MAKING INVESTMENT ARBITRATION WORK FOR ALL: ADDRESSING THE DEFICITS IN ACCESS TO REMEDY FOR WRONGED HOST STATE CITIZENS THROUGH INVESTMENT ARBITRATION

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Abstract: The current dominant system for resolving international investment disputes is the Investor-State Dispute Settlement system or, more precisely, the Investor-State Arbitration system (ISA). The ISA system has proved to be an effective avenue for remedy for foreign investors whose investments are wrongfully impaired by host states. However, the system is not accessible to Host State Citizens (HSCs) whose interests may be harmed by investors. Wronged HSCs can seek redress in domestic fora only. The domestic fora in many jurisdictions leave many wronged HSCs without remedy, a problem that has long been acknowledged. This Essay proposes a solution. It proposes that access to remedy for wronged HSCs can be operationalized within the existing arbitration system (or integrated into a future international investment court system that may eventuate). This can be achieved by expanding the current ISA system to be a more inclusive system that allows all affected persons—investors and non-investors—whose interests are adversely affected to seek remedy. The proposed system, termed Investment Related Dispute Settlement, would allow for: (1) traditional ISA proceedings, in which investors may initiate proceedings against host states; (2) HSG-Investor Arbitration, in which host state governments may initiate proceedings against investors; and (3) HSCs-Investor Arbitration, in which HSCs may initiate arbitral proceedings against investors.

INTRODUCTION

There are several deficiencies in the current system for settling international investment related disputes, which has led to backlash against the sys-

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tem.[1] The dominant mechanism for settling investment disputes is Investor State Dispute Settlement ("ISDS").[2] Broadly defined, ISDS includes any technique for settling investment disputes. This encompasses litigation in domestic or foreign courts, domestic or international arbitration, mediation, conciliation and negotiation. But, the term ISDS has become synonymous with investor–state arbitration ("ISA").

ISA is usually a way for foreign investors (often a corporation or a private individual) to challenge a law, regulation, judicial or administrative ruling, or other government decision, in front of private arbitrators vested with the authority to make decisions and give binding, enforceable awards.[3] Critics have voiced many concerns about the ISA system.[4] The criticisms of ISA have led to backlash against it.[5] They have also led to some reform efforts.[6]

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[1] *See generally* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et al. eds., 2010); Raphael Lencucha, *Is It Time to Say Farewell to the ISDS System?: Comment on "The Trans-Pacific Partnership: Is It Everything We Feared for Health?,"* 6 INT'L J. HEALTH POL'Y & MGMT. 289, 289 (2017) (discussing criticisms and proposed reforms of ISDS in the area of health policy); Chief Justice Robert Shenton French, Chief Justice of Australia, ISDS—Litigating the Judiciary, Address at the Chartered Institute of Arbitrators Centenary Conference (Mar. 21, 2015), http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21mar15.pdf [https://perma.cc/2DSM-DVWV] (discussing the relationship between the ISDS tribunals and domestic courts).

[2] Although investment disputes may be resolved by litigation, mediation, conciliation, negotiation, or arbitration, for reasons explained under 'Development of ISA' (in Part I) below, parties often choose arbitration over the other mechanisms. *See infra* notes 18–27 and accompanying text. As explained there, the purpose of developing ISDS was to establish an international system of neutral forum that would assuage the concerns of investors (capital exporters) and encourage them to invest in developing countries with perceived weak judicial systems and governance. Consequently, investors have come to prefer ISAs to the other mechanisms of settling investment disputes. Some investors have even sought to bypass provisions in investments agreements that require them to seek resolution by one or more of the other mechanisms before ISAs. *See generally* Emilio Agustin Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Jurisdiction (Jan. 25, 2000) (finding claimant, an Argentine national, could bypass a requirement in the Argentina-Spain Bilateral Investment Treaty that disputes must first be submitted to the domestic courts of the host state before they can be submitted to an ISA tribunal).

[3] Lisa Crawford, Patrick Emerton & Emmanuel Laryea, *Investor-State Dispute Settlement and the Australian Constitutional Framework, in* THE CHINA-AUSTRALIA FREE TRADE AGREEMENT: A 21ST CENTURY MODEL 259, 260 (Colin Picker et al. eds., 2018) [hereinafter Laryea et al., *ISDS and the Australian Constitutional Framework*].

[4] Some of the criticisms are that ISA enhances the power of multinational corporations at the expense of national sovereignty and interests. The argument is that ISA curtails the ability of governments to adopt laws and regulations in the national interest because they may be challenged before a panel of private arbitrators, who may award damages against the state. So too, the criticism goes, does ISA allow judicial decisions in sovereign states to be challenged before private arbitrators, who might not be trained judges. ISA tribunals are also perceived to interpret the laws in favor of-investors, rather than in a balanced manner, to the disadvantage of sovereign states. Another criticism is that, with prospects of claims by investors against the host state before perceived pro-investor tribunals if the state adopts laws and regulations that affect investors adversely, host state governments may refrain from implementing legitimate policies that may trigger ISA claims (this is often referred to as "regulatory chill"). The system is also criticized for lacking in transparency and diversity since it involves a

This Essay contributes to the reform effort by proposing a new arbitration system that addresses the criticism that the ISA system protects only investors' interests to the exclusion of both host states' interests and other affected persons' interests because only investors are allowed to initiate claims.[7] This is a major deficiency in the current ISA system specifically and international investment law ("IIL") generally. In particular, the lack of room within the IIL regime for wronged host state citizens ("HSCs")[8] to obtain remedy is of great concern.[9]

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small pool of mostly male practitioners who sometimes act in different capacities (being arbitrators in some cases and then appearing as counsel before their fellow arbitrators in other cases). The system is said to challenge core constitutional law values, such as the principle of democracy, the concept of the rule of law, and the protection of fundamental or human rights. Another criticism is that the ISA system protects only investors' interests, to the exclusion the interests of both host states and other affected persons, because only investors can initiate claims. For a discussion of the criticisms, see Laryea et al., *ISDS and the Australian Constitutional Framework, supra* note 3, at 262–63 (citing Chief Justice Robert Shenton French, Chief Justice of Australia, Investor-State Dispute Settlement—A Cut Above the Courts?, Address at the Supreme and Federal Courts Judges' Conference (July 9, 2014), www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf] [https://perma.cc/DNB3-XF27]). *See generally* Rudolf Dolzer, *Perspectives for Investment Arbitration: Consistency as a Policy Goal?* 11 TRANSNAT'L DISP. MGMT. 403 (2014); EUROPEAN FED'N FOR INV. LAW & ARBITRATION, A RESPONSE TO CRITICISMS AGAINST ISDS (May 17, 2015), https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf. [https://perma.cc/R7FD-5RQC]); Press Release, EU–US Trade Negotiations (TTIP): Investor Dispute Mechanism Trojan Horse Must be Excluded from TTIP, Greens/European Free Alliance in the European Parliament (Jan. 21, 2014), www.greens-efa.eu/eu-us-trade-negotiations-ttip-11492.html [https://perma.cc/5ZZ8-82VJ].

[5] Leon E. Trakman & David Musayelyan, *The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration*, 31 ICSID REV. 194, 194–95 (2016).

[6] *See generally* UNITED NATIONS CONFERENCE ON TRADE & DEV., REFORMING INVESTOR-STATE DISPUTE SETTLEMENT: IN SEARCH OF A ROADMAP (2013), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf [https://perma.cc/FQ8U-V3HS] (analyzing ISDS reform proposals that address ISDS criticisms); Piero Bernardini, *Reforming Investor-State Dispute Settlement: The Need to Balance Both Parties' Interests,* 32 ICSID REV. 38 (2017) (analyzing a system proposed by the European Commission to replace ISDS); Stephan W. Schill, *Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework*, 20 J. INT'L ECON. L. 649 (2017) (discussing criticisms of ISDS and proposals for its reform).

[7] Schill, *supra* note 6, at 3.

[8] HSCs should be understood to mean people (individuals and collectives) who are adversely affected by international investment activities. They may be indigenous or non-indigenous, formally recognized or not. "Citizens" is used here broadly to encompass both nationals and non-national residents in the host state or abroad. Arguably, non-residents are unlikely to be adversely affected by activities in the host state. However, non-residents may own property the value of which is heavily diminished by investment related activity, such as pollution of land.

[9] *See Opinion of the European Union Agency for Fundamental Rights on Improving Access to Remedy in the Area of Business and Human Rights at the EU Level*, at 18 (Apr. 10, 2017), http://fra.europa.eu/en/opinion/2017/business-human-rights [https://perma.cc/YQ79-PSUW] (advising "which EU action could be undertaken for the right to a remedy to be improved in cases of business-related human rights abuse"); U.N. Office of the High Comm'r for Human Rights, *Access to Remedy for Business-Related Human Rights Abuses (Consultation Draft)*, U.N. Doc. A/32/10, at 2 (Jan. 2018),

This Essay argues that access to remedy for wronged HSCs can either be operationalized within the existing arbitral system of dispute resolution or integrated into a future international investment court system that may eventuate in its place or operate parallel to the ISA. The Essay focuses on access to remedy through the existing arbitral system, but the thrust of the analysis is applicable to an international investment court, if one eventuates. The arbitral access can be achieved by expanding the current ISA system, which is currently used only by investors against host states, to a more inclusive system that allows all affected persons—investors and non-investors—whose interests are adversely affected to seek remedy. The proposed system, termed Investment Related Dispute Settlement ("IRDS"), would allow for (1) traditional ISA proceedings, in which investors may initiate proceedings against host states; (2) HSG-Investor Arbitration ("HGIA"), in which host state governments ("HSGs") may initiate proceedings against investors; and (3) HSCs-Investor Arbitration ("HCIA"), in which HSCs may initiate arbitral proceedings against investors.

ISA is already widely known and practiced; and as of December 31, 2017, there were at least 855 publicly known treaty-based ISA cases.[10] It has been observed by other scholars that the current ISA system already allows for HGIA, though host states rarely initiate proceedings against investors in practice.[11] Thus, this Essay's discussion will focus on HCIA, which has, to-date, been missing.

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https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARP_II_Consultation.pdf [https://perma.cc/ZU9L-5P69] (containing policy objectives "aimed at helping [UN Member] States strengthen . . . [a]ccess to Remedy for business-related human rights abuses"); *infra* notes 28–69 and accompanying text (discussing further examples of access to remedy problems faced by wronged HSCs in countries such as Cambodia and Nigeria).

[10] *Investment Dispute Settlement Navigator*, UNCTAD: INVESTMENT POLICY HUB (Dec. 31, 2017), http://investmentpolicyhub.unctad.org/ISDS [https://perma.cc/XZ7N-THTE]. This is in addition to non-treaty based ISAs. *See, e.g.*, Biloune & Marine Drive Complex Ltd. v. Ghana Invs. Ctr. & Gov't of Ghana, 95 I.L.R. 184 (Perm. Ct. Arb. 1990). Treaty-based ISA claims are those in which the claims are based on alleged breaches of International Investment Agreements ("IIAs"). IIAs are treaties between two or more states covering investment relationships between nationals or other identifiable entities of one state in the jurisdiction of the other. It may be specifically for investments or be contained, usually as a chapter, in a broader International Economic Agreement covering, not just investment but also trade, between the state parties and their nationals. It may be bilateral (i.e. between two states), regional (often between a few countries in a geographical area), or between countries in dispersed regions that share a common goal in investment promotion and regulation. Non-treaty claims are those in which the claims are based on breaches of contract or customary international law, because there is no IIA between claimant's home state and the host state. In *Biloune*, the claimant's home state, which is Syria, did not have an IIA with Ghana, and so his claim was based on Ghana's breach of contract and customary international law. The claimant was successful.

[11] *See, e.g.*, CHRISTOPH H. SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH & ANTHONY SINCLAIR, THE ICSID CONVENTION: A COMMENTARY 458 (2d ed. 2009). The authors observed that, in theory, either host states or investors may request ICSID arbitration; however, in practice, investors usually make the request. *See generally id.*

Part I of this Essay provides a brief background on ISA.[12] Part II discusses the lack of access to remedies for non-investors, particularly HSCs, who are wronged by investment activities.[13] Part III discusses the problems with, and the undesirability of, the lack of access to remedy for HSCs.[14] This discussion will provide useful context for understanding Part IV's examination of both the changes that would be required to move from an ISA system to an IRDS system and how the IRDS system would operate.[15] The proposed IRDS system will address the specific criticism of ISA mentioned above, help to balance the rights and interests of all affected parties, enhance the legitimacy of the system that is often called into question,[16] improve the foreign investment climate for businesses and states, and work for all. Nevertheless, I anticipate concerns and objections to the IRDS system, many of which may be underpinned by the concepts that have left the deficiencies unaddressed. These include the applicable law that determines substantive rights of affected interests and the investors' consent to arbitrate. I will, therefore, examine and address those potential concerns and objections at the end of this Essay.

I. Development of the ISA System[17]

ISA is a system that allows an investor (often a corporation or a private individual) to use dispute settlement proceedings against a foreign government. The concept of ISA was created by the International Convention for the Settlement of Investment Disputes of 1965 ("ICSID Convention").[18] The ICSID Convention provides a procedural framework for dispute settlement between host states and foreign investors through conciliation or arbitration. It

[12] *See infra* notes 18–27 and accompanying text.

[13] *See infra* notes 28–69 and accompanying text.

[14] *See infra* notes 70–98 and accompanying text.

[15] *See infra* notes 99–120 and accompanying text.

[16] *See, e.g.*, Julius Cosmas, *Legitimacy Crisis in Investor-State International Arbitration System: A Critique on the Suggested Solutions & the Proposal on the Way Forward*, 4 INT'L J. SCI. & RES. PUBL'NS 1 (2014) ("It is contended that the [ISA] system is overshadowed with flaws and lacks the necessary values of a legitimate adjudicative system."); Frank J. Garcia, Lindita Ciko, Apurv Gaurav & Kirrin Hough, *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. INT'L ECON. L. 861, 861 (2015) ("Investment law today is undergoing a . . . legitimacy crisis . . . particularly with respect to . . . investor-State arbitration."); Jane Kelsey, *The Crisis of Legitimacy in International Investment Agreements and Investor-State Dispute Settlement*, JUDICIAL POWER PROJECT (Jan. 9, 2018), https://judicialpowerproject.org.uk/jane-kelsey-the-crisis-of-legitimacy-in-international-investment-agreements-and-investor-state-dispute-settlement/ [https://perma.cc/REL5-G2ET] ("This essay . . . set[s] out the broad-church criticisms of ISDS that have provoked a crisis of legitimacy in the investment arbitration regime.").

[17] Portions of this section also appear in my prior work, Laryea et al., *Investor-State Dispute Settlement and the Australian Constitutional Framework*, *supra* note 3.

[18] *Id.* at 260 (citing Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 129 (2006)).

established a center, the International Centre for Settlement of Investment Disputes ("ICSID Centre"), that acts as an arbitral forum for the settlement of international investment disputes between investors of one contracting state (the home state) and the government of another contracting state (the host state).

Up until the promulgation of the ICSID Convention, developing countries asserted that jurisdiction in international investment disputes lay with the host state.[19] Beyond that, foreign investors had to resort to customary international law ("CIL") for the settlement of disputes between them and foreign (host state) governments.[20] However, under CIL, sovereigns are immune to suits by private entities for actions taken by a government in pursuit of its administrative functions.[21] Thus, if the actions of a host government injured a foreign national, the injured party would have to rely on its home government to seek redress on its behalf and the home government may exercise diplomatic protection rights on behalf of its injured national abroad.

Developed (capital exporting) countries had concerns about the quality and independence of the laws, governments, and judiciaries of developing countries. Capital exporters also saw obvious limitations to the effectiveness of using CIL. For instance, the home government might not be keen to antagonize the foreign government; the decision by the home government to intervene might require a lot of politicking; the remedies that may be sought, or accepted, by the home government might not be what the injured party wants; and, the process might take unduly long.[22] Thus, capital exporters preferred some form of independent forum under international law.[23]

At the time, the opposing positions between developing (capital importing) countries and developed (capital exporting) countries on fora for settling investment disputes (as well as on the substantive law regarding standard of protection for foreign investments and compensation for injury to foreign investors) were considered to discourage capital exporters from investing in developing economies.[24]

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[19] *Id.* at 261 (citing Emmanuel Laryea, *Evolution of International Investment Law and Implications for Africa*, *in* NATURAL RESOURCE INVESTMENT AND AFRICA'S DEVELOPMENT 293, 298–300 (Francis N. Botchway ed. 2011); Gus Van Harten, *Investment Treaty Arbitration and Public Law—A Return to the Gay Nineties?*, 4 TRANSNAT'L DISP. MGMT. 12, 16–17 (2007)).

[20] *Id.* (citing RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 232 (2d ed. 2012)).

[21] *Id.* This stems from the principle of state sovereignty. In its basic form, state sovereignty is the right to exercise, within a territory, the functions of a state exclusive to any other state or kingdom, and subject to no other authority. In practice, such exclusive authority may be limited by obligations under international law. *Id.* at n.7.

[22] *Id.* (citing DOLZER & SCHREUER, *supra* note 20, at 232).

[23] *Id.* (citing Michael Brandon, *Recent Measures to Improve the International Investment Climate,* 9 J. PUB. L. 125, 126–31 (1960)).

[24] *Id.* (citing Laryea, *supra* note 19, at 298–300).

ICSID was conceived as an independent international forum that would assuage the concerns of capital exporters and encourage them to invest in developing countries with (perceived) weak judicial systems and governance. Ratification of the ICSID Convention by developing countries was to serve as a kind of insurance to potential investors that they would have recourse to the ICSID Centre's independent dispute resolution mechanism if the host state government undermined the property rights of the investor. As observed in 2005 in *Gas Natural SDS v. Argentine Republic*, the independent international dispute resolution mechanisms such as ICSIDs "offered to investors assurances that disputes that might flow from their investments would not be subject to the perceived hazards of delays and political pressures of adjudication in national courts."[25] The tribunal felt "that assurances of independent international arbitration is an important—perhaps the most important—element in investor protections."[26]

ISA practice has now developed beyond ICSID. Most IIAs provide for ISA, at ICSID or elsewhere, as a mechanism for settling disputes between foreign investors and host state governments. And, many ISA cases take place under the auspices of international arbitral tribunals governed by non-ICSID rules and/or institutions, such as the UNCITRAL Arbitration Rules, the Permanent Court of Arbitration, the London Court of International Arbitration, and the International Chamber of Commerce. As noted earlier, as of December 31, 2017, there were at least 855 publicly known treaty-based ISAs.[27]

II. ISA AND LACK OF ACCESS TO REMEDY FOR NON-INVESTOR PARTIES

The ISA system was conceptualized and developed to serve as an investor protection mechanism.[28] It was designed as a response to the "perceived hazards of delays" and politically compromised national courts of the host state to which investors could be subject.[29] The ISA system instead provided investors with a reputable, independent, international forum for settling "disputes that

[25] Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, Jurisdiction, ¶ 29 (June 17, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0354.pdf [https://perma.cc/XK59-MJ2L].

[26] Laryea et al., *ISDS and the Australian Constitutional Framework*, *supra* note 3, at 262 (citing *Gas Natural SDG*, ICSID Case No. ARB/03/10, Jurisdiction, ¶ 29).

[27] *See supra* note 10 and accompanying text.

[28] *See supra* notes 18–27 and accompanying text (discussing the creation and development of the ISA system); *see also* Upendra D. Acharya, *Globalization and Hegemony Shift: Are States Merely Agents of Corporate Capitalism?*, 54 B.C. L. REV. 937, 952–53 (2013) ("The treaties establishing the [ICSID Centre] have been branded 'bills of rights for foreign investors' as part of an international legal framework that forces non-hegemon sovereign states to be accountable to corporations.").

[29] *Gas Natural SDG*, ICSID Case No. ARB/03/10, Jurisdiction, ¶ 29.

might flow from their investments" abroad.[30] But, because of its genesis, the ISA system today only benefits investors.

The focus on investor protection has meant that non-investors whose interests are adversely affected by investment activities are left with only the domestic fora that are perceived to be inadequate for the investor. Thus, while investors are shielded from the hazards of domestic systems of law by the ISA mechanism, those whose interests have been adversely affected by the activities of the investor are left to resort to the lax domestic system.

Worse yet, investors can, and sometimes do, take advantage of the lax domestic system to operate in a manner they would not in their home state or other jurisdictions of strong laws and institutions. An example is the operations of the British–Dutch multinational oil and gas giant, Royal Dutch Shell PLC ("Shell") in Nigeria. Shell has been flaring gas, spilling oil, and polluting lands, waterways and habitats in Nigeria's Niger Delta area for decades.[31] Shell will not, and cannot, operate in the Netherlands, United Kingdom, United States or other developed countries the way it does in Nigeria and get away with it for this long. The extent of devastation that Shell's operations have caused the environment and the inhabitants of the Niger Delta area would likely have resulted in billions of dollars in fines, compensation payments, and clean-up expenses had this harm been inflicted in a developed country. To give an example of what would have happened in a developed country, oil spillage following a well blowout at the site of British Petroleum PLC's (BP) Deepwater Horizon drilling rig in the Gulf of Mexico in 2010 cost it over $61 billion in fines, compensations, and clean-up expenses. [32] BP's market capitalization immediately before the accident was $180 billion, but "[t]he accident actually shaved off one-third of the market capitalization of the company" after the accident.[33] As oil analyst Fadel Gheit put it, "[i]t's a miracle that the company is still in business"[34] after the spill. Yet, Shell's persistent spills, gas flaring, and pollution in Nigeria has cost it little, if at all. Shell is one of many for-

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[30] *Id.*

[31] *See, e.g., High Court Blocks Nigeria Oil Spill Case Against Shell*, AL JAZEERA (Jan. 27, 2017), https://www.aljazeera.com/news/2017/01/high-court-blocks-nigeria-oil-spill-case-shell-170126132912975.html [https://perma.cc/7HGJ-AEH5]. Thousands of residents of Nigeria's Niger Delta region commenced legal action against Shell, demanding action over decades of oil spills there that the claimants argued had devastated their lives, harmed the environment, and caused diseases.

[32] Steven Mufson, *BP's Bill for the World's Largest Oil Spill Now Reaches $81 Billion*, SYDNEY MORNING HERALD NEWSPAPER (July 15, 2016), https://www.smh.com.au/business/bps-bill-for-the-worlds-largest-oil-spill-now-reaches-81-billion-20160715-gq67ui.html [https://perma.cc/2997-EL2S].

[33] *Id.*

[34] *Id.*

eign investors from developed economies whose sub-standard practices in a developing country have adversely affected HSCs.[35]

Section A of this Part discusses the adverse impact that some foreign investments have on HSCs.[36] Section B of this Part discusses desperate, often failed, attempts by affected HSCs to obtain a remedy within the existing dispute settlement framework.[37]

A. Adverse Impact of Foreign Investment-Related Activity

It has long been recognized that investor actions can adversely affect HSCs, and in many jurisdictions, such affected HSCs lack effective remedial options.[38] For example, oil producing companies have participated in gas flaring activities in various locations in Nigeria for decades.[39] Gas flaring is proven to be harmful to inhabitants of nearby lands, violating their right to health, dignity, and life.[40] Shell's practices in the area have been notoriously damaging to the life, health, and livelihoods of the locals.[41] Forestry and large scale farming land concessions and activity have led to locals being forced off traditional lands in Cambodia, which has obliterated their economic and cultural life

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[35] For instance, Canadian companies have been accused of undesirable practices in other jurisdictions. John Ahni Schertow, *Briefing on the Human Rights and Environmental Abuses of Canadian Corporations*, IC MAG. (Dec. 28, 2009), https://intercontinentalcry.org/briefing-on-the-human-rights-and-environmental-abuses-of-canadian-corporations/ [https://perma.cc/AZU4-X5PC].

[36] *See infra* notes 38–49 and accompanying text.

[37] *See infra* notes 50–69 and accompanying text.

[38] Carola Glinski, *The Ruggie Framework, Tort Law and Business Human Rights Self-Regulation: Increasing Standards Through Mutual Impact and Learning* 2 (University of Copenhagen Legal Studies Research Paper Series, Paper No. 2017-41, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2997971 [https://perma.cc/9D89-HBQW] (citing ORG. FOR ECON. CO-OPERATION AND DEV'T, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), http://www.oecd.org/corporate/mne/48004323.pdf [https://perma.cc/2V9A-CZCY]; Comm'n on Human Rights, *Norms on the Responsibilities of Transnational Corps. and Other Bus. Enters. with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter Comm'n on Human Rights, *Norms on the Responsibilities of Transnational Corps.*]; Comm'n on Human Rights, *Report on the Forty-Sixth Session*, U.N. Doc E/1990/22 (1990)). *See generally* INT'L LABOUR OFFICE, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (5th ed. 2007), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf [https://perma.cc/L4YE-SX7S].

[39] Eferiekose Ukala, Note, *Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices,* 2 WASH. & LEE J. ENERGY, CLIMATE, & ENV'T 97, 103 (2011).

[40] Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd. [2005] 6 AHRLR 151, 152–54 (Nigeria).

[41] *See, e.g.*, Emily Gosden, *Why Shell's Bodo Oil Spill Still Hasn't Been Cleaned Up*, THE TELEGRAPH (Jan. 8, 2018), https://www.telegraph.co.uk/business/2017/01/08/yet-clean-nigerian-oil-spills-two-years-compensation-deal/ [https://perma.cc/HK9S-WLNS]; *Shell Sued in UK for "Decades of Oil Spills" in Nigeria*, AL JAZEERA (Nov. 23, 2016), https://www.aljazeera.com/news/2016/11/shell-sued-uk-decades-oil-spills-nigeria-161122193545741.html [https://perma.cc/8WP8-YW9C].

without due compensation.[42] To make way for the construction of a shopping mall, perpetrators forcibly evicted over one thousand house owners amidst police brutality from a village located on the Bassac River bank in Cambodia in May 2006.[43] Mining concessions and activities in many developing countries have had, and continue to have, an adverse impact on HSCs without due compensation.[44] Sometimes actual assault, intimidation, and, in extreme cases, murder occurs.[45] Investment in energy generation has also resulted in wide-

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[42] *See, e.g.*, Jeff Smith, *UN Presses Ministry to Protect Hill Tribes in Logging Dispute*, CAMBODIA DAILY (Mar. 9, 1998), https://www.cambodiadaily.com/archives/un%E2%80%88presses-ministry-to-protect-hill-tribes-in-logging-dispute-86426/ [https://perma.cc/G6HV-N663]; Yash Ghai (Special Representative of the Secretary-General for Human Rights in Cambodia)*, Report on the Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council*,*"* U.N. Doc. A/HRC/4/36 (Jan. 30, 2007); GLOBAL WITNESS, THE COST OF LUXURY (Feb. 2015), https://www.globalwitness.org/documents/17788/the_cost_of_luxury_1.pdf [https://perma.cc/DA7K-W7F5]; GLOBAL WITNESS, RUBBER BARONS (May 2013), https://www.globalwitness.org/documents/10525/rubber_barons_lores_0_1.pdf [https://perma.cc/AJA9-5Q4J]; GLOBAL WITNESS, CAMBODIA'S FAMILY TREES (June 2007), https://www.globalwitness.org/documents/14689/cambodias_family_trees_low_res.pdf [https://perma.cc/E6MZ-6TUM]; GLOBAL WITNESS, TAKING A CUT (Nov. 2004), https://www.globalwitness.org/documents/14709/takingacutlowres.pdf [https://perma.cc/77NL-KX33].

[43] *See e.g.*, *Cambodia's Disappearing Capital: Lake Inferior—The Poor Pay for a Property Boom,* ECONOMIST (Jan. 29, 2009), https://www.economist.com/asia/2009/01/29/lake-inferior [https://perma.cc/8KQR-3KGD]; Asian Human Rights Comm'n, *Cambodia: The Situation of Human Rights in 2006* (Dec. 21, 2006), http://material.ahrchk.net/hrreport/2006/Cambodia2006.pdf [https://perma.cc/6QDG-5L6Z]; U.N. Special Representative of the Secretary-General for Human Rights in Cambodia*,* Cambodia Office of the High Comm'r for Human Rights, *Economic Land Concessions In Cambodia: A Human Rights Perspective* (June 2007), http://cambodia.ohchr.org/~cambodiaohchr/sites/default/files/Economic%20Land%20Concession%20-%20a%20human%20rights%20perspective%202007.pdf [https://perma.cc/E37T-FR85].

[44] *See, e.g.*, Deanna Kemp & John R. Owen, *The Reality of Remedy in Mining and Community Relations: An Anonymous Case-Study from Southeast Asia, in* BUSINESS AND HUMAN RIGHTS IN SOUTHEAST ASIA 239 (Mahdev Mohan & Cynthia Morel eds., 2015) [hereinafter BUSINESS AND HUMAN RIGHTS IN SOUTHEAST ASIA]; Mahdev Mohan, *Human Rights Risks Amidst the 'Gold Rush': Cambodia, Laos, Myanmar and Vietnam, in* BUSINESS AND HUMAN RIGHTS IN SOUTHEAST ASIA, *supra,* 133, 150–51; *see also* Roseanne Gerin, *Myanmar Police Arrests Two in Letpadaung Copper Mine Protest,* RADIO FREE ASIA (May 6, 2016) http://www.rfa.org/english/news/myanmar/myanmar-police-arrest-two-in-letpadaung-copper-mine-protest-05062016164650.html [https://perma.cc/7BY8-QW7E]; Wa Lone, *Fresh Tension, Injuries at Letpadaung Mine,* MYANMAR TIMES (Feb. 16, 2015) http://www.mmtimes.com/index.php/national-news/13144-fresh-tension-injuries-at-letpadaung-mine.html [https://perma.cc/54U4-Z8PA]; *Myanmar: Letpadaung Mine Protesters Still Denied Justice*, AMNESTY INT'L (Nov. 27, 2015), https://www.amnesty.org/en/latest/news/2015/11/myanmar-letpadaung-mine-protesters-still-denied-justice/ [https://perma.cc/5HWF-X7X4].

[45] Roseanne Gerin, *As Many as 10 Myanmar Villagers Injured in Shooting at Letpadaung Copper Mine,* RADIO FREE ASIA (Mar. 24, 2017), http://www.rfa.org/english/news/myanmar/as-many-as-10-myanmar-villagers-injured-in-shooting-at-letpadaung-copper-mine-03242017164150.html [https://perma.cc/CHT5-UJ8N]; *Thailand: Mining Company Must Withdraw Threat of Legal Actions Against Community Leaders,* FORUM-ASIA (Oct. 28, 2014), https://www.forum-asia.org/?p=17885 [https://perma.cc/KZX4-M9EE]; Equitable Cambodia & Inclusive Dev. Int'l, *Bittersweet Harvest: A Human Rights Impact Assessment of the European Union's Everything but Arms Initiative in Cambodia* (2013), https://www.inclusivedevelopment.net/wp-content/uploads/2013/10/Bittersweet_Harvest_web-version.pdf [https://perma.cc/XR3Q-EGSJ].

ranging negative social and environmental harm to thousands of HSCs.[46] Some local workers have been subjected to what is tantamount to modern day slavery practices.[47] Other forms of labour rights abuses and child labour have occurred in some places.[48] Some companies' activities have damaged water bodies and access to clean water by locals.[49]

B. Desperation of HSCs for Remedies

As previously stated, under the current system, HSCs who are victims of adverse impact from investment activities are expected to seek remedies in their domestic fora, the very fora perceived to be inadequate for foreign inves-

[46] *See, e.g.*, Chris Greacen & Apsara Palettu, *Electricity Sector Planning and Hydropower in the Mekong Region, in* DEMOCRATIZING WATER GOVERNANCE IN THE MEKONG REGION 93 (Louis Lebel et al. eds., 2007); Ian G. Baird & Noah Quastel, *Rescaling and Reordering Nature-Society Relationship: The Nam Theun 2 Hydropower Dam and Laos-Thailand Electricity Networks*, 105 ANNALS ASS'N AMERICAN GEOGRAPHERS 1221, 1226 (2015); Ikuko Matsumoto, *Laos' Nam Theun 2 Dam Starts Operation*, INT'L RIVERS (Mar. 23, 2010) https://www.internationalrivers.org/resources/laos-nam-theun-2-dam-starts-operation-3478 [https://perma.cc/HNT8-U9VE]; *see also* Brendan M. Howe & Seo Hyun Rachelle Park, *Laos: The Dangers of Developmentalism?*, 2015 S.E. ASIAN AFFAIRS 165, 173–76 (2015); *Don Sahong Dam*, INT'L RIVERS (Sept. 5, 2018), https://www.internationalrivers.org/campaigns/don-sahong-dam [https://perma.cc/Q974-WHHA]; *Update: Nam Theun 2 Hydropower Project, Laos,* EUROPEAN INV'T BANK (Nov. 9, 2015), http://www.eib.org/infocentre/press/news/topical_briefs/2005-november-01/nam-theun-2-hydropower-project-laos.htm [https://perma.cc/8JBT-NQ8R]; *What Is the Don Sahong Dam Project?*, WWF-CAMBODIA, https://web.archive.org/web/20170702204651/http://cambodia.panda.org/projects_and_reports/don_sahong_dam/ [https://perma.cc/BL7U-AJ9R].

[47] CARL MIDDLETON & ASHLEY PRITCHARD, CORPORATE ACCOUNTABILITY IN ASEAN: A HUMAN RIGHTS-BASED APPROACH 74 (2013) http://www.forum-asia.org/uploads/publications/2013/September/Corporate-Accountability-ASEAN-FINAL.pdf [https://perma.cc/SM7Y-7LXY]; Kate Hodal & Chris Kelly, *Trafficked into Slavery on Thai Trawlers to Catch Food for Prawns,* THE GUARDIAN (June 10, 2014), https://www.theguardian.com/global-development/2014/jun/10/-sp-migrant-workers-new-life-enslaved-thai-fishing [https://perma.cc/JB8D-PZYZ]; Margie Mason et al., *Shrimp Sold by Global Supermarkets Is Peeled by Slave Labourers in Thailand*, THE GUARDIAN (Dec. 15, 2015), https://www.theguardian.com/global-development/2015/dec/14/shrimp-sold-by-global-supermarkets-is-peeled-by-slave-labourers-in-thailand [https://perma.cc/JJ24-TMP3]; Becky Palmstrom, *Forced to Fish: Slavery on Thailand's Trawlers*, BBC NEWS (Jan. 23, 2014), http://www.bbc.com/news/magazine-25814718 [https://perma.cc/V46D-D8TD]; *Indonesia: Burmese Workers in Slave-Like Conditions to Catch Seafood Supplying US Businesses*, BUS. & HUMAN RIGHTS RES. CTR., https://business-humanrights.org/en/indonesia-burmese-workers-in-slave-like-conditions-to-catch-seafood-supplying-us-businesses [https://perma.cc/H5PT-7UFV]; Letter from 45 Regional and International Nongovernmental Organizations and Labor Associations to Gen. Prayuth Chan-ocha, Prime Minister of Thailand (Jan. 14, 2015), https://www.hrw.org/sites/default/files/related_material/Letter%20to%20Thai%20PM%20regarding%20prison%20labor_FINAL.pdf [https://perma.cc/D9RE-NTPL].

[48] IRENE PIETROPAOLI & BOBBIE ST. MARIA, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, BRIEFING: DEVELOPMENT FOR ALL, OR A PRIVILEGED FEW? 16–17, https://www.ohchr.org/Documents/Issues/Business/AsiaForum/Southeast_Asia_Briefing_16April_2015.pdf [https://perma.cc/U4HS-7G7Y]; Surya P. Subedi (Special Rapporteur on the Situation of Human Rights in Cambodia), *A Human Rights Analysis of Economic and Other Land Concessions in Cambodia*, U.N. Doc. A/HRC/21/63/Add.1/Rev.1, at 54–55 (Oct. 11, 2012).

[49] Subedi, *supra* note 48, at 54–55.

tors. Unsurprisingly, those fora turn out to be woefully unhelpful to victims in many developing countries. In many of the incidences mentioned above, the affected HSCs did not have an avenue for effective remedy. Incidences in Cambodia and Nigeria offer specific examples.

In August 2006, the Cambodian government granted land concessions covering vast tracts of land to two companies in a province called Koh Kong. The two companies, Koh Kong Sugar Industry Co. Ltd. ("KKS") and Koh Kong Plantation Co. Ltd. ("KKP"), were owned 70% by a Thai company, Khon Kaen Sugar Industry Group, and 30% by a Taiwanese company, Ve Wong Corporation.[50] The concessions involved forced evictions of HSCs from their traditional lands.[51]

In February 2007, Civil Society Organisations (CSOs) representing the affected HSCs filed a complaint against KKS and KKP in Cambodia's Koh Kong Provincial Court seeking cancellation of the concession granted to KKS and KKP. [52] They argued that the transfer of the land was illegal because the concession (1) contravened Cambodian law against the arbitrary expropriation of private property; (2) breached the right of the affected HSCs to fair and just compensation for acquisition of their registered land; (3) contravened Cambodian law prohibiting the grant of concessions of state-private land of more than ten thousand hectares to the same person or company (the concession covered two lots spanning ten thousand hectares land); and (4) contravened the requirement that environmental and social impact assessments must be carried out, that public consultations be held with potentially affected communities, and that solutions for voluntary resettlement be reached before economic land concessions are granted.

In March 2007, a group of the affected HSCs travelled to Phnom Penh, Cambodia's capital, to submit complaints to the country's National Assembly, the Ministry of the Interior, the Council of Ministers, and other government bodies. The discussions with various government bodies that continued over the following two years did not resolve the issues.

In September 2012, more than five years after the affected HSCs petitioned the Koh Kong Provincial Court, the court ruled that it did not have the

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[50] *See* Kuch Naren, *Thai Representative Meets with Koh Kong 'Blood Sugar' Families*, CAMBODIA DAILY (Feb. 28, 2013), http://www.cambodiadaily.com/archive/thai-representative-meets-with-koh-kong-blood-sugar-families-11884 [https://perma.cc/BJ9C-ZNBV]. A Cambodian businessman and Senator, Ly Yong Phat, originally owned 20% of the plantations but reportedly sold his stake to Kong Kaen in 2010.

[51] For further facts and commentary on the case, see Mahdev Mohan*, The Road to* Song Mao*: Transnational Litigation from Southeast Asia to the United Kingdom,* 107 AM. J. INT'L L. UNBOUND e-30, e-30 (2014), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/CFDC97535628A0145944F1AE74526D01/S239877230000966 1a.pdf/road_to_song_mao_transnational_litigation_from_southeast_asia_to_the_united_kingdom.pdf [https://perma.cc/VGC9-VADE].

[52] *Id.*

power to hear the dispute.[53] The court transferred the case to a Cambodian alternative dispute resolution body, the Cadastral Survey Commission, to take action.[54] It is unclear whether the commission took any action.

The unsuccessful attempts by the affected HSCs to obtain redress in the Cambodian court system epitomises the problems some HSCs face in seeking remedies in their domestic system. Efforts at the domestic level by wronged HSCs in other jurisdictions have been similarly ineffective. Even in the rare case where a domestic court in Nigeria granted a declaration against gas flaring in favour of affected HSCs, as well as a restraint on the government of Nigeria and Shell Petroleum,[55] gas flaring continued.[56]

Some desperate HSCs who are unable to obtain remedies at home have resorted to unorthodox methods. Some have initiated suits in the investors' home state or other locations where the investor conducts substantial operations. An example is the ultimately unsuccessful U.S. Supreme Court case of *Kiobel v. Royal Dutch Petroleum Co.,* decided in 2013,[57] in which a group of Nigerians sued Shell in the United States under the Alien Tort Statute for alleged torts committed by Shell in Nigeria. An earlier example is *Bowoto v. Chevron Corp.*, decided in 2010 by the United States Court of Appeals for the Ninth Circuit, in which claims by a group of desperate Nigerians failed.[58] Furthermore, in *Wiwa v. Shell Petroleum Development Co.,* on the night before the trial commenced at the United States Court of Appeals for the Second Circuit in 2009, Shell agreed to settle after thirteen years of litigation.[59]

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[53] *Id.*

[54] *Id.*

[55] *Gbemre*, 6 AHRLR at 155–56.

[56] *Shell Still Flaring Gas, Defying Nigerian Courts,* FRIENDS OF THE EARTH EUROPE (May 3, 2007), http://www.foeeurope.org/press/2007/May3_DU_Flaring.htm [https://perma.cc/Y6VW-CEYS]; *Gas Flares Still a Burning Issue in the Niger Delta,* IRIN (Mar. 8, 2012), http://www.irinnews.org/report/95034/nigeria-gas-flares-still-burning-issue-niger-delta [https://perma.cc/H78Q-RWRR] ("While gas flaring has technically been illegal in Nigeria since 1984, the government sometimes grants exemptions to oil companies.").

[57] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 113–14 (2013).

[58] Bowoto v. Chevron Corp., 621 F. 3d 1116, 1120–21 (9th Cir. 2010).

[59] Ed Pilkington, *Shell Pays Out $15.5m Over Saro-Wiwa Killing*, THE GUARDIAN (June 8, 2009), http://www.theguardian.com/world/2009/jun/08/nigeria-usa [https://perma.cc/QEE3-H6AL]; Press Release, Center for Constitutional Rights, Settlement Reached in Human Rights Case Against Royal Dutch/Shell (June 8, 2009), https://ccrjustice.org/home/press-center/press-releases/settlement-reached-human-rights-cases-against-royal-dutchshell [https://perma.cc/92SE-5JV2]. In January 2013, four out of five claims against Shell arising out of spills in Nigeria were quashed by a Dutch court. Fiona Harvey & Afua Hirsch, *Shell Acquitted of Nigeria Pollution Charges*, THE GUARDIAN, (Jan. 30, 2013), http://www.theguardian.com/environment/2013/jan/30/shell-acquitted-nigeria-pollution-charges [https://perma.cc/3NBF-X6LD]. The matter has been so protracted that the UNEP compiled a report on the issue. *See generally* U.N. Env't Programme, *Environmental Assessment of Ogoniland* (2011), https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf [https://perma.cc/4CVX-GUH3].

In the Cambodian example mentioned above, while the HSCs' petition to the Koh Kong Provincial Court stalled, the claimants sought recourse beyond Cambodia.[60] In January 2010, they filed a complaint in Thailand, the home state of the majority owner, KSL.[61] They filed the complaint before the National Human Rights Commission of Thailand ("Thai Commission") alleging that KSL, through its subsidiaries in Cambodia, had obtained the land concession illegally.[62] The Thai Commission accepted jurisdiction and investigated the claim.[63] It found evidence of breaches of human rights principles and instruments.[64] However, the Thai Commission did not have the power to bind the company.

In 2013, the HSCs commenced proceedings in the United Kingdom's High Court against Tate & Lyle Industries Ltd., a UK-based company to which KKS and KKP sold the produce from the disputed land.[65] The claim was based on the tort of conversion, a tortious protection against wrongful interferences with goods.[66] The HSC claimants argued that, as purchasers of the produce from the sugarcane grown on the land from which they were violently and unlawfully expelled, the defendants wrongfully deprived them of their property.[67]

In 2014, in *Bodo Community v. Shell Petroleum Development Co. of Nigeria*, more than 15,000 HSCs sought compensation under the law of Nigeria in relation to oil spills from pipelines said to have been caused by Shell in the Niger Delta.[68] When the claimants sued in the United Kingdom, Shell settled the case for $55 million Euros without admitting liability.

Litigation has been initiated in the Netherlands too. In *Dooh et al. v. Royal Dutch Shell*, Nigerians sued Shell in the Netherlands for the harm its opera-

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[60] Mohan*, supra* note 51, at e-30.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at e-30 n.2 (citing Particulars of Claim, Song Mao v. Tate & Lyle Indus. Ltd., Claim No. 2013 Folio 451 [2013] EWHC (Comm.) [2013] QB (Eng.), https://www.business-humanrights.org/sites/default/files/media/documents/tate-lyle-particular-of-claim-28-mar-2013.pdf [https://perma.cc/J48G-CE8K]).

[66] Conversion has been the primary vehicle for tortious protection against interferences with goods. *See generally* ROBIN HICKEY, PROPERTY AND THE LAW OF FINDERS (2010).

[67] *See* Mohan, *supra* note 51, at e-30 n.2 (citing Particulars of Claim, *Song Mao*, [2013] EWHC (Comm.)). The status of the case is unclear. There does not seem to have been a valid judgement handed down by the court, five years after it was filed. It was listed for hearing, but the hearing did not happen. *See Did the Cambodian Sugar Case Settle?* CORP. WAR CRIMES (May 1, 2015), https://corporatewarcrimes.com/2015/05/01/did-the-cambodian-sugar-case-settle/ [https://perma.cc/F63P-PNT6].

[68] Glinski, *supra* note 38, at 10 (citing Bodo v. Shell Petroleum Dev. Co. of Nigeria [2014] EWHC (TCC) 1973, [2014] QB (Eng.)).

tion in the Niger Delta area caused them.[69] It can be seen from the above discussions that investment-related activities sometimes harm HSCs. In response, HSCs have pursued remedies, but their pursuit has been difficult. I now turn to efforts at resolving this difficulty.

III. Efforts So Far at Solving the Problems

This Part looks briefly at the United Nation's main efforts to address the problems identified in Part II. I conclude that those efforts have been ineffective; there remains a serious lack of access to effective remedies for HSCs in many developing countries.

For decades, the UN has made efforts to aid HSCs. There was a UN report in 1973 looking into the conduct of multinational corporations in developing countries.[70] In 1983, the UN drafted a code of conduct on transnational corporations, which, among other things, called on corporations to respect and observe domestic laws, regulations and administrative practices.[71] Article 9 of the code called on transnational corporations to adhere to the economic goals and development objectives, policies, and priorities of the host states, while Article 12 called on them to adhere to socio-cultural objectives and values.[72]

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[69] Cees van Dam, *Preliminary Judgments Dutch Court of Appeal in the Shell Nigeria Case*, ¶ 1 (Jan. 14, 2016), http://www.ceesvandam.info/default.asp?fileid=643 [https://perma.cc/YJ8F-L6MH].

[70] *See* U.N. Secretary-General, *The Impact of Multinational Corporations on the Development Process and on International Relations*, U.N. Doc E/5500 (June 14, 1974). *See generally* Christopher May, *Multinational Corporations in World Development: 40 Years On,* 38 THIRD WORLD Q. 2223 (2017) (reviewing the first major discussion at the UN on the role of multinational corporations in world development in 1973, and attempts at progressing the discussions over the following forty years).

[71] *See* Commission on Transnational Corporations, *Draft United Nations Code of Conduct on Transnational Corporations*, ¶¶ 6–8, U.N. Doc. E/1983/17/Rev.1, annex II, 23 I.L.M. 626 (1984).

[72] *Id*. arts. 9, 12. Articles 9 provides:

> Transnational corporations shall/should carry on their activities in conformity with the development policies, objectives and priorities set out by the Governments of the countries in which they operate and work seriously towards making a positive contribution to the achievement of such goals at the national and, as appropriate, the regional level, within the framework of regional integration programmes. Transnational corporations shall/should co-operate with the Governments of the countries in which they operate with a view to contributing to the development process and shall/should be responsive to requests for consultation in this respect, thereby establishing mutually beneficial relations with these countries.

Id. art. 9. Article 12 provides:

> Transnational corporations should/shall respect the social and cultural objectives, values and traditions of the countries in which they operate. While economic and technological development is normally accompanied by social change, transnational corporations should/shall avoid practices, products or services which cause detrimental effects on cultural patterns and socio-cultural objectives as determined by Governments. For this

Most significantly, Article 13 called on transnational corporations to respect human rights and fundamental freedoms.[73] But, the document remained a draft and does not have the force of law. In 1990, a UN intergovernmental working group drafted a code of conduct for transnational corporations.[74] Consequently, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights was adopted in 2003.[75] The UN's Global Compact also offers guidance to businesses in implementing socially responsible policies.[76] The most acclaimed of the recent efforts is John

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> purpose, transnational corporations should/shall respond positively to requests for consultations from Governments concerned.

Id. art. 12.

[73] *Id.* art. 13. Article 13 provides as follows:

> Transnational corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations should/shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational corporations should/shall conform to government policies designed to extend equality of opportunity and treatment.

Id.

[74] Glinski, *supra* note 38, at 2 (citing Comm'n on Human Rights, *Report on the Forty-Sixth Session*, *supra* note 38).

[75] *Id.* (citing Comm'n on Human Rights, *Norms on the Responsibilities of Transnational Corps.*, *supra* note 38).

[76] The United Nations Global Compact ("UNGC") is a UN initiative to encourage businesses worldwide to adopt sustainable and socially responsible policies, and to report on their implementation. Its mission is to support companies to (1) do business responsibly by aligning their strategies and operations with UNGC's Ten Principles on human rights, labour, environment, and anti-corruption; and (2) take strategic actions to advance broader societal goals, such as sustainable development, with an emphasis on collaboration and innovation. UNGC's ten principles (grouped under the four themes of human rights, labour, environment and anti-corruption) are as follows:

> *Human Rights*
> Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
> Principle 2: make sure that they are not complicit in human rights abuses.
>
> *Labour*
> Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
> Principle 4: the elimination of all forms of forced and compulsory labour;
> Principle 5: the effective abolition of child labour; and
> Principle 6: the elimination of discrimination in respect of employment and occupation.
>
> *Environment*
> Principle 7: Businesses should support a precautionary approach to environmental challenges;
> Principle 8: undertake initiatives to promote greater environmental responsibility; and
> Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Ruggie's, "Protect, Respect and Remedy Framework," which led to the UN Guiding Principles on Business and Human Rights in 2011.[77] The attempts so far "have either failed," "remained soft law" or relied on "the voluntary co-operation of transnational corporations."[78] Currently, transnationally active corporations are not bound by public international law obligations.[79] Obligations, if any, are seen mainly in terms of the domestic law of the host state, and not as an overarching international standard. Ruggie has thus surmised that the challenge is to change the fact that "[e]ach legally distinct entity is subject to the laws of the countries in which it operates, but the corporate group as a whole is not governed directly by international law."[80]

While the focus of this Essay is for a where harmed HSCs may access effective remedies, rather than the substantive law on, or source of, obligations of foreign investors, I will briefly comment on the supposed challenge of subjecting multinational investors to international law. The idea that the obligations of investors are determined by the host state where the investors are operating is rooted in the notions of state sovereignty,[81] non-interference,[82] and

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> *Anti-Corruption*
> Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

U.N. GLOB. COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles [https://perma.cc/2ANR-SZ67].

[77] Glinski, *supra* note 38, at 4; *see also* U.N. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

[78] Glinski, *supra* note 38, at 4.

[79] *Id.* at 2 (citing Errol Meidinger, *Multi-Interest Self-Governance Through Global Product Certification Programmes, in* RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND THE LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 259 (Olaf Dilling et al. eds., 2008)).

[80] *Id.* (quoting John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 824 (2007)).

[81] Jibin Mary George, *Doctrine of Sovereignty*, ACADEMIKE (Apr. 30, 2015), https://www.lawctopus.com/academike/doctrine-of-sovereignty/ [https://perma.cc/KH5Y-SJC] ("In the simplest terms, the doctrine of sovereignty refers to the quality of enjoying a superseding authority over a geographical area or a populace."). Sovereignty, in the relation between states, signifies independence. Independence with regard to a territory (i.e., a portion of the globe) is a state's right to exercise therein, to the exclusion of any other state, the functions of that state. *See* Island of Palmas Case (Netherlands v. U.S.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928).

[82] The principle of non-interference is the corollary doctrine of sovereignty. Essentially, sovereign states shall not intervene in each other's internal affairs. It is based on the respect for states' sovereignty and territorial integrity, which governs the relationship between states with regard to their rights and obligations. It is seen as a general principle of customary international law, but it is also enshrined in the UN Charter (Article 25). For discussions of the principle, see generally Zhang Naigen, *The Principle of Non-interference and Its Application in Practices of Contemporary International Law,* 9 FUDAN J. HUMAN. & SOC. SCI. 449 (2016).

territoriality.[83] That is, domestic laws in a country are determined by that sovereign state, and it is those domestic laws that determine what obligations are owed by individuals and entities within the jurisdiction. In other words, it is solely domestic law that determines legality and compensation schemes. Other countries cannot make laws for the internal operations of another country. Where there are weak or non-existent laws to protect citizens or the environment, investors can take advantage of the situation and operate "legally" within the laws of the host state, while blatantly harming citizens or the environment generally. Where the laws are there, they are probably there because they are copied from another jurisdiction (i.e., legal transplant), but are poorly understood or enforced, and investors can still take advantage of them.

When sovereignty and territoriality did not suit advanced countries, those countries formulated and imposed an international minimum standard of treatment for countries, specifically developing countries. Developing countries in Latin America in the mid-nineteenth century and later in Asia and Africa in the mid-twentieth century, tried to use notions of sovereignty and equality to subject foreign investors to their local laws.[84] Their argument, which has become known as the Calvo doctrine (named after its chief proponent, Carlos Calvo) is to the effect that:

> [I]f the host State treated foreign investors without discrimination, and on a par with nationals of the country, then that host State was in compliance with the norms of international law . . . . Essentially, the Calvo doctrine views the principle of sovereignty of States to entail: (a) absolute equality before the law between nationals and foreigners; (b) exclusive subjection of foreigners and their property to

[83] "Title to territory is based on Sovereignty." DONALD R. ROTHWELL ET AL., INTERNATIONAL LAW: CASES AND MATERIALS WITH AUSTRALIAN PERSPECTIVES 333 (2014). The territoriality principle is a principle of public international law that bars states from exercising jurisdiction beyond their borders, unless they have jurisdiction under other principles. *See, e.g.*, CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 6–8 (2015); *see also* Anna Stilz, *Why Do States Have Territorial Rights?*, 1 INT'L THEORY 185, 186 (quoting A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 306 (1992) to explain that state rights over territory include "(a) rights to exercise jurisdiction (either full or partial) over those within the territory, and so to control and coerce in substantial ways even non-citizens within it; (b) rights to reasonably full control over land and resources within the territory that are not privately owned; (c) rights to tax and regulate uses of that which is privately owned within the state's claimed territory; (d) rights to control or prohibit movement across the borders of the territory; and (e) rights to limit or prohibit ''dismemberment'' of the state's territories").

[84] Laryea, *supra* note 19, at 294–95 (citing NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 465–66 (2009); DONALD R. SHEA, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY 17–19 (1955); Alwyn V. Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge to International Law,* 40 AM. J. INT'L L. 121 (1946); K. Lipstein, *The Place of the Calvo Clause in International Law*, 22 Brit. Y.B. Int'l L. 130 (1945); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 20–24 (2005)).

> the laws and jurisdictions of the country in which they reside or invest; and (c) abstention from intervention by other governments, particularly those of countries whose nationals are investing or residing abroad and who may be in dispute with the nationals or governments of the host country.[85]

The Calvo doctrine was rejected by developed countries, who claimed a State was instead bound by standard international law rules, which entail an international minimum standard of treatment.[86] Developed countries rejected the supremacy of the laws of sovereign states within their jurisdictions, and superimposed an overarching international standard because they feared that the Calvo doctrine rendered investments of their citizens vulnerable in developing countries. And that fear was not unfounded. For example, there were nationalizations in Africa and Asia without appropriate compensation.[87] So, it is understandable that developed countries advocated for an international standard.

But, the duplicity of developed countries is betrayed when they say the obligations of investors is a matter for the host state. They say so for two reasons. First, they are likely to be capital exporters to developing countries, and therefore, ultimate beneficiaries of the lapses in developing countries that are taken advantage of by their investors.[88] Second, their domestic laws and institutions are strong and so they will not suffer the effect of the lack of laws that impose minimum standards on investors. They see no advantage or need for international standards on investors' behavior that would only benefit developing countries, and arguably reduce the profits of their corporations. For instance, as previously stated above, BP's spillage in the Gulf of Mexico resulted in $61 billion in penalties, compensation, and clean-up costs[89] because

[85] *Id.* (citing SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 14 (2008); Wil D. Verwey & Nico J. Schrijver, *The Taking of Foreign Property Under International Law: A New Legal Perspective?*, 15 NETHERLANDS Y.B. OF INT'L L. 3, 23 (1984)).

[86] *Id.* at 295 (citing SUBEDI, *supra* note 85, at 15; Elihu Root, *The Basis of Protection to Citizens Residing Abroad,* 4 AM. J. INT'L L. 517, 528 (1910)).

[87] An African example is Libya's nationalization of foreign interests in petroleum concessions within the country, an action that generated a few notable cases. *See, e.g.*, British Petroleum Co. v. Libya*,* Award (Oct. 10, 1973), 53 I.L.R. 297 (1974); Texaco Overseas Petroleum Co. v. Libya*,* Award, 104 J. Droit Int'l 350 (1977), 17 I.L.M. 1 (1978); Libya Am. Oil Co. v. Libya*,* 20 I.L.M. 1 (ICC Int'l Ct. Arb.1977). *Texaco Overseas Petroleum Company* is noted to be the first case in the history of international arbitration relating to development contracts where an arbitral tribunal held that the injured parties were entitled to restitution in *integrum,* and that the sovereign State was obliged to perform specifically its contractual obligations with private foreign investors. Laryea, *supra* note 19, at 295.

[88] With the exception of a few developing countries, such as China (if we can still call it a developing country), most developing countries are net importers of capital.

[89] *See* Mufson, *supra* note 32.

there are strong laws and enforcement mechanisms in the United States. The same cannot be said of Shell's spills and devastating pollution in Nigeria.

I am not against minimum international law standards that must be upheld by States to give protection to investors and their investments abroad. Actions of some developing HSGs towards foreign investors are clearly abusive of investors' rights.[90] But, I am in favor of balanced protections: protections for the investor, and protections against the investor's wrongs. If developed countries endorsed such efforts, international standards could be set for both. As it stands, they have taken the low road by seeking protection for investors against the weak laws and institutions in developing countries, but not against the harm inflicted by investors.

There is a glimpse of hope for an international legally binding instrument on the conduct of transnational corporations eventuating from the work of the UN's Human Rights Council, which is considering such an option.[91] But, as noted above, this is not the first time such options have been considered. There

[90] In *Biloune & Marine Drive Complex Ltd. v. Ghana Investments Centre & Government of Ghana*, 95 I.L.R. 184 (Perm. Ct. Arb. 1990), for instance, the Claimants (Antoine Biloune and Marine Drive Complex Ltd. (a Ghanaian corporation in which Biloune was the principal shareholder) entered into a joint venture agreement with the Ghana Tourist Development Company ("GTDC"), a government agency. The venture was for the construction and management of a new four-star hotel resort complex. GTDC contributed the land, for a share of 51% stake in the venture, and MDCL was to finance and manage the construction and operation of the hotel, for a share of 49% in the venture. *Id.* MDCL applied to the Ghana Investment Centre ("GIC"), another state agency, and was given approval for the investment. *Id.* About a year into the construction, the local government in the area where the land was located, the Accra City Council, served notice on the parties to the venture to stop work, and to "show cause" why the construction should not be demolished. *Id.* Before the expiration of the notice period given to show cause, the construction was demolished. Biloune and other officers of MDCL were asked to report to the National Investigations Committee ("NIC"). *Id.* NIC asked Biloune to declare his assets, giving him a form to complete for that purpose. Subsequently, NIC referred Biloune to the Office of Revenue Commission. After Biloune and his accountants requested and obtained several extensions on the deadline to file his declaration form, he was arrested and held in custody for thirteen days without charge. *Id.* He was then deported from the country, on the grounds that his presence in Ghana was "not conductive to the public good," and he was warned never to return to the country. *Id.* The tribunal found that "the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Biloune without possibility of re-entry" had the effect of constructively expropriating MDCL's assets, and Biloune's investment. *Id.* Even if Biloune infringed any laws of Ghana (and, Ghana adduced very little evidence to that effect), the Ghanaian authorities seem to have abused their authority in their treatment of him. *Id.*

[91] For the text of the draft of the legally binding instrument, see U.N. Human Rights Council, *Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises* (July 16, 2018), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf [https://perma.cc/Y28W-LDNX].

have been several attempts in the past, and they have all failed because of the lack of support from developed countries.[92]

Treaties are one of many sources of international legal obligations. Article 38(1) of the Statute of the International Court of Justice ("ICJ Statute"), which is generally considered to be the most authoritative enumeration of the sources of international law, identifies sources of international law other than treaties. These include "general principles of law recognized by civilized nations."[93] International tribunals have applied general principles of law in deciding cases. For instance, in *Amco Asia Corporation v. Indonesia,* decided in 1984, the ICSID tribunal "looked to general principles of law rather than to the treaty's terms for guidance" in calculating damages to be paid by Indonesia.[94] The tribunal referred to and applied the general principles governing damages for contractual liability under Indonesian law, French law, English law and U.S. law, which it found to be similar.[95] Similarly, it is arguable that general principles of the tort of negligence (duty on investors, or their activities, not to cause harm) can be deduced for application.[96] Even if general international principles of tort cannot be readily deduced, arbitral tribunals may apply the tort law of the state where the harm was caused, which is likely to be the law of the host state.[97] As currently formulated, the ICJ Statute only binds consenting states.[98] Accordingly, international law generally only binds states.

But, this supposed barrier is, itself, part of the convenience and duplicity previously alluded to in this Essay. A state may subject its nationals, including corporations, to general principles of law. Tribunals may apply general principles of law to determine whether an investor has committed a wrong in a given

[92] For a detailed discussion of these efforts, see Karl P. Sauvant, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations*, 16 J. WORLD INV. & TRADE 11, 53–54 (2015).

[93] Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 STAN. J. INT'L L. 347, 362 n.68 (1998) (quoting Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060 (1945)).

[94] *Amco Asia Corp. v. Indonesia,* ICSID Case No. ARB/81/1, Award (Nov. 21, 1984), 24 I.L.M. 1022 (1985); KRISTA NADAKAVUKAREN SCHEFER, INTERNATIONAL INVESTMENT LAW: TEXTS, CASES AND MATERIALS 51 (2013).

[95] *Amco Asia Corp.*, 24 I.L.M. at 1036–37.

[96] *See, e.g.*, Glinski, *supra* note 38, at 6–7 (arguing that the basis of tort law on negligence are similar in English, German, and U.S. laws).

[97] This is the position taken by the European Union. *See* Council Regulation 864/2007, art. 4(1), 2007 O.J. (L 199) 40 (EC), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0864&from=EN [https://perma.cc/YSQ7-FCP7]. While this is EU specific, it may hold lessons for the IRDS proposed in this Essay.

[98] The ICJ is the principal judicial organ of the United Nations. All UN member states are parties to the Statute of the ICJ. *See* U.N. Charter arts. 92–93. "Only states may be parties in cases before the Court [ICJ]" and the "[t]he Court [ICJ] shall be open to the states parties to the present Statute." Statute of the International Court of Justice, arts. 34(1), 35(1), June 26, 1945, 59 Stat. 1055, 1060 (1945).

situation. Subjecting transnational corporations to international law may entail complex conceptual and doctrinal issues and arguments that are beyond the scope of this Essay. If developed economies wish to have that happen, though, it will likely happen, as is evidenced by the responsibility of states towards transnational corporations.

As previously stated, the focus of this Essay is determining a forum where harmed HSCs can access effective remedies. In many cases, such as those discussed in Part II.B above, the problem lies with the availability, quality, competence or effectiveness of the domestic forum, rather than with the substantive law of obligations. These deficiencies are what investors try to avoid when they argue for international arbitration. International arbitration between the HSCs and foreign investors will ameliorate that problem for HSCs. That is the focus of this Essay, to which I now turn.

IV. IRDS AS A SOLUTION

I propose making the current investment arbitration system (or an international investment court system that may eventuate) available to HSCs who are harmed by a foreign investor. Unlike the current ISA system, the IRDS system would give HSCs a forum to initiate arbitral proceedings against international investors. The IRDS would help solve the problem of the lack of access to remedies for HSCs.

Allowing HSCs to be able to seek remedies through international arbitration has numerous benefits. First, it will ameliorate, if not eliminate, their access to remedies problem.[99] Second, allowing HSCs to initiate arbitral proceedings will be just, fair, and equitable to both investors and HSCs. Third, the system will help balance the rights of investors and those of HSCs (currently, the system is lopsided in favor of investors). Fourth, it may mean that some investors will no longer be able to get away with sub-standard, damaging or harmful practices.[100] Fifth, where an investor does not have "sufficient assets . . . within a territory," an arbitral award would be better able to be "enforceable abroad, where more valuable assets may be located, than" a domestic court judgement.[101] Sixth, it may help reduce negative perceptions about, and backlash against, ISAs.[102] Seventh, such an avenue for remedies for possible harm

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[99] *See supra* notes 70–80 and accompanying text (discussing HSCs' access to remedies).

[100] *See supra* notes 38–49 and accompanying text (providing examples of past damaging and harmful investor practices).

[101] THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY, *supra* note 1, at 590.

[102] *See id.* at xxvii–xlv (outlining negative perceptions about ISAs, discussing the negative perceptions and backlash, and attempting to dispel some of those perceptions).

may help reduce social conflict surrounding some investments, and consequently, reduce delays and costs as well.

The IRDS proposed here is to be seen as an alternate forum to litigation in domestic courts against an investor for harm caused by the investor. Instead of going to a weak or ineffective domestic court, an HSC can go to arbitration. That means the complainant may be an individual or a group, possibly in a class action.

I anticipate economic, legal and systemic objections to this proposal. Therefore, Section A of this Part addresses the potential economic objections to establishing an IRDS system.[103] Then, Section B of this Part addresses the potential legal and systemic objections to establishing an IRDS system.[104]

A. Economic Objections

Possible economic objections are that such a system would (1) increase the risk of cases against investors and therefore, dissuade them from investing in developing countries; (2) lead to an increased cost of doing business in developing countries, making them uncompetitive and undermining their ability to attract investment; (3) waste investors' time and delay projects if multiple, particularly vexatious, proceedings are initiated; and (4) cost HSCs more in arbitration fees than they may be able to afford.

Apart from the objection that HSCs may not be able to afford the cost of arbitration, all the objections equally apply to litigation in domestic courts, which is already available to HSCs in the current system. HSCs who perceive that an investment activity will cause harm, or has caused harm, to their heath, property, or environment can initiate court action to obtain injunctive or other remedial relief against the investor. Several of these have been cited in Part III above.[105] Therefore, affording HSCs a better forum, as proposed in this Essay, should not increase the incidence of cases or the cost of doing business. It should not lead to delay of projects. If anything, the current system breeds discontent and social conflicts, which IRDS could ameliorate. Only investors who intend to operate by unacceptable standards, taking advantage of the lax systems in some developing countries, would have reason to fear that the access to effective international fora for remedies would thwart their intentions.

Arbitration costs could be substantial, and unaffordable by certain HSCs. Litigation can be costly too, though. Even if international arbitration is costlier, that should not be a reason for blocking access to the arbitration process to HSCs. Given the opportunity, impecunious HSCs who have been harmed by

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[103] *See infra* notes 105–106 and accompanying text.
[104] *See infra* notes 108–120 and accompanying text.
[105] *See supra* notes 70–80 and accompanying text.

investment activities may receive the help of benevolent organizations to take up their cause. Many of the cases referred to in Part III above were initiated with the support of benevolent organizations.[106] Further, considering that foreign investors are likely to have deep pockets, strong cases against them may be attractive to third-party funders, who may fund cases with the expectation of commercial benefit, or law firms pre-financing the case on the basis that their legal fees are contingent on being successful. Third-party funders and law firm pre-financing may help HSCs initiate claims in circumstances where the HSCs are unable to afford the costs of arbitration.

In summary, the proposed IRDS system, if implemented, would improve the current position of many HSCs and make investment arbitration, the dominant mechanism for settling investment disputes, work for all parties—investors and non-investors.

B. Legal or Systemic Objections

Two main legal or systemic objections may be raised. The first relates to the legal basis for claims. That is, by what law, international law or domestic law, would an investor's legal liability, or non-liability, be determined? The second objection relates to investors' consent to arbitrate. That is, as arbitration is a consensual dispute resolution mechanism, meaning no tribunal will have jurisdiction unless all parties to the dispute have consented to the tribunal's jurisdiction to determine the matter, how may an investor's consent be obtained?

I have previously discussed issues of substantive law in Part III above.[107] I do not intend to go over those again. I will, therefore, address only the issue of consent to arbitrate in this section. There are various ways by which the consent

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[106] *See, e.g.*, Mohan, *supra* note 51, at 32–35 (explaining a Cambodian case, *Song Mao*, involving the evictions for the sugar cane plantation where several CSOs, including Equitable Cambodia, Cambodian Human Rights and Development Association ("ADHOC"), Cambodian League of the Promotion and Defense of Human Rights ("LICADHO"), Citizens Commission on Human Rights ("CCHR"), and Community Legal Education Center ("CLEC"), worked in concert with the affected HSCs to document the abuses related to the land, and in seeking redress in the various fora). *Dooh et al. v. Royal Dutch Shell*, discussed above, was commenced in the District Court (Rechtbank) in The Hague by Friends of the Earth Netherlands on behalf of four representatives of HSCs in the Niger Delta area of Nigeria that were adversely affected by Shell's operations in the area. *See* Dam, *supra* note 69, ¶ 1; *see also* Jon Vidal, *Niger Delta Villagers Go to the Hague to Fight Against Oil Giant Shell*, THE GUARDIAN (Aug. 6, 2011), https://www.theguardian.com/world/2011/aug/06/shell-oil-spills-niger-delta-pollution [https://perma.cc/H7QF-344W]. *Wiwa v. Royal Dutch Petroleum*, discussed above, was initiated by the Centre for Constitutional Rights (A U.S.-based organization that is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights) on behalf of the HSCs. *See* Press Release, Center for Constitutional Rights, Settlement Reached in Human Rights Case Against Royal Dutch/Shell (June 8, 2009), https://ccrjustice.org/home/press-center/press-releases/settlement-reached-human-rights-cases-against-royal-dutchshell [https://perma.cc/92SE-5JV2]; Pilkington, *supra* note 59.

[107] *See supra* notes 70–98 and accompanying text.

of all parties, HSCs and investors, may be obtained. In the context of this Essay, HSCs are those who would be seeking arbitration. That is, they are the ones that will have the opportunity to initiate arbitration proceedings. It is fair to say that if an HSC initiates a proceeding as a claimant, that HSC would, by necessity, consent to the tribunal arbitrating the matter in dispute. If so, the consent of HSCs is a non-issue. The issue is the consent of the respondent investor.

There are several ways by which an investor's consent to arbitrate may be obtained. These include: (1) ad hoc, case by case, consent (i.e., giving consent when requested by an HSC after a dispute has arisen); (2) voluntarily making a standing offer of consent to all HSCs, which may be accepted by the act of initiating arbitral proceedings; (3) making a standing offer of consent to all HSCs in an investment contract between the investor and the host state, if there was such a contract; (4) a declaration in the host state's law that all foreign investors are deemed to have consented to arbitration initiated by HSCs; and (5) a declaration in a mandatory domestic licensing or authorization regime for foreign investors and investments stating that they have consented to arbitration proceedings initiated by HSCs. Some of these mechanisms are more practical, or would be more effective, than others. I look at each in turn.

1. Ad Hoc Consent

An investor would feasibly consent to a request by HSCs to arbitrate when a dispute has arisen. Such an option will not be of much help to HSCs, however. An investor who has caused harm, and thinks an award is likely to be made against it, is unlikely to consent to arbitration. This would be particularly unlikely if the investor believes that litigation in domestic courts of the host state would be to its advantage. An investor in such a situation is likely to decline consent, and to steer the harmed HSCs to the domestic courts, which, as previously stated, can turn out to be unhelpful in some jurisdictions.[108]

2. Standing Offer of Consent to All HSCs

An investor may make a standing offer of consent by publishing a declaration to HSCs who may wish to institute arbitral proceedings against it. This process is reminiscent of some governments' undertaking in domestic law that they consent to arbitration with foreign investors.[109] Such provisions are found

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[108] *See supra* notes 50–54 and accompanying text.

[109] *See, e.g.*, Ghana Investment Promotion Centre Act (2013), Act 865 (Ghana), http://www.gipcghana.com/press-and-media/downloads/promotional-materials/3-gipc-act-2013-act-865/file.html [https://perma.cc/5J5S-7FQK]. The Ghana Investment Promotion Centre Act states:

> (1) Where a dispute arises between a foreign investor and the Government in respect of an enterprise, effort shall be made through mutual discussion to reach an amicable set-

in investment promotion legislation or policy documents, and the offer of arbitration is independent of arbitration clauses in IIAs to which the government may be a party.

The advantage of the standing offer option is that it would have been made before a dispute arises between the HSCs and the investor. HSCs seeking to commence arbitral proceedings would not be at the mercy of the prospective respondent investor. And, HSCs would be able to initiate proceedings quicker, as they do not need to wait for the consent of the investor, which they may or may not get.

The big question, though, is whether prospective investors will make such standing offers to HSCs voluntarily. Why will an investor make such an offer, and thereby open itself up to arbitral proceedings, when it can limit any claims to domestic fora? One can envisage that, at best, investors of high repute, who are confident of operating impeccably or open to remedying their shortcomings are the ones who will make such an offer. Investors willing to take advantage of the weak system of laws and judiciaries are unlikely to be supportive of such a scheme.

Thus, a system providing a voluntary standing offer of consent is unlikely to be helpful to those HSCs who need it most. At best, there will be some investors willing to make the offer and some who will not be, and those who will not be are likely to be the ones against whom such consent would be most needed.

3. Standing Offer of Consent to All HSCs in Investment Contract with the Host State

Some investments by foreign entities are undertaken pursuant to signed contracts between the investor and the host state. This is usually the case with huge infrastructure projects (such as power generation and road construction) and exploitation of natural resources such as agricultural land use, forestry, logging, hard-rock minerals extraction, and oil and gas extraction. Such projects are the ones that most often cause harm to HSCs, and therefore, impose a

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> tlement. (2) A dispute between a foreign investor and the Government in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions within six months may be submitted at the option of the aggrieved party to arbitration as follows: a. in accordance with the rules of procedure for arbitration of the United Nations Commission of International Trade Law; or b. in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Government and the country of which the investor is a national are parties; or c. in accordance with any other national or international machinery for the settlement of investment dispute agreed to by the parties.

Id. § 33(1)–(2).

need for HSCs to be able to obtain redress. All the examples of harm to HSCs cited in Part II above (and many more around the globe not cited in this Essay) relate to infrastructure or natural resource exploitation.[110] Shell's gas flaring, oil spillages and pollution in the Niger Delta area of Nigeria relates to its exploitation of petroleum.[111]

Those investments involved a contract between the host state and the foreign investor. I propose inserting a clause into such contracts under which the investor consents to arbitral proceedings initiated by HSCs. Some scholars have explained that, in the context of the investor consenting to the host state initiating proceedings, "consent . . . typically [is] not a problem" because "the contract typically provid[es] for obligations on both sides."[112] The proposal in this Essay is that the undertaking of the foreign investor in such a clause would be a consent to arbitration initiated by HSCs, in addition to any consent it may give to proceedings by the HSG.

An issue that may arise with respect to some jurisdictions is whether HSCs, who are not necessarily privy to the investment contract between the investor and the host state can enforce the consent undertaken if the investor were to renege on that undertaking and challenge the jurisdiction of the arbitral tribunal. However, privity is unlikely to pose much of a problem. In many common law jurisdictions where this would have been a problem, legislation has been enacted to enable third-parties to enforce contracts made for their benefit.[113] Beside legislation, courts have used other principles of law (such as agency, estoppel, trust, and unjust enrichment) to circumvent the privity issue when it has presented a problem.[114] The host state may also provide in the con-

[110] *See supra* notes 28–69 and accompanying text.

[111] *See* Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd. [2005] 6 AHRLR 151, 152–54 (Nigeria).

[112] THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY, *supra* note 1, at 589.

[113] Consultation Paper, Sub-Committee on Privity of Contract Consultation, the Law Reform Commission of Hong Kong, Privity of Contract (May 2004), http://www.info.gov.hk/hkreform [https://perma.cc/QRR9-WT32].

[114] *See, e.g.*, Trident Gen. Ins. Co. v. McNiece Bros. Pty. (1988) 165 CLR 107 (Austl.) (resorting to various principles, including trust and unjust enrichment, to circumvent the privity problem). In this case, McNiece was a contractor for construction work being carried out at a site belonging to Blue Circle. Blue Circle had entered into a contract of insurance with Trident, in June 1977, covering the works. "The Assured" was defined as "Blue Circle Southern Cement Limited, all its subsidiary, associated and related Companies, all Contractors and Sub-Contractors and/or Suppliers." In 1979, an employee of McNiece was seriously injured at the construction site. McNiece was found liable to pay damages to the employee. McNiece sought indemnity for the amount from Trident under the insurance policy contracted by Blue Circle. Trident denied liability on the ground that McNiece was not a party to the insurance contract. McNiece commenced legal action against Trident. Both the trial judge and, on appeal, the NSW Court of Appeal, held in favour of McNiece. Trident's appeal to the High Court of Australia, was dismissed by a majority of five to two. Among the majority, Justice Deane explained that McNiece could not claim directly under the insurance contract, but that Blue Circle

tract that it acts on its own behalf and on behalf of its citizens. That way the HSCs may be deemed to be parties to the contract with the foreign investor.

What may be more problematic is whether host states would be willing to insert such a clause in their contracts with foreign investors. That may be difficult with HSGs that are oblivious to, or contemptuous of, the plight and rights of their citizens. For instance, the action of the Cambodian government in evicting its citizens to make way for KKS and KKP to farm sugarcane on some twenty-thousand hectares of land may suggest that the Cambodian government would not have been interested in facilitating arbitral proceedings against the investor. Similarly, the inaction of successive Nigerian governments, and in some cases, complicity of government, may suggest that the government will not be interested in facilitating arbitral proceedings against Shell or other investors.

A further limitation of consent in contracts is the fact that not all foreign investments involve a contract between the investor and the host state. A foreign investor may enter a country to acquire or merge with an existing private business. It may enter into a joint venture with some private HSCs or may commence a wholly-owned investment operation that does not require contracting with the host state.

Thus, even if host states are willing to obtain foreign investors' consent to arbitration by contract, not all investors and investments would be captured. That said, if host states agree to adopt investor consent to arbitrate clauses in investment contracts, it would be an effective mechanism for access to arbitration, and remedy, for HSCs in most of the situations in which they find themselves helpless.

4. Host State Law Deeming Foreign Investor Consent to Arbitrate

Host states may pass legislation deeming that all foreign investors are considered to have consented to international arbitral proceedings initiated by its citizens. In such a case, the fact that a foreign enterprise has invested in the jurisdiction may trigger the operation of consent; express agreement of the investor would not be required, as it would be under the investment contract, standing offer, or through ad hoc consent.

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held benefit of insurance contract on trust for McNiece. *Id.* at 149. He suggested that estoppel may also have been applicable, but that was not argued. *Id.* at145–46. Justice Gaudron, on the other hand, explained that while McNiece could not claim under the insurance contract, McNiece had an unjust enrichment claim against Trident. She held that by accepting consideration for a promise to benefit a third-party (in this case McNiece) Trident would be unjustly enriched at the expense of McNiece if the promise was not fulfilled. *Id.* at 176–77; *see also* JEANNIE PATERSON, ANDREW ROBERTSON & ARLEN DUKE, PRINCIPLES OF CONTRACT LAW 268–77 (5th ed. 2015) (discussing various principles of law by which the privity problems may be circumvented).

This legislative option seems straightforward and would capture all foreign investors and investments. There are possible obstacles, however. First, the governing law in some jurisdictions may vest adjudication of disputes arising within the jurisdiction exclusively in the courts established under the governing law. For instance,

> Chapter III of the [Australian] Constitution establishes the federal judicature, and vests it with certain power and jurisdiction . . . [that] has long been interpreted as an exhaustive statement of the manner in which the judicial power of the Commonwealth can be exercised. That is, Chapter III implies a strict separation of the judicial power of the Commonwealth from the other branches of the federal government and other kinds of governmental power. This separation is effected by . . . interlocking rules . . . [including that] the 'judicial power of the Commonwealth' can only be exercise by Chapter III courts. . . . Though the concept of judicial power defies precise definition, it is . . . clear that . . . [it] include[s] the power to interpret the Constitution, and to decide whether legislative or executive action is within power.[115]

It is possible then that Australia's highest court (the High Court of Australia) may rule that legislation by Parliament or an executive order that purports to vest adjudicatory authority of disputes in international arbitral tribunals is beyond the authority of those bodies of government and infringes upon Chapter III of the Australian Constitution.[116] That said, Australia has long accepted and facilitated international arbitration. Australia is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958 (New York Convention) and the ICSID Convention, and the federal Parliament has enacted the International Arbitration Act 1974 to affect these conventions in Australian law.[117] The many contracting parties to these two conventions are likely to be in a similar position. Thus, constitutional limitations are unlikely to be a problem.

What may instead be a problem is the willingness of host states to adopt such a law. As was the case with investors' standing offer to consent in invest-

[115] Laryea et al., *ISDS and the Australian Constitutional Framework*, *supra* note 3, at 260–62.

[116] The High Court of Australia is the highest and final court in Australia's judicial system. It is this court that interprets and enforces the Australian Constitution. *Id.* at 265.

[117] *Id.* at 267. The International Arbitration Act of 1974 states its objects to include giving "effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting" and giving "effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 Mar. 1975." *Id.* at 267 n.42.

ment contracts, HSGs that are oblivious to the plight and rights of their citizens or complicit in perpetrating the harm may also be unwilling to adopt such a law.[118] If host states can adopt such a law, however, it would be a very effective mechanism for investor consent and facilitating access to arbitration and remedy for HSCs.

5. Mandatory Domestic Licensing or Authorization Regime Incorporating Investor Consent to Arbitrate

Host states could require, as a matter of domestic law, that all foreign investors obtain an authorization (or license) to invest in that state. Obtaining authorization to invest in the host state would be contingent upon investors consenting to arbitral proceedings both initiated by HSCs and by the HSG. In this way, "[s]ubmission to arbitration may be made a condition for admission of investments in the host [s]tate."[119] A similar suggestion has been made, albeit in the context of the investor consenting to arbitration initiated by the HSG.[120]

This mechanism is like the proposal above under host state law deeming consent. The main difference is that the investor will know from the onset in this case that its investment is admitted to the jurisdiction subject to the terms of the authorization, including the investor's consent to arbitration.

Like the mechanisms under options (3) and (4) above, though, the limitation would be the willingness of the host state to adopt such a law so as to facilitate access to arbitral proceedings for its citizens.

CONCLUSION

This Essay has argued that the lack of access to effective remedy for HSCs who are harmed by foreign investment in many jurisdictions is a problem that can be addressed by arbitration or in a future international investment court system that may eventuate. Because arbitration is the dominant mechanism for settling international investment disputes, it would be a great fit for HSCs seeking a remedy. This can be achieved by expanding the current ISA system, which is predominantly used by investors against host states, to become a more inclusive IRDS system that allows all affected persons—investors and non-investors—whose interests are adversely affected to seek a remedy. IRDS would allow for (1) traditional ISA proceedings, in which investors may initiate proceedings against host states; (2) HGIA, in which HSGs

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[118] For a discussion on HSGs' potential unwillingness to make this change in their contracts with foreign investors, see *supra* notes 110–114 and accompanying text.

[119] Christoph Schreuer, *Consent to Arbitration, in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 831, 837 (Peter Muchlinski et al. eds., 2008).

[120] *Id.*

may initiate proceedings against investors; and (3) HCIA, in which HSCs may initiate arbitral proceedings against investors.

This Essay focused on HCIA. If the proposal in this Essay is adopted, it will not only address the specific seemingly intractable problem of access to remedies for HSCs, but also yield other benefits. These include helping to balance the rights and interests of all affected parties, enhancing the legitimacy of the system that is often called into question, improving the foreign investment climate for businesses and states, and working for all.

I have identified and addressed possible economic and legal arguments against implementation of the proposed IRDS. I have identified what I predict would be the two main problems: the applicable law and investors' consent to arbitrate. I then suggested means of overcoming those problems. Perhaps the most nagging issue is the willingness of governments to implement the proposed solution.