INTERNATIONAL ARBITRATION AS A SOLUTION TO THE LACK OF ACCESS TO REMEDIES FOR HOST STATE CITIZENS HARMED BY FOREIGN INVESTMENTS: A ROLE FOR UNCITRAL

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I INTRODUCTION

There is currently a lack of access to remedies in International Investment Law (IIL) for host-state citizens ("HSCs")[1] whose interests are harmed by the activities of investors (investment activities). Under the current system, harmed HSCs are required to seek redress in domestic forums (domestic courts or other adjudicatory forums). However, it is acknowledged that the domestic forums in many jurisdictions leave many harmed HSCs without a remedy.[2] Often this is due to weak governance institutions which leads to lack

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1 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 recognised or not. "Citizens" is used here to broadly 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 may be heavily diminished by investment related activity, such as pollution of land.

2 See eg UN Office of the High Commissioner for Human Rights, *Access to Remedy for Business-Related Human Rights Abuses (Consultation Draft)* UN doc A/32/10 (2 January 2018) <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARPIIConsultation.pdf> (containing policy objectives aimed at helping UN Member States strengthen access to remedy for business-related human rights abuses); *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* 18 (10 April 2017)

of adequate, or lax, laws; lack of enforcement of laws if they exist; corruption on the part of public authorities, including law enforcement agencies, judiciaries and other adjudicatory bodies; incompetence on the part of government officials; lack of rule of law, or respect for the rule of law; political interference in judicial processes; and outright oppression of HSCs by their governments. There are several examples of such situations in some Asian, African and Latin American countries, where harmed HSCs have been left without remedy (some of these are outlined in Part II below, by way of examples). Yet, despite efforts over the last several decades, particularly through the UN system, no solution has been found; the problem remains unresolved.

This paper argues that access to a remedy for harmed HSCs can, and should, be given in international forums. This can be operationalised within the existing arbitral system, which has proven to be effective for investors in resolving their disputes with host states. If HSCs are granted access to the system, it will be effective for harmed HSCs too.[3]

This paper argues further that UNCITRAL, which is currently working on possible reform of the Investor-State Arbitration (ISA) system, including

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<http://fra.europa.eu/en/opinion/2017/business-human-rights> (advising "which EU action could be undertaken for the right to a remedy to be improved in cases of business-related human rights abuse"). See also Access to Remedy Problems detailed in Part II below.

3 The proposals of this paper are for arbitration, but they may also be integrated into a future international investment court system that may eventuate in parallel to, or in place of, the current arbitral system. This paper focuses on investment arbitration because that is what it is working currently. There is no IIC currently in place, though there seems to be a strong push for such an institution. On IIC, see for example UH Ghori "The International Investment Court System: The Way Forward for Asia?" 21 International Trade and Business Law Review 205-229; UH Ghori "Investment Court System or 'Regional' Dispute Settlement?: The Uncertain Future of Investor-state Dispute Settlement" (2018) 30(1) Bond L Rev 83-117; Gabrielle Kaufmann-Kohler and Michele Potestà *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards* (CIDS Supplemental Report, 15 November 2017) <http://www.uncitral.org/pdf/english/workinggroups/wg3/CIDSSupplementalReport.pdf>; David M Howard "Creating Consistency Through a World Investment Court" (2017) 41(1) Fordham International Law Journal 1-52; Directorate-General for the External Policies *In Pursuit of an International Investment Court* (European Parliament study, 2017) <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603844/EXPOSTU(2017)603844_EN.pdf> accessed June 2019.

considering the option of an international investment court (IIC),[4] is well placed to operationalise access to a remedy for HSCs. UNCITRAL can play an important role in operationalising international access to remedy for harmed HSCs in various ways. First, it can amend the UNCITRAL Arbitral Rules to enable the commencement of arbitral proceedings by HSCs against investors. Second, it can initiate the formulation of texts for inclusion in international investment agreements, either in bilateral or multilateral arrangements. Third, it can initiate the collation and promulgation of general principles of torts (delict) to serve as substantive international law on torts for assessing investors' actions for the determination of liability or otherwise. Fourth, it can expand the ambit of its current work on ISA, which focuses on the forum for investors' proceedings against host-states, to include a forum for HSCs against investors. That is, whatever forum UNCITRAL designs at the end of its current project to complement or replace investment arbitration, can be made available to HSCs as well.

To achieve the objective of this paper, the following structure is adopted. Part II gives examples of situations where harmed HSCs have been left without a remedy. This is to underscore the problem some HSCs face in accessing appropriate remedies. Part III briefly discusses efforts so far at trying to provide access to remedy for harmed HSCs. It outlines the challenges faced by those efforts and why they have been unsuccessful. The discussions in Parts II and III would help understand the proposals in this paper, namely why and how UNCITRAL should intervene. Part IV outlines the proposed solution, namely the investment-related dispute settlement (IRDS) system.[5] Part V examines specific challenges to the IRDS system. Part VI discusses the possible solutions to the challenges and the role that UNCITRAL can play in that. It argues that UNCITRAL is well placed to help resolve and operationalise the IRDS system. Part VII concludes.

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4 For UNCITRAL's work in this regard, see UNCITRAL, Working Group III: Investor-State Dispute Settlement Reform <http://www.uncitral.org/uncitral/en/commission/workinggroups/3InvestorState.html> accessed June 2019. Documents detailing UNCITRAL's mandate, deliberations, comments and proposals can be found on this page.

5 Much of the discussions in Parts II, III and IV have been detailed in the author's earlier work but are summarised here for ease of reference and for the sake of completeness. For the earlier work, see Emmanuel T Laryea "Making Investment Arbitration Work for All: Addressing the Deficits in Access to Remedy for Wronged Host State Citizens through Investment Arbitration" (2018) 59(8) Boston College Law Review 2845 at 2851-2874.

II LACK OF ACCESS TO REMEDY FOR NON-INVESTOR PARTIES

This Part briefly outlines the lack of access problems faced by harmed HSCs in some jurisdictions. It starts by briefly outlining the ISA system, indicating why it is currently not available to harmed HSCs, followed by some examples of harmed HSCs who have been left without a remedy and the desperation of those in their attempts to secure remedies.

A Investor-State Arbitration is Currently Unavailable to HSCs

The current dominant mechanism for settling investment disputes is the ISA system.[6] 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.[7] The ISA system was conceptualised and developed to serve as an investor protection mechanism.[8] It was designed to respond to perceived disadvantages that foreign investors may face if they seek redress in national courts against host-state governments of developing countries. These disadvantages are of various forms. For instance, there may be

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6 This is often referred to as Investor-State Dispute Settlement (ISDS). Broadly defined, ISDS includes any methods for settling investor-state 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"), the dominant mechanism for settling investment disputes. Although investment disputes may be resolved by methods other than arbitration, investors have come to prefer ISA. 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 ISA. See eg *Emilio Agustin Maffezini v Kingdom of Spain* ICSID Case No ARB/97/7 Jurisdiction (25 January 2000), where the investor-Claimant, an Argentine, sought to 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. The claimant was successful, the tribunal finding that he could resort to ISA without seeking redress in the domestic courts first.

7 Lisa Crawford, Patrick Emerton & Emmanuel Laryea "Investor-State Dispute Settlement and the Australian Constitutional Framework" in Colin Picker, Heng Wang & Weihuan Zhuo (eds) *The China-Australia Free Trade Agreement: A 21st Century Model* (Hart Publishing 2018) 259 at 260.

8 See Upendra D Acharya "Globalization and Hegemony Shift: Are States Merely Agents of Corporate Capitalism?" (2013) 54 Boston College Rev 937 at 952–53 ("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").

inordinate delays in those courts. The courts may lack judicial independence because sued governments may exert pressure or influence the decision in its favour. The host-state government may not respect the rule of law, such that they may ignore or legislate to override judicial decisions. Even if they are truly independent, the courts may be limited by the laws they can administer (for instance, they can only administer domestic law, such that valid legislation or regulation that expropriates investors' investments without compensation may leave investors without remedy in domestic law). Against these, the ISA system provides investors with a reputable, independent, international forum for settling disputes that might flow from their investments abroad.[9]

Because of its genesis, the ISA system, as it stands today, benefits only foreign investors. The focus on investor protection has meant that non-investors, whose interests are adversely affected by foreign investment activities, are left with only the domestic forums, which are perceived to be inadequate for the investor. Thus, while the ISA system shields investors from the risks of domestic systems of law mentioned above, HSCs, whose interests are adversely affected by the activities of investors, are left to resort to the weak and inadequate domestic system. Worse yet, investors can, and sometimes do, take advantage of the weak domestic system to operate in a manner they would not do in their home-state or other jurisdictions of strong laws and institutions.

B Examples of Investment-Related Harm to HSCs

There is ample evidence of foreign investor activities having devastating impacts on HSCs in some jurisdictions. For example, forestry and large scale farming land concessions and activity have led to locals being forced off traditional lands in Cambodia, obliterating their economic and cultural life without due compensation.[10] In May 2006, over 1,000 house owners were

9 *Gas Natural SDG SA v Argentine Republic* ICSID Case No ARB/03/10 Jurisdiction (17 June 2005) <https://www.italaw.com/sites/default/files/case-documents/ita0354.pdf> accessed June 2019.

10 See eg 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"* UN doc A/HRC/4/36 (30 January 2007); Jeff Smith *UN Presses Ministry to Protect Hill Tribes in Logging Dispute* Cambodia Daily (9 March 1998) <https://www.cambodiadaily.com/archives /un%E2%80%88 presses-ministry-to-protect-hill-tribes-in-logging-dispute-86426/> accessed June 2019; Global Witness, The Cost Of Luxury (2015) <https://www.globalwitness.org/documents/

forcibly evicted amidst police brutality from a village located on the Bassac Riverbank in Cambodia to make way for constructing a shopping mall.[11] Mining concessions and activities in many developing countries have had, and continue to have, adverse impacts on HSCs without due compensation.[12]

17788/thecostofluxury1.pdf> accessed June 2019; "Rubber Barons" (Global Witness, 2013), <https://www.globalwitness.org/documents/10525/rubberbaronslores01.pdf> accessed June 2019; "Cambodia's Family Trees" (Global Witness, 2007) <https://www.globalwitness.org/documents/14689/cambodiasfamilytreeslowres.pdf> accessed June 2019; "Taking a Cut" *(*Global Witness, 2004) <https://www.globalwitness.org/documents/14709/takingacutlowres.pdf>1 accessed June 2019 .

11 See eg UN Special Representative of the Secretary-General for Human Rights in Cambodia, Cambodia Office of the High Commissioner for Human Rights, Economic Land Concessions In Cambodia: A Human Rights Perspective (2007) <http://cambodia.ohchr.org/~cambodiaohchr/sites/default/files/Economic%20Land%20Concession%20%20a%20human%20rights%20perspective%202 007.pdf> accessed June 2019; "Cambodia's Disappearing Capital: Lake Inferior the Poor Pay for a Property Boom" (29 January 2009) *Economist* <https://www.economist.com/asia/2009/01/29/lake-inferior> accessed June 2019; Asian Human Rights Commission, Cambodia: The Situation of Human Rights in 2006 (2006) <http://material.ahrchk.net/hrreport/2006/Cambodia2006.pdf> accessed June 2019.

12 See eg Deanna Kemp & John R Owen "The Reality Of Remedy In Mining And Community Relations: An Anonymous Case-Study From Southeast Asia" in Mahdev Mohan and Cynthia Morel (eds) *Business and Human Rights in Southeast Asia: Risk and the Regulatory Turn* (Routledge, 2015) 239; Mahdev Mohan "Human Rights Risks Amidst the Gold Rush: Cambodia, Laos, Myanmar and Vietnam" in Mahdev Mohan and Cynthia Morel (eds) *Business and Human Rights in Southeast Asia: Risk and the Regulatory Turn* (Routledge, 2015) 133 at 150–151. See also Association of Southeast Asian Nations (ASEAN), *ASEAN Minerals Cooperation Action Plan 2005-2010* (4 August 2005) <http://www.asean.org/uploads/archive/17706.pdf> accessed June 2019; Association of Southeast Asian Nations (ASEAN), *Joint Press Statement: The Fourth ASEAN Ministerial Meeting on Minerals* 2 (28 November 2013) <http://www.asean.org/storage/images/pdf/2014_upload/Annex%206%20-%20AMMin%204%20-%20JPS%20of%20the%204th%20AMMin%20final.pdf> accessed June 2019; Amnesty International, *Open for Business? Corporate Crime and Abuses at Myanmar Copper Mine*, AI Index ASA 16/003/2015 (February 2015), <https://www.amnesty.org/download/Documents/ASA1600032015ENGLISH.PDF> accessed June 2019; Roseanne Gerin "Myanmar Police Arrests Two in Letpadaung Copper Mine Protest" *Radio Free Asia* (6 May 2016) <http://www.rfa.org/english/news/myanmar/myanmar-police-arrest-two-in-letpadaung-copper-mine-protest-05062016164 650.html> accessed June 2019; "Myanmar: Letpadaung Mine Protesters Still Denied Justice" *Amnesty International* (27 November 2015) <https://www.amnesty.org/en/latest/news/2015/11/myanmar-letpadaung-mine-protesters-still-denied-justice/> accessed June 2019; Wa Lone "Fresh Tension, Injuries At Letpadaung Mine" *Myanmar Times* (16 February 2015) <http://www.mmtimes.com/index.php/national-news/13144-fresh-tension-injuries-at-letpadaung-mine.html> accessed June 2019; "Mountain of Trouble: Human Rights Abuses Continue at Myanmar's Letpadaung Mine" AI Index ASA 16/5564/2017 *Amnesty*

Therefore, investments in energy generation resulted in wide-ranging social and environmental harm to thousands of HSCs.[13] Some companies' activities have damaged water bodies and access to clean water by locals.[14] Sometimes actual assault, intimidation, and, in extreme cases, murder occurs.[15] Some

International (February 2015) <https://www.amnesty.org/en/documents/asa16/5564/2017/en/> accessed June 2019; Rachel E Ryon "Foreigners in Burma: A Framework for Responsible Investment" (2014) 23 Pac Rim L & Pol'y J 831 at 860-861; Carl Middleton and Ashley Pritchard *Corporate Accountability in ASEAN: A Human Rights-Based Approach* (Forum-Asia, 2013) 58; "In the Name of Mining" *IC Magazine* (24 November 2007) <https://intercontinentalcry.org/in-the-name-of-mining/> accessed June 2019; "Increased Human Rights Abuses Around TVI Pacific's Philippines Operation" *Mining Watch Canada* (July 7 2003) <http://miningwatch. ca/news/2003/7/7/increased-human-rights-abuses-around-tvi-pacifics-philippines-operation> accessed June 2019. Another high-profile case in the Philippines involves around the Apex Mining Co Inc "Philippines: Congressional Investigation of Poor Mining Practice" *MAC: Mines & Communities* (21 April 2014) <http://www.minesandcommunities.org/article.php?a=12626> accessed June 2019.

13 See for example Chris Greacen & Apsara Palettu "Electricity Sector Planning and Hydropower in the Mekong Region" in Louis Lebel and others (eds) *Democratising Water Governance in the Mekong Region* (2007) 93; Ian G Baird & Noah Quastel "Rescaling and Reordering Nature-Society Relationship: The Nam Theun 2 Hydropower Dam and Laos-Thailand Electricity Networks" 105 Annals of the Association of American Geographers 1221, at 1226 (2015); Ikuko Matsumoto "Laos" Nam Theun 2 Dam Starts Operation, International Rivers (23 March 2010) <https://www.internationalrivers.org/resources/laos-nam-theun-2-dam-starts-operation-3478> accessed June 2019. See also *Update: Nam Theun 2 Hydropower Project, Laos* European Investment Bank (9 November 2015) <http://www.eib.org/infocentre/press/news/topicalbriefs/2005-november-01/nam-theun-2-hydropower- project-laos.htm> accessed June 2019; Brendan M Howe & Seo Hyun Rachelle Park "Laos: The Dangers of Developmentalism?" (2015) Southeast Asian Affairs 165, 173–176; Don Sahong Dam "International Rivers" <https://www.internationalrivers.org/campaigns/don-sahong-dam> accessed June 2019; *What is the Don Sahong Dam Project?* WWF-Cambodia <https://web.archive.org/web/20170702204651/http://cambodia.panda.org/projectsandreports/don_sahong_dam/> accessed June 2019.

14 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" UN doc A/HRC/21/63/Add.1/Rev.1 (1 October 2012) 54 at 55.

15 Roseanne Gerin "As Many As 10 Myanmar Villagers Injured in Shooting at Letpadaung Copper Mine" *Radio Free Asia* (24 March 2017) <http://www.rfa.org/english/news/myanmar/as-many-as-10-myanmar-villagers-injured-in-shooting-at-letpadaung-copper-mine-03242017164150.html> accessed June 2019; "Thailand: Mining Company Must Withdraw Threat of Legal Actions against Community Leaders, Forum-Asia" (28 October 2014) <https://www.forum-asia.org/?p=17885> accessed June 2019; "Bittersweet Harvest: A Human Rights Impact Assessment of the European Union's Everything But Arms Initiative in Cambodia" (2013) Equitable Cambodia & Inclusive Development 55 <https://www.inclusivedevelopment.net/wp-content/uploads/2013/10/Bittersweet_Harvest_web-version.pdf> accessed June 2019.

local workers have been subjected to what is equivalent to modern-day slavery practices.[16] Other forms of labour rights abuse and child labour have happened in some places.[17]

Oil-producing companies have participated in gas flaring activities in various locations in Nigeria for decades.[18] Gas flaring is proven to be harmful to inhabitants of nearby lands, violating their right to health, dignity, and life.[19] In particular, the British–Dutch multinational oil and gas giant Royal Dutch Shell PLC ("Shell") has been flaring gas, spilling oil, and polluting lands, waterways, and habitats in Nigeria's Niger Delta area for decades.[20] Shell's practices in the area have been notoriously damaging to the locals' life, health, and livelihoods.[21]

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16 Kate Hodal & Chris Kelly "Trafficked into Slavery on Thai Trawlers to Catch Food for Prawns" *Guardian* (10 June 2014) <https://www.theguardian.com/global-development/2014/jun/10/-sp-migrant-workers-new-life-enslaved-thai-fishing> accessed June 2019; Becky Palmstrom "Forced to Fish: Slavery on Thailand's Trawlers" *BBC News* (23 January 2014) <http://www.bbc.com/news/ magazine-25814718> accessed June 2019; See Letter from 45 regional and international nongovernmental organisations and labor associations to Gen. Prayuth Chan-ocha, Prime Minister of Thailand (14 January 2015) <https://www.hrw.org/sites/default/files/related_material/Letter%20to20Thai%20PM%20regarding%20prison%20laborFINAL.pdf> accessed June 2019; Margie Mason and others "Shrimp Sold by Global Supermarkets is Peeled by Slave Laborers in Thailand" *Guardian* (15 December 2015); "Indonesia: Burmese Workers In Slave-Like Conditions To Catch Seafood Supplying US Businesses" Business & Human Rights Resource Centre <https://business-humanrights.org/en/indonesia-burmese-workers-in-slave-like-conditions-to-catch-seafood-supplying-usbusinesses> accessed June 2019.

17 Irene Pietropaoli & Bobbie St. Maria *Business and Human Rights Resource Centre, Briefing: Development for All or A Privilege for the Few?* 16–17 <https://www.ohchr.org/Documents/Issues/Business/AsiaForum/SoutheastAsiaBriefing16April2015.pdf> [https://perma.cc/U4HS-7G7Y] accessed June 2019; CCHR (December 2013) 35–36.

18 Eferiekose Ukala "Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices" (2011) 2 Wash & Lee J Energy, Climate & Environment 97 at 103.

19 *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* [2005] 6 AHRLR 151 at 152–54 (Nigeria).

20 "High Court blocks Nigeria oil spill case against Shell" *Aljazeera* (27 January 2017) <https://www.aljazeera.com/news/2017/01/high-court-blocks-nigeria-oil-spill-case-shell.html> accessed June 2019. 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 has devastated thousands of lives, the environment, and caused diseases.

21 See "Shell Sued in UK for 'Decades of Oil Spills' in Nigeria" *Aljazeera* (23 November 2016) <https://www.aljazeera.com/news/2016/11/shell-sued-uk-decades-oil-spills-nigeria-161122193545741.html> accessed June 2019; Emily Gosden "Why Shell's Bodo Oil

C The 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 forums, the very forums perceived to be inadequate for foreign investors. Unsurprisingly, those forums turn out to be woefully unhelpful to victims in many developing countries. The problem in some cases is with the availability, quality, competence, or effectiveness of the domestic forum. These are what investors try to avoid when they argue for access to international arbitration for effective remediation, which was devised for them in the form of ISA. For many affected HSCs in different incidences mentioned (Part II, B) above, they have no avenue for an adequate remedy. For illustration, a few examples of incidences in Cambodia and Nigeria are analysed below.

In August 2006, the Cambodian government granted land concessions covering vast tracts of land to two companies in Koh Kong province. The two companies, Koh Kong Sugar Industry Co Ltd (KKS) and Koh Kong Plantation Co Ltd (KKP), were owned 70 per cent by a Thai company (Khon Kaen Sugar Industry Group) and 30 per cent by a Taiwanese company (Ve Wong Corporation).[22] The concessions involved forced eviction of HSCs from their traditional lands.[23]

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

Spill Still Hasn't Been Cleaned Up" *Telegraph* (8 January 2018) <https://www.telegraph.co.uk/business/2017/01/08/yet-clean-nigerian-oil-spills-two-years-compensation-deal/> accessed June 2019.

22 Kuch Naren "Thai Representative Meets with Koh Kong 'Blood Sugar' Families" *Cambodia Daily* (28 February 2013) <http://www.cambodiadaily.com/archive/thai-representative-meets-with-koh-kong-blood-sugar-families-11884> accessed June 2019. A Cambodian businessman and Senator, one Ly Yong Phat, originally owned 20 per cent of the plantations but reportedly sold his stake to Kong Kaen in 2010.

23 Ibid.

and KKP.[24] They argued that the transfer of the land was illegal for the reasons that the concession:

(1) contravened Cambodian law against the arbitrary expropriation of private property;

(2) breached the right of the affected HSC 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 of 10,000 hectares land); and

(4) contravened the requirement that environmental and social impact assessments should 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 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 power to hear the dispute.[25] The Court transferred the case to a Cambodian alternative dispute resolution body, the Cadastral Survey Commission, to take action.[26] This author has no information that 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 harmed 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 and restraint on the government of Nigeria and Shell Petroleum,[27] gas flaring

24 Mahdev Mohan "The Road to Song Mao: Transnational Litigation from South East Asia to the United Kingdom" (2014) 107 American J International L (Unbound e-30). The further facts and procedural history that follows are from this article.

25 Ibid.

26 Ibid.

27 *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* [2005] 6 AHRLR 151 at 152–54 (Nigeria).

continued unabated.[28] In many jurisdictions, such affected HSCs lack effective remedial options.

Desperate for remedies, some affected HSCs who cannot obtain remedies at home have resorted to seeking remedies outside of their domestic jurisdictions. In the Cambodian example mentioned above, while the HSCs' petition to the Koh Kong Provincial Court stalled, the claimants sought recourse beyond Cambodia. In January 2010, they filed a complaint in Thailand, the home state of the majority owner (KSL).[29] They filed the complaint before the National Human Rights Commission of Thailand alleging that KSL had obtained the land concession illegally through its subsidiaries in Cambodia.[30] The Commission accepted jurisdiction and investigated the claim but later ruled that it did not have the power to bind the company.[31]

In 2013, the HSCs commenced proceedings in the UK's High Court against Tate & Lyle Industries Ltd, a UK based company to which KKS and KKP sold the produce from the disputed land.[32] The claim was based on the tort of conversion.[33] The claimants (HSCs) 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 (the claimants) of their property.[34]

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28 "Shell Still Flaring Gas, Defying Nigerian Courts" *Friends of the Earth Europe* (3 May 2007) <http://www.foeeurope.org/press/2007/May3_DU_Flaring.htm> accessed June 2019; "Gas Flares Still a Burning Issue in the Niger Delta" (8 March 2012) <http://www.irinnews.org/report/95034/ nigeria-gas-flares-still-burning-issue-niger-delta> accessed June 2019 ("While gas flaring has technically been illegal in Nigeria since 1984, the government sometimes grants exemptions to oil companies").

29 Mohan, above n 24.

30 Mohan, above n 24.

31 Mohan, above n 24.

32 See Mohan, above n 24, at e-30 (citing Particulars of Claim, No 2013 Folio 451 (EWHC (Comm) 28 March 2013) (UK).

33 "Conversion" has been the primary vehicle for tortious protection against interferences with goods. See Richard H Helmholz "Property and the Law of Finders" (2011) 31 Legal Studies 511-515.

34 See Mohan, above n 24, at e-30 No 2 (citing Particulars of Claim, No 2013 Folio 451 (EWHC (Comm), 28 March 2013) (UK).

Some have initiated suits in the investors' Home-State or other locations of substantial operations of the investor. An example is the ultimately unsuccessful United States Supreme Court case of *Kiobel v Royal Dutch Petroleum Co* decided in 2013. In this case, a group of Nigerians sued Shell in the US under the Alien Tort Claims Act for alleged torts committed by Shell in Nigeria.[35] Another earlier example is the case *Bowoto v Chevron Corp*[36] decided in 2010 by the Ninth Circuit Court of Appeals, in which claims by a group of desperate Nigerians failed. In *Wiwa v Shell Petroleum Development Company*,[37] on the night before the trial commenced at the Second Circuit Court of Appeals in 2009, Shell agreed to settle after 13 years of litigation.[38] In *The Bodo Community and Others v The Shell Petroleum Development Company of Nigeria Ltd*,[39] more than 15,000 sued Shell in the UK. They claimed compensation under the law of Nigeria concerning oil spills from pipelines said to have been caused by Shell in the Niger Delta, which had affected people living in the areas. Shell settled the case, agreeing to pay £55,000,000, though not admitting liability.

Litigation has been initiated in the Netherlands too. *Dooh et al v Royal Dutch Shell*[40] was a suit commenced in the Netherlands against Shell on

35 *Kiobel v Royal Dutch Petroleum Co* [2013] 569 US 108, 113–14.

36 621 F 3d 1116, 1120–21 (2010).

37 *Wiwa et al v Royal Dutch Petroleum et al Center for Constitutional Rights* (last modified 21 February 2012) <https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al> accessed June 2019.

38 Ed Pilkington "Shell Pays Out $15.5m Over Saro-Wiwa killing" *Guardian* (8 June 2009) <http://www.theguardian.com/world/2009/jun/08/nigeria-usa> accessed June 2019. 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" *Guardian* (30 January 2013) <http://www.theguardian.com/environment/2013/jan/30/shell-acquitted-nigeria-pollution-charges> accessed June 2019. The matter has been so protracted that the UNEP compiled a report on the issue. See United Nations Environment Programme (UNEP) *Environmental Assessment of Ogoniland* (2011) <https://postconflict.unep.ch/publications/OEA/ UNEP_OEA.pdf> accessed June 2019.

39 [2014] EWHC 1973 (TCC) <https://www.bailii.org/ew/cases/EWHC/TCC/2014/2170.html> See also *Okpabi and others v Royal Dutch Shell plc* and another [2018] EWCA Civ 191 (UK) <https://www.businesshumanrights.org/sites/default/files/documents/Shell%20Approved%20Judgment.pdf> accessed June 2019.

40 Cees van Dam *Preliminary judgments Dutch Court of Appeal in the Shell Nigeria case* 1 No 1 (14 January 2016) <http://www.ceesvandam.info/default.asp?fileid=643> accessed June 2019.

behalf of a group of Nigerians who had been adversely impacted by Shell's operations in the Niger Delta area.

As can be seen from the above examples, there is a woeful lack of access to remedy for harmed HSCs in some countries, particularly developing countries with weak governance and judicial systems. It has led to affected victims having to follow arduous, lengthy and tortuous paths in their attempts at procuring remedies, most of which have been ineffective. The result is that lives and livelihoods are destroyed by emboldened investors, who perpetrate the harm because they did not have to pay for the harm they cause.

III EFFORTS SO FAR AT SOLVING THE PROBLEMS

This Part looks briefly at efforts made so far, particularly in the United Nations system, to address the problems identified in Part II above. It would be seen that those efforts have been ineffective; there remains a severe lack of access to effective remedies for HSCs in many developing countries.

For decades, the United Nations has made efforts to assist HSCs. The focus has been on the conduct of investors to prevent or minimise harm to host-states and their citizens. There was a UN report back in 1973 looking into the conduct of multinational corporations in developing countries.[41] 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.[42] Article 9 of the code called on transnational corporations to adhere to the host states' economic goals and development objectives, policies, and priorities. Article 12 called on them to adhere to socio-cultural objectives and values. Very importantly, for the purpose of this paper, it is relevant to note that art 13 called on transnational corporations to respect human rights and fundamental freedoms. However, the document did not receive the necessary promulgation to become law. In

41 See UN Secretary-General *The Impact of Multinational Corporations on The Development Process and On International Relations* UN Doc E/5500 (14 June 1974). See also Christopher May "Multinational Corporations in World Development: 40 Years On" (2017) 38 Third World Quarterly 2223 (reviewing the first major discussion at the United Nations on the role of multinational corporations in world development in 1973 and attempts at progressing the discussions over the following 40 years).

42 See Commission on Transnational Corporations, Draft United Nations Code of Conduct on Transnational Corporations 6–8, UN doc E/1983/17/Rev.1, annex II, 23 ILM 626 (1984).

2003, another document, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, was adopted by the UN.[43] There is also the UN's Global Compact.[44] The most acclaimed of the recent efforts is John Ruggie's Protect, Respect and Remedy Framework, which has led to the UN Guiding Principles on Business and Human Rights.[45]

The attempts have either failed to prevent the infliction of harm on HSC by investment activities or grant the victims access to an effective remedy. The current situation is characterised by the absence of binding public international law obligations for transnationally active corporations or avenues for an effective remedy for the victims of harm.[46] Obligations, if any, are seen mainly in terms of the domestic law of the host state, not an overarching international standard.[47] This is why there is the need for a re-think of approach, hence the proposal in this paper that UNCITRAL can play

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43 See UN Commission on Human Rights *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* <https://digitallibrary.un.org/record/501576/files/ECN.4Sub.2200312Rev.2-EN.pdf> accessed June 2019. For discussion of this instrument, see David Weissbrodt and Muria Kruger "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) 97(4) The American Journal of International Law 901-922.

44 The United Nations Global Compact (UNGC) is a United Nations 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 the UN Sustainable Development Goals, with an emphasis on collaboration and innovation. See United Nations Global Compact <http://www.unglobalcompact.org> [https://perma.cc/U4YN-5JBN] accessed June 2019.

45 See UN Special Representative of the Secretary-General "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" UN doc A/HRC/17/31 (21 March 2011).

46 Errol Meidinger "Multi-Interest Self-Governance through Global Product Certification Programmes" in Martin Herberg & Gerd Winter (eds) *Responsible Business: Self-Governance and the Law in Transnational Economic Transactions* (Olaf Dilling, 2008) 259.

47 For a detailed discussion of the efforts made so far and bedeviling problems, see John Gerard Ruggie "Business and Human Rights, The Evolving International Agenda" (2007) 101 American J International L 819-840; Karl P Sauvant "The Negotiations of the United Nations Code of Conduct on Transnational Corporations" (2015) 16 J World Investment & Trade 11-87.

an essential role in reshaping the law and providing avenues for an effective remedy for HSCs.

IV INVESTMENT-RELATED DISPUTE SETTLEMENT AS A SOLUTION

It is proposed that making the current investment arbitration system (or an international investment court system that may eventuate) available to HSCs, whom a foreign investor harms, would grant them access to an effective remedy. It is also likely to compel a change in investor behaviour for the good of all. Section A of this Part explains how the Investment-Related Dispute Settlement (IRDS) system works to help solve the problems of lack of access to remedies for HSCs. Section B of this Part outlines some potential legal and practical challenges to the proposed system.

A The IRDS System

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. There are cases in which the problem is with the availability, quality, competence or effectiveness of the domestic forum, rather than the substantive law of obligations. These deficiencies are what investors try to avoid when they argue for international arbitration. An international arbitration between HSCs and foreign investors will alleviate that problem for harmed HSCs.

Unlike the current ISA system, which is available to investors only, the IRDS system would give HSCs a forum to initiate arbitral proceedings against international investors. Instead of going to a weak or ineffective domestic court, the HSC would go to arbitration. That means the complainant may be an individual or a group of people, possibly in a class action.

Allowing HSCs to be able to seek remedies through international arbitration has several benefits. First, it will alleviate, if not eliminate, their access to remedy problems. Second, allowing HSCs to initiate arbitral proceedings will be fair and equitable to both investors and HSCs. After all, investors have embraced the arbitral system as their preferred avenue for remedy when host-states harm them. So, it is fair and just that HSCs whom they may harm are allowed access to the same system they trust for a remedy against them (investors). Third, the system will help balance the rights of investors and those of HSCs; currently, the system is lopsided in favour of investors. Fourth, it may change investor behaviour for the better. When

investors know they may be made to pay for the harm they cause, they are likely to take steps to avoid causing any harm. Fifth, compared to a judgment of a domestic court (if any), an arbitral award would be better able to be enforceable abroad, where the investor may have valuable assets located. It may prove valuable when an investor does not have sufficient assets within the territory where the harm is caused. Sixth, such an avenue for remedies for a possible harm may help reduce social conflict surrounding some investments and consequent delays and costs.

There is a growing view in recent times along the lines of the proposal made in this paper, albeit varyingly. Amado, Kern and Rodriguez have looked at the possibility of arbitration as a solution to resolving the access to remedy problems for host-state populations. However, their coverage and views differ in significant respects to arguments in this paper.[48]

Calderon-Meza, too, has considered the possibility of arbitration for human rights.[49] Arcuri and Montanaro have explored three options in procuring justice for harmed host-state constituents.[50] Maya Steinitz believes that arbitration would not work and proposes a permanent International Court of Civil Justice (ICCJ) instead.[51] The details vary, but none of these authors have looked at the role of UNCITRAL. However, a case can be made that some momentum is growing towards addressing the problem.

B Legal or Systemic Challenges to IRDS

Two main legal or systemic challenges may arise. 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

48 See Jose Daniel Amado, Jackson Shaw Kern and Martin Doe Rodriguez *Arbitrating the Conduct of International Investors* (CUP, 2018).

49 Juan Pablo Calderón-Meza "Arbitration for Human Rights: Seeking Civil Redress of Corporate Atrocity Crimes" (2016) 57 Harvard International Law Journal (online symposium) available at <https://harvardilj.org/wp-content/uploads/sites/15/Calderon-Meza_0615.pdf> accessed June 2019.

50 Alessandra Arcuri "Justice for All? Protecting the Public Interest in Investment Treaties" (2018) 59(8) Boston College Law Review 2791-2824.

51 See Maya Steinitz "Back to the Basics: Public Adjudication of Corporate Atrocities Torts" (2016) 57 Harvard International Law Journal (online symposium) available at <https://harvardilj.org/wp-content/uploads/sites/15/Steinitz_0615.pdf> accessed June 2019. See also Maya Steinitz "The Case for an International Court of Civil Justice" (2014) 67 Stanford Law Review 75.

second relates to investors' consent to arbitrate. That is, as arbitration is a consensual dispute resolution mechanism, no tribunal will have jurisdiction unless all parties to the dispute have consented to the tribunal determining the matter. So how may an investor's consent be obtained?

The challenges mentioned above are more problematic in respect of remedies through HSC-Investor arbitration. It is because arbitration operates more based on the private ordering of parties, and therefore a lot is left for the parties' determination, including agreeing (consenting) to arbitrate. They will be less of a challenge when access to remedy is granted through an international investment court (if any should eventuate). In particular, in a court system, investors' consent may not be an issue, as it may be possible to seize the court with compulsory jurisdiction over investors. They (investors) in a territory are deemed to be subject to the jurisdiction of the judicial system of the territory in which they operate. As arbitration as an avenue for redress is the focus of the proposal in this paper, I will address the challenges in that respect only.

I have previously discussed in detail how the consent of investors to arbitrate may be obtained.[52] I do not intend to repeat those details; I will only list them here. The methods include: (1) ad hoc, case by case, consent (for example giving consent when requested by an HSC after a dispute has arisen); (2) investors' voluntary standing offer of consent to all HSCs, which may be accepted by the act of initiating arbitral proceedings; (3) investors' 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 authorisation regime for foreign investors and investments stating that they have consented to arbitration proceedings initiated by HSCs. As discussed there, some of these mechanisms are more practicable or would be more effective than others.[53] I will focus on the substantive law challenge next in Part V below, followed by the role UNCITRAL can play in overcoming that challenge.

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52 See Laryea, above n 5, at 2869-2874.

53 At 2869.

V SUBSTANTIVE LAW OF INVESTORS' OBLIGATION

In the current system, the obligations of foreign investors are concerning the domestic laws of the host-state where they operate. As previously noted, the current situation is characterised by the absence of binding public international law obligations for transnationally active corporations or avenues for an effective remedy for victims of harm.[54] Obligations, if any, are seen mainly in terms of the domestic law of the host state, not an overarching international standard.[55]

A major problem has been the way international law has been conceptualised: it is for the states and not for individuals or business entities. "The state-based system of global governance has struggled for more than a generation to adjust to the expanding reach and the growing influence of transnational corporations." [56] However, the "longstanding doctrinal arguments over whether such firms could be 'subjects' of international law are yielding to new realities on the ground".[57] The reality is that foreign investors now acquire significant rights under various IIAs and agreements with host states.[58] These investors, who may not be considered subjects of international law under traditional conceptions, eagerly enforce their acquired rights in international law, mainly through investment arbitration. Thus, at a minimum, they "have become 'participants' in the international legal system… with the capacity to bear some rights and duties under international law".[59]

That said, international law generally, and international investment law particularly, is yet to fully find where to situate individuals and businesses for duties and responsibilities appropriately. In this paper, it is not intended to revisit the debates and attempt to construct the situation for duties and

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54 Errol Meidinger "Multi-Interest Self-Governance through Global Product Certification Programmes" in Martin Herberg & Gerd Winter (eds) *Responsible Business: Self-Governance and the Law in Transnational Economic Transactions* (Olaf Dilling, 2008) 259.

55 Ruggie, above n 47, at 824.

56 At 819.

57 At 824.

58 At 824.

59 Ruggie, above n 47, at 824, citing Rosalyn Higgins *Problems and Process: International Law and How We Use It* (Clarendon Press, 1995) 50.

responsibilities. This paper adopts a more straightforward, pragmatic approach to imposing legally enforceable duties on investors and remedies when they breach those duties. Methods that may be used include enshrining such obligations in IIAs (bilateral or multilateral) and general principles of law observed by civilised states. These are in addition to duties under the domestic law of host states. I now turn to how these may work and the role that UNCITRAL can play in bringing that to fruition.

VI ROLE OF UNCITRAL IN FORMULATING SUBSTANTIVE LAW OF OBLIGATIONS FOR INVESTORS FOR EFFECTING IRDS

As discussed in Part V above, a major challenge for the proposed IRDS is the substantive law to be applied by arbitral tribunals, based on which the liability or otherwise of an investor may be determined. This issue may vary slightly depending on the forum, whether arbitration or IIC. As noted earlier, an IIC, if one eventuates, may be created by a specific treaty, and that treaty may comprehensively set out jurisdiction and substantive law. By contrast, as noted in the context of jurisdiction, arbitration is considered as the private ordering of parties and therefore more problematic. For this purpose, and the fact that arbitration is the developed system for the settlement of investment disputes and the system proposed in this paper, the only substantive law in arbitral proceedings, and the role UNCITRAL may play in formulating that, is discussed here.

There are three sources of law that arbitral tribunals can apply to determine the duties and liabilities of investors-respondents. These are (1) domestic law of the host state where the harm is perpetrated, (2) treaty law, and (3) general principles of torts (delict). I consider these in order.

A Domestic Law of the Host State

It is fair to say that all legal systems have some form of general tort (delict) law under which liability of people or entities who cause harm to others is determined and the perpetrators held liable. In Common Law jurisdictions, this may be composed of case law and legislation. In civil law systems, this

may be enshrined in a Civil Code. And in religious systems, such as Saudi Arabia, the law may derive principally from religious texts.[60]

The proposal here is that an international arbitral tribunal can apply the relevant domestic law as the proper law of the conduct complained of to determine the respondent/investor's liability or otherwise. It is not without precedent. It is a position taken by the European Union concerning transnational torts within the EU.[61]

Admittedly the law would be different in different jurisdictions. But that should not be a problem. The general rule in international law is that investors are subject to and bound by the domestic law of the jurisdiction where they operate. It means that an investor who operates in multiple jurisdictions would be subject to the different laws in the various jurisdictions. So, the proposal here is in line with the prevailing conception of law.

However, what is new is that instead of the law being applied by domestic courts which, as noted earlier, are often heavily compromised and fail to dispense justice, the law is applied by an international arbitral tribunal. As previously stated, the focus of this paper is a forum where harmed HSCs can access effective remedies. In many cases, such as those discussed in Part II.B above, the problem is 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. An international arbitration between HSCs and foreign investors will alleviate the problems HSCs face.

B Treaty Law

IIAs now dominate the substance of international investment law. States may be able to include in their IIAs, substantive obligations on investors covered by the IIAs. The vast majority of the existing IIAs impose obligations on host-states toward investors, but not on investors toward host-states and

60 See Othman Talbi "Tort Reform in Saudi Arabia: Obstacles and Solutions" (2015, Theses and Dissertations Paper 20 Indiana University) <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1019&context=etd> accessed June 2019.

61 Council Regulation 864/2007, art 4(1), 2007 OJ (L 199) 40 (EC) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0864&from=EN> accessed June 2019. While this is specific for the EU, it may hold lessons for the IRDS proposed in this Essay.

their citizens.[62] It is often due to the content of IIA provisions. They are mostly couched in terms of the standard of treatment expected from the host-state toward covered investors. The idea is that the sovereign state has its political, legislative, and regulatory power available to enact laws and regulations over investments within its jurisdiction. This power may be exercised against an investor in a manner contrary to acceptable standards of international law, and IIAs are supposed to guard against this risk. As far as the host-state is concerned, it can always legislate legitimately to protect itself from abuses and breaches by the investor. Consequently, the state does not need the protection of IIA provisions.

At first glance, the argument of the line above is sound. However, experience has shown that some investors have taken undue advantage of the lack of responsibility in international law to inflict unremedied harm on HSCs, particularly in developing countries where political, legal, and governance systems are weak.[63]

States can include in their IIAs, obligations on covered investors to a standard of conduct that prevents them from causing harm. It can also hold them liable when they do cause harm. In other words, states may create substantive law on the standard of behaviour of investors in their IIAs. Some IIAs or similar instruments are beginning to provide as such. For instance, the Morocco-Nigeria IIA concluded in 2016 includes mandatory impact assessments of investment by investors and post-establishment investors' obligations concerning the environment, human rights and labour.[64] So too

62 For discussions of the imbalance in the law, see eg Frank Garcia and others "Reforming the International Investment Law Regime: Lessons from International Trade Law" (2015) 18 Journal of International Economic Law 861; Arcuri, above n 50; George K Forster "Balancing Investor Protections, the Environment and Human Rights. Investors, States and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties" 17 Lewis & Clark L Rev 361.

63 See eg Megan Chapman "Seeking Justice in Lago Agrio and Beyond: An Argument for Joint Responsibility Host States and Foreign Investors Before the Regional Human Right Systems" 18 Human Rights Brief 6; Arcuri, above n 50; Laryea, above n 5, at 2852.

64 See Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and The Government of The Federal Republic of Nigeria (signed 3 December 2016) arts 14, 15, 18 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download> accessed June 2019.

does the draft Pan-African Investment Code adopted by the African Union in December 2016.

Another example is the ECOWAS Community Rules on Investment 2008 (ECI).[65] It requires investors to conduct environmental and social impact assessments before making their investments.[66] It also imposes duties on investors to uphold human rights obligations, social obligations, labour standards and environmental obligations.[67] These treaty provisions are reasonable first steps. They would help hold investors liable for breaches. Arbitral tribunals can assess the liability or otherwise of investors by those obligations.

However, there is a risk that it would take a long time and result in fragmentation and multiple and divergent provisions if the system develops in this piece-meal fashion. UNCITRAL can initiate the development of model IIA provisions for adoption by states or by way of a multilateral IIA. Provisions developed at that level would allow thoughtful and methodical consideration to make it appealing for most states and other stakeholders.

Admittedly, as noted earlier, this is not the first time a UN body may consider developing an instrument covering investor conduct. There have been several attempts in the past. But they have all failed because of the lack of critical support, often from developed countries.[68] In fact, the UN's Human Rights Council is considering an option for a binding multilateral instrument.[69] A problem with most of the unsuccessful attempts is that they have been conceptualised on the basis of human rights, which tend to belong to public and administrative law, and evokes controversy and disagreement. By contrast, private law generates less controversy. The proposal here is for the streamlining of tort provisions in international investment instruments.

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65 ECOWAS Supplementary Act A/SA.3/12/03 adopting Community Rules on Investment (ECI).

66 ECI, art 12

67 ECI, art 14.

68 For a detailed discussion of these efforts, see Sauvant, above n 47, at 11-87.

69 For the text of the draft of the legally binding instrument, see Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises (16 July 2018) UN Human Rights Council <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> accessed June 2019.

UNCITRAL has been very successful in developing and harmonising several aspects of international law in the private sphere. Not surprisingly, it was recently tasked with investor-state dispute resolution reform. It has the clout, recognition and capability to lead the implementation of the proposal in this paper.

C General Principles of Tort Law

Treaties, as discussed in VI.B above, are one of many sources of international legal obligations. Article 38(1) of the Statute of the International Court of Justice (ICJ Statute), 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 recognised by civilised nations".[70] International arbitral 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.[71] The tribunal referred to and applied the general principles governing damages for contractual liability under Indonesian law, French law, English law and US law, which it found to be similar.[72] 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. Arbitral tribunals already use this method in assessing liability.

UNCITRAL can initiate the collation of broad principles of torts recognisable as general principles of international tort law. Such an instrument will serve as a standard to guide investors in their operations and for arbitral tribunals when adjudicating claims. As stated under treaty law above, UNCITRAL has the clout, recognition and capability to lead the development of such an instrument.

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70 Article 38(1), Statute of the International Court of Justice.

71 *Amco Asia Corp v Indonesia* ICSID Case No ARB/81/1 Award (21 November 1984) 24 ILM 1022 (1985); Krista Nadakavukaren Schefer *International Investment Law: Texts, Cases and Materials* (Edward Elgar, 2013) 51.

72 *Amco Asia Corp* 24 ILM, at 1036–37.

VII CONCLUSION

The paper has argued that there is currently a lack of access to remedy in International Investment Law (IIL) for HSCs whose interests are harmed by foreign investment activities. Under the current system, harmed HSCs are required to seek redress in domestic forums, which are ineffective in many jurisdictions, and leave many harmed HSCs without a remedy. There are several examples of such situations given. This paper has argued that access to remedy for harmed HSCs can, and should, be provided in international forums. This can be done within the existing arbitral system, which has proven effective for investors in resolving their disputes with host states.

This paper has argued further that UNCITRAL, which is currently working on possible reform of the ISA system, is well placed to operationalise access to remedy for HSCs. UNCITRAL can do this in various ways. First, it can amend the UNCITRAL Arbitral Rules to enable the commencement of arbitral proceedings by HSCs against investors. Second, it can initiate the formulation of texts for inclusion in IIAs, either in bilateral or multilateral arrangements. Third, it can start collating and promulgating general principles of torts (delict) to serve as substantive international law standards on torts for the arbitral tribunals to apply in determining the liability or otherwise of investors. Fourth, it can expand the ambit of its current work on ISA, which focuses on the forum for investors' proceedings against host-states, to include a forum for HSCs against investors.