

Developing Human Right Norms for Investor-State Arbitration: The Needed Panacea for Environmental Injustice?

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Abstract

The dissatisfaction of States and some non-State actors with investor-State arbitration has deepened over the years. This has resulted in agitations for the reform of investor-State dispute settlement. Part of the reform agenda is the need for international investment tribunals to be required to consider human right norms, in appropriate cases, in the determination of arbitration matters before them. This is because, as good as the idea of protecting foreign investments is, if it is not put in its right perspective, it may lead to good government policies and the human rights of indigenes of host communities being sacrificed on the ‘altar’ of investment protection. Thus, this work aims at contributing to the ongoing debate on the need for international investment tribunals to always take public interest into account when deciding disputes before them. In that regard, this work examines the connection between human rights and investor-State arbitration, with particular focus on how these evolving human right norms would produce the needed panacea for environmental injustice. Although the ongoing agitations for reform transcend investor-State arbitration, this work is limited to discussing the specific issue of the need for investor-State arbitration tribunals to be required to give adequate consideration to human right norms in the determination of the matters that come before them. In this work, we used qualitative methodology based on doctrinal approach. The research design used is content analysis, which helps in describing the connection between human rights and investor-State arbitration as well as the concept of developing human right norms in investor-State arbitration.

Keywords: Environmental injustice, Human right norms, Investment, Investor-State arbitration, Public interest

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1. Introduction

A major concern today among scholars and arbitration institutions is the fragmentation of investor-State dispute settlement (ISDS) system.¹ This fragmentation is principally due to most States’ present dissatisfaction with investor-State arbitration (ISA)² and the perception of some scholars that ISA is skewed towards investors in a way that makes States virtually helpless.³ The perception seems strengthened by the fact that investors usually resort to ISA in order to contest host States’ measures that they perceive as a threat to their anticipated profits.⁴ The flip side is that, sometimes, in an attempt to protect foreign investments, municipal government policies⁵ and citizens’ human rights are thereby sacrificed.⁶ This state of affairs has prompted States and other stakeholders to engage in concerted efforts at looking for alternatives to ISA in all directions – including the use of local remedies only⁷ and diplomatic protection,⁸ which both have severe pitfalls.⁹ Diplomatic protection, as innocent as it sounds, did result to war in extreme cases, making it most undesirable.¹⁰ And, to insist on local remedy only

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

² ISA is also known as international investment arbitration (IIA) and, in some context, used interchangeably with ISDS. It is important to note, however, that ISDS is wider in scope than ISA and that ISA is actually subset under ISDS.

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

⁴ Remmer (n 3) 796 citing Todd Weiler, ‘Philip Morrison vs. Uruguay: An Analysis of Tobacco Control Measures in the Context of International Investment Law’ (2010)

⁵ Joubin-Bret (n 3)

⁶ See ‘Mandates of the Working Group on the Issue of Human rights and Transnational Corporations and other Businesses’ (7 March 2019) 4

⁷ See, for example, the South African Protection of Investment Act 2015, s 13

⁸ See Luke Nottage, ‘Throwing the Baby Out with the Bathwater: Australia’s New Policy on Treaty-Based Investor-State Arbitration and its Impact in Asia’ (2013) 37(2) *Asian Studies Rev* 253, 264; see also Sanjeet Malik, ‘BIT of Legal Bother’ (*Business Today*, May 2012) <www.businesstoday.in/magazine/columns/india-planning-to-exclude-arbitration-clauses-from-bits/story/24684.html> accessed 17 March 2020

⁹ Leon E. Trakman, ‘Investor State Arbitration or Local Courts: Will Australia Set a New Trend?’ (2012) 46(1) *J of World Trade* 83, 91

¹⁰ John Dugard, ‘Articles on Diplomatic Protection, 2006: Introductory Note’ (Audiovisual Library of international Law) <<https://legal.un.org/avl/ha/adp/adp.html>> accessed 20 July 2021

will hamper foreign direct investment (FDI) inflows required for economic development.¹

Although some approaches by States in pursuing the ISDS reform agenda (use of local remedy only and diplomatic protection) are unsuitable for international investment disputes as mentioned above, the agitation for reform has scored a high point in awakening the need to take public interest into account in ISA proceedings, which has already resulted so far² in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014 (Rules on Transparency) and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 2014 (the 'Mauritius Convention on Transparency').³ Similarly, there is a developing jurisprudence premised on the argument that ISA arbitral tribunals should act as agents not only for the parties that appointed them but also for the global community at large.⁴

In pursuing the argument that ISA tribunals should also act as agents for the larger community, human right norms have steadily been creeping into ISA.⁵ The main objective of this work, therefore, is to examine the connection between human rights and ISA,⁶ especially those that are treaty-based, with particular focus on how these evolving human right norms in ISA would produce the needed panacea for environmental injustice.

2. The Demand for ISDS Reform Touching on Human Rights

As noted above, there are on-going agitations for and actions towards reforming ISDS, principally because of the shortcomings of ISA as it is presently practised. ISDS reform agenda as it stands today seeks to address, inter alia: (a) the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISA tribunals;⁷ (b) concerns pertaining to arbitrators and decision makers;⁸ (c) the need for human right norms to be given adequate consideration in ISDS⁹ and d) the perceived need to establish a Multilateral Investment Court (MIC).¹⁰ In this work, our concern is limited to item (c) as it relates to ISA.

The need for human right norms to be given adequate consideration in ISA addresses, inter alia: the issue of human rights breaches by transnational corporations and other business enterprises; the issue of the right to development of host communities; the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the issue of the rights of indigenous peoples; and the issue of human rights to safe drinking water and sanitation.¹¹ These concerns arose because of the perception of scholars that the inherently imbalanced nature of the ISA system and lack of investors' human rights obligations, among other factors, have led to undue restrictions of States' fiscal capability and undermined their capacity to regulate economic activities and to realise the economic, social, cultural and environmental rights of their citizens.¹²

The developing jurisprudence, therefore, is that international arbitral tribunals should be bound to consider third-party claims for human rights violations when deciding investment disputes.¹³ The corollary of this is that, though the investment agreement may be between two States¹⁴ or a State and a foreign investor,¹⁵ as the case may be, the arbitral tribunal, as agent of the larger community, must seriously consider the issue of human rights violations affecting members of the public even though they are not, strictly speaking, party to the investment agreement.

Investment treaty arbitration arises from either a bilateral investment treaty or multilateral investment treaty. This means that, though the agreement is for the protection of their citizens' investments in the other contracting State(s), only States are parties to the agreement. Usually, by the nature of these investment agreements, their aim of promoting foreign investment in host States is not emphasised but contingent on the fact that protecting foreign investment would attract investors to the investment-seeking country. This template, therefore, does not

¹ See World Economic Forum, 'Global Investment Policy and Practice' <<https://www.weforum.org/projects/investment>> accessed 20 July 2020, where the author argues that FDI inflows depend on creating the right business environment and investment climate, underpinned by international agreements, national policies, domestic regulations and specific measures

² The ISDS reform discussion is ongoing.

³ Joubin-Bret (n 3)

⁴ Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2020) *Law and Ethics of Human Rights*, para 1

⁵ See Fola Adeleke, 'Human Rights and International Investment Arbitration' (2016) 32(1) *South Africa J on Human Rights* 48-70, where the author discusses, among other things, how recent investment arbitration disputes have raised several human rights related issues.

⁶ See T. Weiler 'International Investment Law and International Human Rights Law: Reuniting Two Long Lost Siblings' (Speaking Notes, 15 March 2018)

⁷ Doug Jones, 'Investor-State Arbitration in Times of Crisis' (2013) 25 *Nat'l L Sch Indian Rev* 27, 57-58; See IIED, CCSI and IISD, 'Shaping the Reform Agenda: Concerns Identified and Cross-Cutting Issues' (15 July 2019) para 1

⁸ See IIED, CCSI and IISD (n 15)

⁹ 'Mandates of the Working Group' (n 6) 4

¹⁰ See Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (European Yearbook of International Economic Law, Springer Open, Berlin 2020) 117

¹¹ 'Mandates of the Working Group (n 6)

¹² IIED, CCSI and IISD (n 15)

¹³ Sweet (n 12) 14

¹⁴ In the case of treaty-based arbitration.

¹⁵ In the case of international investment arbitration based on a specific contract between a State and a foreign investor.

directly include obligations on foreign investors to protect the human rights of indigenes of host communities in the course of their investment activities.¹ And, these rights become easily violated, especially in third-world countries with weak accountability mechanisms.² We submit that because of this gap, it behoves an international arbitral tribunal to diligently consider human right issues brought to its attention in the course of determining the dispute before it, based on internationally recognised human rights.

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

Historically, ISA was essentially a mechanism for achieving the twin aims of protecting the investments of foreigners, on the one hand, and enhancing the inflow of foreign direct investments (FDIs) into developing countries, on the other. In the 1960's, many third-world countries, including the newly independent African nations, were amongst the foremost nations that canvassed for an arbitration regime for international investment disputes, beginning with their contribution to the negotiation of the Convention for the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) in 1964,³ which crystallised with the eventual enactment of municipal laws devoted to promoting and protecting foreign investments.⁴

In recent times, however, scholars and international organisations have drawn attention to the activities of some foreign investors in the oil and mining sector that are inimical to the environment and to the impunity with which these activities are carried out in developing and third-world countries.⁵ These environmentally harmful activities are exemplified by some arbitration matters, such as, *Chevron v Ecuador*,⁶ and *The Renco Group Inc. v The Republic of Peru*⁷ (*Renco v Peru*).

Chevron v Ecuador arbitration touches directly on ISA vis-à-vis environmental injustice. In this arbitration, the activities of Chevron, and its predecessor Texaco Petroleum Company, had led to severe pollution and complete degradation of the Ecuadorian Amazon. Since Ecuador, because of some legal constraints, could not sue Chevron for the damage done, the inhabitants of the Amazon decided to bring a group action against Chevron in the *Largo Agrio* claim and got a municipal court judgment for US\$9.5 billion.⁸ Despite the palpable damages caused by Chevron, it responded by suing Ecuador on the basis of the US-Ecuador BIT⁹ and prayed the arbitral tribunal to override the Ecuadorian Constitution and Ecuador's obligations under human rights treaties in favour of the BIT, which the tribunal regrettably did.¹⁰ And, though the judgment of the court of first instance has been upheld by Ecuador's Supreme Court, Chevron has refused to pay the judgment sum.¹¹

Similarly, *Renco v Peru* provides another important instance where ISA has been used to perpetuate environmental injustice in underdeveloped countries. In 2006 and 2007, La Oroya, the centre of Peruvian mining activities where in 1997 the US Company Doe Run Peru bought a metallurgical complex, was reported to be one of the ten most polluted areas of the world, with 70% of the children in the area having great health challenges as a result of the pollution.¹² Environmental cleanup was part of the contract between Doe Run Peru (a subsidiary of the Renco Group Inc.) and the government of Peru but the company failed woefully to implement any of the environmental specifications in the contract, leading to the revocation of its operating licence by the Peruvian government.¹³ As a result, Renco Group Inc. instituted a PCA investment arbitration against Peru for US\$800million in damages, which it lost; but rather than accept the PCA's verdict, it instituted another arbitration on the same facts,¹⁴ namely, *The Renco Group Inc. v The Republic of Peru II* (*Renco v Peru II*)¹ based

¹ See Nsongurua Udombana, 'Shifting Institutional Paradigms to Advance Socio-Economic Rights in Africa' (2007) <DOI - 10.13140/RG.2.2.12829.15846> 242

² 'Investor-State Dispute Settlement' <<https://www.elstel.org/ISDS.html.en>> accessed 28 May 2021

³ See Paul-Jean Le Cannu, 'Foundation and Innovation: The Participation of African States in the ICSID Dispute Resolution System' (2018) 33(2) ICSID Rev 456

⁴ See, for example, the Nigerian Investment Promotion Commission Act, CAP N 117, LFN 2004, which was originally promulgated as Nigerian Investment Promotion Commission Decree in 1993.

⁵ See Global Justice Now, 'Investigating the Impact of Corporate Courts on the Ground – The Truth is out there' <https://waronwant.org/sites/default/files/ISDSFiles_Chevron_April2019.pdf> accessed 28 May 2021; see also Information Centre on Business and Human Rights, 'Prominent Organizations Publicly Condemn Chevron's Actions in Ecuador's Case' <business-humanrights.org/es/ultimas-noticias/prominent-organizations-publicly-condemn-chevrons-actions-in-ecuador-case/> accessed on 29 May 2021

⁶ PCA Case No. 2007-02/AA277

⁷ ICSID Case No. UNCT/13/1

⁸ Global Justice Now (n 30)

⁹ US-Ecuador BIT signed in 1997

¹⁰ 'Investor-State Dispute Settlement' (n 25); see generally Fola Adeleke, 'Human Rights and International Investment Arbitration' (2016) 32(1) South Africa J on Human Rights 48-70

¹¹ Information Centre on Business and Human Rights (n 28)

¹² 'Investor-State Dispute Settlement' (n 25)

¹³ *ibid*

¹⁴ Business & Human Rights Resource Centre, 'Peru: Govt. Wins Arbitration Brought by Renco over Doe Run Smelter-Company Claimed Govt. Cleanup Order to Protect Town's Health Was Excessive' (Bloomberg, 18 July 2016) <<https://www.business-humanrights.org/en/latest-news/peru-govt-wins-arbitration-brought-by-renco-over-doe-run-smelter-company-claimed-govt-cleanup-order-to-protect-towns-health-was-excessive/>> accessed 4 June 2021

on the Peru-United States Trade Promotion Agreement (PTPA).²

As protective as the PTPA is in respect of American investors in Peru, its aim is to ensure that all forms of investment by US citizens in Peru are protected and that ‘U.S. investors will enjoy in almost all circumstances the right to establish, acquire and operate investments in Peru on an equal footing with local investors’,³ not on a better footing as most foreign investors attempt to use investment treaty arbitration to achieve.

The *Renco* arbitrations and *Chevron v Ecuador* award give credence to the argument that BITs enable investors commit corporate misdeeds in host States that they do not commit in their own countries, and that they do so without any repercussions;⁴ but, rather sometimes, they are rewarded with high damages against their host States when these States decide to regulate their actions.⁵ As stated earlier, this state of affairs is the reason some scholars believe that ISA is skewed towards investors,⁶ citing violations of indigenous peoples’ human rights in host communities where oil exploitation and other mining activities take place, without regard for how these activities affect their economic, social, cultural and environmental rights.⁷ It is against this backdrop that the United Nations Human Rights Council (UNHRC), by Resolution 26/9,⁸ established a new intergovernmental Working Group (IGWG) to develop an international legally binding instrument to regulate transnational corporations (TNCs) and other businesses with respect to human rights.⁹

While there appears to be unanimity on the necessity to protect the environment, there remains a big gap between theory and practice and a similar big gap between what happens in developed countries and third-world countries. In order to drive the point home, we will undertake a comparative study between what is obtainable in the United States and Nigeria in terms of responses to the issue of environmental damage and personal injuries occasioned by oil spillages resulting from the activities of transnational companies.

Grigsby laments the glaring difference between the attitude of British Petroleum (BP) in settling the claims resulting from the U.S. Gulf Coast oil spill and oil conglomerates’ attitude in similar or even worse circumstances in Ogoni, Nigeria.¹⁰ He reports the incident of April 20, 2010, when BP’s Deepwater Horizon oil rig in the Gulf of Mexico burst into flames resulting in eleven deaths and environmental pollution and degradation. Medical claims by affected individuals settled by BP, together with cleanup efforts, amounted to US\$7.8 billion; and another US\$5 billion was paid by the company to 62,000 businesses and individuals. In addition, the company agreed to pay US\$18.7 billion to the states of Louisiana, Mississippi, Texas, and Florida over an 18-year period.¹¹

In contrast to the above scenario, the plight of the Ogoni people, who are also victims of alleged careless practices by transnational companies, including Shell-BP, has not received similar treatment in spite of the Ogoni people’s protestation that the exploitation of oil and gas on their land has resulted in the destruction of crops, fish and community land.¹² Interestingly, even though Nigerian law criminalises pollution of the environment,¹³ the degradation of the environment where oil is exploited has gone on for over six decades without any meaningful remediation, amelioration of the plight of the residents or meaningful development of the affected communities.¹⁴

To terminate, or at least, minimise the above dichotomy, there is the urgent need for concerted international effort to arrest the situation due largely to the prevalent corruption and poverty in third-world countries.¹⁵ To this end, the United Nations needs to accelerate the process of adopting the proposed international legally binding

¹ PCA Case No. 2019-46

² The PTPA entered into force on 1 February 2009.

³ Office of the United States Trade Representative, ‘Peru Trade Promotion Agreement’ <<https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa>> accessed 6 June 2021

⁴ See Udombana (n 24) 245

⁵ See Leer Mas, ‘Prominent Organizations Publicly Condemn Chevron’s Actions in Ecuador Case’ (Amazon Watch, 18 December 2013) <www.business-humanrights.org/ultimas-noticias/prominent-organizations-publicly-condemn-chevron-actions-in-ecuador-case/> accessed 2 June 2021

⁶ Karen L. Remmer, ‘Investment Treaty Arbitration in Latin America’ (2019) 54(4) *Latin American Research Rev* 795, 796

⁷ See, for example, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (African Commission Communication 156/96, pp 9-10)

⁸ A/HRC/RES/26/9

⁹ Friends of the Earth International, ‘The UN Treaty on Transnational Corporations and Human Rights’ (2019) <<https://www.foei.org/un-treaty-tncs-human-rights>> accessed on 20 January 2020.

¹⁰ Scheagbe Mayumi Grigsby, ‘Enforcing Economic, Social and Cultural Rights: A Stark Dichotomy’, *NE. U. L. R. EXTRA LEGAL* (3 May 2017) 2-3.

¹¹ Jessica Hagen-Zanker and Heidi Tawakoli, ‘An Analysis of Fiscal Space for Social Protection in Nigeria’ (2012) <www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7580.pdf> cited in Scheagbe Mayumi Grigsby, ‘Enforcing Economic, Social and Cultural Rights: A Stark Dichotomy’, *NE. U. L. R. EXTRA LEGAL* (3 May 2017).

¹² Grigsby, (n 46) 3-4.

¹³ Minerals and Mining Act, s 115.

¹⁴ Udombana (n 24) 247-248

¹⁵ See Global Citizenship Commission, *The Universal Declaration of Human Rights in the 21st Century*, Gordon Brown (ed.) (Open Book Publishers, 2016) 68-69.

instrument to regulate the activities of transnational corporations (TNCs) and other companies¹ touching on human rights,² in order to safeguard the environment globally.³ The proposed UN Treaty on Transnational Corporations and Human Rights (UN Treaty) would offer a major legal regime to address environmental injustice, especially if it is based on the principle of the already existing equality of all peoples irrespective of their backgrounds or national legal systems⁴ and social equity that seeks to eliminate obvious inequities.⁵

Thus, if properly developed, the proposed UN Treaty would help to ensure that environmental pollutions resulting in similar circumstances receive the same treatment, irrespective of whether they occur in a first or third-world country.⁶ The proposed UN Treaty defines ‘human rights abuse’ to mean any harm committed by a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, that impedes the full enjoyment of internationally recognised human rights and fundamental freedoms, including environmental rights.⁷ Similarly, the proposed Treaty defines ‘business activities’ to mean any for-profit economic or other activity undertaken by a natural or legal person, including State-owned enterprises, transnational corporations, other business enterprises, and joint ventures, undertaken by a natural or legal person, including activities undertaken by electronic means.⁸ However, the proposed Treaty is to apply only to businesses, including but not limited to transnational corporations and other business enterprises, that undertake business activities of a transnational character.⁹ Of utmost importance is the provision that victims of human rights abuses in the context of business activities shall enjoy all internationally recognised human rights and fundamental freedoms.¹⁰

In concluding this section, it is important to note that the aim of developing human right norms is to balance foreign investor’s right to the protection of their investment against their obligation to respect the recognised human rights of all those that may be affected by their business activities. Thus, under the proposed UN Treaty, the UN reaffirms the fundamental human rights and the dignity and worth of the human person, the equal rights of men and women and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations.¹¹ In a nutshell, just like the Founding Fathers of the United States perceived it, human rights must come first, and legal regimes second.¹²

4. State Parties’ Role under the Evolving Dispensation

One of the fallouts of corruption in third-world countries is that government and government officials usually fail to monitor the operations of and require standard safety measures by transnational companies and other businesses in the oil and mining sector. For instance, in *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria*¹³ (SERAC case), the Applicant alleged that Nigeria failed to monitor the operations of and require standard safety measures by its company, Nigerian National Petroleum Company (NNPC) and a joint venture, Shell Development Petroleum Company, in which it has majority shareholding. The complaint further alleged that the involvement of government and the oil companies’ operations led to the violation of the Ogoni people’s economic, social and cultural (ESC) rights under the African Charter of Human and Peoples’ Rights (African Charter).

The African Commission found that Nigeria was in breach of several ESC rights, including the rights to health, property, and protection of family.¹⁴ The Commission also found that Nigeria failed in its responsibility under the African Charter to take the needed steps for the ‘improvement of all aspects of environmental and industrial hygiene.’¹⁵

¹ See the proposed UN Treaty on Transnational Corporations and Human Rights (2020 Second Revised Draft of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises).

² Friends of the Earth International (n 45).

³ The UNHRC adopted Resolution 26/7 which established a new Intergovernmental Working Group (IGWG) to develop a legally binding instrument to regulate transnational corporations.

⁴ Lawrence Cronin, ‘The Ninth Amendment and Conceived Children: Legal Theory and Civil Action’ (2021) 31 <https://app.scholasticahq.com/supporting_files/3957471/attachment_versions/3970589> accessed 15 June 2021

⁵ See Tia Gaynor, ‘Decisionmaking, Social Equity and Choice Points’ [10 January 2017] PA Times <<https://patimes.org/decision-making-social-equity-choice-points/>> accessed 16 June 2017

⁶ See Hilary Charlesworth, ‘A Regulatory Perspective on the International Human Rights System’ in Peter Drahos (ed), *Regulatory Theory* (ANU Press, 2017) 357.

⁷ 2020 Second Revised Draft of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, art 1.2

⁸ *ibid*, art 1.3

⁹ *ibid*, art 3

¹⁰ *ibid*, art 4

¹¹ 2020 Second Revised Draft (n 58), Preamble

¹² Cronin (n 55) 16-17

¹³ Communication 155/96 (2001)

¹⁴ *ibid* 10.

¹⁵ *ibid* 9.

One great feature of the proposed UN Treaty is its obligation on States to ensure the protection of their citizens against human rights violations resulting from transnational-like business activities.¹ This is important for two reasons. First, it adequately addresses the lack of or inadequate enforcement mechanism in previous human rights instruments,² which often resulted in a wide gap between promise and performance.³ Secondly, as the *SERAC* case above reveals and as contemplated by article 1.3 of the proposed UN Treaty, the contravening business entity may be wholly or partly owned by the State, which may decide to turn a blind eye to the violation of the human rights of those it is supposed to protect.⁴

From the analysis above, the proposed UN Treaty is a welcome development but it is not foolproof as some States have not always kept faith with their human rights obligations.⁵ In the new dispensation, affected communities should have legal standing to institute group action in international investment arbitration or join arbitral proceedings as third parties.⁶ This can be facilitated in two ways. First, the proposed UN Treaty should specifically provide for third-party rights to participate in ISA proceedings where a person or a group of persons can show that their human rights have been violated by the activities of an investor.

The second way to fortify persons or communities with *locus standi* to protect their human rights against violation before ISA tribunals is for States to enact third-party rights legislations as some countries, such as, Australia, United Kingdom and United States, have already done. For instance, under the English Contracts (Rights of Third Parties) Act 1999, a person who is not a party to a contract may nevertheless enforce a term of that contract if the contract expressly provides that he may do so or if it purports to confer a benefit on him.⁷ Also, where the contract in question contains an arbitration agreement whose scope is wide enough to cover the dispute in question, a third party who applies to be joined to the arbitral proceedings is treated as being a party to the arbitration agreement as regards the enforcement of his right pursuant to the contract,⁸ such that he is not just entitled but can be required to arbitrate any dispute.⁹

It is submitted that third-party rights should be advanced beyond the 1999 English Act to allow any person or group of persons who can show that their interest is likely to be affected by the outcome of the arbitration proceedings to join in the proceedings for the purpose of protecting their interest. On that score, it is pertinent to note the momentous and revolutionary decision of the Nigerian Court of Appeal in *Statoil (Nigeria) Limited & Anor v Federal Inland Revenue Services & Anor*,¹⁰ where the Court held that a third party non-signatory to an arbitration agreement has the right to intervene in an on-going arbitration with the aim of stopping the continuation of the process where the third party can show that his interest is likely to be affected by the outcome of the arbitration proceedings. Although the *Statoil* decision has been criticised as having no basis under Nigerian law,¹¹ it remains a bold judicial pronouncement begging for legislative support to provide a legal framework for the entrenchment of third-party rights in Nigeria and other countries which are yet to enact third-party rights legislations.

5. Conclusion

The rationale for the position taken in this paper is that rights vested in a person must attract obligations and that where there is a proved wrong there has to be a remedy.¹² Where, for example, a foreign company derives rights from an investment instrument, it cannot avoid its liability to the community where it carries out operations if such operations result in the violation of the rights of those who live in the community. The opposite approach ultimately resulted in several human rights violations in Nigeria by government and transnational companies for

¹ 2020 Second Revised Draft (n 58), art 5

² Hilary Charlesworth, 'A Regulatory Perspective on the International Human Rights System' in Peter Drahos (ed), *Regulatory Theory* (ANU Press, 2017) 357, 359; see also David Kosař and Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts' [October 2015] (109)(4) *The American Journal of International Law*, 713, 748.

³ See Nsongurua Udombana, 'Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter' (2004) 40 *Stan J Intl L* 105, 138; See also Inter-Parliamentary Union and OHCHR, *Human Rights Handbook for Parliamentarians* (No. 26, 2016) 100

⁴ See Udombana (n 24) 247-249

⁵ *SERAC* case (n 58); see the *Convention on the Rights of the Child 1989*, which has similar obligations on States as the proposed UN Treaty and which has been ratified by all the nations of the world except the US but has received only lip-service from most third-world countries as evidenced by the deplorable conditions under which many children live in these countries; see generally Violet Benneker, Klarita Gërkhani and Stephanie Steinmetz, 'Enforcing Your Own Human Rights? The Role of Social Norms in Compliance with Human Rights Treaties' (2020) 8(1) *Social Inclusion* 184-193

⁶ See *Chevron v Ecuador* (n 28) where one of the arguments of the Claimant was that the indigenes of the devastated Ecuadorian Amazon lacked the locus to bring a group action against it.

⁷ English Contracts (Rights of Third Parties) Act 1999, s 1

⁸ *ibid*, s 8(1)

⁹ David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (23rd edn, Sweet & Maxwell, London 2007) 96

¹⁰ (2014) LPELR-231444 (CA)

¹¹ Jeremy Wilson, 'Nigerian Court of Appeal Allows Third Party to Challenge Arbitration Award' (12 February 2015) <<https://www.covafira.com/2015/02/nigerian-court-of-appeal-allows-third-party-to-challenge-arbitration-award/>> accessed 8 February 2021

¹² See the decision in *Statoil (Nigeria) Limited & Anor v Federal Inland Revenue Services & Anor* (n 76).

over half a century, and still counting.¹ These violations are as a result of pollution and degradation of the environment from oil and gas exploitation, with no regard to the indigenes of the affected communities.² This has led to agitations, insurgencies and deaths.³ It is against this background that in 2014, a people's victory was celebrated when the UNHRC adopted Resolution 26/9,⁴ which established a new intergovernmental Working Group (IGWG) to develop an international legally binding instrument to regulate transnational corporations (TNCs) and other businesses with respect to human rights.⁵

It is recommended that all individual countries should build on the effort of UNHRC by enacting municipal laws to protect the environment as Chile has done recently.⁶ And countries, like Nigeria, which already have laws that criminalise environmental pollution⁷ should begin to give teeth to these laws. On its part, the UN should consider incorporating effective accountability measures in the proposed Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.

¹ See generally K. G Kingston, C. Wigwe, S. Dike, Z. Adango and O. V. C Okene 'Current Issues in Environmental Justice in the Nigerian Society' (Published Conference Paper of the National Association of Law Teachers, April 2019) <https://www.researchgate.net/publication/332379885_CURRENT_ISSUES_IN_ENVIRONMENTAL_JUSTICE_IN_THE_NIGERIAN_SOCIETY> accessed 8 June 2021

² *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (African Commission Communication 156/96) 9-10

³ See Crisis Group, 'The Swarms of Insurgency: Nigeria's Delta Unrest' (20 August 2006) <<https://www.crisisgroup.org/africa/west-africa/nigeria/swamps-insurgency-nigerias-delta-unrest>> accessed 12 June 2021; see also Udombana (n 24) 247

⁴ A/HRC/RES/26/9

⁵ Friends of the Earth International (n 45)

⁶ Information Center on Business and human Rights, 'Chile: By Majority Vote, the Legislature approves a Law that Defines the Crime of "Water Theft" to Control and Sanction Agribusiness, Mining and Forestry Companies' (4 June 2021) <<https://www.business-humanrights.org/es/%C3%BAltimas-noticias/chile-por-mayor%C3%ADa-de-votos-legislativo-aprueba-ley-que-tipifica-el-delito-de-robo-de-agua-para-fiscalizar-y-sancionar-a-empresas-de-agronegocio-miner%C3%ADa-y-forestales/>> accessed 12 June 2021

⁷ Minerals and Mining Act, s 115.