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EDITORIAL COMMENTS

I am pleased to present Volume 10 of the *University of Uyo Law Journal*. The Editorial Team has worked tirelessly to bring you this issue, comprising ten scholarly papers of nine articles and a statute review. This edition of the journal offers a range of topical and insightful ideas on themes in the fields of international investment arbitration, access to information law, trade dispute and industrial jurisprudence, insurance law, testamentary disposition, pension administration law, taxation law, international criminal law, and legal/constitutional theory. This is in accord with the aim of the *University of Uyo Law Journal* to provide a forum for the widest discussion of subjects on the law and contemporary issues of sub-national, national and global concern.

This edition opens with a paper by Osawe Omosede Andre, which examines the nexus between access to information law and corruption. It argues that corruption impact on access to public information as it works to promote secrecy. As such, any advancement towards opening governments to public scrutiny must foster anti-corruption efforts, which must of necessity validate the demand for openness in government actions and inactions as a right. Thus, the paper notes that a virile public information system will engender transparency that is necessary to expose corrupt acts, as access laws promote public right as well as serve as deterrent to corruption.

The joint paper by Francis Ohiwere Oleghe and Olusesan Oliyide examines the relationship between human rights and international investment arbitration using Weiler's concept of lost siblings. It argues that international investment arbitration (IIA) has elicited so much attention in recent times. So much so that the United Nations Commission on International Trade Law and the International Centre for the Settlement of Investment Disputes have engaged in programmes aimed at reforming the investor-state dispute settlement (ISDS) system, of which IIA is a subset. It makes the point that while the ISDS system has evolved with protection for investors, the experience of host states remains that of misgivings about the system's usefulness, which have resulted in agitations for its reform to give adequate consideration to human rights norms in ISDS cases. The aim of which is to strike a balance between investors' bilateral investment treaty (BIT) rights and their human rights obligations.

The papers by Ogancha Ogbole and John Inaku offer exposés on trade dispute jurisprudence. On the one hand, the former paper examines the constructions of 'trade disputes' and 'state trade disputes' under Nigerian labour laws and regulations. It argues that the recognition of the concept of state trade disputes under Nigerian labour law contributes in expanding the frontiers of trade disputes in the workplace, which poses recondite challenges for the current constitutional arrangement for labour jurisprudence in Nigeria. It therefore recommends the unbundling of labour, as an item under the Exclusive Legislative List, to pave the way for the involvement of state legislative assemblies if the notion of state trade dispute as conceived by Nigerian labour law is to be properly harnessed. On the other hand, the latter paper examines the impact of the finality of the decision of the Court of Appeal on labour and industrial disputes and how it impacts on the development of labour and industrial jurisprudence in Nigeria, in view of the level of expertise available to the Court of Appeal. It therefore proposes packing the Court of Appeal with judges from the National Industrial Court or, in the alternative, for the establishment of a National Labour Appeal Court, constituted of labour and industrial law experts, to hear appeals from the National Industrial Court of Nigeria.

Kehinde Anifalaje's paper considers the regulation of compulsory liability insurance in Nigeria as a means of public protection from the risk of death, bodily injury or loss of property. The paper examines the laws regulating compulsory liability insurance in Nigeria and the enforcement of the rights of third parties within the context of the common law rule of privity of contract. It argues that the current tort-based system of compensation coupled with some regulatory challenges patently constitute a hindrance to a timely enforcement of the right of third parties under the contract of insurance, and suggests, among other things, the institutionalisation of a no-fault system of compensation that would guarantee quick and effective compensation of persons, who suffer losses by means of death, bodily injury or loss of property.

Also advancing the need for improved public protection, Lilian Nwabueze's paper examines public protection through a change in approach towards better Wills by means of legislative amendment to Wills law to include the use of technological devices in communicating Wills; while and the paper by the duo of Onikosi Adedeji and Ahmed Muhammed-Mikaaeel examines the legal regime for pension administration in Nigeria, which it argues possess inherent lapses, including lack of direct prosecutorial power on the part of relevant agencies, unjust and insensitive

exclusion of the state and local government workers from coverage under the extant pension scheme and non-compliance of the pension scheme to Shari'ah.

The focus then moves to taxation law, in which Uche Jack-Osimiri, Anthony Ekpoudo, Rowland Ipoule and Amara Ijeomah comprehensively examine jurisdictional issues that emanate in the administration and practice of tax laws, arising from the jurisdiction of the National Assembly and State Houses of Assembly to exercise legislative power to promulgate tax legislation within the limits conferred by the Constitution. It proposes certain measures to bring about reforms for the smooth administration and practice of tax laws in Nigeria. Glory Okebugwu's paper thereafter examines the investigative and prosecutorial approaches in combating transnational crimes under international law. It argues for a neutral body that will ensure balance of conflicting interests in the investigation and prosecution of transnational crimes, as transnational crimes universally present certain challenges to national criminal justice systems. The paper, therefore, recommends the collective involvement of the international community, as well as the adoption of more proactive investigative approaches with long term control guarantees with human rights considerations.

The paper by Olanrewaju Aladeitan and Adeboro Adamson focuses on the loss of proprietary interest by a private entity on the basis of overriding public purpose in the context of a liberalised and privatised regime, which raises critical legal issue regarding the extent to which the legal framework for the acquisition of land for energy infrastructure development impacts on the rights of a landowner and the correlation to the effective performance of the Nigerian Electricity Supply Industry (NESI). The paper proposes a legal regime that is fair and balanced for operators/investors in sector, as well as for other stakeholders. The final paper, a statute review by Ekokoi Solomon, evaluates the Akwa Ibom State Map Establishment Law 2023. It argues that the AKS map law appears to be inconsistent and out of step with the constitutional provisions on boundary adjustment. This, the paper argues, is in view of the nature of the extant constitutional order, which requires the exercise of legislative power to promote the integrity of the legal/constitutional order.

There is evidently a wealth of good reading, thoughtful analyses and helpful materials in this volume of the journal. In effect, the authors have worked diligently to provide innovative perspectives on the issues covered by their papers, which have sub-national, national and international

concerns. We therefore welcome constructive feedback and suggestions on the issues covered in this edition. If there are any questions, comments or concerns, please do well to contact us at facultyoflaw@uniuyo.edu.ng

With gratitude to members of the Editorial Team and our external reviewers, who volunteered their time and intellect to enhance the quality of the papers selected, I welcome readers to turn the pages of this volume of the journal and embrace the wealth of information and knowledge contained in them.

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The Nexus between Human Rights and International Investment Arbitration: An Examination of Weiler's Concept of Lost Siblings

Francis Ohiwere Oleghe and Olusesan Oliyide***

ABSTRACT

International investment arbitration has elicited so much attention in recent times. International organisations, such as the United Nations Commission on International Trade Law and the International Centre for the Settlement of Investment Disputes, have been assiduously engaged in programmes toward reforming investor-state dispute settlement (ISDS), of which international investment arbitration is a subset. While the ISDS system has evolved with adequate protection for investors, the experience of host states and their citizens has been that of misgivings about the system's usefulness. These misgivings have resulted in agitations for the reform of the system. One cardinal aspect of the reform agenda, and the focus of this paper, is the need for international investment arbitration tribunals to give adequate consideration to human rights norms in ISDS cases. This paper adopts the doctrinal research methodology for examining the relationship between human rights and international investment arbitration. The work concluded that there is a need for international investment arbitration tribunals to strike a balance between investors' bilateral investment treaty (BIT) rights and their human rights obligations.

Keywords: BIT rights, human rights, investor obligations, ISDS system, transparency

I. INTRODUCTION

The fragmentation of the investor-state dispute settlement (ISDS) system has become a serious concern in academic circle.[1] This fragmentation is

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principally due to the present dissatisfaction with international investment arbitration (IIA),[2] and the perception of some scholars that IIA skews toward investors in a way that makes states and aggrieved third parties virtually helpless.[3] The perception seems strengthened by the fact that investors usually resort to IIA to circumvent their human rights obligations[4] and contest host states' measures that they perceive to threaten their anticipated profits.[5] Sometimes, in an attempt to protect foreign investments, municipal government policies[6] and host states' citizens' human rights are thereby sacrificed.[7] This state of affairs has prompted states and other stakeholders to engage in concerted efforts at looking for alternatives to IIA in all directions – including the use of local remedies only[8] and diplomatic protection,[9] which both have severe pitfalls.[10] Although diplomatic protection sounds harmless, it could result

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[1] Report of the United Nations Commission on International Trade Law (Fiftieth session, 3-21 July 2017) paras 243-250.

[2] IIA, in some literature, is used interchangeably with ISDS. It is, however, pertinent to note that ISDS is broader than IIA in scope and that IIA is a subset of ISDS.

[3] Karen L Remmer, 'Investment Treaty Arbitration in Latin America' (2019) 54(4) *Latin American Research Rev* 795, 796; Anna Joubin-Bret, 'UNCITRAL ISDS Reform: Mandate, Process and Reform Solutions' (27 April 2021) <https://afaa.ngo/page-18097/10368672> accessed 6 June 2021.

[4] See, eg, *Chevron v Ecuador*, PCA Case No 2007-02/AA277, where the claimant successfully prayed the arbitral tribunal to override the Ecuadorian Constitution and Ecuador's obligations under human rights treaties in favour of the US- Ecuador BIT.

[5] Todd Weiler, 'Philip Morrison vs. Uruguay: An Analysis of Tobacco Control Measures in the Context of International Investment Law' (July 2010) 16-17 <http://arbitrationlaw.com/files/free_pdfs/2010-07-28_-_expert_opinion.pdf> accessed 13 March 2023; Remmer (n 3) 796.

[6] Joubin-Bret (n 3).

[7] International Justice Resource Centre, 'Mandates of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Businesses' (7 March 2019) <https://ijrcenter.org/un-special-procedures/working-group-on-the-issue-of-human-rights-and-transnational-corporations-and-other-business-enterprises/> accessed 13 March 2023.

[8] See, eg, the South African Protection of Investment Act 2015 s 13.

[9] Luke Nottage, 'Throwing the Baby Out with the Bathwater: Australia's New Policy on Treaty-Based Investor-State Arbitration and its Impact in Asia' (2013) 37(2) *Asian Studies Rev* 253, 264; Sanjeet Malik, 'BIT of Legal Bother' (*Business Today*, May 2012) <www.businesstoday.in/magazine/columns/india-planning-to-exclude-arbitration-clauses-from-bits/story/24684.html> accessed 17 March 2020.

[10] Leon E. Trakman, 'Investor-State Arbitration or Local Courts: Will Australia Set a New Trend?' (2012) 46(1) *J of World Trade* 83, 91.

in war in extreme cases, making it most undesirable.[11] Similarly, insisting on local remedies only will hamper foreign direct investment (FDI) inflows required for economic development because that approach to investment dispute resolution does not resonate with foreign investors.[12]

While the ISDS system has evolved with adequate protection for investors, the experience of host states has been that of misgivings about the system's usefulness. These misgivings have resulted in agitations for the reform of the system. Scholars have categorise the reform agenda as it stands today into the following subsets: (a) reform to address the lack of consistency, coherence, predictability, and correctness of arbitral decisions by ISDS tribunals;[13] (b) concerns about arbitrators and decision-makers;[14] (c) concerns about cost and duration of ISDS cases;[15] (d) the need for human rights norms to be given adequate consideration in ISDS cases;[16] and e) the perceived need to establish a Multilateral Investment Court (MIC).[17] However, this paper's thrust is narrowed down to item (d) as it relates to IIA.

Although some approaches by states in pursuing the ISDS reform agenda (use of local remedies only and diplomatic protection) are unsuitable for international investment disputes, as mentioned above, the agitation for reform has scored a high point. It has awakened the need to consider public interests in IIA proceedings. This movement has already resulted[18] in the UNCITRAL Rules on Transparency in Treaty-based

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[11] John Dugard, 'Articles on Diplomatic Protection, 2006: Introductory Note' (Audiovisual Library of International Law) <https://legal.un.org/avl/ha/adp/adp.html> accessed 20 July 2021.

[12] World Economic Forum, 'Global Investment Policy and Practice' <https://www.weforum.org/projects/investment> accessed 20 July 2020, where the author argues that FDI inflows depend on creating the right business environment and investment climate, underpinned by international agreements, national policies, domestic regulations, and specific measures.

[13] Doug Jones, 'Investor-State Arbitration in Times of Crisis' (2013) 25 *Nat'l L Sch Indian Rev* 27, 57-58; IIED, CCSI and IISD, 'Shaping the Reform Agenda: Concerns Identified and Cross-Cutting Issues' (15 July 2019) para 1 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_crosscuttingissues__0.pdf > accessed 13 March 2023.

[14] IIED, CCSI and IISD (n 13).

[15] ibid, Table 1

[16] International Justice Resource Centre (n 7).

[17] Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (European Yearbook of International Economic Law, Springer Open, Berlin 2020) 117.

[18] The ISDS reform discussion is ongoing.

Investor-State Arbitration, 2014 (Rules on Transparency) and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 2014 (the 'Mauritius Convention on Transparency').[19] Similarly, there is a developing jurisprudence premised on the argument that IIA tribunals should act as agents not only for the parties that appointed them but also for the global community.[20]

In pursuing the argument that IIA tribunals should also act as agents for the larger community, human rights norms have steadily been creeping into IIA.[21] The main objective of this paper is to examine the connection between human rights and IIA,[22] especially treaty-based IIA, with a particular focus on how these evolving human rights norms in IIA would produce the needed panacea for environmental injustice.

II. THEORETICAL AND CONCEPTUAL ANALYSIS

Based on the different opinions and decisions of municipal courts and developments of municipal laws on arbitration, four main theories have evolved concerning the nature of arbitration.[23] These theories (contractual, jurisdictional, hybrid, and autonomous theories) essentially focus on international commercial arbitration.[24] However, these theories may relate to IIA for the following reasons. Firstly, the issue of delocalisation relates to IIA as it does international commercial arbitration. Secondly, both types of arbitration are based essentially on contract–for, even when IIA is based purely on municipal investment law, such investment law acts as a standing offer to prospective foreign investors. Thirdly, parties in IIA are at liberty to adopt international commercial arbitration laws and rules for

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[19] Joubin-Bret (n 3).

[20] Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2020) *L and Ethics of Human Right*s, para 1.

[21] Fola Adeleke, 'Human Rights and International Investment Arbitration' (2016) 32(1) *South Africa J on Human Rights* 48-70, where the author discusses, among other things, how recent investment arbitration disputes have raised several human rights-related issues.

[22] Todd Weiler, 'International Investment Law and International Human Rights Law: Re-uniting Two Long Lost Siblings,' Speaking Notes, 15 March 2018 (2018) 5 TDM <www.transnational-dispute-management.com/article.asp?key=2592> accessed 20 September 2022.

[23] Alexander J Belohlavek, 'Arbitration and Basic Rights: Movement from Contractual Theory to Jurisdictional Theory' (17 October 2013) 47 <https://ssrn.com/abstract=2344701> accessed 31 July 2021.

[24] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) *Contemp Asia Arb J* 255, 257.

their investment arbitration.[25] On the last point, several parties have adopted the UNCITRAL Model Law and rules, which UNCITRAL initially developed for international commercial arbitration, for their IIA proceedings. Similarly, some IIA cases, such as *Process and Industrial Developments Limited v Ministry of Petroleum Resources of the Federal Republic of Nigeria (P&ID v Nigeria)*,[26] have been based on municipal laws[27] and rules[28] enacted originally for commercial arbitration.

The four theories mentioned above address the relationship arbitration should have with municipal courts.[29] They evolved due to the description of arbitration from the perspective of public authorities,[30] especially municipal courts. However, the thesis of this paper transcends the description of arbitration as a concept or its relationship with municipal courts: its focus is to establish the role of human rights norms in IIA. Therefore, the work employs two other theories as the basis of its analysis. These other two theories are justice theory and human rights theory. The selected theories are employed throughout the work.

On the other hand, the conceptual framework in this paper attempts to present an understanding of the intersection of IIA and human rights. Although there are several studies on the subject, the ongoing ISDS reform programme is not yet conclusive. Similarly, the debate among scholars on whether to allow human rights norms in IIA is also inconclusive. While a school of thought holds that the arbitral tribunal has to follow the legal principles of contract and shut out third parties from its proceedings,[31] another school holds that arbitral tribunals should consider third-party applications against foreign investors in appropriate cases.[32]

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[25] Aikaterini Titi, *The Right to Regulate in International Investment Law, in Vol.* 10 Studies in International Investment Law (Hart 2014) 29, where the author correctly asserts that some aspects of both public international law and private commercial arbitration under IIA.

[26] *P&ID v Nigeria*, Case No 1:18-cv-00594 (ad hoc arbitration).

[27] The relevant municipal laws are the Arbitration and Mediation Act 2023 and the Nigerian Investment Promotion Commission Act, CAP N 117 Laws of the Federation of Nigeria (LFN) 2004 (NIPC Act).

[28] The relevant rules are the Arbitration Rules, First Schedule to the Arbitration and Mediation Act 2023.

[29] Belohlavek (n 25).

[30] Yu (n 24) 257.

[31] Anibal Sabaster, 'Towards Transparency in Arbitration (A Cautious Approach)' (2010) *Publicist* <https://bjil.typepad.com/publicist/2010/05/towards-transparency-in-arbitration-a-cautious-approach.html> accessed 17 May 2023.

[32] Robert Argen, 'Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration' (2014) 40(1) *Brooklyn J of Intl L* 209-210; Mealey's International Arbitration Report: International Arbitration Experts Discuss

This paper relies on arbitral decisions, municipal legislation, and materials from two inter-governmental organisations (IGOs), namely, UNCITRAL and the Convention for the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), the main international organs responsible for global dispute resolution governance.[33] The article examines some concepts that have a bearing on the enforcement of human rights in IIA against the backdrop of the backlash against the IIA system.[34] Some of the concepts used in this paper include human rights, investor rights, investor obligations, and balance of rights and obligations.

Re-Uniting Weiler's Two Long-Lost Siblings

Weiler's concept of two long-lost siblings attempts to establish that there has always been a relationship between IIA and human rights and that they are, in no way strange bedfellows. Although the relationship between IIA and human rights seems complex, it is experienced globally by the adverse effect the latter has on the former.[35] States' bilateral investment treaty (BIT) obligations towards foreign investors do quickly come in conflict with their obligations under international human rights law towards their citizens,[36] which has resulted in a clamour for and a movement towards a greater degree of balance in BITs between the legitimate interests of investors and host countries.[37]

Fry points out the observation of Remi Bachand and Stephanie Rousseau that ISDS decisions that negatively impact a host government's policies relating to human rights protection contribute to fuelling strong

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Transparency on Public Perception (A Commentary Article Reprinted from the December 2022 Issue of Mealey's International Arbitration Report) 1.

[33] These inter-governmental organisations include ICSID, UNCITRAL, and UNCTAD.

[34] Georgios Dimitropoulos, 'Comparative and International Investment Law: Prospects for Reform – an Introduction' (2020) 21 *J of World Investment & Trade* 1; Mohammed Ahmed Mohammed Mossallam, *Exit, Quasi-Exit, And Silence: How Developing Countries React when Discontent with the Investment Treaty Regime* (PhD thesis. SOAS University of London 2018) 12-13 <http://eprints.soas.ac.uk/32198> accessed 28 December 2022; see, generally, Michael Waibel and others (eds), *The Backlash Against Investment Arbitration. Perceptions and Reality* (Kluwer 2012).

[35] Jason D Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' <www.semanticscholar.org/paper/International-Human-Rights-Law-in-Investment-of-Fry/108bc9c30bb86a76c3a50b64501e384be78acba3> accessed 17 May 2022.

[36] ibid.

[37] Patrick Dumberry and Gabrielle Dumas-Aubin, 'How to Impose Human Rights Obligations on Corporations under Investment Treaties?' (2011-2012) 4 *Yearbook on International Investment Law and Policy* 569.

concerns over international trade and investment.[38] To effectively address these concerns, tribunals should consider investor rights vis-à-vis the human rights of those affected by investment activities. In addition, there is a need to reform the international legal framework for the enforcement regime of human rights in IIA, the main forum for international investment disputes.

An investment typically involves three categories of persons: the investor, the State, and the indigenes of the community where the investment activity takes place. Under the present regime of investment treaties, the investor takes all the rights, the host community has a no-right position, and the host state has only obligations. This situation allows the system to skew towards the investor[39] to the extent that Jose Alvarez correctly, though satirically, characterises the Investment Chapter (Chapter 11) of the North American Free Trade Agreement (NAFTA) as a human rights treaty exclusively reserved for foreign investors, giving the bulk of the rights to the few and ignoring the rights of those affected by investment activities.[40] The situation trumps one set of rights (property rights) over an even more important set of rights (human rights), narrower rights over broader ones. Alvarez refers to Chapter 11 of NAFTA as 'the most bizarre human rights treaty ever conceived' aimed at favouring foreign investors.[41]

Weiler's concept of two long-lost siblings attempts to revive, in theory, the once-lost relationship between IIA and human rights. The view of Weiler mirrors the Norway Model BIT 2015 and the Pan-African Investment Code (PAIC), which both serve as a model template for reviving the once-lost relationship between IIA and human rights.

III. THE DEMAND FOR ISDS REFORM TOUCHING ON HUMAN RIGHTS

As noted above, there are ongoing agitations for and actions towards reforming ISDS, principally because of the shortcomings of IIA as presently practised. One of the concerns is the need for human rights norms to be given adequate consideration in ISDS.[42] The ISDS reform agendum bordering on good review of human rights norms in IIA addresses, among other things, human rights breaches by TNCs and other business

[38] ibid.
[39] Remmer (n 3); see also Joubin-Bret (n 3).
[40] Fry (n 35).
[41] ibid.
[42] International Justice Resource Centre (n 7) 4.

enterprises, the right to development of host communities, human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, the rights of indigenous peoples, and the issue of human rights to safe drinking water and sanitation.[43] These concerns arose because of the perception of scholars that the inherently imbalanced nature of the IIA system and lack of investors' human rights obligations, among other factors, have led to undue restrictions on states' fiscal capability and undermined their capacity to regulate economic activities and to realise the economic, social, cultural and environmental rights of their citizens.[44]

The developing jurisprudence is that international arbitral tribunals should be bound to consider third-party claims for human rights violations when deciding investment disputes.[45] The result of this is that, though the investment agreement may be between two states[46] or a state and a foreign investor,[47] as the case may be, the arbitral tribunal, as the agent of the larger community, must seriously consider the issue of human rights violations affecting members of the public even though they are not, strictly speaking, party to the investment agreement.

By the nature of BITs and MITs, although they exist to protect the investments of contracting states' citizens investing in each other's territories, only states are parties to these international agreements. Usually, their aim of promoting foreign investment in host states is not emphasised but contingent on the fact that protecting foreign investment would attract investors to the investment-seeking country. This template, therefore, does not directly include obligations on foreign investors to protect the human rights of indigenes of host communities during their investment activities.[48] And these rights become easily violated, especially in third-world countries with weak accountability mechanisms.[49] This gap requires arbitral tribunals to seek creative ways of enforcing internationally-recognised human rights.

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43 ibid.
44 IIED, CCSI and IISD (n 13).
45 Sweet (n 20) 14.
46 In the case of treaty-based arbitration.
47 In the case of international investment arbitration based on a specific contract between a State and a foreign investor.
48 Nsongurua Udombana, 'Shifting Institutional Paradigms to Advance Socio-Economic Rights in Africa' (2007) <DO-10.13140/RG.2.2.12829.15846> 242.
49 Attac Munich and ILSTEL, 'Investor-State Dispute Settlement' <www.elstel.org/ISDS.html.en> accessed 28 May 2021.

A. Striking a Balance between Investors' BIT Rights and their Human Rights Obligations

Historically, the IIA system was essentially a mechanism for achieving the twin aims of protecting the investments of foreigners, on the one hand, and enhancing the inflow of foreign direct investments (FDIs) into developing countries, on the other. In the 1960s, many third-world countries, including the newly independent African nations, were among the first nations that canvassed for an arbitration regime for international investment disputes, beginning with their contribution to the negotiation of the ICSID Convention in 1964,[50] which crystallised with the eventual enactment of municipal laws devoted to promoting and protecting foreign investments.[51]

In recent times, however, scholars and international organisations have drawn attention to the activities of some foreign investors in the oil and mining sector that are detrimental to the environment and the impunity with which TNCs carry out these activities in developing and third-world countries.[52] These environmentally harmful activities surface in the arbitration matters of *Chevron v Ecuador*[53] and *The Renco Group Inc. v The Republic of Peru*[54] *(Renco v Peru)*.

Chevron v Ecuador arbitration touches directly on IIA vis-à-vis environmental injustice. In this arbitration, the activities of Chevron and its predecessor, Texaco Petroleum Company, had led to severe pollution and complete degradation of the Ecuadoran Amazon. Since Ecuador, because of some legal constraints, could not sue Chevron for the damage done, the inhabitants of the Amazon decided to bring a group action against Chevron in the *Largo Agrio* claim and got a municipal court judgment for US$9.5 billion.[55] Despite the palpable damages caused by Chevron, it responded by suing Ecuador based on the US-Ecuador BIT[56] and prayed

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[50] Paul-Jean Le Cannu, 'Foundation and Innovation: The Participation of African States in the ICSID Dispute Resolution System' (2018) 33(2) *ICSID Rev* 456.

[51] See, eg, the NIPC Act 2004, originally promulgated as the Nigerian Investment Promotion Commission Decree in 1993.

[52] Global Justice Now, 'Investigating the Impact of Corporate Courts on the Ground – The Truth is out there' <https://waronwant.org/sites/default/files/ISDSFiles_Chevron_April2019.pdf> accessed 28 May 2021; see also Information Centre on Business and Human Rights, 'Prominent Organizations Publicly Condemn Chevron's Actions in Ecuador's Case' <business-humanrights.org/es/ultimas-noticias/prominent-organizations-publicly-condemn-chevrons-actions-in-ecuador-case/> accessed on 29 May 2021.

[53] PCA Case No. 2007-02/AA277.

[54] ICSID Case No. UNCT/13/1.

[55] Global Justice Now (n 52).

[56] US-Ecuador BIT was signed in 1997.

the arbitral tribunal to override the Ecuadorian Constitution and Ecuador's obligations under human rights treaties in favour of the BIT, which the tribunal regrettably did.[57] Although Ecuador's Supreme Court has upheld the trial court's judgment, Chevron has refused to pay the judgment sum.[58]

Similarly, *Renco v Peru* provides another important instance where ISA has been used to perpetuate environmental injustice in underdeveloped countries. Despite the uncontroverted evidence that 70 per cent of the children in La Oroya were having severe health challenges because of the pollution caused by the investment activities of the claimant, it kept insisting on its BIT rights.[59] This trajectory of impunity by some TCNs, at times, with their host governments' complicity, remains the narrative in many communities where mining and mineral explorations are taking place in developing countries.

The Ecuadorian Amazon and La Oroya incidences defeat the purpose of investor protection under the IIA system. The legal regime of investor protection (under any system), which attempts to override the well-established human rights regime, may imperil itself. The aim of developing human rights norms in IIA is to balance foreign investors' right to the protection of their investment against their obligation to respect the recognised human rights of all those that may be affected by their business activities. Thus, under the proposed UN Treaty, the UN reaffirms the fundamental human rights and the dignity and worth of the human person, the equal rights of men and women and the need to promote social progress and better standards of life in more extensive freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations.[60] Just like the United States Founding Fathers perceived it, human rights must come first, and legal regimes second.[61]

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[57] Munich and ILSTEL (n 49); see, generally, Adeleke (n 21).

[58] Information Centre on Business and Human Rights (n 40).

[59] Munich and ILSTEL (n 49).

[60] The proposed UN Treaty on Transnational Corporations and Human Rights (2020 Second Revised Draft of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises), pmbl.

[61] Lawrence Cronin, 'The Ninth Amendment and Conceived Children: Legal Theory and Civil Action' (2021) 16-17 <https://app.scholasticahq.com/supporting_files/3957471/attachment_versions/3970589> accessed 15 June 2021.

B. The Meeting Point between Human Rights and IIA

Reiner and Schreuer highlight the prohibition of discrimination and property protection as features that human rights and IIA have in common.[62] Similarly, Dupuy, Petersmann, and Francioni discuss the interaction between international investment law, investment arbitration, and human rights.[63] In the attempt to reinforce their legal positions before IIA tribunals, both foreign investors and host states often have recourse to the provisions of public international law, including IHRL.[64] However, the big question is how far these tribunals are willing to exercise jurisdiction in pronouncing on human rights issues raised before them or considering human rights claims by third parties. The *Chevron v Ecuador* tribunal was persuaded by the claimant not to consider the human rights issues raised in the case, trumping the BIT rights of the claimant over and above the human rights of the Ecuadorian Amazon inhabitants that the claimant had violated.[65]

The question whether an IIA tribunal's jurisdiction extends to pronouncing on human rights issues raised by way of defence or counterclaim is less complex than that of a third party's human-rights claims. An evaluation of the latter would rest on the legal framework available for third-party rights, which is the focus of chapter four. Regarding the former, whether an arbitral tribunal would have jurisdiction to rule on human rights issues raised against an investor by its host state[66] is said[67] to depend on the relevant investment instrument.[68] On the subject

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[62] Clara Reiner and Christoph Schreuer, 'Human Rights and International Investment Arbitration' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration*, International Economic Law Series (Oxford University Press 2009); online edn, Oxford Academic, 1 February 2010) <https://doi.org/10.1093/acprof:oso/9780199578184.003.0004> accessed 18 February 2023.

[63] Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration*, International Economic Law Series (Oxford, 2009; online edn, Oxford Academic, 1 February 2010) <https://doi.org/10.1093/acprof:oso/9780199578184.001.0001> accessed 17 February 2023.

[64] Aceris Law LLC, 'Human Rights Law and Investment Arbitration' (2021) <www.acerislaw.com/human-rights-law-and-investment-arbitration/> accessed 19 February 2023.

[65] Munich and ILSTEL (n 49).

[66] The jurisdiction of an arbitral tribunal to pronounce on human rights issues raised by an investor is not debatable since investment instruments aim at protecting an investor and his investment.

[67] See, eg, Aceris Law LLC (n 64).

[68] An investment instrument includes an investment treaty, contract, or municipal investment law.

of a tribunal considering human rights issues based on provisions of an investment instrument, Aceris Law LLC comments on the decision of the tribunal in *Urbaser v Argentina*[69] thus:

> [T]he tribunal upheld jurisdiction over the host State's counterclaim for alleged violation of human rights by the foreign investors under the Spanish-Argentine Bilateral Investment Treaty (BIT). While Argentina's main argument was that the foreign investors had violated the principles of good faith and *pacta sunt servanda* by failing to comply with the Concession Contract, the tribunal addressed, for the first time, Argentina's considerations on the basic human right of access to water services.[70]

IV. STATE PARTIES' ROLE UNDER THE EVOLVING DISPENSATION

One of the fallouts of corruption in third-world countries is that government and government officials usually fail to monitor the operations of and require standard safety measures by TNCs and other businesses in the oil and mining sector. For instance, in the *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria*[71] (*SERAC case*), the African Commission upheld the applicants' allegation that Nigeria failed to monitor the operations of and require standard safety measures by its company, NNPC, and a joint venture, Shell Development Petroleum Company, in which it has a majority shareholding. The applicants also succeeded in their further allegation that the involvement of the government and the oil companies' operations led to violating the Ogoni people's ESC rights under the African Charter.[72] As stated earlier, the Commission found that Nigeria failed in its responsibility under the African Charter to take the needed steps for the 'improvement of all aspects of environmental and industrial hygiene.'[73]

The role of a government in monitoring the operations of TCNs in its jurisdiction is pertinent for any sustainable reform of the ISDS system.[74] Thus, the responsibility of states to protect their citizens' human rights ought to inform their investment laws, investment contracts, and

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69 ICSID Case No. ARB/07/26

70 Aceris Law LLC (n 64).

71 *SERAC Case,* African Commission Communication 155/96 (2001).

72 ibid 10.

73 ibid 9.

74 Oluwole Ojewale and Alize Le Roux, 'Endless Oil Spills Blackens Ogoniland's Prospect' (24 March 2022) <https://issafrica.org/iss-today/endless-oil-spills-blacken-ogonilands-prospects> accessed 25 January 2023.

negotiation of investment treaties. Accordingly, the UN Guiding Principles on Business and Human Rights provides states with guidelines and parameters for protecting, respecting, and enforcing human rights within their jurisdictions. The Guiding Principles provide as follows:

> States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.[75]

States' obligation regarding human rights includes ensuring the protection of its citizens against human rights violations by third parties, including business enterprises.[76] In addition, the Guiding Principles require states to set out the expectation that all business enterprises domiciled in their jurisdiction should respect human rights throughout their operations.[77] At present, states are not generally obligated under IHRL to regulate the extraterritorial activities of their citizens' businesses.[78] However, the obligation of a state regarding the right to food extends to ensuring that its citizens, including corporate entities, do not violate this right in other countries.[79]

States' obligation regarding human rights and businesses includes enforcing laws that at requiring business enterprises to respect human rights, periodically assessing the adequacy of such laws, and addressing any gap.[80] States also must ensure that other rules and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable businesses to respect human rights.[81] Other duties of states in this regard include: providing practical guidance to business enterprises on how to respect human rights throughout their operations; and encouraging, and where appropriate requiring, business enterprises to communicate how they address their human rights impacts.[82]

The Office of the High Commissioner on Human Rights (OHCHR) comments that failure to enforce existing laws that directly or indirectly

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[75] UN Guiding Principles on Business and Human Rights, para.1.
[76] ibid, Commentary to para 1.
[77] ibid, para 2.
[78] ibid, Commentary to para 2.
[79] Report of the Special Rapporteur on the Right to Food, Jean Ziegler (E/CN.4/2006/44) paras 28–38; OHCHR and FAO, The Right to Adequate Food (Fact Sheet No. 34) 19.
[80] UN Guiding Principles on Business and Human Rights, para.3(a).
[81] ibid, para 3(b).
[82] ibid, para 3(c) and (d).

regulate business respect for human rights (such as laws on non-discrimination, labour, the environment, property, privacy, and anti-bribery) is often a significant legal gap in state practice.[83] OHCHR recommends that states should critically consider whether they are currently enforcing such laws effectively, and if not, why this is the case and what measures may reasonably correct the situation.[84] OHCHR also recommends that states review whether these laws provide the necessary coverage in light of evolving circumstances and whether they provide an environment conducive to business respect for human rights and relevant policies. Finally, OHCHR observes that corporate and securities laws, which shape business behaviour, do not provide sufficient guidance on human rights and recommends that these laws clearly state businesses' role in promoting human rights, indicating expected outcomes and best practices.[85]

As part of the paradigm shift in IIA, many countries no longer use traditional-type language for investment protection, as found in old-generation BITs and the Energy Charter Treaty (ECT), because of public interest considerations.[86] Bernasconi-Osterwalder notes, African countries have been particularly active in revising their investment treaty models and negotiating progressive regional and bilateral investment agreements.[87] Bernasconi-Osterwalder refers to the models developed within the Eastern African Community (EAC), the Southern African Development Community (SADC), and at the Pan-African level, which have all included more precise definitions of investment protection standards, set out responsibilities for investors and integrated innovations regarding dispute settlement to ensure transparency and independence of the arbitral tribunal.[88]

A. Far-reaching Municipal Interventions

At the municipal level, South Africa and Tanzania have made far-reaching reforms to ISDS. In 2015, South Africa legislatively abolished IIA. It replaced it with two local remedies: mediation under the auspices of its Department of Trade and Industry and litigation or other forms of

[83] ibid, Commentary on para 3.
[84] ibid.
[85] ibid.
[86] Nathalie Bernasconi-Osterwalder, 'Expansion of the Energy Charter to Africa and Asia: Undoing Reform in International Investment Law?' (2017) 8(2) *Investment Treaty News Quarterly* 4.
[87] ibid 4-5.
[88] ibid.

adjudication within South Africa.[89] Section 13 of the Protection of Investment Act 2015 (South Africa) provides that: 1) an aggrieved investor may submit a request to the Department of Trade and Industry for it to appoint a mediator for the resolution of an investment dispute with the government; and 2) alternatively, the investor may approach any competent court, independent tribunal or statutory body, within South Africa, for the resolution of such an investment dispute.

Similarly, in 2017, Tanzania enacted the Natural Wealth and Resources (Permanent Sovereignty) Act[90] (Permanent Sovereignty Act), which provides that the natural wealth and resources of the country can no longer be subject to proceedings in any foreign court or tribunal.[91] To that end, only judicial bodies or other organs established in Tanzania shall adjudicate disputes on the extraction, exploitation, or acquisition and use of Tanzania's natural wealth and resources, and application of the laws of Tanzania shall be acknowledged and incorporated in all arrangements or agreements in that regard..[92] Furthermore, the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017[93] (Review and Renegotiation of Unconscionable Terms Act) requires the Tanzanian National Assembly to review and renegotiate all agreements that contain unconscionable terms.[94]

B. The European Union Reform Solution

The EU is pushing to replace IIA with a judicialised Multilateral Court (MIC).[95] Norway is at the forefront of the ISDS reform agenda of all the EU

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[89] Protection of Investment Act 2015 (South Africa), s 13; see also Mmiselo Freedom Qumba, 'South Africa's Move away from International Investor-state Dispute: A Breakthrough or Bad Omen for Investment in the Developing World?' (2019) 52(1) *De Jure L J* <http://dx.doi.org/10.17159/2225-7160/2019/v52a19> accessed 7 December 2020.

[90] Permanent Sovereignty Act, Act Supplement No 5 of 2017 in the Gazette of the United Republic of Tanzania No 27 Vol 98 dated 7 July 2017; see Magalie Masamba, 'Government Regulatory Space in the Shadow of BITs: The Case of Tanzania's Natural Resource Regulatory Reform' (21 December 2017) IISD Investment Treaty News <www.iisd.org/itn/en/2017/12/21/governmentregulatory-space-in-the-shadow-of-bits-the-case-of-tanzanias-natural-resource-regulatory-reform-magalie-masamba/> accessed 2 August 2021.

[91] Permanent Sovereignty Act, s 11(1).

[92] Permanent Sovereignty Act, s 11(2).

[93] Review and Renegotiation of Unconscionable Terms Act, Act Supplement No 6 of 2017 in the Gazette of the United Republic of Tanzania No 27 Vol 98 dated 7 July 2017.

[94] Review and Renegotiation of Unconscionable Terms Act, ss 4 and 5.

[95] Hongling Ning and Tong Qi, 'Multilateral Investment Court: The Gap between the EU and China' (2018) *4 Chinese J of Global Governance* 154, 175.

countries. Norway Model BIT 2015[96] seeks to achieve an overall balance of the rights and obligations between the host state and the foreign investor.[97] Norway Model BIT emphasises the need for CSR, the protection of health, safety, labour, the environment, democracy, and human rights.[98] Perrone's argument that foreign investors' rights are not commodity rights but entrenched in social relations well reflects Norway Model BIT, suggesting that their enforcement should strike a balance between protecting the foreign investor and protecting local interests, which state parties and politicians do not always represent well.[99] Perrone argues that foreign investors should enforce their rights against the backdrop of their obligations to their host states and other actors within their host states.[100]

Protecting public interests and standardising the IIA system by making its outcomes predictable seem to be the driving force of the EU reform programme. But many developing countries do not favour a multilateral court for international investment disputes. To accommodate the views of some member states who are not comfortable with the idea of a multilateral court, UNCITRAL no longer uses the term 'MIC' but a 'standing multilateral mechanism,'[101] which form is yet unknown.

C. International Investment Arbitration and the Issue of Transparency

Another important aspect regarding the agitation for ISDS reform is the issue of transparency and public participation in ISDS proceedings.[102] The fact that ISDS has its roots in international commercial arbitration, characterised by secrecy,[103] explains, in part, the lack of transparency that

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[96] Norway Model BIT 2015.

[97] ibid, art 6(2).

[98] ibid; Asha Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009) 50 *Harv Intl L J* 491, 494-95.

[99] Nicolás M Perrone, 'An Interview with Nicolás Perrone on Investment Treaties and the Legal Imagination: How Foreign Investors Play by their own Rules' (2021) 12(2) *Online J on Investment L and Policy* 10 <www.iisd.org/system/files/2021-06/iisd-itn-june-2021-english.pdf> accessed 2 August 2021.

[100] ibid 12.

[101] UNCITRAL, 'Draft Code of Conduct for Judges in International Investment Dispute Resolution and Commentary: Note by the Secretariat, A/CN.0/1149 (UNCITRAL 56th Session, Vienna, 3-21 July 2023) para C.1

[102] Jorge E Viñuales, 'Amicus Intervention in Investor-State Arbitration'‖ (Nov 2006- Jan 2007) 62 61(4) *Dispute Resolution J* 72, 76; Paul Kenneth Kinyua, 'Assessing the Benefits of Accepting amici curiae briefs in Investor-State Arbitrations: A Developing Country's Perspective' (2016) 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310753 > accessed 17 July 2022.

[103] Secrecy in commercial arbitration is based on the foundational principles of arbitration, namely, privacy and confidentiality; see Kinyua (n 102) 6.

bedevilled investment arbitration.[104] However, many NGOs have successfully taken advantage of the public character of international trade and investment disputes to gain access to arbitral proceedings as *amici curiae*.[105] Some of these NGOs, including Greenpeace, Oxfam, WWF, and Friends of the Earth, postulate the emergence of new principles, influence the negotiation of treaties, and influence the negotiation of, or create, non-binding guidelines, regulations, and codes of conduct for parties to investment agreements.[106]

The Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration 2014 (Mauritius Convention on Transparency) came into force with a significant boost to the transparency reform drive.[107] Transparency entails making provisions for the members of the public to follow proceedings and to participate in some form, such as the filing of *amicus curiae* and presenting memoranda.[108] Transparency in IIA is vital because of the public nature of the issues before IIA tribunals.[109]

The ICSID addresses the concern about transparency in two ways: publishing awards on its website and mandating its Secretary-General's office to publish all arbitration requests registered by it.[110] The ICSID's gesture did not entirely assuage the transparency protagonists. Thus, in 2006, ICSID amended its Rules and Regulations to allow non-disputing parties to file written submissions.[111] Based on the 2006 amendment, the *Aguas v Argentina*[112] tribunal allowed non-disputing parties (the

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104 Steffen Hindelang, 'Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law' in *Investor-State Dispute Settlement Provisions in the EU's International Investment Agreements* (Volume 2-Studies, European Union 2014) 98.

105 Viñuales (n 102) 76.

106 Alexandra Wawryk, 'International Energy Law: An Emerging Academic Discipline' in Paul Babie and Paul Leadbeter (eds), *Law as Change: Engaging with the Life and Scholarship of Adrian Bradbrook* (University of Adelaide Press) 233

107 See also the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

108 Thore Neumann and Bruno Simma, 'Transparency in international adjudication,' in Andrea Bianchi and Anne Peters (eds.), *Transparency in International Law* (Cambridge University Press, 2013), 437; Shahla Ali and Wilson Mbugua, 'Dispute Resolution in International and Bilateral Agreements' (2019) 27 <www.researchgate.net/publication/337532396_Dispute_Resolution_in_International_and_Bilateral_Agreements> accessed 12 July 2022.

109 Ali and Mbugua (n 108) 28-29.

110 ICSID Administrative and Financial Regulations, regulation 22

111 ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) 37.

112 *Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentina* (ARB/03/19).

petitioners) to file written submissions because the petition centred on the water supply and sewerage service, affecting millions of residents in Buenos Aires.[113] Similarly, in *Biwater Gauff (Tanzania) v United Republic of Tanzania*[114] (*Biwater v Tanzania*), the tribunal allowed the filing of written submissions under the 2006 ICSID Rules and Regulations.[115]

Ali and Mbugua comment on two NAFTA arbitrations that bother on transparency: *Methanex Corporation v United States of America*[116] (*Methanex v United States*) and *United Parcel Service of America Incorporated v Government of Canada*[117] (*UPS v Canada*). In allowing *amicus curiae* in *Methanex v United States,* the tribunal stated that the 'arbitral process could benefit from being perceived as more open or transparent: or conversely be harmed if seen as unduly secretive.'[118] The *UPS v Canada* tribunal also allowed *amicus* standing on similar ground. In that case, the tribunal emphasised that the dispute concerned a matter of public interest 'not merely because one of the Disputing Parties is a State' but because it affected the provision of public services and issues of human health, and that the *amicus* could bring a new perspective on the case.[119]

Amicus curiae applications allow third parties to participate in an arbitration. As Levine rightly observes, one avenue interested parties increasingly rely on to promote broader participation in IIA is *amicus curiae* intervention.[120] Although *amicus curiae* intervention provides only limited opportunity for participation in the arbitral process, the increasing willingness of investment tribunals to allow it has afforded third parties, such as non-governmental organisations (NGOs) and IGOs, the opportunity to participate by way of written *amicus* briefs in many high profile cases[121] to provide expertise on thematic issues of public policy

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[113] Ali and Mbugua (n 108) 28.

[114] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania* (ICSID Case No. ARB/05/22).

[115] *Biwater v Tanzania* Procedural Order No. 5, 2 February 2007; Ali and Mbugua (n 108) 28.

[116] *Methanex v. United States*, UNCITRAL Arbitration 1999

[117] *UPS v Canada*, ICSID Case No. UNCT/02/1.

[118] *Methanex v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*' 15 January 2001, para. 49; Ali and Mbugua (n 108) 28.

[119] Eugenia Levine, '*Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third Party Participation' (2011) 29 *Berkeley J Int'l L* 210.

[120] ibid 201.

[121] See, eg, *AES Summit Generation Limited and AES-Tisza Erdma Kft. v Republic of Hungary (AES)*, where an ICSID tribunal granted the European Commission an *amicus*

involved in the dispute.[122] Such *amici* often act as advocates for affected populations or communities in response to the reluctance of governments to introduce their human rights duties into the investment dispute.[123]

Although arbitral tribunals increasingly allow *amicus curiae* interventions, Kube and Petersmann note that most BITs and published ISDS awards remain silent on human rights law (HRL).[124] Thus, one cardinal role of the states in the evolving dispensation would be their support for transparency by negotiating investment treaties and specific investment agreements that empower arbitral tribunals to consider human rights issues raised by parties or third parties once the issues relate to the investment in dispute.

V. CONCLUSION AND RECOMMENDATIONS

Weiler's concept of two long-lost siblings, together with the efforts of other scholars, has revived discussions on the relationship between human rights and IIA. The concerns of scholars regarding the inherently unbalanced nature of the IIA system and lack of investors' human rights obligations, coupled with the agitations of host states, have culminated in the current ISDS reform agenda championed by UNCITRAL and the ICSID. At the municipal law level, some states have enacted third-party rights legislation. However, this paper asserted that for these legislative interventions to achieve the promotion of human rights norms in IIA, they must extend to allowing third parties who can show, *prima facie*, that the outcome of the arbitral proceedings will affect them one way or the other to join in such arbitral proceedings to protect their rights or interests.

The work advanced the argument that the need for IIA tribunals to adequately consider human rights norms in ISDS cases is more so in the petroleum and mining sectors, where investment activities fundamentally disrupt the lives of locals and violate their internationally recognised human rights. The Norway Model BIT now recognises investor obligations regarding human rights, and this is the recommended path to tread, in the future, by all investment-seeking countries. These investor obligations should create a new vista that allows individuals or a class of individuals

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curiae status to represent the European Community's interest in enforcing competition law.

[122] Levine (n 119) 201.

[123] Vivian Kube and Ernst-Ulrich Petersmann, 'Human Rights Law in International Investment Arbitration' (2016) EUI Working Papers (Law 2016/02) 1.

[124] ibid 1.

whose rights are infringed to join in an ongoing arbitration or bring an action before an international Commission for actual redress.

This paper is premised on admonishing national governments to not only view ISDS reform from the perspective of what transpires during arbitral proceedings but, more importantly, from the perspective of securing the preservation of the right balance between public and private interests at the stage of concluding investment instruments and developing an efficient public policy for international investment, including its dispute resolution mechanisms. Finally, the proposed UN Treaty should specifically provide for third-party rights to participate in IIA proceedings where a person or a group of persons can show that their human rights have been violated by the activities of an investor. To this extent, therefore, the paper proposes the following recommendations:

1. States should always endeavour to incorporate public interest exceptions for state liability into treaty language, as some states and IGOs have done.[125] In the same vein, when states and IGOs are elaborating investment agreements, they should provide sufficient guidance to arbitral tribunals and mandate them to consider the public interest and human rights norms in their decision-making process.
2. States should not view ISDS reform only from the perspective of what transpires during arbitral proceedings but, more importantly, from the perspective of securing the preservation of the right balance between public and private interests at the stage of concluding investment instruments and developing an efficient public policy for international investment, including its dispute resolution mechanisms. Investors' claims are more likely to fail when a host state's regulations are well-intended and appropriately formulated and implemented.
3. In negotiating investment treaties and contracts and formulating investment laws, states should endeavour to use the Norway Model BIT and the PAIC models to achieve an overall balance of the rights and obligations between the states and investors and protect human rights within the context of IIA.

[125] See 2012 US Model BIT, NAFTA and the Trans-Pacific Partnership (TPP) Agreement; Alison Giest, 'Interpreting Public Interest Provisions in International Investment Arbitration' (2017) 18(1) *Chicago J of Intl L* 321, 323.

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