcome to be considered fair, it needs to *procedurally* qualify as such for all affected parties. Thus, our argument is not concerned with the outcome of an altercation, but with the process of its adjudication/resolution. If a process is agreeable, beneficial or desirable for one actor, but unacceptable, undesirable or harmful to another, it is, by definition, *favourable* to the former, but in no way *fair* to the other. As IIAs currently stand, the principle of FET implies that said process is fair, when it would be much more accurately described as 'favourable'.[96] The only point of reference for an IIA is the foreign investor, who receives favourable treatment by virtue of one's investment in a particular host state. The individuals and communities, who are affected by the investment projects remain unacknowledged in any significant way. Their dependency on the state to be responsive to their vulnerability and protect their rights is left unrecognized. Beyond leading to the unconscionable monetization of human rights by making them exclusive contingent on capital, the IIL regime also thereby entrenches unfairness. The stakeholders who might eventually be adversely affected by an investment have no international avenue to address and remedy their predicament, even though they are embedded in, and thus affected by, the material, social and political institutions around them.[97] The IIL infrastructure disregards human vulnerability and works in ways that exacerbates its more dangerous consequences. This is because the state enters, and after that honours, agreements with investors which *de facto* permit the latter's undertakings to affect local communities' socio-legal materiality, livelihood, or existence in harmful ways with impunity. A system built upon such a paradigm is far from a *fair and equitable* system.

A vulnerability-driven interrogation of the reigning interpretation of the FET principle highlights its misleading nature and points towards what an equitable, true-to-the-meaning

[95] Kenneth Vandevelde, 'A Unified Theory of Fair and Equitable Treatment' (2010) 43 *International Law and Politics* 43, 53.

[96] This is perhaps the most evident in the analysis of investors' legitimate expectations. Already a controversial subset of expropriation and fair and equitable treatment obligations particularly on what expectations are 'legitimate' (therefore protected), some Tribunals asserted that if foreign investors' legitimate expectations are frustrated, this can be a violation of FET obligation. See *El Paso Energy International Company v Argentina*, ICSID Case No. ARB/03/15, Award (31 October 2011), para 227.

[97] Perrone, notes 13 and 15.

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application of it should look like – one that accounts for and gives equal weight to the interests of the investor and all relevant stakeholders (i.e., local communities and affected individuals) alike. Once these additional interests are part of the equation, it might be that the procedurally fair quality of the application of the FET principle would also result in substantively equitable outcomes for local communities affected by the operations of a foreign investor. Any other interpretation would mean turning a blind eye to local communities' dependency on the state to be resilience-enhancing and responsive to their vulnerability by protecting their rights. Exposing the one-dimensionality of the idea of fairness in IIAs, vulnerability theory does away with IIL's foundational premise that favourable treatment towards a foreign investor equals fairness for all. This holistic interpretation of the FET principle also emphasizes the indispensable role of the state as the sovereign, the resilience-builder, and the ultimate *balancer* of rights and obligations within its territory – where a multitude of actors have different and often clashing needs and interests. The decades-long discussions on how the interests of foreign investors and the public could be balanced and how states' so-called right to regulate could be retained attest to the imminency and centrality of VT's contribution to this debate.

As a corollary to the FET principle, the Full Protection and Security (FPS) standard obliges states to not directly harm investors or investments and to take actions to protect them against harm from other private parties. It is thus consequential for the role of the state in protecting foreign investors from (physical) damage.[98] Embedded in this principle is a flawed asymmetry that not only one-sidedly favours foreign investors, but also actively supresses the public and local communities from voicing any discontent towards the operations of foreign investors. Whilst bolstering foreign investor resilience, this factor curbs, even eradicates, the state's ability to pursue resilience-building processes for the public. In her analysis of the standard, Tzouvala identifies three layers to it: the first (and perhaps the most obvious) layer is that FPS entitles foreign investors to the protection of their investments.[99] This is what the IIAs often explicitly note. The second layer is that any threats, including those instigated by the public in protest against the potentially harmful activities of the foreign investor, need to be contained through 'repressive state apparatuses'.[100] The third layer, which can also be seen as a direct consequence of the second, is that FPS effectively bars individuals' 'right to use mass protests and even violence when ordinary political process and litigation are unable to effectively protect their interests'.[101]

Weighing in on whether the right to violence is a pre-requisite for resilience-building is a matter beyond the scope of this article. However, from the way FPS is designed, it is clear that it puts a pronounced responsibility on the state to effectively curb the public's right to protest against foreign investors' undertakings even when those are deemed harmful or fatal to the public's livelihood. Seen through the prism of VT, this limitation on the state's possible manoeuvres is consequential for its ability to be responsive and resilience-safeguarding when it comes to its citizens' vulnerability. This is due to the unequitable idea of fairness that currently underlies the FPS principle. From a VT perspective, remedying this requires acknowledging the FPS principle's multi-directionality in a way that does not disregard the public's right to protection and security when it comes to the operations of a foreign investor. As a natural extension of this multi-directionality, the state remains

[98] Although some arbitral tribunals have indicated that the standard also covers the protection of legal rights through judicial mechanisms. See *Lauder v Czech Republic*, UNCITRAL, Final Award (3 September 2001), para 214.

[99] Ntina Tzouvala, 'Full Protection and Security (for Racial Capitalism)' (2022) 25:1 *Journal of International Economic Law* 224, 234–235.

[100] Ibid.

[101] Ibid.

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responsible in donning the public with the necessary tools, processes and rights to protest potential harm, take action against it, and seek remedies where necessary. Taking this a step further, one could also envisage a reverse reiteration of the 'full protection and security' standard put in place to guard against a foreign investor's potentially harmful actions *vis-à-vis* the public.

Context-Sensitivity and the Equitable Potential of Prior Consultation

The *raison d'etre* of IIL neither accommodates conflicting or diverse interests, nor responds to changing circumstances. When used as a heuristic device, VT locates the sources of IIL's inequity in its inability to reflect the multi-faceted relationship between the public, the state, and foreign capital. As IIL currently stands, there is virtually no explicit recognition of local communities as 'central protagonists of foreign investment projects',[102] let alone a prescribed consultation mechanism that gives them the voice that they deserve in this process. This leaves the 'voices of the weakest unheard' in a system where their vulnerability makes them highly susceptible to the risks inherent to investment undertakings. Their virtually non-existent bargaining power diminishes their ability to prepare for and pre-empt such risks.[103]

VT allows seeing procedural measures that enhance local communities' participation in foreign investment decisions such as including drafting relevant international treaties and the admission of foreign investment projects in their lands[104] as essential steps towards enhancing these communities' resilience.[105] The ideas of humans as 'embodied and embedded' in their social and institutional surroundings also highlight the value of extending prior consultation to other third parties, such as civil society organizations, capable of offering their expertise on points pertaining to the agreements in question. The vulnerability prism exposes the deep connection between IIL, investments, local communities and relevant third parties, highlighting the context-blindness of the current *status quo*, which makes rights contingent on capital.[106] The theory allows for viewing such procedural measures as responsive to the vulnerability of local communities and de-coupling rights from capital within the context of IIL.

Prior consultation with local communities is ultimately a complex and multi-pronged issue. Whilst the first prong relates to consultation *vis-à-vis* the investment contracts themselves, the second prong concerns the negotiations of IIAs. As Szoke-Burke and Cordes argue, in the context of investment contracts, human rights principles 'set out various entitlements to information and participation for communities and community members who may potentially be affected' by the operations of foreign

[102] Perrone, note 15, 16.

[103] Perrone, note 13, 404–405.

[104] This was a key issue in *Bear Creek Mining Corporation v Peru*, ICSID Case No. ARB/14/21. The factual background of the dispute makes it evident that social approval of such large-scale industrial operations can spark social unrest, if pressed on against the local communities' will.

[105] Norms mandating prior consultations with local communities already exist in international law. See ECOSOC, 'An Overview of the Principle of Free, Prior and Informed Consent and Indigenous People in International and Domestic Law and Practices', Document No. PFII/2004/WS.2/8 (2005). For the development of good practices in mining industry, see Angus MacInnes, Marcus Colchester and Andrew Whitmore, 'Free, Prior and Informed Consent: How to Rectify the Devastating Consequences of Harmful Mining for Indigenous Peoples' (2017) 15 *Perspectives in Ecology and Conservation* 152. Furthermore, local communities are permitted to submit *amicus curiae* briefs. See Lorenzo Cotula and Nicolás M Perrone, 'Reforming Investor-State Dispute Settlement: What About Third Party Rights?' (IIED 2019), https://pubs.iied.org/pdfs/17638IIED.pdf (accessed 29 July 2022).

[106] For a similar point, see van Harten, note 16.

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investors.[107] They also identify a catalogue of other rights which require governments 'to meaningfully consult with such communities' by offering early access to all relevant information regarding the project in a way that is easy to understand, providing opportunity to deliberate and communicate community priorities, as well as enabling participation in and influence of the decisions relating to the project where such decisions would have an effect on community rights, lands and resources.[108]

Therefore, we argue that the need to consult local communities on relevant decisions pertaining to foreign investments could even be extended to the negotiations and re-negotiations of IIAs. The catalogue of rights identified above can easily be transposed to this context. Local communities arguably have an integral interest in being informed about the rights and entitlements extended to foreign investors *vis-à-vis* the latter's investments. Thus, it is crucial that the communities are adequately informed about the role, importance and consequences of the IIAs in an accessible and intelligible manner. They should also be given the opportunities to internally deliberate and communicate their priorities *vis-à-vis* these agreements, so that treaty negotiators can take them into account in shaping the extent and scope of the protections provided to foreign investors. Ideally, these consultations would prompt treaty makers to not only reshape foreign investor protections, but to also include further guarantees that local communities' livelihood and environment will be protected in a direct manner and not only as ancillary considerations that are intrinsically linked to foreign investor rights. In a system where these concerns are not addressed in a transparent manner, decision-makers run the risk of perpetuating a lopsided and opaque regime.

The Responsive State in the Framework of Investor Obligations

While some recent IIAs seek to address the shortcomings mentioned above, the extent of the ongoing transformation is limited. IIAs' historical embeddedness in a climate committed to foreign investor protection has meant that the majority of modifications, clarifications and omissions in newer generation IIAs seek to limit or clarify the extent of states' obligations and responsibilities towards the foreign investor without prescribing obligations for investors *vis-à-vis* host states or local communities.[109] From a VT perspective, this *status quo* is completely blind to humans' inherent vulnerability and the state's mandate to be responsive to it.

As per most IIAs, states can only invoke an investor's contributory fault (thereby reducing the compensation or damages they ultimately pay) or break the causal link between their actions and the consequences of an alleged breach, if they demonstrate that the purported harm was not of their doing. However, they have no real possibility of pursuing an active claim or requesting an adjudicatory body to declare the responsibility of a foreign investor on that matter. Yet, there is no reason why such disputes cannot be deemed as 'arising directly out of an investment' if the applicable IIA is to prescribe obligations to an investor – the breach of an investor obligation could prompt a dispute which arises out of an

[107] Sam Szoke-Burke and Kaitlin Cordes, 'Mechanisms for Consultation and Free, Prior and Informed Consent in the Negotiation of Investment Contracts' (2020) 41 *Northwestern Journal of International Law and Business* 49, 57–58.

[108] Ibid.

[109] Neve Adrienne Campbell, 'House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law' (2013) 30 *Journal of International Arbitration* 361; *Vattenfall AB and others v Germany*, ICSID Case No. ARB/12/12; *Philip Morris Asia Limited v Australia*, Final Award, 2015, PCA Case No. 2012-12; *Philip Morris Brands Sarl, Philip Morris Products SA and Abal Hermanos SA v Uruguay*, Final Award (8 July 2016), ICSID Case No. ARB/10/7.

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investment.[110] For example, Article 8 of the Bosnia-Herzegovina–Albania BIT of 2009 notes that '[a]ny dispute which may arise between one Contracting Party and an investor of the other Contracting Party in connection with an investment on the territory of that other Contracting Party' is covered by its ISDS provisions – a formulation commonly found in IIAs.[111] If the applicable IIA includes investor obligations, such a provision could, in principle, permit claims against the foreign investor by the host state. Framing such proposals as vulnerability-driven and resilience-enhancing, VT would give them a novel philosophical foundation. Investor obligations in IIL would thus epitomize states acknowledging individuals' dependency on them for safeguarding their rights and interests and for being responsive to their human vulnerability. The theory's commitment to context-sensitivity would also interrogate such obligations' acknowledgment of investments' connectedness to resources that are essential to the livelihoods of local communities and their regard for the environment in which they are embedded. Such obligations could vary depending on the resilience of the individual applicant(s) or communities involved.[112] While their effectiveness will greatly depend on addressing broader imbalances and injustices entrenched in the system as addressed in this article, one avenue could be to impose obligations on the investor to carry out environmental impact assessments as well as human rights due diligence before undertaking their work.[113] Such obligations should include, in particular, identifying expected (adverse) outcomes and sharing best practices to mitigate these effects.

Case law indicates that arbitral tribunals are aware of the possibility of devising investor obligations in international law exists – in particular, investors' obligation to respect human rights.[114] Still, tribunals are either unable to tackle the issue head-on due to the lack of relevant IIA provisions or unwilling to do so. A well-known example is the *Urbaser v Argentina* award.[115] When Argentina argued that the claimant had failed to provide adequate water and sewage services in violation of the human right to water, the claimant investor alleged that such obligations applied exclusively to states and not private parties.[116] The tribunal disagreed, albeit reluctantly, noting that '[i]f the BIT therefore is not based on a corporation's incapacity of holding rights under international law, *it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations*'.[117] It further observed that 'it can no longer be admitted that

[110] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, art 25.

[111] Agreement between Bosnia and Herzegovina and the Council of Ministers of the Republic of Albania on the Reciprocal Promotion and Protection of Investments (2009), art 10.

[112] For some examples of what investor obligations could look like, see Report of the Expert Meeting, 'Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements' (11–12 January 2018), https://www.iisd.org/system/files/publications/report-expert-meeting-versoix-switzerland-january-2018.pdf (accessed 8 August 2023). The debates, as evident from the Report, often entertain the idea of pursuing justice through domestic courts. The document offers examples of concrete items that can improve the rights of local communities (and incorporate concrete investor obligations) if included in IIAs.

[113] See, for example, Article 37(4) of the United Nations Economic and Social Council (ECOSOC) and African Union, 'Draft Pan-African Investment Code' (26 March 2016) E/ECA/COE/35/18, repository.uneca.org/bitstream/handle/10855/23009/b11560526.pdf?sequence=1&isAllowed=y (accessed 8 August 2023); Article 14 of the Nigeria–Morocco BIT; Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).

[114] See Ranjan, note 7, 142–147 (discussing some ISDS decisions in which investor obligations were interpreted into the signed BITs).

[115] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26.

[116] Ibid.

[117] Ibid, 1194 (emphasis added).

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companies operating internationally are immune from becoming subjects of international law',[118] but promptly drew attention to the extent of any currently feasible extension of responsibility to corporations: 'even though several initiatives undertaken on the international scene are seriously targeting corporations' human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law'.[119] It is difficult to argue against this observation, at least on legal grounds, in the absence of any recognition of investor obligations akin to the ones discussed by Argentina in the IIAs themselves. Indeed, similar claims have arisen in several other arbitral disputes, but were ultimately rejected primarily due to treaty limitations.[120] For arbitral tribunals to be able to entertain those claims concretely, IIAs would have to include more explicit and more robust investor obligations than the existing ones – an argument repeatedly put forth in academia.[121]

What these investor obligations would *be* is a distinct matter. Still, let us entertain an (admittedly) provocative idea: that foreign investors should be obliged to act fairly and equitably. In line with the remarks above concerning the FET principle and its re-imagined reading, a contextually adjusted fair treatment obligation (perhaps renamed 'fair and equitable *conduct*' (FEC)) could be prescribed to foreign investors, mirroring states' FET obligation. As the FET obligation serves as a context-dependent and over-arching principle, FEC could similarly guide investor behaviour. From a VT perspective, host states' ability to claim that foreign investors must act in accordance with expectations created through explicit and direct promises made at the time of an investment would serve their responsibility to be 'responsive' to local communities' vulnerability. Such expectations could relate to CSR, human rights, compliance with internationally recognized labour standards, environmental impact pledges, societal undertakings such as schools or other civil contributions to society. Even when couched in pre-ambulatory, best endeavour or soft law terms, which admittedly would be the weakest form of their incorporation to the system, it is important to remember that such language can contribute to changing the background that defines how ISDS tribunals interpret IIAs. After all, investor obligations might not be an element of current IIAs, but as Kern rightly highlights, the idea of coupling investor responsibilities to investor rights was present at the inception of modern era-IIL.[122] Thus, it is relevant to meditate on how foreign investor accountability could be incorporated into future IIAs. Not only that, but such incorporation could slowly add towards reframing the object and purpose of IIAs to go beyond protecting foreign investments and in the direction of adding investor conduct as 'a significant aspect of the interpretative mix' ISDS tribunals apply.[123] Keeping this valuable effect in mind – whilst acknowledging that more systemic adjustments remain needed – it is important to start incorporating investor obligations into IIAs and doing so in the most concrete and specific manner possible. This

[118] Ibid, 1195.

[119] Ibid.

[120] *Hesham T Al Warraq v Republic of Indonesia*, UNCITRAL, Award (15 December 2014); *David R Aven and Others v Republic of Costa Rica*, Award (18 September 2018), ICSID Case No. UNCT/15/3. In other cases, respondents brought counterclaims for domestic law violations, e.g., *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, Award (12 July 2019), ICSID Case No. ARB/12/1.

[121] For a recent work on different possibilities for incorporating investor accountability in IIL, see Martin Jarrett, Sergio Puig and Steven Ratner, 'Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals' (2021) 14:2 *Journal of International Dispute Settlement* 259.

[122] Jackson Shaw Kern, 'Investor Responsibility as Familiar Frontier' (2019) 113 *AJIL Unbound* (2019) 28.

[123] Ranjan, note 7, 143. See also Güneş Ünüvar, 'The "Object and Purpose" and Incrementalism of Investment Treaties: Can International Investment Law Reinvent its Identity?' in Michelle Egan et al (eds.), *Contestation and Polarization in Global Governance – European Responses* (Cheltenham: Edward Elgar, 2023) 378.

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would work to pre-empt the enforceability deficit that we are currently seeing from continuing to plague the system in the future.

V. Concluding Remarks

The mounting critique levelled against IIL[124] supports this article's foundational claim that the time is ripe for reimagining IIL and the role of the state in it. With a holistic set of concepts that complement each other, Fineman's theory offers a solid philosophical framework for this purpose. Recourse to VT's concepts of 'vulnerability', 'resilience' and the 'responsive state' as heuristic devices for examining IIL's architecture exposes the shortcomings of treaty-making and adjudicatory methods based solely on the principle of protecting foreign investors. Suppose one accepts the inherent vulnerability of all humans, contingent upon their 'embedded and embodied' nature, and further highlighted by their permanent susceptibility to harm due to exogenous and/or endogenous factors. In that case, one could read the regime's ongoing legitimacy struggle in a new light and gain a novel understanding of why the *status quo* fails to capture the reality of investment disputes, let alone address their inequitable consequences. Fineman's theory is thus a compelling philosophical foundation for reconceptualizing IIL in a way that takes heed of the quintessential human condition – our universal vulnerability.

Competing interest. The authors declare none.

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[124] Sergio Puig, 'International Indigenous Economic Law' (2019) 52 *UC Davis Law Review* 1243, 1244.

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