Introduction: today’s ESG standards
The foundation of the current ESG framework can be traced back to the Earth Summit held in Rio de Janeiro in 1992, where a coalition formed by political leaders, scientists, and non-governmental organisations sought to develop a global action plan focusing on the impact of human socio-economic activities on the environment.

The principles laid down by the Earth Summit have been pivotal in shaping the current ESG standards. The ESG framework now comprises a robust system of domestic and international laws, regulations, and soft-law instruments that are fundamental to sustainable and ethical business conduct.

Whether driven by legal obligations, reputational concerns, and/or financial benefits, the corporate sector has actively embraced the shift towards sustainability, with companies increasingly integrating ESG criteria into their business models and investment strategies. Their additional concerns include combating climate change (mitigation and adaptation), the safeguarding of the environment, human and labour rights (including within companies’ supply chains), and the avoidance of harmful business practices.

The ESG ecosystem has profound implications for international investments in developing and low-income countries, especially in Africa. With abundant natural resources, a need for sustainable development, susceptibility to climate change, and manifold social challenges, this unique and pressing set of circumstances needs to be tackled.

ESG and investment treaties in Africa: a new substantive standard?
After ratification of the first sustainable investment facilitation agreement, between the EU and Angola, Carla Gonçalves Borges, Mariana França Gouveia, and Assunção Cristas of Vieira de Almeida analyse ESG considerations in African states’ investment treaties.
ESG Angola

by local governments, with the support of
developed countries and international
investors.

The most recent example of this
cooperation is the European Parliament’s
consent to the ratification of the first
sustainable investment facilitation
agreement (SIFA), between the EU and
Angola, which is expected to enter into
effect shortly. Angola ranks as the EU’s
sixth-largest African investment destination,
having attracted 7% of the EU’s foreign
direct investment in the continent with a
total of €14.1 billion in 2021.

Within this context, a broader trend can
be seen in international policy and treaty
making corresponding to the increased
adoption by African states of investment
treaties with ESG-aligned language (see
section 2 below), which could represent a
new substantive set of rules governing the
rights and obligations of foreign investors
(see section 3).

ESG clauses in international
investment agreements

Bilateral investment treaties (BITs) and
investment chapters included in plurilateral,
regional, inter-regional, or, more broadly,
multilateral preferential trade
agreements are generally accepted as the
most important instruments for the
international protection of foreign
investments. Dating back to 1959, when
the first BIT was concluded between
Germany and Pakistan before its entry into
force in 1962, BITs have been regulating the
treatment of foreign investment,
providing a series of guarantees and
protections for investors of one contracting
state on the territory of the other
contracting state.

In the 1960s, the highest number of
BITs worldwide were signed by African
countries, predominantly partnering with
developed nations, according to the United
Nations Conference on Trade and
Development’s database on BITs. This
trend has been consistently upheld, with a
steady stream of investment treaties signed
over the years, reflecting Africa’s enduring
commitment to fostering a conducive
atmosphere for foreign investment.

Fast forward over half a century, and the
landscape of international investment
agreements (IIAs) has evolved significantly,
with more than 2,800 treaties signed
globally as at 2022.

Reflecting contemporary concerns, many
investment treaties signed by African states
now include ESG-related clauses. These
provisions vary widely, from preamble
language that frames the importance of
ESG factors to jurisdictional clauses that
delineate the treaty’s applicability to ESG
issues. They also encompass substantive
obligations that clearly define the ESG
duties of the contracting parties, and
institutional arrangements empowering
designated joint committees to consider and
interpret ESG standards.

In October 2023, the ESG
Subcommittee of the International Bar
Association’s Arbitration Committee
published a study on “ESG obligations in
investment treaties” in its Report on use of
ESG contractual obligations and related
disputes, which examined ESG clauses
within investment treaties. Data from the
IIAs involving African countries reveals
that the earliest text incorporating an ESG
clause dates back to 2008. In its model BIT,
Ghana not only included ESG principles
in its preamble but also stipulated that
investors shall comply with the labour,
health, and environmental laws and
regulations of the host state. The model
BIT also presented an environmental
cave-out for non-discriminatory measures
taken by a host state, which prevents
investors from arguing over indirect
expropriation of investments affected by
such measures.

Following Ghana’s lead, countries such as
Benin, Nigeria, Senegal, and Morocco
have signed BITs or incorporated clauses in
their model BIT containing similar
substantive ESG obligations.

Despite their varied wording, these
substantive clauses consistently convey three
key points:

• Foreign investment should not be
encouraged through the relaxation of
domestic health, safety, or environmental
measures;

• Investors are encouraged to voluntarily
embrace internationally recognised
corporate social responsibility standards
that encompass labour, environmental,
human rights, community relations, and
anti-corruption practices; and

• States maintain their autonomy to
regulate ESG-related matters, which
effectively exempts certain state actions
from triggering the state’s investment
protection duties under the treaty.

This last exception typically includes
cautious, stipulating that the state’s measures
must be necessary and non-arbitrary.

The Nigeria–Morocco BIT, signed in
2016 but not yet in force, is an example of a
treaty containing stringent operational ESG
standards for investments. These include the
establishment of an environmental
management system, adherence to human
rights in the host state, compliance with core
International Labour Organization standards,
and, in some cases, a requirement to obtain
certification equivalent to ISO 14001.

The treaty also aims to prevent investors
from circumventing international
environmental, labour, and human rights
obligations.

Notably, the Moroccan model BIT,
adopted in 2019, not only enshrines these
ESG obligations but also introduces a
requirement for foreign investors who wish
to resolve their investment disputes through
arbitration: the treaty bars investors from
bringing investment claims if it is found that
the investment was made through some
form of corruption.

Lastly, the pioneering SIFA ratified in
March 2024 between the EU and Angola
sets out a framework for sustainable
investment and mutual development
between the parties, encompassing:

• A commitment to uphold environmental
and labour laws and standards, without
diluting, derogating from, or waiving
them with the purpose of attracting
foreign investment;

• A commitment to the effective
enforcement of international labour and
environmental treaties, including the
Paris Agreement;

• The promotion of corporate social
responsibility and responsible business
practices; and

• The strengthening of bilateral
coopération on investment-related
aspects of climate change and gender
equality.

While the SIFA explicitly indicates that
it neither creates nor modifies rules on the
protection of established investors in the
territories of the parties, or of their
investments, or on investor–state dispute
settlement (ISDS), its implementation is
expected to streamline the process for
attracting and expanding sustainable
investments in Angola by facilitating the
establishment and day-to-day operation of
businesses for European investors.
Investors and ESG clauses: a new substantive standard?

The ISDS has faced a legitimacy crisis almost since its advent. The fact that it empowers investors to claim compensation from host states for measures taken under the mandate given by their citizens has always led to questions regarding the degree to which arbitral tribunals may exercise the power to override a country’s electoral choices. Notwithstanding, the inclusion of ESG standards and principles may contribute to a better definition of the limits to the arbitral tribunals’ adjudicatory powers.

It is commonly accepted that the inclusion of ESG standards applicable to investments may function as a reinforcement of the host state’s right to regulate (see Section 423 of the ruling in ADMC Affiliate Limited and ADC & ADMC Management Limited v Hungary, International Centre for Settlement of Investment Disputes, October 2 2006). As stated above, the standards may call for compliance with certain values or rules, or determine the host state’s freedom to establish stringent ESG-related standards.

From the perspective of international investment law, a state’s right to regulate is particularly relevant to determine the level of protection against regulatory measures granted to an investment. Indeed, the way the host state’s right to regulate has been presented in case law and legal doctrine is as follows:

- There is a recognition that it informs and limits the circumstances in which a given host state may act detrimentally in relation to a given investment by approving laws and regulations;
- An exclusion of its liability under the relevant investment treaty, or under a given substantive protection or guarantee;
- As long as no stabilisation clause is in place.

Moreover, the host state’s right to regulate has evolved from being understood as a circumstance precluding wrongfulness, subject to certain criteria, to a proportionality assessment that may lead to the exclusion of a duty to compensate the investor.

However, the question is whether the somewhat recent preponderance of ESG standards in international investments can give rise not only to the enhancement of host states’ right to regulate, but also be considered as a new substantive standard.

It is possible for ESG clauses and standards to be used by investors to sue host states for action or compensation should any failure to comply with ESG standards affect their investments (see, for example, Peter A. Allard v Barbados, Permanent Court of Arbitration, June 27 2016). However, such cases are arguably less probable than cases where non-compliance by investors with those standards may be used as a defence by host states.

Indeed, it has been suggested (see ISDS and ESG: Friends or Foes?) that the inclusion of ESG standards in IIAs may be used as a defence by host states against investors. The protection afforded by these standards stems from the fact that they would limit the host states’ consent to arbitrate, thus restricting the cases where its liability to arbitrate with investors would lie. The limitation on the host states’ consent to arbitrate would derive from a more nuanced definition of ‘investment’, which would not only include the general requirements of ‘investment’ but also the need to comply with the ESG standards.

Although this understanding is still untested in arbitration tribunals, the limitation of a host state’s consent due to the investor’s failure to comply with the host state’s internal laws is not unheard of. Indeed, in Worley International Services Inc v Ecuador (Permanent Court of Arbitration, December 22 2023), the tribunal stated that the jurisdictional question it was asked to decide on was whether “a State would have given its consent to arbitration to protect investments that breached its own law”. When deliberating on this, and bearing in mind that there was no specific provision to that effect, the tribunal asserted that “the absence of an express legality clause in the Treaty does not preclude an enquiry into whether the Claimant’s alleged investment complied with the law” (Section 307).

Ultimately, the Tribunal concluded that the state would not consent to arbitration to protect investments that breached its own law (Section 304) and, on that basis, the tribunal declined jurisdiction over the investor’s claims, citing “a widespread pattern of illegality and bad faith” in the making of the investment (Section 419).

Moreover, the final award in Alvarez y Martin Corporation and others v. Panama (International Centre for Settlement of Investment Disputes, October 12 2018) similarly stated that “In [ISDS], it is reasonable to assume that states have only consented to this curtailment of their sovereignty on the condition that the protective mechanism is limited to investments made in compliance with their own legal system – but does not cover non-compliant investments. To argue otherwise, and to extend coverage to investments made in violation of national law, would go against one of the most basic principles of any legal system: nemo auditur propriam turpitudinem allegans” [no one can benefit from their own wrongdoing].

The fact that the claimant was non-compliant with Panamanian law led the tribunal to decline jurisdiction, as the host state’s consent to arbitration was implicitly limited to the investor being compliant with said law.

Although, as argued elsewhere (see 2023 in Review: Climate Change and ISDS – Reshaping Investment Arbitration to Achieve Climate Goals), investment tribunals should uphold international environmental legal obligations. A case where an investor sues a host state as a result of its lack of commitment to ESG obligations is far less probable than situations in which ESG standards are used by host states as a defence against non-compliant investors. In that sense, only time will tell whether there will be a new substantive protection for ESG standards.

Final thoughts on the ESG landscape

ESG is shaping the legal landscape and the ISDS is not immune to this influence. Indeed, in recent years, the inclusion of ESG standards in IIAs has raised the requirements that investors and host states will have to fulfil in investments.

These developments give rise to the question of whether ESG will eventually evolve into a new substantive protection under international investment law. This question arises from the fact that ESG standards can be used by investors to sue host states if compliance with such standards under the relevant IIA is not
met. However, although that is possible, the potential of host states relying on such standards for protection against an investor’s claims seems more probable.

The widespread and increasing acceptance of ESG standards as binding provisions in IIAs can be widely considered to be a reinforcement of the host state’s right to regulate. Indeed, by implementing ESG standards in IIAs, host states are not just adhering to modern treaty making, they are effectively establishing enforceable obligations that investors must comply with if they wish to conduct business in their territory.

Ultimately, by adopting these standards and steering investments towards sustainable, responsible practices, host states may be successful in balancing investor rights with environmental protection and social equity concerns.

The authors would like to thank Betyna Jaques, senior associate at Vieira de Almeida, and Bernardo Kahn, associate at Vieira de Almeida, for their contributions to this article.