The scope for strengthening the procedural rights of third party groups in ISDS

THE SCOPE FOR STRENGTHENING THE PROCEDURAL RIGHTS OF THIRD PARTY GROUPS IN ISDS

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Abstract

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My research is on third party groups and their lack of involvement in the Investor-State Dispute Settlement (ISDS) processes despite the negative impact on their livelihood and environment. The absence of third-party rights in ISDS has culminated in a debate, reflected in the United Nations Commission on International Trade Law (UNCITRAL) discussions, on the development of a framework for third party access to the ISDS system. This thesis informs the UNCITRAL reform process by interrogating the concept of third-party rights in ISDS and seeking international law solutions to the access problem. States generally rely on the international law system for dispute settlement and the underpinning contracts are invariably governed by international law, which is the focus of this study. Nigeria is used as a case study to evidence the problem which leads to potential solutions from existing and emerging practices from other jurisdictions. The scale of the problem is captured in a May 2023 report by the Bayelsa State Oil and Environmental Commission titled: An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria. This study finds that existing mechanisms such as, domestic and international courts, amicus curie and counter claims are limited in terms of effectiveness. This thesis recommends the introduction of an African Investment Court under the African Continental Free Trade Area (AfCFTA) as a solution to the prevailing bottlenecks to third party access to ISDS in Africa.

Acknowledgements/Dedication

To The God Almighty who is the owner of this transitory life and all I have been, am and will be.

To my late Mother Mrs Goldcoast Dickson, who stared at the face of poverty yet refused to bow, she who crisscrossed the creeks of the Niger Delta to eek-out existence for me. To my late father Mr Nanaye Dickson who believed in me enough pay my first school fees as a child in the village; he who above all gave me the gift of blooded resilience, courage, bravery and to say no when no is there right answer.

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Finally, I dedicated this to my children as a gift of my academic toils in the hope that they find this as proof of their endless ability to soar above the sky in their earthly journey of learning.

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CHAPTER ONE: Third-Party Rights in Investor-State Disputes

1. Introduction

Since 2013, a Working Group of the United Nations Commission on International Trade Law (UNCITRAL) has been exploring options for reforming Investor-State Dispute Settlement (ISDS). During its 37th session, in April 2019, the UNCITRAL Working Group III addressed a fourth category of 'other concerns' as part of its mandate.[1] This mainly covers third-party participation in ISDS; obligations of investors in relation to human rights, and the possibility of allowing claims by States against foreign investors on behalf of affected third party groups.

The UNCITRAL discussions on the relationship between host states, third party groups and foreign investors is very important because international investment law does not generally recognise the concept of "third party groups", thereby excluding them from the ISDS process. On the other hand, international investment law provides protections to investors through the ISDS system; the only parties to this system are usually the investor and the home State which might be impacted by the investor. Even the treaty provisions of most Bilateral Investment Treaties (BITs), with most belonging to the first generation, are investor-centric (see discussion under 2.4). They do not permit access to ISDS for injuries caused by their activities and rarely allow counterclaims by the host State on behalf of communities whose interests could have been breached as a result of the investment. As a result, a number of disputes have surfaced in the past two decades, largely from the developing world, with third party groups from countries as diverse as Peru,[2]Tanzania[3]and Bolivia,[4]seeking redress for the impact of investment on the environment. In some cases, the impact on third party groups is compounded by state complicity and reluctance to seek justice for the affected third-party groups within their regulatory territories(see 1.3 on justification for choosing the Niger Delta as a case study).

This research is important from a developing country context because of the often-varying levels of protection afforded to third party groups in developing and developed countries. For example, third party groups in developed countries such as the United Kingdom (UK) would not have much problem accessing justice because the State has a well-functioning and reliable judicial system in place to protect their interests, as opposed to a developing country such as

[1] UNCITRAL, WG III, Working Report of April 2019, 8.
[2] Bear Creek vPeru (ICSID Case No. ARB/14/21).
[3]Biwater Gauff Ltd V United Republic of Tanzania, ICSID Case No. ARB/05/22.
[4] Bolivia Aguas del Tunari vBolivia (ICSID Case No. ARB/02/3).

Nigeria. Thus, the necessity for strengthening access to justice framework may not be similar among developing (often capital importing) and developed (often capital exporting) countries. This provides context to the discussion on the definition of third party groups in Chapter 2.

The absence of third party rights in ISDS has culminated in a debate, reflected in the UNCITRAL discussions, on a framework for third party groups access to the ISDS system. This thesis aims to inform the UNCITRAL deliberations by interrogating the concept of third party rights in ISDS and explore potential solutions. While understanding the dispute resolution processes and protections under domestic and regional law is important and influential, States generally do not have a separate ISDS system domestically or regionally, rather they rely on the international law system and the underpinning contracts are invariably governed by international law, which would be the focus of this study.

However, for the purposes of this thesis, it is important not to dismiss existing remedial options but to evaluate them as part of this inquiry. The underlying argument in this thesis is that the complexity of current investment disputes, often involving social, environmental and economic impact, requires more sophisticated procedural tools so that all affected parties can assert their rights effectively. Addressing this issue requires a systemic reform of the international investment regime starting by clearly identifying fundamental problems, in this case the omission of third party groups from the dispute settlement framework. This would involve exploring whether the existing challenges warrant recourse to a permanent body such as a Multilateral Investment Court (MIC), or procedural reforms to existing international law tools such as amicus curae and counterclaims, or whether these procedural reforms could be integrated.[5] This view is shared by the European Commissioner for Trade, who observed that a MIC is the logical way to progressively and effectively address the concerns within the ISDS system.[6] Accordingly, the UNCITRAL Working Group III has considered the European Union (EU)'s proposal, as well as other procedural solutions, during its debates about ISDS reform.[7]This thesis could also reach a judgement that other efforts at a multilateral framework have not worked and therefore, if a multilateral body falls through, the procedural reforms become more important in that context. But the challenge would be whether they would go far enough. Chapters 6 and 7 provide a comprehensive examination and evaluation of these reform.

[5] R Stiftung "A World Court for Corporation how the EU plans to entrench and institutionalise investor-state dispute settlement" Brussels, (2017) p 7.
[6]See G KaufmannKohler & M Potestà, "The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards" Supplemental Report p 2-3.
[7]UNCITRAL WG III, Report of April 2019, 8-9.

1.1. Research aim

This thesis aims to inform the UNCITRAL reform process by identifying a solution for addressing third party access to justice in the international investment regime and strengthening the procedural rights of affected third party groups. This solution should: (i) enable affected third party groups to become party to the proceedings in order to ensure fair, efficient and effective resolution of the dispute, and (ii) provide for dismissal or other reframing of the case. For the purposes of this study, it is imperative to explain from the outset, the meaning of third party groups. The UNCITRAL Working Group clarifies that "third party groups" include both the "general public," i.e. individuals and groups who may have an interest but not a direct stake in the dispute and "local communities affected by the investment or the dispute at hand".[8] Thus, given that the of impact on their activities goes beyond local communities, this thesis employs the Working Group's clarification on the meaning of third party groups. Nonetheless, a thorough examination of the meaning of third-party rights is provided in Chapter 2.

The examples discussed in this opening Chapter of the thesis will inform the direction of this enquiry, and in particular, the relevant reform options to study.

The aim of this thesis is fivefold:

a) Firstly, to provide a rationale for expanding the procedural rights of third party groups in ISDS.
b) Secondly, to critically examine the international law mechanisms, both institutional and procedural, that protect the interests of third-party groups.
c) Thirdly, to critically examine empirical evidence on the impact of foreign investor activities on third party groups and lack adequate access to justice through national, regional and international regulatory regimes, using oil spills in Nigeria's Niger Delta as a case study.
d) Fourthly, to undertake a comprehensive study of the Investment Court System proposal and whether it represents a viable solution to the problem of access to justice in ISDS for third party group.
e) Finally, to evaluate recommendations for reform.

[8]UNCITRAL WG III, 37th Session Report, paragraph 31.

1.2. Research questions

The underlying goal of this study is to undertake an enquiry into third party groups as stakeholders in the ISDS system.

In order to achieve the goal of this study, this thesis aims to answer the following questions:

How may formal recognition of third party groups in ISDS be implemented?

What is the scope of this right?

Who may represent them?

In order to answer these questions, I would need to carry out an examination of the dispute settlement process under ISDS. Thus, the thesis starts off from a conceptual level (chapters 2-4) before moving to a practical/ implementation level (chapters 6 and 7), where existing international law mechanisms or potential solutions would be explored. At the implementation level, it aims to answer fundamental questions such as who should protect third party interests?

In order to answer these research question or address the research aims, it is important to address the following question from the outset: i) is there evidence to support the research objective? In order words, is there empirical evidence that links investor activities to challenges faced by third party groups to accessing ISDS? Much of this analysis and empirical evidence will be provided in subsequent chapters, particularly chapters 2 and 4 (case studies). The next subsection highlights the justification for choosing the Niger Delta as a case study.

1.3. Justification for choosing the Niger Delta as a case study

The May 2023 report written by the Bayelsa State Oil and Environmental Commission titled "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," interrogated more than 60 years of oil spillage and environmental degradation.[9] As captured in the executive summary, "…the Niger Delta, in Southern Nigeria, is in the grip of a human and environmental catastrophe of unimaginable proportions. At one time, the area was home to the largest mangrove forests on the planet; an area of unrivalled ecological value. Today, it is one of the most polluted places on Earth. Oil extraction and its impact is the overwhelmingly evident cause of this disaster." To sum up the scale the devastation, the report concludes that "…the Niger Delta has suffered the equivalent of a major oil spill, on the scale of the Exxon

[9]The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, p.6.

Valdez disaster - which devastated over a thousand kilometres of the Alaskan coastline - every single year for 50 years."[10] While Bayelsa is not used as a case study owing to the fact this report has been published at the end of my doctoral research, this thesis uses other affected communities in the Niger Delta as a case study to explore the level of impact on the health, environment and broader human rights of these groups and the protection afforded to foreign investors under the international investment law regime without corresponding protections for third party groups. For instance, the May 2023 Bayelsa Report found that the oil producers, with the support of the federal government, have externalised most of the costs and risks of production. As a result, Nigeria is seen as a low cost, high profitability jurisdiction for the oil majors. For instance, "in a Shell Group annual report, the company states that it makes a higher profit per barrel and incurs lower production costs in the country than in virtually any other region of the world in which it operates."[11]It also to examines cases of breach of third party interests without adequate and effective recourse to justice in Nigeria.

For example, Oil, natural gas and its by-products constitute 80 per cent of the government's revenues and 90 per cent of the total export volume.[12] This is supported by the Nigerian Investment Promotion Commission Act,[13] which permits 100 per cent foreign ownership in all sectors apart from the petroleum sector where foreign participation is restricted to joint ventures.[14]Nigeria's oil wells are operated mainly by large International Oil and Gas companies rather than by the state-owned national oil company, the Nigeria National Petroleum Company (NNPC). The five main companies are – Shell, Chevron, Total, Exxon-Mobil and Eni (Agip), NAOC (Eni operates through its subsidiary known as the Nigerian Agip Oil Company locally referred to as Agip, which is the former name of Eni) working through wholly owned subsidiaries and joint ventures with NNPC. Together they account for 75 percent of the oil extracted in Nigeria.[15] The legislation guarantees foreign investors protection against

[10] The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, p.11.
[11] The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, p.9.
[12]Nigeria Investment Promotion Commission, 'Opportunities' https://nipc.gov.ng/opportunities/industry/03May 2023.
[13] Cap 117, Laws of the Federation of Nigeria, 2004, s17 and 31.
[14]UNCTAD Investment Policy Review/; Nigeria' https://investmentpolicy.unctad.org/investment-policy-reviewaccessed 03May 2023.
[15] The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, p.9.

nationalisation, expropriation[16] and international arbitration.[17] Nigeria is a signatory to the New York Convention and the ICSID Convention.

Nigeria signed the New York Convention in March 1970. The Convention was domesticated through the second schedule to the Nigerian Arbitration and Conciliation Act of 1988. Today, following several reforms, it is Cap A18 of 2004. The legislation applies to domestic and international arbitrations. As of April 2023, Nigeria has signed a total of 29 BITs with9regional and multilateral investment treaties.[18] Nigeria is a Member State of the International Convention on the Settlement of Investment Disputes between States and Nationals of other States, known as the ICSID Convention relied on domestic laws to attract investment and protect Convention of 1965. The ICSID Convention created the International Centre for the Settlement of Investment Disputes and this is also domesticated in Nigeria's International Centre for the Settlement of Investment Disputes (Enforcement of Awards) Act, 2004. As of March 2023, Nigeria has signed BITs with 15 countries including Canada, China, France, Germany, Italy, the Netherlands, Russia, Singapore, Spain, Sweden, Switzerland, United Arab Emirates and the United Kingdom. These legal instruments are relevant to the discussion on third party rights because they highlight efforts made by the State to protect national interests, including environmental standards and human rights.

Nigeria's first three BITs were with the UK and France in 1990 alongside the Netherlands. They were modelled after templates developed by capital exporting states in conjunction with the draft Organisation for Economic Cooperation and Development Conventions.[19] Indicatively, the Nigeria Germany BIT 2000, contains standard provisions such as ISDS (Article 10) and Full Protection and Security (Article 5) without corresponding obligations on investors or emphasis on sustainable development. Similarly, the fair and equitable treatment (FET) provision of the Netherlands Nigeria BIT provides that States "shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair by unreasonable or discriminatory measures, maintenance, management, operation, use,

[16]Nigerian Investment Promotion Commission Act, section 25.
[17]Nigerian Investment Promotion Commission Act, section 26.
[18]These multilateral treaties include the European Community and its Member States2000; Economic Community of West African States (ECOWAS) Supplementary Act on Investments 2008; Agreement between the Government of the USA and the Government of Federal Republic of Nigeria, Concerning the Development of Trade and Investment Relations 2000.
[19] A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment*"*, (Kluwer Law International, 2009) 52.

enjoyment or disposal thereof by those nationals."[20] This provision places a heavy burden of responsibility on the host State despite the treaty standards being reciprocal.

This is symptomatic of Nigeria's BIT programme signed before 2014, also known as first-generation BITs. In fact, Nigeria only started signing second generation BITs from 2014 as evidenced by the Nigeria Canada BIT (2014), Singapore Nigeria BIT (2016) and the Nigeria Morocco BIT (2016), with emphasis on sustainable development and investor obligations. As of April 2023, only 3 out of 29 of Nigeria's BITs are second generation. Thus, the bulk of Nigeria's BITs are first generation with British, Dutch and American nationals known to be the most frequent investors. Consequently, the three investment arbitrations Nigeria has been involved in were brought by Dutch and American companies:*Shell v. Nigeria,*[21] *Guadulupe v. Nigeria,*[22] and *Interocean Oil Development Company and Interocean Oil Exploration Company v. Nigeria.*[23] The facts of these cases involve a broad range of third party interests, largely pertaining to environmental degradation.

Given that Nigeria's first generation investment treaties do not impose obligations on foreign investors, it is imperative that third party right of access to ISDS is revisited to ensure that their voices are heard in cases where the investor's activities have had a detrimental effect on their interests. Unfortunately, there is no efficient mechanism for holding investors accountable through ISDS. These efforts include the Zero Draft of the UN Human Rights Council, which has received mixed reception from a number of stakeholders including the European Union, the US and the international business community.[24]In accordance with the United Nations Agenda 2030 (Goal 16), to ensure that their citizens have equal access to justice. In fact, States are not only accountable for human right abuses by their agencies but also violations by private entities within the country.[25]These obligations were articulated in the African Commission on Human and Peoples Rights in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,*[26] also known as the Ogoni case. It was alleged that the activities of Nigerian National Petroleum Company (NNPC) with its partner Shell Petroleum Development Corporation (SPDC) caused massive violation of economic,

[20]NigeriaNetherlands- BIT, Article 3.
[21] ICSID Case No. ARB/07/18.
[22]ICSID Case No. ARB/78/1.
[23]ICSID Case No.ARB/13/20.
[24]TIshikawa, "Counterclaims and the Rule of Law in Investment Arbitration" 113 AJIL (2019) p.34.
[25]Comment No. 31, UN Human Rights Commission, Nature of the General Legal Obligation Imposed on State Parties to the Covenant, U.N Doc. CCPR/C/21/Rev.1 (May, 2004). See paragraph 8 of the Comment.
[26]Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v the Republic of Nigeria (Communication No 155/96).

social and cultural rights through massive contamination of water, farmland, air and destruction of homes in Ogoniland.[27] The African Commission found Nigeria to have violated of the African Charter on Human and Peoples' Rights by allowing Shell to devastate the livelihoods of the Ogoni people[28]

The challenge to accessing justice for third party groups in Ogoniland was compounded by the fact that the government was a shareholder in Shell operations. Consequently, the government constantly sent policemen and soldiers to suppress protests against shell[29] which saw the killing of thousands of people and burning of homes.[30] It led to over 3000 Ogonis fleeing to seek refuge in neighbouring regions. In 1995, following a trial characterised by procedural irregularities, nine Ogoni activists and Movement for the Survival of the Ogoni People (MOSOP) chiefly Ken Saro-Wiwa, executed under the military rule of Sani Abacha. Although, Shell stopped oil production activities in 1993, the spillage continues to this day.[31] This is compounded by prevailing socio-economic challenges resulting from environmental degradation is yet to be remediated. Thus, due to sometimes conflicting interests, States cannot be relied upon to bring action on behalf of affected third party groups. This provides the impetus for reform.

In an effort to mitigate such challenges, the Nigeria government developed a Model BIT in June 2015. It contains first generation provisions including Article 25(1) which provides that investors "should strive to make the maximum feasible contributions to the sustainable development of the host State and local community" and protects the right of the host State to regulate.[32] In view on protecting third party interests, the Model BIT contains obligations on investors to uphold human and labour rights,[33] avoid corruption[34] and operate within accepted standards of corporate governance.[35] The Model's retains the traditional ISDS procedural

[27] EEkhator, "Improving access to environmental justice under the African Charter on Human and Peoples' Rights: the roles of NGOs in Nigeria. (2014) African Journal of International and Comparative Law, February 2014, vo. 22, No. 1: pp. 63-79.
[28]Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v the Republic of Nigeria (Communication No155/96).
[29]A XFellmeth, "Wiwa v. Royal Dutch Petroleum Co. A New Standard for the Enforcement of International Law in US Courts?" (2002) 5(1) Yale Human Rights and Development Law Journal, p. 244.
[30] RMclean, "Shell awaits court ruling on complicity in deaths of Ogoni Nine" (April 30 2019).
[31] The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023; See Inimino, E, Otubu, O.P. and Akpan, J.E. 2020. Petroleum profit tax and economic growth in Nigeria, Asian Journal of Sustainable Business Research, 1(2), pp. 121- 130.
[32]Article 24, Nigeria Model BIT.
[33]Article 15, Nigeria Model BIT.
[34]Article 18, Nigeria Model BIT.
[35]Article 20, Nigeria Model BIT.

mechanisms and offers little in terms of representation of third party interests in ISDS.As of April 2023, Nigeria is in the process of reviewing their Model BIT, which makes this research timely.

1.4. Gap in existing scholarship

As explained in 1.2 above, third party groups do not have direct access to remedies in ISDS. While investors have direct access to justice where breach treaty rights is alleged, host States cannot bring direct claims or in most cases, counterclaims, on behalf of third-party groups. However, through scholarship, proposals have been made in an effort to improve access to justice of investment related victims. On one hand, are proposals that have focused on improving access to justice for oil producing communities in Nigeria. Some scholars condemn judicial protectionism towards foreign investors and recommend a change of attitude.[36] Other scholars support judicial reform to aid the speedy disposal of cases and related measures to reduce the operation of the locus standi rule thereby allowing non-governmental organisations (NGOs) to file claims on behalf of third party groups.[37] On strengthening environmental laws, Edu at al recommend legislative reform and empowerment of administrative enforcement agencies.[38] They also advocate domestication of international Corporate Social Responsibility (CSR) instruments such as the UN Global Compact into Nigerian law.[39]

The logic of commercial interests and the logic of social responsibility depart both principally and practically. Commercial interests translate primarily into a private obligation on corporations to provide a financial return to a specific and identifiable group of individuals who have investments in that corporation. Social responsibility on the other hand translates into a public obligation to ensure that certain fundamental standards are maintained for the

[36] K Ebeku, "Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria" Review of European Community & International Environmental Law, (2003) 12 (2) 199, p.199; M Ajomo, "An Examination of Federal Environmental Laws in Nigeria", in Ajomo and Adewale (eds), *Environmental Law and Sustainable Development in Nigeria* (Nigeria 1994) p.22.

[37]K Odeku and S Animashaun, "Poverty, human rights and access to justice: Reflections from Nigeria" African Journal of Business Management (2012) 6(23), p.6753-55; E Brems and C Adekoya, "Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria" Journal of African Law (2010) 54(2) 258, p.263; N Okogbule, "Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects" Sur- International Journal on Human Rights (2005) 2(3) 94 p.98.

[38] K Edu, "A Review of the Existing Legal Regime on Exploitation of Oil and the Protection of the Environment in Nigeria" Commonwealth Law Bulletin(2011) 37, p.307; U Orji, "An Appraisal of the Legal Frameworks for the Control of Environmental Pollution in Nigeria" Commonwealth Law Bulletin (2012) 38(2), p.322; R Ugbe and A Ekpoudo, "Legal Approach to Causes and Consequences of Oil Spillage in Nigeria" Nigerian Law Journal (2017) 20(1) p.146; K Ebeku, "Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria" Review of European Community & International Environmental Law, (2003) 12 (2) 199, p.202.

[39] H Ijaiya, "Challenges of Corporate Social Responsibility in the Niger Delta Region of Nigeria" Journal of Sustainable Development Law and Policy (2014) 3, p.68.

security, well-being and freedom of all individuals. On occasion the activities of corporations can threaten the security, well-being and freedom of individuals both within and across national borders. The question then arises, what, if any, of the public obligations can be brought to bear on these corporations for these negative and harmful activities? . The focus will therefore be on the impact of multi-national corporations trading globally. The current status of legal approaches to ensure corporate social responsibility will be explored. These will include engagement with international human rights based approaches to corporate accountability as well as consideration of international trade treaties, bi-lateral investment treaties, and international contracts. Non-legal approaches to corporate social responsibility will also be examined, including international guidelines relating to business practices and international trade as well as self-regulation initiatives instigated by businesses.

On the same issue, other scholars recommend amendment to the Companies and Allied Matters Act to support enforcement of CSR policies in Nigeria.[40] CSR is premised on the belief that companies should exercise a higher and broader level of accountability that encompasses social-economic and legal, towards all stakeholders.[41] This places legal expectations on companies beyond philanthropic activities to ensure that they reduce the impact of their activities on the wellbeing of communities and society. However, despite the reform of CAMA in 2020, the primary companies law in Nigeria, there are no enforceable duties on companies to ensure that they act in a socially responsible manner against their host communities. This means CAMA does not offer safeguards on CSR, disincentivising companies from engaging in social responsible activities. There are some incremental safeguards. For example, section 43(2) forbids corporate donations to political bodies. It means donations would only be considered intra vires where they are directed to a non political body. Section 305(3) and (5) provides little consideration for the interests of third party groups such as employees, local communities, by placing decision making primarily in the hands of the board for the benefit of the shareholders. The fact that in practice, directors have construed interest of the company to mean shareholders, is

[40] O Amao, "Corporate social responsibility, multinationals and the law in Nigeria: Controlling multinationals in home state" Journal of African Law 52(1) (2008) p.89.

[41] Bueno, N., Vastardis, A. Y., & Djeuga, I. N. (2023). Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses. The Journal of World Investment & Trade, 24(2), 179-216.

likely to play a major role in derailing future CSR initiatives.[42] Nonetheless, oil companies are bound through the Petroleum Industry Act 2021 to exercise due diligence and abide by CSR activities. This is explored in Chapter 3, however, the challenge of enforcement remains the Achilles heel of these developments.[43]

I am of the view that, the Nigerian Constitution should also be amended to provide for the justiciability of environmental rights. Although the African Charter guarantees the applicability of this right in Nigeria, affected third party groups experience challenges to prove fundamental breach. There is also a general reluctance and lack of political to amendment of relevant statutory laws out of fear that legal empowerment of affected communities would affect oil production and revenues. This is compounded by inadequate funding often due to corruption in government leading to weak enforcement of existing legal obligations by the relevant administrative agencies. These are some of the fundamental reasons behind my proposal to provide access to third party groups in ISDS.

Scholars have argued that there are three essential limbs for rights-based climate change litigation consisting of causation, standing and justiciability.[44] On causation, the affected parties must establish a link between governmental failure to remedy the climate change and its impact on human rights. On justiciability, they must explore whether the court has jurisdiction to hear the matter relating to executive orders pertaining to climate change. On standing, this involves eligibility to file court cases. However, there are additional issues such as difficulty in handling complex scientific evidence compounded by litigation expenses and other resource constraints. In Nigeria, some scholars have persuasively argued that the right to environment is enforceable and justiciable in Nigeria based on the domestication of the African Charter on Human and Peoples Rights and enforceable human rights in the constitution; right to environment can be enforced in Nigeria.[45] This is largely because

[42] Nojeem Amodu, 'Stakeholder protection and corporate social responsibility from a comparative company law perspective: Nigeria and South Africa' 64 (3) (2020) Journal of African Law 425- 449.
[43] Amodu N. Stakeholder Protection and Corporate Social Responsibility from a Comparative Company Law Perspective: Nigeria and South Africa. Journal of African Law. 2020;64(3):425-449.
[44] Etemire, U., 2021. The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight. CCLR, p.158.
[45] R.T. Ako, 'The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India' (2010) 3National University of Juridical Sciences Law Review423; Ako, R., Stewart, N. and

the world has seen a “rights turn” whereby claimants assert that climate change infringes their rights to life, liberty, and security. Environment related cases have often been confronted by jurisdictional challenges at the preliminary stage. These motions are premised on the justiciability doctrine where some disputes fall outside the scope of judicial authority. [46] As evidenced in chapter 5, this has acted as a roadblock to social and economic rights, as well as environmental rights. Furthermore, on the implications of the Centre for Oil Pollution on the justiciability of environmental rights in Nigeria,[47] Miriam Anozie and Emmanuel Wingat argue that non-governmental organisations can play a greater role in adjudicating environment related cases. In their view, they carry a positive obligation to intrude in social economic policy. Conversely, some scholars have argued that based on the Nigerian constitution, right to environment is neither justiciable nor enforceable in Nigeria.[48] These views are premised on the conception that economic and social rights are indivisible from civil and political rights, largely due to their recognition in the constitution. According to the scholars, division of these rights creates a disconnection from human rights, yet these rights are interdependent.

A number of academic commentators have advanced proposals for addressing the lack of effective remedies for investment related victims around the world. On counterclaims, Bernaz[49] and others advocate for the empowerment of host States to raise claims on behalf of third party groups in an ongoing international investment arbitration. Another scholar extends their work

Ekhator, E.O., 2016. Overcoming the (non) justiciable Conundrum: The Doctrine of Harmonious Construction and the Interpretation of the Right to a Healthy Environment in Nigeria. In Justiciability of Human Rights Law in Domestic Jurisdictions (pp. 123-141). Springer, Cham.

[46] Anaebo, O.K. and Ekhator, E.O., 2015. Realising substantive rights to healthy environment in Nigeria: A case for constitutionalisation. Environmental Law Review, 17(2), pp.82-99. •

[47] Miriam C. Anozie, and Emmanuel O. Wingate. "NGO standing in petroleum pollution litigation in Nigeria—Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation." The Journal of World Energy Law & Business 13, no. 5-6 (2020): 490-497; Olatunbosun, A. & Onu, K.O.N. (2020). The liberalisation of Locus Standi in Environmental cases in Nigeria: An appraisal of the Supreme Court’s decision in centre for oil pollution watch v NNPC. The Gravitas Review of Business & Property Law, 11(2), 1–11.

[48] L. A. Atsegbua et al, Environmental Law in Nigeria: Theory and Practice (Ababa Press: Lagos, 2004); G. Ogbodo, ‘Environmental Protection in Nigeria: Two Decades after the Koko Incident’ (2009) 15(1) Annual Survey of International and Comparative Law 1.

[49]NBernaz, “Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap”(Routledge, 2017)p138-139; Sornarajah, “Resistance and Change in the International Law on Foreign Investment” (CUP, 2015) para.1.4; T Ishikawa, “Counterclaims and the Rule of Law in Investment Arbitration”, AJIL (2019) 113, p.35; J Ho, “The Creation of Elusive Investor Liability” American Journal of International Law (2019) 113, p.16

by advising States to include treaty clauses that permit claims against investors,[50] and clauses that allow direct claims by third party groups against investors.[51]Another scholar recommends a human rights enforcement mechanism within ISDS to safeguard third party interests.[52] The scholar argues for the creation of an opt-in convention to enable direct claims by host State. However, he does not articulate the modalities of this opt in mechanism. There are also a number of challenges associated with the development of international agreement or conventions. A convention needs to be ratified in order to achieve the intended purpose and owing to past experience, it is unlikely that capital-exporting countries, who have been often unwilling to create legally binding instruments to regulate activities of their citizens in foreign countries would sign up to the opt in convention. The scholars conclude that host States should use available tools under ISDS.[53] However, this may constitute a problem, as evidenced in 1.3 above, where for political reasons, the host government may be unwilling to support a third party claim.

Similarly, Francioni posits that regional and international courts can offer an adequate redress route for third party claims.[54] However, international courts are generally an ineffective form of redress for investment related violations (see the discussions in Chapter 4). This is partly because of the recommendations of bodies such as the African Commission are not binding as exemplified by the decision in *SERAC*,[55] to clean-up Ogoni land is yet to be implemented almost 20 years later. Even the Court of the Economic Community of West African States (ECOWAS) that can issue a binding decisions has experienced compliance challenges over its decision in *SERAP*. This is compounded by the fact, international human rights bodies generally, the African Court, African Commission and ECOWAS Court do not provide *locus standi* for private actors. The scholar also stresses the importance of *amicus* submissions.[56] The mechanism that grants third party groups a say in arbitration. However, a say is not as empowering as direct right of standing. It is indeed one of the proposals interrogated in this thesis as most BITs do not support *amicus* submissions in ISDS arbitral proceedings.

[50]S Subedi" International Investment Law: Reconciling Policy and Principle" (Hart, 2016) p.270-272.
[51]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2016) p.250-261.
[52] TWeiler "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order" Boston College International and Comparative Law Review 27(2) (2004), 429,p.438.
[53]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2016) p.270- 272.
[54]FFrancioni "Access to Justice, Denial of Justice, and International Investment Law" in Pierre-Marie Dupuy, et al. Human Rights in International Investment Law and Arbitration (OUP, 2009) p.73.
[55]Communication 155/96. Decision at 30th Ordinary Session, 2001.
[56]F Francioni "Access to Justice, Denial of Justice, and International Investment Law" in Pierre-Marie Dupuy, et al. Human Rights in International Investment Law and Arbitration (OUP, 2009) p.74-79.

Counterclaims are also interrogated as a potential solution. It involves drafting clear and unequivocally worded clauses thereby avoiding doubt as to the intention of the contracting parties. For example, in *Urbaser*,[57] the tribunal accepted the counterclaim clause in the Argentina-Spain BIT (1991)for a breach of a right to water, but without breach as no obligation was contained in the BIT. In *Burlington*,[58] despite the Ecuador United States BIT (1993) has no obligations to protect the environment. The tribunal made reference to the host state's tort law to find the company liable for environmental damage. Thus, it is important to include clear investor and obligations relevant national or international policies in investment treaties to support counterclaims. It is argued that the problem of access could be addressed through host State claims and counterclaims. This thesis recognises the practical and conceptual challenges associated these mechanisms and maintains that strengthening access rights of third party groups to bring direct claims is crucial to achieving the UN Agenda 2030.

The research conducted has shown that most literature is on improving third party access to national, regional and international human rights courts rather than to ISDS. This thesis extends existing scholarship through my proposal for a mechanism that could permit third party representation in investment disputes. It examines at length the practicality of an African Investment Court system (Chapters 6 and 7) and measures to strengthen existing mechanisms. The overarching goal is to inform the ongoing UNCITRAL Working Group III deliberations on ISDS reform and open up opportunities for further research on investment treaty reform.

The proposal for an African Investment court comes at a time when the Investment Protocol of the African Continental Free Trade Area agreement gathers momentum. Indeed, one subject that will dominate the discussions is the method for dispute settlement. The African continent does not have a cohesive investment dispute resolution architecture, preferring to settle investor-state disputes through external investment arbitration frameworks. Without a full excursion into the merits and demerits of investment arbitration, a prominent denominator of the system is its legitimacy crisis and limitations in driving the sustainable developmental aspirations of African states. This view is supported by the outcome of my research in Chapters 6 and 7. Consequently, this thesis interrogates the Investment Court System as possible dispute resolution mechanism in the Investment Protocol of the African Continental Free Trade Area (AfCFTA Agreement hereafter). This mechanism is explored in Chapter 6.

[57] *Urbaser v. Argentina* ICSID Case No. ARB/07/26.
[58] *Burlington v. Ecuador* ICSID Case No. ARB/08/5.

Trading under the Agreement Establishing the AfCFTA officially started on 1 January 2021 after being postponed from 1 July 2020 due to the Covid-19 pandemic.[59] The AfCFTA was achieved through the focused effort of the African Union[60] which successfully drew its Member States to sign this historic Agreement with the aim of boosting intra-African trade and investment and promoting a single market for goods and services with the potential to overcome the prevailing fragmentation of African economies while moving towards the African Union Agenda 2063: 'The Africa We Want'.[61] It is envisaged that the AfCFTA will expand trade and investment through greater harmonization and coordination of trade and investment liberation and facilitation instruments within the Regional Economic Communities (RECs) and across the continent. Therefore, the AfCFTA is more than a traditional Free Trade Area (FTA) Agreement, but it rather resembles Economic Partnership Agreements (EPAs). This is supported by Article 6 of the AfCFTA Agreement which stipulates that "[t]his Agreement shall cover trade in goods, trade in services, investment, intellectual property rights and competition policy."[62]

To give some context, a United Nations Conference on Trade and Development (UNCTAD) survey of Special Economic Zones (SEZs) in Africa found that due to the AfCFTA, Foreign Direct Investment (FDI) in SEZs is expected to increase by 15 percent due to investment from Member States and 30 percent from outside Africa.[63] The continent-wide survey also captured the optimism on the continent with over 85 percent of respondents expecting FDI from Africa

[59] African Union, Agreement Establishing the African Continental Free Trade Area. March 21, 2018 (entered into force May 30, 2019), available at <https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf> [Accessed 06 July 2021]. AfCFTA Agreement hereafter.

[60] The African Union is an inter-governmental organisation founded in 2002 as the successor to the Organization of African Unity (OAU). The African Union comprises 55 Member States that represent all economies on the African continent (including the Sahrawi Arab Democratic Republic, also known as Western Sahara, which is a disputed territory claimed by Morocco).

[61] Out of 55 African Union Member States, Eritrea is the only state which has not signed the AfCFTA Agreement as of August 2021. The current Member States of AfCFTA are: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cabo Verde, CentralAfrican Republic, Chad, Comoros, Congo, the Democratic Republic of Congo, Cote d'Ivoire, Djibouti, Equatorial Guinea, Egypt, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau. Kenya, the Kingdom of Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Kingdom of Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe; The African Union Agenda 2063 is available at <https://au.int/en/agenda2063/overview> [accessed 03 July 2021]; See also the AfCFTA Preamble and Article 1.

[62] For an excellent discussion of the AfCFTA's development and significance, see Katrin Kuhlmann and Akinyi L Agutu, The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development, (2020). Vol. 51(4) Georgetown Journal of International Law, p. 753.

[63] UNCTAD, Special Economic Zones and African Continental Free Trade Agreement: Results from a continent-wide survey (2021), p.20, available at <https://www.africaeconomiczones.com/wp-content/uploads/2021/04/SEZs-and-AfCFTA-Results-from-a-wide-continental-survey-AEZO-UNCTAD-Project.pdf> [accessed 30 July 2021].

to increase significantly and 95 percent expecting growth in investment from outside Africa as a result.[64] According to SEZ stakeholders, the most promising industries for FDI flows in Africa following the implementation of the AfCFTA include textiles and electronics.[65] Therefore, the AfCFTA presents an opportunity to move away from primary commodities traditionally driving African trade and investment such as mining and hydrocarbons towards higher value-add industries such as automotive and electronics. Amid these progressive developments, there is a reality that must be confronted: with the increase in investment, there will be an increase in disputes, and if not well handled, could derail the objectives of the AfCFTA Agreement. This is reinforced by the fact the current legal architecture for the settlement of international investment disputes has been weighed by a strong focus on arbitration. There is substantial scholarly literature that has noted the limitations of this mode of dispute settlement[66], with an emerging body of scholarship focusing on the benefits of a court-based system.[67]

This research situates within this body of scholarship that argues for a court-based system. The purpose of this research is not to reinforce the theoretical merits for a court-based system. Instead, it seeks to provide a normative picture of what such a court system should look like in the African context: its architecture, modus operandi and other useful attributes. Therefore, the proposed normative design will add to the existing literature surrounding the advocacy for a court-based system by giving a detailed picture of the form the court should take. The proposals in this thesis are intended to inform the ongoing discussions over content of the AfCFTA Protocol on Sustainable Investment by advancing a proposal for a multilateral court that will allow for the equitable resolution of investment disputes without compromising on the Member States and private investors' interests. This proposal will be articulated in the final half of this

[64] Ibid, p.10.
[65] Ibid, p.20.
[66] C Brower and S Schill, "Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law" (2009), Vol 9(2), Chicago Journal of International Law, pp.471–498; Susan D. Frank, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions (2005), Vol 73(4), Fordham Law Review, 1521–1625; Anthea Roberts, Clash of paradigms: Actors and analogies shaping the investment treaty system (2013), Vol 107(1), American Journal of International Law, 45-94; A Guzman "Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1998) Virginia Journal of International Law, Vol 38(4) pp.638-689.
[67] See for example, Gus Van Harten, A Case for an International Investment Court (June 30, 2008), Society of International Economic Law (SIEL); Juan Miguel Alvarez, How Innovative Is the EU's Proposal for an Investment Court System: A Comparison between ICS and Traditional Investor-State Dispute Settlement (2020), EU Law Working Papers No. 43, Stanford-Vienna Transatlantic Technology Law Forum; C Nyombi and T Mortimer Rebalancing International Investment Agreements in favour of host states: Towards a World Investment Court (2019), 3 Journal of Business Law, 200-222; Eduardo Zuleta, The Challenge of Creating a Standing International Investment Court, in Jean E. Kalicki and Anna Joubin-Bret, Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century (Brill Nijhoff, 2015), 403–423.

thesis while the proceeding sections will critically examine existing mechanisms, emerging treaty drafting practices and Africa's relationship with ISDS. The findings and proposals in this thesis are intended to go beyond academia by producing a prototype for a standing African Investment Court that Member States can draw upon and in so doing, set up the scaffolding to accelerate discussions on the creation of a continental court under the AfCFTA.

1.5. Contribution to knowledge

Most of the debate in this research area has centred on the relationship between investors and States. However, third party groups are often excluded from this equation despite the impact on their social-economic and environmental interests as exemplified in the oil projects in Nigeria (see the justification for choosing Nigeria as a case study above). These projects have affected their land, polluted their water and air, and reduced migration flows. This is compounded by the fact the government has an ownership stake in these investments having offered incentives and facilitated consultations. These dynamics make the relationship between the State, investors and third party groups very complex and, when a dispute arises, affected third party groups have very limited choices, including to protest or litigate against the investor, and for the State to enforce their rights, often in weak legal systems.

On international litigation, third party legal rights are very limited. Foreign investors can rely on the ISDS system yet third party groups face legal and practical barriers to accessing international human rights courts or espousing their claims through ISDS proceedings. On the latter, ISDS tribunals often limit their interpretation to the relevant investment treaty which usually do not clearly contain the rights of affected third party groups, despite international law them to take into account other areas of public international law covering human rights and environmental law when interpreting investment treaties and rendering awards. Even second generation investment treaties that require investors to both comply with domestic law and uphold international standards such as the Nigeria Morocco BIT, do not clearly spell out their application in dispute settlement context despite the fact third party groups could play an important role in holding investors to account for breach of treaty standards. Thus, the international investment dispute settlement regime is yet to embrace multi-party litigants.

However, this is not new. Courts have capacity to consider the rights and obligations of stakeholders who are not a party to a dispute (see the discussion on domestic and international law procedural mechanisms in Chapter 3) yet ISDS lacks a comparable mechanism. For example, subject to applicable rules, third party groups may be permitted amicus curiae

submissions on points of fact or law at the ISDS tribunal's discretion and without access to the hearings or documents submitted by the parties (see the discussion in Chapter 3).In essence, they are not party to the dispute. Even with counterclaims, a government cannot be trusted to represent the interests of third party groups because in highlighting the possible human rights breaches of an investor the government may inadvertently expose its own.

Offering third party groups access to ISDS is important because of the limitations in existing mechanisms, meaning inability to independently access ISDS can erode the quality of awards and the legitimacy of the dispute settlement system. It is also contrary to the Sustainable Development Goals (SDGs) including Goal 16.3, "equal access to justice for all", Goal 16.6 developing "effective, accountable and transparent institutions at all levels" and Goal 16.7 ensuring "responsive, inclusive, participatory and representative decision making at all levels"(see the discussion in Chapter 2).

Existing literature has shown that enabling third-party participation within ISDS has been a source of debate but without corresponding proposals. Thus, this study extends existing literature by examining the potential for introducing the concept of third-party rights in ISDS with corresponding international law proposals to support their accession to it.

1.6. Scope of this study

This thesis explores the scope for introducing the concept of third party rights in ISDS. This involves an examination of international law mechanisms to determine how they can be reformed, and or the development of new multilateral mechanisms in order embed the concept of third party rights in ISDS. Given that investors generally have no obligations under first generation BITs, where does this leave third party groups which are affected by their activities? The obvious answer is to look to domestic and international law mechanisms which, as discussed above, are not always effective and accessible. Despite that, both domestic and international dispute settlement systems recognise that disputes involve interests of others who are not formally party to the proceeding. These procedural rules are prevalent legal systems around the world which provide for participation by affected third party groups through measures such as intervention, joinder or interpleader, dismissal of claims and reframing of claims, arguments and remedies where necessary. These systems can provide guidance as to the operationality and feasibility of these solutions, and how they can be considered in the context of ISDS. However, such an inquiry is beyond the scope of this research.

However, examples of national practice are provided throughout the thesis, but mainly limited to Nigeria. This is largely to narrow down the scope of the research for the purposes of doctoral study, which is a 4 year rather than a lifetime endeavour. Nonetheless, such analysis would have expanded our understanding of global practice on third party rights. It is therefore left to future researchers to undertake a comprehensive study of approaches in other jurisdictions. For the purposes of this thesis, I believe that the evidence deduced from a study of domestic law and practice in Nigeria is sufficient and can be generalised, to give an African or developing country position and therefore support the reform proposals explored in this thesis. Furthermore, while intervention in ISDS may serve important aims, it may not always be the right solution for aggravated third party groups. It could force them to join potentially costly and physically remote proceedings in the process creating further barriers to parties already experiencing financial and technical challenges to accessing justice. It leaves scope for future researchers to explore the mechanics of dismissals in an ISDS context.

1.7. Methodology

This part interrogates the research methods and approach that would be employed in this thesis in order to answer the research questions and address the research aims.[68] In order to answer the questions: How may formal recognition of third party groups in ISDS be implemented? What is the scope of this right? Who may represent them?, a methodological approach that aligns with the research questions needs to be selected and justified.[69] The research within this thesis begins with a factual investigation of the problem of investment and its impact on third party interests and closes with submission of results from the case study investigation, which informs the reform proposals in Chapter 7.[70]

Research methods are generally divided into three key components: qualitative, quantitative and mixed methods. A qualitative approach aims to discover both existing and non-existing facts or issues in the research. Krik and Miller observe that, "qualitative research depends on watching people in their own territory and interacting with them…on their own terms."[71] Conversely, a quantitative research approach consists of measurements or numerical studies in which data is collected through experiments, questionnaires and surveys. A quantitative

[68]D De Vaus,"Research Design in Social Research" London (SAGE,2001) p11.
[69]W Trochim, "Research Methods Knowledge Base", 2006. p.15.
[70] Webley L, "Qualitative Approaches to Empirical Legal Research" in P Cane and H Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) p.65.
[71] PCane and H Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010), P.23.

approach is not necessary in this thesis because the nature of the inquiry is exploratory; involving an examination of the legal framework and the social-economic and environmental impact on investment on third party groups. This type of inquiry lends itself to black letter law and documentary analysis as opposed to quantitative analysis.

Qualitative research approach is employed in this thesis to uncover thoughts and opinions coupled with a critical analysis and evaluation of the challenges faced by third party groups in accessing justice. Through this approach, I was able to find exact, relevant and appropriate research methods for collecting, analysing and examining data for the purposes of addressing the research question. Data from local communities, arbitration tribunals, court decisions and governmental reports will be relied upon to evidence the research problem and propose potential solutions.

This thesis intends to find evidence and solutions to the access to justice challenges faced by third party groups. To do this, this thesis employs an exploratory approach.[72]Through an exploratory legal approach, legal researchers are able to respond quickly to legal changes and make interesting observations in a legal context. Brownsword emphasises that regulatory legitimacy at local, regional and international level must guide the research process.[73]This thesis seeks to find legitimacy for the introduction of the concept of third party rights in ISDS. Thus, an exploratory approach would enable me to examine the governance framework at local, regional and international, through documentary analysis.

1.7.1. Research design

The two most appropriate research designs for this thesis are functionalism and exploratory. Firstly, the functionalism design is used to assess whether the reform proposals in view of the legal, political and environmental challenges. Functionalism interprets segments society in terms of how they contribute to the stability of the entire society. Thus, every institution exists by playing a vital role in society. If it no longer has a functioning role, an institution will lose credibility, paving way for new institutions with evolved roles and needs. Zweigert and Kotz acknowledge that only things that perform the same function can be compared.[74] The challenges faced by third party groups in Nigeria and Africa generally are similar to those in

[72] DDragos, B Neamţu and D Balica, "The Romanian Ombudsman and its Interaction with the Courts: An Exploratory Research" Transylvanian Review of Administrative Sciences,(2010) 31, p.58.
[73] Roger Brownsword, "What the World Needs Now: Techno Regulation, Human Rights and Human Dignity*"*(Hart, 2004) p.34.
[74] Zweigert and Kotz, "Introduction to Comparative Law" (OUP,1998) p.68.

other jurisdictions around the world, making the functionalist design relevant in this thesis. Thus, this thesis employs a functionalist approach in order to understand how access to justice works from an institutional perspective thereby leading to reform proposals. Secondly, the exploratory design will enable a better understanding of the existing challenges faced by third party groups. This design will help to gain a deeper understanding of the prevailing challenges to accessing justice and the range of available international law remedial options.[75] The exploratory design will be used to establish an understanding of how best to proceed in studying international law remedies or how to introduce a concept of third party groups rights that generally does not exist in ISDS. Above all, exploratory research is flexible and can address research questions of all types (what, why, how), which are examined in this study.

1.7.2. Research Methods

The methods that will be used in this thesis are mainly conceptualisation, comparative, doctrinal and documentary analysis. Documentary and doctrinal analysis will be applied in a holistic manner thereby featuring throughout the thesis. The thesis lends itself to qualitative research in which documents are examined and interpreted to gain a deeper understanding of the research problem. Documentary analysis would be most relevant to the case study on third party access to justice, which would be provided in Chapter 4. A case study is an in-depth study of a particular research problem.[76] It is a useful design where not much is known about an issue or phenomenon. It involves an investigation of a contemporary phenomenon (the "case")within its real-world context, especially when the distinction between phenomenon and context are not clear. This thesis employs a case study of the Niger Delta region of Nigeria to illustrate the impact of investor activities on the interests of third-party groups.

The conceptualisation method is also used in this thesis and it simply means to develop a concept.[77] This is because the entire concept of third party in an ISDS context is very much underdeveloped and resisted in existing arbitrations thus warrantying in-depth analysis of existing legal frameworks and institutions in order to devise a mechanism for establishing the concept. This is important for this thesis because reform proposals require effective evaluation of existing frameworks. This method first uses a process to build and develop a concept, and

[75]K Christophe, "Exploratory Case Study" In Encyclopaedia of Case Study Research. A Mills, G Durepos and E Wiebe(Thousand Oaks,2010) p.82.
[76]K Eisenhardt and M Graebner "Theory building from cases: opportunities and challenges." Academy of Management, (2007),50(1),pp.25-32.
[77]V. Anfara and N Mertz "Theoretical framework in qualitative research" (Thousand Oaks,2006) pp.23 – 35.

then helps to clarify the concept.[78] Since third party groups is a challenged concept, its meaning is examined in Chapter 2 and a conceptualisation method is used to clarify the concept. Conceptualisation is relevant for the purposes of this thesis because third party groups are not widely accepted in the ISDS theory and practice and I plan to justify its inclusion. Similarly, a doctrinal method is applied. Doctrinal method means to instruct, through a systematic evaluation of the legal framework.[79] This method will be used in this thesis to analyse relevant domestic, regional and international laws, in addition to institutional standards and rules.

1.7.3. Declaration of ethical consideration

This thesis does not involve any interviews or questionnaires thus there are no ethical considerations in relation to preserving anonymity of individuals or data protection. The sources used in this thesis are publicly available in print form and online on official websitesof recognised national and international organisations.

1.8. Chapter Outline

Chapter 1: Provides an overview of the thesis including the research title, research purpose and aims, questions and research rationale, as well as scope of study. This chapter also contains a section on methodology. The underlying purpose of this chapter is to introduce the topic of inquiry and provide justification for undertaking a comprehensive study of third-party rights in a bid to improve their power of intervention in ISDS.

Chapter 2: This chapter provides a background to this study. It explores important concepts such as third party groups, state intervention on behalf of third party groups and the impact of multinational activities on such groups. This chapter interrogates some of the United Nations development goals, and how empowering third party groups can play an important part in achieving them. It also examines key literature that has made a significant contribution to this debate. Thus, this chapter provides the scaffolding to this thesis, by tracing the genesis of the research problem identified in Chapter 1.

Chapter 3: This chapter examines international law mechanisms, that protect the interests of third-party groups. It is divided into three parts. Part one examines earlier attempts at strengthening the rights of third party groups in international law as well as ISDS such as the

[78]S Leshamand V Traford "Overlooking the conceptual framework" Innovations in Education and Teaching International"(2007) 44 (1), p.100.
[79]J Vranken, "Methodology of legal doctrinal research" In MHoecke (Ed.), "Methodologies of legal research. Which kind of method for what kind of discipline"(Hart, 2010)pp.113-125)

Multilateral Agreement on Investment (MAI) and the reasons why such attempts did not succeed. This will provide important lessons for my reform proposals in Chapters 6 and 7. Part two sets out the international law framework for investment and its protection, and the impact on state autonomy/sovereignty. Again, this would feed into my reform proposals.

Chapter 4: This Chapter aims to examine empirical evidence on the impact of foreign investor activities, using Niger Delta as a case study. It reviews cases pursued in domestic, regional and international courts and tribunals. It draws on the broader literature on the impact of foreign investments on third party groups. While the main focus is Nigeria, the chapter also interrogates selected disputes from other jurisdictions for comparative purposes. Thus, this chapters provides the evidence that would be used in subsequent chapters to evaluate the reform proposals.

Chapter 5: This chapter is divided into two parts. Part one analyses the findings from the case study in Chapter 4. The aim is to draw lessons on the impact of multinational activities on third party groups and the role and effectiveness of available legal mechanisms. These lesson feed into part two of this chapter which aims to explore a range of reform options. These include proposals from the UNCITRAL Working Group III. The aim is to explore ways of strengthening the effectiveness of these mechanisms.

Chapter 6: This chapter critically examines substantive reforms such as a regional multilateral court system premised on handling investment disputes. The chapter interrogates the features of this body and whether it can be created with a mandate to consider public international law matters.

Chapter 7: This chapter evaluates the suggested reform proposals, taking into account regional realities and public international law considerations, and whether they can be used in an ISDS context to strengthen the intervention rights of third party groups. The purpose of this chapter is to evaluate whether the proposals are feasible. It considers whether reforms could be adopted in procedural rules and treaties. Whether procedural tools for addressing issues of third party groups' rights could be incorporated within traditional ISDS, as well as in the context of more encompassing multilateral reform through the Investment Court System.

Chapter 8: This Chapter contains a conclusion and final remarks.

1.9. Summary

This Chapter has introduced the rationale for undertaking research on third party rights in ISDS. There is not only concerned about ensuring that the rights of third party groups are protected in comparable ways to the approaches used in many national and international legal systems but that the ISDS dispute resolution procedures are characterised as fair. This thesis intends to interrogate third party rights in order to determine whether multilateral reform is necessary in order to embed the concept of third party groups in ISDS and interrogate the shape it ought to take. This also ties in with sustainable development goals. As will be explained in Chapter 2, sustainable development was rarely considered in how investment treaties were interpreted and applied. Now, second generation international instruments are including the sustainable development goals, meaning that states and other relevant actors should ensure coherence between investment policies and environmental commitments. This strengthens the case for ensuring that investments advance sustainable development instead of leaving third party groups without a voice. Thus, this thesis explores the scope of strengthening the rights of intervention of third party groups in ISDS. The definition of these groups is examined next.

CHAPTER TWO: Background to study

2. Introduction

As explained in Chapter 1, this study is predicated on the idea, supported by scholarly work and international treaty making and investment dispute settlement practice, that existing national and international law remedies for aggravated third party groups are ineffective and need urgent reform, to coincide with the ongoing efforts of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III to find a workable solution. This urgency is captured in the Bayelsa State Report of May 2023 which found that "the devastating effects have unleashed an environmental and human catastrophe on an enormous scale. Irreversible damage has already been done and so many lives have been blighted or cut short as a result. Time is running out to secure justice for those who have suffered, to mitigate the damage that has already been done, and to prevent further harm in the future."[80] This Chapter provides clarity on the meaning of "third party" groups in an international investment context. The Chapter is divided into eight sections. Section 2.1 provides a general discussion on the roots of the discourse on third party access to justice which is largely premised on a desire to achieve Goal 16 of the United Nations Sustainable Development Goals (SDGs) which focuses on the inclusion of societies for sustainable development. It then explores the range of third party groups affected by the access to justice gap within international investment law. Section 2.2. explains the meaning of third-party groups and the complicated nature of their relationship with the state, foreign investors and non-governmental organisations. Sections 2.3 and 2.4 delves deeper into this relationship by examining the reasons for the creation of an investor-state dispute settlement (ISDS) regime and the justification for their omission. Sections 2.5-2.7 examines existing judicial mechanisms and the inherent challenges towards accessing justice for third party groups. Lastly, section 2.8 articulates the contribution to knowledge made in this thesis before reaching a circumspect conclusion.

For the purposes of this study, it should be emphasised from the outset that seeking to improve the current situation in relation to third party access to ISDS by changing arbitral institutional rules will not grant them the right remedy because those rights are embedded in treaties. This means a solution has to be sought outside of arbitral institutional rules. Third party groups cannot also rely on their domestic legal systems, which are often tainted with governance issues such as state complicity and corruption. For instance, the Bayelsa State Report found that

[80] The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, p.9.

"Chief among them are the systemic failings of international oil company operators with the complicity of Nigeria's political classes and a dysfunctional Nigerian regulatory state. While the state accounts for only slightly over 1 percent of Nigeria's total population, it is estimated to have suffered over a quarter of total recorded instances of oil pollution. The environmental, ecological and health consequences on the Niger Delta as a whole and on the people of Bayelsa have been catastrophic. They have suffered in silence for too long."[81] Thus, granting third party groups access to ISDS circumvents the need to be protected by the State because already it is evident that the State is not suited. This begs the question; if given access to ISDS, would the State be weary of third party groups? And what are the implications for their already complicated relationship? This chapter interrogates these complex relationships largely from a developing world perspective, given the often cited governance challenges in those countries.

2.1. Promoting peaceful and inclusive societies

The goals of this thesis are rooted in the United Nations (UN) Agenda 2030 for Sustainable Development which is predicated on 17 action areas known as the Sustainable Development Goals (SDGs).[82]The SDGs represent founding international human rights law principles and the Charter of the United Nations.[83] They have their roots in the 1987 Brundtland Report by the World Commission on Environment and Development (WCED) on our common future.[84] The common future is represented in the Charter of the United Nations which is premised on the idea that our common human requires peace and prosperity for all, as enshrined in the Universal Declaration of Human Rights.[85] They also contain a pledge for all countries to transform our world while protecting the planet.[86] This is a clear indication that poverty eradication measures should be followed by policies that promote social-economic transformation while simultaneously handling climate change and environmental protection.[87] These goals to the African Union (AU) Agenda 2063 underpinned by a commitment from African States to strive to achieve a "…prosperous Africa based on inclusive growth and

[81] The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, p.7.
[82] UN, "Transforming our World: The 2030 Agenda for Sustainable Development" A/RES/70/1.
[83]UN, "Transforming our World: The 2030 Agenda for Sustainable Development" A/RES/70/1, paragraph 10. The goals embody the Universal Declaration of Human Rights and the Millennium Declaration.
[84] Brundtland, G.H. (1987) Our Common Future: Report of the World Commission on Environment and Development. Geneva, UN-Dokument A/42/427.
[85] UN, "Transforming our World: The 2030 Agenda for Sustainable Development" A/RES/70/1, paragraph 10. The goals embody the Universal Declaration of Human Rights and the Millennium Declaration.
[86] UN, "Sustainable Development Goals"Goal 17 to transform our World.
[87] UN, 'Sustainable Development Goals : 17 Goals to Transform our World.

sustainable development" by 2063.[88] Thus, national governments are required to integrate these goals into planning processes and policies,[89] and work collectively to ensure full implementation.[90]

The Goal 16 of the SDGs which emphasises the inclusion of societies for sustainable development is of particular relevance to this thesis. This goal requires national governments to "promote the rule of law at the national and international levels and ensure equal access to justice for all."[91] The UN Guiding Principles on Business and Human Rights, in particular, Principle 25, require States to take adequate steps, whether through administrative, legislative, judicial, or other means, to ensure that affected persons within their territory have access to effective remedies. Furthermore, the Zero Draft of the UN Human Rights Council calls on national governments to strive to create effective remedies for human rights violations in course of business of a transnational nature.[92] Article 8(1) of the Draft Zero emphasises the right to "fair, effective and prompt access to justice and remedies in accordance with international law." Furthermore, Article 8(2) mandated national governments to "guarantee the right of victims, individually or as a group, to present claims to their Courts." To this end, national governments are required to "provide for a comprehensive regime of civil liability for violations of human rights undertaken in the context of business activities and for fair, adequate and prompt compensation."[93] Thus, prevention, victims' rights and international cooperation are key pillars of the Zero Draft. The 2019 Draft Hague-Rules on Business and Human Rights Arbitration are premised on supporting the development efficient and effective arbitration-based remedies for third party victims of corporate human rights violations.[94]

Thus the concept of access to justice, as supported by the abovementioned initiatives, is at the heart of this thesis. The main reason for granting access to international justice for foreign investors largely relates to the limitations of domestic courts.[95] The domestic courts made be perceived to be insufficiently independent and neutral,

[88] African Union Commission, Agenda 2063: 'The Africa We Want'.
[89]UN, 'Transforming our World: The 2030 Agenda for Sustainable Development' paragraph 55-56. A/RES/70/1.
[90]Preamble. UN, "Transforming our World: The 2030 Agenda for Sustainable Development" A/RES/70/1.
[91]UNCTAD, IIA Issues Note, "Reforming Investment Dispute Settlement: A Stocktaking' Tools" (March 2019) p.23.
[92]UNCTAD, IIA Issues Note, "Reforming Investment Dispute Settlement: A Stocktaking' Tools" (March 2019) p.25.
[93] Article 8 (5).
[94]UNCTAD, IIA Issues Note, "Reforming Investment Dispute Settlement: A Stocktaking' Tools" (March 2019) p.26.
[95] T Weiler, "Balancing Human Rights & Investor Protection: A New Approach for a Different Legal Order" Boston College International and Comparative Law Review 429, (2004) 27(2) p.450.

thereby unable to offer effective dispute resolution. Their ineffectiveness is compounded by other factors such as lengthy procedures and clogged dockets. Offering recourse via an international forum substitutes those limitations thereby providing access to justice that embodies the essential components of the rule of law. However, access to justice is not a concern only for governments with weak legal systems but on the contrary, deficits in access to justice also exist in developed legal systems. Such countries may limit review of government policy where, for example, foreign companies do not enjoy the same level of constitutional protection as domestic companies.[96] Having a developed legal system does not eradicate the politicisation of investment disputes where host state courts favour their party as opposed to the foreign entity. We also bear in mind that, due to political turbulence, a well-functioning legal system may change, thereby decreasing its standard of operation. The international system responds better to these concerns.

While ISDS may be seen as beacon of access to justice from an investor perspective, and State, to some extent, emerging literature has shown growing discontent over investor access to ISDS. Investment treaties generally impose obligations on States without corresponding obligations on investors resulting in environmental damage without resource for the affected third parties, who are not recognised under the ISDS system.[97] So in this thesis, when I speak of access to justice, I am referring to the exclusion of third party group from accessing ISDS, given the limitations of domestic mechanisms as explained above from the perspective of investors and States. Even the option of denying investors access to ISDS does not serve the interests of third party groups because, explained in Chapter 3, third party groups have exhausted domestic remedies with no recourse. The only successful recourse has been through international foras, both at regional and in foreign courts.[98] Thus, access to justice in this these is premised on the opening up the international sphere to enable third party

[96] Article 19(3) of the German Constitution.

[97] Oamen, P.E. and Erhagbe, E.O., 2021. The impact of climate change on economic and social rights realisation in Nigeria: International cooperation and assistance to the rescue?. African Human Rights Law Journal, 21(2), pp.1080-1111; Eghosa Ekhator 'Sustainable Development and the African Union Legal Order' in Femi Amao, Michele Olivier, and Konstantinos Magliveras (eds.) The Emergent African Union Law: Conceptualization, Delimitation, and Application (Oxford University Press 2021).

[98] E Brems and C Adekoya, "Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria" Journal of African Law (2010) 54(2) p.257.

groups to bring action via ISDS for damage caused by the foreign investor.[99] There is argument that amicus curae and counterclaims can be used as tools for advancing the interests of third party groups in ISDS. However, although these mechanisms are already in use, as explained in Chapter 1 and subsequently in Chapter 3, they are discretionary on the State and must be properly contained in the treaty.

The next sub-section explains the meaning of third party groups.

2.2. Meaning of third party groups in an ISDS context

Before examining the impact of business activities on third party groups, it is important to explain the meaning third party groups and provide justification for focusing on third party groups. As evidenced in Chapter 4, investment activities have a negative impact on the interests of third party groups such as local farming communities in the vicinity of the investment.[100] The rights affected broadly includes the right to health, life, water, to avoid being subjected to degrading treatment, or impact on their social economic and cultural development. These rights are captured in the African Charter on Human and Peoples' Rights,[101] Universal Declaration of Human Rights,[102] the International Covenant on Civil and Political Rights,[103] as well as the International Covenant on Economic, Social and Cultural Rights.[104]

Examples of breach include gas leaks, land grabbing and displacement of local communities to establish commercial or industrial projects.[105] These human rights violations have a wide-ranging impact on third party groups as supported by the Ogoni oil spillage in Nigeria (see Chapter 4 Case study). Unfortunately, there is a general lack of accountability for these violations.[106] Although, third party groups are stakeholders in the international investment process, they are generally excluded from international investment dispute settlement regime,

[99] F Francioni, "Access to Justice, Denial of Justice, and International Investment Law" in P Dupuy, E Petersmann, and F Francioni, "Human Rights in International Investment Law and Arbitration" (OUP, 2009) p.71

[100] N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016) p.1.

[101] Adopted June 27, 1981 and came into force October 21, 1986.

[102] Adopted December 10, 1948.

[103] Adopted December 16, 1966 and came into force March 23, 1976

[104] Adopted December 16, 1966 and came into force February 3, 1976

[105] N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016) p.2.

[106] N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016) p.9.

also known as ISDS.[107] The continued lack of access to justice has implications for the attainment of SDGs.[108] Sustainable development is at the centre of the SDGs, defined as "development that meets the needs of the present without compromising the ability of future generations to meet their…needs."[109] It means a balance has to be struck between economic development and the environment, and incorporated in national, regional and international policies, strategy and practice. It is also premised on creating a common future by giving priority to the needs of the poor and ensuring that technological and social development does not hinder the present and future environmental objectives.[110]

So, who are the affected third party groups? Business activities often affect the rights and interests of actors that are not formally party to the dispute. This a reflection of the wide range of relationships that typically arise in the context of international investment. It is not an investor verses host State matter only, rather the factual configurations are very diverse as well as the types of actors involved. For illustrative purposes and based on concluded investor-state arbitrations, affected third party groups may include:

Table 1: Third party groups

Third party groups	Example
Local government bodies or indigenous authorities with rights and powers over land, contracts, or regulatory bodies that are at issue in the ISDS case.	For example, Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania 2015. A case in which the rights of municipalities over the land was central to the dispute).[111]
Local communities that are specifically affected, for example, where the investment is a natural resource or infrastructure project that impacts the enjoyment of their environment.	Examples of such cases include (i) ISDS claims challenging State action taken in response to community mobilization concerning an investment, and (ii) ISDS claims challenging alleged failure of the State to act when required to, e.g.to comply with full protection and security obligations. For

[107]NPerrone, "The invisible Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime" American Journal of International Law (2019) 113, p.16.
[108]UNCTAD, IIA Issues Note, "Reforming Investment Dispute Settlement: A Stocktaking' Tools" (March 2019) p.23.
[109]World Commission on Environment and Development (WECD), Our Common Future (OUP, 1987) pp.42-44.
[110]World Commission on Environment and Development (WECD), Our Common Future (OUP, 1987) p.43.
[111] Award, ICSID Case No. ARB/10/13 of 2 March 2015.

	example, in Copper Mesa Mining Corporation v. Republic of Ecuador, 2018.[112]
Users of utilities and other public services, who are affected by measures concerning those services, or by investment claims challenging those measures.	Examples include: Teco v. Guatemala, Award, ICSID Case No. ARB/10/23, 19 December 2013; SAUR International SA v. Republic of Argentina, Award, ICSID Case No ARB/04/4, 22 May 2014.
Individuals or groups, both local and domestic, that have competing claims to property at stake in the dispute.	For example, Bernhard von Pezold and Others v. Republic of Zimbabwe, Award and Decision on Annulment, 2015.[113]

Based on Table 1, third-party rights or interests can be triggered or affected by ISDS disputes in a range of circumstances, including where disputes arise out of competing claims advanced in different forums between nongovernmental actors, States and investors.[114] This is the underlying reason for focusing a group rather than individual stakeholders. However, inthe international investment regime, affected third party interests are rarely represented largely due to the nature of the relationship between investors, the State and third party groups.

2.2.1. The Investor- State-Third party relationship

This part provides examples to illustrate the conflict of interests within this complex relationship and the challenges for third party groups in accessing justice.

Example 1: When an environmental organisation challenges a government agency's issuance of an environmental permit to an investor before national courts, and the investor brings an ISDS claim to challenge the permit's revocation;

NGO v. Govt Agency ⇒ Investor v. State (NGO not present)

Example 2: When individual plaintiffs secure a tort judgment against the investment, and the investor brings an ISDS claim to challenge the tort judgment as being arbitrary and

[112] Award and Joint Motion for Stay of the Pending Action Pending Completion of Settlement Agreement, PCA No. 2012-2 of 15 March 2016 and 25 July 2018.
[113] ICSID Case No. ARB/10/15 of 28 July 2015 and 21 November 2018.
[114] See Infinito Gold Ltd v. Costa Rica, ICSID Case No. ARB/14/5 and TransCanada Corporation and TransCanada PipeLines Limited v. United States of America, ICSID Case No. ARB/16/21.

disproportionate; or when a local firm successfully challenges a pharmaceutical company's patent, and an investor in that pharmaceutical company challenges the court's decision in ISDS;

Tort Plaintiff v Investment ⇒ Investor v State (Tort Plaintiff not present)

Generics Firm v Pharmaceutical Co ⇒ Investor v State (Generics Firm not present)

Example 3: Where affected communities challenge a government agency's granting of a concession before national courts, arguing that consultation processes were inadequate, and the investor brings an ISDS claim to challenge a court injunction that stopped the project until consultation was complemented.

Affected Communities v Ministry of Mines and Investor ⇒ Investor v State (Affected Communities not present)

Example 4: An indigenous community and investor have competing claims over rights to a piece of land, and the investor sues in ISDS to secure an award ordering the State to provide it title to the disputed property.

Indigenous Community v Investor ⇒ Investor v State (Indigenous Community not present)

This part has shown that third-party groups interests might be affected by the absence of effective access route under ISDS. Can existing domestic and international law procedural tools assist? This is interrogated next.

Bringing a claim in the home State of an investor is a potential option. However, it is not clear who will initiate the claim.[115] If it is the aggrieved third party, then costs and the strain of handling the logistical issues would be a hindrance, especially if the home State has a weak judicial system. If it is the State to initiate the action, it would require espousal of the claim by the host government, which is never a straightforward process.[116] For example, in Nigeria, domestic courts have shown a general reluctance to support the international claims of third party groups.[117] And where they have been able to, jurisdiction has often been declined on the basis of *forum non conveniens*.[118] Additional challenges include statutory limitations, absence

[115] C Nyombi, T Mortimer and N Ramsundar, "The Morocco-Nigeria BIT: Towards a New Generation of Intra-African BITs" International Company and Commercial Law Review (2018) 29(2), p.78.
[116]C Nyombi, T Mortimer and N Ramsundar, "The Morocco- Nigeria BIT: Towards a New Generation of Intra-African BITs" International Company and Commercial Law Review (2018) 29(2), p.78.
[117]T Ishikawa, "Counterclaims and the Rule of Law in Investment Arbitration" 113 AJIL (2019) p.35.
[118]T Ishikawa, "Counterclaims and the Rule of Law in Investment Arbitration" 113 AJIL (2019) p.35.

of class action provisions corporate liability rules and evidence collection obstacles.[119] Thus, there are significant problems associated with using this domestic courts to obtain redress for aggravated third party groups. This is compounded by the fact ISDS does not generally permit *amicus curiae* submissions by non-governmental organisations who are seeking redress for affected third party groups.[120]

The next sub-section discusses the relationship between third party groups and foreign investors. This will provide some context as to why third party rights of intervention need strengthening.

2.3. The relationship between third party groups, host States and foreign investors

The challenges created by the lack adequate access to justice for third-party groups can be illustrated by the hardships faced by host communities in the Niger Delta region of Nigeria which has experienced environmental and human rights violations owing to exploitative actions of oil companies in the region. These hardships include oil spillage and gas flaring with implications for the social-economic welfare of the local communities. The Ogoni community, in particular, has experienced environmental degradation as a result of Shell Petroleum Development Company activities which have still not been remedied.[121] Ogoniland had great biodiversity and a thriving fishing industry prior to this incident.[122] The land produced some of the largest mangrove trees in the largest surviving rainforest Nigeria.[123] Fishing and farming were the main source of livelihood for the Ogoni people. In 1950s, a subsidiary of Royal Dutch Shell Group began oil exploration in the region and over the course of 30 years, extensive production facilities were setup.[124] Since 1960s, there has been recurring gas flaring, acid rain and oil spills.[125] The resulting problems has been extensive, including: fish started dying due

[119] International Institute for Sustainable Development, "Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements" (2018) p.18.

[120] See Maciej Zachariasiewicz, "Amicus curiae in international investment arbitration: can it enhance the transparency of investment dispute resolution?" Journal of International Arbitration, 2012, p.2; JViñuales, "Amicus Intervention in Investor-State Arbitration" Dispute resolution journal, 2007, p. 72.

[121]N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016) p.8.

[122]The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, Chapter 2.

[123]J Langeveld. and S Delany 2014. The impact of Oil Exploration, Extraction and Transportation on Mangrove Vegetation and Carbon Stock in Nigeria 1401. Biomass Research Report, 1401: Biomass Research, Wageningen p.11.

[124]The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, Chapter 2.

[125]G James, J Adegoke, S Osagie, S Ekechukwu, P Nwilo and J Akinyede, J "Social valuation of mangroves in the Niger Delta region of Nigeria." 2013 International Journal of Biodiversity Science, Ecosystem Services & Management, 9(4), pp.311-323.

to water contamination,[126] soil erosion leading to food becoming scarce because the soil could not support crops.[127] This is in addition to high death-rate and miscarriages due to health complications associated with air and water pollution.[128] As stated in the Bayelsa State May 2023 report, a "common ailments affecting the communities…include mental disorders; hypertension; eye irritations; nose, throat and skin lesions; vomiting and rectal bleeding; liver and kidney damage; short-term memory loss and confusion; respiratory problems; miscarriages; and blood in urine."[129] As a result, since the 1990, protests and activism against oil exploration has gripped the Ogoni community leading to the creation of the Movement for the Survival of the Ogoni People (MOSOP) as a voice for the victims.[130]

There is also evidence to indicate that Shell has spilt more than 500000 barrels of oil into Bodo community resulting in loss of livelihoods.[131] The 35 villages that make up Bodo community were highly depended on subsistence fishing and farming before the oil spills.[132] In 2008, the Bodo Community witnessed two large oil spillages by Shell, in August and December that year, leading to land devastation and water contamination.[133] This happened despite Shell stopping exploration activities in the community in 1994,[134] however due to poor maintenance, the area remained susceptible to oil spills.[135] The incident left the villages in poverty having lost their source of livelihood coupled with health risks.[136]

While both communities could consider pursuing redress through the domestic, regional or international human rights courts, they would be confronted with the aforementioned

[126]The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, Chapter 2.
[127]The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, Chapter 2.
[128] E Ezenwaji, A Okoye and V Otti, "Effects of gas flaring on rainwater quality in Bayelsa State, Eastern NigerDelta region." Nigeria. 2013. Journal of Toxicology and Environmental Health Sciences, 5, pp. 97-105.
[129]The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, p.117.
[130]M Watts, Chronicle of a future foretold: The complex legacies of Ken Saro-Wiwa. Extractive Industries and Society, 2015. 2, pp. 635–644
[131] S Pegg and N Zabbey, N, "Oil and Water: The Bodo Spills and the Destruction of Traditional Livelihood Structures in the Niger Delta," 2013. Community Development Journal, 48(3), pp. 391–405.
[132]The Bodo Community and Others v. Shell Petroleum Company of. Nigeria Ltd [2014] EWHC 1973 (TCC) paragraphs1-10.
[133]The Bodo Community and Others v. Shell Petroleum Company of. Nigeria Ltd [2014] EWHC 1973 (TCC).
[134]The Bodo Community and Others v. Shell Petroleum Company of. Nigeria Ltd [2014] EWHC 1973 (TCC) paragraph 10.
[135]Leigh Day. Shell-Bodo. Available at https://www.leighday.co.uk/latest-updates/ cases-and-testimonials/cases/shell-bodo/.accessed 05 May 2022.
[136]Leigh Day. Shell-Bodo. Available at https://www.leighday.co.uk/latest-updates/ cases-and-testimonials/cases/shell-bodo/.accessed 05 May 2022.

challenges over reliability and effectiveness of court systems.[137]T he obvious complicity of the government has contributed to the continued denial of justice through the Nigerian legal system leading to the communities seeking justice in international foras. However, despite the African Commission on Human and Peoples' Right and the Court of Justice for the Economic Community of West African States recommendations,[138] the communities have not been compensated for their losses and the environmental problems persist. Even individual and joint efforts to obtaining redress from the courts of the Netherlands, United States and the UK have not been successful (see Chapter 4). Unlike the Ogoni community which has failed to obtain meaningful justice, for the Bodo community, following action in an English court, Shell accepted responsibility and paid compensation in a settlement.[139] However, the damage environment remains largely unrepaired contrary to the terms of the settlement.[140]Unlike Ogoni, the Bayelsa report finds that "The Bodo Mediation Initiative, also in Ogoni, Rivers State, is one example of post oil spill mangrove restoration, the largest ever undertaken in Africa. It began in 2015 and was only undertaken as a result of successful legal action, and the threat of it, by Bodo communities against Shell in the English courts."[141] For these reasons, this thesis will focus on Ogoni communities to evidence the problem caused by the fragile relationship between foreign investment and third party interests, and access to justice.

Given the aforementioned, third party groups around the world, particularly in the developing countries, are generally without an adequate source of redress and excluded from ISDS. This is compounded by the fact foreign investors can bring direct claims against the host State for breach of substantive treaty standards whereas third party groups or the government, cannot bring direct claims against investors through ISDS.[142] This raises a question, why do we have an investment architecture that does not protect third party interests?

[137]N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016) p.290-292.
[138]Communication 155/96: Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v.The Federal Republic of Nigeria(Decision of the 30th Ordinary Session, October 2001) 15; Socio-Economic Rights and Accountability Project (SERAP) *v.*The Federal Republic of Nigeria, ECOWAS Community Court, ECW/CCJ/JUD/18/12.
[139]Bodo v. Shell Petroleum Development Corporation of Nigeria 2014. EWHC 958.
[140]N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016) p.9-11.
[141]Leigh Day. Shell-Bodo. Available at https://www.leighday.co.uk/latest-updates/ cases-and-testimonials/cases/shell-bodo/.accessed 05 May 2022.
[142]UNCTAD, IIA Issues Note, "Reforming Investment Dispute Settlement: A Stocktaking' Tools" (March 2019) p.23.

2.4.Why do we have an investor-centric international investment regulatory framework?

States have a duty to protect their citizens against human rights breach by non State actors within their jurisdiction and guarantee adequate and equal access to justice for personal injury or loss of life resulting from business activities. This duty is enshrined in the UN Guidelines on Business and Human Rights, UN Guiding Principles 2011[143] and Instrument to Regulate the Activities of Transnational Corporations and other Business Enterprises.[144]

However, these Public International Law duties were not integrated in the building blocks of the international investment regulatory regime. This is because the first generation BITs were developed on the blueprints of the 1959 Abs-Shawcross Draft Convention on Investments Abroad and the OECD Draft Conventions on the Protection of Foreign Property of 1962 and 1967.[145] These instruments contained the minimum standard of treatment as articulated by the major capital exporting countries at the time.[146]For example, the OECD Draft of 1967 provides under Article 1(a) that: "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. It shall accord within its territory the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures…" Essentially, foreign investors must be accorded FET and most constant protection and security. It means the host State must ensure the investor's rights in relation to the investments are not compromised through unreasonable or discriminatory policy measures. The Draft Article 3 also incorporates the Hull Formula guaranteeing prompt, adequate and effective compensation.[147]

This was the genesis of investor-centric investment treaties with emphasis on protecting capital exporting states economic interests abroad without any corresponding obligations on the investors. In fact, the OECD Council Resolution of 1967 adds that it, "will be a useful in the preparation of agreements on foreign investment."[148] These investor-centric provisions are also contained in Articles 1 and 3 of the Abs-Shawcross Draft Convention of1959. Despite their

[143]UN Guidelines on Business and Human Rights, 2011, principles 1, 3 and 25 and Resolution 17/4, UN Human Rights Council.
[144]Revised Draft on a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises 2019, Articles 4(5)& 4(10).
[145] Jeswald Salacuse. "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries." The International Lawyer 24, no. 3 (1990): 655–75.
[146]UNCTAD "World Investment Report 2015: Reforming International Investment Governance"p.122.
[147]Draft Convention on the Protection of Foreign Property1967, Article 3.
[148] Resolution of the OECD Council of October 19677 ILM 117; A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment"(Kluwer Law International, 2009) p.30-31.

influence on investment treaty making at time, the Drafts never obtained the requisite support to become binding conventions or treaties.[149] Nonetheless, the capital exporting countries development their BIT models and programmes based on the spirit these drafts. These templates provided a basis for negotiations with capital importing countries, primarily from the developing world, who had no models of their own. The resulting BITs capitalised on the unbalanced economic power at the time thereby over stressing the rights and interests of the capital exporting nations and their nationals over those of the capital importing countries. This is reflected in the ongoing efforts to rebalance international investment agreements (IIAs) in favour of host States.[150]

However, these investor-centric standards of treatment did not go uncontested. Disagreements began in the 1960s aimed at forcing a rebalance of international investment agreements to reflect the interests of developing countries.[151] This culminated the UN General Assembly Resolutions on the establishment of a New International Economic Order (NIEO) and the Charter of Economic Rights and Duties of States (the Charter).In 1962, the UN passed a Resolution on Permanent Sovereignty over Natural Resources 1962 to affirm the economic independence of developing States. Paragraph 4 of the Resolution states that, "nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign." Paragraph 1 states that, "permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned." Both the NIEO and Charter reaffirmed the principle of sovereignty over resources and economic activities and the economic rights and duties of State. It meant a sovereign State could not be coerced to accord preferential treatment to foreign investors. However, both instruments were not binding, thus, State practice on investment treaty making remained the same contrary to the principles of the both the NIEO and Charter.[152]

[149]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.30-31.
[150]UNCTAD "World Investment Report 2015: Reforming International Investment Governance" (United Nations, 2015) p.121-122.
[151]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.30-31.
[152]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.30-34.

The 1980s saw a gradual expansion in the global BIT programme. However, the BITs continued to follow the OECD templates with capital-exporting States dictating treaty making practices with their capital importing counterparts primarily in Africa and Latin America.[153]The 1980s also saw a paradigm shift in investment relations as a result developing countries concluding BITs amongst themselves.[154]There was a realisation that these instruments could be designed to attract investments while simultaneously protecting host State national interests, such as supporting infant industries through technology transfer requirements and protection of human rights.[155] A number of key events in the 1990s helped to further cement this treaty practice. This included growth in investment-treaty making with on average three new BITs signed almost every week.[156] The dissolution of the Soviet Union created more scope for economic liberalism that further fuelled the thirst for Foreign Direct Investment (FDI) and BITs.[157] As a result, FDI replaced international lending which had been the main source of financing until that point.[158] The lenders also shifted their policy and conditioned loan facilities on the conclusion of BITs.[159]Amidst this shift, capital exporting States continued to sign BITs with the same ideology and practice.[160] These agreements had inflexible rules with ISDS as the final enforcer.[161] Accordingly, the developing States did not understand the nature of the BITs they adopted.[162] Thus, international investment policy before the turn of the twenty-first century followed the OECD Draft template, with capital exporting developed countries dictating the treaty making practice.[163]

Many developing countries joined the BIT programme at the conclusion of the twentieth century as a show of goodwill in a bid to increase FDI inflows and grow their economy.[164]

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[153] UNCTAD, "World Investment Report 2015: Reforming International Investment Governance" (United Nations, 2015) p.122.
[154]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.46-47.
[155]UNCTAD, "Bilateral Investment Treaties 1959-1999" (2000) pp.1-3.
[156]UNCTAD "World Investment Report 2015: Reforming International Investment Governance" (United Nations, 2015) p.123-125.
[157]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.48; UNCTAD "World Investment Report 2015: Reforming International Investment Governance" (United Nations, 2015) p.125.
[158]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.48-49.
[159]M Sornarajah "Resistance and Change in the International Law on Foreign Investments" (CUP, 2015) p.14-16.
[160]UNCTAD "World Investment Report 2015: Reforming International Investment Governance" (United Nations, 2015) p.123-125.
[161]UNCTAD "World Investment Report 2015: Reforming International Investment Governance" (United Nations, 2015) p.122.
[162]M Sornarajah, "Resistance and Change in the International Law on Foreign Investments" (CUP, 2015) p13-15.
[163]M Sornarajah "Resistance and Change in the International Law on Foreign Investments" (CUP, 2015) p.14.
[164] ICSID, "History of the ICSID Convention" (1968) Vol II-1, pp.239.

Such optimism was reflected in the efforts made by African countries in negotiating the Draft ICSID Convention. In 1963, of the 31 African countries 29 were invited to attend a Meeting in Addis Ababa on the adoption of the Draft Convention. These countries "overwhelming acceptance of the ICSID."[165]A representative from Sierra Leone observed that it would make investment attraction easier "if all investment agreements contained a clause…for disputes to be referred to the ICSID."[166]As of March 2023, 45 African States are signatories to the ICSID Convention.[167] In fact, Nigeria became the first African country to ratify the Convention in August 1965.[168]However, despite the creation of a neutral despite settlement body, concerns over the substantive standards of treatment under first generation BITs remained unresolved.[169]

Given that investors generally do not have corresponding obligations under first generation BITs, where does this leave affected third party groups? The answer is to look at domestic, regional and international law instruments and dispute resolution mechanisms which are not always effective or accessible. This is the foundation of my thesis and is explored next.

2.5. First generation investment treaties and access to justice

As explained in Chapter 1 and further evidenced in Chapter 4, investment operations are usually carried out in resource filled developing countries with often weak environmental standards.[170] The absence of corresponding obligations in first generation BITs to observe human rights, creates a high risk of environmental and human rights violations against third party groups. As explained under 2.3, States have an international law responsibility to protect their nationals.[171] States are required to safeguard against breach by both State and non-State actors or organisations, including multinational corporations.[172] This is even more significant considering third party groups have no standing to bring a direct claim against investors for investment related violations via ISDS. In essence, as the UNCTAD puts it, these third party

[165]WKidane "The China Africa Factor in the Contemporary ICSID Legitimacy Debate" University of Pennsylvania Law Journal (2014) 35 (3), p.562.
[166]W Kidane "The China Africa Factor in the Contemporary ICSID Legitimacy Debate" University of Pennsylvania Law Journal (2014) 35 (3), p.561; AAsouzu "International Commercial Arbitration and African States: Practice, Participation and Institutional Development" (CUP, 2001) pp.214 -235.
[167] ICSID, "Database of ICSID Member States"accessed 18 April 2023.
[168]The Federal Republic of Nigeria ratified the Convention on 23 Aug 1965.
[169]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.26-27.
[170]M Sornarajah "Resistance and Change in the International Law on Foreign Investments" (CUP, 2015) p.264-365.
[171]T Weiler, "Balancing Human Rights & Investor Protection: A New Approach for a Different Legal Order" Boston College International and Comparative Law Review (2004) 27(2), p440-142.
[172]T Weiler, "Balancing Human Rights & Investor Protection: A New Approach for a Different Legal Order" Boston College International and Comparative Law Review (2004) 27(2), p440-142.

groups affected by multinational activities have no comparable options.[173] in the process rendering them outsiders to the international investment law regime.[174] However, academic commentators describe third party groups as "the real victims."[175] This is supported by the challenges faced by the Niger Delta communities in Nigeria and incidents around the world where host communities' livelihoods have been decimated by business operations.

This reality has forced the legal community to intervene in order to find solutions to the effect of investor-centric investment dispute settlement and treaty standards. The latter has been the main focus on the academic discourse. Perrone, recognises the prevailing challenges and argues that when interpreting treaty standards, tribunals have failed to take into account public international law considerations such as the corresponding interests of third party groups and instead,[176] the focus is on investor protection even where there are socio-economic implications attached to their decisions.[177] The learned scholar also recognised the need to strengthen third party rights in international investment law.[178] In essence, third party groups are key stakeholders in the international investment regime with property and rights that out to be protected and respected by the state and foreign investors.[179]

Arbitral tribunal practice supports the thesis objective and the prevailing narrative. For example, in *Copper Mesa*[180] and *Urbaser*,[181] the tribunals failed to recognise non treaty based claims by third party groups because they have no *locus standi* in international investment law.[182]As observed in Chapter one, Nigeria's BITs are first generation BITs do not impose obligations on investors. For foreign investors to respect environmental standards and human

[173]UNCTAD, IIA Issues Note, "Reforming Investment Dispute Settlement: A Stocktaking' Tools" (March 2019) p.23.
[174] NPerrone, "The Invisible Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime" American Journal of International Law (2019) 113,p.16..
[175]SSubedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2016) p.261.
[176] N Perrone, "The Invisible Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime" American Journal of International Law (2019) 113,p.16.
[177] NPerrone, "The International Investment Regime and Local Populations: Are the Weakest Voices Unheard' Transnational Legal Theory (2016) 7(3), p.383.
[178]N Perrone, "The Invisible Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime" American Journal of International Law (2019) 113,p.16.
[179]N Perrone, "The Invisible Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime" American Journal of International Law (2019) 113,p.16.
[180]Copper Mesa Mining Corporation v. Republic of Ecuador, PCA Case No. 2012-02, Award (15 March 2016).
[181]Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine RepublicICSID Case No. ARB/07/26, Award (8 December 2016).
[182]N Perrone, "The Invisible Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime" American Journal of International Law (2019) 113, p.18-19

rights.[183] However, treaty making is not the answer because even if treaties contain investor obligations, the existing claims structure is inherently structured to support claims by investors and host States, and excludes direct claims by third-party groups. There is an urgent need for an investment law mechanism to adjudicate harms done to the environment by multinationals. In essence, a fusion of investment protection and investor responsibility is necessary for the development of a more accessible dispute settlement mechanism. One academic commentator argues that rule of law equates to equality in treatment of all actors in the State.[184] On the future of international investment law, he warns that a lack of consideration for environmental standards would lead to a backlash with the potential to threaten the investment treaty system.[185]

This section has explained the challenges faced by third party groups and the need to improve their visibility through access to the ISDS regime. The thesis explores the possibility of creating a new redress system for third party groups. The next sub section explains why even foreign courts are not suited for third party redress.

2.6. The Challenges of Litigating Investment cases in Foreign Courts

States generally cannot exercise jurisdiction on actions within another State because of the principle sovereignty.[186] In the field investment law, courts have accepted jurisdiction to adjudicate harms done to third party groups by multinationals in other jurisdictions. This is largely due to the challenges to accessing redress mainly in the developing countries' courts.[187] In the US, Alien Tort Claims Act (ATCA) allows foreigners to bring claims for torts committed in another jurisdiction, that qualifies as a violation of international law obligations or the law of nations.[188] The legislation is rooted in historical efforts by the federal government to exert supremacy over foreign affairs, particularly in disputes arising from alien conduct and treatment within and outside the US. In 1980, the U.S. Court of Appeals for the Second Circuit rendered a decision in Filártiga v. PeñaIrala,[189] that enabled the

[183]T Weiler, "Balancing Human Rights & Investor Protection: A New Approach for a Different Legal Order" Boston College International and Comparative Law Review (2004) 27(2), p429.
[184]M Sornarajah "Resistance and Change in the International Law on Foreign Investments" (CUP, 2015) p.95.
[185]M Sornarajah "Resistance and Change in the International Law on Foreign Investments" (CUP, 2015) p.97.
[186]N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016) p.265.
[187] European Parliament, "Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries" (European Union, 2019) p.14-15.
[188]N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016) p.260.
[189] Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

recognition of ATS claims in international human rights. This led to a growth is litigation under the legislation, leading to efforts to place limitation on its application via the jurisdictional route. This was reinforced in Sosa v. Alvarez-Machain that the legislation only applies to a narrow set of claims relating to international human rights violations.[190] This position was limited further in 2013 when the US Supreme Court held in Kiobel v Royal Dutch Petroleum that the legislation does not provide jurisdiction to claims involving matters arising outside the territorial jurisdiction is the US.[191] The Supreme Court limited the position further in Jesner v. Arab Bank by holding that foreign companies cannot be sued under the ATS.[192] The extraterritorial reach of the legislation was ruled on in Nestlé (USA), Inc. v. Doe over allegations that Nestle was involved in the trafficking of children from West Africa and forced labour. [193] The Supreme Court held that there was no "sufficient connection" between the allegations and the US operations to justify the application of ATS jurisdiction.[194]

The US court judgements threaten to limit the scope of the ATS thereby reducing access to the redress route under US law.[195] In particular, although the decision in *Kiobel* is restrictive, the sufficient connection general requirement does not completely bar the application of the ATS to claims emanating from outside the United States provided the claim has connection to the US.[196] This means the US courts are able to ace claims against American companies as they fulfil the requirement of sufficient force given that their place of central administration would be the United States.[197] Thus, although *Kiobel* makes it harder for non US companies to bring claims on grounds of human rights violations in the course of business conduct, it retains that US companies are bound by the obligations and can be sued under ATS.[198]

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[190] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[191] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013)

[192] Jesner v. Arab Bank, PLC, No. 16-499, 584 U.S

[193] Nestlé USA, Inc. v. Doe, 593 U. S.

[194] N Jagers, K Jesse and J Verschuren, "The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case against Shell" American Journal of International Law (2014) 1, p.36-37.

[195] N Jagers, K Jesse and J Verschuren, "The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case against Shell" American Journal of International Law (2014) 1, p.36-38.

[196] A Chander, "Unshackling Foreign Corporations: Kiobel's Unexpected Legacy" The American Journal of International Law (CUP, 2013) 107, p.830.

[197]A Chander, "Unshackling Foreign Corporations: Kiobel's Unexpected Legacy" The American Journal of International Law (CUP, 2013) 107, p.830-381.

[198]A Chander, "Unshackling Foreign Corporations: Kiobel's Unexpected Legacy" The American Journal of International Law (CUP, 2013) 107, p.839-330.

Nonetheless, academics such as Chander argue that reach of the ATS should be re-examined and applied to apply regardless of the nationality of the corporation.[199] Academic commentators recognise the impact *Kiobel* will have on future claims and how it limits avenues for accessing justice. However, the scholar concludes that despite the American position, there is a growing recognition, especially in European legal systems, that avenues must be left open to enable injured third party groups to bring claims irrespective of jurisdictional connection.[200] Europe is making progress on adjudication of international tort claims supported by Brussels and Rome II Regulations. In court, the ruling in *Chandler* upheld parent liability for wrongs done by their subsidiaries[201] alongside the common law principles of *forum necessitates and forum non conveniens*.

One academic commentator in particular, examined the position in the European Union (EU), which is the seat of a large number of multinationals as well as the approach taken by the law courts in handling international tort claims.[202] He recognised the limitations on instituting joint suits under these regimes, the application of the *lex causae* as well as the challenge of linking corporate violations to human rights, as barriers to a successful claim in the EU.[203] From this analysis, he concluded that the EU has: "…development of effective litigation outside the United States that avoids many of the difficulties seen in ATS."[204] This is supported by a number of scholars arguing despite the setback created by extraterritorial application of the ATS, Europe is the future of international tort claims.[205] This is supported by the fact European countries recognise universal civil jurisdiction, with the European Commission recognising that multinationals should be held accountable human rights violations around the world.[206] On those grounds, they argue that both Brussels I and the relevant procedures apply to EU courts thereby ensuring extra jurisdictional corporate liability.[207] In conclusion, both scholars are

[199]A Chander, "Unshackling Foreign Corporations: Kiobel's Unexpected Legacy" The American Journal of International Law (CUP, 2013) 107, p.834-385.
[200]RMcCorquodale, "Waving not drowning: Kiobel outside the United States" American Journal of International Law (2013) 107, p.846.
[201]*Chandler v Cape*PLC[2012] EWCA (Civ) 525.
[202]R McCorquodale, "Waving not drowning: Kiobel outside the United States" American Journal of International Law (2013) 107, p.847-850.
[203]R McCorquodale, "Waving not drowning: Kiobel outside the United States" American Journal of International Law (2013) 107, p.847-851..
[204]R McCorquodale, "Waving not drowning: Kiobel outside the United States" American Journal of International Law (2013) 107, p.847-851.
[205]C Kaeb and DScheffer, "The Paradox of Kiobel in Europe" American Journal of International Law, 2013, 107(4), p.852.
[206]C Kaeb and D Scheffer, "The Paradox of Kiobel in Europe" American Journal of International Law, 2013, 107(4), p.853.
[207]C Kaeb and D Scheffer, "The Paradox of Kiobel in Europe" American Journal of International Law, 2013, 107(4), p.856.

hopeful that such claims will be normalised in Europe.[208] Equally, another scholar, examined the position the Netherlands while comparing *Kiobel*and *Akpan* court decisions.[209] He reached a resounding conclusion that the Dutch courts are advanced than the US courts. However, challenges remain that while Shell subsidiary was found liable in *Akpan* for breach of duty of care, there was no corresponding liability for the parent company because it applied *lex causae*, which in this instance was Nigerian Law.[210] However, under Nigerian Law, a parent corporations is not liable for the actions of their subsidiaries that result in negligence in the course of business. In essence, the practice of applying *lex causae* raises many problems for future claimants as it may not be explicit on parent company liability, as in the case of Nigeria. Although *lex fori* is an option, it may be viewed as a form of disrespect to the sovereignty of the host State.[211] *Lex causae* does not only discourage parent companies to act responsibly out of fear of international tort claims and it also lowers the level of expected compensation or award which would be obtainable under Nigerian law which is usually lower than what is obtainable in Europe or under US law. In 2015, the Dutch Court of Appeal held that the parent company of Shell subsidiary was liable for the environmental violations abroad.[212]Thus, given the challenges posed by ATS, the Dutch courts offer a good alternative for third party groups affected by the operations of multinationals.

Besides the jurisdictional issues, the fee structure remains a barrier to accessing justice for international torts. This is due to the prevailing practice of loser pays the costs which has culminated in fewer international tort claims taking place in the UK as compared to the US. Similarly, another scholar discusses civil jurisdiction and *forum neccessitatis*, as a new wave that is slowly gaining momentum in Europe with reference to *Akpan Chandler,* and the French case of *Erika* where Total was made liable for the actions of its subsidiary.[213]While *Chandler* relates to health and safety, *Erika* was a criminal case, which are specific violations that give us little account on the types of violations would be successful.*[214]* Other factors include lack of

[208]C Kaeb and D Scheffer, "The Paradox of Kiobel in Europe" American Journal of International Law, 2013, 107(4), p.857.
[209]N Jagers, K Jesse and J Verschuren, "The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case against Shell" American Journal of International Law (2014) 1, p.40,
[210]N Jagers, K Jesse and J Verschuren, "The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case against Shell" American Journal of International Law (2014) 1, p.40.
[211]N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016) p.281.
[212]*The Guardian* "Dutch appeals court says Shell may be held liable oil spills in Nigeria"(18 December 2015)
[213]N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016) p.274-279.
[214]N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016) p.278-285.

punitive damages and the absence of a class suits as additional barriers to international corporate litigation in Europe.[215]In fact one academic commentator concluded that Europe offers a "uncertain route" for those afflicted by the operations of multinationals.[216] Another scholar recognises the English courts advanced approach to dealing with international tort claims above that of the US but gradually held back by nationalist tendencies for being unwilling to hold their parent companies to account.[217]

From this analysis, it is evident that foreign courts in the US and Europe are still grappling with jurisdictional issues relating to human rights claims arising from corporate violations. In fact, even international human rights courts have been considered as an avenue for third party claims. However, it has not been as effective as explained next.

2.7. International Human Rights Courts and corporate misconduct

Victims of human rights violations can bring claims to International human rights courts established in accordance to international human rights instruments, whether regionally or internationally. In Nigeria, Victims of human rights violations can access the African and ECOWAS Courts and the African Commission with jurisdiction to hear cases against national governments for human rights violations. For third party groups, the ECOWAS Court of justice could potentially be used as an investment court for affected third party groups in the region. In fact, some scholars argue that based on the ECOWAS 2009 Supplementary Act on Investments, the ECOWAS Court of Justice has jurisdiction over investors in the region. The idea of building an investment court model under the ECOWAS system by potentially modifying and strengthening the existing structure was proposed Matthew Happold. The scholar argued that the jurisdiction of the ECOWAS court should be extended to private actors therefore enabling affected private entities to seek recourse.[218] This view is supposed by Jean Ho, who argues for the redevelopment of existing mechanisms to better safeguard the

[215]N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016) p.282.
[216]N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016) p.260
[217] ASanger, "Transnational Corporate Responsibility in Domestic Courts: Still Out of Reach?" American Journal of International Law, 2019, 113, p.8.
[218] Happold, M., & Radović, R. (2018). The ECOWAS Court of Justice as an investment tribunal. The Journal of World Investment & Trade, 19(1), 95-117. Happold, Matthew. "Investor–state dispute settlement using the ECO WAS court of justice: an analysis and some proposals." ICSID Review-Foreign Investment Law Journal 34.2 (2019): 496-518.

interests of both States the investors.[219] However, the author calls for caution on these matters due to the potential impact of new policies on the attractiveness of host States to foreign investment. Eghosa Ekhator builds on this literature to argue that, in cases of environmental damage, which links in with the efforts in this thesis to advance a solution for affected third party groups, the focus should be on developing sub-regional mechanisms such as the ECOWAS courts as a means of strengthening access to justice.[220] However, the issue of jurisdiction remains the most controversial aspect of these proposed reform directions. jurisdiction does not extend to private actors but governments can be ordered by the courts to exercise measures against private actors accused of human rights violations, especially where the government and private actors are complicit,[221] as in *SERAP*[222] and *SERAC.*[223] However, these decisions have not resulted in any change to national practice towards human rights and environmental protection.

The main challenge is enforcement. International human rights courts generally are unable to police corporate misconduct. This is recognised by academic commentators stating that foreign multinationals are not subjects of these courts as they fall outside of their jurisdiction and this compounded by the fact the State is sometimes complicit in the violations despite the negative effect on third party groups.[224] For example, the African Commission does not permit claims against private actors. It only permit submissions by State parties, individual and organisations.[225] This is supported by the decision in *SERAC*[226] where the African Commission erred on the side of caution when elaborating on Shell's violations due to jurisdictional limitations but the government was found liable for the violations in Ogoniland.[227]

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[219] Jean Ho, 'International Law's Opportunities for Investor Accountability' in Jean Ho and Mavluda Sattorova (eds.), Investors' International Law (Hart, 2021) 23.

[220] Eghosa O. Ekhator, 'Multinational Corporations, Accountability and Environmental Justice: The move towards sub regional litigation in Africa' (2022) 121 (02) German Journal of Comparative Law (Zeitschrift für Vergleichende Rechtswissenschaft) 118- 130

[221] *SERAP v Nigeria*, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12, paragraph 121

[222] *SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12, paragraph 121.*

[223] *SERAC and CESR,* (Decision at 30th Ordinary Session, 13- 27 October 2001).

[224]N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016) p.140.

[225]Article 5 and 6 of the African Charter and 'Communications Procedure of the African Commission on Human and Peoples' Rights.

[226]*SERAC and CESR, (Decision at 30th Ordinary Session, 13-27 October 2001).*

[227]F Coomans, "The Ogoni Case before the African Commission on Human and Peoples' Rights" The International and Comparative Law Quarterly (2003) 52(3), p.760.

The jurisdictional problem is reinforced by the non-binding nature the African Commission's judgements since it is not a judicial body.[228] The Commission's lack of enforcement powers was the underlying reason for the creation of the African Court.[229] One academic commentator argues that the African Commission is, "merely a quasi-judicial body… with no binding force."[230] At the time of creating the African Commission, protection of national sovereignty was deemed to be more important than human rights protection hence the omission of enforcement powers for the Commission.[231] In fact, one scholar argues that the African Charter provides "a mechanism with limited funding and independence…and unable to provide meaningful redress."[232] Given the absence of a mechanism under the African Charter for monitoring and enforcing the African Commission's recommendations of the Commission or sanctions for failure to comply, it raises concern over the future of human rights in the region.[233] It leaves the continent reliant on goodwill.[234]For instance, even where the African Commission found in favour of the Ogoni community, the Commission could no enforce the judgement on the State or Shell thereby leaving the victims without adequate redress despite a receiving a favourable judgement. As a result, the government did not partake in the proceedings of the African Commission in case of *SERAC*,[235] and over 20 years following the judgement, it has not been remediated. In essence, governments are often uncooperative in regards to implementing decisions and recommendations of these bodies.[236] However, even in instances where the court has binding force or power such as the ECOWAS Court, compliance with the decision becomes another problem.[237] For instance, following the decision in *SERAP*[238] the government was required to reverse the environmental damage and bring action against the

[228]Article 54 of the African Charter and 'Communications Procedure of the African Commission on Human and Peoples' Rights

[229]EUdu, "Repositioning the African Court of Human and Peoples' Rights in the Enforcement of Human and People's Rights in Africa" Journal of International Law & Jurisprudence (2017) 8(1) p.174.

[230]E Udu, "Repositioning the African Court of Human and Peoples' Rights in the Enforcement of Human and People's Rights in Africa" Journal of International Law and Jurisprudence (2017) 8(1) p.174.

[231]G Bekker, "The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States" Journal of African Law (2007) 51(1), p.171-171.

[232]G Bekker, "The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States" (Journal of African Law 2007) 51(1), p.171-171.

[233] MLinde and LLouw, "Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC Communication" African Human Rights Law Journal (2003) 3 167, p.180-181.

[234]Article 54 of the African Charter and 'Communications Procedure of the African Commission on Human and Peoples' Rights.

[235]F Coomans, "The Ogoni Case before the African Commission on Human and Peoples' Rights" The International and Comparative Law Quarterly (2003) 52(3), p.159.

[236] F Viljoen, "International Human Rights Law in Africa"(OUP, 2012) p297-300.

[237]Art 15(3-4) Treaty of the Economic Community of West African States,1993.

[238]*SERAPv Nigeria*, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.

entities involved in the human rights and environmental violations. Unfortunately, this has not been carried out because the ECOWAS court cannot compel sovereign governments to act on its decisions.[239] Again it goes back to reliance on goodwill of States and national courts. Indeed, according to the registrar of the ECOWAS court, the vast majority of the court's decisions remain unenforced.[240]

The African Commission's inability to bind States motivated the creation of the African Court.[241] The African Court's jurisdiction is limited to States thus private actors lack direct access Court. Both non-governmental organisations and private persons can only bring claims where their government has ratified the Protocol to the African Charter with a declaration that the African Court can permit nongovernmental claims.[242] However, it means governments can limit claims against themselves for human rights breaches. This is because claimants need to file their complaints for screening to a quasi-judicial commission followed by recommendations.[243] This tiered structure ensures political protection for the government at the expense of the victims.[244] Indeed, one scholar concludes that this "condition precedent will operate to impede access to justice for the redress of human rights infractions against individual citizens of States."[245] The tiered structure is the main limitation of the African Court as it does not "permit individuals or NGOs to submit cases directly to the Court."[246]

This is compounded by the fact countries such as Tanzania have taken steps to withdrawn their declarations, [247] with only 9 States having filed the declaration. The low number of declarations and continued withdrawals could put the courts future at risk as it would mean fewer cases being filed and therefore raising concern over its continued viability as human rights courts. Overall, human rights courts are not sufficiently operational or effective to provide adequate

[239]KAlter, L Helfer and JMcAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" The American Journal of International Law (2017), p736-378..
[240] TMaidoh, "The Mandate of a Regional Court: Experiences from ECOWAS Court of Justice" SADC, 2016.
[241]Article 28, African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights" Protocol.
[242]Article 34(6-7, African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights" Protocol.
[243]K Alter, L Helfer and J McAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" The American Journal of International Law (2017), p736-753.
[244]K Alter, L Helfer and J McAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" The American Journal of International Law (2017), p773.
[245]E Udu, "Repositioning the African Court of Human and Peoples' Rights in the Enforcement of Human and People's Rights in Africa" Journal of International Law and Jurisprudence (2017) 8(1) p.175.
[246] R Murray, "The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights" in C Jalloh et al (ed) "*The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges"* (CUP, 2019) p.968
[247]Ivory Coast on 29 April 2020 withdrew their declaration.

redress for third party groups. Jurisdictional limitations or enforcement challenges have more or less closed the door for victims of human rights violations or tort claims against corporations.

2.8. Summary

This Chapter has examined the meaning of third party groups and provided justification for seeking a solution within international investment law to ensure adequate redress for human rights and environmental violations caused by foreign investors. The chapter has found the quest for broader and stronger protection of third party interests is not new but hindered by the lack of an adequate dispute settlement mechanism. This leads back to the aims of this thesis, to put a case forward for the inclusion of third party groups in ISDS. The chapter has shown that many domestic legal systems, and some regional and international dispute settlement bodies recognise that disputes involve violations of rights and interests of other groups who are not formally party the proceeding. Despite this reality, procedural rules that provide for third party groups have direct access or even as joinder or interpleader are limited under international law. This leaves a major lacuna in the international legal framework and as justified in this chapter, ought to be filled through the creation of comparable mechanisms or approaches within international legal systems such as the ISDS dispute resolution, that support third party direct access. This is line with Goal 16 of the SDGs and state responsibilities under international law to protect their citizens from human rights violations. Thus, the next chapter will interrogate existing mechanisms within international law to determine the legal of protection afforded to third party within ISDS and other areas of public international law.

CHAPTER THREE: The International Legal Framework and Third party groups' Rights

3. Introduction

The integrity of global governance today is dependent on the evolving function and role of international law. International law has experienced many defining, globally significant, moments including the establishment of the United Nations, the proclamation of the Universal

Declaration of Human Rights, the adoption of the Geneva Conventions and the establishment of international courts and tribunals including the Permanent Court of Arbitration, the Permanent Court of International Justice and the International Centre for the Settlement of Investment Disputes. Today, international law features more than ever before in the conduct of public life. It means international law must rise to meet new challenges, including eradicating hunger and poverty and protecting the environment. Around the world, policy makers have become more acutely aware of the legacy and importance of international law resulting in the development of international rules in areas such as international trade and investment. This chapter examines the legal framework for regulating the activities of international investment. It interrogates the customary international law position and the approaches taken at regional and international level to regulate investment activities around the world. The main focus is international law, relying on bilateral and multilateral investment treaties and tribunal decision to explore the current and emerging jurisprudence on treaty drafting and protection of third party groups.

This chapter adds to the underlying argument in this thesis that the existing international legal framework does not adequately support third party access to justice. So, is there scope for their inclusion in Investor State Dispute Settlement (ISDS) mechanisms? This chapter attempts to answer this question but examining existing approaches to protecting third party interests via international investment law. The Chapter is structured as follows. The first part examines the customary international law position to determine the genesis of investment rules and whether third party groups were recognised. Secondly, it examines efforts taken by the international law community to embed third party rights in international investment law and reasons for their failure. Lastly, it examines emerging practices from around the world and whether the sustainable development movement supports the third party quest for recognition as stakeholders in the international investment treaty regime.

3.1. Customary International Law and its limitations

This thesis part examines the genesis of State practice and *opinio juris* that is the bedrock of public international law. This state practice emanates from customary norms within the various subfields of international law, including international investment law. As explained in Chapter 2, these customary norms were the product of capital exporting countries practice aimed at protecting the interests of their nationals abroad. It was response to the constant denial of legal

capacity and rights to foreigners,[248] in process treated like enemies or outcasts by host governments.[249] This prompted scholars and lawmakers to formulate customary standards of treatment for foreign investors, thereby laying the foundation for the prevailing debates around investor rights and responsibilities under international investment law.[250]Some scholars advocated for aliens to be accorded the same rights as aliens. De Vitoria argued that aliens have a right to free movement and to own property and engaged in commercial activities abroad.[251] This resulted in the development of national treatment rights for foreigners without discrimination.[252] Grotius added to this debate by arguing for a right common to all men, or human rights under international law without distinction between nationals and foreigners.[253] Vattel in his treatise, *The Law of Nations,* took the view that aliens were in a different category to nationals and should be treated differently in accordance with international standards.[254] This is because aliens moved with the citizenship of their home country and therefore not obliged "to submit to all the commands of the sovereign."[255] It meant that in addition to aliens being accorded a higher level of protection under international law, host States had a duty to provide foreigners the same protection as their nationals.[256] These development, although influential to customary international law norms, arose in the eighteenth and nineteenth centuries.[257]

National treatment became the dominant view leading up to the twentieth century for a number of reasons. Firstly, the capital exporting States had imperial powers over their colonies and these were exercised to protect investment abroad, leaving only a narrow window for international rules.[258] One academic commentator described it as an "imperial system that ensured the protection….within the system, with no desire to create a separate system of law

[248]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.2-4
[249]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.3-4
[250]M Sornarajah "The International Law on Foreign Investments"(CUP, 2010) p.19.
[251]FVitoria "*De Indis et De Ivre Belli: Relectiones"* Carnegie Institution, 1917, p.5.
[252]F Vitoria "De Indis et De Ivre Belli: Relectiones" Carnegie Institution, 1917, p.5.
[253] H.Grotius "*De Jure Belli Ac Pacis Libri Tres"*(Clarendon Press, 1925),pp.XXII; Article 2 of theTreaty of Friendship Commerce & Extradition between the US and Switzerland, 25 November 1850.
[254]J Salacuse, "The Law of Investment Treaties (OUP, 2021) pp.63-65.
[255] EVattel "The Law of Nations or the Principles of Natural Law*"*Paragraphs 107-109; M Sornarajah "The International Law on Foreign Investments" (CUP, 2010) p.19.
[256]E Vattel "The Law of Nations or the Principles of Natural Law" Paragraphs 104.
[257]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.10.
[258]M Sornarajah "The International Law on Foreign Investments" (CUP, 2010) p.19; P Dumberry "The Formation and Identification of Rules of Customary International Law in International Investment Law" (CUP, 2016) p.62.

for the protection of foreign investments."[259] In essence, colonialism held back the development of investment rules and protected a system of imperialism that safeguarded the interests of developed capital exporting States. In addition to imperial submissions, gunboat diplomacy and coercion was sometimes put in place to safeguard foreign interests.[260]

For example, in Nigeria, the British colonial rulers used treaty agreements to exercise informal control over foreign economic interests and secure British merchant trade. This was supported by colonial laws aimed at regulating land ownership and use,[261] bypassing traditional land ownership rule and thereby making it easier to further the British merchant's interests.[262] It means foreign investments were accorded a higher level of protection than that available under the traditional land ownership system. In addition to colonial control, the colonists used an extraterritoriality system of investment governance in capital importing countries signed treaties that extended the territorial control of the home State of the investor. This was evident in countries such as China, who entered such treaties with Great Britain, France, the Netherlands and the US.[263] However, resistance towards foreign investor protection beyond national treatment persisted though the influential work of Calvo, an Argentinian jurist who advocated for equality for both national and foreign investors.[264] He argued that State sovereignty must be respected without interference from another State whether diplomatically or through coercive measures. This meant, according to Calvo, remedies should be found only under the legal system of the host State,[265] thereby eliminating the need for diplomatic protection and minimum standard of treatment for foreigners. This formulation came at a time when Latin American States had grown suspicious of western driven international law rules, and the threat of gunboat diplomacy particularly by the United States.[266]

Despite the resistance towards protection above national treatment, the Latin American position was rejected as a new principle of customary international law.[267]In fact minimum standard of treatment to aliens and compensation in the event of expropriation became

[259]M Sornarajah, "The International Law on Foreign Investments" (CUP, 2010) p.19; P Dumberry "The Formation and Identification of Rules of Customary International Law in International Investment Law" (CUP, 2016) p.62.
[260]M Sornarajah, "The International Law on Foreign Investments" (CUP, 2010) p.19.
[261]The Land Proclamation Ordinance, 1900 &Land and Native Rights Act, 1916.
[262] N Udoekanem, "Land Ownership in Nigeria: Historical Development& Current Issues and Future Expectations", Journal of Environment & Earth Science (2014), 4(21) p.183.
[263] LLee and J Quigley "Consular Law and Practice*"* (OUP, 2008) pp.7-11.
[264]P Dumberry "The Formation and Identification of Rules of Customary International Law in International Investment Law" (CUP, 2016) p.64.
[265]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2016) p.28-32.
[266]J Salacuse "The Law of Investment Treaties (OUP, 2021) pp.66.
[267]J Salacuse, "The Law of Investment Treaties (OUP, 2021) pp.68.

established principles of customary international law. However, third party groups were not considered as a key part of this equation. The early initiatives aimed to instituting a regulatory framework for foreign investment are examined next and the extent to which third party interests were considered I the formulation.

3.2. Post World War Foreign Investment Regulatory Initiatives

The end of the second world war herald a new chapter in international economic relations as a result of decolonisation, the creation of the United Nations and efforts to establish an international investment protection regime.[268] These initiatives were complemented the creation of the International Monetary Fund,[269] World Bank,[270] and the General Agreement on Tariffs and Trade.[271] The latter was created for the purposes promoting trade and tariff reduction, laying the framework for international trade relations away from bilateral arrangements dominated by Friendship Commerce and Navigation treaties, towards a global framework.[272] Trade related effort inspired emerging initiatives aimed at developing a multilateral treaty on foreign investments.[273]

The 1948 Charter for an International Trade Organisation (hereafter the Havana Charter) provided the foundation for a new financial regulatory system that included the World Bank and the IMF.[274] It was borne out of discussions between the UK and the US and a proposal for International Trade Organisation (ITO) for the purposes of regulating international trade but with additional rules on international investment promotion and protection.[275]A draft Havana Charter was discussed November 1947 at a UN Conference on Trade and Employment in Cuba.[276]In relation to trade, the Charter focused primarily on trade facilitation, with the objective to "foster and assist industrial and general economic development…and to encourage the international flow of capital for productive investment."[277] The initial draft did not contain

[268] CTietje and FBaetens, "The Impact of Investor State Dispute Settlement in the Transatlantic Trade and Investment Partnership" (2014)Ministry of Foreign Affairs, The Netherlands).
[269]Articles of Agreement of the International Monetary Fund: Washington 27 Dec, 19452, UNTS 38.
[270]Articles of Agreement of the International Monetary Fund: Washington 27 Dec, 1945 2, UNTS 135.
[271] General Agreement on Tariffs and Trade (30 Oct 1947)55 UNTS 194& 61 Stat A-11.
[272]KVandevelde, "A Brief History of International Investment Agreements" UC Davis Journal of International Law and Policy, 2005 12 157, p.162.
[273] JSalacuse, "The Law of Investment Treaties" (OUP, 2021) p.105-106
[274]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.26-27. 19.
[275]K Vandevelde, "The first bilateral investment treaties: US friendship, commerce and navigation treaties in the Truman administration" University of California, 2012 p159.
[276]Havana Charter- International Trade Organization, 24 Mar1948 and UN Conference on Trade and Employment, UN Doc. E/CONF.2/78.
[277] Article 1, Havana Charter- International Trade Organization, 24 March 1948 and UN Conference on Trade and Employment, UN Doc. E/CONF.2/78.

content on investments,[278] but a part on *Economic Development and Reconstruction* was thereafter added to cover investment promotion and protection.[279] The signatories were prohibited from taking unjustifiable action that could affect the economic interests of foreign investors.[280]

The Charter recommend both bilateral and multilateral agreements or treaties containing, just and equitable treatment[281] provisions, prohibition of discrimination between investments and adequate security to the foreign investor's investments.[282] For implementation, the ITO was empowered to, "…promote the adoption of a general agreement regarding treatment of foreign investment."[283] These obligations were geared towards protecting the interests of foreign investors without corresponding obligations for the investors to adhere to human rights and environmental standards nor did they recognise third party rights of access to justice. This is despite the fact foreign investors could access the International Court of Justice under the auspices of their home State to enforce any violation of obligations. Both the Charter and ITO did not obtain the required level of support.[284] This was partly because the United States preferred personal contractual negotiations in order to impose more control over their investments instead of a multilateral treaty that would be geared towards levelling up the standards of protection.[285]

Thus, third party rights were excluded from the first attempt at regulating investment. This has shown the roots of the problem I seek to resolve in this thesis. The Abs-Shawcross Convention on Investments Abroad was the next attempt to create a multilateral treaty.[286]

3.3. Abs-Shawcross Draft Convention on Investments Abroad of 1959

The Abs-Shawcross Convention emerged out of consultations between the European business community leading to strong investment protections such as "non-discrimination",[287] "fair and

[278] SSubedi "*International Investment Law: Reconciling Policy and Principle"* (Hart, 2020) p.43.
[279] S Subedi "*International Investment Law: Reconciling Policy and Principle"* (Hart, 2020) p.42.
[280]Article 11(1) (b)
[281]Article 11(2) (a)
[282]Article 12(2) Havana Charter: International Trade Organization, 24 Mar 1948 and UN Conference on Trade and Employment, UN Doc. E/CONF.2/78.
[283]Article 11(2)(c) Havana Charter- International Trade Organization, 24 Mar 1948 and UN Conference on Trade and Employment, UN Doc. E/CONF.2/78.
[284]K Vandevelde "The first bilateral investment treaties- U.S friendship, commerce and navigation treaties in the Truman administration" (University of California, 2012) p.158.
[285] C Wilcox, "*A Charter for World Trade"*(Macmillan, 1949) p.147.
[286]Article I Abs-Shawcross Draft Convention.
[287]Article I Abs-Shawcross Draft Convention.

equitable treatment",[288] "constant protection and security", and just and effective compensation.[289] However, there were no corresponding obligations on investors towards human rights and environmental standards. In terms of dispute resolution, the Convention provided for disputes to "be submitted to an Arbitral Tribunal… by either Party to the International Court of Justice."[290] The Convention permitted foreign investors to initiate arbitration claims directly against the host State, marking the first ISDS treaty provision.[291]Article VII (2) permitted investor-State arbitration triggered only by investors. However, there were no corresponding investor obligations. The Draft Convention did not consider third party groups rights of access to the dispute settlement mechanism despite the impact on their livelihood or the social-economic welfare of the peoples of the host State. Unsurprisingly, the Draft Convention was overwhelmingly rejected by sovereign capital importing States.

The next milestone to creating a multilateral treaty on investment was the OECD Draft Convention on the Protection of Foreign Property.[292] The 1967 OECD Draft Convention focused on creating a minimum standard of treatment by requiring host States to provide fair and equitable treatment, constant protection and security, to avoid unreasonable or discriminatory treatment towards foreign investors,[293] prompt, adequate and effective compensation as prescribed under the Hull formula,[294] with investor-State arbitration as a mode of dispute resolution.[295] However, despite the OECD Draft's influence on the future BIT programme,[296] there was no provision for environmental standards. The Draft Convention did not get the requisite level of support from the OECD members who considered it too investor focused thereby preferring bilateral negotiations as opposed to a multilateral arrangement.[297] The next subsection discusses post-colonial efforts to create a New International Economic Order that recognises the developing host States interests.

[288]Article I Abs-Shawcross Draft Convention.
[289]Article III of the Abs-Shawcross Draft Convention.
[290]Article VII, Abs-Shawcross Draft Convention; G Harten, "Investment Treaty Arbitration and Public Law" (OUP, 2007) p.20
[291]Article 7 (2), Abs-Shawcross Draft Convention.
[292]UCTAD, "World Investment Report 2015: Reforming International Investment Governance" 2015) p.122-23.
[293]Article1(a) OECD Draft Convention.
[294]Article 3 of the OECD Draft Convention.
[295]Article 7(b), OECD Draft Convention.
[296] UNCTAD, "World Investment Report 2015: Reforming International Investment Governance" 2015) p.122
[297]S Schill "The Multilateralization of International Investment Law'(CUP, 2009) p.36.

3.4. A New International Economic Order

Exploitation of natural resources by foreign entities was rife during the colonial period, a result of treaties of capitulation or contractual arrangement between colonies and the colonial governments.[298] These contracts had a negative impact on economic dependence of these newly independent countries.[299] In order to break the bondage from these agreements,[300] the newly independent countries sought to reaffirm their sovereignty over natural resources in their territory and in particular, the right to nationalise private assets.[301] This new ideology was supported by communist and socialist countries who considered international law rules repressive and a continuation of western imperialism.[302] However, the capital exporting countries professed that nationalisation should be accompanied with adequate compensation.[303] They sought to enforce the compensation rules by influencing UN General Assembly resolutions, which was dominated by Western capital exporting majorities.[304] In 1962, UN Permanent Sovereignty over Natural Resources Resolution 1803 on was unanimously passed. Paragraph 1 recognised the, "right of peoples and nations to permanent sovereignty over their natural wealth and resources [which] must be exercised in the interest of their national development and of the well-being of the people of the State concerned." This was accompanied by paragraph 4, stating that "nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign."

This resolution affirmed the developing States economic independence with "appropriate compensation,"[305] as opposed to "prompt, adequate and effective" compensation.[306] This meant that disputes over expropriation were to be handled under the host States' laws unless

[298]SSubedi "*International Investment Law: Reconciling Policy and Principle"* (Hart, 2020) p.44-45.
[299]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2020) p.44-45.
[300]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2020) p.44-45.
[301]JSalacuse "*The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital"* (OUP, 2013) p.324.
[302] KVandevelde, "A Brief History of International Investment Agreements" (UC Davis Journal of International Law and Policy, 2005) 12, p.168.
[303] M Mugharby "Permanent Sovereignty over Oil Resources" Malvin, (1966) p.15; J Salacuse "The three laws of International Investment: National, Contractual and International Frameworks for Foreign Capital" (OUP, 2013) p.325.
[304]S Schill "The Multilateralization of International Investment Law" (CUP, 2009) p.37; A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.31.
[305]Resolution 3171, Resolution on Permanent Sovereignty over Natural Resources1973; A Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" Virginia Journal of International Law (1998) 38(4) p651-53.
[306]Resolution 1803, Resolution on Permanent Sovereignty over Natural Resources of 1962.

the parties elect to use international dispute resolution mechanisms.[307] The resolution was adopted by a majority and remains an influential source of customary international law in this field.[308] However, although there was no mention of third party rights, the emphasis had began to shift away from investors towards the host State's national interests.

This was further evidenced in May 1974 when a UN Resolution on a New International Economic Order (NIEO) was adopted by the General Assembly thereby affirming the right to nationalise foreign property without compensation[309] and permanent sovereignty over economic and natural resources.[310] This was the result of concerted efforts by developing countries to assert their sovereignty and protect their economic interests from their developed counterparts. The efforts were motivated by incidences of foreign multinationals interfering in internal politics of developing countries such as Chile[311] and the rising number of nationalisations in developing countries around the world,[312] thereby prompting the to redesign the international investments rules on their terms.[313] The NIEO focused on fair conduct between States and investors by requiring State regulation and supervision of foreign investors activities in the host State.

The move away from international law towards national regulation of foreign investment activities was also captured in the December 1974 Charter for Economic Rights and Duties of States.[314] The Charter affirmed the right to nationalise with "appropriate compensation"[315] with domestic dispute resolution as an option.[316] Both the NIEO and Charter rejected the capital exporting countries preferred Hull formula in favour of appropriate compensation.[317] However, State practice of using the Hull formula continued as both resolution were non-binding and

[307]Resolution 1803, Resolution on Permanent Sovereignty over Natural Resources of 1962.
[308]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2020) p.46.
[309] Resolution on the establishment of a New International Economic Order, Resolution 3201, Declaration 4(e).
[310] Resolution on the establishment of a New International Economic Order, Resolution3201, Declaration 4(e).
[311] KSauvant "Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned", Journal of World Investment and Trade, 2015,16, p.13.
[312]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2020) p.50.
[313]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2020) p.46.
[314]Adopted by the United Nations General Assembly on 12 December 1974.
[315]Article 2.2 of Resolution 3281, Charter of Economic Rights and Duties of States 1974; C Brower and JTepe, "The Charter of Economic Rights and Duties of States- A Reflection or Rejection of International Law" International Lawyer (1975) 9 295 p.306.
[316]Art 2.2, Charter of Economic Rights and Duties of States 1974.
[317]A Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" Virginia Journal of International Law (1998) 38(4) p654.

merely influential.[318] Even at this juncture, third party groups had not firmly entered the discussion but complementary national interests were being debated at UN level.

During the NIEO deliberations, the developing States sought a code of conduct to support them in regulating the activities of foreign investors. As a result, the UN Commission on Transnational Corporations was founded in1974 for the purposes of developing this code of conduct.[319] However, there were many disagreements in the negotiations particularly in the inclusion of international law in the code.[320] International law was the preferred option for the capital-exporting developed States as a way of guaranteeing the international minimum standard of treatment for future investments. This decision was opposed by the capital importing countries as a representation of western international law standards and not the general international community.[321] Other contentious issues included compensation.[322]

A draft of the Code was released in May 1990 containing the States right nationalise followed by compensation,[323] FET[324] and to regulate investment activities in their jurisdiction.[325] On the latter, was the inclusion of investor obligation to respect the host State's socio-economic rights and human rights.[326] And above all, for the purposes of this thesis, was the inclusion of the requirement to respect environmental standards within the course of their business in the host State.[327] The multinationals were required to, "protect the environment and where damaged to rehabilitate it"[328] with any resulting disputes adjudicated using local courts.[329] However, third party groups were not mentioned as parties to future disputes. Despite support from the developing countries, the UK and US, joined other capital exporting countries in July 1992 to reject the Draft Code considered as an extension of the NIEO ideology.[330] Despite this,

[318]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.30.
[319]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.33.
[320]P Muchlinski "*Multinational Enterprises and the Law"* (OUP, 2007) p.660-62.
[321]P Muchlinski "Multinational Enterprises and the Law" (OUP, 2007)
[322]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.33.
[323]UN"Draft Code of Conduct for Transnational Corporations Doc E/1990/94, 12 June 1990, paragraph 55.
[324]UN "Draft Code of Conduct for Transnational Corporations" Doc E/1990/94, 12 June 1990, paragraph 49.
[325]UN "Draft Code of Conduct for Transnational Corporations" Doc E/1990/94, 12 June 1990, paragraph 48.
[326]UN "Draft Code of Conduct for Transnational Corporations" Doc E/1990/94, 12 June 1990, paragraph 14.
[327]UN "Draft Code of Conduct for Transnational Corporations" Doc E/1990/94, 12 June 1990, paragraph 42.
[328]UN "Draft Code of Conduct for Transnational Corporations" Doc E/1990/94, 12 June 1990, paragraph 42.
[329]UN "Draft Code of Conduct for Transnational Corporations" Doc E/1990/94, 12 June 1990, paragraph 57.
[330] KSauvant "Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned", Journal of World Investment and Trade (2015) 16, p57.

these initiatives introduced the idea of regulating in the interests of the host State and paved way for the World Bank and the World Trade Organisation to further augment these initiatives.

3.5. The World Bank Investment Regulatory Initiatives

The World Bank also played an important role in the quest for investment protection that recognises national and third party interests despite focusing primarily investment promotion and facilitation for the purposes of spurring economic development. The most important development is undoubtedly the International Centre for the Settlement of Investment Disputes (ICSID) Convention of 1965. The aim was to create legal certainty and promote foreign investment due to the absence of a fully independent judiciary in most host States, particularly in the developing world.[331] This was achieved through discussions with government officials around the world on the establishment of a mechanism for the settlement of investment disputes between contracting States and foreign investors. It was motivated largely by the growth in international investment at the end of the Second World War and the limitations of State-State dispute settlement mechanisms that aligned with diplomatic protection.[332]

Although state-state arbitration was available under International Chamber of Commerce and the Permanent Court of Arbitration in the form arbitration clauses in the relevant investment arrangements with States, there were always issues around validity of the clauses resulting in increased reliance on diplomatic protection and other relevant dispute settlement mechanisms.[333] Even the world bank, despite not being a dispute settlement body, was involved in settling disputes between States and private organisations before the advent ICSID.[334] Thus there was strong justification for the creation of a neutral mechanism that was acceptable to both investors and States.[335] In absence of the minimum standards of treatment for foreign investment, the idea was an independent voluntary dispute resolution mechanism for arbitration and conciliation provided by the ICSID would spur confidence and reassure investors through protection available for breach of their treaty rights thereby promoting investment flow around

[331] S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2020) pp52-54.
[332]JSalacuse, "*The Law of Investment Treaties"* (OUP, 2021) p.521.
[333]J Salacuse, "The Law of Investment Treaties" (OUP, 2021) p.522.
[334]EBlack, World Bank President: Annual Meeting of the Board of Governors on 19 Sept 1961).
[335]Articles I of Agreement of the International Bank for Reconstruction and Development (Washington) 2UNTS 134.

the world.[336] Incidentally, it has become the premier body for the resolution of investor-State disputes with 164 signatories.[337]

However, the ICSID was focused primarily on investment protection and conferred jurisdiction on the Centre on disputes over "investment between a Contracting State and a national of another Contracting State."[338] Similarly, Article 36(1) of the ICSID-Convention provides that parties wishing to institute arbitral proceedings to write to the Secretary General.[339] This was achieved notwithstanding the existence of international dispute settlement bodies, diplomatic protection and BITs in accordance with customary international law rules and norms.[340] Additionally, the Multilateral Investment Guarantee Agency (MIGA) Convention was adopted by the World Bank in 1985 for further promotion of investment for economic development.[341]Article 2 on objective and purposes states that MIGA endeavours "to encourage the flow of investments for productive purposes among other members."[342] The institution issues guarantees particularly against risks in member States.[343] As a condition for guaranteeing investment, the Agency must be satisfied of the accessibility of fair and equitable treatment and sufficient legal protection for investment in the host State.[344] This was determined from the BIT concluded between State parties or the law and practice in the host State which was require to be consistent with the established international law position.[345] Thus, investment guarantees required assurance of strong legal investment protection in the relevant host State. However, the MIGA did not address any corresponding responsibilities on foreign investors or measures to protect the environment and human rights. Generally, both the MIGA and ICSID did not recognise third party right of access to justice or insurance.

In 1992, following consultations, a working group of the World Bank developed Guidelines on the Treatment of Foreign Direct Investment which were submitted to the Development Committee and adopted in September that year.[346] This was a follow up to the MIGA initiative

[336]C Schreuer, "The ICSID Convention: A Commentary*"* (CUP, 2009) p.ix.
[337] J Golden and C Lamm, "International Financial Disputes- Arbitration and Mediation" (OUP, 2015) p46-48.
[338]Article 25(1) of the ICSID Convention.
[339]Articl 28 ICSID Convention.
[340]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2020) p.57.
[341]The Multilateral Investment Guarantee Agency 1985 (MIGA).
[342]Article 2 of the Multilateral Investment Guarantee Agency 1985 (MIGA).
[343]Article 2 (a)of the Multilateral Investment Guarantee Agency of 1985 (MIGA).
[344]Article 12 (e), Multilateral Investment Guarantee Agency 1985 (MIGA).
[345]Paragraph 3 of the "Multilateral Investment Guarantee Agency Operational Regulations" of 2002.
[346]World Bank, "Legal Framework for the Treatment of Foreign Investment: Volume 2 Report to the Development Committee & Guidelines on the Treatment of Foreign Direct Investment" (World Bank, 1992) p.4-6.

with a goal of creating a regulatory framework for the purposes on promoting foreign investment.[347] The guidelines covered, *inter alia*, standards of treatment, expropriation, dispute resolution, with the focus investor protection rather than host State or third party interests.[348] The Guidelines made no attempt at recognising the State's right to regulate or providing remedies for human rights violations as a consequence of investor activities.[349] Further attempts were made during the Uruguay Round.

3.6. The WTO initiatives on Investments

The General Agreement on Tariffs and Trade (GATT) applied only to selected trade-related investment measures (TRIMs) but failed to consider the relationship between investment and trade. TRIMS was used primarily by developing countries to obtain concessions and local content requirements such as technological transfers from foreign investors operating in their jurisdiction.[350] Consequently, during the Uruguay Round of negotiations, capital exporting countries such as the US and Japan supported the incorporation of TRIMs in the GATT.[351] This would essentially allow them to negotiate more commercially viable concessions or requirements in the GATT away from the localised and nationalists measures.[352] The developing countries, however, argued that international investments was within their regulatory autonomy or jurisdiction and not part of the GATT.[353]

The negotiations culminated in a TRIMs Agreement with less trade related requirements that would have a negative effect on investment. These TRIMs included, under Article 2, "the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production."States are also prohibited

[347]World Bank, "Legal Framework for the Treatment of Foreign Investment: Volume 2 Report to the Development Committee & Guidelines on the Treatment of Foreign Direct Investment" (World Bank, 1992) p.4-6.
[348]Parts 2-5 of "the Guidelines on the Treatment of Foreign Direct Investment" AdoptedSeptember1992.
[349]World Bank, "Legal Framework for the Treatment of Foreign Investment: Volume 2 Report to the Development Committee & Guidelines on the Treatment of Foreign Direct Investment" (World Bank, 1992) p.18; Part 2of "the Guidelines on the Treatment of Foreign Direct Investment" Adopted September 1992.
[350]PCivello, "The TRIMs Agreement, A Failed Attempt at Investment Liberalisation" Minnesota J of International Law (1999) 8(97), p.100.
[351]P Civello, "The TRIMs Agreement, A Failed Attempt at Investment Liberalisation" Minnesota Jof International Law (1999) 8(97), p.107.
[352]P Civello, "The TRIMs Agreement, A Failed Attempt at Investment Liberalisation" Minnesota J of International Law (1999) 8(97), p.100.
[353]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2020) p.63

from passing any measure that affects the requirement to eliminate restrictions.[354] Thus, the TRIMs Agreement's main focus is protecting foreign investors from unfair prohibitions or discrimination through local requirements in relation to buying or selling products.[355] However, since the TRIMS Agreement was trade-focused, human rights and environmental obligations for foreign investors were not considered.

A General Agreement on Trade and Services was also concluded at the Uruguay Round with provisions on investor treatment and liberalisation of trade in services.[356] For example, article 2contains the most-favoured nation requirement which prohibits discrimination between services and service suppliers in different member countries. The GATS also did not address third party interests or place obligations on foreign investors. Other WTO agreements include the Trade-Related Aspects of Intellectual Property and the Agreement on Government Procurement and neither agreement addresses environmental standards and human rights thereby leaving third party groups exposed to the negative externalities from investor operations.

3.7. OECD Guidelines and the Multilateral Agreement on Investment

Following the failed negotiations on a Draft Convention on the Protection of Foreign Property, the OECD made further attempts at developing guidelines for foreign enterprises. This was a result of increasing economic and political aspirations of developing States in the 1970s particularly in Africa and Asia through the UN.[357] These aspirations culminated in an oil crisis in 1973 and nationalisations in the process affecting the economic interests capital exporting States around the world.[358] These organisations were also viewed as representatives of imperialists and an extension of the colonial powers of former colonists. This created a need to exert more control over the activities of foreign multinationals.[359] The Guidelines on Multinational Enterprises were adopted in 1976 with the OECD Declaration on International Investment and Multinational Enterprises. They contained voluntary standards requiring multinationals to observe codes of conduct in their business activities.[360]

[354]Article 2 of the Agreement on Trade-Related Investments Measures.
[355]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2020) p.64.
[356]Preamble of the General Agreement on Trade and Services.
[357]P Muchlinski "*Multinational Enterprises and the Law"* (OUP, 2007) p658.
[358]P Muchlinski "Multinational Enterprises and the Law" (OUP, 2007) p659.
[359]P Muchlinski "Multinational Enterprises and the Law" (OUP, 2007) p610
[360]Policy Brief 1, "The Guidelines for Multinational Enterprises" of June 2001.

However, the guidelines were voluntary in practice taking into account national policies such as labour relations, data protection and competition. With reference to environmental protection, multinationals are required to "give due consideration to those countries aims and priorities with regards to economic and social progress, including…the protection of the environment." These were voluntary and without any binding force, it became difficult to enforce them. To this end, the OECD set out to finalise a Multilateral Agreement on Investment (MAI) during the Uruguay Round on negotiations led by capital-exporting States.[361] The aim was to create better protection for foreign multinationals and increase the attractiveness of foreign investment around the world.[362] The OECD International Investment and Multinational Enterprises Report aimed to create a strong framework for international investment to strengthen global investment flows.[363] The report added that the "obligations under the agreement would need to be reinforced by effective dispute settlement procedures."[364] The draft text of the MAI was released in April 1998 containing investment protection and an broad description covered investments under the MAI.[365] The MAI required most-favoured nation and national treatment to be accorded to foreign investors by the OECD Member States.[366] The substantive protection standards contained in Article IV states that: "Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security."It also prohibited direct and indirect expropriation and endorsed fully the "prompt, adequate and effective" compensation.[367] It permitted investors to bring claims for breach of the substantive protections to national courts or arbitration via the ICSID and other foras.[368]

However, there was no dispute settlement options for third party groups. In addition, there were no provisions on environmental standards despite the OECD's instance on achieving sustainable development.[369] In fact, the OECD was convinced to implement the MAI with

[361]W Witherell, "Developing International Rules for Foreign Investment: OECD's Multilateral Agreement on Investment" Business Economics, (1997) 32(1) pp.39-40.
[362]Preamble, Draft Consolidated Text of the Multilateral Agreement on Investments 1998.
[363]The Committee on International Investment & Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions 5 May 1995.
[364]The Committee on International Investment & Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions 5 May 1995.
[365]Article 2Draft Consolidated Text of the Multilateral Agreement on Investments of 1998.
[366]Article 3Draft Consolidated Text of the Multilateral Agreement on Investments of 1998.
[367]Article 4Draft Consolidated Text of the Multilateral Agreement on Investments of 1998.
[368]Article 5Draft Consolidated Text of the Multilateral Agreement on Investments of 1998.
[369] P Muchlinski "The Rise and Fall of the Multilateral Agreement on Investment: Where Now?" The International Lawyer (2000) 34(3) p.1048.

sustainable development and consistent with the Rio Declaration.[370] There was also a proposal to include a clause to prevent host States from relaxing their national regulatory policy on the environment for the purposes of promoting sustainable development.[371]Although there was a lack of agreement on the working of the clause, these developments were the first to firmly recognise investor obligations towards the host State and third party groups. However, despite recognising this position, the MAI made no provision for investors to observe these obligations either through an enforcement mechanism or a requirement to incorporate them. Thus, MAI collapsed due to a failure to balance political with emerging social-environmental interests within the investment regime.[372]

The OECD, in June 2000revisited the failed MAI negotiations and the Guidelines in a bid to create a more informed and adapted instrument.[373] New OECD guidelines were issued in June that year containing non-binding principles for responsible business activity. It covered areas previously overlooked under the 1976 guidelines including the environmental protection, sustainable development and human rights.[374] Foreign investors were required to respect host State social economic policies in order to achieve sustainable development.[375] It placed sustainable development at the centre of business activity[376] with regard to "relevant international agreements, objectives, principles, and standards…and…contributing to the wider goal of sustainable development."[377]

Article V(I) required foreign investors to set up environmental management systems to enable them to undertake impact assessment of business activities in their territory,[378] and ensure that the public is informed of health and safety and environmental impact.[379] It also includes a requirement for a contingency plan with the aim of averting and mitigating the damage caused by the business operations,[380] and introduce technologies for the purpose of improving environmental performance,[381] and train employees on environmental conduct.[382] Generally,

[370]Preamble, Draft Consolidated Text of the Multilateral Agreement on Investments 1998.
[371] Draft Consolidated Text of the Multilateral Agreement on Investments 1998, pp138-141.
[372] P Muchlinski "Multinational Enterprises and the Law" (OUP, 2007) pp.667-670.
[373]Policy Brief 1, "The OECD Guidelines for Multinational Enterprises" (June, 2001).
[374]Article 2 and V of the OECD Guidelines for Multinational Enterprises of2000.
[375]Article 2(1) OECD Guidelines for Multinational Enterprises of 2000.
[376] Page 40 of the OECD Guidelines for Multinational Enterprises of 2000.
[377]Article5 of the OECD Guidelines for Multinational Enterprises of 2000.
[378]Article 5 (2)(a) of the OECD Guidelines for Multinational Enterprises of 2000.
[379]Article 5 of the OECD Guidelines for Multinational Enterprises of 2000.
[380]Article 5 (5) of the OECD Guidelines for Multinational Enterprises of 2000.
[381]Article 5 (6) of the OECD Guidelines for Multinational Enterprises of 2000.
[382]Article 5 (7) of the OECD Guidelines for Multinational Enterprises of 2000.

these guidelines were inclusive of sustainable development as compared to the MAI and the OECD Guidelines of 1976. The OECD Guidelines of 2000 were modified again in May 2011 to further imbed the sustainable development narrative with modifications to the environment chapter aimed safeguarding the environment.[383] It also included a chapter on human rights with the emphasis on safeguarding and remedying human rights violations.[384]

3.8. Bilateral Investment Treaties and third party rights

As aforementioned, developed countries were at the forefront of international trade and investment, particularly in the developing countries the early twentieth century. Following the end of colonial rule, Treaties of Friendship, Commerce and Navigation (FCN) became a new tool for strengthening these trade relations. These treaties were bilateral in nature with a focus on promotion and protection of trade. They were also a tool for maintaining and developing political relationships between State parties,[385] which also included European countries such as France[386] and Great Britain.[387] However, despite guaranteeing protection to the property abroad, they did not cover investment protection.[388] The focus was on protecting property and not investment. They included protection standards such as compensation for expropriation,[389] most favoured nation and national treatment.[390] In case of a dispute, foreigners could access local courts.[391] The FNCs were mainly used by the United States as other developed nations had a system of investment protection through their colonial.

The approach changed after First World War, with the United States further strengthening the FCNs with investment protections for protecting investments as opposed to protecting property.[392] They included a requirement for most constant protection and security and other protections as defined under international law, including national treatment. The new template

[383]Article 6,OECD Guidelines for Multinational Enterprises of 2011, p.4.
[384]Article 4 of the OECD Guidelines for Multinational Enterprises, 2011.
[385] S Schill "The Multilateralization of International Investment Law*'* (CUP, 2009) pp28-30.
[386]France United States Treaty of Amity & Commerce, February. 6, 1778, 8 Stat 12 TS. No. 83.
[387]England United States Treaty of Amity, Commerce and Navigation, November. 19, 1794, 8 Stat. 116 TS. No. 105.
[388] JSalacuse, *The Law of Investment Treaties* (OUP, 2015) pp9-94; Article 2of the United States Nicaragua Treaty of Friendship Commerce and Navigation, June 21, 1867, 15 Stat. 549.
[389]Article IX of the United States Nicaragua Treaty of Friendship Commerce and Navigation, June 21, 1867, 15 Stat. 549.
[390]Article 1 of the United States Congo, Treaty of Amity, Commerce, and Navigation, Jan 24 1891, 27 Stat. 926.
[391]Article 3 of the United States Congo, Treaty of Amity, Commerce, and Navigation, Jan24 1891, 27 Stat. 926; Article VIII of the Argentina United States Treaty of Friendship Commerce and Navigation, Jul 27,1853, 10Stat. 1005;Article IV of the Yugoslavia United States Treaty of Commerce, Oct 14, 1881 22Stat. 963.
[392]JSalacuse "BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries' The International Lawyer (1990) 24(3)p.655.

also permitted expropriation with compensation in accordance with the international law. However, these protections were for individual rather than business property.

At the end of the Second World War, there was a surge in foreign investment around the world. This resulted in a new template with protection for multinationals[393] that protected investors in currency exchanges accompanied by prompt, adequate and effective compensation.[394] It retained the exhaustion local remedies requirement and the option for diplomatic protection but with State consent in order to obtain direct access to international tribunals. In terms of dispute resolution, the International Court of Justice was given jurisdiction to such disputes. The FCNs were replaced with BITs between countries but after setting the path for investor protection.[395] This is an important historical assessment for the purposes of my thesis as it evidences the early attempts at regulating foreign investment with limited consideration for host State and third party rights.

The FCNs were the building blocks of modern BITs led by capital-exporting States keen on strengthening investment protection and promoting economic interests around the world.[396] There was a desire to access newly independent markets of developing nations, particularly in Africa and Asia, supported by formal treaties with the goal of protecting investments in the host State.[397] It was also a response to a consensus on the minimum standards of treatment for foreign investment.[398] It was also convenient because capital-exporting States had reduced influence or control over former colonies following decolonisation, coupled with a desire for capital importing developing countries to improve their attractiveness to Foreign Direct Investment (FDI). The process of decolonisation led to the creation of new countries across the world and through this independence, it created a need to grow their economies,[399] while simultaneously increasing the risk on capital exporting countries.[400] The proliferation in BITs was a result of economic turmoil following the end of the World War and political cooperation

[393]Article 7 of the Japan United States Treaty of Friendship, Commerce and Navigation, 2 April 1953.
[394]Article 7 of the Japan United States Treaty of Friendship, Commerce and Navigation, 2 April 1953.
[395] CTietje and FBaetens, "The Impact of Investor State Dispute Settlement in the Transatlantic Trade and Investment Partnership "Ministry of Foreign Affairs, Netherlands, (2014)p.19
[396]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.41; J Salacuse "BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries' The International Lawyer (1990) 24(3) p.655.
[397]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.41.
[398]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.41.
[399] P Dumberry "The Formation and Identification of Rules of Customary International Law in International Investment Law"(CUP, 2016) p.71.
[400] DLandes, "The Wealth and Poverty of Nations" (Norton, 1998) pp.430-434.

during the 1980s and 1990s in which African and Asian states sought to expand their political and economic control.[401] It was also a period in which communist states started opening up to liberal policies and respect for private property.[402] The BIT regime was also fuelled by a lack of alternatives to FDI and increased debt levels in developing countries which pushed these countries to look for alternatives to loans and foreign aid.[403] As a result, developing States sought to conclude BITs in large numbers in order to safeguard the interests of foreign investors and promote investment flow.[404] The emphasis moved away from exerting sovereignty over natural resources with a focus on increased flow of foreign investments.[405] Thus, BITs were seen as a viable tool for boosting FDI flow and increasing the confidence of foreign investors to invest in the host State. This was the justification and motivations for the growth in the BIT programme.

It is not surprising, therefore that Germany and Pakistan opened the BIT programme in 1959.[406]Germany was recovering from the ruins of World War 2 and sought to capitalise from raw material rich nations such as Pakistan in order to expand their commercial activities and protect their investments through BIT arrangement.[407] This BIT sought to create favourable conditions for investment in a bid to increase the attractiveness of Germany and Pakistan.[408] These conditions included the right to full protection and security,[409] non-discrimination,[410] compensation for expropriation,[411] free movement of capital,[412] MFN treatment,[413] among other protections. There were no corresponding obligations on foreign investors to respect human rights and protect the environment or a safeguard for the host state to regulate in national interest. In terms of dispute resolution, the BIT provides for state-state arbitration to safeguard

[401]UNCTAD, 'World Investment Report 2015: Reforming International Investment Governance' (United Nations, 2015) P.123.
[402]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.48; UCTAD, "World Investment Report 2015: Reforming International Investment Governance" (United Nations, 2015) p.124.
[403]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.48.
[404]UCTAD, "World Investment Report 2015: Reforming International Investment Governance" (United Nations, 2015) p.121.
[405] M Sornarajah, *Resistance and Change in the International Law on Foreign Investments* (CUP, 2015) pp.13-14.
[406]Germany Pakistan BIT 1959.
[407]J Salacuse "BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries' The International Lawyer (1990) 24(3) p.655.
[408]Preamble of the Pakistan Germany BIT of 1959.
[409]Article 3(2) of the Germany Pakistan BIT (1959).
[410]Article 1(2) of the Germany Pakistan BIT (1959).
[411]Article 3(1) of the Germany Pakistan BIT (1959).
[412]Article 4 of the Germany Pakistan BIT (1959).
[413]Article 3 of the Germany Pakistan BIT (1959).

the interests of foreign investors.[414] It remained that investors had to obtain espousal of their claim by their government in order to access the international dispute settlement mechanism. This BIT opened the door for the European BIT programme in the following decade including the Chad France (1960), Tunisia Switzerland (1961), Tunisia Netherlands (1963) and Guinea Italy(1964). These BITs were premised on protecting investment as well as revolutionising international investment relations.[415] Such innovations included an investor-State arbitral clause which was introduced in the 1968 BIT between the Netherlands and Indonesia in Article 11, with a requirement for a dispute to be submitted for settlement under the International Centre for the Settlement of Investor Disputes. The Chad Italy1969 BIT conferred jurisdiction to the ICSID.

This was the beginning of arbitration without privity combining strong investor protection standards with a dispute resolution via an international arbitration body instituted by the investor.[416] This was cemented in Article X of the Belgium Indonesia BIT 1970 which clarified that access to ISDS should be at the auspices of "a national or legal person of the other Contracting State."[417] This means States are excluded from directly initiating a claim against the investor. It means only investors can bring a claim. But where does this leave affected third party groups. This is compounded by the fact that a counter claim was not included as an option for the host State. The exclusion of the host State correspondingly meant further exclusion of third party groups affected by the operations of foreign investors. Consequently, this investor-state arbitration clauses became a reference point for future investment treaties and remains a standard today. This was helped by the capital importing and capital exporting divide where developed, predominantly European countries, dominated treaty practice against African States.[418] However, it came with little resistance from capital importing developed countries whose focus was on attracting FDI by affording investors strong legal protection.[419] This is captured in a African Legal Consultative Report of1963 on the ICSID Convention negotiations

[414] Article 11(2) Pakistan Germany BIT offers the option of ISDS via an arbitral tribunal or the ICJ.
[415]KVandevelde, "A Brief History of International Investment Agreements" (UC Davis Journal of International Law and Policy,2005) 12, p.170.
[416]Article 7 of the Chad-Italy BIT (1969); A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.45.
[417]Article 5 of the Indonesia Belgium BIT (1970).
[418]UNCTAD, "Bilateral Investment Treaties in the mid1990s" (UNCTAD,1998) p.8; K Vandevelde, "A Brief History of International Investment Agreements" (UC Davis Journal of International Law and Policy, 2005 12, p.170.
[419]UNCTAD, "Bilateral Investment Treaties in the mid1990s" (UNCTAD,1998) p.8; K Vandevelde, "A Brief History of International Investment Agreements" (UC Davis Journal of International Law and Policy, 2005) 12, p.171.

which saw overwhelming support from African countries on the contents of the Convention.[420] The promise of a unbiassed forum for resolving disputes coupled with high prospects of economic development spurred the African States to support the Draft ICSID Convention.[421]As of April 2023, 45 African Countries have signed the ICSID Convention. Third party groups were not considered in the ISCID negotiations. Throughout the 1980s and 1990s, the number of BITs grew significantly, with countries such as China joining the programme in order to expand and protect their economic interests.[422] This era also saw the end of the developing-developed divide with the conclusion of BITs amongst capital importing countries. Despite that, investor-State arbitration remained unchanged without corresponding obligations on investors.

For the purposes of this thesis, it is important to examine these developments from a Nigerian context given that Nigeria is the main focus of this study in order to implement remedial action for the Niger Delta. Since Nigeria began their BIT programme, they have concluded BITs with France, the Netherlands, China and United Kingdom as well as BITs with developing countries such as Romania and South Korea. However, most of these treaties are of a first generation type, reflecting the blueprint of the OECD Convention and Pakistan- Germany 1959 BIT that contained investor-centric protections. For the developed capital exporting States, Nigeria was classified as politically unstable with a high risk of expropriations and state intervention in business activities thereby supporting the decision for including strong investment protections.[423] The BITs offered assurance to foreign investors resulting a uniform approach to investment treaty practice as reflected Nigeria's BITs before 2016.[424]

These protections include fair and equitable treatment, full protection and security, MFN, non-discrimination, expropriation with prompt, adequate and effective compensation. In terms of dispute resolution, if an "agreement cannot be reached within three months…then…Centre for settlement by conciliation or arbitration under the Convention."[425] It means the host State

[420] 29 African States took part. ICSID "*History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention"* 1968 Volume II-1, pp. 235-299
[421]A Asouzu, "*International Commercial Arbitration and African States: Practice, Participation and Institutional Development"* (CUP, 2001) p.214 -235; W Kidane "The China Africa Factor in the Contemporary ICSID Legitimacy Debate" Uni of Pennsylvania International Law Journal (2014) 35 (3), p561.
[422] UNCTAD, 'International Investment Agreements Navigator.
[423]UNCTAD, "World Investment Report 2015: Reforming International Investment Governance" (United Nations, 2015) p.123.
[424]A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.44.
[425]Article 8(1) of the United Kingdom Nigeria BIT (1990) and Article 8(3) of the Nigeria Korea BIT (1997).

cannot initiate direct proceedings against the investor and equally, none of these BITs imposed corresponding obligations on investors or protections for the host State. The BITs do not provide the option for counterclaim or corresponding option for third party access to justice. Similarly, the Nigeria Romania BIT states that "if consultations do not result in a solution….the investor may submit the dispute, at his choice for settlement." The options include an ad hoc arbitration and a competent court. This means the investor can bring a claim against the host State but without a corresponding right for the host State or other third party groups in the host State. However, we must remember that this is the intention of both contracting states who draft these contractual agreements to reflect their intentions. Nigeria expanded their BIT programme at the turn of the twentieth century with Switzerland and Germany entering the arrangement. It also expanded the BIT programme to include developing in Africa such as Egypt, Algeria, and South Africa. Despite this, the BITs remained investor-centric and this contributed to the growing number of ISDS cases around the world.[426] However, the tide change began around 2010 with sustainable development beginning to feature in investment policy around the world to reflect a growing realisation that investment could have an adverse effect on national interests.

The Switzerland Egypt 2010 BIT recognised sustainable development and a nations right to regulate in national interest without impacting on environmental standards and human rights.[427] For Nigeria, their first investment treaty to recognise sustainable development, environmental standards and human rights generally was in 2013 with Austria.[428] For Africa generally, the 2016 Nigeria Morocco BIT took a bold step in recognising third party interests in relation to environment and human rights. The BIT provides for a joint committee responsible for ensuring that there are checks and balances in terms of promoting and protecting the interests of investors and the host State under the BIT.[429] These sustainable development-oriented includes an obligation on investors to make the maximum contribution to the welfare of the local community.[430] In addition it provides

[426]UNCTAD, "World Investment Report 2015: Reforming International Investment Governance" (United Nations, 2015) p.125.
[427]Preamble of the Egypt Switzerland BIT 2010.
[428]Article 4 of the Nigeria Austria BIT (2013) and Article 10 of the Singapore Nigeria BIT (2016),
[429] Article 4, Morocco Nigeria BIT (2016); C Nyombi, T Mortimer and N Ramsundar, "The Morocco-Nigeria BIT: Towards a New Generation of Intra African BITs" International Company and Commercial Law Review (2018) 69 29(2), p.70.
[430] Article 24 of the Morocco-Nigeria BIT (2016).

for the State's right to regulate in national interest,[431] the host State's right to conduct social impact and environmental assessment;[432] to ensure adequate protection of labour rights,[433] and corporate governance.[434]

However, despite these innovations, the dispute resolution provisions remain unchanged lending them to the first generation BITs. Although it provides a requirement to exhaust local remedies and counterclaim, investor-state arbitration remains unchanged.[435] Nonetheless, it was a bold attempt at rebalancing international investment agreements (IIAs) in favour of host States.[436] These innovative sustainable provisions were contained in the 2020 BIT between Japan- Morocco, however with the same dispute resolution procedures.[437]

The counterclaim provisions also permit the host State to bring a counterclaim during proceedings. This is however a departure from Nigeria's old treaty practice. For example, 2002 BIT with Sweden states that the State shall at "shall at no time whatsoever …counterclaim that the investor has received compensation."[438]That compensation has been paid to the foreign investor in relation to an insurance arrangement. However, this does not mean counterclaims are permitted. Generally, clear treaty language is needed in order for a counterclaim to proceed. Although a claim is permissible under counterclaim clauses, a state cannot initiate a claim directly to the ICSID. Thus, counterclaims are reliant on the availability of an ongoing investor action against the State.[439] It means the State can only act as a respondent in opposition to an ongoing investor claim. Unlike an investor who can submit a claim at their discretion to arbitration, the State cannot utilise a counterclaim in the same manner. This is the main limitations of counterclaims, which is further demonstration of the challenges faced by States and third party groups in terms of enforcing their treaty rights. For third party groups affected by the operations of foreign investors, direct access of any sort is not permitted. In fact, the BITs are silent on third party access, and this even applied to recently completed second generation investment treaties. The 2016 Morocco- Nigeria BIT is the only investment treaty

[431] Article 23 Morocco-Nigeria BIT (2016)' T Gazzini, Nigeria and Morocco Move Towards a New Generation of Bilateral Investment Treaties (May, 2017).
[432] Article 14 of the Morocco-Nigeria BIT (2016).
[433] Article 15 of the Morocco-Nigeria BIT (2016).
[434] Article 19 of the Morocco-Nigeria BIT (2016).
[435]Article 21, Nigerian Model BIT 2015.
[436]C Nyombi, T Mortimer and N Ramsundar, "The Morocco-Nigeria BIT: Towards a New Generation of Intra African BITs" International Company and Commercial Law Review (2018) 69 29(2), p.70.
[437]Preamble and Article 9(7) of the Japan Morocco BIT (2020).
[438]Sweden Nigeria BIT (2002).
[439] See for example Mytilineos v Serbia, Dissenting Opinion of September 6 2006, Award on Jurisdiction of 8September, 2006

that recognises third party access. It avers that: "Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state."[440] This means investors can be sued in their home State and it is contained in the Nigeria Model BIT of 2016.

In essence, it allows redress in the home State of the investor, however, without regard to the practical challenges, both political and financial, associated with it. It is not clear which party can bring the civil action, is it NGOs or .[441] The logistical and political challenges associated with third party access to dispute resolution were discussed in the previous chapters and its important to mention that, as evidenced in this analysis of treaty clauses, third party groups are generally excluded and where permitted, a number of practical hurdles remain in terms of accessing justice. For instance, if the claim is brought by a home state, then it leaves matters of compensation and willingness to pursue the matter to completion at the discretion of the third party groups' home state. Nigeria's BIT, although the new generation ones are offering the possibility of civil action, none recognises third party right to access ISDS for redress. This finding would therefore inform the reform proposals in Chapters 6 and 7.

3.8.1. Multilateral Investment Treaties and third party rights

The concept of sustainable development started to enter international investment treaty drafting in the 1990s for the purposes of safeguarding national interests relating to the protection of the environment and human rights. The multilateral investment treaties contributed immensely to the development of international investment law jurisprudence.[442] Some the key multilateral treaties completed during this period include the Association of Southeast Asian Nations Comprehensive Investment Agreement and the Southern Common Market Investment Treaties. These multilateral treaties followed the BIT model and did not contain obligations for foreign investors. In November 1990, at the Eleventh Arab Summit Conference in Amman, Jordan, Arab countries signed the Unified Agreement for the Investment of Arab Capital in the Arab States.[443] It included a protocol for the Arab Investment Court which came into force in February 1988. The aim of the 1980 agreement was to strengthen development and economic

[440]Article 20, Morocco Nigeria BIT (2016).
[441]C Nyombi, T Mortimer and N Ramsundar, "The Morocco-Nigeria BIT: Towards a New Generation of Intra African BITs" International Company and Commercial Law Review (2018) 69 29(2), p.77.
[442] JSalacuse, "The Law of Investment Treaties" (OUP, 2021) p.117.
[443] Unified Agreement for the Investment of Arab Capital in the Arab States (26 Nov 1980)

integration in the Arab States,[444]by encouraging investment between the developing and developed Arab States. However, the agreement was primarily written in favour of investors to reflect the prevailing practice in BITs. It retained standard clauses such as the MFN,[445] free transfer of capital[446] and the right to compensation in the event of expropriation.[447] Nonetheless, the drafters relaxed the obligations under the fair and equitable treatment by limiting it to customary international law.[448] Further amendment to the Agreement was made in 2013 to further safeguard investor rights by expanding the transferability of capital with a broader fair and equitable treatment provision.[449] It also contains protection in relation to protection of regulated activities and observing environmental standards. However, it does not provide scope for enforcing this right, which is the core issue interrogated in this thesis.

In terms of dispute settlement, the Arab Investment Court was created for the purposes of providing a regional mechanism for resolving investment disputes arising from the agreement. It did not provide scope for investor arbitration via the ICSID.[450] However, the Agreement did not include the host State's right to regulate in the national interest and the rights of third party groups, in relationship to human rights and environmental standards. Nonetheless, it contained an obligation for investors to observe and respect the laws in the host State in relation to the establishment and administration of their projects.[451] In relation to sustainable development, investors were required to contribute to long term economic development programmes of the host State.[452] Equally, the investor is required to avoid any action that would be deemed to violate morality, public order or lead to illegitimate gains.[453] However, the underlying issue is the absence of direct access to the investment court for third party groups.

[444]Preamble of the Unified Agreement for the Investment of Arab Capital in the Arab States (26 November 1980).
[445]Article 6(2)of the Unified Agreement for the Investment of Arab Capital in the Arab States (26 November 1980).
[446]Article 7(1) of the Unified Agreement for the Investment of Arab Capital in the Arab States (26 November 1980).
[447]Article 9(2)(a) of the Unified Agreement for the Investment of Arab Capital in the Arab States (26 November 1980).
[448] J Salacuse, "The Law of Investment Treaties" (OUP, 2021), p.117
[449]Article 2 and 6 of the Unified Agreement for the Investment of Arab Capital in the Arab States (26 November 1980).
[450]Article 25 of the Unified Agreement for the Investment of Arab Capital in the Arab States (26 November 1980); JSalacuse, "The Law of Investment Treaties" (OUP, 2021), 117.
[451]Article 14(1) of the Unified Agreement for the Investment of Arab Capital in the Arab States (26 November 1980).
[452]Article 14(1) of the Unified Agreement for the Investment of Arab Capital in the Arab States (26 November 1980).
[453]Article 14(2) of the Unified Agreement for the Investment of Arab Capital in the Arab States (26 November 1980).

In 1981, the Organisation of Islamic Conference concluded an Agreement for the Promotion, Protection and Guarantee of Investments the Organisation of Islamic Conference Member States. The goal was to strengthen economic relations between Islamic States by deepening economic integration in the Islamic common market.[454] This agreement was seen as the backbone for this integration. This agreement offered less protection to investors as compared to the Arab Agreement, with only MFN[455] and expropriation followed by adequate compensation.[456] It excluded standard protections such as fair and equitable treatment and national treatment. Nonetheless, it provides for dispute settlement options for investors without regards to redress options for host States and the third party groups.[457] On the latter, there is no requirement for investors to respect established human rights or adhere to environmental standards within the course of their business activities. However, similar to the Arab Agreement, it calls on investors to respect laws and regulations in the Host state and any action that may harm public interest.[458]

Similarly, in December 1987, an Agreement for the Promotion and Protection of Investments was entered into by the ASEAN Member States.[459] The aim was to improve capital movement and deepen economic integration among the Members.[460] It also followed the BIT template by incorporating a number of substantive investment protection standards without corresponding obligations on investors to respect national laws, or observe human rights and environmental standards.[461] Generally, third party rights were not considered in the discussions leading up to this agreement. Even Article X on the dispute settlement mechanism did not recognise other parties beyond the host State and investors. To further deepen investment and trade in the region, a Framework Agreement was concluded by the ASEAN States in October 1998.[462] The focus was on stimulating trade and investment in the region through broader investment

[454]Article 1 of the Charter of the Organisation of Islamic Conference, 1969.
[455]Article 8Agreement for the Promotion Protection and Guarantee of Investments among Member States of the Organisation of Islamic Conference, 1981.
[456]Article 10(2) of the Agreement for the Promotion, Protection and Guarantee of Investments among Member States of the Organisation of Islamic Conference, 1981.
[457]Article 17 of the Agreement for the Promotion, Protection and Guarantee of Investments among Member States of the Organisation of Islamic Conference, 1981.
[458]Article 9 of the Agreement for the Promotion, Protection and Guarantee of Investments among Member States of the Organisation of Islamic Conference, 1981.
[459]ASEAN Agreement for the Promotion and Protection of Investments (1987) but terminated in 2012.
[460]Preamble of ASEAN Agreement for the Promotion and Protection of Investments (1987) but terminated in 2012.
[461]Articles IV(2) and VI(1) of ASEAN Agreement for the Promotion and Protection of Investments (1987) but terminated in 2012.
[462] Framework Agreement, the ASEAN Investment Area (Oct 1998).

facilitation requirements.[463] Both agreements were consolidated into one Comprehensive Investment Agreement in 2012 with the goal of providing enhanced protection to investors with investor-state arbitration as a redress mechanism.[464] However, just like its predecessors, there were no corresponding obligations to adhere to environmental standards and human rights. However, it recognises the states right to regulate in order to achieve public welfare objectives in relation to public health and the environment.[465] Third party access to dispute settlement mechanism pursuant to the obligations contained the treaty is not recognised nor does it offer obligations on foreign investors.

Another important multilateral agreement was the Protocol of Colonia composed of Paraguay, Brazil, Argentina and Venezuela in January 1994. Similarly, for the purposes of supporting non- Mercosur States to realise the trade and investment benefits, the Protocol of Buenos Aires was concluded in August that year.[466] Both, very investor-centric protocols are yet to come into force due to insufficient ratification. Neither placed obligations on foreign investors nor the option of a counterclaim. Equally, third party right to redress was not considered. These protocols were followed up by the MERCOSUR Protocol on Investment Cooperation and Facilitation signed in April 2017 for the purposes of strengthening trade and investment among themselves. However, unlike the earlier protocols, the 2017 version requires investors to act in a socially responsible manner and help the host State to realise sustainable development objectives.[467] It requires any compensation for expropriation pursuant to the host State's law, while excluding the fair and equitable treatment provision.[468] It places emphasis on sustainable development and encourages foreign investors to adhere to related laws and guidelines on social-economic and environmental protection.[469] It also recognises the State's right to regulate in order to realise public policy objectives.[470] Above all, it omits ISDS thereby further safeguarding national interests. However, it does not necessarily provide a direct route for third

[463]Article 1(b) of the ASEAN Agreement for the Promotion and Protection of Investments (1987) but terminated in 2012.
[464] Article 33 of the ASEAN Agreement for the Promotion and Protection of Investments (1987) but terminated in 2012.
[465] Annex 2(4) of the ASEAN Agreement for the Promotion and Protection of Investments (1987).
[466]The Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR (17 Jan 1994); Protocol of Buenos Aires for the Promotion and Reciprocal Protection of Investments from Non MERCOSUR State Parties (5 Aug1994).
[467]Preamble of the Protocol for Intra MERCOSUR Investment Facilitation and Cooperation of 2017.
[468]Article 6(2) and 6(6) of the Protocol for Intra MERCOSUR Investment Facilitation and Cooperation of 2017.
[469]Article 14(2) of the Protocol for Intra-MERCOSUR Investment Facilitation and Cooperation of 2017.
[470]Article 16(1) of the Protocol for Intra-MERCOSUR Investment Facilitation and Cooperation of 2017.

party groups injured by the operations of investors to access redress through the available mechanisms.

Throughout the last two decades of the twentieth century, a number of multilateral initiatives were launched. Such keynote efforts include the Multilateral Agreement on Investment (MAI) in 1995 which capitulated due to a lack of support and preference for bilateral negotiations in form of BITs. However, the tide has started to change. There are more capital exporting countries today as opposed to 40 years ago and this has contributed to a change in investment policy reflected in the ongoing UNCITRAL Reform proposals (see the discussion in Chapter 1). As explained in this chapter, the prevailing practice of excluding third party groups from access to redress is a product of post World War western driven initiatives negotiated between newly independent countries. There was a power imbalance and that has contributed to the continued struggle for equality in the protection of host state interests with those of foreign investors who are predominantly from developed Western nations such as the Canada and the UK.

However, strong investor protection can be justified on the basis that the State has many ways it can protect itself, mainly through legislating or passing policies that investors must adhere to. This raises a number of challenges for the host State however, especially when it risks breaching treaty provisions such as fair and equitable treatment but also projecting itself as unfriendly to foreign investment. This reality has somewhat contributed to the continued imbalance where corresponding obligations on foreign investors to respect national policies or human rights are excluded from the treaties, which are essentially bilateral; meaning both State have contractually agreed to the terms of the treaty.[471]Such imbalance has neglected or left an important stakeholder out of the equation altogether; the third party groups. It is assumed that protecting the host State's interest such as affording them the right to regulate also caters for the interests of interested third party groups.[472] However, this might not necessarily be the case because in some cases, as exemplified in Chapter 1 and the case studies in Chapter 4, there might be a conflict between the State's interests and those of the local communities. In this instance, it means that the State cannot be trusted to enforce or protect the rights of third party

[471] C Brower and SSchill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?" Chicago Journal of International Law (2009) 9(2), p.482.
[472] UNCTAD, "Bilateral Investment Treaties in the mid1990s" (UNCTAD, 1998) p.9; K Vandevelde, "A Brief History of International Investment Agreements" UC Davis Journal of International Law and Policy, 2005, 12, p.171.

groups, especially where the State is also complicit in the human rights or environmental degradation as exemplified by the Ogoniland case study in this thesis.[473]

Indeed, the investment system has developed a mechanism, dominated by investor state arbitration, however, without regard to the host State, which, based on analysis of existing redress mechanisms cannot initiate a direct ISDS claim.[474] The dispute settlement mechanism is designed primarily for foreign investors who are at liberty to initiate claims without a corresponding right to third party groups affected by the operations of these organisations.[475] So who is to blame? The investors or the States? We should remember that treaties are international contracts which must be agreed by the parties. The articles of these treaties, whether bilateral or multilateral, are the product of these negotiations. Thus, investors are bystanders and mere beneficiaries. It is therefore incumbent on States to model and create a system of governance that protects their long-term interests and those of their citizens.[476]

3.9. Summary

This chapter has examined the international legal framework to ascertain the underlying reasons behind the continued exclusion of third party groups of ISDS and the legal foundation for the protection of national interests such as the environment and human rights which are directly linked to the challenges faced by third party groups, particularly in the developing countries around the world. Emphasis in this chapter has been placed on Africa, given that Nigeria is the main focus on my case studies despite the findings in this research having far wider impact beyond Africa and Nigeria. The analysis in this chapter shown that many of the challenges faced by third party groups in terms of recognition as stakeholders in the international investment regime is largely down to the historical foundations of this area of law. The policies that govern international investment law that ultimately became customary international law standards were crafted at the time when most of Asia and Africa was waking up from the grip of colonial rule. This legacy has shaped policy initiatives since the end of the Second World War, particularly reflected in the NIEO struggles and the failed MAI

[473] ABjorklund, "The Role of Counterclaims in Rebalancing Investment Law" Lewis and Clarke Review (2013) 17(2) p.461.
[474]UNCTAD, "Bilateral Investment Treaties in the mid1990s" (UNCTAD, 1998) p.9; K Vandevelde, "A Brief History of International Investment Agreements" UC Davis Journal of International Law and Policy, 2005, 12, p.170.
[475]K Vandevelde, "A Brief History of International Investment Agreements" UC Davis Journal of International Law and Policy, 2005, 12, p.170.
[476] TIshikawa, "Counterclaims and the Rule of Law in Investment Arbitration" American Journal of International Law (2019) 113,p.33; W Reisman, "International Investment Arbitration and ADR: Married but Best Living Apart" ICSID Review (2009) 24(1) pp.191-192.

negotiations. Even recent efforts in the MERCOSUR region further demonstrate the prevailing challenge to rebalancing international investment policies in favour of host States. Nonetheless, as reflected in the Nigeria Morocco 2016 BIT, countries are starting to embrace sustainable development and recognising that development does not have to come at cost to national public policy. It is this realisation that drove the UNCITRAL to put together Working Group III for the purposes of investing and suggesting reform to ISDS. The next chapter evidences the problem associated with the continued exclusion of third party groups from ISDS, as discovered in this chapter which has examined the international law framework.

CHAPTER FOUR: A case study of selected Niger Delta communities

4. Introduction

This chapter aims to contribute to the substantive discussion in the preceding chapters which has shown that third party groups are generally excluded from the investor-state dispute settlement (ISDS) regime and are therefore without adequate access to redress either under domestic, regional and international dispute resolution bodies. While the previous chapter has interrogated the international legal framework to determine the extent of their exclusion from the international investment regulatory regime, this chapter evidences the impact of this continued exclusion on third party groups. Thus, this chapter sets out to evidence the potential impact of foreign investors on third party groups, mainly local communities in the Niger Delta region of Nigeria. This would provide further impetus and support for intervention, discussed in Chapters 6 and 7.

The Niger Delta communities have faced neglect by international companies dating back to the trans-Atlantic slave trade which involved the commercialisation and sale of people. This changed in the nineteenth century and subsequently with the discovery of Oil. The ongoing gas flaring by oil multinationals and local operators owing to exploitation and neglect of the land and the people. According to the Bayelsa Report, this largely a result of design and intentional operating strategy and actions of oil companies.[477] This, did not stop even after Nigerian courts ordered an end to the practice.[478] The Bayelsa Report concluded "gas flaring is banned or heavily restricted in many other jurisdictions, oil operators persist with the practice in Nigeria, including in Bayelsa."[479] Within the Niger Delta region, the Ogoniland has been selected because of the degree of impact foreign investor activities have had on the environment, people's livelihoods and the challenges faced in obtaining redress at national, regional and international level. The communities in Ogoniland have, for over half a century, faced water, air and land devastation, contributing to health and economic hardships. Shell Petroleum (Nigeria subsidiary) has been at the centre of these disputes and despite several judgements against them, the health, environmental, social and economic impact on the Ogoni communities

[477] The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, p.17

[478] Business and Human Rights Resource Centre. 2005. Nigerian Judge Rules Gas Flaring Violates Constitutional Rights. Available at https://www. business-humanrights.org/en/latest-news/nigerian-judgerules-gas-flaring-violates-constitutional-rights Accessed 13 October 2023.

[479] The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, p.17.

continues to this day.[480] In fact, a study, cited in the Bayelsa Report,[481] conducted on pipelines in six states in the Niger Delta found that more than 70 percent of the pipelines were over 20 years old and over 40 percent were more than 30 years old with much of the infrastructure suffering from mechanical failures due to poor construction and maintenance.[482] Equally, between 2006- 2020, 2 of 47 oil companies operating throughout the Niger Delta Agip and Shell accounted for 75 percent of spill incidents.[483]

In addition to impact, this chapter examines the access to justice challenges, mostly financial and jurisdictional, in prosecuting these environmental and human rights related challenges faced by third part groups. Regionally, the ECOWAS Community Court of Justice as well as the African Commission on Human and Peoples' Rights have heard cases on the Ogoniland and rendered judgements. It should be emphasised from the outset that most of the damage caused to the Ogoni community has not been remediated despite the judgements thereby raising further concern over the effectiveness of existing remedial routes. This raises a question on whether a new remedial route such as an African Investment Court should be considered for the purposes of protecting the interests of third party groups.

To evidence the impact on Ogoniland, this chapter employs an exploratory case study methodology. The case study focuses on the adverse impact caused by oil production largely by Shell and other oil companies in the Niger Delta and the procedural hurdles faced in prosecuting these companies within the national and international legal systems. The impact on Oginiland has been documented around the world and featured in research literature and media outlets. Therefore, a range of sources relied on this chapter which includes published research, policy documents, and even media reports. The findings from these case studies can apply to experiences in other regions in Nigeria and other countries around the world because of the similarity or relatability of the impact on third party groups by multinationals.

This chapter contains four sub-sections. 4.1 provides some background context on Ogoniland and why it has been a lever for multinational activities. Subsection 4.2 explores the impact on

[480]Amnesty International, "No Clean-Up, No Justice: An Evaluation of the Implementation of UNEPs Environmental Assessment of Ogoniland, Nine Years on" (June 2020) p.7.
[481] The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, p.18.
[482] C. H Achebe, U Nneke and O Anisiji, 2012. Analysis of oil pipeline failures in the oil and gas industries in the Niger delta area of Nigeria. In Proceedings of the International Multi Conference of Engineers and Computer Scientists, Hong Kong, 14–16 March 2012; pp. 1274–1279.
[483] M Watts and A Zalik, 2020. Consistently unreliable: Oil spill data and transparency discourse. The Extractive Industries and Society, 7, pp. 790-795.

the Ejama Ebubu Community (EEC) in Ogoniland. And section 4.3 examines the efforts of the Goi community within national and foreign courts with the aim of getting redress for affected third party groups. Mostly importantly it evidences the challenges faced by these groups in obtaining redress within national courts Sub-section 4.4examines the efforts of the Ogale and Bille communities to seek redress within international courts, while subsection 4.5 looks at the efforts of the entire Niger Delta to seek redress from regional courts. All these case studies evidence, financial, jurisdictional, time delays and enforcement challenges as the major drawbacks of available redress options. It therefore evidences the prevailing problem and provides justification for opening up an access route for third party groups via ISDS. In the end, under 4.6, it brings together the strands of argument throughout the chapter in order to reach a circumspect conclusion.

4.1. Why is Ogoniland significant?

Ogoniland is located in the Niger Delta, South-South geopolitical zone of Nigeria with a population of roughly 800,000 people.[484] The area has four districts with many local community groups, which are interrogated in this thesis.[485] Ogoniland has been a major target for international investment because of its rich environment with both oil and gas making up a slew of natural resources found in the region.[486]In terms of bio diversity, the land host lash forestry and in menagerie graced by animal wildlife, lakes, fish, which has allowed local communities to build their livelihoods around hunting, farming and fishing.[487]For these reasons, the Ogoniland has helped to feed other regions in the country and contributed to the social-economic development in the Niger Delta region, achieved through the economic benefits that have accrued primarily from farming and fishing.[488] Thus, Ogoniland is at the heart of the Niger Delta's social-economic wellbeing.

However, the area has witnessed, for over half a century, devastation to the local community's way of life. The environment has been continuously polluted by oil companies, mostly led by

[484] Unrepresented Nations and Peoples Organisation, "Member Profile: Ogoni" (2018) 2available: https://unpo.org/members/7901 accessed 18 July 2022.
[485]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) available: www.unep.org/nigeria accessed 05May 2022
[486]The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, p.11.
[487]Amnesty International. 2018. Negligence in the Niger Delta: Decoding Shell and Eni's poor records on oil spills. Amnesty International [Online]. Available at https://www.amnesty.org/en/documents/ afr44/7970/2018/en/accessed 04 August 2022
[488] OYakubu, "Addressing Environmental Health Problems in Ogoniland through Implementation of United Nations Environment Program Recommendations: Environmental Management Strategies" Environments (2017) 4(2) 28 p3-5.

multinational corporations. The impact has been in the form of gas flares and oil spills.[489] In fact, this environmental problem dates back to the mid-1950s, before Nigeria's independence, when oil was discovered, bringing with it insecurity and land grabbing activities, even before the actual oil exploration operations.[490] Once oil exploration in the region began in 1958, the environment faced the brunt of these operations.[491] In the intervening period, shell established oil production facilities in the region [492] From 1958 onwards, oil spills ravaged the land, destroying the lash plains and contaminating the water, destabilising the social-economic wellbeing of the local communities, while Shell and other oil companies profiting enormously from these activities. The 1960s were geared towards attaining political independence with little or no regard to the environmental degradation in befalling the Niger Delta region.[493]

However, recognition began in the 1970s, with government reports detailing the scale of the damage to the land, water and air in the region. This was evident from the increased food shortages, lack of adequate drinking water and decline in both fishing and farming in the region. However, despite the growing recognition of these challenges, the oil spills and gas flares continued unabated, further devastating the dwindling farmlands and waters in the region. This culminated in protests, forcing the government to act and demanding the decommissioning of some of the functioning oil production plants.[494] However, production did not stop altogether, rather Shell continued to operate other plants in the region, with oil pipelines often encroaching on private property, disturbing natural life, thereby creating further damage to the land.[495]Since oil production began in the Ogoniland, local communities have faced thousands of devastating oil spills, which have devastated the land, water and air, with these condition being blamed for a surge in the number of cancer related illnesses including reproductive and respiratory problems faced by indigenous people.[496]

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[489]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) available: www.unep.org/nigeria accessed 05 May 2022. P.8

[490]Paragraph 3 of Bodo Community v Shell Petroleum Development Company of Nigeria Limited [2014] EWHC 1973 (TCC).

[491]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) available: www.unep.org/nigeria accessed 05 May 2022. P.25.

[492]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) available: www.unep.org/nigeria accessed 05 May 2022. p.24.

[493]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) available: www.unep.org/nigeria accessed 05 May 2022. p.25.

[494]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) available: www.unep.org/nigeria accessed 05 May 2022. p.25.

[495]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) available: www.unep.org/nigeria accessed 05 May 2022. p.25.

[496]Paragraph 2 of *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v the Federal Republic of Nigeria* (Decision at 30th Ordinary Session, 13-27 October 2001).

The effect on biodiversity in the region is even more resounding. The waters have become highly contaminated to the extent that fishing is no longer an option, thereby totally devastating the fishing industry and the economic wellbeing of those that depended on fishing for their livelihoods.[497] The land has also been damaged to the extent that certain food crops can no longer grow thereby contributing to the prevailing food scarcity in the region.[498] These devastations were documented in 2011 by the United Nations Environmental Programme, and in its recommendations, called for civil society groups in Nigeria and the international community to act in order to save the environment and the livelihood of the people of the Niger-Delta region. In its report, it found water contamination with benzene and other chemicals associated with cancer and high levels of soil pollution.[499] In its assessment, it found no viable alternatives for the local communities who are left to rely on the same polluted water sources and soil for food and livelihoods.[500] In terms of social-economic well-being, the report found rising poverty levels in the region a consequence of the collapsing fishing and food industry in the region due to pollution.

The Nigerian government has made some effort to compel the oil multinationals to act in an environmentally friendly manner and have regard to the wellbeing of the communities close to their operations.[501] However, this has not halted the oil spills nor compelled the companies to clean up the oil adequately. In fact, according to an Amnesty International report, even with the recommendations in 2011, 91 percent of the oil spills are yet to be cleaned up.[502] This is compounded by the fact oil plants were not decommissioned properly and oil spills continue to ravage Ogoniland to this date.[503] The issue of compensation is even more concerning, with affected third party groups still waiting for compensation, decades after the oil spills. This introductory analysis to the situation in Ogoniland paints a picture on the challenges faced by

[497]Paragraph 9 of Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v the Federal Republic of Nigeria (Decision at 30th Ordinary Session, 13-27 October 2001).
[498]Paragraph 66 of the *of* Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v the Federal Republic of Nigeria (Decision at 30th Ordinary Session, 13-27 October 2001).
[499]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) available: www.unep.org/nigeria accessed 05 May 2022. p.25.
[500]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) available: www.unep.org/nigeria accessed 05 May 2022. p.20.
[501]Amnesty International, "Nigeria: No Clean-Up, No Justice: An evaluation of the implementation of UNEP's environmental assessment of Ogoniland, nine years on" (June 2020) p.11.
[502]Amnesty International, "Nigeria: No Clean-Up, No Justice: An evaluation of the implementation of UNEP's environmental assessment of Ogoniland, nine years on" (June 2020) p.16.
[503]Amnesty International, "Nigeria: No Clean-Up, No Justice: An evaluation of the implementation of UNEP's environmental assessment of Ogoniland, nine years on" (June 2020) p.7.

third party groups and why it is pivotal that these groups have access to justice as a means of obtaining redress for the damage caused to their environment and livelihoods. The next sub-section maps the challenges faced by different community groups in Ogoniland in terms of obtaining redress.

4.2. Oil exploration and the impact on third party groups in Ogoniland

This sub-section interrogates the broad impact on local communities within the Ogoniland as a result of the oil exploration in the region. It also explores the quest for justice at national level and the challenges to accessing justice faced by these third party groups, characterised as local communities. These communities have been selected because of the degree of impact on their land has gone beyond environmental pollution to human rights and social-economic impact as a result investor operations in the region.

The first Ogoniland community examined is the Ejama Ebubu Community (EEC). For over half a century, the EEC has been ravaged by rising health challenges a result of environmental pollution in the area affected water, air and the soil. To given some background and context, the EEC is predominately of substance farming, supported by fishing and food retailing as the main source of income in the community. The EEC is host to oil pipelines which are used to transport oil across the region to the Port of Bonny Offshore Terminal.[504] Consequently, one of the biggest oil pillages happened in 1971 when oil saturated into the soil and water streams,[505] with raging fires that took weeks to properly extinguish.[506] The actual oil spillage took three weeks to halt with over 2 million barrels saturated in roughly 300 acres of land and water stream.[507]

Between 9-13 million barrels of oil have been spilled in the Niger Delta between 1958 and 2010.[508] Equally, the NNPC's own Annual Statistical Reports reveals that "it lost almost 34

[504]Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Ltd, FHC/ASB/CS/231/2001 (June 2010) p4-5.
[505]United Nations Environmental Program, 'Environmental Assessment of Ogoniland' (2011) available at: www.unep.org/nigeria accessed 13 January 2022; Paragraph 11 of Agbara v Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Ltd, FHC/ASB/CS/231/2001 (June 2010) p4-5.
[506] N Akani, E Amadi and S Braide, "Long-term Effects of Spilled Crude oil on a Sandy loam Soil in Ejama-Ebubu in Rivers State, Nigeria" Nigerian Journal of Microbiology (2009) 23(1) p.1940.
[507]Paragraph 11 of Chief Isaac Osaro Agbara & others v. The Shell Petroleum Development Company of Nigeria Ltd, FHC/ASB/CS/231/2001 (June 2010) p4-5.
[508] Osuagwu, E.S. and Olaifa, E. 2018. Effects of oil spills on fish production in the Niger Delta. PloS one, 13(10), e0205114: https://doi.org/10.1371/journal.pone.0205114 accessed 18 January 2023

million barrels of 'petroleum products' from its pipelines in the period 2005-2018 alone."[509] These figures describe unprecedented levels of oil pollution. According to the Bayelsa Report of May 2023, "this would mean that the Niger Delta has suffered the equivalent of a major oil spill, on the scale of the Exxon Valdez disaster - which devastated over a thousand kilometres of the Alaskan coastline - every single year for 50 years."[510] This severely damaged the environment resulting in water contamination, affecting the fishing industry and the social-economic well-being of the community. According to the Bayelsa Report, "some locations are highly toxic with oil-related contaminants such as chromium present in groundwater at over 1,000 times the WHO limit, while in others, concentrations of noxious chemicals, such as Total Petroleum Hydrocarbons, exceed safe levels by a factor of 1 million according to some of the samples taken".[511]The side effects of this event remain until today.[512] The EEC has faced acid rain,[513] a rise in cancer related illnesses, economic inequality and poverty levels.[514] This also impacted their access to education services, and despite efforts led by civil society groups in Nigeria to remedy the damage,[515] the spillage and the negative externalities, social-economic, deriving from this damage.[516]

The UN Environment Programme found that since 1970, the contamination has not reduced but rather continued owing to negligent clean up practices and protracted delays by the relevant government bodies and foreign investors.[517] The report found contaminants as a result of crude oil spills to have drenched into the waterways that is used for animal and human consumption. It also found hydrocarbons were present in the water and soil and this contamination could be

[509] Nigeria National Petroleum Corporation. 2019. 2019 Annual Statistical Bulletin. NNPC ASB 2019. 1st Edition. [Accessed 3 October 2021]. Available at https://nnpcgroup. com/NNPC Documents/Annual%20Statistics%20 Bulletin%E2%80%8B/ASB%202018%201st%20Edition.pdf accessed 19 January 2023.
[510] The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, p.11.
[511] A Jamieson and S Gomes, 2020. An Independent Forensic Assessment of Environmental Pollution in Bayelsa State. Bayelsa State Oil and Environmental Commission.
[512]Paragraph 11 of Agbara v Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Ltd, FHC/ASB/CS/231/2001 (June 2010) p4-5; F Ogbuehi, "Religion and Human Rights Violation in Nigeria" International Journal of Research in Arts and Social Sciences (2017) 9(2) p.165.
[513] Unrepresented Nations and Peoples Organisation, "Ogoni: The people of Ejama-Ebubu compensated for oil spill after a 40 year wait" (July 2010) https://unpo.org/article/11398 accessed 08April 2023. p.1.
[514]Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Ltd, FHC/ASB/CS/231/2001 (June 2010) p.7; Unrepresented Nations and Peoples Organisation, "Ogoni: The people of Ejama-Ebubu compensated for oil spill after a 40 year wait" (July 2010) https://unpo.org/article/11398 accessed 08 April 2023, p1.
[515]F Giadom and A Tse, "Groundwater Contamination and Environmental Risk Assessment of a Hydrocarbon Contaminated Site in Eastern Niger Delta, Nigeria" Journal of Environment and Earth Science (2015) 5(14), p.166.
[516]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) available at: www.unep.org/nigeria accessed 13 January 2022; p.111-112.
[517]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) available at: www.unep.org/nigeria accessed 13 January 2022; p.112.

linked to the rising health issues in the community.[518] For the people of EEC, the pollution has changed their way of life with rising mortality rates, birth defects in children, they live in constant danger of contracting new diseases, while the air they breach has been deemed below the accepted levels.[519] Four decades after the oil spills, owing to poor government response to the environment and human rights violation and a lack of sufficient and adequate remedial action, the EEC sought to bring legal action against Shell within the national court system.[520] The claim was not only for the 1971 oil spill but also subsequent spills in1991 and 2009.[521]

The legal battle started in 1991 and they were marked by severe delays; a reflection of the challenges facing national courts, particularly in the developing countries, such as Nigeria. A legal challenge against Shell was brought by the traditional ruler of EEC, seeking compensation before the Rivers State Judiciary, High Court for the environmental devastation caused by the oil multinational. Monumentally, the High Court found in favour of the EEC and awarded them over 5 million GBpounds sterling (Nigeria equivalent). However, the Federal High Court overturned the decision on ground of jurisdiction, that matters relating to the actions of multinationals are under the jurisdiction of the Federal courts.[522] A new case thereafter brought at the Federal High Court of Nigeria in 2001 citing the same claims broadly relating to environmental damage and human rights violations. A total of 12 million GB pound sterling (Nigeria equivalent) was sought by the claimants to cover the loss suffered as a result of decades of environmental degradation and human rights violations, including the effect on their quality of life like access to education, good health and economic well-being.[523] In addition to the financial compensation, the EEC sought a court order to force shell to expediate the cleanup process and ensure that land can be returned to the same position it was before the oil spills.[524]

In its submission, Shell argued that the oil spills was partly the result of a brutal civil war in the 1970s that culminated in vandalism and destruction of private property including pipelines.

[518]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) available at: www.unep.org/nigeria accessed 13 January 2022; p.111.
[519]F Giadom and A Tse, "Groundwater Contamination and Environmental Risk Assessment of a Hydrocarbon Contaminated Site in Eastern Niger Delta, Nigeria" Journal of Environment and Earth Science (2015) 5(14), p.174.
[520]Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Ltd, FHC/ASB/CS/231/2001 (June 2010) p.6.
[521]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) available at: www.unep.org/nigeria accessed 13 January 2022, p.111.
[522]Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Ltd, FHC/ASB/CS/231/2001 (June 2010) paragraph 9.
[523]Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Ltd, FHC/ASB/CS/231/2001 (June 2010) paragraph 9.
[524]Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Ltd, FHC/ASB/CS/231/2001 (June 2010) p.7.

Shell recognised the impact on the environment and the efforts made to remedy the pollution since the 1970s.[525] However, the Federal suit experienced severe delays with the proceedings taking many years,[526] a change of changes within the course of the proceedings and an adjournment by shell which was construed as a means of frustrating the claimant's actions.[527] Shell sought further adjournment of the hearings in July 2007 but this was denied by the judge on the ground that there was insufficient evidence to support their claim that their lawyers were not available for the court sitting.[528] The judge dismissed this argument owing to the fact the law firm representing the client had scores of eligible lawyers that could have taken up the matter.[529] These delays continued throughout the trial period. As the case proceeded, Shell's legal team filed a motion to delay their cross-examining process despite the availability of all the weaknesses and without any viable justification.[530] Shell filed another motion challenging the on grounds of impartiality and thereby sought the case to delayed pending the appointment of a new judge.[531]

However, Shell's legal team did not appear before the court to defend the motion, leading to it being struck out, another catastrophic delay to the legal proceedings.[532] Unsurprisingly, Shell filed another motion to disqualify the judge which was ultimately and a year since starting the proceedings and several delays, another schedule for Shell to defend the case in January 2008. However, Shell refused and filed another motion on grounds that its previous motion had not been decided on and should be concluded before Shell can present its defence.[533]Both motions were dismissed and shell was required to present its defence in February that year but again chose to file another motion,[534] appealing against the dismissal of its motions and for the judge

[525]Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Ltd, FHC/ASB/CS/231/2001 (June 2010) p.7.
[526]Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Ltd, FHC/ASB/CS/231/2001 (June 2010) paragraph 10; I Anaba, "Oil Spill: Shell to pay N15.4bn"*Vanguard* (July 2010).
[527]Paragraph 10 of Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Limited [2019] EWHC 3340 (QB).
[528]Paragraphs 10-13 of Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Limited [2019] EWHC 3340 (QB).
[529]Paragraphs 10-11 of Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Limited [2019] EWHC 3340 (QB).
[530]Paragraphs 11-12 of Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Limited [2019] EWHC 3340 (QB).
[531]Paragraphs 12-13 of Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Limited [2019] EWHC 3340 (QB).
[532]Paragraphs 13 of Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Limited [2019] EWHC 3340 (QB).
[533]Paragraphs 13-14 of Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Limited [2019] EWHC 3340 (QB).
[534]Paragraph 15 of Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Limited [2019] EWHC 3340 (QB).

to be replaced on grounds of impartiality.[535] These applications failed and Shell put together over 25 appeals throughout the trial process.[536] Finally, the trial came to an end in 2010 and in June that year, the judge found in favour of the EEC on grounds that there was sufficient evidence to support the fact Shell had violated their rights and damaged their land, and were therefore entitled to compensation.[537] Shell was ordered to pay roughly 18 million GB pound sterling with interest as compensation, in addition to putting in place additional measures to clean up the environment.[538]

Unsurprisingly, given previous attempts, Shell appealed the judgement on grounds of impartiality, denial of a fair trial, among others. An appeal was made in June and September that year, and amended in October, before receiving a judgement on the appeals in December 2012. In the appeal, Shell sought a stay on execution of the judgement until the Court of Appeal had made a ruling on the matter before them. Shell also guaranteed the judgement debt as required in the appeal and as a show of goodwill.[539] However, the appeal was rejected because Shell paid the insufficient fees. The catalogue of errors were a clear indication that Shell was bent on frustrating the EEC and delay the court proceedings as much as possible in the hope of reaching an out of court settlement. However, even the decision to deny the appeal on the basis of incorrect fees was appealed by Shell to the Highest Court in Nigeria, the Supreme Court. Unfortunately for the EEC, the appeal was overturned and the Court of appeal was seized again in the legal dispute. Again, in June 2017, the court sat to hear the substantive appeal by Shell to the judgement rendered in June 2010. The Appeal was rejected on grounds that Shell had failed to submit their arguments thereby making it impossible to make a determination on the merits of their appeal.

Despite a dismissal of their appeal, Shell brought the matter before the Supreme Court of Nigeria in 2018. Unsurprisingly, the Supreme Court rejected the appeal in January 2019 for failure to obtain leave from the Court of Appeal. Another pressing issue was the award which had risen to roughly 183 GB pound sterling largely due to interest rates. A month later, in

[535]Paragraphs 10-13 of Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Limited [2019] EWHC 3340 (QB).
[536]Paragraphs 12-14 of Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Limited [2019] EWHC 3340 (QB).
[537]Chief Isaac Osaro Agbara & others v Shell Petroleum Development Company of Nigeria Ltd, FHC/ASB/CS/231/2001 (14 June 2010) p14-17
[538]Chief Isaac Osaro Agbara & others v Shell Petroleum Development Company of Nigeria Ltd, FHC/ASB/CS/231/2001 (14 June 2010) pp.17-20.
[539] First Bank of Nigeria agreed to guarantee the debt.

February 2019, the EEC enforcement proceedings against Shell in the UK.[540] Unfortunately, the case was dismissed following a strong defence by Shell that the UK court did not have jurisdiction and it was not unjust on grounds of natural justice for the matter to be heard in the UK.[541] Shell then approached the Supreme Court of Nigeria to set aside the January 2019 decision. This application was deemed unmerited and dismissed by the Supreme Court in November 2020.

Essentially, the Supreme Court of Nigeria upheld the earlier decisions of the Appeals court thereby denting Shell's efforts to escape liability and demanding that shell compensates the EEC and remedies the damage to the environment as per the earlier judgement. Shell refused to accept this judgement and in February 2021, opted to utilise the last available option by bringing an investor-state claim at ICSID via the Nigeria Netherlands BIT.[542]It reported that "the decision to drag the country to the arbitration panel followed the Anglo-Dutch energy giant's unsuccessful efforts last year to reverse a court order instructing the company to pay compensation to a community for polluting its land. While the case's victors say they are now owed more than N183 billion ($479 million), Shell contests that valuation and denies being responsible for the decades-old oil spill."[543] It is important to recognise the impact Shell's activities have had on the EEC despite efforts to access justice via domestic channels and the catastrophic delays dating back to the 1970s. While the case remains pending, it must be recognised that Shell is the claimant and the State is the defendant, leaving the third party groups affected by their activities outside of this dynamic. As explained in Chapter 2 and 3, these third party groups are excluded from ISDS despite the limitations of other dispute settlement avenues. Another community afflicted by similar challenges is examined next.

4.3. The Goi community case against Shell

This case study focuses on the impact of another oil spillage disaster by Shell in an affluent community in Nigeria, the Goi. The impact has been so severe to the extent local people were forced to migrate to other parts of the region. As in the case of EEC, the Goi community brought civil claim against Shell for the destruction to the land and water, and their claim was also

[540]Paragraph 2 of Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Limited [2019] EWHC 3340 (QB).
[541]Paragraphs 45 of Chief Isaac Osaro Agbara & others v The Shell Petroleum Development Company of Nigeria Limited [2019] EWHC 3340 (QB).
[542] Shell Petroleum N.V. and Shell Petroleum Development Company of Nigeria Limited v. Federal Republic of Nigeria (ICSID Case No. ARB/21/7).
[543] Bloomberg, available at: https://www.thisdaylive.com/index.php/2021/02/15/shell-reports-Nigeriato-wbank-panel-over-oil-spill-dispute/ accessed 23/03/2023.

subject to catastrophic delays of over 15 years. Despite the lengthy delays, the community still failed in its claim. Ultimately, the community proceeded to the home State of Shell, the Netherlands, and despite the merits of the case, Shell challenged the case on jurisdictional grounds. In October 2004, a major oil spill occurred in the community, following years sporadic oil spills.[544] The oil spill was the result of destruction of an underground pipeline in a nearby village.[545] This leak resulted in raging fires that damaged forestry and further damaged the soil and killed animal life.[546] There were multiple leakages throughout this period despite efforts to contain the situation, with 200 barrels spilt in fishing water throughout the community.[547] Eventually, after two weeks, the leakage and fire were stopped.[548]

In the aftermath, thousands of acres of land had been destroyed resulting in the death of crops, decrease farming, thereby impacting on the livelihood of fathers and food security in the community and region.[549] The water was contaminated leading to scores of fish deaths and migration of fish to cleaner waters, again affecting the economic well-being of the local community.[550] The contamination extended to the breathing air and drinking water to the extent that people started to experience health problems.[551] The economic impact was more pronounced resulting in high unemployment levels due to the decline in farming and fishing due to the oil leakage.[552] For example, a local farmer named Dooh had 13 acres of farmland destroyed by the oil spills which damaged his crops and devastated his fishing business.[553] For Mr Dooh, his land was the main source of livelihood, relied on for both household consumption as well as trading.[554] The oil spills traversed over 2 miles through the waterways, destroying

[544]The Centre for Environment, Human Rights and Development, "After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria" (CEHRD, 2015) p.25; see also "The Plaintiffs and their Villages' https://en.milieudefensie.nl/shell-in-nigeria/the-plaintiffs-and-their-villages accessed 11 November 2022

[545]Paragraph 1.1 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, GHDHA, 2021.

[546]Paragraph 6.2 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, GHDHA, 2021.

[547]Paragraph 2.5 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, GHDHA, 2021;

[548]Paragraph 6.2 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, GHDHA, 2021.

[549]Ejatlas 'Goi Case against Shell, Nigeria' July 2021.

[550]Ejatlas 'Goi Case against Shell, Nigeria' July 2021.

[551]Milieudefensie "The Plaintiffs and their Villages' https://en.milieudefensie.nl/shell-in-nigeria/the-plaintiffs-and-their-villages accessed 11 November 2022.

[552]Ejatlas 'Goi Case against Shell, Nigeria' July 2021.

[553]Eric Barizaa Dooh v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, (Writ of Summons) paragraph 343

[554]Eric Barizaa Dooh v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, (Writ of Summons) paragraph 342; Paragraph 1.1. of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, GHDHA, 2021.

not only Mr Dooh's land but also private property belonging scores of people throughout the community.[555] As both water, land and air was polluted, local people started experiencing episodes of ill-health compounded by rising poverty levels due to the destruction of their source of income.[556] As reported in the Guardan, "Dooh received an urgent call from one of his father's employees: the waterway surrounding their houses was running black with oil. Near the outskirts of Dooh's village of Goi, a pipeline built by Royal Dutch Shell in the 1960s carried oil from inland Nigeria to an offshore terminal where it would be barreled and exported around the world. Dooh suspected the pipeline had sprung a leak. He attempted to alert the pipeline operator, but both Shell and its Nigerian subsidiary had largely abandoned oil operations in Goi a decade earlier in response to local uprisings. On that day, Shell's community relations officer was unavailable."[557]The 2004 oil spills, in addition, to the smaller spills throughout the 1990s, compounded the damage and destroyed the social-economic fabrics of the community.[558]

In the intervening period, the Nigerian government advised the local communities afflicted by the oil pollution to migrate from their community in order to safeguard their health and living conditions as a result of water, land and air pollution.[559]As the EEC did, Mr Dooh and his community brought a case against Shell in the Nigerian courts and later foreign courts. However, they experienced similar challenges.

The remedial process began in 1997 when Shell put together a compensation package for the community.[560] However, this money was misappropriated by the government bodies and shell's own representatives. It meant that compensation did not reach the third party groups that were actually affected such as Mr Dooh and other farmers.[561]This prompted them to pursue legal proceedings against Shell in 1998 at the High Court of the Federal Republic of Nigeria with goal of obtaining compensation for the damage caused by the damage to their land, air

[555]Paragraph 4.2 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, GHDHA, 2021.
[556]Paragraph 2.2 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, BM1470, 2010.
[557]Milieudefensie "The Plaintiffs and their Villages' https://en.milieudefensie.nl/shell-in-nigeria/the-plaintiffs-and-their-villages accessed 11 November 2022.
[558]The Centre for Environment, Human Rights and Development, "After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria" (CEHRD, 2015) p.25.
[559]A Maitland and M Chapman, "Oil Spills in the Niger Delta: Proposals for an Effective Non-Judicial Grievance Mechanism' (Justice Empowerment Initiate, 2014) p.8.
[560]The Centre for Environment, Human Rights and Development, "After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria" (CEHRD, 2015) p.24.
[561]The Centre for Environment, Human Rights and Development, "After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria" (CEHRD, 2015) p.24.

and water.[562] However, as in the EEC case, Shell issued a series of appeals in order to delay the proceedings with the goal of frustrating the community to discontinue the case. Tragically, owing to ill health as a result of explore to pollution,[563] Mr Dooh passed way in 2012 years after initiating the claim against Shell but without an end in sight.[564] His son sought to replace him in the suit but the High Court refused to grant this motion and ruled that a new case had to be brought altogether.[565] It sadly meant that after 15 years of endless legal battles, the Goi Community and the late Mr Dooh's claim had reached nowhere.

In addition to the legal proceedings in Nigeria, Mr. Dooh and the community had sought redress from court in the Netherlands. To given some background and context, in October 2004, a devastating oil spill decimated the environment and killed millions of fish.[566] Three years later, Shell decided to take some responsibility and began the process of cleaning up the environment.[567] In Shell's argument, the oil spill was not down to negligence any of fault of their rather, oil terrorism resulting in the damaging of oil pipes. However, no compensation was provided and the cleanup process was deemed unsatisfactory by the local community. As a result, in April 2009, a Netherland's based Non-Governmental Organisation (NGO) called Milieudefensie joined the community in bringing a case against Shell in The Hague.[568]Their argument for using an international court was merely the absence a viable avenue at domestic level in Nigeria to adjudicate environment based cases given the catastrophic delays already experienced in prosecuting Shell previously. They argued that Shell breached their duty of care towards the local communities by delaying the cleanup process, frustrating any remedial action and allowing the affected people to go on compensated.[569] They also claimed that the

[562]*Barizaa Dooh v The Shell Petroleum Development Corporation of Nigeria Ltd*, Suit No. FHC/PH/159/97(30 March 1998).
[563]The Centre for Environment, Human Rights and Development, "After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria" (CEHRD, 2015) p.24.
[564]Paragraph 1.3 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd.RBDHA:2013.
[565]Mr Barizaa Dooh (deceased) v The Shell Petroleum Development Corporation of Nigeria Ltd (Substituted for the Deceased). Suit No. FHC/PH/159/97 (23 October 2012).
[566]Paragraph 1.1(j). of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, GHDHA, 2021. The Centre for Environment, Human Rights and Development, "After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria" (CEHRD, 2015) p.24.
[567]Paragraph 1.1(i) of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, GHDHA, 2021.
[568]Paragraph 2.2 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, RBSGR:2010; Paragraph 3.5 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd:2013.
[569]Paragraph 2.2 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, , 2010.

government made failures in its enforcement procedures when dealing with Shell knowingly that it had breached environmental laws and damaged the social-economic wellbeing of the local community.[570]

In its submission, Shell argued on grounds of jurisdiction, as it did in the EEC case, that the matter was already seized in a domestic court.[571] It also argued that there was no efficient to prove that the Nigerian courts were inefficient in handling this dispute.[572] However, the Dutch ruled in favour of the local communities that it had jurisdiction to hear the matter given the connection between Shell and the Netherlands.[573] This decision was appealed but it was upheld.[574] With the jurisdictional challenge out of the way, the trial began. Unfortunately, in January 2013, the court found in favour of Shell given that the leak was caused by sabotage or oil terrorism in the region.[575] The court also recognised Shell's efforts to clean up the oil as best and fast as possible.[576] In the end, the court failed to find sufficient justification for the community's claims that shell had not remedied the oil spill thereby denting the efforts of Mr Dooh and the NGO in obtaining compensation for the damage cause to their land and livelihood.[577] Mr Dooh died a year before this judgement and his son Eric chose to further the matter to the Court of Appeal, the Hague.[578] Almost a decade after the ruling, the court gave its judgement in January 2021. It found that Shell to provide concrete evidence to support the argument that oil terrorism was to blame for the oil spill thereby finding them liable and reversing the previous decision. While this is a milestone for the affected third party groups, the ordeal is not over given that Shell is likely to take the matter to the Supreme Court as they did in EEC and if that fails, they could initiate international arbitration as provided for under

[570]Paragraph 2.2 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, 2010.
[571]Paragraph 2.4 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, 2010.
[572]Paragraph 2.4 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, 2010.
[573]Paragraph 2.2 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, 2010.
[574]Paragraphs 3.1-3.8 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd,2015.
[575]Paragraphs 4.2 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, 2013.
[576]Paragraphs 4.51 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, 2013.
[577]Paragraphs 4.57 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, 2013.
[578]See Paragraph 5.5 of Eric Barizaa Dooh and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, 2013.

the Nigeria Netherlands BIT. But where does this leave the third party groups? Yet again without an alternative remedy.

4.4. Shell verses the Ogale and Bille Communities

Shell's devastation of Ogoniland did not end with the EEC and Goi, both the Bille and Ogale communities were affected by their activities as a result oil spills. These communities had learnt from the experiences of the Mr Dooh and the EEC and decided to avoid the domestic courts altogether and reach out to international courts, in this case, English courts. However, even with international courts, there has been stumbling blocks over matters of jurisdiction for the English courts as well as catastrophic delays of over 7 years. Despite this, the dispute is still ongoing High Court of England and Wales and any decision is likely to be accompanied by a catalogue of appeals by Shell. To give some background and context, both communities are located in Ogoniland, comprising of over 60,000 people.[579] These communities rely on the rivers and lakes within Ogoniland for fishing and the soil for farming, which are their main source of income and livelihood.[580] Tragically, in 1988, oil started flowing into the soil and water a result of a leakage from the pipelines and this did not stop, despite efforts by the local communities and the government to force Shell to put measures in place to stop the leakage.[581] In fact, more than 50 oil leaks have been reported since the late 1980s, owing to catastrophic failures in maintenance and sabotage through oil terrorism.[582] The latter was put forward as a defence by Shell and contributed to their reluctance to clean up the oil spill and compensate the affected local communities.

However, the impact to the local communities has been profound. For the fishermen, who relied on fishing for their livelihoods, the oil spillage destroyed their only source of income.[583] The spillage soaked into the soil and entered water channels and lakes, rendering even wells that are used for the purposes of procuring water for domestic use unsuitable.[584] In its report, the UN Environment Programme found catastrophic devastation to marine life, with oil literally

[579]Okpabi and others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd [2017] EWHC 89 (TCC).
[580]I Khalid, "Polluted Communities Can Sue in English Courts'" *BBC News* (Lagos, 12 Feb 2021).
[581]Leigh Day, "The Nigerian Communities who Claim they have Suffered Year of Oil Pollution"https://www.leighday.co.uk/latest-updates/news/2020-news/the-nigerian-communities-who-claim-they-have-suffered-years-of-oil-pollution/accessed 28May 2022.
[582]Paragraph 137 of *Okpabi& Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd* [2018] EWCA Civ 191.
[583]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) <www.unep.org/nigeria> accessed 18November 2022,p.189.
[584]Paragraph 9 of Okpabi & Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd [2018] EWCA Civ 191; United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) <www.unep.org/nigeria> accessed 18 November 2022, p.189.

floating on top of waterways, while the local fishermen, the effect on their social-economic wellbeing was more pronounced.[585] In fact, the report found that the two communities were the most affected in terms of water pollution as a result of oil spillage.[586] The water pollution also led to a rise in cancer related illnesses as a result of Benzene and hydrocarbons entering the waterways, which were the only source of domestic water used by the local communities.[587] The UN environment Programme urged the government to intervene immediately in the matter to avoid a health crisis in the communities.[588]Local people began to experience miscarriages, impotency, cancer related skin diseases. The UN body recommended that local communities should be discouraged from drinking the polluted water,[589] and both shell and the government should intervene to set up alternative means of accessing water and to clean up the environment.[590]

However, these recommendations were not adequately actioned, with people remaining reliant on drinking water from the available water streams and the impact on their livelihoods has not been remediated either through a clean-up of the oil or compensation for the affected third party groups.[591] In addition, to the water contamination, local communities have been devastated by occasional fires as a result of the oil spills leading to the destruction of plant life and entire ecosystem.[592] It has also forced people to migrate from the community to seek menial jobs in other communities in order to sustain their lives and survive.[593]As a result, 13000 people from Bille and Ogale communities filed a claim against Shell in the English courts. A foreign court was necessary because "Shell is Nigeria and Nigeria is Shell."[594] Thus, it is difficult for local

[585]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) <www.unep.org/nigeria> accessed 18 November 2022, p.189.
[586]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) <www.unep.org/nigeria> accessed 18 November 2022, p.10.
[587]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) <www.unep.org/nigeria> accessed 18 November 2022, p.11.
[588]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) <www.unep.org/nigeria> accessed 18 November 2022, p.189.
[589]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) <www.unep.org/nigeria> accessed 18 November 2022, p 213.
[590]I Khalid, "Polluted Communities Can Sue in English Courts'" BBC News (Lagos, 12 Feb 2021).
[591]Leigh Day, "The Nigerian Communities who Claim they have Suffered Year of Oil Pollution" https://www.leighday.co.uk/latest-updates/news/2020-news/the-nigerian-communities-who-claim-they-have-suffered-years-of-oil-pollution/ accessed 28 May 2022.
[592]I Khalid, "Polluted Communities Can Sue in English Courts'" BBC News (Lagos, 12 Feb 2021); see also United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) <www.unep.org/nigeria> accessed 18 November 2022, p 213.
[593] LUnah and K Iruoma "Nigerian Farmers Win Right to Sue Shell over Pollution. But who'll clean up the Mess?*" Devex* (2 March 2021).
[594]Luke May, "42,500 Nigerian farmers can sue Royal Dutch Shell in English Law Courts after Years of Oil Spills in the Niger Delta contaminated land and groundwater, Supreme Court judges Rule"*Mail Online* (12 February 2021) p1.

communities to get justice in Nigeria hence the reason the communities opted to pursue their case in a foreign court rather than experiencing catastrophic delays and spending resources on a domestic court.

The proceedings commenced at the Technology and Construction Court (TCC) in October 2015. The community sought damages for the pollution and an order for Shell to remedy the damage caused to the environment. However, the case faced severe jurisdictional challenges which resulted in further delays.[595] Shell argued that Nigeria was the right forum to hear the dispute and the English court did not have jurisdictional grounds to hear the matter.[596] It also argued that there was no breach of a duty of care towards the local communities given that the sabotage was the result of oil terrorism. In response, the affected communities argued that the Nigerian courts were just and appropriate to handle the dispute and that Shell was responsible for the oil spillage due to failure to carry out necessary and adequate maintenance. Thus, in their view, Shell owed a duty of care to remedy the damage caused as a result of their business activities in the communities. The community wanted the Parent Company of Shell to be held liable for the activities of its subsidiaries in the affected communities. They went as far was contending that outside the medium of the English courts, there was no chance of getting redress from available mechanisms either at national, regional or international level.[597]

A judgement was reached in January 2017, rejecting the argument that the English Courts were not convenient to handle this dispute and rather should be heard by the Nigerian Courts. However, the communities failed to establish a close link between the parent company and the subsidiary thereby defeating the argument that a duty of care was owed by the parent company towards the local communities for the actions or omissions of the subsidiary.[598] Justice Fraser applied the principles in Thompson[599] and the Caparo test of reasonableness and foreseeability, and arrive at a conclusion that while the parent company has the expertise, the Shell subsidiary was not adequately resourced in terms of expertise to detect and avert the oil spills, or foresee the scale of impact on the environment.[600] On this basis, the English court found that it would

[595]Paragraph 2 of *Okpabi& Othersv Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC).
[596]Paragraph 16 of *Okpabi v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC) para 16
[597]*Paragraph 16 of Okpabi & Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC).
[598]*Paragraph 122 of Okpabi & Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC).
[599]*Thompson v Renwick Group* [2014] EWCA Civ 635
[600]*Chandler v Cape* [2012] 1WLR 3111

be unfair to impose liability on the Parent company, which reliant on the expertise of its subsidiary.[601] The judge went as far as placing caution on any assertion that the Nigerian courts were not adequate because of delays, which he deemed to be part of any modern legal system.[602]

The communities, however, were dissatisfied with the outcome and took the matter to the Court of Appeal. The court upheld the decision on the basis that there was no sufficient connection between the parent company and subsidiary to determine that a duty of care was owed and had been breached by Shell as a result of the oil spills.[603] It was deemed impossible to prove proximity in this matter towards the entire communities afflicted by oil spills, which consequently meant a dismissal of the claim in February 2018.[604] The community decide to appeal the matter to the UK Supreme Court, which found that the Court of Appeal should not have focused merely on the merits which led them to a strict application of the law.[605] The Supreme Court further noted that the lower courts should have interrogated the extent to which there was shared responsibility between the parent and subsidiary and that would have been the basis upon which to determine any potential liability.[606] It therefore found the appeals court was wrong to assume the parent company was not liable for the actions of their subsidiaries merely because there were company policies in existence that required every member of the group to comply with in their operations.[607] The Supreme Court also found that the law of negligence should have applied even in relation to group companies,[608] and both the parent and subsidiary should have been characterised as one entity for the purposes of this assessment.[609]

[601]Paragraph 72 of Okpabi & Others *v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC).
[602]*Paragraph 121 of Okpabi & Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC).
[603]*Paragraph 207 of Okpabi & Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd*[2018] EWCA Civ 191.
[604]*Paragraph 206 of Okpabi & Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd*[2018] EWCA Civ 191.
[605]*Paragraph 107 of Okpabi & Others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2021] UKSC 3.
[606]*Paragraph 146 of Okpabi & Others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2021] UKSC 3.
[607]*Paragraph 143 of Okpabi & Others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2021] UKSC 3.
[608]*Paragraph 149 of Okpabi & Others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2021] UKSC 3.
[609]*Paragraph 151 of Okpabi & Others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2021] UKSC 3.

The Supreme court reached a judgement in February 2021 that there was a sufficient degree of control and between the parent and subsidiary for the parent to owe a duty of care to the local communities afflicted by the operations of the subsidiary.[610] The Supreme Court reversed the earlier decision and thereby gave permission to the communities to present the substantive issues.[611] This is currently ongoing, after 8 years characterised by appeals, delays and financial burden on the parties. While, this case offers some hope for the affected local communities, the chances of not succeeding on technical grounds are high. It also exposes a range of challenges faced by these weak third party groups in accessing justice through domestic and foreign courts. It therefore provides further impetus for the introduction of a new mechanism for the purposes of strengthening and broadening the range of options for accessing justice, even through the international investment law regime, if possible. The next sub-section discusses the challenges faced by third party community groups in accessing justice through international human rights courts, even at regional level.

4.5. Case Study 3: Ogoni communities and Human Rights Courts

The plight of the Ogoni communities did not end with the aforementioned cases, but scores of their cases have been put forward by injured third party groups in pursuit of compensation and remedial action. Since oil exploration in Ogoniland began in the1950s, the communities have faced over 2000 instances of oil spills, leaving devastation in its wake. On this, the Bayelsa Report concluded that the "oil bonanza has brought limited benefits to Bayelsa and has come at a terrible cost to the state and its people."[612] This devastation has been social-economic, destroying the economic wellbeing of local communities as well as their health. This case study highlights an important point, state complicity or unwillingness to prosecute the foreign companies due to having joint operations that result in breach of human rights or environmental devastation. The Nigerian National Petroleum Corporation (NNPC Limited) is the foremost organisation in joint operation with Shell in Ogoniland oil exploration. Unfortunately, the NNPC as well as the Nigerian government bodies have been unable to lobby Shell to clean up the damage, compensate and put measures in place to deter further oil spills. The government has also been accused of participating in human rights violations when they used force to stop peaceful protests in the Ogoniland in

[610] *Okpabi & Others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2021] UKSC 3.
[611] *Paragraph 159 of Okpabi & Others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2021] UKSC 3.
[612] The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, p.9.

response to the continued devastation of the environment without adequate compensation. As a result, cases were filled against the government at international courts for their failure to regulate the activities of the NNPC and their complicity in the human rights violations. The cases were led by two NGOs, the Centre for Economic and Social Rights (CESR) and the Social and Economic Rights Action Centre (SERAC).[613] In 1996, the NGOs brought a case at the African Commission on Human and Peoples' Rights on behalf of the Ogoni community for human rights and environmental violations in Ogoniland.

To give some background and context, throughout the 1990s, protests spread out across Ogoniland in response to continued oil spillage and destruction of the environment as a result of oil exploration by Shell in the region. The protests were marred by police brutality, culminating in allegations of rape and killing of people as well as confiscation and destruction of private property.[614] These protests culminated in the execution of environmental activists, including the famous Ken Saro-Wiwa, in 1995 on account of murder and pillaging during the protests in Ogoniland.[615] While oil exploration stopped in 1994, the spillage continued due to poor maintenance. As a result, the local communities grew tired of the continued disregard for their social-economic well-being and environmental destruction leading to the creation and intervention of NGOs with the goal of championing for the rights of affected third party groups.[616] The goal was not only for remedial action and compensation but also some control over oil expropriation on their land to deter future sabotage and catastrophic oil spills.[617]

The case against the government at the African Commission on Human and Peoples' Rights commenced in March 1996. The NGOs argued that the government was directly responsible for the oil spills as a stakeholder in a joint venture with Shell in the oil exploration in Ogoniland that has ravaged the environment and left scores of people dead due to pollution and destruction of livelihoods. Some of the evidence presented include devastation on the water, thereby destroying marine life, fish and the fishing industry in Ogoniland. It also included farmland

[613]The Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR),Decision at 30th Ordinary Session, 13-27 October 2001.
[614] AFellmeth, "Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts?" Yale Human Rights and Development Law Journal, (2002) 5(1) pp.245-246.
[615]F Aigbogun, "It took five tries to hang Saro-Wiwa" *The Independent* (13 Nov 1995).
[616]Paragraphs 4 of *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Federal Republic of Nigeria* Decision at 30th Ordinary Session, 13-27 October 2001.
[617] Reuters, "Timeline: Shell's operations in Nigeria" (23 Sept 2018).

that has been destroyed through soil pollution as a result of oil soaking into the land thereby destroying agricultural land and the farming market or industry in the region.[618]

The NGOs presented evidence of ill-health as a result of pollution resulting in a rise in cancer related illnesses, rising mortality, birth defects and violation of the right to life as secured under African Charter on Human and Peoples' Rights, particularly articles 4, 18 and 24. These articles safeguard the right to life and private property, as well as family life and protection of environment. There was also evidence that the Government failed to exercise adequate supervision of safety procedures and Shell's compliance with relevant safety and environmental policies, such as a requirement for an health impact assessment in their business operations.[619] There was a requirement for oil companies to carry out an environmental impact assessments on a quarterly basis to ensure that risk is quickly averted and clean up in case of a spillage.

It was also alleged that the deployment of the army during the protests was unmeasured and unnecessary given that they were generally peaceful and only transcended into violence once the soldiers began beating people and destroying private property.[620] On account of the damage and violation of people's rights that occurred, the communities sought compensation.[621] However, the Nigerian government failed to produce a substantive response to the complaint but recognised that there had been an escalation of violence that culminated in destruction and killings, to which the government had taken necessary steps to bring those found guilty to account and was liaising with Shell to ensure that any damage from the oil spills is adequately cleaned up.[622] For instance, the Bayelsa Report finds that once a pollution incident has occurred, the oil companies "are often slow to respond, compounding the damage done. By law, oil companies are meant to report all spills within 24 hours. Yet, to take just one example, Shell met this requirement in only 26 percent of cases during the period 2014-2017…occasionally these delays can be even more extreme…Amnesty International reported a case where it took Agip 430 days to respond to a leak in a flow line in Bayelsa." [emphasis

[618]Communication 155/96. A Fellmeth, "Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts?" Yale Human Rights and Development Law Journal, (2002) 5(1) pp.245-246.
[619]Paragraphs 3 and 4, Communication 155/96, The Social and Economic Rights Action Centre & the Centre for Economic and Social Rights.
[620]Paragraphs 3 and 4, Communication 155/96, The Social and Economic Rights Action Centre & the Centre for Economic and Social Rights.
[621]Paragraph 30, Communication 155/96, The Social and Economic Rights Action Centre & the Centre for Economic and Social Rights.
[622]Paragraph 40, Communication 155/96, The Social and Economic Rights Action Centre & the Centre for Economic and Social Rights.

added][623] Despite the government's failure to provide a substantive response to the allegations brought by the two NGOs on behalf of the affected people, the African Commission proceeded with a deliberation on the merits of the case.

The African Commission first cleared questions about its jurisdiction to hear the matter and added that despite the NGOs failure to exhaust local remedies in Nigeria before approaching the court, they were correctly seized in the matter because of prior evidence of cases where the communities have failed to obtain redress or have their cases heard due to catastrophic delays and government's direct interest in the matter given the NNPC's joint venture with Shell.[624] Thereafter, in October 2001, the African commission reached a judgement that the government had a duty of care towards the communities and had breached this duty as provided under the articles of the African Charter. This was based on a number of factors. First, the government had not compelled or sanctioned Shell for its inability to undertake environmental and health impact assessments,[625] which contributed to the subsequent oil spills that lead to catastrophic environmental devastation and severe impact on the social-economic wellbeing of the Ogoni people.[626] As a result, the government was found to have breached the Ogoni people's right to enjoy their land,[627] resulting in evictions and migrations.[628]

To sum up, the African Commission concluded that "the Government of Nigeria facilitated the destruction of the Ogoniland" resulting in a breach of a range of African Charter Articles including 2, 14 and 21impacting the livelihood of the Ogoni people. The African Commission instructed the government to put in place measures to avert future oil spills, to redress the damage made to the environment, including a cleanup of the soil and water, and compensate the communities for the damage caused.[629] Thus, after 25 years of waiting, a judgement in favour of the communities was reached. However, the African Commission's

[623] Stakeholder Democracy Network (SDN). 2016. Improving Oil Spill Response in Nigeria: Comparative Analysis of the Forms, Data and Related Process in the Joint Investigation Visits (JIV) and Suggestions on How These Could be Improved: Available at https://www.stakeholderdemocracy.org/wp-content/uploads/2016/06/Improving-Oil-Spill-Response-in-Nigeria. pdf. Accessed 15 October 2022

[624]Paragraph 42, Communication 155/96, The Social and Economic Rights Action Centre & the Centre for Economic and Social Rights.

[625]Paragraph 54, Communication 155/96, The Social and Economic Rights Action Centre & the Centre for Economic and Social Rights.

[626]Paragraphs 65, Communication 155/96, The Social and Economic Rights Action Centre & the Centre for Economic and Social Rights.

[627]Paragraph 58, Communication 155/96, The Social and Economic Rights Action Centre & the Centre for Economic and Social Rights.

[628]Paragraph 64, Communication 155/96, The Social and Economic Rights Action Centre & the Centre for Economic and Social Rights.

[629]*Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR),* (Decision at 30th Ordinary Session, 1327 October 2001) p.14.

recommendations on non-binding on the Member States. Unsurprisingly, the Ogoni people have yet to receive compensation and the remedial action has been deemed unsatisfactory.

As a response, in July 2009, an NGO named the Socio-Economic Rights and Accountability Project (SERAP), dissatisfied by government acts and omissions in the Niger Delta, filed a suit at the Economic Community of West African States (ECOWAS) Court of Justice.[630] The case was brought on behalf of all the communities in the Niger Delta region, including Ogoniland, against the government and the National Petroleum organisation, NNPC as well as subsidiaries of Chevron Oil, ExxonMobil, Total energies, Agip and Elf Petroleum, all operational in the region. Thus, the case involved a broad range of defendants accused of environmental and human rights violations.

In their submission, the SERAP argued that the Niger Delta had suffered from decades of devastation to the land, air and water, destroying the social-economic fabrics of the communities, with the fishing and farming sectors almost wiped out. The SERAP also presented evidence to show the degree of impact on peoples' health, which had worsened as a result of access to polluted water and soil, as well as breathable air.[631] The situation was made worse by the failed attempts to clean up the environment properly and inability to enforce available environmental policies and carry out health and environmental impact assessments.[632] These failures were a result of both collective and individual actions and omissions that resulted in a breach of the rights to heath, dignity and private property.[633] The NGOs sought over a billion US dollars as compensation for the human rights violations committed collectively by Nigeria,[634] and the subsidiaries of foreign multinationals plus an order to clean up the environment from decades of oil spills.[635]

In their submission, the government and subsidiaries objected to the accusations levied against them by the Niger Delta communities. Most importantly, they raised jurisdictional challenges over the ECOWAS Court on the grounds that they were private entities rather than

[630]Socio-Economic Rights and Accountability Project *SERAP v Nigeria*, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.
[631]*Paragraph 14 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.*
[632]*Paragraph 15 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.*
[633]*Paragraph 19 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.*
[634]*Paragraph 19h of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.*
[635]*Paragraph 19f of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.*

governmental organisations. Nigeria also raised question over the admissibility of SERAP on jurisdictional grounds because it is also a private entity.[636] On the substantial issues, Nigeria argued that the oil spills were the result of sabotage,[637] and that there was insufficient evidence to prove that they had breached a duty of care towards the people of the Niger Delta.[638] It also that it's the corporations, who had breached a duty of care, that should pay compensation not the government.[639] On the issue of failure to enforce environmental and health standards, the government argued that these were in place and the corporations ought to be blamed for failure to comply.[640] In sum, the government denied culpability, placing the blame on the foreign investors.[641]

Having considered both sides, in October 2020, the court accepted the government's argument that it lacked jurisdiction because the defendants were corporations.[642]As a result, the foreign investors or subsidiaries were removed from the case and only the Nigerian government remained.[643] The court found that the human rights breaches occurred due to a failure of the Nigeria government to enforce relevant policies, particularly in relation to health and environment in the Niger Delta.[644] Nigeria failed to hold the companies to account following enactment of relevant laws.[645] In essence, the government had breached international standards article 24 of the African Charter that requires the State to safeguard the environment and ensure citizens are not harmed by government operations.[646] Due to this failure, the companies undertook their operations with "clear expectation of impunity."[647] As a result, the court

[636]*Paragraph 23 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.*
[637]*Paragraph 75 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.*
[638]Paragraph 87 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.
[639]*Paragraph 82 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.*
[640]*Paragraph 84 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.*
[641]*Paragraph 73 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.*
[642]Paragraph 7 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.
[643]*Paragraph 8 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.Decision* ECW/CCJ/APP/07/10 delivered on 10 October 2010;
[644]*Paragraph 110 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.*
[645]*Paragraph 112 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.*
[646]Paragraph 111 of *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR),* Decision at 30th Ordinary Session, 13-27 October 2001).
[647]*N° ECW/CCJ/JUD/18/12*

instructed the government to clean up the environment and ensure that its environment policies are consistently updated and adhered to by both public and private entities.[648] The court rejected an order for compensation but instructed the government to support the communities and ensure that companies comply with its policies.[649] All the government's objections were rejected by the court in support of SERAP.[650] However, as in previous cases, enforcement remains a major stumbling block almost a decade after the decision.[651]

4.6. Summary

This chapter has interrogated two aspects: 1) the impact of third party activities on local community groups (in sum referred to as third party groups) in Ogoniland and; 2) the quest for justice. It firstly, explored the impact within the EEC and found evidence of air, water and soil pollution documented in literature, environmental reports and court documents. When these matters were taken to national courts, Shell made every available effort to frustrate the parties resulting in catastrophic delays. This is also applied when the parties tried to pursue the matter in foreign courts, with Shell often using the option of appealing every decision without putting in place adequate measures to safeguard the health and wellbeing of the affected third party groups. A similar problem was evidenced in the exploration of the Goi community where, despite clear evidence of breach of human rights and environmental standards, Shell used the court both as a sword and shield, often evoking the option to appeal both national and foreign judgements. This became pronounced in the Ogale and Bille dispute where despite receiving favourable outcomes, enforcement became an issue, with jurisdictional grounds often evoked for the purposes of escaping liability. And in instances where they have been found liable, for example, in the final case study of Niger Delta, again the government failed to enforce the judgement or bring the companies to account for the environmental, health and other human rights violations. These case studies have therefore highlighted the plight of third party groups in terms of accessing justice within available domestic, foreign, regional and international mechanisms. In light of this, the option of either strengthening existing mechanisms or establishing new mechanisms is considered in the chapter 6 and subsequently evaluated in

[648]*Paragraph 120 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.*
[649]Paragraph 121 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.
[650]*Paragraph 120 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.*
[651]K Alter, L Helfer and JMcAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" The American Journal of International Law (2017) 107 p.765.

chapter 7. The next chapter provides a comprehensive analysis of the findings from the case studies to inform the reform direction in chapter 6.

CHAPTER FIVE: Analysis of the findings

5. Introduction

The case study in chapter 4 has shown the devastation on the land, air and water in the Niger Delta as a result of pollution from oil spills from oil production facilities operated largely by foreign companies and their subsidiaries. This pollution has been consistent and extensive dating back to the 1960s and continued until today. the impact has been severe resulting in the destruction of social-economic fabrics of the communities in the region. The case study has shown that the effect has not been on the environment and economic well-being only, it has extended to health, with a growing number of cancer related illnesses, birth defects as well as mortality rates. In addition to the social economic, environmental and health impact, the local communities have faced severe hardship in obtaining compensation and an order for the clean up the environment, marred by delays and jurisdictional challenges. In fact, the Bayelsa Commission recommended concerted international action to generate and invest at least US 12 billion over the course of 12 years to repair, remediate and restore the environmental and public health damage caused by oil and gas and to lay the foundations for Bayelsa's just transition towards renewable energy and opportunities for alternative livelihoods.[652] The judgements have been generally unpredictable, often to the detriment of the local communities. These findings are extensively analysed in this chapter.

This chapter is structured as follows. Subsection 5.1 examines the findings in relation to the impact on the health and environment. This is followed by subsection 5.2 which examines the findings from the efforts to obtain redress from the domestic courts in Nigeria. Equally, subsection 5.3, examines the findings in relation to holding multinational to account in foreign courts, especially the dilemma between parent and subsidiary companies. Lastly, 5.4 explains the findings in relation to obtaining redress from international and regional courts. This chapter analyses and puts the findings from the case study in the context of my research question with the aim of finding a solution to the redress hurdles facing third party groups affected by the operations of foreign investors.

5.1. The impact on the environment, health and the social-economic wellbeing in the Niger Delta

As explained in Chapter 4, the Ogoniland is situated within the greater Niger Delta. Almost all Nigeria's onshore oil output comes from the Niger Delta. The region "is a 40,000 km2

[652] The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, Chapter 2.

labyrinth of wetlands, mangroves, marshland, swamp forests, creeks and farmlands, dotted with over 5,000 oil wells and crisscrossed by over 21,000 km of oil pipelines".[653] Based on the case study, the local communities within the Ogoniland and neighbouring towns, since the 1950s, experienced environmental degradation without the corresponding economic benefit from the oil production activities in their communities. Shell has been at the forefront of the catastrophic oil production, alongside other multinational organisations operating subsidiaries in the region. Due to this impact, the local communities were pursued the matter, through a series of cases, in national, regional and international courts in a bid to find redress. Part of the challenge is the lack of adequate enforcement of national laws, particularly environmental and human rights against multinational corporations for violation of the rights enshrined under the relevant national laws.

Despite its inadequacy, Nigeria has enacted a number of laws, including the Oil Pipelines Act, Laws of the Federation of Nigeria 2004, with the goal of strengthening and observing their obligations towards citizen. The Oil Pipelines Act makes "provision for licences to be granted for the establishment and maintenance of pipelines incidental and supplementary to oilfields and oil mining and for purposes ancillary to such pipelines." These laws have been in place since the mid 1950s but without recognition and adequate protection of third party groups, particularly affected local communities.[654] Other relevant laws include Environmental Guidelines and Standards for the Petroleum Industry,; Oil Navigation Act, Laws of the Federation of Nigeria 1968; the Associated Gas Re-injection Act, Laws of the Federation of Nigeria 2004; the Petroleum (Drilling and Production) (Amendment) Regulations, Laws of the Federation of Nigeria 2019; the Petroleum Refining Regulations, Laws of the Federation of Nigeria 1974. These laws were enacted for the purposes of realising the nation's oil potential by permitting oil companies to invest in the sector through an enabling legal framework. However, the biggest concern was the absence of sufficient safeguard for third party groups private property violated as result of oil production.

In response, since the 2000s, Nigeria has enacted a number of laws for the purposes of protecting environmental, private property, health and other social-economic benefits. Laws that recognise these rights and interests include the National Oil Spill Detection and Response Agency (Establishment) Act, Laws of the Federation of Nigeria 2006; the National

[653] The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, Chapter 2.
[654] *Bodo Community& Others v Shell Petroleum Development Company of Nigeria Limited* [2014] EWHC 1973 (TCC) Paragraphs 2-3.

Environmental Standards and Regulations Enforcement Agency (Establishment) Act, Laws of the Federation of Nigeria 2007; and the Environmental Impact Assessment Act, Laws of the Federation of Nigeria 2004. To improve enforcement, the "National Environmental Standards and Regulations Enforcement Agency" (NESREA) and the "National Oil Spills Detection and Response Agency" (NOSDRA). However, despite the creation of several agencies for the purposes of leveraging the rights of investors and the local communities, enforcement remains the biggest hurdle. This is generally due to a lack of a strong and independent judicial system that would allow the agencies to bring legal action against these corporations for inability to pay fines. The enforcement challenges are summed up by the fact these rights are not justiciable in Nigeria and where fines are imposed, for example under section 6 of the National Oil Spill Detection and Response Agency Act, they are too small to provide a meaningful deterrence. The section imposes roughly 600 GB Pound Sterling for failure to report oil spills and to clean it up adequately and within reasonable time.

The Nigerian Petroleum Industry Act 2021 is worth further analysis as it places obligations on oil companies to exercise due diligence and abide by CSR activities. The legislation contains five chapters, with chapter three dedicated to host communities. According to section 234, the Act aims to "foster sustainable prosperity; provide direct social and economic benefits for petroleum operations to host communities; enhance peaceful and harmonious coexistence between licensees and host communities; and create a framework to support development of host communities." In order to achieve this, section 235 requires the company is expected to incorporate a host community development trust to benefit the communities in the area of operation. The objective of the host community development trust include section (239)(f), to "support local initiative within the host communities, which seek to enhance protection of the environment." The legislation shows a shift from voluntary to statutory for oil and gas companies in Nigeria. However, some scholars have raised concern over the implementation and enforcement of this legislation.[655] This is because the Commission established for monitoring the activities of the communities and compliance with the legislation has been highly politicised. This has led to delays and impracticalities in administration. However, on the issue of third party access to justice, the commission is tasked with settling up a grievance handing mechanism to

[655] Agbarakwe Ugochukwu H & Bredino Samson M (2024). Nigerian Petroleum Industry Act 2021 & Host Communities Development: Issues & Challenges. Saudi J. Humanities Soc Sci, 9(2): 38-44.

handle cases between the parties before they escalate to the courts. It should be emphasised that this applies only to oil and gas companies, thereby leaving providing only a partial solution to the problem.

Equally, Non-Government Organisation (NGOs) can bring action for breach of rights enshrined. The Nigerian Supreme Court in the Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation (COPW) liberalised locus standi of NGOs in environmental matters in Nigeria.[656] For years, environmental cases in Nigeria have failed to proceed for lack of locus standi by the claimant. The Supreme court in COPW affirmed the position of the appeal court that NGOs have standing to institute environmental claims. In making the judgement, the court observed that such public interest litigation is an essential fabric of a modern legal system and would improve access to justice for the affected parties, often the poor and marginalised communities.[657] It was also viewed as mechanism for liberating and protecting marginalised third party groups. While the decision has strengthened third party protection, there remains scepticism in some quarters. In particular, some scholars argue that while the Supreme Court decision is binding on lower courts, overtime they may start to distinguish the facts of COPW from future cases thereby limiting its application.[658] There is also the risk of National Assembly passing a legislation that overrules this judicial precedent. Alternatively, it could be strengthened by passing a legislation to this effect.[659]

Another impediment to enforcement is corruption and inadequate funding which results in systematic failures in monitoring and assessing the activities of corporations in the field.[660] However, despite this, the Nigerian government has been slow to

[656] Miriam C. Anozie, and Emmanuel O. Wingate. "NGO standing in petroleum pollution litigation in Nigeria—Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation." The Journal of World Energy Law & Business 13, no. 5-6 (2020).

[657] Eghosa Ekhator, 'Sustainable Development and the African Union Legal Order' in Olufemi Amao, Michele Olivier and Konstantinos Magliveras (eds) The Emergent African Union Law: Conceptualization, Delimitation, and Application (Oxford
University Press 2021) pages 335 – 358

[658] Anozie, M. C., & Wingate, E. O. (2020). NGO standing in petroleum pollution litigation in Nigeria—Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation. The Journal of World Energy Law & Business, 13(5-6), 490-497

[659] N Izoukumor, "A Critical Assessment of the Pollution Prevention Laws and Regulations of Nigeria: Why they failed to Protect the Environment of Nigeria" (Journal of Law, Policy and Globalisation (2019), 87, p.47.

[660] U Orji, "An Appraisal of the Legal Frameworks for the Control of Environmental Pollution in Nigeria" Commonwealth Law Bulletin (2012) 38 (2), p 343.

respond and impose fines on the oil companies owing to a number of factors including over reliance on them for the country's economy including employment, technological spillovers, taxation, leading to reluctance to take a strong stance in regulating their activities. As shown in Chapter 4, a change of government, whether military or civilian rule, has not changed the approach to regulating the activities of multinational corporations. Government complicity was evident particularly in the execution of Ken Saro Wiwa, as a result of continued protests throughout the 1990s, by the peoples of the Ogoniland due to the oil spills in their land. These oil spills devastated the social-economic fabrics of the communities, resulting in mass migration due to environmental devastation as well as health challenges resulting from water, air and soil pollution.

The execution of environmental activists was majorly blamed on government vested interests in the oil sector and the need to safeguard their commercial interests. This is due to the fact Nigerian investment laws require any foreign investment in the sector to be jointly entered into with the government agencies or corporations. As a result, the Nigerian National Petroleum Corporation (NNPC) was created to grant licences, and all Shell and other foreign investor's operations are undertaken in joint venture. In fact, the NNPC has over 50 percent share in these consortiums, meaning they are equally culpable in the ongoing environmental devastation and human rights violations in Ogoniland. Since 1977, the company has been managing Nigeria's oil and gas resources via a joint venture with the Nigerian government. This is significant because over 80 percent of the country's revenue comes from oil and gas. The NNPC has been turned into a limited liability company by the Petroleum Industry Act 2021.[661] The commercialisation of the NNPC has meant that the federal government would be entitled merely to a return on shares, thereby reducing its dependence on the company and forcing it to diversity its sources of revenue.[662]

Government vested interest in the oil sector has also been blamed for the challenges faced by affected third party groups in bringing successful claims against Shell and

[661] Bredino, S., Fiderikumo, P., & Dikeogu, C. (2022).The Nigerian Petroleum Industry Act 2021 & Rural Community Development in Niger Delta, Nigeria. Scholarly Journal of Scocial Sciences Research, 1(3).

[662] Bredino, S. M., Fiderikumo, P., & Adedoyin, A. (2022). Corporate Social Responsibility & Poverty Reduction In Bayelsa State, Nigeria: A study of Shell Petroleum Development Company CSR Strategy. International Journal of Humanities and Social Science, 9(4), 17-23.

other oil companies in national courts. For example, in *Allar Irou,* the court rejected the injunction application by the local communities to demand that Shell stops oil production and cleans up the environment due to an ongoing oil spill and the continued devastation of the environment. However, the court rejected the application on the basis that it would result in the company stopping oil production which it deemed to be the lifeblood of the country.[663] This has had the effect of deterring future cases against Shell due to government unwillingness or vested interest in the sector.[664]

This problem was also recognised by the regional court in SERAP case against the Nigerian government. The court stated that it could not find sufficient evidence that the government had put in place measures to support these groups in accessing justice within national foras. Rather, the court found a persistent and diligent effort by the government to hinder local community efforts to bring to account multinational corporations for environmental and human rights violations in the region, despite the enactment of relevant laws and creation of related agencies.[665] This is compounded by the fact that over two decades after the SERAP judgment, the recommendations to the Nigerian government have not been actioned therefore the multinational corporation continue operating unabated.

Similarly, the recommendations by the United Nations Environmental Programme in 2011 have not been actioned with only 10 percent of the contaminated environment. This is contrary to Chapter 2, Constitution of the Federal Republic of Nigeria, which states that: "17. (1) The State social order is founded on ideals of Freedom, Equality and Justice. (2) In furtherance of the social order- (a) every citizen shall have equality of rights, obligations and opportunities before the law; (b) the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced; (c) governmental actions shall be humane; (d) exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented; and (e) the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained."The constitution safeguards the environment and the right of the Nigerian people to have equal access to justice. Thus, Nigeria has failed to observe constitutional rights as well as international law state

[663] *Allar Irou v. Shell-BP Development Company Nigeria Ltd* (No W/89/71) 26 Nov 1973.
[664] Centre for Environment, Human Rights and Development, "After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria" (CEHRD, 2015) p.8.
[665]Paragraph 110 of Socio-Economic Rights and Accountability Project SERAP v Nigeria, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.

responsibilities towards their nationals against violations of natural rights such as the right to health, private property and life by multinational corporations.

These State responsibilities are contained in Article 3 of the Universal Declaration on Human Rights: "everyone has the right to life, liberty and the security of person" and article 2 of the African Charter on Human and Peoples' Rights: "every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." Similarly, Article 2(3) of the International Covenant on Civil and Political Rights: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy." Thus, States have an international law responsibility to ensure they protect their citizens from state organisations and private actor's conduct that could lead to a violation of these fundamental human rights within their jurisdiction.

The State must also ensure that systems are put in place to support the justiciability and enforcement of these rights within their jurisdiction,[666] which requires powers or agencies with investigative powers and the power to penalise any breach of associated human rights.[667] The failure to observe these rights was recognised in the SERAC case,[668] and the court went as far as saying the Nigerian government wilfully permitted the continued devastation of Ogoniland through their failure to support judicial action against the oil multinationals or to enforce relevant environmental laws in order to safeguard the interests of affected citizens, and in this case, the local communities afflicted by the operations of Shell and other oil companies.[669] In fact, the UN Guiding Principles on Business and Human Rights 2011, provide under Principle 1, that "States protect against human rights abuse within their territory". This requires taking "

[666]*Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988)* paragraph 165.
[667] T Weiler, "Balancing Human Rights & Investor Protection: A New Approach for a Different Legal Order" Boston College International and Comparative Law Review (2004) 27(2) p.441.
[668]The *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR),* Decision at 30th Ordinary Session, 13-27 October 2001).
[669]Paragraph 58 of Communication No. 155/96.

steps to punish, prevent, investigate and redress such abuse through effective policies, legislation, regulations and adjudication." Thus, failure to protect the Ogoniland is tantamount to a breach of established principles of international law.[670] As a recommendation, Nigeria and other States, should put in place measures to investigate, prevent and make an effort to redress the challenges faced by citizens through legislative, regulatory reform and other relevant policies. To sum up, the Ogoniland and surrounding areas have been devastated by recurring oil spills and despite attempts to obtain redress, the oil spills continue to the detriment of local communities and other third party groups. This is finding number one.

5.2. Frustration, appeals and access to justice

As evidenced in the Chapter 4, the local communities in Ogoniland have made several attempts at finding adequate redress in the Nigerian, regional and international courts but these attempts have been frustrated by appeals and delays, further impeding justice. Article 6(1)(2) of the Nigerian constitution states that, "The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation…the judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State."[671] It means that judiciary is empowered to ensure all citizens have equal right of access for breach of their human rights.[672] This right is also contained in Article 1 of the African Charter on Human and Peoples' Rights, which states that "every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community…the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." Similarly, Article 2(3)(b) of the International Covenant on Civil and Political Rights, which states that: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of Judicial remedy."

[670]Principle 1 of the UN Guiding Principles.
[671]See Section 6(1) of the Constitution of the Federal Republic of Nigeria of 1999 (Amended).
[672]See Section 6(6)(b) of the Constitution of the Federal Republic of Nigeria of 1999 (Amended).

Thus, both national and international law provide a right access to justice for all citizens within their territory, particularly the High Court.[673] In Nigeria, this right is enshrined in Order 2 of the Nigerian Fundamental Human Rights Enforcement Rules 2009, which states that: "Any person who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and to which he is entitled, has been, is being, or is likely to be infringed, may apply to the Court in the State where the infringement occurs or is likely to occur, for redress." However, despite Nigeria ratifying and domesticating a number of international laws, access to justice, as evidenced under Chapter 4 of this thesis, is severely hampered by a number of procedural and structural issues, mainly delays.[674]

As evidenced in Chapter 4, the Goi community was one of those afflicted heavily by environmental devastation and their efforts to obtain justice in the High Court were marred by catastrophic delays as a result of appeals by Shell to every application submitted by the community. As illustrated throughout Chapter 4, the cases against Shell went on for decades and some are not even concluded to this day, referred to the Court of Appeal on numerous occasions. It meant that at national level, the Rivers State and Federal High Courts, as well as the Court of Appeal, have heard cases involving Shell and the Ogoniland communities since the disputes began in the 1970s and despite many years of litigation, the communities are yet to obtain an adequate remedy. In some cases, such as that involving the Ejama Ebubu Community (EEC), have lasted over 30 years moving through the various levels of the Nigerian courts.[675]

For example, the Federal High Court took 8 years to begin prosecution and within the intervening period, judges were challenged and removed, leading to the adjournment of the case filled by Shell. The scale of the problem with delays and access to justice by third party groups is exemplified by the case where even after the High Court made a judgement, Shell appealed and too the Matter to the Supreme Court,[676] and even that judgement was not accepted by Shell leading to a case being filled against the Federal Republic of Nigeria at the

[673]EBrems and C Adekoya, "Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria" Journal of African Law (2010) 54(2) p.257.
[674]E Brems and C Adekoya, "Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria" Journal of African Law (2010) 54(2) p.257.
[675]E Brems and C Adekoya, "Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria" Journal of African Law (2010) 54(2) p.257.
[676]Chief Isaac Osaro Agbara & Others v The Shell Petroleum Development Company of Nigeria Limited [2019] EWHC 3340 (QB) paragraph 11.

International Centre for the Settlement of Investment Disputes (ICSID).These delay tactics were observed by the Federal High Court of Nigeria leading to their decision to deny continued adjournment of the case due to Shell on trivial grounds such as absence of legal counsel, when Shell was actually represented by a large law firm with hundreds of lawyers. Thus, to the judge, Shell was merely using the procedural system as a sword rather than a shield to advance their interests while simultaneously denying the third party groups redress for the social-economic and environmental violations taking place in their land. Thus, for over three decades, the EEC and other affected communities have suffered from the consequences of the oil spills that started in the 1960s, which has not been cleaned up, and from the social-economic impact which is exacerbated by the lack of compensation, despite years of litigation.[677]

The challenges were not only for the EEC, but as evidenced in Chapter 4, Mr Dooh faced several delays from the Rivers State High Court to the Federal High Court in a bid for justice as a result of environmental damage from recurring oil spills. Unfortunately, Mr Dooh died, as a result of exposure to contaminated water, air and soil.[678] His death came almost 15 years after the commencement of the legal proceedings, without a final judgement or redress for the harmful environmental devastation.[679] The case proceeded, under a cloud of frustration and animosity, owing to a series of appeals initiated throughout the prosecution phase, dating back over a decade.[680] But despite concerns over these delay tactics, the court proceeded to permit adjournments following a series of motions tabled by Shell, thereby turning years into decades of delays.[681] These adjournments and continued appeals were not limited only to national judicial systems, there were also sought in foreign courts.[682] However, this had a broader impact on the local communities who had limited financial budgets, further impeding access to justice, alongside other factors including jurisdictional challenges and transparency concerns, further delaying causing delays.[683] This is a systematic issue in Nigeria and across

[677]Chief Isaac Osaro Agbara & Others v The Shell Petroleum Development Company of Nigeria Limited [2019] EWHC 3340 (QB) paragraph 10.
[678]Centre for Environment, Human Rights and Development, "After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria" (CEHRD, 2015) p.24.
[679]Centre for Environment, Human Rights and Development, "After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria" (CEHRD, 2015) p.24.
[680]*Barizaa Dooh v The Shell Petroleum Development Company of Nigeria Ltd*. FHC/PH/159/97 of 30th March 1998.
[681]Centre for Environment, Human Rights and Development, "After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria" (CEHRD, 2015) p.9.
[682]Centre for Environment, Human Rights and Development, "After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria" (CEHRD, 2015) p.9.
[683]Centre for Environment, Human Rights and Development, "After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria" (CEHRD, 2015) p.22.

many developing countries, affecting not only tortious claims, but commercial, criminal and other types of cases.[684]

However, despite academic studies and court judgements pointing out the challenges facing the Nigerian judicial system and the need for reform, the systematic reform has yet to be realised. The recent case of IPCO Limited brought against the NNPC clearly evidence this, without continued delays, leading to arbitral proceeding being sought.[685] The arbitral award was made in 2004 but when enforcement against the government was sought, it was not realised. This prompted IPCO to bring an enforcement claim in the UK against the NNPC in December 2004. However, the NNPC proceeded to the Federal High Court for the arbitral award to be dismissed on grounds of jurisdiction. There was also an application for the UK should stay pending the proceedings in the High Court. However, and unsurprisingly, the applications are still pending in the Nigerian system owing to delays, meaning that two decades after the court proceedings commended, the IPCO is yet to obtain relief despite applications in the UK courts.[686] It means the third-party groups continue to face environmental degradation without adequate legal recourse or remedy. As evidenced, in Chapter 4, the impact on local communities has been widespread and access to justice remains a major challenge for affected third party groups.

5.3. The issue of Jurisdiction

One of the core findings from Chapter 4 is in relation to procedural limitations in foreign courts, which often hinder third party claims against foreign investors, in light of the judicial weaknesses in their own national courts. Thus, the case study finds that third party groups often resort to courts, outside of their own jurisdiction, in the hope of finding justice. In the case of the local communities in Nigeria, the oil pollution, as a result of multinational oil exploration in the region, has forced the local communities to abandon their domestic legal system in pursuit of justice in the foreign courts, particularly the home State of the foreign investor. This was evident from the case involving Mr Dooh and other communities within the Niger Delta. The challenge arises from the fact Nigerian courts would, for all rights and purposes, be deemed the rightful forums for hearing the disputes, given that the alleged violations had taken place within their territorial jurisdiction. However, Mr Dooh and other NGOs opted for foreign

[684] DMann, "Curbing Delays In The Administration of Justice: Case Management in the Magistrate Courts" https://nji.gov.ng/images/Workshop_Papers/2017/Orientation_Newly_Appointed_Magistrates/s2.pdf accessed 19 May 2023.
[685] IPCO Limited v Nigerian National Petroleum Corporation, [2017] UKSC 16
[686] E Onyema, "IPCO v NNPC Saga and Liability of Nigerian Legal System", The Guardian 22 Dec 2015.

proceedings, in the Netherlands and the UK for a number of reasons. One of the fundamental reasons is the absence of neutral forum, following years of court petitions an adjournments within national courts, leading to the third party groups to allege lack of neutrality given the government's economic interests in the concerned case as well as Shell's influence, both economic and political, in the country. Outside neutrality, the cases too years for the court to make a judgement; for example, Mr Dooh's case took over 15 years for the Rivers State High Court to issue a judgement. This prompted Mr Dooh to approach the Netherlands, where Royal Dutch Shell had their main head office. However, the Dutch courts were not automatically seized in the matter given that the applicants had to first prove that the courts had jurisdiction to hear a matter involving parties from Nigeria. To support their jurisdictional case, the parties made reference to Brussels Regulations Article 2(1), which states that: "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State." Similarly, Article 60(1) which provides that, "for the purposes of the Brussels I Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: statutory seat, or; central administration, or; principal place of business." Thus, since Shell had their headquarters in the Netherlands, their registered seat of business, it meant that the courts had jurisdiction to entertain a foreign dispute relating to their actions or omissions in another State.

The local communities were also required to show connection between the parent and the subsidiary in Nigeria to enable the court to enjoin both companies or treat them as one entity in the case. This is supported by the Dutch Civil Procedure Article 7(1) of the which provides that "If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency." These issues were considered at the preliminary stage of the case and the parties succeeded thereby enabling the case to proceed to the merits. Even in foreign courts, the delays were evident. The district court trial took 4 years and 9 years at the Court of Appeal, which reversed the district court's decision and finding Shell liable for the oil spills that occurred between 2004-2005. Thus, almost 14 years after the

commencement of the foreign case, the local communities received a favourable judgement. These delays were caused by continued appeals and jurisdictional matters, and if the case never succeeded, it would have left sour taste in the mouth of the local communities. Failure in the foreign court would have meant a new case in a domestic and another court with further delays, sometimes lasting decades with jurisdictional challenges and trial delays. Thus, it is evident that the local communities in the Niger Delta have reached out to foreign courts in pursuit of justice owing to the fact national courts were had failed to provide meaningful redress.

Even for the Ogale verses Shell dispute which proceeded to the English courts 2015, the issue of jurisdiction caused delays and required substantive evidence. The UK Practice Direction 6B, provides under 3.1 service out of the jurisdiction where permission is required: "The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –General Grounds (1) A claim is made for a remedy against a person domiciled within the jurisdiction within the meaning of sections 41 and 42 of the Civil Jurisdiction and Judgments Act 1982. (1A) A claim is made against a person in respect of a dispute arising out of the operations of a branch, agency or other establishment of that person within the jurisdiction, but only if proceedings cannot be served on the branch, agency or establishment. (2) A claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction."[687] Thus, a claim can be initiated provided there is proximity and clear link between the subsidiary and the parent within English jurisdiction. This requires clear evidence that there was a duty of care owed to the local communities as stated in the Caparo case, involving proximity, reasonableness and foreseeability as core standards that must be determined before the case can progress. However, attempts at proving these elements did not succeed at both the Court of Appeal and High Court. The claimant could not evidence sufficient connection between the parent and subsidiary to prove that a duty of care was owed. This required evidence that Shell's operations in Nigeria were connected and controlled by the UK parent and thereby the oil spills can be attributed partly to the direction given by the parent company. The decision was upheld by the Court of Appeal due to Ogale's failure to provide sufficient proximity between the parent and subsidiary.

This decision was overturned by the Supreme Court, further demonstrating the general lack of predictability in these cases. This was also seen in *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited case*,[688] where a case was brought against the Parent Unilever PLC in the

[687]UK Practice Direction 6B
[688] [2018] EWCA Civ 1532

UK for the failure to institute proper crisis management systems that led to harm to employees during the 2007 presidential elections riots. Again, the court failed to find reasonableness and sufficient foreseeability for there to be a duty of care owed by the parent to the subsidiary in Kenya. However, the court found proximity in the manner in which the subsidiary's operations were being directed. However, this was overturned by the Court of Appeal and again, demonstrating the lack of predictability in these cases. The court found that the parent company did not owe a duty of care to the subsidiary's employees and therefore not responsible for the subsidiary's actions or omissions.

Thus, the English court decision in favour of the local communities is one of the few and rare success stories, marking a positive development in a fight against environmental and human rights abuse committed by multinational corporations abroad. However, these cases have shown there is a general lack of certainty over jurisdictional claims in relation to international tort claims. This is evidenced from the number of appeals to the court of appeal and the Supreme Court in the aforementioned cases. These findings have highlighted some of the challenges facing third party groups in relation to accessing justice. It means if the polluting companies did not have parent companies in the Netherlands or the UK, or failed to establish a close connection between the parent and subsidiary companies, then the trial would not proceed and the third-party groups would not have a remedy. These challenges provide further justification for the introduction of a mechanism at international level for the purposes of supporting third party access to justice. This is explored in Chapters 6 and 7 where the available mechanisms under international investment law are interrogated.

5.4. International Courts

In addition to foreign courts, the case studies have shown that international courts provide another meaningful avenue for pursuing cases of human rights and environmental violations. Within the African context, two courts have been examined. Firstly, the African Commission on Human and Peoples' Rights established under the African Charter. Another continental body, established under the African Charter, is the African Court on Human and Peoples' Rights charged with interpreting the African Charter and protecting human rights in Africa. There are also human rights courts at sub- regional level, including the ECOWAS Court of Justice. This court is an organisation of the Economic Community of West African States, a regional economic community of 15 Member States in West Africa. Others include the East African Court of Justice, a treaty-based judicial organisation of the East African Community. It means relevant parties can access both the continental and regional courts in search of redress

for human rights violations. As evidenced in Chapter 4, local communities in the Niger Delta have approached both the African Commission and ECOWAS Court of Justice for redress in relation to human rights and environmental devastation in the region.

These cases were brought against the government of the Federal Republic of Nigeria due to their inactivity in the face of oil spills in the region by Shell and other corporations in the Niger Delta. It should be emphasised from the outset that the recommendations made by these bodies have not yielded any meaningful changes to Nigeria's approach to holding Shell and other oil companies accountable for the violations. However, these bodies also suffer from the same procedural problems. Both the *SERAC and SERAP* cases took a combined 30 years to reach a decision. Even after many years of legal dispute, the Ogoni community has yet to see any meaningful developments in terms of oil being sufficiently cleaned up or compensated for the damage done to the environment. Perhaps the biggest limitation of the ECOWAS Court of Justice and African Commission is the absence of jurisdiction for private parties. This means the African Commission only hears disputes filled by Member State to the African Charter against another Member, as provided under Article 47.[689]

Similarly, as per Article 55, the court only entertains cases filled by NGOs and individuals against Member States, meaning that private/corporate bodies are excluded.[690]Article 56 states that: "Communications relating to human and peoples' rights referred to in 55 received by the Commission, shall be considered if they: … 5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged, 6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and 7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter."Thus, the African commission's exclusion includes cases filed against individuals, corporate and private bodies. This is why the SERAC case was against the Nigerian government rather than Shell or other oil companies responsible for polluting the Niger Delta. As a result, the African commission could not render a decision on Shell's responsibility or complicity in the human rights violations in the region because its jurisdictional limitation.

[689]Articles 46 to 50 of the African Charter and the Communications Procedure of the African Commission on Human and Peoples' Rights, found at https://www.achpr.org/procedure accessed 04February 2023.
[690]Article 56 of the African Charter and the Communications Procedure of the African Commission on Human and Peoples' Rights, found at https://www.achpr.org/procedure accessed 04 February 2023.

The same limitation of jurisdictional exclusion for private actors faces the ECOWAS Court of Justice. Pursuant to Articles 2, 9 and 30 ECOWAS Supplemental Protocol, which states that "the CCJ has jurisdiction to hear human rights cases and expands the admissibility rules to include disputes between individuals and their own member states."[691]It means the ECOWAS Court of Justice has jurisdiction to hear cases against Partner States and governmental institutions.[692] This exemplified by the decision in SERAP where the court reached a decision that it lacked jurisdiction over the private parties joined onto dispute, including Shell, Agip, Chevron Oil, Total and ExxonMobil Corporation. These defendants were dismissed on the basis that the court lacked the jurisdictional power to hear the dispute as provided under the ECOWAS Charter.[693] This was upheld in other decisions including *Peter David.*[694] It means affected third party groups cannot rely on regional mechanisms to brings claims directly against foreign multinationals for environmental and human rights violations.[695]

Essentially, third party groups must rely on the government to implement the judgement of the regional courts. The third-party groups are therefore unable to enforce claims against corporate entities that have contributed to the human rights violations simply because the judgement is against the State rather that the companies as evidenced in SERAC and SERAP. In cases where the African Commission finds the state liable and makes remedial recommendations to be carried out for the benefit of the claimant, such recommendations are generally not legally binding because of the quasi judicial nature of the Commission.[696] These recommendations are contained in the African Commission's annual report which is sent to the African Union Assembly of Heads of State and Government.[697] This is the process in which, following adoption, the recommendation become binding on the relevant Member States.[698]

[691]Preamble of the Supplementary Protocol A/Sp.1/01/05; Protocol A/P.1/7/91 on the ECOWAS Community Court of Justice.
[692]Paragraph 71 of the *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria*, Suit No: ECW/CCJ/APP/08/09 and No: ECW/CCJ/APP/07/10 (Preliminary Ruling).
[693]*Paragraph 73 of the Socio-Economic Rights and Accountability Project (SERAP) v Nigeria, Suit No: ECW/CCJ/APP/08/09 and No: ECW/CCJ/APP/07/10 (Preliminary Ruling).*
[694]*Peter David v Ambassador Ralph Uwechue*, ECW/CCJ/RUL/03/10.
[695]*Paragraph 72 of the Socio-Economic Rights and Accountability Project (SERAP) v Nigeria, Suit No: ECW/CCJ/APP/08/09 and No: ECW/CCJ/APP/07/10 (Preliminary Ruling).*
[696]Article 56 of the African Charter and the Communications Procedure of the African Commission on Human and Peoples' Rights, found at https://www.achpr.org/procedure accessed 04 February 2023.
[697]Article 54 of the African Charter and the Communications Procedure of the African Commission on Human and Peoples' Rights, found at https://www.achpr.org/procedure accessed 04 February 2023.
[698]F Viljoen and L Louw, "The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation" Journal of African Law (2004) 48, p.17; Article 56 of the African Charter and the Communications Procedure of the African Commission on Human and Peoples' Rights, found at https://www.achpr.org/procedure accessed 04 February 2023.

Despite this process, implementation and enforcement of these recommendation remains a fundamental problem, as evidenced in the Chapter 4 owing to the absence of a supervisory body for the purposes overseeing the enforcement process.[699] The African Commission normally communicates reminders to the relevant governments to adhere to the relevant recommendations.[700] However, this is done following the adoption process by the Assembly, leaving the decision in the hands of the government.[701] There is no procedure for compelling implementation or sanctions for failure to comply in a timely manner.[702] These limitations have derailed access to justice that even though they obtain a positive recommendation, it does not necessarily mean the recommendation would be carried through.[703]A 2007 published study found that 44 percent of African commission's recommendations within a 10 year period, 1994-2004, were not enforced or implemented by the Member States.[704]

The ECOWAS Court of Justice has a mandate to make decisions that are binding on the parties.[705] However, it does not have capacity to enforce those decisions.[706] It leaves the implementation on the goodwill of the Member States and occasional political pressure from the ECOWAS, as a regional body.[707] Thus, the responsibility to enforce and execute the court's judgement lies with the Member States. However, it should be emphasised that more than 100 decisions of the court, over 70 percent, are not implemented.[708] The jurisdiction of the ECOWAS Court derives from the ECOWAS treaties to which Nigeria is a signatory. In essence, Article 15(4) of the ECOWAS

[699]Article 56 of the African Charter and the Communications Procedure of the African Commission on Human and Peoples' Rights, found at https://www.achpr.org/procedure accessed 04 February 2023.
[700]Article 56 of the African Charter and the Communications Procedure of the African Commission on Human and Peoples' Rights, found at https://www.achpr.org/procedure accessed 04 February 2023.
[701]Article 56 of the African Charter and the Communications Procedure of the African Commission on Human and Peoples' Rights, found at https://www.achpr.org/procedure accessed 04 February 2023.
[702] M Linde and LLouw, "Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC Communication" African Human Rights Law Journal (2003) 3, p180.
[703]Article 56 of the African Charter and the Communications Procedure of the African Commission on Human and Peoples' Rights, found at https://www.achpr.org/procedure accessed 04 February 2023.
[704]F Viljoen and L Louw, "The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation" Journal of African Law (2004) 48, p.17; Article 56 of the African Charter and the Communications Procedure of the African Commission on Human and Peoples' Rights, found at https://www.achpr.org/procedure accessed 04 February 2023.
[705] Article 20(2) of the Revised Treaty of the Economic Community of West African States, July 24, 1993, art 15(4); ECOWAS Court Protocol.
[706]S Ebobrah, "Litigating Human Rights Before Sub-regional Courts in Africa" African Journal of International and Comparative Law (2009) 17, p.96.
[707]S Ebobrah, "Litigating Human Rights Before Sub-regional Courts in Africa" African Journal of International and Comparative Law (2009) 17, p.96.
[708] First regular session of the 5th Economic Community of West African States Parliament in Abuja, the President of the Court, Edward Asante.

revised Treaty provides that Nigeria has a duty to enforce all the judgements of the ECOWAS court.[709] Further safeguard is provided by Article 27 of the Vienna Convention on the Law of Treaties, which requires State Parties not to enact laws for the purposes of avoiding its obligations under the treaty.[710] This partly explains why the SERAP judgement of 2012 is yet to be enforced over a decade later. It means the oil spills have not been cleaned up and the environmental degradation with redress.[711] The enforcement challenges have led scholars such as Eghosa Ekhator to argue for the introduction of sub-regional courts in Africa with a clear mandate on hearing environmental cases and a clear enforcement charter.[712] The compliance challenges faced by the ECOWAS Court of Justice are similar to those faced by other regional human rights courts across the continent. This is supported by a 2017 published study which found that 41 of 113 South African Development Community Tribunal, East African Court of Justice, ECOWAS Court of Justice, African Commission and African Court on Human and People's Rights between 1988-2015 were not implemented.[713]

The African court also faces a number of jurisdictional and compliance challenges and it is the reason why the Niger Delta oil pollution cases have not been brought before the court. Articles 5(3) and 34 of the Protocol establishing the African Charter on Human and Peoples' Rights permits Member States to sign a declaration allowing private actors, including NGOs, within their territorial jurisdiction to file claims to the African Court.[714] Some academic commentators argue that continued restriction of private actors is geared towards limiting claims against States for human rights related violations.[715] It means States that have not signed the declaration would be denying access to private actors, thereby restricting their options for remedy or access to

[709] O. C. Okafor, U. Owie, O. Effoduh and R. Zarma, 'On the Modest Impact of West Africa's International Human Rights Court on the Executive Branch of Government in Nigeria' (2022) 35 Harvard Human Rights Journal 169–232

[710] Amos Enabulele, 'Reflections on the ECOWAS Community Court Protocol and the Constitutions of Member States' (2010) 12 (1) INT'L COMM L REV 111.

[711] *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria*, ECOWAS Community Court, N° ECW/CCJ/JUD/18/12.

[712] Eghosa Ekhator, 'International Environmental Governance: A Case for Sub-regional Judiciaries in Africa' in Michael Addaney and Ademola Jegede (eds) Human Rights and the Environment under African Union Law (Palgrave Macmillan 2020) pages 209- 231

[713] D Abebe, "Does International Human Rights Law in African Courts Make a Difference?" Virginia Journal of International Law 527 (2017) 56, p. 567.

[714] Article 34(6) of the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Protocol.

[715] K Alter, L Helfer and J McAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" The American Journal of International Law (2017), p753.

justice.[716] This is the reality for the local communities of the Niger Delta, given that Nigeria has not signed the declaration or taken steps to ratify the Protocol.[717] In fact, Nigeria is not alone at this juncture, with only 38 out of 54 African Union members not having signed the declaration. This includes Benin and Ivory Coast withdrawing their declarations in April 2020 and the United Republic of Tanzania in November 2019.[718] This is further justification for exploring redress options under the international investment law regime.

5.5. Summary

This Chapter has explored the findings made from the case studies in Chapter 4. It has found that the redress options available to third party groups affected by the operations of multinational corporations are generally ineffective. The mechanisms are available both at national, foreign, regional and continental level. This thesis proposes that an avenue via the international law mechanisms should be considered, and this case, investor-state dispute settlement (ISDS) is explored as a potential avenue in Chapters 6 and 7. This decision is reached on the basis on the findings made this chapter. Firstly, it found that domestic law mechanisms are slow, often tainted by nationalistic and political intrusion, especially when the government has an economic benefit in the dispute. Secondly, it found that delays are a significant impediment to natural justice. This is evidenced from the countless instances at national, foreign and regional levels where courts take decades to pronounce a decision. Thirdly, it found that jurisdictional challenges pose significant hurdles for claimants, particularly in the parent-subsidiary related cases, with proximity and foreseeability used as a test for determining duty of care. Fourthly, it found that domestic, regional and foreign judgements or recommendations face enforcement challenges. This due to the absence of sanctions or mechanisms for ensuring that the recommendations are adhered to by the companies and governments. Last but not least, it has found that the court's jurisdiction is limited to government bodies and in most cases, third party groups or private actors, are excluded from bringing a case. It means third party groups have to rely on the support of their national governments or NGOs, where permitted, to represent their interests. This thesis therefore advocates for an international law mechanism that permit direct access or claim to be

[716] E Udu, "Repositioning the African Court of Human and Peoples' Rights in the Enforcement of Human and People's Rights in Africa" Journal of International Law and Jurisprudence (2017) 8(1) p.174.
[717] African Court on Human and Peoples' Rights, available at https://www.african-court.org/en/> accessed 03 July 2022.
[718] T David and E Amani, "Another One Bites the Dust: Côte d'Ivoire to End Individual and NGO Access to the African Court" (22 March 2021).

brought by third party groups against foreign investors for environmental and human rights violations. The mechanics of this proposal are examined in Chapter 6.

CHAPTER SIX: Potential solutions

6. Introduction

The findings made from Chapters 4 and 5 have shown that third party groups are affected by the operations of foreign investors and the available mechanisms under national, regional and international foras. The foreign, regional and sub-regional human rights courts face jurisdictional and enforcement constraints that have contributed to the continued challenges to accessing justice for third party groups. The Niger Delta has been used as a case study for the purposes of evidencing the research problem; third party exclusion and non-recognition in the international investment law regime. Chapter 4 showed that even the bilateral investment treaties (BITs), using Nigeria as an example, often do not recognise labour, human rights and environmental rights. This is also reflected in procedural rules in investor State dispute settlement (ISDS), often reflected in investment treaties, as permitting foreign investors to bring claims against third party groups. Investment treaties, especially the first generation treaties, do not permit counterclaims or amicus curiae submissions, which makes it difficult for third party claims to be heard. This was discussed in Chapters 1 and 2 for the purposes of evidencing the limitations of existing international law mechanisms, particularly those that could be utilised by the host State against foreign investors in ISDS. Thus, while investors can access ISDS where there is breach of their treaty obligations, third party groups do not have any corresponding rights of access under the system, despite often being victims of the international investment regime, as exemplified by the Niger Delta case studies in Chapter 5.

As elaborated in Chapter 1, this thesis aims to inform the United Nations Commission on International Trade Law (UNCITRAL) reform process by identifying a solution for addressing third party access to justice problem for environmental and human rights violations committed by foreign investors, their exclusion from the international investment regime and potential for strengthening the existing international law procedural rights. It should also be emphasised that although the case studies in Chapter 4 focused on local communities in the Niger Delta, the UNCITRAL Working Group III clarifies that third party groups include both the general public, i.e. individuals and groups who may have an interest but not a direct stake in the dispute and local communities.[719] A thorough explanation of the meaning of third-party rights is provided in Chapter 2. The previous chapters have already addressed some the underlying aims; a) provided a rationale for expanding the procedural rights of third party groups in ISDS (Chapters 2); ii) examined the international law mechanisms, both institutional and procedural,

[719]Paragraph 31 of the 37th Session Report of UNCITRAL Working Group III.

that protect the interests of third-party groups (Chapters 3); and iii) provided empirical evidence on the impact of foreign investor activities on third party groups and lack adequate access to justice through national, regional and international regulatory regimes, using oil spills in Nigeria's Niger Delta as a case study (Chapter 4, with analysis of the findings in Chapter 5).

This Chapter undertakes a comprehensive study of investment law mechanisms, including a proposal for an Investment Court System proposal and whether it represents a viable solution to access to justice in ISDS for third party group. This proposal is further evaluated and recommendations for reform put forward for the purposes of strengthening the procedural rights of third party groups. When examining these proposals, the next chapters will answer the thesis questions: How may formal recognition of third party groups in ISDS be implemented? What is the scope of this right? Who may represent them? Thus, Chapters 6 and 7provides the conceptual underpinning before moving to a practical/ implementation. Chapter 5 has shown that there is evidence to support this search for solutions or a reform direction, given the weaknesses of existing domestic and international mechanisms.

This Chapter is structured as follows. Firstly 6.1, provides the background and context to the reform proposal. Justification is provided for undertaking a search for reform options given the impact of foreign investment on third party groups around the world. Secondly, 6.2- 6.3 explores proposals for improving access to justice for aggrieved third party groups. These options include strengthening counterclaims and introducing binding regulation. Thirdly, 6.4-6.4 takes ISDS to court from the perspective of African States. This section involves an examination of a State-State dispute settlement mechanism, ISDS mechanism, ongoing reform activity at international level and the African States relationship with ISDS. Fourthly, 6.5-6.6 examines the prospects of excluding of ISDS in its entirety from invest treaties and how an African Investment Court can be introduced via the African Continental Free Trade Area (AfCFTA) investment protocol. Last but not least, the Investment Court System is proposed as a potential system before reaching a circumspect conclusion.

6.1. Background and context

As elaborated in Chapters 3, 4 and 5, most the world's share of BITs is mainly dominated by the first generations treaties signed before 2010. The treaties do not place emphasis on sustainable development, investor obligations in the host state towards labour, environment

and human rights.[720] These first generation treaties and the investment regime in general, does not recognise third party direct access to ISDS, even where they have suffered an injury as a result of the foreign investor's activities. The investment clauses are a product of historical efforts to promote foreign investment around the world through investor-friendly treaties, as explained in Chapter 3.In addition to State desire to attract foreign investment by seeking to project themselves as investor-friendly, the historical measures to promote investment played a pivotal role in the continued divergence between investors and State rights under the investment treaties. The impact has been severe, as evidenced in Chapters 4 and 5, particularly in oil and gas sectors or other relevant extractive sectors, with environmental devastation and social-economic rights violated without remedy under the investment regime.[721]Nigeria is the either largest oil producer in the world, and first in Africa, with largest natural gas reverses on the continent.[722] This has makes the Nigeria an attractive destination, of which Shell has held a major stake in the country's oil production since the 1950s.[723]Other major investors include Total Energies and Agip, ExxonMobil. Given that oil is a key resource in Nigeria and the main economic driver, it means the government have a vested in interest in ensuring that production is not halted or disrupted.[724]

As evidenced in Chapter 3, foreign investors in Nigeria's oil sector must enter into a joint venture with the government. It means the government is jointly responsible for enforcing laws and liable for any actions or omissions that endanger the livelihoods of local communities and other third-party groups.[725] The oil exploration has led to environmental devastation through oil spills, with air, water and soil damaged without redress.[726] The impact of oil spills in Nigeria goes beyond the villages examined in my case studies, with thousands of oil spills and millions

[720] O Yakubu, "Addressing Environmental Health Problems in Ogoniland through Implementation of United Nations Environment Program Recommendations: Environmental Management Strategies" Environments 1, (2017) 4(28) pp.2-5.
[721]NBernaz, "*Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap"* (Routledge, 2016) p.1.
[722]Paragraph 1 of *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Federal Republic of Nigeria* (Decision at 30th Ordinary Session, 13-27 October 2001).
[723]A Palomaki, "Flames Away: Why Corporate Social Responsibility is necessary to stop excess Natural Gas Flaring in Nigeria" Colorado Natural Resources, Energy and Environmental Law Review 499, (2013) 24(2) p.503; Centre for Environment, Human Rights and Development, "After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria" (CEHRD, 2015) 1 < https://cehrd.org.ng/index.php/activities/publications/item/61> accessed 18 May 2023;
[724] OAdewale, "Oil Spill Compensation Claims in Nigeria: Principles, Guidelines and Criteria" Journal of African Law (1989) 33(1), p.91.
[725] Nigeria Investment Promotion Commission, "Opportunities" available at https://nipc.gov.ng/opportunities/industry/ accessed 23June 2022.
[726]United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) <www.unep.org/nigeria> accessed 18June 2021, p 20.

of people affected by the social-economic and environmental damage.[727] In fact, the Ogoniland had diverse biodiversity that included ravines, waterways, mangrove trees, and a vibrant fishing industry that was the source of livelihood for the people of Ogoniland.

The realities of oil production surfaced in the 1960s when oil spills became a common occurrence, gas flares and acid rain followed with continued environmental devastation and ill-health among the people of the Niger Delta.[728] The impact was widespread, affecting access to water, a human right and private property, all protected areas under national and international law.[729] The Bayelsa State report states that "…continued activities of the oil industry have fuelled an environmental emergency, a silent health crisis, and deep economic hardship. This overwhelming tide of oil contamination has turned the Niger Delta – home to some of the planet's largest mangroves and freshwater swamps, forests, and Africa's largest wetlands – into one of the most polluted places on Earth. As much as 40 percent of the mangrove forests have been lost."[730] In relation to health, access to polluted water, air and soil resulted in cancer related illnesses, respiratory problems, skin diseases and birth and reproductive problems among the Ogoni people.[731] The livelihood of the people of Ogoni were also affected.[732] This culminated in protests by the Ogoni communities throughout the 1990s, with governmental intervention through the military operations in the region to quash protests against multinational corporations in the oil exploration.[733] This partly due to the fact government has joint ownership of oil exploration activities in Nigeria, and such intervention to stop protests could be viewed as a measure to protect their economic interests.[734]In fact, the military has been accused of destroying property torture in its effort to stop the protests in Ogoniland.[735]

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[727] Centre for Constitutional Rights, "The Case against SPDC" (24 Mar 2009) https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-case-against-SPDC accessed 27 July 2022.

[728]Paragraph 9 of *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Federal Republic of Nigeria* (Decision at 30th Ordinary Session, 13-27 October 2001)

[729]*Paragraph 66 of Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Federal Republic of Nigeria (Decision at 30th Ordinary Session, 13-27 October 2001).*

[730] The Bayelsa State Oil and Environmental Commission, "An Environmental Genocide: Counting the Human Cost of Oil in Bayelsa, Nigeria," May 2023, p.7.

[731]*Paragraph 2 of Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Federal Republic of Nigeria (Decision at 30th Ordinary Session, 13-27 October 2001).*

[732]*Paragraph 65 of Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Federal Republic of Nigeria (Decision at 30th Ordinary Session, 13-27 October 2001).*

[733]RMclean, "SPDC awaits court ruling on complicity in deaths of Ogoni Nine" (30 Apr 2019) *The Guardian*https://www.theguardian.com/world/2019/apr/30/SPDC-awaits-court-ruling-on-complicity-in-deaths-of-ogoni-nine accessed 10May 2023.

[734]*Paragraph 4 of Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Federal Republic of Nigeria (Decision at 30th Ordinary Session, 13-27 October 2001).*

[735] R Mclean, "SPDC awaits court ruling on complicity in deaths of Ogoni Nine" (30 Apr 2019) *The Guradian*<https://www.theguardian.com/world/2019/apr/30/SPDC-awaits-court-ruling-on-complicity-in-deaths-of-ogoni-nine accessed 9 June 2021.

Ken Saro-Wiwa was one of the outspoken activists executed by the military in 1995 in the wake of the protests.[736] On top of human rights violations, oil spills continued even after shell oil exploration stopped in the early 1990s owing to security challenges.[737] This continued environmental degradation is captured in Amnesty International report detailing the social-economic devastation, with the environment damaged and health of the local communities deteriorating.[738] Thus, as evidenced in Chapter 4, the Ogoniland provides a good case study on the impact of multinational activities on third party groups. The most important aspect of this case study, beyond the human rights and environmental devastation, is the weak mechanisms for accessing justice. As evidenced in Chapter 5, the African Commission on Human and Peoples' Right and ECOWAS Court of Justice,[739]have all made recommendations to the government to remedy the damage to the environment but decades later, the people of Ogoniland still suffer from the environmental damage.[740]

Even redress channels through the Dutch courts and those in the UK have not provided adequate assistance to third party groups afflicted by the operations of foreign investors. Unfortunately, the investment system does not provide a procedural route for third party groups. This is the underlying goal of this thesis, to find a solution for third party groups within the existing investment regime. Foreign investors are also aware of this challenge and arguably, it does not provide the necessary deterrence against environmental and human rights abuse.[741] However, as explained in Chapter 5, the problems of access to justice are not Nigeria's alone. They are global and the results and recommendations in this thesis would be influential beyond Nigeria. The idea is to inform the work of UNCITRAL Working Group III tasked with reforming ISDS to ensure that it is fit for purpose for both investors and the host State in light of the emerging legitimacy crisis.

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[736]F Aigbogun, "It took five tries to hang Saro-Wiwa" *The Independent* (13 Nov 1995) https://www.independent.co.uk/news/world/it-took-five-tries-to-hang-saro-wiwa-1581703.htmlaccessed 8July 2023.

[737] United Nations Environmental Program, "Environmental Assessment of Ogoniland" (2011) www.unep.org/nigeria accessed 28 May 2022, p. 25.

[738]Amnesty International, "No Clean-Up, No Justice: An Evaluation of the Implementation of UNEPs Environmental Assessment of Ogoniland, Nine Years on" (June 2020) p.7.

[739]*Paragraph 15 of Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Federal Republic of Nigeria (Decision at 30th Ordinary Session, 13-27 October 2001)*; Paragraph 121 of the *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria*, ECOWAS Community Court, Judgement N° ECW/CCJ/JUD/18/12.

[740]R Mclean, "SPDC awaits court ruling on complicity in deaths of Ogoni Nine" (30 Apr 2019) The Guardian https://www.theguardian.com/world/2019/apr/30/SPDC-awaits-court-ruling-on-complicity-in-deaths-of-ogoni-nine accessed 10 May 2023.

[741]N Bernaz, "Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap" (Routledge, 2016) p.8.

These procedural problems have been documented in academic literature as explained in Chapters 1,2 and 3. For example, one academic commentators discusses how the investor liability mechanisms are inaccessible and elusive,[742] another academic commentator interrogated counterclaims and reached a conclusion that treaty practice needs to be reformed,[743] equally other scholars have discussed improving national and international laws in order to increase accountability for environmental and human rights violations,[744] and other scholars have made similar recommendations on developing existing remedial options for affected third party groups.[745] One of the main recommendations is to improve treaty practice by encouraging states to incorporate obligations on foreign investors and clearly drafted counterclaim provisions. The underlying goal is to rebalance international investment agreements to ensure that both investor and state interests are clearly reflected.[746] The scholars have gone as far was recommending direct access for third party groups in ISDS through the inclusion of specific treaty clauses for investor liability.[747] Others have also proposed empowering arbitration panels to consider human rights violations and other public international law issues when making awards.[748]

This could be in the form of an opt in mechanism, as found in the Singapore Convention on Mediation, particularly in multilateral treaties, allowing States the option of enabling third party groups to have direct access to the same dispute settlement mechanism as foreign investors.[749] However, such a convention or treaty requires ratification by a large number of States, given previous attempts made since the 1960s, such as the Multilateral Agreement of Investment, as explained in Chapter 3.[750] However, there might also be reluctance on behalf the State Parties on permitting third party claims out of fear that it might deter investment. Some scholars have insisted that third party groups should be considered outside the investment regime, through the international human rights mechanisms.[751] However, as explained in

[742]JHo "The Creation of Elusive Investor Liability" American Journal of International Law (2019) 113 p. 15.
[743]T Ishikawa, "Counterclaims and the Rule of Law in Investment Arbitration" 113 AJIL (2019) p.35.
[744]N Bernaz, "Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap" (Routledge, 2016) p.139.
[745]M Sornarajah, "*Resistance and Change in the International Law on Foreign Investment* (CUP, 2015) paragraph 1.4.
[746]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2016) p.271.
[747]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2016) p.261.
[748]T Weiler, "Balancing Human Rights & Investor Protection: A New Approach for a Different Legal Order" Boston College International and Comparative Law Review (2004)429, 27(2) p.438.
[749]JKern, "Investor Responsibility as a Familiar Frontier American Journal of International Law (AJIL) " (2019) p.31.
[750]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2016) p.270.
[751]F Francioni, "Access to Justice, Denial of Justice, and International Investment Law" in PDupuy, E Petersmann, and F Francioni, "*Human Rights in International Investment Law and Arbitration"* (OUP, 2009) p.73.

Chapter 5, international courts have procedural and enforcement challenges, which hinder access for third party groups. And even when decisions are given in favour of third party groups as in SERAC, the remedial action is yet to be implemented two decades after the decision was rendered.[752] Even at regional level, the ECOWAS Court of Justice's recommendations have not been adhered to or implemented, with the additional limitation of not permitting private actors to bring claims against foreign investors. In addition to counterclaims, *amicus curiae* submissions are considered as a potential solution.[753]However, the investment treaty has to include provisions that permit such submission, accompanied by State willingness to support them.

Given the aforementioned practical challenges facing third party groups in their bid to access justice, counterclaims were examined in Chapters 2 and 3. The analysis showed that the biggest challenge facing counterclaims is the actual wording of the clauses. Indeed, the clauses need to be clearly drafted in order to remove any doubt over the intention of the parties. The wording must not be ambiguous to their intention and in this case, for foreign investors to respect environmental standards. This is exemplified by the *Urbaser* case,[754] where the tribunal approved the counterclaim clause, following an alleged violation of the treaty obligation on the investor to respect the right to water, as contained in the investment treaty. Despite that, after interpreting the clause, the tribunal found that the investor had not breached the treaty right to water.

On the other hand, in *Burlington*,[755] the counterclaim clause was permitted with reference to national do Ecuador's tort law, to find the foreign investor liable for polluting the environment. Reference to national law was made despite the BIT between Ecuador and the US not containing any obligation for foreign investors to respect environmental standards with the course of their business operations. This shows that, arbitral tribunals, armed with clearly drafted counterclaim clause, can listen to State claims over environmental and human rights violations in the host State committed by foreign investors.

[752]*Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR)*(Decision at 30th Ordinary Session, 13-27 October 2001).
[753]F Francioni, "Access to Justice, Denial of Justice, and International Investment Law" in P Dupuy, E Petersmann, and F Francioni, "Human Rights in International Investment Law and Arbitration" (OUP, 2009) p.73-76.
[754]*Urbaser v Argentina* ICSID Case No. ARB/07/26.
[755]*Burlington v Ecuador* ICSID Case No. ARB/08/5.

6.2. Proposals in academic literature for improving access to justice

Academic literature is versed with proposals for ways of improving access to justice for affected third party groups as a result of the activities of foreign investors within their jurisdiction. As expounded above, foreign investors are not recognised as subjects of the international legal regime; they operate outside that legal matrix.[756]This has had the consequence of damaging any efforts to develop a binding international legal instrument, as evidenced from the UN efforts from the 1960s. Thus, there is no international law agreement on regulating the activities of foreign investors. The regulation is left to national states, bilateral arrangements or multilateral treaties, with sometimes only a handful of member states and even with such treaties, enforcement becomes a major hurdle.[757] The absence of an international law regulatory system for foreign investors has contributed to the continued impact on the interests of third-party groups around the world without adequate redress. This absence has fuelled a debate on whether social-economic rights of third party groups should be strengthened under international law to enable, affected groups such as local communities to access corresponding foras such as international investment arbitration due to treaty breach.[758]

This argument is premised on the aforementioned weaknesses of the existing international law regime, which has seen affected groups do without redress.[759] The quest for such redress mechanisms is not new, and in fact it intensified at the turn of the century, with scholars calling for human rights and environmental standards to be incorporated in BITs and other multilateral investment treaties, with the option for third party groups to sue foreign investors via the ISDS route for any damage caused.[760] It would mean compensation would move directly from the multinational corporations to the affected groups without any intermediaries whether government agents or NGOs.[761] The creation of such remedial mechanisms can also help to strengthen existing international codes of conduct or provoking compliance with tribunal or court decisions.[762] However, on the contrary, other scholars argue that existing international

[756] PTamuno, "Potential and Limits of Corporate Social Responsibility in the Niger Delta" Nigerian Law Journal 385, (2016) 19(2), p.388.
[757]T Ishikawa, "Counterclaims and the Rule of Law in Investment Arbitration" 113 AJIL (2019) p.34.
[758]F Francioni, "Access to Justice, Denial of Justice, and International Investment Law" in P Dupuy, E Petersmann, and F Francioni, "Human Rights in International Investment Law and Arbitration" (OUP, 2009) p.71.
[759]F Francioni, "Access to Justice, Denial of Justice, and International Investment Law" in P Dupuy, E Petersmann, and F Francioni, "Human Rights in International Investment Law and Arbitration" (OUP, 2009) p.71.
[760]T Weiler, "Balancing Human Rights & Investor Protection: A New Approach for a Different Legal Order" Boston College International and Comparative Law Review 429, (2004) 27(2) p.438.
[761]T Weiler, "Balancing Human Rights & Investor Protection: A New Approach for a Different Legal Order" Boston College International and Comparative Law Review 429, (2004) 27(2) p.443.
[762]T Weiler, "Balancing Human Rights & Investor Protection: A New Approach for a Different Legal Order" Boston College International and Comparative Law Review 429, (2004) 27(2) p.450.

law dispute settlement mechanisms, as exemplified by the *Mayana*[763] case and SERAC[764] clearly indicate that existing mechanisms are functional but suffer from compliance concerns.[765] This essentially calls for a merger between state responsibility under international law and promotion of foreign investment.[766] Some scholars argue that this is the desired direction and most likely future outcome, where States are able to sue foreign investors in international investment arbitration for violation of stated treaty standards.[767] In fact, the second generation treaties now contained emphasis on sustainable development and obligations on foreign investors to protect the environment.[768] Other scholars however prose that third party access in ISDS should be limited to severe environmental and human rights breaches only as this is more likely to be accessed as a point of compromise by the investors.[769]

However, this is normally invoked once an investor has brought a claim against the State. It is suggested that, direct access clauses should be incorporated in treaties, allowing State verses investors claims, within international investment arbitration foras.[770] The state-state approach to dispute settlement is also a potential avenue where human rights and environmental standards have been violated by a national of another State.[771] However, this brings back the challenges seen in the Ogoniland where due to State complicity or economic interests in the matter, they were unwilling to intervene on behalf of the affected third party groups or enforce the recommendations of the courts.[772]

Ishikawa examines dispute settlement options provide by international bodies.[773] The *amicus curiae* submissions and national courts are examined within this study in order to determine their effectiveness and provide further support for the creation of new dispute settlement

[763]*Mayana Awas Tingni Community v Nicaragua*, I/A Court HR (ser C) No 124 (15 June 2005).
[764]*Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR)*(Decision at 30th Ordinary Session, 13-27 October 2001).
[765]F Francioni, "Access to Justice, Denial of Justice, and International Investment Law" in P Dupuy, E Petersmann, and F Francioni, "Human Rights in International Investment Law and Arbitration" (OUP, 2009) p.74.
[766]M Sornarajah, "Resistance and Change in the International Law on Foreign Investment (CUP, 2015) paragraph 1.4.
[767]M Sornarajah, "Resistance and Change in the International Law on Foreign Investment (CUP, 2015) paragraph 1.4.
[768]M Sornarajah, "Resistance and Change in the International Law on Foreign Investment (CUP, 2015) paragraph 1.4.
[769]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2016) p.261.
[770]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2016) p.270.
[771]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2016) p.270.
[772]N Bernaz, "Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap" (Routledge, 2016) p.139..
[773]N Bernaz, "Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap" (Routledge, 2016) p.140.

avenues for third party groups.[774] The author argues that the weaknesses inherent in the prevailing international law mechanisms provide the impetus and justification for the inclusion of third party groups in the international investment law regime.[775] This argument is supported by the prevailing evidence that third party groups are not recognised and more or less excluded from the investment arbitration system. This places a duty on the States to make sure that their domestic systems are fit for purpose to enable the affected groups to bring successful claims against foreign investors; which is unfortunately not the case. In light of this, the author argues that States then have a duty to ensure that foreign investors do not violate human rights or breach environmental standards; which means there must be adequate laws and dispute settlement mechanisms at national level or internationally.

And as evidenced in the prevailing chapters, this is also not the case.[776] The author sums up that the lack of an adequate dispute settlement mechanism has resulted in a legitimacy crisis and calls for reform by providing access to the ISDS regime and continued development and inclusion of counterclaims in investment treaties in support of third-party groups.[777] This reform direction has received support within the international law community with scholars arguing that the international investment law regime is too investor-centric, and need to be rebalanced in order to include and safeguard the evolving rights of third party groups, such as the local communities evidenced in my case studies.[778] The author blames the continued resistance towards developing third party redress mechanisms to host State unwillingness to counterclaim even where such incidences warrant a counterclaim or even such violations are deemed domestic issues and sought to be handled through ineffective domestic measures.[779] The latter is unlikely to be successful as supported by the limitations of domestic courts highlighted in Chapters 4 and 5. To this end, another scholar argues that third party interests are best served through the ISDS regime through the creation for a new mechanism for handling violation of third party interests as a result of multinational operations.

The author based this decision on the jurisdictional limitations of foreign and international courts, stringent interpretation of counterclaim clauses and permitting amicus submissions,

[774]N Bernaz, "Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap" (Routledge, 2016) p.142
[775]T Ishikawa, "Counterclaims and the Rule of Law in Investment Arbitration" 113 AJIL (2019) p.35.
[776]T Ishikawa, "Counterclaims and the Rule of Law in Investment Arbitration" 113 AJIL (2019) p.36.
[777]T Ishikawa, "Counterclaims and the Rule of Law in Investment Arbitration" 113 AJIL (2019) p.34.
[778]J Ho "The Creation of Elusive Investor Liability" American Journal of International Law (2019) 113 p.10.
[779]J Ho "The Creation of Elusive Investor Liability" American Journal of International Law (2019) 113 p.15.

around the world as reflected in the *Bear Creek*[780] and *MTD.*[781] The author goes as far as suggesting that even ISDS is not suited for handling claims involving third party groups due to expense and inherent procedural challenges that have historically favoured foreign investors. The system was built for the purposes of promoting foreign investment at the end of the second world war and decolonisation in Africa and around the world, with national interests, particularly the host State's interests which closely align with third party interests, excluded in the building stage.[782] The author concludes that, the investment regime needs to be rebalanced to incorporate third party interests, either through a systematic reform process, as envisioned under the UNCITRAL Working Group III, or through the creation of a new dispute settlement mechanism (see subsection 6.4 below).[783] The next subsection examines the scope for reforming counterclaims and the extent to which this could strengthen third party access to justice.[784]

6.3. Strengthening Counterclaims

As explained in Chapters 2 and 3, the international investment regime, particularly the International Centre for Settlement of Investment Disputes (ICSID) Convention allows counterclaims provided it is consented by the parties.[785] However, this counterclaims have not been successful owing to unclear wording and willingness for State parties to incorporate them in the relevant investment treaties.[786] Thus, State consent is essential to the operation of counterclaims and thus it is recommended that States ensure that there is adequate consent, provided in advance through the treaty, detailing the operationality of the counterclaim.[787] Once both State parties consent to its conclusion, then the investors automatically consent the moment they initiate a claim on the basis of a treaty that contains a counterclaim provision.[788] However incorporation of a counterclaim provision is not enough. States are encouraged to include obligations on foreign investors and this would be the basis of triggering a counterclaim

[780]*Bear Creek Mining v Peru*, ICSID Case No. ARB/14/2, Award (30 Nov 2017).
[781]*MTD v Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004).
[782]J Kern, "Investor Responsibility as a Familiar Frontier" American Journal of International Law (AJIL) " (2019) p29-30.
[783]J Kern, "Investor Responsibility as a Familiar Frontier" American Journal of International Law (AJIL) " (2019) p.31.
[784]J Kern, "Investor Responsibility as a Familiar Frontier" American Journal of International Law (AJIL) " (2019) p.31.
[785]Article 46 of the ICSID Convention.
[786]Article 46 of the ICSID Convention; J Kern, "Investor Responsibility as a Familiar Frontier" American Journal of International Law (AJIL) (2019) p.30.
[787]*Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1, Award (7 December 2011).
[788]J Kern, "Investor Responsibility as a Familiar Frontier" American Journal of International Law (AJIL) " (2019) p.29.

in the event of breach, for example, with evidence of human rights violations and failure to adhere to environmental standards as stipulated in the relevant articles of the treaty.[789] Thus, the working is key as evidenced in the *Urbaser* case, where Argentina initiated a counterclaim against a foreign investor in an ongoing ICSID arbitration.[790] And if the treaty does not contain obligations, the counterclaim would not succeed.[791]

Thus, a cause of action needs to be stablished in order for a counterclaim to succeed at the merits stage. State parties are therefore advised to renegotiate existing investment treaties and incorporate the right to counterclaim with relevant cause of action. In doing so, they would be safeguarding national interests and strengthening third party groups right to access justice.[792] The Comprehensive and Progressive Agreement for Trans Pacific Partnership(TPP11), is a trade agreement between Australia, Brunei, Japan, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam and contains a detailed counterclaim provision. The treaty allows counterclaims in relation to any investment authorisation or breach contractual provisions.[793] Thus, environmental devastation is not covered by the counterclaim provisions largely due to the absence of environmental standards.[794] However, it means that if incorporated, human rights and environmental standards, could be counterclaimed by the host State in the event of breach.

In Africa, the Pan African Investment Code (PAIC) was elaborated 2006 to provide a guide on investment treaty making in Africa and to support African countries in attracting investment while protecting their national interests.[795] The Code also aligns with the African Union's goal of creating industrial development in Africa by safeguarding infant industries and promoting a fertile environment for trade and investment.[796] The emphasis on the notion of "Ubuntu" premised on universality and Africanism aims to achieve sustainable development and preserving culture and values of the people. Thus, it is evident that, in Africa, countries are

[789]*Rusoro Mining v Venezuela*, ICSID Case No ARB (AF)1/5, Award (7 December 2011).
[790] ICISD Case No. ARB/07/26, Award (8 December 2016); *Burlington v Ecuador* ICSID Case No. ARB/08/5, Counterclaim decision on 7 February 2017; *Perenco v Ecuador* ICSID Case No ARB/08/6, decision on Environmental Counterclaim on 11 August 2015.
[791]T Ishikawa, "Counterclaims and the Rule of Law in Investment Arbitration" 113 AJIL (2019) p.33.
[792] G Laborde "The Case for Host State Claims in Investment Arbitration" Journal of International Dispute Settlement (2010) 971(1), p.111.
[793]Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Article 9.19.
[794] See generally, Comprehensive and Progressive Agreement for Trans-Pacific Partnership.
[795]Preamble to the PAIC.
[796]Preamble to the PAIC; M Kane, "The Pan-African Investment Code: A good First Step, but more is needed", Columbia FDI Perspectives, January 2018 p.216.

opening up to second generation driven policies when negotiating treaties.[797] The Code, as a guide, incorporates obligations on both the State and foreign investors, including environmental and human rights related obligations.[798] In fact, article 43 (2) provides that: "A Member State may initiate a counterclaim against the investor before any competent body."[799] Thus, the provision allows Member States to file counterclaims in support of third party groups interests violated by a foreign investor through their operation. However, the wording shows that only the investor can initiate a claim and during that process, the State can counterclaim. Thus, the right is not automatic and it also means that it is dependant on the availability on an ongoing suit. This is further justification for developing an independent mechanism that would permit direct claims for breach of treaty obligations imposed on foreign investors.

6.4. Introducing binding regulation

Another proposal for improving third party access to justice was put forward by Engobo Emeseh and other scholars, who argued that for the introduction of binding regulation as a means of elevating corporate social responsibility from being a soft law measure to a hard law requirement.[800] In their study, the scholars found that national legislation or national courts are often too weak to direct the behaviour of multinational corporations, particularly in developing countries. They suggested a number of practical solutions, including development of the international legal framework, through for example, UN corporate social responsibility initiatives.[801] Thus, international law was seen as the best avenue to developing corporate social responsibility instruments given the inherent weaknesses of national legal systems, as evidenced in Chapter 4, particularly in the developing world.[802] Another scholar defended the soft law instruments as the backbone of the international law regime which is premised on consent rather than coercion.[803] However, these codes, whether national or international,

[797]Preamble to the PAIC.
[798]Articles 20 and 24 of the PAIC,
[799]Article 43(2) of the PAIC,
[800]EEmeseh, R Ako, P Okonmah, O Ogechukwu and L Ogechukwu, "Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?" German Law Journal, 230, (2010) 11 (2) p. 237.
[801]E Emeseh, R Ako, P Okonmah, O Ogechukwu and L Ogechukwu, "Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?" German Law Journal, 230, (2010) 11 (2) p. 237
[802]E Emeseh, R Ako, P Okonmah, O Ogechukwu and L Ogechukwu, "Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?" German Law Journal, 230, (2010) 11 (2) p.237.
[803]OAmao, "Emergent state practice on the creation and practice of standards on corporate social responsibility" State Practice and International Law Journal 117 (2014) 1(1), p.122.

merely represent desired international standards or obligations and enforced through non-binding recommendations and the willingness of States.[804]

This can be exemplified by the position in Nigeria where " CSR… is still at the discretion of the companies."[805] Thus, domestication and enactment of CSR related laws is would play a key part in safeguarding the rights of third party groups.[806] In fact, the author argues that Nigeria should adopt the United Nations Global Compact and OECD Guidelines for Multinational Enterprises, and domesticate them into laws.[807] Nonetheless, the number of international investment policies with sustainable development objectives are increasing around the world.[808] On that background, it can be argued that strengthening CSR related laws can play a crucial role in protecting the interests of third party groups. However, enforcement remains the issue, as evidenced from the case study in Chapter 4.[809] The next subsection explores the various options for reforming the ISDS mechanism in order to improve access for third party groups under the international investment law regime.

6.5. The nature of investment dispute resolution under the AfCFTA Agreement

It should be emphasized from the outset that the AfCFTA Phase II negotiations offer a unique opportunity to debate, when negotiating the Protocol on Sustainable Investment, and agree to a mechanism that will allow for the equitable resolution of investment disputes without compromising on the Member States and private investors' interests. Phase I of the negotiations produced four legal instruments: the AfCFTA Agreement, the Protocol on Trade in Goods, the Protocol on Trade in Services and the Protocol on Rules and Procedures on the Settlement of Disputes. Article 7 of the AfCFTA Agreement states that Member States "shall enter into Phase II negotiations in the following areas: (a) intellectual property rights; (b) investment; and (c) competition policy". On dispute settlement, the AfCFTA Agreement provides for the establishment of a Dispute Settlement Mechanism (DSM) for the settlement of disputes between Member States administered in accordance with the Protocol on Rules and Procedures

[804] G Teubner, "Self-Constitutionalizing TNCs? On the Linkage of Private and Public Corporate Codes of Conduct" Indiana Journal of Global Legal Studies 617, (2011) 18 (2) p.634.
[805] H Ijaiya, "Challenges of Corporate Social Responsibility in the Niger Delta Region of Nigeria" Journal of Sustainable Development Law and Policy 60, 2014) 3 p.67.
[806]H Ijaiya, "Challenges of Corporate Social Responsibility in the Niger Delta Region of Nigeria" Journal of Sustainable Development Law and Policy 60, 2014) 3 p.67.
[807]H Ijaiya, "Challenges of Corporate Social Responsibility in the Niger Delta Region of Nigeria" Journal of Sustainable Development Law and Policy 60, 2014) 3 p.69.
[808] O Amao "Corporate social responsibility, multinationals and the law in Nigeria: Controlling multinationals in home state" Journal of African Law (2008) 52(1) p.89.
[809]A Palomaki, "Flames Away: Why Corporate Social Responsibility is necessary to stop excess Natural Gas Flaring in Nigeria" Colorado Natural Resources, Energy and Environmental Law Review 499, (2013) 24(2) p.552.

on the Settlement of Disputes. The Protocol establishes a Dispute Settlement Body (DSB) to handle disputes arising between Member States concerning their rights and obligations under AfCFTA Agreement. Article 1 of the Protocol defines a dispute as "a disagreement between Member States regarding the interpretation and/or application of the Agreement in relation to their rights and obligations". Notably, the AfCFTA Agreement defines "Member States" to mean the Member States of the African Union.[810] This implies it is for the Member States to bring disputes either on behalf of their governments or individual investors.

Under this formulation, the private sector does not have standing to sue host States. Indeed, the rights of private investors will be one of the important matters to be debated and agreed under the Protocol on Sustainable Investment. Phase II negotiations were initially expected to be completed by January 2021 but the deadline could not be met due to the pandemic and as a result, the legal text of the Protocol on Sustainable Investment is still under negotiation. The negotiations are expected to be concluded in 2024.

6.6. The AfCFTA Protocol on Sustainable Investment

The continental legal instrument to be adopted as the AfCFTA Protocol on Sustainable Investment will constitute a binding international agreement for the Member States to the AfCFTA Agreement. The AfCFTA Agreement defines an AfCFTA Protocol to mean "an instrument attached to this Agreement, which forms an integral part of the Agreement".[811] It means Member States will be bound by all the AfCFTA instruments and cannot choose their obligations. Therefore, the AfCFTA Protocol on Sustainable Investment will not be a stand-alone agreement.

In terms of substantive content, given that the negotiations between the AfCFTA Member States have not been made public, the private sector should refer to recent developments in the field of investment promotion and facilitation for an indication on potential outcomes. It is envisaged that under an investment agreement based on 'cooperation', Member States will be required to enact new laws or adjust existing investment related legislation to give effect to obligations under the Protocol on Sustainable Investment. To give effect to this, the Protocol will most likely provide for the establishment of specific committees for the purposes of inter-State dialogue, consisting of representatives of the Member States.

[810] AfCFTA Agreement, Article 1(q).
[811] AfCFTA Agreement, Article 1(s) Definitions.

In terms of dispute resolution provisions, the options include delegation to regional or international dispute settlement bodies, or the creation of institution(s) with supra-national powers such a standing African Investment Court, with jurisdiction over disputes involving private investors with a commercial presence within the Member States. While indications are that national courts, given the cooperative nature of the Agreement, could be preferred, the curtain has not yet been drawn on the other options. All in all, a guarantee of effective legal remedies through dispute settlement procedures exercised by independent judicial foras would be crucial to the success of the investment regime under the AfCFTA Agreement.

The next sub-section explains why incorporating an investment dispute settlement mechanism would be crucial to achieving the objectives of the AfCFTA.

6.6.1. Dispute Resolution Regime crucial to the AfCFTA

An effective investment dispute resolution regime is crucial because investors within the AfCFTA, the cornerstone of the Agreement, expect to enjoy enforceable rights. This is supported by the high number of international investment cases involving African States for breach of treaty provisions. Based on the International Centre for the Settlement of Investment Disputes (ICSID) statistics, as of July 2021, 128 ISDS claims have been filled against African countries.[812] Of these, 15 percent of the cases involve Parties from Sub-Saharan Africa and 18 percent from the Middle East and North Africa. Similarly, according to a 2017 ICSID report on Africa, of the 135 cases involving African Parties registered in ICSID at the time, 79 percent were commenced by investors from outside Africa.[813] The ICSID statistics indicate a relatively high percentage of cases filed against African States by investors mostly from outside Africa. On the other hand, from the African States' perspective, this issue is particularly sensitive given that many governments lack the necessary financial resources to deal with disputes of such magnitude. Thus, both investors and AfCFTA Member States have a vested interest in the outcome of the negotiations over the dispute settlement provisions of the Protocol on Sustainable Investment.

The picture is, however, unlikely to change following the successful negotiation of the AfCFTA Protocol on Sustainable Investment due to the differences between the nature of disputes administered under the AfCFTA and arbitral institutions such as the ICSID. The ICSID's jurisdiction covers disputes arising directly out of an investment between a

[812] ICSID Cases Database <https://icsid.worldbank.org/cases> [accessed 20 June 2021].
[813] ICSID The ICSID Caseload—Statistics (Special Focus – Africa), (2017), p.13.

Contracting State and a national of another Contracting State,[814] whereas the AfCFTA Agreement's jurisdiction covers disputes between Member States in relation to the Agreement.[815] Therefore, the AfCFTA investment dispute settlement mechanism will not have jurisdiction to hear disputes brought by investors from outside Africa, who statistically dominate the number of proceedings against African States. Only those investment disputes covered by the AfCFTA Agreement would remain under the jurisdiction of the AfCFTA. This suggests that the AfCFTA investment dispute settlement mechanism will have very limited impact on the overall number of the ICSID and investment cases in general because investment disputes will continue to be submitted to the ICSID and other institutions to which African States are party.[816] However, over time, we may begin to see more investment disputes involving African investors and African States thereby strengthening the role and importance of the investment dispute resolution mechanism under the AfCFTA.

Furthermore, although relatively small, FDI flows in Africa warrant protection through the inclusion of an investment dispute settlement mechanism to safeguard investors' interests and strengthen the attractiveness of the continent to intra-African investment and potentially, foreign investment. According to a study by the African Development Bank (AfDB), intra-African FDI from 2003-2017 was about USD 92.8 billion and shared mainly between four capital-exporting countries, namely the Republic of South Africa (39 percent), Morocco (11 percent), Nigeria (9 percent) and Kenya (8 percent) respectfully.[817] In terms of global share of investment, based on the UNCTAD World Investment Report 2021, FDI flows to Africa declined by 16 per cent in 2020 to USD 40 billion, representing 4 per cent of the global FDI flows but projected to increase by 5 percent in 2021.[818] These figures remind us of the importance of balancing the interests of Member States and investors in the AfCFTA Protocol on Sustainable Investment as a catalyst for sustainable investment.

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[814]The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Article 25:1 (1): "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally" [New York Convention hereafter].

[815]AfCFTA Agreement, Article 20(1)-(3).

[816] It should be emphasised that African States and investors also seek recourse before other foras such as Permanent Court of Arbitration (PCA) or ad hoc arbitration under UNCITRAL Rules Therefore these statistics only provide an incomplete but sizeable picture.

[817] AfDB Intra-African Foreign Direct Investment (FDI) and Employment: A Case Study (2020), Working Paper Series, 335, available at <https://www.afdb.org/en/documents/working-paper-335-intra-african-foreign-direct-investment-fdi-and-employment-case-study> [accessed 10 July 2021], p.11.

[818] UNCTAD, World Investment Report 2021, United Nations, New York, p.4.

The dispute resolution options are examined next.

6.6.2. ISDS in court: The perspective of African States

An investment dispute settlement mechanism is crucial because investors expect to enjoy enforceable rights. This is exemplified by the high number of international investment cases involving African States and to a lesser extent, African investors. Based on the International Centre for the Settlement of Investment Disputes (ICSID) statistics, as of July 2021, 128 ISDS claims have been filled against African countries.[819] Of these, 15 percent of cases involve parties from sub-Saharan Africa and 18 percent from the Middle East and North Africa. Similarly, according to a 2017 ICSID report on Africa, of the 135 cases involving African parties registered in ICSID at the time, 79 percent were commenced by investors from outside Africa.[820] Thus, the ICSID statistics indicate a relatively high percentage of cases filed against African States by investors mostly from outside Africa. This issue is particularly sensitive given that many governments lack the necessary financial resources to deal with disputes of such magnitude.

What shape should the investment dispute settlement mechanisms take without compromising on third party rights? The options are examined next.

6.6.3. A State-State Dispute Settlement Mechanism

African countries may elect an active State to State dispute mechanism to handle investment disputes. Indeed, inter-State dispute mechanisms are becoming increasingly popular as shown in a number of recent Bilateral Investment Treaties (BITs).[821] While the merits of an inter-State mechanism are plausible, the mechanism only entertains disputes between State Parties, which may not necessarily reflect the interests of the private sector. This could lead to the under-utilisation of the forum since Africa's private sector lacks the political will and economic scale to lobby governments to litigate on their behalf.[822] Moreover, locking out the private sector may lead to a redirection of the original purpose of the forum from economic integration and

[819] ICSID Cases Database: https://icsid.worldbank.org/cases [accessed 20 June 2021].
[820] ICSID (2017). The ICSID Caseload—Statistics (Special Focus – Africa) p.13.
[821] See for example, the Brazil–Ethiopia BIT (2018) and Brazil–Malawi BIT (2015), the Japan-Philippines Economic Partnership Agreement (2006) and the Australia-Malaysia FTA (2012).
[822] See comments on the AfCFTA Dispute Settlement Body by Professor David Luke (LSE), Coordinator of the African Trade Policy Centre at the United Nations Economic Commission for Africa (UNECA), available at https://iclg.com/alb/15796-afcfta-a-window-of-opportunity [accessed 18 July 2021].

investment protection towards human rights protection, as exemplified by the experiences of regional courts in Africa.[823]

Nonetheless, in order to strengthen cooperation among African states, there may be a preference to submit the disputes to an Africa-based dispute settlement body(s). This is supported by the increasing number of intra-African BITs.[824] For example, Uganda has five intra-African BITs with Eritrea, Nigeria, Egypt, Zimbabwe and the Republic of South Africa (all not in force). The Republic of South Africa has BITs with (Algeria, Angola, Congo, Congo-Democratic, Egypt, Ethiopia, Equatorial Guinea, Gabon, Ghana, Guinea, Libya, Madagascar, Mali, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, Sudan, Tunisia, United Republic of Tanzania and Zimbabwe) with only 4 in force. Indeed, the current state of intra-African BITs supports the harmonisation of rules and procedure relating to dispute resolution in order to avoid overlapping jurisdiction. Under a harmonised regime, where there is a disagreement among Member States, they may deem it more appropriate to submit the dispute to an African dispute settlement forum than an international tribunal because of the assumption that a local dispute settlement forum would be better suited to understand the African commercial context.

Therefore, having established that an investment dispute settlement forum that accounts for the African commercial context is essential, the next sub-section discusses Africa's preparedness for an ISDS mechanism.

6.6.4. An Investor-State Dispute Settlement Mechanism

Africa already has an architecture for handling investment disputes. A 2015 study by Onyema finds 71 arbitration centres in 39 African countries.[825] For example, the Kigali International Arbitration Centre (KIAC) and the Mauritius Chamber of Commerce and Industry Arbitration Centre (MCCI). There are several other forums across the continent, particularly at regional level, with a mandate to handle commercial disputes. For example, the Organization for the Harmonization of African Business Law (OHADA) has a set of uniform laws applicable to its Member States and a Common Court of Justice and Arbitration (CCJA) where natural and legal

[823] See generally, James Thuo Gathii (2020). The Performance of African's International Courts: Using Litigation for Political, Legal, and Social Change (OUP, Oxford); Regis Simo (2019). A Future Court without Cases? On the Question of Standing in the AfCFTA Dispute Settlement Mechanism, Afronomicslaw blog.

[824] Although it is outside the scope of this paper, in order to strengthen cooperation among African States under the AfCFTA, a discussion on the future of Intra-African BITs is necessary. For a discussion on intra-African BITs, C Nyombi, T Mortimer and N Ramsundar (2018). The Morocco-Nigeria BIT: Towards a new generation of intra-African BITs, International Company and Commercial Law Review, Vol 29(2), pp.69-80.

[825] See list of arbitration centres in Africa compiled by Emilia Onyema, available at: https://docs.wixstatic.com/ugd/ef6df1_a0f973bbbbb14c7b8d733ba7c58f6a0b.pdf [accessed 28 July 2021].

persons have standing to bring cases.[826] Similarly, the East African Community (EAC) has a supranational court, the East African Community Court of Justice (EACJ), with the jurisdiction to take referrals from Member State national courts and make preliminary rulings in the interpretation of EAC laws.[827] The EACJ has jurisdiction to sit as an arbitral tribunal with its judges acting as arbitrators.[828].

6.6.5. Ongoing reform activity at international level

This study comes at a time when there is deep skepticism about ISDS in Africa and around the world. According to the UNCTAD World Investment Report 2021, the number of investment policy measures of a restrictive nature more than doubled in 2020 amounting to 50, against 21 in 2019, with the global share of restrictive policy measures reaching 41 per cent, the highest on record.[829] The increased use of restrictive measures was largely driven by national security concerns over FDI in sensitive industries such as oil and gas.

On investment dispute settlement, the idea of replacing the ISDS mechanism with other mechanisms or limiting investor access, has pervaded this field for the past decade with African countries such as the Republic of South Africa foreclosing future participation in international investment arbitration except in very limited circumstances[830] and the United Republic of Tanzania terminating the Tanzania-Netherlands BIT in April 2019 over similar concerns. A continental position is reflected in the 2020 African Union Declaration on the Risk of Investor–State Dispute Settlement with Respect to Covid-19 Pandemic Related Measures. This was adopted at the 14th meeting of African Union Ministers for Trade held on 24th November 2020.[831] The Declaration highlights the "potential for disputes arising between investors and states under investment treaties in relation to the measures taken by African governments to respond to the COVID-19 pandemic." It calls on African Union Member States to explore options under international law to mitigate the risks of ISDS claims, including through a mutual

[826] Treaty on the Harmonization of Business Law in Africa, 17 October 2008; Arbitration Rules of the Common Court of Justice and Arbitration, 23 November 2017, 15 March 2018; Rules of Procedures of the Common Court of Justice and Arbitration, 18 April 1996, revised 30 January 2014. See Emilia Onyema (2008). Arbitration under the OHADA Regime, International Arbitration Law Review, 11 (6). 205-218, p. 205.
[827] Article 34 of the Treaty for the Establishment of the East African Community, May 5, 1966, 5 I.L.M. 633. A Revised EAC Treaty was adopted in Arusha, Tanzania on November 30, 1999, Article 27(1), 2144 U.N.T.S. 257 [EAC Treaty hereafter].
[828] See Articles 30- 34 of the EAC Treaty.
[829] UNCTAD (2021). World Investment Report 2021, United Nations, New York, p xi.
[830] See the South African Protection of Investment Act, 2015 entry into force, in 2018 (Act No. 22 of 2015).
[831] The International Institute for Sustainable Development (IISD), "IISD welcomes AU Ministerial declaration on the risks of investor–State arbitration for COVID-19 measures", 21 December 2020, available at https://www.iisd.org/articles/iisd-welcomes-au-ministerial-declarationrisks-investor-state-arbitration-covid-19 [accessed 02 August 2021].

temporary suspension of ISDS provisions in investment treaties with respect to COVID-19 related measures and the renegotiating investment treaties by integrating provisions better suited to national interests in accordance with emerging trends.

Emerging trends have shown an increasingly cautious approach to ISDS being taken in some of the more recent megaregional agreements.[832] For example, the ongoing negotiations on the modernisation of the Energy Charter Treaty (ECT) which commenced in 2020 are extremely influential given Africa's growing extractive sector and its appeal to foreign investment. Following commencement of the second phase of negotiations, which cover dispute settlement, a group of nearly 100 representatives from the European Parliament and national parliaments signed and issued a declaration calling on "EU (European Union) negotiators to ensure that the provisions in the ECT that protect foreign investment in fossil fuels are deleted and thus removed from the ECT" and for "ISDS provisions (…) to be scrapped or fundamentally reformed or limited."[833] These global developments present important questions for AfCFTA Member States over the future of ISDS in the Protocol on Substantive Investment.

More importantly in these discussions, is the Member States relationship with ISDS.

6.6.6. African States relationship with ISDS

Africa's relationship with ISDS can be characterised as complex for two reasons; (i) the overwhelming acceptance of the ISDS framework and (ii); the growing unease over the operation of ISDS. On the ISDS framework, almost one third (47) of the 155 countries that have ratified the ICSID Convention are in Africa[834] and more than half (42) of the countries in Africa have ratified the 1958 New York Convention.[835] African countries have also signed hundreds of BITs that provide for ISDS while African investors are starting to exercise that

[832] Megaregional agreements, such as the AfCFTA, are broad economic agreements among a group of countries that together carry significant economic influence and in which investment is one of several areas addressed.
[833] Statement on the modernisation of the Energy Charter Treaty, 8 September 2020, available at https://www.euractiv.com/wp-content/uploads/sites/2/2020/09/Statement-on-Energy-Charter-Treaty-ENG_080920.pdf [accessed 18 July 2021].
[834] As of July 2021, these African countries have signed but yet to ratify the ICSID Convention: Namibia signed on October 26, 1998; Ethiopia signed September 21, 1965, available at https://icsid.worldbank.org/sites/default/files/documents/ICSID3-June%202021.pdf [accessed 18 July 2021].
[835] The remaining 12 non-parties are: Chad, Congo (Brazzaville), Equatorial Guinea, Eritrea, Eswatini the Gambia, Guinea-Bissau, Libya, Namibia, Somalia, South Sudan, and Togo.

right against African[836] and non-African States.[837] Thus, African countries have clearly embraced the ISDS framework.

However, many African countries are now facing their first known ISDS claim and coming to terms with the economic implications of these disputes.[838] For example, South Sudan gained its independence in 2011 and faced its first ISDS claim in 2012.[839] Equally, an ICSID tribunal issued one of the largest known investment treaty awards (USD 2 billion) in August 2018 against an African country.[840] Furthermore, the limited involvement of African arbitrators and African institutions in the ISDS processes is a matter of great concern. According to the June 2021 ICSID Caseload Statistics, although Sub-Saharan Africa contributes 15 percent of all ICSID cases by State Party involved, the region accounts for only 2 percent of arbitrators, conciliators and ad hoc committee members appointed in ICSID cases.[841] By contrast, Western Europe contributes 8 percent of all ICSID cases by State Party involved but account for 48 percent of arbitrators, conciliators and ad hoc committee members appointed in ICISID cases.[842] North America (Canada, Mexico and the U.S.) contributes 6 percent of all ICSID cases by State Party involved but accounts for 20 percent of arbitrators, conciliators and ad hoc committee members appointed in ICSID cases. Given the growing number of domestic and regional legal frameworks for arbitration in Africa coupled with reputable arbitration centres, the continued exclusion of African arbitrators from the global ISDS mechanisms is indeed unwarranted.

Therefore, despite the overwhelming acceptance of the ISDS framework, African countries are not shielded from the growing concern over its operation. These concerns were captured in a March 2019 letter to the UNCITRAL Working Group III by members of the Working Group on Business and Human Rights.[843] The human rights experts argued that international

[836] For example, *Mauritius Madagascar Courts (Indian Ocean) Limited and Courts Madagascar S.A.R.L. v. Republic of Madagascar* (ICSID Case No. ARB/13/34) *and South Africa Mozambique Oded Besserglik v. Mozambique*, ICSID Case No. ARB(AF)/14/2.
[837] For example, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16.
[838] Benin faced its first ISDS case in 2017 and Mauritius in 2016.
[839] *Sudapet Company Limited v. Republic of South Sudan* (ICSID Case No. ARB/12/26)
[840] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4; See also *Mohamed Abdulmohsen Al-Kharafi and Sons Co. v. Libya and others*.
[841] ICSID Caseload Statistics 2021, available at https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The%20ICSID%20Caseload%20Statistics%202021-2%20Edition%20ENG.pdf [accessed 02 August 2021] p.12.
[842] Ibid, 17-20.
[843] The United Nations Human Rights bodies submission is available on the UNCITRAL webpage at https://uncitral.un.org/sites/uncitral.un.org/files/public_-_ol_arm_07.03.19_1.2019_0.pdf [accessed 21 July 2021].

investment agreements and their ISDS mechanisms, in particular, international arbitration, "have often proved to be incompatible with international human rights law and the rule of law." They recommended "systemic structural change" to address some of the perceived problems in the system including the exorbitant costs associated with the proceedings and the extremely high arbitral awards that lead to undue restrictions of States' fiscal space and undermine their ability to regulate economic activities.[844]

Consequently, one of the objectives of the AfCFTA is to "promote and attain sustainable and inclusive socio-economic development…". On the right to regulate, in the, Member States explicitly recognised the importance of democracy, human rights, gender equality and the rule of law by "reaffirm[ing] the right of State Parties to regulate within their territories and the State Parties' flexibility to achieve legitimate policy objectives…."[845] The Morocco-Nigeria BIT (2016), although not in force, represents Africa's boldest attempt at realising these objectives at bilateral level though the inclusion of a provision on 'Impact Assessment' (Article 14), 'Investor Liability' (Article 20) and 'Right of the State to Regulate' (Article 23). Thus, given Africa's complex but evolving relationship with ISDS, a bold decision has to be taken on the future of ISDS.

Given the aforementioned concerns, the next section discusses whether the exclusion of ISDS is a viable option in light of emerging megaregional treaty practice and the availability of viable alternatives.

6.6.7. Exclusion of ISDS in its entirety: A viable option?

The exclusion of ISDS could, to an extent, be considered a viable option in light of the issues discussed above and emerging treaty practice. Megaregional agreements are very influential in terms of informing and directing treaty practice in the concerned region(s) and the most recent megaregional treaties clearly show a cautious approach to drafting ISDS provisions and in some cases, its total exclusion.

For example, the Regional Comprehensive Economic Partnership (RCEP) Agreement was signed on 15th November 2020.[846] Its Investment Chapter does not provide for ISDS. However,

[844] See examples: NigeriaMorocco BIT (2016) – not in force, Article 13; Canada-Côte d'Ivoire BIT (2014), Article 15 and 17; Macedonia-Morocco BIT (2010), Article 2(6); NigeriaTurkey BIT (2011) – not in force, Article 6; Cameroon-Turkey BIT (2012) - not in force, Article 5; Japan-Mozambique BIT (2013), Article 18; NigeriaMorocco BIT (2016) – not in force, Article 13.

[845] Preamble to the AfCFTA Agreement.

[846] RCEP is a Free Trade Area Agreement between the Asia-Pacific nations of Australia, Brunei, Cambodia, China, Indonesia, Japan, Laos, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, South Korea,

the RCEP allows State Parties to enter into discussions on ISDS no later than two years after the date of entry into force of the agreement and conclude them within three years of the commencement of the discussions. Similarly, the Agreement in Principle for the China–EU Comprehensive Agreement on Investment (CAI) was reached on 30th December 2020.[847] The Agreement contains a section dedicated to Investment Liberalisation, but it does not provide for ISDS. Instead, it provides for an inter-State mechanism for settling disputes between the parties using a two-step approach consisting of consultations and recourse to an arbitration panel.[848] In the same vein, the EU–United Kingdom Trade and Cooperation Agreement (TCA) was concluded on 30th December 2020 with a chapter on Investment Liberalization without a FET provision and ISDS.[849]

Some megaregional trade and investment agreements have significantly limited the space for ISDS. For example, the United States Mexico Canada Agreement (USMCA) entered into force on 1st July 2020 following its ratification by Canada on 13th March 2020, the United States on 29th January 2020 and Mexico on 19th June 2019. The USMCA replaces the North American Free Trade Agreement (NAFTA) which was signed in 1992. The Agreement contains a revised ISDS provision under Annex 14-D which limits the application of ISDS exclusively to disputes between the United States and Mexico and narrows the claims that investors can bring under the provision.[850] Similarly, the Comprehensive and Progressive Agreement for TransPacific Partnership (CPTPP hereafter) came into force on 30th December 2018. Under Chapter 9 Agreement, the State Parties agreed to suspend the application of the provisions relating to investor–State contracts and investment authorization. There is therefore a narrow scope for challenging government measures, as claims by private parties in relation to investment contracts and approvals are excluded.[851]

Given the abovementioned megaregional treaty drafting practices, African States may opt to limit or exclude ISDS, which has already been embraced in some African countries. For

Thailand and Viet Nam, unifying the pre-existing bilateral agreements between the 10-members of the Association of Southeast Asian Nations (ASEAN).

[847] European Commission, "EU–China Comprehensive Agreement on Investment (CAI)", Available at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237 [accessed 18 July 2021].

[848] The State Parties agreed to continue the negotiations with a view to negotiate an agreement on investment protection and investment dispute settlement within two years of the signature of the CAI.

[849] The EU-UK Trade and Cooperation Agreement, available at https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en [accessed 18 July 2021].

[850] See Chapter 14 'Investment', 'The United States–Mexico–Canada Agreement, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement [accessed 02 August 2021].

[851] See Chapter 9 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5673/download [accessed 03 August 2021].

example, the Republic of South Africa has openly and formally rejected international investment arbitration. Following a review of its BIT framework, the Republic of South African government elected to terminate some of the country's 'first generation' BITs and put in place a domestic policy framework for resolving investment disputes.[852] The Republic of South Africa went further by enacting the Protection of Investment Act which entered into force in 2018. The legislation makes no provision for ISDS and only provides for dispute settlement in domestic courts and State-State arbitration. This is provided under Section 13(4) of the legislation which states that an investor "is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment". Similarly, Section 15(5) provides that subject to the exhaustion of domestic remedies, the Republic of South African government "may consent to international arbitration" but "[s]uch arbitration will be conducted between [the Republic of South Africa] and the home State of the applicable investor". Given its substantial economic power and political influence on the continent, the Republic of South African voice would be crucial to the future of ISDS in the AfCFTA Agreement.

However, the Republic of South Africa is not alone at this juncture.[853] In 2016, Namibia enacted an Investment Promotion Act which, under Section 28(4), provides that "the jurisdiction over disputes relating to this Act lies exclusively with the courts of Namibia, but the Minister and investor or investment, as required by the circumstances of the alleged breach of rights or obligations, may, by written agreement, agree to arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965) in Namibia."[854] Similarly, in 2017, Tanzania enacted the Natural Wealth and Resources (Permanent Sovereignty) Act which, under Section 11(2), provides that "disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources shall be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of Tanzania" and they "shall not be a subject of proceedings in any foreign court or tribunal."[855] This was followed by a Public

[852] In 2015, the Republic of South Africa terminated their BITs with Austria, Belgium- Luxembourg, Denmark, France, Germany, the Netherlands, Spain, Switzerland and the UK.
[853] Some African states have elected to exclude ISDS from their more recent BITs including the Brazil–Ethiopia BIT (2018) and the Brazil–Malawi BIT (2015). However, this was more or less expected given Brazil's established policy of excluding ISDS. See Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5717/download (accessed 17 June 2021); Investment Cooperation and facilitation agreement between the Federative Republic of Brazil and the Republic of Malawi available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4715/download [accessed 17 June 2021].
[854] Namibia Investment Promotion Act. Law No. 199 of 2016.
[855] Natural Wealth and Resources (Permanent Sovereignty) Act No.5 of 2017.

Private Partnership (Amendment) Act 2018 which requires all Public Private Partnership agreements to be subject to local arbitration under the arbitration laws of Tanzania and/or conclusively dealt with by Tanzanian courts.

Regional support for local litigation requirements is found in the 2016 EAC Model Investment Treaty. Pursuant to Article 23.4, an investor may submit a claim to arbitration provided that the investor "has first submitted a claim before the domestic courts of the host State for the purpose of pursuing local remedies."[856] A special note to Article 23 of the EAC Model Investment Treaty shows a preference for exclusion of ISDS. The special note reads: "[T]the preferred option is not to include Investor-State Dispute Settlement. Several States are opting out or looking at opting out of investor-State mechanisms, including Australia, South Africa and others…."A strong preference for African institutions is also found in the Pan-African Investment Code (PAIC)[857] which provides for ISDS in "any established African public or African private alternative dispute resolution centre or the Permanent Court of Arbitration centres in Africa (or the African Union Court of Arbitration) or African regional court where applicable."[858]

In addition, the PAIC contains an important limitation to the investors' access to dispute resolution: "may be resolved through arbitration ISDS" pursuant to Article 42(c), subject to the applicable laws of the host State and/or the mutual agreement of the disputing parties." This implies that if the host State's law does not allow for ISDS, as in the case of the Republic of South Africa, ISDS cannot take place and even if the host State's law provides for ISDS, the investor would still need the consent of the host State to initiate ISDS proceedings.

The key benefits of using African foras, from the perspective of African States, includes the tremendous understanding of local context that these foras are perceived to possess and the undeniable affordability and convenience from both an African State and local investors' perspective. As investment flourishes on the continent as a result of the AfCFTA, it is presumed that regional bodies would be pressed to develop capacity, their understanding of business-related matters and their repository of business law precedent in order to serve a rapidly

[856] EAC Model Investment Treaty https://www.eac.int/documents/category/key-documents [accessed 03 August 2021].
[857] The PAIC was elaborated under the auspices of the African Union and for some commentary see, Makane Moïse Mbengue and Stefanie Schacherer (2017). The 'Africanization' of International Investment Law: the Pan-African Investment Code and the Reform of the International Investment Law Regime, Journal of World Investment and Trade vol. 18, no. 3, p. 414-448; The text of the draft PAIC is available at: https://au.int/en/documents/20161231/pan-african-investment-code-paic [accessed 26 June 2021].
[858] PAIC, Article 42(4).

growing market. However, more often than not, multinational corporations, when negotiating transactions on the continent, will insist that disputes will be brought outside the host country, and typically outside the continent as a whole, to neutral international dispute settlement bodies, due to concerns about independence.

These independence concerns are reinforced by the troubled and very short existence the South African Development Community (SADC) Tribunal, marked by jurisdictional challenges and threats from some SADC Member States.[859] The SADC Tribunal was established pursuant to Article 9(g) of the SADC Treaty. Under Article 18 of the Protocol on Tribunal and the Rules of Procedure, natural and legal persons have standing to file claims with the SADC Tribunal.[860] The problem arose from the *Mike Campbell (Pvt) Ltd. and others* v. *Republic of Zimbabwe*, in which White farmers in Zimbabwe initiated claims challenging Zimbabwe's land reform programme and compulsory acquisition of agricultural land. The SADC Tribunal's decision in favour of the farmers effectively signalled its untimely end. This began in 2010 when a SADC Summit of Heads of State and Government suspended the SADC Tribunal by electing not to renew the terms of the serving judges or to appoint new judges. This was followed by a new Protocol in 2014, adopted and signed by the SADC Summit, limiting the Tribunal's jurisdiction to State-State disputes.[861] However, in 2018, the Republic of South Africa's Constitutional Court ruled that former President Jacob Zuma's signing of the protocol was unconstitutional.[862] As a result, in August 2019, the Republic of South African President, Cyril Ramaphosa, officially withdrew the country's signature from the Protocol.[863] On that background, lessons from the SADC experience should be given considerable weight in the negotiations especially since several Members of the SADC have ratified the AfCFTA Agreement including, Eswatini (21st June 2018), Namibia (25th January 2019), the Republic of South Africa (31st January 2019) and Zimbabwe (25th April 25).

[859] Treaty of the Southern African Development Community, Aug. 17, 1992, 32 I.L.M. 116 [hereinafter SADC Treaty].
[860] The SADC Protocol on Tribunal and the Rules of Procedure, available at https://www.sadc.int/documents-publications/show/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf [accessed 22 July 2021].
[861] See Article 33 of Protocol on the Tribunal in the SADC adopted on 21 February 2014 available at https://ijrcenter.org/wp-content/uploads/2016/11/New-SADC-Tribunal-Protocol-Signed.pdf [accessed 18 July 2021]. The Protocol is yet to gather the ratifications it needs to enter into force.
[862] Law Society of South Africa and Others v President of the Republic of South Africa and Others (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018)
[863] Communique of the 39th SADC Summit (paragraph 20), available at https://www.sadc.int/files/1915/6614/8772/Communique_of_the_39th_SADC_Summit-English.pdf [accessed 18 July 2021].

Thus, despite the emergence of megaregional treaties as well as domestic and regional support for the exclusion of ISDS, strong protection for private sector is essential for encouraging investment and sustainable economic development in the region. However, concerns about independence and the ghost of the SADC Tribunal are likely to overshadow any of the current and future regional dispute settlement bodies that permit private actors to sue States. The next sub-section discusses whether utilising other alternative dispute resolution (ADR) mechanisms such as mediation, conciliation and negotiation as a precondition for accessing ISDS could offset the African countries' concerns over its operation and strengthen the rights of third party groups.

Therefore, a proposal for a standing hybrid regional investment court (the African Investment Court) is presented next, with clear explanations on how such a mechanism would balance the interests of both States and private sector and bring about systemic structural change within the African context aimed at protecting third party groups rights.

6.6.8. Third party access to ISDS: A proposal for an African Investment Court

For almost a decade, the EU has been advocating for the establishment of a multilateral investment court system where private investors retain standing to file claims directly against States.[864] However, in the African context, a standing African Investment Court to rule on investment disputes within the AfCFTA would be a new and much welcomed development. This is supported by a 2016 United Nations Economic Commission for Africa (UNECA) report which suggested that "[t]he continent could consider a pan-African solution such as the African Court of Justice … for the proposed Continental Free Trade Area (CFTA) …'[865] Similarly, Onyema concludes that an African Commercial Court "will ensure that arbitration as the dispute resolution of choice by commercial parties…[and] play its supportive role for the actualisation of the goals of greater intra-African trade in goods, services and investment, envisioned in the AfCFTA."[866]

[864] See generally, Eleftheria Neframi (2020). Permanent Investment Courts and the EU Legal Order, University of Luxembourg Law Working Paper No. 2020-010; Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (2015). International investment law: a handbook Oxford: Hart Publishing, p. 186.
[865] UNECA (2016). Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration, Addis Ababa, Ethiopia, p. 46.
[866] Emilia Onyema (2020). Reimagining the Framework for Resolving Intra-African Commercial Disputes in the Context of the African Continental Free Trade Area Agreement, World Trade Review Volume 19(3), pp. 446 – 468.

Furthermore, the idea of investment court has also been advocated by Nyombi and Obiajunwa.[867] The latter argued for the establishment of regional court in Africa to handle investment disputes. However, the emphasis was not on the protection of third party groups. His work is premised on strengthening the regulatory power of the State and realigning investment treaties to serve both investors and states, as opposed to the asymmetrical approach in first generation treaties. Thus the rationale for introducing the court is different from mine. Nyombi on the other hand, viewed the investment court has body to that would engender confidence in ISDS and overcome the prevailing legitimacy crisis in the field. While we are all proposing a court, thesis provides the logistical and structural design of the court, which is not explored in either works of Nyombi and Obiajunwa. Similarly, my proposal focus on enabling third party groups to access justice, hence its features that are third party friendly. Both Nyombi and Obiajunwa's proposals do not take into consideration this often forgotten group of stakeholders. The make up of the court system and the proposed features that would enable third party access are explained in subsequent sub-sections.

6.6.9. How does an African Investment Court strengthen third party access to ISDS?

Given the aforementioned concerns surrounding the operation of ISDS, in particular, international arbitration, in Africa and around the world, the African Investment Court would first and foremost bring about predictability and consistency through the establishment of a standing mechanism with permanent, full-time adjudicators. Under the current system, stakeholders cannot have reasonable expectations that a ruling in one dispute will be followed in another due to the ad hoc nature of the arbitral tribunals.[868] Greater predictability of legal interpretation and consistent case-law both at the first and appeal level is likely to lead to more efficiency thereby reducing the scope for adventurous claims and the amount of cases overall.

[867] Chrispas Nyombi (2018). Towards a new International economic order: proposal for a Pan-African investment court. in: Onyema, E. (ed.) Rethinking the Role of African National Courts in Arbitration Kluwer Law International; Obiajunwa Ama (2020) "Investor-State Arbitration and African States: A Proposal for A Pan-African Investment. PhD Thesis, Canterbury Christ Church University.

[868] See Katharina Diel-Gligor (2017). Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration, Brill Nijhoff, Leiden and Boston: "The ICSID system is based on institutionally supported arbitral tribunals and annulment committees. It operates with a large number of arbitrators on the same hierarchical level who work in varying compositions in each case. Accordingly, over time, different arbitrators decide on the same or at least very similar interpretative legal issues. This absence of a permanent tribunal and the corresponding personnel discontinuity result in a relatively low level of internal pressure towards "continuous collegiality" and stand in contrast to permanent judicial institutions such as the ICJ or the CJEU" p. 164.

It is assumed that diligent investor will not bring a claim based on a legal argument that has been rejected by a standing mechanism, whilst this is reasonable with regards an ad hoc tribunal established for each dispute.

In addition, the proposed two-tier mechanism is the most effective structure for ensuring predictability and consistency. An appeal mechanism will review the legal correctness of the decisions taken at first instance and correct any legal errors, which is also an important feature of domestic legal systems, since it ensures a check on decision-makers. This will gradually bring about greater consistency.

Furthermore, a standing investment court will be better placed to gradually develop a more coherent approach to the relationship between investment law and other domains, in particular, other fields of international law such as International Human Rights Law, which would inform and lead to better decision making.[869] For instance, the WTO Appellate Body has made a number of pronouncements on the relationship of WTO law with other fields of international law.[870]

Perhaps the greatest benefit of having a continental tribunal, from a third party perspective, will be the contextual awareness that is added by having local judges who are familiar with the most pressing issues on the African continent. These include concern for the impact investment disputes on the continent. African judges will be more likely to take into consideration the social, environmental and economic consequences of their decisions and to balance their reasoning with investors' interests. This is the essence of cooperation and sustainability. While other mechanisms, including international investment arbitration, regional and local courts, exhaustion of domestic remedies and an inter-state mechanism, are likely to further third party objectives, in their own different but limited way, it is submitted that establishing a standing two-tier African Investment Court offers the best available option for achieving sustainable investment and balancing the interests of African investors and African States.

[869] See generally S Frank (2005). The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions, Fordham Law Review 73,1522.

[870] See for instance, Appellate Body Report, US – Gasoline, p. 17: "[T]he Appellate Body has been directed, by Article 3(2) of the DSU, to apply ["customary rules of interpretation of public international law"] in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law." Available at https://www.wto.org/english/tratop_e/dispu_e/2-9.pdf [accessed 29 July 2021].

6.7. Summary

This chapter has examined a number of potential solutions to the third-party access to justice concerns. Firstly, it has shown that counterclaims, when suitably drafted, can be utilised as means of enabling tribunals to hear third party claims. However, it requires State consent, to buy into the idea of incorporating such innovative provisions as well as investor obligations. Secondly, it has shown that CSR related policy development can contribute to protecting the interests of third-party groups. However, enforcement and domestication of international codes remains a major concern and another hurdle to filling the access to justice gap. Thirdly, it has shown that ISDS is widely utilised and a core feature of international investment agreements since the 1970s. This chapter has shown that despite the legitimacy concerns, international arbitration continues to be utilised in Africa and around the world as the main dispute settlement option in investment treaties. A proposal for an investment court system is advanced in this chapter as the most feasible solution for resolving the access to justice concerns for third party groups. Although it does not permit direct claims by third party groups, it allows the judges to consider public international law issues such as environment and human rights as part of their decision making. It also empowers the court to make enforceable court awards through the well-established New York Convention. This proposal is evaluated next in Chapter 7.

CHAPTER SEVEN: Evaluation of recommendations

7. Introduction

This chapter aims to evaluate the reform proposals put forward in Chapter 6. As explained in Chapter 6, in order to resolve the problem of third-party access to justice, it is imperative that a viable solution that offers them a practical route via Investor State Dispute Settlement (ISDS) is put forward. For the purposes of this, a proposal for a Pan- African Investment Court system is considered to be the most viable solution. However, the proposal has a number of potential limitations which would be explained. In order to achieve the aim of this Chapter, a number of areas are explored. Firstly, the idea of granting third party groups access to ISDS is evaluated from a practical point of view. Secondly, it explores the challenges posed by regulatory chill and how innovative investment treaty making practices can play a significant role in rebalancing international investment agreements in favour of host States. Thirdly, the sustainable development narrative is examined for the purposes of guiding treaty making practices and providing justification for the creation of a new dispute settlement mechanism. Last but not least, the operationality of the Pan African Investment Court is explored and evaluated before reaching a circumspect conclusion.

7.1. The practicalities of granting third party groups access to ISDS

As expounded in Chapter 6, ISDS has been accused of favouring the interests of foreign investors above those of the State and third-party groups affected by their activities. Gus Van-Harten has been at the forefront of this debate, by arguing that the State's consent to international arbitration via the investment treaties translates into an international law responsibility to represent the interests of their people during those proceedings.[871] This is also part of their responsibility as a sovereign State to regulate in favour of their people and represent them in foreign and international courts. While Gus Van-Harten's argument is plausible, it must be conceded that international investment agreements represent a compromise for national governments, resulting in a surrender of their sovereign rights through the ISDS regime. Thus, given that most international investment agreements contain ISDS, States are placed in a position where they are unable to protect their citizens against

[871] G Harten "Investment Treaty Arbitration and its Policy Implications for Capital-Importing States" in D Sanchez-Ancochea and K C Shadlen (eds), "*The Political Economy of Hemispheric Integration: Responding to Globalization in the Americas"* (Palgrave Macmillan, 2008,) p.101-103.

environmental and human rights violations, unless they include specific provisions such as investor obligations, the right to regulate and counterclaims.

It should also be remembered that the international investment regime generally does not support third party access to ISDS, despite the often devastating impact on their environment, as evidenced in Chapter 4. The system also deters host States from taking action or bringing claim in national foras against the foreign investor out of fear that the investor could evoke the FET clause or other substantive protection standard in the treaty.[872] Investors on the other hand, are empowered by the investment treaties to bring a claim against the host State for any violations.[873] These factors have played a major part in the continued denial of access to justice and redress for affected third party groups via the investment regime, as exemplified by the Niger Delta case study in Chapter 4. Some scholars have gone as far as saying that a bargain was reached between the States and investors within the investment agreements, premised on the host state gaining capital in return for protecting the investor.[874] Thus, States willingly surrender their sovereign rights in exchange for investment and the ability to project themselves as an attractive investment destination.[875] This problem is reinforced by the fact foreign investors, particularly in the developing African, south American and Asian countries, have a general distrust over national courts.[876] As evidenced in the case studies, Shell opted to challenge all domestic court decisions and even sought redress at international investment tribunals over allegations of unfair treatment.[877] To investors, the domestic courts lack neutrality and the ability to make independent decisions. Thus, investors view a neutral international tribunal as the safest means of safeguarding their economic interests in the host States.[878]

Investment treaties have two core features that need reform in order to improve access to justice. Firstly, the contents these treaties is determined largely by the bargaining powers of the

[872]Principle 25 of the UN Guiding Principles; D Dagbanja, "The Limitation on Sovereign Regulatory Autonomy and Internationalization of Investment Protection by Treaty: An African Perspective" Journal of African Law (2016) 60, 56, pp.59-62.
[873]BChoudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?" Vanderbilt Journal of Transnational Law (2008) 41 p774.
[874]JSalacuse and NSullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain"Harvard International Law Journal(2005) 46, p.77.
[875] O Garcia-Bolivia, "Defining an ICSID Investment: Why Economic Development should be the Core Element' (2012) p. 11.
[876]S Subedi "*International Investment Law: Reconciling Policy and Principle"* (Hart, 2016) p.46.
[877] TIshikawa, "Counterclaims and the Rule of Law in Investment Arbitration" American Journal of International Law 33, (2019) 113, p.34.
[878]S Subedi "International Investment Law: Reconciling Policy and Principle" (Hart, 2016) p.46.

contracting States, usually by a developed and developing country.[879] This is largely reflected in the substantive protection standards which commonly guarantee investors FET, National Treatment, Most Favoured Nation, full protection and security among other protection standards.[880] They also provide for protection of investment within the minimum standards established under customary international law.[881] On the other hand, investment treaties generally exclude investor obligations, and required to provide that they had a permitted investment under the treaty to qualify for protection under the relevant treaty. It means for there to be meaningful reform, the substantive protection standards must be adhered must be renegotiated for the purposes of strengthening national interests. Secondly, most international investment agreements contain ISDS provisions, which permits investors to bring direct claims via through international arbitration, against the host States for breach of any of the treaty provisions.[882] ISDS was created purposely to depoliticise and create a neutral fora where investment disputes can be heard and decisions enforced quickly and in an effective manner. These disputes take place outside of the national sovereignty of the State, to an international fora where direct access for third party groups is prohibited.[883] The system also aimed to replace the historically unsuitable mechanisms such as diplomatic protection that depended on espousal from the home State as well as the much maligned gunboat diplomacy.[884] Today, most treaty based investment disputes are resolved via international arbitration, and including those entered into through a contractual arrangement or a national legislation.[885] Statistically, over 95 percent of international investment agreements contain ISDS provisions.[886] As a point of clarity, ISDS clauses can also permit mediation and conciliation or other dispute settlement

[879]GKaufmann-Kohler and M Potesta "Can the Mauritius Convention serve as a Model for the Reform of Investor-State Arbitration in connection with the introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap" (UNCITRAL, 2016) p.5.
[880]Article 4 of the United States Model BIT (2004); Article4 of the Nigeria Netherlands BIT (1992) and the Singapore Nigeria BIT (2016) particularly Chap 2.
[881]SFrank, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" Fordham Law Review 1521, (2005) 73 pp.1532 -1534.
[882]G Kaufmann-Kohler and M Potesta "Can the Mauritius Convention serve as a Model for the Reform of Investor-State Arbitration in connection with the introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap" (UNCITRAL, 2016) p.6.
[883]UNCTAD, IIA Issues Notes "Improving Investment Dispute Settlement: UNCTAD Policy Tools" (Nov, 2017) Issue 4.
[884]S Frank "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" Fordham Law Review 1521, (2005) 73 pp.1532 -1534.
[885] N Calamita and E Zelana "The Changing Landscape of Transparency in Investor-State Arbitration: The UNCITRAL Transparency Rules and Mauritius Convention" in C Klausegger and P Klein, *"Austrian Yearbook on International Arbitration 2016"* (2016) pp.270-172.
[886] UNCTAD, "World Investment Report 2018: Investment and New Industrial Policies" (UNCTAD, 2018) p.106-108.

methods including access to national and international courts, exercised by investors to resolve disputes against the State, with the exclusion of third party groups.[887]

The United Kingdom Nigeria provides that, "investments of nationals or companies of each Contracting Party shall at all times accorded fair and equitable treatment and shall enjoy full protection and security in territory of the other Contracting Party. Neither Contracting Party shall in any way by unreasonable or discriminatory measures the management, maintenance enjoyment or disposal of investment in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."[888]These substantive provisions do not provide corresponding obligations on the host State.[889] This is coupled by the fact there is no requirement for foreign investors to observe human rights, despite the danger of their investment activities impacting on local communities as evidenced in Chapter 2. On the other hand, investment treaties have been accused of limiting national policy space and denying the State the right to regulate in favour of their people, owing to fear of being sued via international arbitration bodies.[890] These international tribunals are also very inconsistent in their application and interpretation of treaty standards. This can be exemplified by the Czech Republic BV v. Czech Republic,[891] which was brought pursuant to the Czech-Netherlands BIT and Lauder v. Czech Republic under the Czech-United States BIT.[892] These cases are famous for tribunals reaching conflicting decisions despite being based on the similar facts.[893] Thus, ISDS has a number of procedural flaws that have contributed to a general distrust and legitimacy crisis.[894]Other concerns include the absence of sufficient guarantee of arbitrator independence or safeguard on the impartiality of arbitrators.[895] There is

[887] UNCTAD "World Investment Report 2020: International Production Beyond the Pandemic"(UNCTAD, 2020) p.110.
[888]Article 2(2); A Newcombe and L Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009) p.5.
[889]The Netherlands Uganda BIT (1970); Zimbabwe United Kingdom BIT (1995); Liberia GermanyBIT (1961); United Kingdom Nigeria BIT (1990)
[890] Article 1 of the Ethiopia Germany BIT (1964) and Article 2(2) of the Zimbabwe United Kingdom BIT (1995); UNCTAD "Investment Dispute Settlement Navigator" p.13.
[891] Ad Hoc UNCITRAL Arbitration Rules, partial award (13 September, 2001); IIC 62 (2003), final award (14 March 2003).
[892] Ad Hoc UNCITRAL Arbitration Rules, Final Award, (3 September, 2001).
[893]G Kaufmann-Kohler and M Potesta "Can the Mauritius Convention serve as a Model for the Reform of Investor-State Arbitration in connection with the introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap" (UNCITRAL, 2016) p.13; JHueckel, "Rebalancing Legitimacy and Sovereignty in International Investment Agreements" Emory Law Journal, (2012) 61(3) pp.602-605.
[894]G Kaufmann-Kohler and M Potesta "Can the Mauritius Convention serve as a Model for the Reform of Investor-State Arbitration in connection with the introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap" (UNCITRAL, 2016) p.6.
[895] G Harten, "Investment Treaty Arbitration and Public Law" (OUP, 2007) pp.166-176;

also a perception that arbitrators are more interested in ensuring that investors are encouraged to bring cases, with higher chances of success, resulting in more jobs for them[896] and the rising costs administrating cases.[897] They have also been accused of expansive interpretation of investment treaties, resulting in questions over the extent of the powers granted to arbitrators who are responsible for making a determination on government policies.[898]

These concerns have resulted in the continued characterisation of investor-State arbitration as investor-centric,[899] resulting in legitimacy concerns over its continued operationality as a medium for resolving investment disputes.[900] These concerns are further compounded by the fact international investment arbitration does not over scope for appeal on the legality of the decision beyond procedural impropriety. The absence of a fully-fledged appeals body which further enhances the powers of the arbitrators.[901] Given that the majority of cases have been brought against developing countries, majorly in extraction industries including Oil and Gas.[902] The compensation or award is usually in hundreds of millions or billions of dollars, with implications for the social-economic wellbeing of the host State and in some cases, leaving them in a crippled by the financial burden.[903] For example, Ecuador was fined over 1 billion dollars by Occidental Petroleum Corporation, which was higher than the country's annual health budget and half of the annual education budget.[904] Despite the mounting cases, there is a dearth of empirical evidence linking investment treaties to FDI.[905] Thus, improving third

[896] GHarten, "Perceived Bias in Investment Treaty Arbitration"in CBalchin, L Kyo-Hwa Chung, A Kaushal and M Waibel*, "*The Backlash Against Investment Arbitration: Perceptions and Reality" *(*Kluwer Law International, 2010) p.444.

[897] C Garcia, "All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration" Florida Journal of International Law (2004) 16(2), p.355.

[898] A Newcombe and LParadell, "*Law and Practice of Investment Treaties: Standards of Treatment"* (Kluwer Law International, 2009) p.65.

[899]UNCITRAL, "Settlement of Commercial Disputes: Revision of UNCITRAL Arbitration Rules" (June 2008) 41st Session of the United Nations, paragraphs 7-10.

[900]G Kaufmann-Kohler and M Potesta "Can the Mauritius Convention serve as a Model for the Reform of Investor-State Arbitration in connection with the introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap" (UNCITRAL, 2016) p.5.

[901] T Cheng, "Precedent and Control in Investment Treaty Arbitration" Fordham International Law Journal (2007) 1014 p.1017; G Kaufmann-Kohler and M Potesta "Can the Mauritius Convention serve as a Model for the Reform of Investor State Arbitration in connection with the introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap" (UNCITRAL, 2016), p.5.

[902] IIA Issues Note, "Factsheet on Investor-State Dispute Settlement Cases in 2018"(UNCTAD, Issue 2, 2019) p.1.

[903] G Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" Arbitration International (2007) 23(3) p.357.

[904] Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11 (Award). Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries? World Development (2005) 33(10) p.1567;

[905]M Driemeier, "Do Bilateral Investment Treaties attract FDI? Only a Bit and they could Bite" World Bank Policy Research Paper, (World Bank, 2003) P.9; UNCTAD, 'Trade and Development Report' (UNCTAD, 2014) 155-161, P.160

party access to justice would require an overhaul of the substantive investment standards and the dispute settlement provisions within investment treaties. This should also be accompanied with a change in negotiation culture to recognise that international investment policy has implications for parties beyond the Contracting States and investors, to include investors. The next sub section examines how regulatory chill could hinder efforts to change the investment treaty negotiation culture.

7.2. Regulatory Chill and third party interests

Another important factor that affects efforts to reform the international investment regime relates to regulatory chill, which deters innovative treaty making practices. For example, Article 3(1) of the Nigeria Netherlands BIT states that: the host State "shall not impair by unreasonable or discriminatory measures, operation, maintenance, management, use, enjoyment or disposal" of investment by the foreign investors.[906] Similarly, in Tecmed, it was observed that the State should not "affect the basic expectations," contained in the investment agreements in favour of the foreign investor.[907] This is essential in terms of safeguarding investor expectations and ensuring that rules are respected in order to advance the interests of the foreign investors and the State.[908]Similarly, in Rumeli, the tribunal acknowledged that the State "must respect the investor's reasonable and legitimate expectations" and any other actions that might affect the legitimate interests of the investors.[909] Equally in *Saluka*, the tribunal held that FET requires the host State to treat investment in accordance to the standards of fairness and equity…in compliance with the standards of reasonableness and non-discrimination.[910] The tribunal added that such standards represent principles that should not be varied or reduced to the lowest denominator as that could harm the stratosphere of investor expectations.[911]

In African countries, some of which have relatively low GDPs, these trends have the potential to severely impact the public purse of defendant States and, by extension, citizens of those countries.[912] In response, many African States are revisiting the investment treaties they have

[906]Article 3(1) Nigeria Netherlands BIT; Article 4(1) Spain- Mexico BIT. Tecmed v. Mexico ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, paragraphs 153-154
[907]T*ecmed v. Mexico ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, paragraph 154.*
[908]T*ecmed v. Mexico ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, paragraphs 153-154*
[909]Paragraph 235, *Eureko v Poland*, Partial Award of 15 August 2005.Paragraph 112*MTD v. Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, 9 September 2008;paragraphs 296-98 *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award of 6 February 2007; paragraph 371 *Azurix v Argentina*, ICSID Case No. ARB/01/12, Award of 14 July 2006.
[910]*Saluka Investments BV v The Czech Republic*, Partial Award, IIC210 (2006), 17 March 2006, (PCA) and *Saluka Investments BV v The Czech Republic* Partial Award, IIC210 (2006), 17 March 2006(PCA).
[911] SSubedi, "*International Investment Law: Reconciling Policy and Principle"* (Hart, 2016) p.178..
[912] UNCTAD, World Investment Report 2022, United Nations, New York, p.4.

entered into. Since 2013, at least 29 different African states have been involved as Respondents in 98 cases brought under Bilateral Investment Treaties (BITs) and Multilateral Investment Treaties (MITs), whereas African states were involved in just 51 cases over the previous 20 year period between 1993 and 2012.[913] As of February 2022, 149 cases have been brought against African States. Indeed, in 2021 alone, there were 13 claims made against African States nearly 20 per cent of the total number of new cases registered with the International Centre for the Settlement of Investment Disputes (ICSID).[914] Critics of the ISDS system point out that many of the first-generation BITs were too much in favour of investors. The Nigeria United Kingdom BIT is a typical example of a first-generation BIT that should be renegotiated or phased out. The Treaty accords investors traditional protections against measures such as expropriation and access to international dispute settlement bodies such as the ICSID. There are no corresponding obligations on investors. The practical reality of these investment treaties has been that investors from more economically developed countries have benefitted in unequal measure when compared to investors from less economically developed countries. The investment flows have largely been in one direction – from more developed countries into developing countries who have ambitious plans to improve their economies. The broad interpretation of investment treaties by the tribunals and the rising number of ISDS cases has contributed to a fear that national policies aimed at advancing national interests may be targeted by the foreign investors and sued.

This has been termed "regulatory chill", essentially implying State fear to regulate.[915] Regulatory chill has been blamed for erosion of democratic values and constitutional rights, and the subordination of national responsibilities in favour of foreign investors.[916] In response, many countries have started the process of imbedding sustainable development initiatives and the right to regulate in a bid to safeguard the interests of third party groups as well as other wider national interests including labour and environment. For example, the Nigeria Model BIT states under Article 25 that investors, "should make the maximum feasible contributions to the sustainable development of the host State and local communities." Similarly, the Model BIT limits FET by putting the "obligation not to deny justice in criminal, civil or administrative

[913] UNCTAD, World Investment Report 2021, United Nations, New York, p.5.
[914] UNCTAD, World Investment Report 2021, United Nations, New York, p.4.
[915] J Kelsey, D Schneiderman and G Harten, "Phase 2 of the UNCITRAL ISDS Review: Why other matters really matter" *Investment Treaty News* (2019) p1.
[916] J Kelsey, D Schneiderman and G Harten, "Phase 2 of the UNCITRAL ISDS Review: Why other matters really matter" Investment Treaty News (2019) p1.

adjudicatory proceedings".[917] It also limits security to police protection pursuant to customary international law.[918]

Indeed, the Nigeria Morocco BIT provides a good case study. Following oil spills and massive environmental degradation in the Niger Delta and ISDS cases brought against Nigeria, the Nigerian government started considering the quality and not just quantity of investment.[919] Nigeria conducted a review of its model BIT to balance investor rights and obligations, with reference the country's sustainable development goals and protect the right to regulate.[920] The new model was adopted in 2016 and was the basis for the Nigeria–Morocco BIT signed in the same year, described as one of the most innovative and balanced BITs ever concluded.[921] What does the preamble stipulate? Recognising the important contribution investment can make to the sustainable development of the state parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, furtherance of human rights and development; seeking an overall balance of the rights and obligations among the State Parties, the investors, and the investments Under the BIT, investment means an enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with law of the Party who is the Host State taken together with the assets of the enterprise which contribute sustainable development of that Party and has the characteristics of an investment involving a commitment of capital or other similar resources, pending profit, risk-taking and certain duration.

The Model BIT also covers sustainable development related rights and duties of Hosts. Article 13 states that" Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters and to make decisions regarding allocation of resources to enforcement with respect to environmental matters determined to have higher priorities." Similarly, Article15(2) recognises that it is inappropriate to encourage investment by weakening

[917]Article 24 of the Nigerian Model BIT (2015).
[918]Articles 7(1) and7(2), Nigerian Model BIT 2015.
[919] Durosaro, W. O. (2016). Bilateral Investment Treaties and Its Implications on Health and Environmental Rights Protection: A Case of the Niger Delta Oil and Gas Sector. The University of Manchester (United Kingdom).
[920] Oleghe, F. O., & Oliyide, O. (2021). Developing Human Right Norms for Investor-State Arbitration: The Needed Panacea for Environmental Injustice. JL Pol'y & Globalization, 111, 54.
[921] Ejims, O. (2019). The 2016 Morocco–Nigeria Bilateral Investment Treaty: More practical reality in providing a balanced investment treaty?. ICSID Review-Foreign Investment Law Journal, 34(1), 62-84; Akinkugbe, O. D. (2021). Africanization and the Reform of International Investment Law. Case W. Res. J. Int'l L., 53, 7.

or reducing the protection accorded in domestic labour laws. Parties recognise that it is inappropriate to encourage investment by relaxing domestic labour, public health or safety. Thus, a party shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social situation, and shall continue to improve them.[922]

For the purposes of safeguarding the State's power to regulate in favour of their people, Article 23(1) provides the: "Right of State to Regulate- a Host State has the right to take regulatory measures to ensure that development in its territory is consistent with goals and principles of sustainable development, and with other legitimate social & economic policy objectives." Furthermore, the BIT contains investor obligations.[923] As per Article 14 Duty to conduct environmental impact assessment as per Host State's laws, & social impact assessment (based on jointly agreed standards) for a potential investment. Investors, their investment & host state authorities shall apply the precautionary principle to their EIA & to decisions taken in relation to a proposed investment, including any necessary mitigation or alternative approaches of the precautionary principle by investors shall be described in the EIA they do. Similarly, Article 17 contains a duty to refrain from corrupt practices prior to the establishment or afterwards, by offering, promising or giving any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relations to an investment.

The Model BIT also includes an obligation on investors to carry out a social and environment impact assessment at varying stages of the investment.[924] Article 24 imposes a Corporate Social Responsibility obligations in the following terms: "In addition to the obligation to comply with all applicable laws and regulations of the Host State and the obligations in this Agreement, and in accordance with the size,

[922] Odumosu-Ayanu, I. T. (2023). Local Communities, Indigenous Peoples, and Reform/Redefinition of International Investment Law. The Journal of World Investment & Trade, 24(4-5), 792-837.
[923] Perrone, N. M. (2022). Bridging the gap between foreign investor rights and obligations: towards reimagining the international law on foreign investment. Business and Human Rights Journal, 7(3), 375-396.
[924] Article 14, Nigerian Model BIT 2015.

capacities and nature of an investments, and taking into account the development plans and priorities of the Host State and the Sustainable Development Goals of the UN, investors and their investments should make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices." This also includes the expectation to respect human rights,[925]as well as corporate social responsibility.[926] This Model is expected to guide future investment treaties and replicated in the Nigeria - Morocco investment treaty in 2016.[927] However, some scholars argue that this might place foreign investors in a wholly unfair position given that through the right the regulate and extensive environmental requirements, States are placed in a position where they have uncapped powers against foreign investors.[928] This is compounded by the fact it is the contracting States that determine the terms of the investment treaty, with the liberty to insert any sanctions or enforcement mechanisms against the investor.[929] The investor is excluded from this contracting process,[930] which means providing them access to ISDS can be viewed as a compromise and a means of protecting themselves in a purely state-state agreement.[931] It leaves the investors in a position where they are unable to guarantee that their rights would be respected without access to ISDS. This is reinforced by the fact national governments have a grip on local dispute settlement mechanism and are therefore in a position to influence the outcome of proceedings, particularly in the developing countries.[932] This is the reason why, in Chapter 1, I stressed that the findings and solutions presented in this thesis have wider implications for developing countries as compared to the developed, mostly capital exporting

[925] Articles 14 and 18, Nigerian Model BIT 2015; C Nyombi, T Mortimer and N Ramsundar, "The Morocco-Nigeria BIT: Towards a New Generation of Intra African BITs" International Company and Commercial Law Review (2018) 69, 29(2) p.71
[926] Article 20 of the Nigerian Model BIT 2015.
[927] Morocco-Nigeria BIT; Nigeria Singapore BIT; see C Nyombi, T Mortimer and N Ramsundar, "The Morocco-Nigeria BIT: Towards a New Generation of Intra African BITs" International Company and Commercial Law Review (2018) 69, 29(2) p.71; T Gazzini, "Nigeria and Morocco Move Towards a New Generation of Bilateral Investment Treaties" (May 2017);
[928] C Brower and S Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?" (Chicago Journal of International Law 471, 2009) 9(2) p.482.
[929] C Brower and S Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?" (Chicago Journal of International Law 471, 2009) 9(2) p.476–78.
[930] C Brower and S Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?" (Chicago Journal of International Law 471, 2009) 9(2) p.482.
[931] C Brower and S Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?" (Chicago Journal of International Law 471, 2009) 9(2) p.482.
[932] A Bjorklund, "The Role of Counterclaims in Rebalancing Investment Law" Lewis and Clarke Review 461, (2013) 17(2) p.476-479.

countries.[933] This, ISDS is seen as mediating force aimed at serving the interests of foreign investors who would otherwise be reluctant to invest in the their money abroad due to fears over expropriation and other unfair practices by the host State.[934] This provides support for my proposal for a court system, where the substantive protection standards are preserved alongside a court system that is viewed wholly neutral while preserving the host States' interests by ensuring that judges consider public international law when interpreting treaties and making awards. This means the impact on health, human rights and environment, within the regional, in this case African context, is considered.

In relation to dispute resolution, Article 20 lays mechanisms for handling Investor's civil liability. However, as evidenced in Chapter 3 and 4, national and foreign courts have provided ineffective in handing third party claims due to issues around delays, political interference and so on. The Treaty also provides per Article 26(1), before initiating an eventual arbitration procedure, "any dispute between the Parties shall be accessed through consultations & negotiations by the Joint Committee within a period of 90 days."Even per Art.26(5), if the dispute cannot be resolved within 6 months from the date of the written request for consultations & negotiations, the investor may, after the exhaustion of local remedies resort to international arbitration. Third party groups' interests would then be at the mercy of the host State to initiate a counterclaim, while the tribunal would be wholly unlikely to consider the public international law concerns, such as environmental and human rights in making their award. This is the underlying reason for seeking to create an African investment court as it offers the opportunity to make decisions within the African context and that reflect African realities, and it is a model that can be replicated in other regions.

The next subsection further evaluates the proposal for an African Investment Court.

7.3. The jurisdictional, operational and structural requirements for an African Investment Court

The jurisdictional, structural and logistical aspects of my proposed African Investment Court are examined next. Dispute is one of the central pillars in investment protection. Why have Provisions on DS been at the centre of controversy? They have exposed many developing

[933] S Schwebel, "In Defense of Bilateral Investment Treaties" Columbia FDI Perspectives (Nov 2014) pp.87-190.
[934] A Bjorklund, "The Role of Counterclaims in Rebalancing Investment Law" Lewis and Clarke Review 461, (2013) 17(2) p.476-479.

countries to heavy penalties by Arbitrators for breaching investment agreements.[935] The tribunals are made up of independent arbitrators that are not bound to follow a unified system. When investors brings a claim against a host state the arbitrators find in favour of the investors without genuinely considering the host state's interest. Over the years, this system of investment related dispute resolution has been criticised as being are drafted in favour of investors' interests. Researchers have argued that the current approach leads to a systemic bias in favour of investor rights over competing public interests due to the fact that professional arbitrators are offered perverse incentives to encourage investor claims. African BITs generally incorporate a minimum time frame providing for duration of time negotiations must take before aggrieved foreign investors can resort to international arbitration. What required time frame is provided for negotiations? Varies but typically ranges between 3 to 6 months. The vast majority of African BITs require the lapse of 6 months before resorting to international arbitration. But, a number of African BITs do not contain any time limitations. What is the implication of this? For treaties containing no such 'cooling-off' provision, foreign investors have the discretion to directly institute international arbitration without having to adhere to any waiting period. Some BITs offer foreign investors the option of either pursuing claims through local courts or international tribunals upon the lapse of the cooling-off period.

To this end, each Contracting Party agrees in advance and irrevocably to the settlement of any dispute by this type of arbitration. Such consent implies that both Parties waive the right to demand that all domestic administrative or judiciary remedies be exhausted. The SADC Model BIT recommends the exclusion of investor-State dispute settlement in its entirety, favouring instead the inclusion of an intra-State dispute settlement mechanism, in which Contracting Parties claim damages on behalf of investors after the investors have exhausted local remedies.

7.3.1. The issue of jurisdiction

Jurisdictional provisions are one of the most important provisions because they determine who might bring an investment dispute before the African Investment Court. State consent to the jurisdiction of the African Investment Court could possibly be achieved through a combination of (1) accession to the instrument establishing the standing mechanism, in this case the Protocol on Sustainable Investment and (2) a specific notification ("opt-in") that a particular existing or future agreement would be subject to the jurisdiction of the African Investment Court. The notion of accession or transferring jurisdiction from one body to another is well established in

[935] M Sornarajah, "The International Law on Foreign Investment" (CUP, 2017) p.95.

international law.[936] This means the scope of jurisdiction of the African Investment Court and the substantive rules that it would apply would be determined by the IIAs or underlying treaties. It would also mean a reference could be added to the agreements concluded after the establishment of the African Investment Court conferring jurisdiction on the standing mechanism or it could be added later through a renegotiation of the agreement.[937] The opt in mechanism would allow contracting parties to an investment agreement to become parties to the instrument establishing the standing court through a notification concerning their agreement to consent to its jurisdiction, thereby empowering the African Investment Court to decide disputes arising under that agreement. This would essentially enable the extension of the court's jurisdiction to current and future extra-African investment agreements, with the contracting parties' consent. However, maintaining all the pre-existing intra-African investment agreements would defeat the goal of harmonisation under the AfCFTA resulting in multiple and overlapping investment protection regimes. Therefore, the AfCFTA Member States would have to consider whether African Investment Court would have jurisdiction in case of divergence with pre-existing intra-African BITs, if these are not separately terminated.

7.3.2. How would it be structured?

The African Investment Court would have two levels of adjudication consisting of a first instance tribunal with a mandate to hear disputes, conduct fact finding and then apply the applicable law to the facts, similar to arbitral tribunals. The first instance tribunal would also handle cases remanded back to it by the appellate tribunal where the appellate tribunal could not dispose of the case.[938] The second level would be the appellate tribunal. This is important because States have long complained of the finality of arbitration decisions without any higher-level reconsideration.[939] An appeals process using tenured judges should diminish this concern and lead to greater consistency.[940] Grounds for appeal would be error of law, including serious procedural shortcomings or manifest errors in the appreciation of the facts but not a de novo

[936] See Article 36(5) of the Statute of the International Court of Justice for the declarations submitting to the jurisdiction of the Permanent Court of International Justice.
[937]S Schwebel, "In Defense of Bilateral Investment Treaties" Columbia FDI Perspectives (Nov 2014) pp.87-190.
[938]JPauwelyn, "At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, how it emerged and how it can be Reformed" (January, 2014)p.11.
[939] See generally, William H. Knull, III & Noah D. Rubins (2000). Betting The Farm on International Arbitration: Is it Time to Offer an Appeal Option? 11 Am. Rev. Int'l Arb. 531; Laurie Kratky Doré (2006), Public Courts Versus Private Justice: It's Time To Let Some Sunshine in on Alternative Dispute Resolution 81 CHIKLR 463.
[940]J Pauwelyn, "At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, how it emerged and how it can be Reformed" (January, 2014)p.11.

review of the facts. Both the first instance tribunal and the appellate tribunal would have their own rules of procedure.

7.3.3. How would the adjudicators be appointed?

Adjudicators at the African Investment Court would be nominated by the contracting States and required to apply directly for appointment.[941] However, consideration should be given to allowing non-nationals of contracting States to be appointed, especially given the inbuilt opt in mechanism.[942] They would be subject to a vote requiring a large majority of votes of the contracting States. This would lead to the availability of a pool of adjudicators with the broad knowledge and experience foreign investors expect of a tribunal of this stature. The persons nominated should be independent. A robust and transparent appointment process would therefore be necessary to ensure the independence and impartiality of the adjudicators. Borrowing from the World Trade Organisation Working Procedures, adjudicators could be appointed to divisions of the African Investment Court on a randomised basis to ensure that the disputing parties would not be in a position to know in advance who will hear their case.[943] Inspiration could also be drawn from, *inter alia*, the Caribbean Court of Justice, which has a screening mechanism to ensure that the adjudicators appointed do in fact meet the necessary standard of judicial independence.[944]

Given that the power to appoint adjudicators to the standing mechanism resides with the Member States, investors may view the mechanism as in favour of State parties thereby leading to its underutilisation. To mitigate this, Member States would be expected to take a balanced and longer-term perspective by appointing objective adjudicators who would internalise their national interests as potential respondents in investment disputes but also ensuring an adequate level of protection for their investors.[945] Adjudicator independence from their national

[941] The number of adjudicators should be based on projections of the workload of the AIC.

[942]J Pauwelyn, "At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, how it emerged and how it can be Reformed" (January, 2014)p.11.

[943] This idea draws on Rule 6(2) of the Working procedures for appellate review of the Appellate Body of the WTO, available at https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm [accessed 03 August 2021].

[944] The Agreement Establishing the Caribbean Supreme Court, Article V1. The bench is comprised of judges who are appointed by an independent Commission. See generally, Kate Malleson (2009). "Promoting Judicial Independence in the International Courts: Lessons from the Caribbean" The International and Comparative Law Quarterly Volume 58 (3) pp.671-687; Adrian Saunders (2007)' The Caribbean Court of Justice and the Legal Profession: Promoting a Caribbean Jurisprudence, Commonwealth Law Bulletin, Vol 33 (4), p. 682.

[945] See Anthea Roberts, Would a Multilateral Investment Court be Biased? Shifting To a Treaty Party Framework of Analysis, EJIL: Talk!, 27 April 2017, available at https://www.ejiltalk.org/would-a-multilateral-investment-court-be-biased-shifting-to-a-treaty-party-framework-of-analysis/ [accessed 19 July 2021] and Anthea Roberts (2010). Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States" American Journal of International Law Volume 104 (4), pp. 179, 180, 182–195.

governments would be ensured through a long-term non-renewable term of office.[946] This could consist of nine year terms, for example, combined with a robust screening and appointment process. The adjudicators should not have any other appointments, in particular, other remunerated or political activities and they would be paid salaries comparable to those paid to adjudicators in other international courts.[947] To this end, adjudicators would be required to disclose past interests, relationships or matters that could affect their independence or impartiality.[948] Even after the end of their term, they would remain subject to obligations to ensure that their independence and impartiality in office are not called into question.

On the question of qualifications, it is important to recognise that there are many African nationals, appointment to the highest judicial offices or are jurisconsults of recognised competence in international law.[949] These could, for example, be senior or recently retired judges from international tribunals or domestic supreme courts. Therefore, it is suggested that the African Investment Court uses comparable qualification requirements similar to other international courts.

Furthermore, mechanisms could also be used to ensure both geographical and gender diversity of the adjudicators. Article 36(8) of the Rome Statute of the International Criminal Court provides an example of the types of rules which could be set for adjudicators in a permanent body. The Assembly of States Parties, that elects the International Criminal Court (ICC) judges, is required to "take into account the need for the representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges."[950] For the election of ICC judges, regional and gender voting requirements have been established by requiring at least six judges to be female and at least six male. Each regional group of the United Nations has at least two judges.[951] If a regional group has more than 16 State parties, this leads to a minimum voting requirement of three judges from the regional

[946]J Pauwelyn, "At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, how it emerged and how it can be Reformed" (January, 2014) p.49-50.
[947]J Pauwelyn, "At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, how it emerged and how it can be Reformed" (January, 2014)p.49-52.
[948]J Pauwelyn, "At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, how it emerged and how it can be Reformed" (January, 2014)p.49.
[949] See for example, Article 2 of the Statute of the International Court of Justice.
[950] Article 36(4)(8)(a)
[951]United Nations regional Groups, available at https://www.un.org/dgacm/en/content/regional-groups [accessed 19 July 2021].

group.[952] The ICC's mechanism to ensuring geographical and gender diversity provides a good example and one that ought to be considered in the African Investment Court architecture.

7.3.4. How would the decisions be enforced?

Effective enforcement of awards of the African Investment Court is vital. There would be no need for review awards at domestic level or through international tribunals given that the African Investment Court would feature an appeal mechanism. Thus, the function of annulment or set-aside currently exercised by national courts and ICSID annulment committees would be exercised through the review process provided by the appeal mechanism. It is suggested that the instrument establishing the African Investment Court should create its own enforcement regime, which would not provide for review at domestic level. Therefore, enforcement of the decisions of the African Investment Court in the territory of a State that would have consented to its founding Charter could be achieved by providing in the Charter a special enforcement regime. For instance, it could require contracting States to recognise a decision of the African Investment court as binding and enforce the obligations arising as if it were a final judgment of its national courts. It means states not party to the court's Charter would not be bound by its enforcement regime. In such cases, without a uniform regime for enforcement of judgments of international courts,[953] enforceability of decisions by the African Investment Court would largely depend on the New York Convention.[954]

The African Investment Court's awards could be capable of enforcement pursuant to the New York Convention as awards made by "permanent arbitral bodies"[955] under which the State would retain some control over the decision through the grounds for non-recognition and non-enforcement under Article 5 of the New York Convention.[956] Given the hybrid nature of the

[952] See Resolution of the Assembly of the State Parties, Procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court (ICC-ASP/3/Res.6), paragraph. 20(b) and (c), available at: https://asp.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/Resolution-ElectionJudges-ENG.pdf [accessed 24 July 2021].

[953] As of August 2021, there is no African State that is party to either the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters or the 2005 Hague Convention on Choice of Court Agreements which came into force on 1 October 2015.

[954] See Gabrielle Kaufmann-Kohler and Michele Potestà (2016). Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and Roadmap, CIDS Report, paragraph 143, available at http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf [accessed 18 July 2021].

[955] See Article 1(2) of the New York Convention.

[956]See CIDS Report, paragraph 140.

proposed African Investment Court, blending both judicial and arbitral features, its awards could be regarded as those of a "permanent arbitral body".[957]

To ensure finality, it might be necessary to include mechanisms to prevent the disputing parties activating set-aside procedures.[958] Article 3.22 of the EU-Singapore Investment Protection Agreement provides a good example. It states that "final awards issued pursuant to this Section by the Tribunal shall be binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy," and reinforced by Article 3.7(1)(f)(iii) which requires a declaration that the claimant "will not seek to appeal, review, set aside, annul, revise or initiate any other similar procedure before an international or domestic court or tribunal, as regards an award pursuant to this Section." Therefore, recognition of the African Investment Court as a permanent arbitral body would be indispensable to the success of its enforcement regime.

A forum located on the African continent with knowledge and experience of the local context within which disputes arise will be crucial in gaining the support of African countries. To foster accessibility, the African Union could create various satellite courts of the African Investment Court, allowing cases to be heard in a mutually agreed upon, convenient location for the parties. At the same time, there should be one primary seat where the permanent staff and judges of the court are located on a regular basis. Thus, satellite offices will be essential in ensuring equitability and access potentially reducing costs for African governments.

7.4. Summary

This chapter has evaluated the African Investment Court proposal advanced as a solution to the problem of third party right of access to ISDS. This chapter started by exploring a number of bottlenecks that hindered progressive reform in this area. These include power dynamics in the treaty negotiation process. The capital exporting countries, normally from developed Western countries, tend to dictate these contractual arrangements culminating in the continued conclusion of investment treaties that offer limited protection to national interests while preserving and protecting foreign investors' interests. It is proposed in this chapter that in order to rectify this position, countries must embrace the emerging sustainable development agenda, as reflected the Morocco-Nigeria BIT and other second generation investment treaties from

[957] Awards by the Iran-US Claims Tribunal have been regarded as being enforceable under the New York Convention. See CIDS Report, pp. 56–57.
[958] See for example CETA Article 8.28(9)(b)) and EU-Viet Nam Investment Protection Agreement, Articles 3.36(3)(b) and 3.57(1)(b).

around the world. It has been shown that this BIT contains key features such as obligations on foreign investors to respect the environment and human rights. The inclusion of such obligations provides the necessary cause of action that would enable States to utilise mechanisms such as counterclaims. The chapter has also shown that the sustainable development agenda requires a dispute settlement mechanism that would help to deter regulatory chill, by offering a balanced approach to interpreting treaty standards in favour of the investor and host States. It has been shown, particularly in Chapters 2 and 3, that the prevailing ISDS arbitration-based system is currently facing a legitimacy crisis. This crisis in a result of factors such as mounting ISDS cases particularly against developing countries, the sheer number of first-generation BITs that offer one-sided protection, the reluctance of arbitration tribunals to infuse public international law standards in relation to human rights and environment when rendering awards, and the supra-national nature of arbitration bodies staffed with unelected, private arbitrators that are empowered to make judgement over national policy decisions. The aforementioned concerns have led to my proposal for an African Investment Court that offers a hybrid of arbitration and a court system, staffed with judges rather than arbitrators and with the mandate to consider public international law standards within the African context. This in my view, offers a better alternative, albeit for African countries.

CHAPTER EIGHT: General conclusion and future outlook

8. Introduction

This thesis set out to interrogate the idea of enabling third party groups access to ISDS given the prevailing challenges of accessing justice through national, foreign and international courts. The thesis began from the conceptual and theoretical, by providing a rationale for undertaking this research, the gap in literature and the challenges faced by third party groups, then it moved to the practicalities of this problem by providing case studies and interrogating as well as evaluating potential solutions. This thesis therefore provides evidence and justification for integration of the concept of third party rights into the ISDS system in order to improve their access to justice. The thesis goes further and proposes an African Investment Court system. The African Investment Court has been put forward in this thesis as the most practical solution that would enable a rebalancing of investment interests, including the interests of the third party groups.

The purpose of this Chapter is to provide concluding remarks on the quest to recognise third party groups as a key stakeholder in the international investment law regime and the hurdles facing existing mechanisms. The Chapter is divided into four subsections. Subsection 8.1 explains the rationale and research problem that motivated a four year study on third party access to justice (Chapters 1 and 2). Subsection 8.2 explains how I was able to evidence the research problem (Chapter 3 and 4). A case study of the Niger Delta communities was carried out in Chapter 4to outline the environmental, human rights and social-economic cost of oil pollution and the challenges associated with accessing justice in national, regional and international courts. The third subsection, 8.3, explains the potential solutions by examining the possibility of reforming existing mechanisms and introduction a new body, the African Investment Court with the jurisdictional authority over intra- African investment treaties with a opt in option for third States (Chapters 5 and 6). Subsection 8.4, provides an overview of the contribution to literature and scope for future research.

8.1. The research rationale

This thesis set out to inform the UNCITRAL Working Group III's efforts to reform ISDS by interrogating the extent to which third party groups have been recognised in ISDS and the winder international investment regime. This rationale has been provided in Chapters 1 and 2, with evidence to support the introduction of stronger protection for third party groups due to increasing empirical evidence showing the impact on their health, environment and the broader

human rights. The chapter has showed that there is concern, as highlighted in the May 2023 Bayelsa State Report, that third party groups are not protected in comparable ways to foreign investors. At beginning of this research, the focus was on undertaking an inquiry into the workings of the dispute settlement system, to determine whether multilateral reform is needed in order to embed the concept of "third party" in ISDS. The sustainable development goals were considered, interpreted and applied in view of achieving coherence between investment policies and environmental commitments. Given that the rationale easily is discernible from the mounting cases of environmental degradation around the world, as evidenced by the case studies on the Niger Delta in chapter 4, the main aim of the thesis was to explore the scope of strengthening the rights of intervention for these groups in ISDS. However, the concept of third party groups needed to be expounded and qualified. Chapter 2 examined the meaning of third party groups and provided justification for seeking a solution within international investment law to ensure adequate redress for human rights and environmental violations caused by foreign investors. The Chapter found that third party groups are plentiful, including local communities and even local business entities.

The subsequent Chapters further offered support to this rationale. They found that third party groups are generally excluded from ISDS owing to historical factors as evidenced in the Havana Charter as well as the Multilateral Agreement on Investment, characterised by unwillingness for development, capital exporting States, to agree to be subjected to a blanket approach to investment regulation. These countries preferred to negotiate investment treaties at a bilateral level thereby placing them in a position where they are able to dominate or exert their influence on the contents of the agreement, particularly when negotiating with developing, newly independent, capital importing countries. This has culminated in an investment regime that is premised on protecting foreign economic interests without alignment to national interests. This misalignment, as evidenced from the contents of the first generation treaties, has contributed to the creation of investment treaties without corresponding obligations for foreign investors. In essence, the majority of investment treaties today do not contain obligations for foreign investors to respect the environment and human rights.

However, since the early 2000s, as evidenced in Chapters 2 and 3, the tide has started to change. The concept of sustainable development has permeated international economic policy, motivated by a number of factors, including climate change. As indicated in Chapter 1, the concept of sustainable development has been captured by the UN Millennium Development Goals, with the goal of ensuring that humanity is uplifted from poverty, disease and hunger

without damaging the environment and the social-economic, cultural fabrics of global communities. Indeed, this is the basis upon which the UNCITRAL Working Group III coined the various stakeholder groups affected by the operations of multinational corporations as third-party groups, to capture the broadness of the impact.

Therefore, the research problem this thesis set out to address is third party exclusion from the international investment regime. The reason for the focus on ISDS, and particularly, the international arbitration system that is commonly attributed to ISDS, is largely down to three factors. Firstly, ISDS offers investors an efficient and fast avenue to sue States for breach of treaty standards. However, for third party groups, the avenues available at national, regional and international law fail to guarantee accessibility due to jurisdictional limitations and speed, with cases often taking decades to reach a suitable conclusion. Secondly, while third party groups are excluded from the investment agreement, the investors are included and have a right to arbitrate without privity. This has left a sour taste in the mouth of third-party groups. Indeed, this reasoning contributed to the increased inclusion of counterclaim provisions in investment treaties. However, despite their inclusion, they are generally underutilized owing to a number of inherent problem; largely the over reliance on the investors to bring an initial claim to counter and the requirement to include investor obligations in the treaty thereby creating a cause of action. Thirdly, foreign investors have been accused of damaging the environment and violating human rights without adequate redress for the affected third-party groups. This, as Emeseh et al. reasoned, is partly the result of host State reluctance to legislative in the favour of the State or to safeguard vulnerable groups. Over-regulation could be seen as a barrier or tax on foreign investment and this is sometimes the reason for excluding third party groups interests, as explained in Chapter 4. These are the three reasons for choosing to investigate a route for the recognition of third-party groups in ISDS, with the potential solution requiring the reconceptualization of third party groups in order to be viewed as important stakeholders in the international investment regime including granting them access to justice in the event their treaty rights has been breached by foreign investors.

The goals of this thesis have been achieved.

8.2. International law and third-party rights

The thesis set out to critically examine the international law mechanisms, both institutional and procedural, that protects the interests of third-party groups. This has been achieved in chapter 3. This chapter clearly examined the legal framework, from its genesis in the early 1900s until

today and the gaps that have contributed to the continued exclusion of third party groups both in the substantive protection standards and the ISDS system. In interrogating the impact on their interests, the chapter found that the quest for broader and stronger protection for third party groups is not new. This leads back to the aims of this thesis, to put a case forward for the inclusion of third party groups in ISDS. The chapter has shown that legal systems recognise that disputes involve violations of rights and interests of other groups who are not formally party the proceeding. Despite this reality, procedural rules that provide for third party groups to have direct access or even as joinder are limited under international law. This is line with Goal 16 of the SDGs and state responsibilities under international law to protect citizens from human rights violations within their territories, as explained in chapters 3 and 5.

8.3. Evidence of impact on third party groups

The thesis set out to critically examine empirical evidence on the impact of foreign investor activities on third party groups and a lack of adequate access to justice through national, regional and international regulatory regimes, using oil spills in Nigeria's Niger Delta as a case study. This has been carried out in chapter 4. This chapter explored the impact on a number of communities and reached a resounding conclusion, captured in the analysis of the findings in chapter 5. Shell made every available effort to frustrate the parties resulting in catastrophic delays. Shell often used the option of appealing every decision without putting in place adequate measures to safeguard the health and wellbeing of the affected third-party groups. Similarly, in Goi community, there is clear evidence of violation of human rights and environmental standards, yet Shell often evoked the option to appeal both national and foreign judgements. Even jurisdictional grounds were often evoked for the purposes of escaping liability. And in instances where they have been found liable, the government failed to enforce the judgement or bring the companies to account for the violations. It was concluded that reform is needed in order to improve the recognition and access of third party groups in ISDS. The redress mechanisms available to third party groups affected by the operations of multinational corporations are generally ineffective. This motivated my proposal for an international law mechanism in Chapters 6 and 7. This decision is reached on the basis of the findings made in Chapter 5. Firstly, it found that domestic law mechanisms are slow, often tainted by nationalistic tendencies and political intrusion, especially when the government has a stake in the dispute. Secondly, that delays are a significant impediment to natural justice. This is evidenced from the countless instances at national, foreign and regional levels where courts take decades to pronounce a decision. Thirdly, that jurisdictional challenges pose significant

hurdles for claimants, particularly in the parent-subsidiary related cases, Fourthly, that domestic, regional and foreign judgements or recommendations face enforcement challenges. This is due to the absence of sanctions or mechanisms for ensuring that the recommendations are adhered to by the companies and governments. Lastly, that the courts' jurisdiction is limited to the exclusion of government bodies and in most cases, third party groups or private actors, from bringing a case.

8.4. An exploration of potential solutions

As a result of these findings, I was able to advance to and answer the main research question; how may formal recognition of third party groups in ISDS be implemented? What is the scope of this right? Chapters 6 and 7 set out to undertake a comprehensive study of the Investment Court System and whether it represents a viable solution to the problem of access to justice for third party group. This has been achieved in chapters 6 and 7. This thesis has contributed to the existing academic discourse on the reform of ISDS by advancing a proposal for a standing African Investment Court under the AfCFTA Agreement, with the aim of informing the ongoing negotiations over the content of the Protocol on Sustainable Investment and future multilateral investment agreements around the world. As explained in Chapter 7, the AfCFTA Investment Protocol provides scope for a binding international agreement for the Member States involved, to enhance obligations accepted under the AfCFTA Agreement. The analysis in Chapter 7 has shown that dispute settlement is critical to the proposed rules-based investment system in Africa. However, an effective dispute settlement regime is key and would ensure equity in representation and predictability. Therefore, investors will be looking at how well their rights are protected under the Agreement when deciding how aggressively to move into the continent and, at the same time, governments will be more likely to buy into the Agreement if it allows for greater protection of their rights than existing investment dispute settlement mechanisms.

The possibility of including a limited version of ISDS has also been examined and is the closest alternative to the proposed African Investment Court. The ISDS regime could be perceived as bringing predictability for investments given that most investment agreements offer such recourse. It is therefore submitted that, given existing investment regulatory instruments often provide for cooling off periods, consisting of conciliation, consultations, negotiations and mediation, to enable parties to reach an amicable settlement, these could potentially be incorporated thereby providing a caveat on the operation of international arbitration. However, a growing number of African States have expressed concern over ISDS, criticising among other

things, arbitral tribunals' bias towards investors as well as inconsistent and costly awards. As a result of a backlash, some African countries have gone as far as terminating BITs (e.g., the Republic of South Africa and the United Republic of Tanzania) or renegotiate investment treaties to limit or exclude ISDS. It is therefore anticipated that a limited version of ISDS through the incorporation of exhaustion of domestic remedies requirements is less likely to receive the AfCFTA Member States support, if it permits recourse to international arbitration. Similarly, some States may favour the resolution of investment disputes through the domestic courts of the host government or regional tribunals. The challenge, however, is convincing investors that African national courts or regional courts are independent from the host governments and have the expertise to effectively adjudicate complex investment disputes.

Having discussed the shortcomings of existing dispute settlement mechanisms, this thesis has set out why a standing two-tier court with full-time adjudicators responds effectively to the concerns identified by African countries and local and foreign investors, taking into consideration regulatory practices from around the world. At its core, this systemic change would involve a tribunal of first instance and an appellate body, with African judges having fixed terms and paid a regular salary. It is therefore submitted that a standing African Investment Court needs to be considered and further developed by the AfCFTA Member States as it strikes the right balance between being sufficiently investor friendly while simultaneously protecting the policy space of host countries.

Chapter 7 also examined how counterclaims and innovative treaty drafting practices could be introduced to further imbed third party protection standards in investment treaties and the proposal for an African Investment Court within the AfCFTA Investment Protocol. Finally, the thesis was able to evaluate recommendations for reform in chapter 7. It has shown that counterclaims, when suitably drafted, can be utilised as means of enabling tribunals to hear third party claims. However, it requires States consent, to buy into the idea of incorporating them and investor obligations.

A proposal for an investment court system is put forward in this chapter as the most feasible solution for the resolution of access to justice concerns for third party groups. Although it does not permit direct claims by third party groups, it allows the judges to consider public international law issues such as environment and human rights as part of their decision making. Before evaluating the African investment court proposal, a number of bottlenecks that hindered progressive reform in this area including the power dynamics in the treaty negotiation process

were considered. It is proposed that countries must embrace the emerging sustainable development agenda, a reflected the Morocco-Nigeria BIT and other second generation investment treaties from around the world. The inclusion of such investor obligations provides the necessary cause of action that would enable States to utilise mechanisms such as counterclaims. This is compounded by the sheer number of first-generation BITs that offer one-sided protection and the reluctance of arbitration tribunals to consider public international law standards when making awards. My African Investment Court proposal would lead to a dispute settlement body with mandate to consider public international law standards and African realities when rendering awards. Overall, a multilateral investment court is arguably the best option at providing a collective response to the limitations of an inter-State mechanism and the recurring concerns over the operation of ISDS in Africa and around the world and should therefore be considered in Africa and around the world.

8.5. Concluding remarks

This thesis represents a significant contribution to research literature on access to justice. It has interrogated the conceptual and practicality of providing access to justice for third-party groups, as well as the solution advanced in this thesis, of creating an African Investment Court, with hybrid features of arbitration and court systems. Increasingly, treaty drafting is being taunted as an option for reforming international investment law. Some have advocated the renegotiation BITs to include human rights provisions. This thesis argues that such a step is important but would not bring about systematic change since human rights law already forms part of public international law yet it is not considered by the arbitral tribunals when rendering awards. There is a need for a more holistic and creative approach to realising human rights and environmental standards beyond treaty drafting. The solution rests on enabling the judges in my proposed African Investment Court to consider the public international law elements, including human rights and environment standards, when considering the merits and rendering awards. However, this does not mean third party groups would have direct access. The procedural difficulties remain the same, and this an area for future inquiry.

Furthermore, as environmental concerns have moved up societies' priority lists, global initiatives to combat climate change actions such as COP 27 in Egypt and the conclusion of the Paris Agreement, are evidence of a shift in global mind-set. Climate change was described as an 'existential crises' by the UN Secretary-General António Guterres at the World Summit in Vienna, 2018, which has seen States prioritise investments in green infrastructure. Whilst these investment agreements should provide legal stability and predictability to foreign investors, the

vague language adopted in these investment agreements have often resulted in restraining regulatory powers to pursue legitimate public interest measures. The issue of balancing investor protection in one hand and the right to regulate in the other, has become more critical at a time where governments are recognising the importance of sustainable development and are adopting varying policy responses to promote environmental protection. These policy responses have triggered a wave of investment arbitrations and ignited the debate as to whether existing investment laws and their substantive provisions unduly restrain the right to regulate in host States and hinder the development of environmental development objectives. This makes research into climate change and its impact on investment policy around the world an important step going forward.

Future researchers can make the following contributions:

a) by examining the practicality and operationality of the African Investment Court, which involves an examination of whether the AfCFTA Investment Protocol could be utilised as a vehicle for a pan African Court;
b) by examining the scope for renegotiating intra-African and extra-African BITs in order to imbed the African Investment Court;
c) by examining how jurisdictional challenges and parent-subsidiary relationships could be reformed in order to improve access to national, foreign, regional and international courts;
d) by proposing innovative treaty making practices, as contained in the Nigeria Morocco BIT, as a standard across Africa and around the world;
e) by explores mechanisms for allowing NGOs and other civil society groups to bring direct claims, on behalf third party groups, in ISDS.

Overall, the findings and recommendations in this thesis are intended to inform the UNCITRAL Working Group III discussions on ISDS reform and direct investment policy in Africa as the continent concludes the AfCFTA Investment Protocol.

Bibliography

Table of Cases

Eric Barizaa Dooh and Vereniging Milieudefensie v. Royal Dutch Shell and Shell Petroleum Development Company of Nigeria, District Court of the Hague, 30th January 2013.

AllarIrou v. SPDC suit, No W/89/71, High Court), judgment,26 November 1973

A. Ariori & Ors. V. Muraino B.O. Elemo &Ors Law Report Supreme Court Nigerian Law

Association France Palestine Solidarité AFPS v. Société ALSTOM Transport SA, Case No. 11/05331, Versailles Court of Appeal, 22 March 2013.

Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12.

Barizaa Dooh v SPDC FHC/PH/159/97

Bear Creek Mining v Peru, ICSID Case No. ARB/14/2, Award (Nov. 30, 2017)

The Bodo Community and Others v. Shell Petroleum Company of. Nigeria Ltd [2014] EWHC 1973 (TCC)

Burlington Resources Inc v Ecuador ICSID Case No. ARB/08/5, Decision Counterclaim, 7 February 2017.

Central Bank of Nigeria & Anor v. Mrs. Agnes M. Igwillo, SC 83/2002

Central Bank of Nigeria v. Mrs Agnes M. Igwillo (S.C. 83/2002) [2007] NGSC 119 (04 May 2007), 04 May 2007, Supreme Court 03 May 2007

Chandler v Cape [2012] EWCA (Civ) 525

J Chinda and ors V Shell BP Petroleum Company of Nigeria [1974] 2 RSLR 1

CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, Ad Hoc UNCITRAL Arbitration Rules, Partial Award (13 September, 2001); IIC 62 (2003), Final Award (14 March 2003)

Copper Mesa Mining Corporation v. Republic of Ecuador, PCA No. 2012-2 Case No. 2012-02, Award (15 March 2016)

Doe v Unocal Corp. 963 F. Supp. 880 (C.D. Cal. 1997)

Eureko B.V. v. Republic of Poland. Partial Award of 15 August 2005

Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)

Gbemre v Shell Petroleum Development Company of Nigeria (2005) AHRLR 151

Guadalupe Gas Products Corporation v. Nigeria, ICSID Case No. ARB/78/1.

Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria, ICSID Case No. ARB/13/20.

IPCO (Nigeria) Ltd v Nigerian National Petroleum Ltd [2014] EWHC 576

Jesner v. Arab Bank, PLC, No. 16-499, 584 U.S.

Kadic v Karadzic, 70 F.3d 232 (2d Cir. 1995)

Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013),

CME/Lauder v Czech Republic, Ad Hoc UNCITRAL Arbitration Rules, Final Award, (3 September 2001)

Mavrommatis Palestine Concessions, Greece v United Kingdom (1924) PCIJ Series A, No 2

Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Judgment of August 31, 2001. (Merits, Reparations and Costs); Court HR (ser C) No 124 (15 June 2005)

Minerva Mills Ltd. and Ors. v. Union Of India and Ors AIR 1980 SC 1789 10

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7. Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16

Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5.

Rylands v Fletcher (1866) L R 1 Ex. 265

Saluka Investments BV v The Czech Republic Partial Award, IIC210 (2006), 17 March 2006, Permanent Court of Arbitration (PCA)

The Shell Petroleum Development Company of Nigeria Limited v Farah [1995] 3 NWLR (Pt 382) 148

The Shell Petroleum Development Company of Nigeria Limited vIsaiah [1997] 6 NWLR (Pt 508) 236

The Shell Petroleum Development Company of Nigeria Limited v Nigeria Case No. ARB/07/18

The Shell Petroleum Development Company of Nigeria Limited v Tiebo VII [1996] 4 NWLR (Pt 445) 657

Siemens A.G. v. The Argentine Republic, Case No. ARB/02/8, Award of 6 February 2007

Seismograph Services (Nigeria) Ltd v. Mark [1993] 7 NWLR (Pt 304) 203

Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Federal Republic of Nigeria, (Decision at 30th Ordinary Session, 13-27 October 2001)

Socio-Economic Rights and Accountability Project v Federal Republic of Nigeria, ECOWAS Community Court of Justice, Judgement N° ECW/CCJ/JUD/18/12

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)

Roussalis v Romania, ICSID Case No. ARB/06/1, Award of 7 December 2011

Tecnicas Medoambientales Tecmed S.A. v Mexico, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003

Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11 (Award)

Ogiale v The Shell Petroleum Development Company of Nigeria Limited [1997] 1 NWLR (Pt 480) 148

Okpabi v The Shell Petroleum Development Company of Nigeria Limited 2017 EWHC 89 (TCC)

Oronto Douglas v The Shell Petroleum Development Company of Nigeria Limited and Ors (Unreported) Suit No. FC/CS/573/93.

Perenco v Ecuador ICSID Case No ARB/08/6, Decision on Counterclaim.

Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26.

Velásquez-Rodríguez v. Honduras Inter-Am Ct HR (Ser.C) No.4 (1988)

Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227

Wakino v Ade John (1999) NWLR (9) 619

Wiwa v Royal Dutch Petroleum Company WL 1574869 (S.D.N.Y. 23 April 2009)

Table of Legislation

African Charter on Human and Peoples' Rights (ACPHR) (Ratification and Enforcement) Act (Laws of the Federation of Nigeria 1990 Cap 10)

Associated Gas Re-Injection Act 380 (Laws of the Federation of Nigeria 2004 Cap A 25)

Companies and Allied Matters Act (Laws of the Federation of Nigeria 2004 Cap C 20)

Constitution of the Federal Republic of Nigeria 1999 (amended)

Environmental Guidelines and Standards for the Petroleum Industry (No. 25 of 2007)

Environmental Impact Assessment Act (Laws of the Federation of Nigeria 2004, Cap E12)

Fundamental Human Rights (Enforcement Rules) 2009

Merchant Shipping Act (No. 27 of 2007)

National Environmental Standards and Regulations Enforcement Agency

National Oil Spill Detection and Response Agency (No.15 of 2006)

Nigerian Enterprises Promotion Decree 1989

Nigerian Investment Promotion Commission Act 1995, (Laws of the Federation of Nigeria, 2004 Cap N117,)

Oil Pipeline Act (Laws of the Federation of Nigeria 2004 Cap O7)

Oil Navigation Act (Law of the Federation of Nigeria 2004 Cap O6)

Petroleum Act (Laws of the Federation of Nigeria 2004 Cap P10)

Petroleum Refining Regulations (1974 Legal Notice 45,)

Protection of Investment Act 2015 (South Africa)

Natural Wealth and Resources Act 2017 (Tanzania)

Conventions and Treaties

Conventions

Abs-Shawcross Draft Convention 1959

African Charter on Human and Peoples' Rights (adopted 27 June 1981)

The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) 11 October 1985, entered into force 12 April 1988, amended in 2010)

Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (adopted 27 November 1992, entered into force 30 May 1996)

Convention on the Settlement of Investment Disputes between Contracting States and Nationals of other Contracting States (ICSID Convention) 1965

The United Nations Convention on Transparency in Treaty based Investor-State Arbitration (Mauritius Convention) 2014

Draft Articles on Diplomatic Protection, 2006

General Agreement in Trades and Services (came into force 1995)

Guidelines on the Treatment of Foreign Direct Investments of 1992

Hague Rules on Business and Human Rights Arbitration of 2019

International Convention of Civil Liability for Oil Pollution Damage (adopted 27 November 1992, came into force 30 May 1996)

International Covenant on Civil and Political Rights (adopted 16 December 1966, came into force 23 March 1976)

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, came into force 3 February 1976)

Draft Conventions on the Protection of Foreign Property 1962

Draft Conventions on the Protection of Foreign Property 1967

Draft Multilateral Agreement on Investment 1998

Protocol A/P.1/7/91 on the Community Court of Justice

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998)

Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014)

Protocol on the Statute of the African Court of Justice and Human Rights

Revised Draft on a Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, 2019

Revised Treaty of the Economic Community of West African States (1993)

Rules on Transparency in Treaty-based Investor-State Arbitration 2008

Statute of the African Court of Justice and Human Rights

Universal Declaration of Human Rights (1948)

Bilateral Investment Treaties

Algeria Nigeria BIT 2000

Argentina Japan BIT 2018

Austria Czechoslovakia BIT 1974

Austria Nigeria BIT 2013

Belarus India BIT 2018

Brazil Ethiopia BIT 2018

Chad Italy BIT 1969

China Nigeria BIT 2001

Cote d'Ivoire Sweden BIT 1965

Denmark Madagascar BIT 1965

Egypt Japan BIT 1977

Egypt Nigeria BIT 2000

Egypt United Kingdom BIT 1975

Finland Nigeria BIT 2005

France Nigeria BIT 1990

France Tunisia BIT 1972

Germany Ethiopia BIT 1964

Germany Liberia BIT 1961

Germany Nigeria BIT 2000

Germany Pakistan BIT 1959

Guinea Italy BIT 1964

Indonesia Netherlands BIT 1968

Italy Nigeria BIT 2000

Korea Nigeria BIT 1998

Madagascar Norway BIT 1966

Morocco Nigeria BIT 2016

Netherlands Nigeria BIT 1992

Netherlands Tunisia BIT 1963

Netherlands Uganda BIT 1970

Nigeria Singapore BIT 2016

Nigeria Spain BIT 2002

Nigeria Sweden BIT 2002

Nigeria United Kingdom BIT 1990

Romania-Nigeria BIT 1998

Russia Nigeria BIT 2009

Serbia Nigeria BIT 2002

South Africa Nigeria BIT 2000

Spain Argentina BIT 1991

Spain Mexico BIT 1995

Sri Lanka Switzerland BIT 1981

Switzerland Nigeria BIT 2000

Switzerland Tunisia BIT 1961

United Arab Emirates Nigeria BIT 2016

United Kingdom Nigeria BIT 1990

United Kingdom Zimbabwe BIT 1995

Common Market for East and Southern Africa Common Investment Agreement of 2007

Comprehensive and Progressive Agreement for Trans-Pacific Partnership of 2018

Economic Community of West African States Supplementary Investment Act of 2009

Southern African Development Community Finance and Investment Protocol of 2016

United States-Mexico-Canada Agreement of 2018

Canada Model BIT 2004

Dutch Model BIT 2018

Nigeria Model BIT 2015

Pan-African Investment Code 2016

United States Model BIT 2004

United Nations Resolutions

Permanent Sovereignty over Natural Resources 1962, General Assembly Resolution 1803 (XVII), 14 December 1962.

Declaration on the Establishment of a New International Economic Order, General Assembly Resolution 3201 (S-VI) of 1 May 1974.

Charter of Economic Rights and Duties of States of 1974, General Assembly Resolution 3281 of 12 December 1974.

An international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, General Assembly Resolution 26/9 of 14 July 2014.

Human Rights and Transnational Corporations & other Business Enterprises, General Assembly Resolution 17/4 of 6 July 2011.

Transforming our World: the 2030 Agenda for Sustainable Development, General Assembly Resolution 70/1 of 21 October 2015.

European Union Law

EU Regulation on Jurisdiction (Brussels I) No 1215/2012 of 20 December 2012
Council Directive 2014/95/EU
Council Directive 2013/34/EU

Arbitration Law

United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules

ICSID Rules of Procedure for Arbitration

Soft Laws

The Tripartite Declaration of the Principles Concerning Multinationals and Social Policy ISO 26000 Guidance Standard on Social Responsibility,

OECD Guidelines on Multinational Enterprises

United Nations Global Compact

United Nations Guiding Principles on Business and Human Rights of 2011

The Shell Petroleum Development Company of Nigeria Limited General Business Principles of 2014

Secondary Sources:

Books

The World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987).

T Aquinas, *Summa Theologica*, (Benziger Bros, 1947)

AA Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (CUP, 2001)

A Epiphany *The Role of Costs and Adjournments in the Expeditious Dispensation of Justice in the Nigerian Courts* (2014).

N Bernaz, "Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap" (Routledge, 2016)

N Blackaby "*Redfern and Hunter on International Arbitration"* (OUP, 2015)

R Cryer and T Hervey *"Research Methodologies in EU and International Law"* (Hart, 2011)

R, Dworkin *Taking "Rights Seriously"* (Harvard University Press 1978)

W Waluchow, "The Many Faces of Legal Positivism" University of Toronto Law Journal (1998) 48 387).

H, Grotius "*De Jure Belli ac Pacis Tres"* (1946) *Classics of International Law* 385 (trans F Kelsey)

H, Hart "*The Concept of Law"* (OUP, 1994)

G Harten, "*Investment Treaty Arbitration and Public Law"* (OUP, 2007)

S Hindelang and M Krajewski, "*Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*" (OUP, 2016)

ICSID "*History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention"* (1968)

H Kelsen, "*The Pure Theory of Law*" by Max Knight (University of California Press, 1970)

M Linde and L Louw, "Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC Communication" African Human Rights Law Journal (2003) 3 167

HC Metz, "*Nigeria- A Country Study"* (Library of Congress, 1992)

C Morris and C Murphy, "*Getting a PhD in Law"* (Hart, 2011)

P Muchlinski "*Multinational Enterprises and the Law"* (OUP, 2007)

TLambooy and M Rancourt, "SPDC in Nigeria: From Human Rights Abuse to Corporate Social Responsibility" Human Rights and International Legal Discourse 229, (2008) 2(2) 263.

A Newcombe and L Paradell "*Law and Practice of Investment Treaties: Standards of Treatment"* (Kluwer Law International, 2009)

WE Rumble, "*Austin: The Province of Jurisprudence Determined* (CUP, 1995).

J, Sachs, et al, Sustainable Development Report 2020: The Sustainable Development Goals and COVID-19 (CUP, 2020)

M Sornarajah, "*Resistance and Change in the International Law on Foreign Investments"* (CUP, 2015)

M, Sornarajah "*The International Law on Foreign Investment*" (CUP, 2017)

J, Stiglitz "*The Roaring Nineties: Why we are Paying for the Greediest Decade in History"* (Penguin, 2003)

S Subedi "*International Investment Law: Reconciling Policy and Principle"* (Hart, 2016)

E, Vattel "*The Law of Nations"* (J Chitty, 1852)

F Viljoen, "*International Human Rights Law in Africa"* (OUP, 2012)

I Shihata, "*The World Bank in a Changing World: Selected Essays and Lectures"* (1995)

Book Chapters

MA Ajomo "An Examination of Federal Environmental Laws in Nigeria" in MA Ajomo and O Adewale, "*Environmental Law and Sustainable Development in Nigeria"* (1994)

NJ Calamita and E Zelana "The Changing Landscape of Transparency in Investor-State Arbitration: The UNCITRAL Transparency Rules and Mauritius Convention" in C Klausegger and P Klein, "*Austrian Yearbook on International Arbitration" 2016*.

B Babatunde "Bunkering Activities in Nigerian Waters and their Eco-Economic Consequences" in Prince H "*The Political Ecology of Oil and Gas activities in the Nigerian Aquatic Ecosystem"* (Academic Press, 2018)

X Carim "International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa" in K Singh and B Ilge, "*Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices"* (SOMO, 2016)

P Fitzpatrick and E Darian-Smith "Laws of the Postcolonial: An Insistent Introduction" in P Fitzpatrick and E Smith, "*Laws of the Postcolonial"* (University of Michigan Press 1999)

O Fagbohun "*The Political Ecology of Oil and Gas activities in the Nigerian Aquatic Ecosystem"*(..Academic Press, 2018).

A Roy, "Postcolonial Theory and Law: A Critical Introduction" Adelaide Law Review 315, (2008) 29 319.

F Francioni, "Access to Justice, Denial of Justice, and International Investment Law" in P Dupuy, E Petersmann, and F Francioni, "*Human Rights in International Investment Law and Arbitration"* (OUP, 2009)

G Harten "Investment Treaty Arbitration and its Policy Implications for Capital-Importing States" in D Sanchez and K Shadlen, "*The Political Economy of Hemispheric Integration: Responding to Globalization in the Americas"* (Palgrave Macmillan, 2008)

G Harten, "Perceived Bias in Investment Treaty Arbitration" in C Balchin, L Kyo-Hwa Chung, A Kaushal and M Waibel, "*The Backlash Against Investment Arbitration: Perceptions and Reality" (*Kluwer Law International 2010)

A Idowu and T Lambo "Sustainable Exploration of Crude Oil in Nigeria" in C Ndimele "The Political Ecology of Oil and Gas activities in the Nigerian Aquatic Ecosystem" (Academic Press, 2018)

G MacDonald and T McLaughlin "Extracting Conflict", in R Sullivan, "*Business and Human Rights"* (Greenleaf, 2003)

R Murray, "The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights" in C Jalloh, K Clarke and V Nmehielle, "*The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges"* (CUP, 2019)

R Pathak, “Historical Approach to Legal Research” in B Nirmal, R Singh and A Nirmal, “*Legal Research and Methodology: Perspectives, Process and Practice”* (Satyam Law, 2019).

C Schreuer, “Investment Arbitration” in C Romano, K Alter and Y Shany “Oxford Handbook of International Adjudication” (OUP, 2014)

Journals Articles

O Adewale, “Oil Spill Compensation Claims in Nigeria: Principles, Guidelines and Criteria” Journal of African Law,1989 p33(1) p.91

E Alobo and S Obaji, “Constitutional Right to Healthy Environment as a Panacea for Sustainable Development in Nigeria” Nigerian Law Journal (2016) (19)2 244.

K Alter, L Helfer and J McAllister, “A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice” The American Journal of International Law (2017) 107 737

O Amao “Corporate social responsibility, multinationals and the law in Nigeria: Controlling multinationals in home state” Journal of African Law (2008) 52(1) 89

O Amao “Emergent state practice on the creation and practice of standards on corporate social responsibility” State Practice and International Law Journal (2014) 1(1) 117

A Babalola “The Right to a Clean Environment in Nigeria: A Fundamental Right” Hastings Environmental Law Journal (2020) 26 (1) 3

G Bekker “The African Court on Human and Peoples’ Rights: Safeguarding the Interests of African States” Journal of African Law (2007) 51(1) 151

A Bjorklund, “The Role of Counterclaims in Rebalancing Investment Law” Lewis and Clarke Review (2013) 17(2) 461

R Blitt, “Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance” Texas International Law Journal (2012) 34(1) 33

T Bodo and C Bodo, “Applicability of the Rule in Rylands V. Fletcher to Petroleum Activities in Nigeria” Journal of Advanced Research and Reports (2019) 3(1) 1

E Brem and C Adekoya “Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria Eva” Journal of African Law (2010) 54(2)

C Brower and S Schill, “Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?” Chicago Journal of International Law (2009) 9(2) 471

A Chander “Unshackling Foreign Corporations: Kiobel’s Unexpected Legacy” The American Journal of International Law (2013) 107 829

T Cheng, “Precedent and Control in Investment Treaty Arbitration” Fordham International Law Journal (2007) 20 1014

B Choudhury “Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?” Vanderbilt Journal of Transnational Law (2008) 41 775

B Chimni, “An Outline of a Marxist Course on Public International Law” Leiden Journal of International Law (2004) 17 1.

B Chimni, “Third World Approaches to International Law: A Manifesto” International Community Law Review (2006) 8 3

F Coomans, “The Ogoni Case Before the African Commission on Human and Peoples Rights” International and Comparative Law Quarterly (2003) 52(3) 749

A Cullison “Morality and the Foundations of Legal Positivism” Valparaiso University Law Review (1985) 20 61

B Desai “Bhopal Gas Leak Disaster Litigation: An Overview” Asian Year Book of International Law (1993) 3 163

D Dagbanja “‘The Limitation on Sovereign Regulatory Autonomy and Internationalization of Investment Protection by Treaty: An African Perspective” Journal of African Law (2016) 60(1) 56

K Ebeku, “Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria” Review of European, Comparative and International Environmental Law (2003) 12 (2) 199

Edu K “A Review of the Existing Legal Regime on Exploitation of Oil and the Protection of the Environment in Nigeria”, Commonwealth Law Bulletin (2011) 37 307

C Emejuru, “Human Rights and Environment: Whither Nigeria’ Journal of Law, Policy and Globalization (2015) 35 108

E Emeseh, R Ako, P Okonmah, L Obokoh and L Ogechukwu “Corporations, CSR and Self Regulation: What Lessons from the Global Financial Crisis?” German Law Journal, (2010) 11 (2) 230

A Fellmeth “Wiwa v. Royal Dutch Petroleum Co. A New Standard for the Enforcement of International Law in U.S. Courts?” Yale Human Rights and Development Law Journal (2002) 5(1) 241

G Fox, “A Future for International Investment? Modifying BITs to Drive Economic Development” Georgetown Journal of International Law (2014) 46 229

S Franck, “Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law” Global Business and Development Journal (2007) 19 337

S Frank “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions” Fordham Law Review (2005) 73 1521

C Garcia, “All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration” Florida Journal of International Law (2004) 16(2) 301

F Garcia, L Ciko, A Gaurav and K Hough “Reforming the International Investment Regime: Lessons from International Trade Law” Journal of International Economic Law (2015) 18 861

E Gelinas “The Natural Law according to Thomas Aquinas” Trinity Law Review (2011) 16, 13

I Gillich “The Normativity of Principles within the Positivist Theory of International Law” North Carolina Journal of International Law (2015) 41 1

J Goldsworthy “The Self-Destruction of Legal Positivism” Oxford Journal of Legal Studies (1990) 10 449

K Gudgeon “United States Bilateral Investment Treaties: Comments on their Origin, Purposes and General Treatment Standards” International Tax and Business Lawyer (1986) 4 105.

H Hart “Positivism and the Separation of Law and Morals” Harvard Law Review (1957) 71 593

J Ho ‘The Creation of Elusive Investor Liability’ (2019) 113 American Journal of International Law 10

Hueckel J, “Rebalancing Legitimacy and Sovereignty in International Investment Agreements” Emory Law Journal, (2012) 61(3) 601

H Ijaiya, “Challenges of Corporate Social Responsibility in the Niger Delta Region of Nigeria” Journal of Sustainable Development Law and Policy (2014) 3 60

T Ishikawa “Counterclaims and the Rule of Law in Investment Arbitration” American Journal of International Law (2019) 113, 33

N Jagers, K Jesse and J Verschuren “The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case against SPDC” American Journal of International Law (2014) 1 36

N Izoukumor “A Critical Assessment of the Pollution Prevention Laws and Regulations of Nigeria: Why they failed to Protect the Environment of Nigeria” Journal of Law, Policy and Globalisation (2019) 87 43

C Kaeb and D Scheffer “Paradox of Kiobel in Europe” The American Journal of International Law 107, 852

M Kane “The PanAfrican Investment Code: A good First Step, but more is needed” Columbia FDI Perspectives (2018) 217

G Kaufmann-Kohler “Arbitral Precedent: Dream, Necessity or Excuse?” Arbitration International (2007) 23(3) 357

J Kelsey, D Schneiderman and G Harten, “Phase 2 of the UNCITRAL ISDS Review: Why other matters really matter” Investment Treaty News (2019) 10(1) 8

T Kendra, “State Counterclaims in Investment Arbitration-A New Lease of Life?” Arbitration International (2013) 29 575

J Kern, “Investor Responsibility as Familiar Frontier” American Journal of International Law (2019) 113 28

W Kidane “The ChinaAfrica Factor in the Contemporary ICSID Legitimacy Debate” University of Pennsylvania Law Journal (2014) 35 (3) 559

J Kirshner, “A Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses” Northwestern Journal of International Human Rights (2015) 13(1) 1

G Laborde “The Case for Host State Claims in Investment Arbitration” Journal of International Dispute Settlement (2010) 1(1) 97

T Lambooy and M Rancourt, “SPDC in Nigeria: From Human Rights Abuse to Corporate Social Responsibility” Human Rights and International Legal Discourse (2008) 2(2) 229

H Lasswell and M McDougal, “Legal Education and Public Policy: Professional Training in the Public Interest” Yale Law Journal (1943) 5243

H Mann, “Reconceptualising International Investment Law: Its Role in Sustainable Development” Lewis and Clarke Law Review (2013) 17(2) 521

R McCorquodale, “Waving not drowning: Kiobeloutside the United States” American Journal of International Law (2013) 107 846

E Neumayer and L Spess, “Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?” World Development (2005) 33(10) 1567

E Nalbandian, “Early Legal Positivism: Bentham and Austin” Mizan Law Review (2008) 2 (1) 147

C Nyombi, T Mortimer and N Ramsundar, “The Morocco-Nigeria BIT: Towards a New Generation of Intra African BITs” International Company and Commercial Law Review (2018) 29(2) 69

K Odeku and S Animashaun, “Poverty, human rights and access to justice: Reflections from Nigeria” African Journal of Business Management (2012) 6(23) 6754

N Okogbule, “Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects” International Journal on Human Rights (2005) 2(3) 94

P Okonmah, “Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta” Journal of African Law (1997) 41 43

I Onwuazombe, “Human Rights Abuse and Violations in Nigeria- A Case Study of the Oil-Producing Communities in the Niger Delta Region” Annual Survey of International and Comparative Law (2017) 22(1) 115

U Orji, “An Appraisal of the Legal Frameworks for the Control of Environmental Pollution in Nigeria” Commonwealth Law Bulletin (2012) 38 (2) 322

A Palomaki, “Flames Away: Why Corporate Social Responsibility is necessary to stop excess Natural Gas Flaring in Nigeria” Colorado Natural Resources, Energy and Environmental Law Review (2013) 24(2) 499

J Paulsson, “Arbitration without Privity” ICSID Review (1995) 10(2) 232

J Pauwelyn, “At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, how it Emerged and how it can be Reformed” (Jan 2014).

N Perrone, “The International Investment Regime and Local Populations: Are the Weakest Voices Unheard” Transnational Legal Theory (2016) 7(3)

N Perrone, “The Invisible Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime” American Journal of International Law (2019) 113 16

S Puig and G Shaffer, “Imperfect Alternatives: Institutional Choice and the Reform of Investment Law” American Journal of International Law (2018) 113 361

W Reisman, “The View from the New Haven School of International Law” (America Society of International Law Proceedings 1992) 86 118

W Reisman, S Wiessnertt and A Willard, “The New Haven School: A Brief Introduction” The Yale Journal of International Law (2007) 32 575

Y Reventlow and R Curling, “The Unique Jurisdiction of the African Court on Human and Peoples' Rights: Protection of Human Rights beyond the African Charter” Emory International Law Review (2019) 33(2) 203

A Roy, “Postcolonial Theory and Law: A Critical Introduction” Adelaide Law Review (2008) 29 315

A Rumble, “John Austin, Judicial Legislation and Legal Positivism” University of Western Australia Law Review (1977) 13 77

J Salacuse “BIT by BIT: The Growth of Bilateral Investment Treaties and their impact on Foreign Investment in Developing Countries’ The International Lawyer (1990) 24 (3) 655
J Salacuse and N Sullivan, “Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain”Harvard International Law Journal (2005) 46 67

A Sanger, “Corporations and Transnational Litigation: Comparing Kiobel with the Jurisprudence of English Courts” American Journal of International Law (AJIL) (2014) 107 23

A Sanger, “Transnational Corporate Responsibility in Domestic Courts: Still Out of Reach?” American Journal of International Law (AJIL) (2019) 113 4

M Sattorova, “Investor Responsibilities from a Host State Perspective: Qualitative Data and Proposals for Treaty Reform” American Journal of International Law (2019) 113 22

S Schwebel “In Defense of Bilateral Investment Treaties” Columbia FDI Perspectives, (24 Nov 2014) 188

D Spencer, “Corporate Social Responsibility in the Oil and Gas Industry: The Importance of Reputational Risk” Chicago- Kent Law Review (2010) 86(1) 56

B Stephens, “Corporate Liability: Enforcing Human Rights Through Domestic Litigation” Hastings International and Comparative Law Review (2001) 24 401

P Tamuno, “Potential and Limits of Corporate Social Responsibility in the Niger Delta” Nigerian Law Journal (2016) 19 385

G Teubner, “Self-Constitutionalizing TNCs? On the Linkage of Private and Public Corporate Codes of Conduct” Indiana Journal of Global Legal Studies (2011) 18 (2) 617

F Tipson, “The Lasswell-McDougal Enterprise: Toward a World Public Order of Human Dignity” Virginia Journal of International Law (1974) 14 535

E Udu, “Re-Positioning the African Court of Human and Peoples' Rights in the Enforcement of Human and People's Rights in Africa” Nnamdi Azikiwe University Journal of International Law and Jurisprudence (2017) 8(1) 173

R Ugbe and A Ekpoudo “Legal Approach to Causes and Consequences of Oil Spillage in Nigeria” Nigerian Law Journal (2017) 20(1) 145

P Utting and K Ives, “The Politics of Corporate Responsibility and the Oil Industry” St Antony’s International Review (2006) 2(1) 11

P Vinogradoff, “Meaning of Legal History” Columbia Law Review (1922) 22 693

W Waluchow, “The Many Faces of Legal Positivism” University of Toronto Law Journal (1998) 48 387

T Weiler, “Balancing Human Rights & Investor Protection: A New Approach for a Different Legal Order” Boston College International and Comparative Law Review (2004) 27(2) 429

C Welch, “The Organization of African Unity and the Promotion of Human Rights” The Journal of Modem African Studies (1991) 29(4) 535

O Yakubu, “Addressing Environmental Health Problems in Ogoniland through Implementation of United Nations Environment Program Recommendations: Environmental Management Strategies” (2017) 4(28) Environments 1.

Papers

T Anene-Maidoh, "The Mandate of a Regional Court: Experiences from ECOWAS Court of Justice' Tribunal was which held in Johannesburg, March 2013.

J Karen, R Alter and R McAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" The American Journal of International Law (2017) 107 737.

S Subedi, "Who Controls the Multinational Corporations? Does the Answer Lie in International Law" 15 May 2002

AAguda, "The Jurisprudence of Unequal Justice" (1987) Lagos State University.

K Odeku and S Animashaun "Poverty, human rights and access to justice: Reflections from Nigeria" African Journal of Business Management, (2012) 6(23) 6759

Internet Sources

The Guardian, "Dutch appeals court says SPDC may be held liable for oil spills in Nigeria" (18 De 2015) https://www.theguardian.com/global-development/2015/dec/18/dutch-appeals-court-SPDC-oil-spills-nigeria accessed 18 February 2023.

Foei, "Friends of the Earth International, 'Revised Binding Treaty Draft shamefully Disappointing" (25 Jul 2019) https://www.foei.org/features/revised-draft-un-binding-treaty-disappointing accessed 18 February 2023.

United Nations, "Peace, Justice, and Strong Institutions: Why They Matter" 1 https://www.un.org/sustainabledevelopment/wp-content/uploads/2018/09/Goal-16.pdf accessed 18 February 2023.

B Adebayo, "Nigeria overtakes India in Extreme Poverty Ranking" (26 June 2018) https://edition.cnn.com/2018/06/26/africa/Nigeriaovertakes-india-extreme-poverty-intl/index.html accessed 18 February 2023.

African Commission on Human and Peoples' Rights, "Communications Procedure" https://www.achpr.org/procedure accessed 18 February 2023.

African Court on Human and Peoples Rights https://www.african-court.org/en/ accessed 18 February 2023.

F Aigbogun, "It took five tries to hang Saro-Wiwa" The Independent (13 Nov 1995) https://www.independent.co.uk/news/world/it-took-five-tries-to-hang-saro-wiwa-1581703.html> accessed 18 February 2023.

J Schunemann and A Porter, "Building the Future Infrastructure in Nigeria until 2040" (03 Nov 2017) 21 West Africa Report 2 https://issafrica.s3.amazonaws.com/site/uploads/war-21.pdf accessed 18 February 2023.

Business and Human Rights Resource Centre, "SPDC Lawsuit" https://www.business-humanrights.org/en/SPDC-lawsuit-re-oil-spills-bodo-community-in-nigeria accessed 18 February 2023.

UN Working Group on Business and Human Rights (2018), "Impacts of the International Investment Regime on Access to Justice" (Sept 2018) https://www.ohchr.org/Documents/Issues/Business/CCSI_UNWGBHR_InternationalInvestmentRegime.pdf accessed 18 February 2023.

Centre for Constitutional Rights, "The Case against SPDC" (26 Mar 2009) https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-case-against-SPDC accessed 18 February 2023.

Centre for Environment, Human Rights and Development, "After Bodo: Effective Remedy and Recourse Options for Victims of Environmental Degradation Related to Oil Extraction in Nigeria" (2015) cehrd.or.ng accessed 18 February 2023.

Chatham House Report, "Collective Action on Corruption in Nigeria A Social Norms Approach to Connecting Society and Institutions" (28 May 2017) https://www.chathamhouse.org/sites/default/files/publications/research/2017-05-17-corruption-Nigeriahoffmann-patel-final.pdf accessed 18 February 2023.

Corporate Accountability Lab, "SPDC in Nigeria: The Case for New Legal Strategies for Corporate Accountability" (8 Jul 2018) https://legaldesign.org/calblog/2018/7/5/SPDC-in-Nigeriathe-case-for-new-legal-strategies-for-corporate-accountability accessed 18 February 2023.

T David and E Amani “Another One Bites the Dust: Côte d’Ivoire to End Individual and NGO Access to the African Court” (18 May 2020) https://www.ejiltalk.org/another-one-bites-the-dust-cote-divoire-to-end-individual-and-ngo-access-to-the-african-court/ accessed 18 February 2023.

A Palma, “NAFTA’s Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say” (11 March 2001, New York Times) https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html accessed 18 February 2023.

Business Human Rights, “Statement on behalf of a Group of Countries at the 24th Session of the Human Rights Council”, (Sept 2013) https://www.business-humanrights.org/en/pdf-statement-on-behalf-of-a-group-of-countries-at-session-of-the-human-rights-council accessed 18 February 2023.

“The Secret Trade Courts”, New York Times (27 September 2004) https://www.nytimes.com/2004/09/27/opinion/the-secret-trade-courts.html accessed 18 February 2023.

R Emas, “The Concept of Sustainable Development: Definition and Defining Principles”https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf accessed 18 February 2023.

European Parliament, “Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries” (EU, 2019) https://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2019)603475 accessed 18 February 2023.

O Garcia-Bolivia, “Defining an ICSID Investment: Why Economic Development should be the Core Element” (IISD, 2012) https://www.iisd.org/itn/2012/04/13/defining-an-icsid-investment-why-economic-development-should-be-the-core-element/ accessed 18 February 2023.

T Gazzini, “Nigeria and Morocco Move Towards a New Generation of Bilateral Investment Treaties” (9 May 2017) https://www.ejiltalk.org/Nigeriaand-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/ accessed 18 February 2023.

M Driemeier, “Do Bilateral Investment Treaties attract FDI? Only a Bit and they could Bite” World Bank Policy Research Paper, (2003) WPS 3121, World Bank https://pdfs.semanticscholar.org/37f3/1ffcfac8b91a3b198092c15f6f8411ec3f3e.pdf accessed 18 February 2023.

A Habbard, “The Integration of Human Rights in Corporate Principles” (20 June 2001) http://www.oecd.org/daf/inv/mne/2348834.pdf accessed 18 February 2023.

Z Huaqun, “On Innovative Path for BIT Practice” OECD 2nd Symposium on IIAs held Paris,France).
http://www.oecd.org/investment/internationalinvestmentagreements/46770362.pdf accessed 18 February 2023.

International Centre for the Settlement of Investment Disputes, ‘Database of ICSID Member States” (2019) https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx accessed 18 February 2023.

The International Chamber of Commerce, “Response of the International Business Community to the Elements for a Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights” (20 Oct 2017) https://cdn.iccwbo.org/content/uploads/sites/3/2017/10/business-response-to-igwg-draft-binding-treaty-on-human-rights.pdf accessed 18 February 2023.

International Institute for Sustainable Development (IISD), “Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements” (January, 2018) https://www.iisd.org/library/integrating-investor-obligations-and-corporate-accountability-provisions-trade accessed 18 February 2023.

J Mouawad, “SPDC to Pay $15.5 Million to Settle Nigerian Case” (9 June 2009) The New York Times https://www.nytimes.com/2009/06/09/business/global/09SPDC.html?ref=global accessed 18 February 2023.

G Kaufmann-Kohler and M Potesta, “Can the Mauritius Convention serve as a Model for the Reform of Investor-State Arbitration in connection with the introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap” (2016) 6 htpps://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf accessed 18 February 2023.

B LeBars “The Evolution of Investment Arbitration in Africa” (May 2018) https://globalarbitrationreview.com/print_article/gar/editorial/1169359/the-evolution-of-investment-arbitration-in-africa?print=true accessed 18 February 2023.

Leigh Day, “The Bodo Community v SPDC Claim” https://www.leighday.co.uk/International/Further-insights/Detailed-case-studies/The-Bodo-community-SPDC-claim#Background accessed 18 February 2023.

H Mann, K Moltke, L Peterson and A Cosbey, “IISD Model International Agreement on Investment for Sustainable Development” (June 2006) https://www.iisd.org/sites/default/files/publications/investment_model_int_handbook.pdf accessed 18 February 2023.

R Mclean, “SPDC awaits court ruling on complicity in deaths of Ogoni Nine” (29 April 2019) The Guardian, https://www.theguardian.com/world/2019/apr/30/SPDC-awaits-court-ruling-on-complicity-in-deaths-of-ogoni-nine accessed 18 February 2023.

Nigeria Investment Promotion Commission, https://nipc.gov.ng/ accessed 18 February 2023.

E Onyema, “IPCO v NNPC Saga and Liability of Nigerian Legal System”, The Guardian (Nigeria, 22 December 2015) https://eprints.soas.ac.uk/21653/1/index.html accessed 18 February 2023.

L Peterson, “Bilateral Investment Treaties and Development Policy-Making” (IISD,2004) https://pravo.hse.ru/data/2012/10/05/1244483607/READER_Bilateral%20Investment%20Treaties%202004.pdf accessed 18 February 2023.

P Ranjan, “India’s Model BIT: Is India too risk Averse?” (8 August 2018) https://www.brookings.edu/wp-content/uploads/2018/08/India%E2%80%99s-Model-Bilateral-Investment-Treaty-2018.pdf accessed 18 February 2023.

S Reed, “$50 Billion Awarded in Breakup of Yukos”, (New York, July 2014) https://www.nytimes.com/2014/07/29/business/international/yukos-shareholders-awarded-about-50-billion-in-court-ruling.html accessed 18 February 2023.

Reuters, “Timeline: SPDC's operations in Nigeria” (23 Sept 2018)<https://www.reuters.com/article/us-NigeriaSPDC-timeline/timeline-SPDCs-operations-in-NigeriaidUSKCN1M306D accessed 18 February 2023.

C Tietje and F Baetens "The Impact of Investor State Dispute Settlement in the Transatlantic Trade and Investment Partnership" Ministry of Foreign Affairs, (2014) The Netherlands) https://www.politiekemonitor.nl/9353000/1/j4nvgs5kjg27kof_j9vvioaf0k accessed 18 February 2023.

United Nations, "Sustainable Development Goals: 17 Goals to Transform our World" https://www.un.org/sustainabledevelopment/ accessed 18 February 2023.

United Nations Commission on International Trade Law "Settlement of Commercial Disputes: Revision of UNCITRAL Arbitration Rules" (12 July 2008) A/CN.9/662 https://undocs.org/en/A/CN.9/662 accessed 18 February 2023.

United Nations Conference on Trade and Development: https://investmentpolicyhub.unctad.org/ISDS/FilterByYear accessed 18 February 2023.

United Nations Conference on Trade and Development, "Bilateral Investment Treaties 1959 - 1999" (February, 2000) https://unctad.org/en/Docs/poiteiiad2.en.pdf accessed 18 February 2023.

United Nations Conference on Trade and Development IIA Issues Notes, "Factsheet on Investor-State Dispute Settlement Cases in 2018" (May 27 2019) https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf accessed 18 February 2023.

United Nations Conference on Trade and Development IIA Issues Notes, "Improving Investment Dispute Settlement: UNCTAD Policy Tools" (11 Nov 2017) https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf accessed 18 February 2023.

United Nations Conference on Trade and Development IIA Issues Note, "Reforming Investment Dispute Settlement: A Stocktaking' Tools" (23 March 2019) https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3_en.pdf accessed 18 February 2023.

United Nations Conference on Trade and Development "International Investment Agreements Navigator: Nigeria" https://investmentpolicyhub.unctad.org/IIA accessed 18 February 2023.

United Nations Conference on Trade and Development "Investment Dispute Settlement Navigator" https://investmentpolicy.unctad.org/investment-dispute-settlement accessed 18 February 2023.

United Nations Conference on Trade and Development "Investment Policy Review of Nigeria" (United Nations 2009) https://unctad.org/en/Docs/diaepcb20081_en.pdf accessed 18 February 2023.

United Nations Conference on Trade and Development, "Trade and Development Report" (March 2014) https://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf accessed 18 February 2023.

United Nations Conference on Trade and Development, "World Investment Report 2014: Investing in the SDGs –An Action Plan" (UNCTAD, 2014) https://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed 18 February 2023.

United Nations Conference on Trade and Development, "World Investment Report 2015: Reforming International Investment Governance" (UNCTAD, 2015) https://unctad.org/en/PublicationsLibrary/wir2015_en.pdf accessed 18 February 2023.

United Nations Conference on Trade and Development, "World Investment Report 2018: Investment and New Industrial Policies" (UNCTAD, 2018) https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf accessed 18 February 2023.

United Nations Conference on Trade and Development, "World Investment Report 2019: Special Economic Zones" https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf accessed 18 February 2023.

United Nations Conference on Trade and Development, "World Investment Report 2020: International Production Beyond the Pandemic", https://unctad.org/en/PublicationsLibrary/wir2020_en.pdf accessed 18 February 2023.

United Nations Environmental Program, "Environmental Assessment of Ogoniland" (June, 2011) www.unep.org/nigeria accessed 18 February 2023.

United Nations Office on Drugs and Crime (2007), "Anti-Corruption Climate Change: it started in Nigeria" Abuja, 11 Nov 2007) https://www.unodc.org/unodc/en/about-unodc/speeches/2007-11-13.html accessed 18 February 2023.

J Vidal, "SPDC Oil Spills in the Niger Delta: Nowhere and no one has escaped" *The Guardian UK* (8 Aug 2011) https://www.theguardian.com/environment/2011/aug/03/SPDC-oil-spills-niger-delta-bodo accessed 18 February 2023.

L Wijekoon, M Congiu and S Marculewicz "United Nations takes another step in Developing a Treaty on Business and Human Rights" (4 Nov 2019)https://www.littler.com/publication-press/publication/united-nations-takes-another-step-developing-treaty-business-and-human accessed 18 February 2023 Accessed 17 July 2022.

Other Sources

Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention of the Settlement of Investment Disputes between States and Nationals of other States 1 ICSID Rep 23

United Nations Treaty Collection (UNCTC), "Bilateral Investment Treaties" (United Nations, 1988, No. ST/CTC/65)