Access to Remedy for Indigenous Right Holders in Relation to Investment-Related Human Rights Abuses – a Critical Search for an Effective Legal Framework.

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Submitted for the Degree of Doctor of Philosophy

School of Law

University of East Anglia

September 2022

Abstract

The lack of access to effective remedy is arguably one of the most compelling challenges faced by indigenous peoples, particularly within the context of investment-related human rights abuses. The search for an effective legal framework to provide access to remedy across judicial and non-judicial settings has been characterised mostly by limitations and prospects.

Given the above challenge, State and non-State actors have argued that the international investment law (IIL) framework ought to provide access to effective remedy for indigenous peoples whose rights are actually or potentially adversely impacted within the context of IIL (Indigenous Rights Holders). This has led to increased attention on the IIL regime as a potentially effective legal framework with the capacity to provide access to effective remedy to Indigenous Rights Holders. According to the proponents of this argument, access to effective remedies in IIL consists in allowing Indigenous Right Holders to participate as actual parties in relevant Investor-state dispute settlement (ISDS) arbitration. However, opponents contend that the IIL framework already provides third parties including Indigenous Right Holders with the opportunity for meaningful participation in ISDS arbitration through the amicus curiae procedure.

This thesis argues that the proposition for participation by Indigenous Right-holders as actual parties in ISDS arbitration oversimplifies indigenous peoples' problem of lack of access to effective remedy which has substantive and procedural dimensions. The thesis critically interrogates these dimensions and ultimately aims to answer the question of whether and how, and if at all, to what extent the IIL regime ought to provide access to remedy for Indigenous Right holders. In the final analysis, the thesis leans in favour of a pluralistic approach to access to remedy along with a consideration of alternative platforms for access to remedies pursuant to the 'all roads to remedy' theory propounded by the UN Working Group.

Contents

List of abbreviations

BHR – Business and Human Rights

Binding BHR Treaty – International legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises

CCSI – Columbia Centre for Sustainable Investment

CSRD – European Union Corporate Sustainability Reporting Directive

ECOSOC – UN Economic and Social Council

EIA – Environmental Impact Assessment

FPIC – Free, Prior, and Informed Consent

HRDD – Human Rights Due Diligence

HRIA – Human Rights Impact Assessment

ICSID – International Centre for the Settlement of Investment Disputes

IFC – International Finance Corporation

IIA – International Investment Agreement

IIL – International Investment Law

ILO 169 – International Labour Organisation's Indigenous and Tribal Peoples' Convention 1989

ISDS – Investor-State dispute settlement

NAPBHR – National Action Plan for Business and Human Rights

NDPs – Non-disputing Parties

Proposed Directive – the Proposed European Union Corporate Sustainability Due Diligence Directive

SPDC – Shell Petroleum Development Company of Nigeria Ltd

UN Working Group (WG) – UN Working Group on the issue of human rights and transnational corporations and other business enterprises

UNCITRAL – United Nations Commission on International Trade Law

UNDRIP – United Nations Declaration on the Rights of Indigenous Peoples

UNEP – United Nations Environment Programme

UNGPs – United Nations Guiding Principles on Business and Human Rights

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Acknowledgement

I am truly grateful to God Almighty for the invaluable gift of life, good health, sound mind infinite mercies and blessings without which it would have been totally impossible to conceive and realise the dream of completing this PhD project. Indeed, the invisible hand working indescribable wonders in my life is God - without you Lord, I can truly do nothing. To my amazing Parents, I consider myself very fortunate to have been raised by you both. For all your prayers, blessings, material and non-material support through the years, the discipline and values you have instilled in me from my formative year to date, I am eternally grateful.

I sincerely thank my supervisors, Associate Professor Youseph Farah and Associate Professor Avidan Kent for their mentorship and support at every stage of this project. Your mentorship, words of encouragement, corrections and insights were truly invaluable, and I am very grateful. To my loving wife, my priceless gem, Dr Adetutu Kunuji who kept me grounded throughout the period of completing my thesis, painstakingly standing by me as an ever-dependable support mechanism and inspiration. I am greatly indebted to you for your love, patience and understanding - ever looking out for me, supporting, inspiring and propelling me to greatness. Thank you for burning the proverbial midnight oil with me severally to keep my morale up while finishing up this thesis.

To my darling daughter, Oluwakanyinsola Kunuji, I thank you greatly for bringing so much joy and happiness on the home front. I hope this makes you proud and inspires you to strive for academic accomplishments. To my siblings, Dr Oluwole Kunuji, Mrs Olutosin Alamu and Mr Olumuyiwa Kunuji, your support, prayers and encouragement consistently fuelled my determination to soldier on to the finish line. My sincere appreciation also goes to the Law School, University of East Anglia and the post graduate research community for providing the enabling environment to complete this project. I am very grateful indeed!

Chapter One - Introduction

On July 28, 2022, the United Nations General Assembly (UNGA) passed a resolution declaring access to a clean, healthy and sustainable environment a universal human right[1]. According to the United Nations Secretary-General, 'the resolution will help reduce environmental injustices, close protection gaps, and empower people, especially those that are in vulnerable situations, including environmental human rights defenders, children, youth, women and indigenous peoples'[2].

The UNGA resolution is relevant in the context of Indigenous Right Holders who are in the category of those affected by the worst form of environmental pollution, and related human rights abuses resulting from business activities[3]. Essentially, the UN resolution adds to the long list of human rights accruable to indigenous peoples which seem to have proved unavailing especially in light of challenges associated with their search for access to effective remedy.

As would be discussed in chapter two of this thesis, indigenous peoples' rights include those stipulated in the International Labour Organisation's Indigenous and Tribal Peoples' Convention 1989 (ILO 169) which has been ratified and is currently in force in 24 countries including Argentina, Ecuador, and the Netherlands among others[4]. Similarly, indigenous peoples' rights are stipulated in the non-binding UN Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted at the UN General Assembly by a majority of 143 countries[5]. Meanwhile, it is instructive that many African States including Nigeria have not ratified and domesticated the ILO 169 or given effect to the provisions of the UNDRIP[6].

Some of the key rights (discussed in more detail in chapter two) accruable to indigenous peoples across the UNDRIP and the ILO 169 respectively include the right to self-determination, right to participate in decision-making processes affecting them and to give their free prior and

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[1] UN News "UN General Assembly declares access to clean and healthy environment a universal human right", (UN News, 22 July 2022) <https://news.un.org/en/story/2022/07/1123482>, accessed 20 August 2022.
[2] Ibid.
[3] Asia Indigenous Peoples Pact (AIPP), ALMÁCIGA and IWGIA 'Business and Human Rights: Indigenous Peoples' Experiences with Access to Remedy Case studies from Africa, Asia and Latin America' (ed) Cathal Doyle (2015) p2.
[4] C169 - Indigenous and Tribal Peoples Convention, 1989, International Labour Organisation Convention No. 169. Adoption: Geneva, 76th ILC session (27 Jun 1989) (Entry into force: 05 Sep 1991).
[5] United Nations Declaration on the Rights of Indigenous Peoples A/RES/61/295, Resolution adopted by the UN General Assembly 13 September 2007.
[6] See International Labour Organisation (ILO) Website <https://www.ilo.org/dyn/normlex/en/f?p=1000:11001:::NO:::>, accessed 1 November 2022.

informed consent (FPIC) where applicable, right to land, natural resources and religion, culture preservation, and right not to be deprived of their means of subsistence among others.

Apart from the specific rights accruable to indigenous peoples under ILO 169 and the UNDRIP, indigenous peoples are beneficiaries of all relevant internationally recognised human rights contained in various international law instruments including the Universal Declaration of Human Rights[7], the International Covenant on Economic, Social and Cultural Rights[8], International Covenant on Civil and Political Rights[9] among others. Notably, Article 17 of the UNDRIP provides that indigenous people have the right to fully enjoy all rights established under applicable international and domestic labour law[10]. The ILO 169 makes a similar provision under Article 3 thereof[11].

Indigenous peoples' rights are mainly enforceable against State parties being the subject of international law with the duty to protect human rights in their domains through laws and regulations domesticating relevant international law instruments. Meanwhile, businesses have the responsibility to respect human rights which have been duly acknowledged in several international standards particularly the United Nations Guiding Principles for Business and Human Rights (Guiding Principles)[12] and the OECD Guidelines for Multinational Enterprises[13].

Meanwhile, the range of human rights accruable to indigenous peoples would be potentially ineffectual in the absence of an effective procedure for access to remedy to guarantee their enjoyment or enforcement in the event of a breach.

[7] United Nations 'Universal Declaration of Human Rights' proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217A).
[8] United Nations 'International Covenant on Economic, Social and Cultural Rights' adopted 16 December 1966 by General Assembly resolution 2200A (XXI).
[9] Ibid.
[10] Ibid n4.
[11] Ibid n5.
[12] Guiding Principles for Business and Human Rights- Implementing the United Nations "Protect, Respect and Remedy" Framework, HR/PUB/11/04, (2011).
[13] OECD 'OECD Guidelines for Multinational Enterprises', (2011) OECD Publishing <http://dx.doi.org/10.1787/9789264115415-en>

1.0 Indigenous peoples – a brief overview

As would be discussed in more detail in chapter two, indigenous peoples' population is estimated to be about 476 million amounting to about 6% of the world's population and accounting for 19% of the world's extremely poor[14]. According to General comment No. 24 (2017) by the UN Economic and Social Council (ECOSOC), indigenous peoples fall into the category of groups disproportionately affected by the negative impacts of business activities with respect to the development, utilization, and exploitation of land and natural resources[15].

Anaya pointed out that indigenous peoples have suffered negative, devasting consequences arising from extractive sector activities[16]. Anaya observed that indigenous peoples are exposed to these harmful consequences due to what he described as the world-wide drive to extract and develop natural resources which are mostly found on indigenous peoples' lands[17]. Across the world today, resource extraction is having serious adverse consequences on indigenous peoples' right to land, resources, culture, and a healthy environment[18].

According to Ruggie, the extractive industry, that is oil, gas and mining accounts for two-thirds of the most grievous human rights abuses extending to complicity in crimes against humanity, acts committed by public and private security forces protecting company assets and property; largescale corruption; violations of labour rights; and a broad array of abuses perpetrated in relation to local communities, particularly indigenous peoples[19].

Given the foregoing, the plight of indigenous peoples has continued to engage attention, particularly at the international level as illustrated by various international law instruments

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[14] World Bank 'Indigenous People' <h www.worldbank.org/en/topic/indigenouspeoples#:~:text=There%20are%20an%20estimated%20476%20million%20Indigenous%20Peoples,than%20the%20life%20expectancy%20of%20non-indigenous%20people%20worldwide> (World Bank, 14 April 2022 accessed 6 August 2022.

[15] General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, (2017) para 8 < http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOuuG4TpS9jwIhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUbw6ujlnCawQrJx3hlK8Odka6DUwG3Y> accessed 20 August 2020.

[16] James Anaya 'Final Thematic Report to the United Nations Human Rights Council in accordance with Council resolutions 6/12 and 15/14', 2013 para 1.

[17] Ibid.

[18] Johannes Rohr & José Aylwin 'IWGIA Report 16 - Business and Human Rights: Interpreting the UN Guiding Principles for Indigenous Peoples, International Work Group for Indigenous Affairs (2014) p14.

[19] John Ruggie, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', U.N. Doc. E/CN.4/2006/97 (2006) para 25.

designed for their protection as mentioned above - the UNDRIP[20] and the ILO 169[21] both of which set out wide-ranging rights of indigenous peoples.

The preamble to the UNDRIP acknowledged the concerns associated with the negative experiences of indigenous peoples. Paragraph six (6) of the preamble to the UNDRIP notes that 'indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests'[22].

Similarly, paragraph six (6) to the preamble of the ILO Indigenous and Tribal Peoples Convention 1989 (ILO 169) notes with respect to indigenous peoples that 'in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded'[23].

1.1 Access to remedy as a challenge for Indigenous Right Holders

The Asia Indigenous Peoples Pact (AIPP) etal noted that 'indigenous peoples' access to remedy through State-based judicial mechanisms in the context of human rights harms caused by natural resource extraction and infrastructure projects is generally ineffective due to significant practical and legal obstacles which they face when attempting to access courts'[24].

According to the AIPP etal, 'State-based non-judicial mechanism tasked with addressing indigenous peoples' rights frequently tend to lack sufficient capacity or awareness of indigenous peoples' rights'[25]. Further, it was noted that 'access to mechanisms at the regional and international levels is also challenging for most indigenous communities, and the lack of enforcement powers of these mechanisms limits their effectiveness'[26].

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[20] United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295) < www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf> accessed 20 August 2020.
[21] Indigenous and Tribal Peoples Convention, 1989 (No. 169) < www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> accessed 20 August 2020.
[22] United Nations Declaration on the Rights of Indigenous Peoples (n5).
[23] Ibid n4.
[24] Doyle (n3) p2.
[25] Ibid.
[26] Ibid.

Given the above and other arguments below, this thesis contends that the seeming incapacity of international law to secure the protection of indigenous peoples' rights is probably attributable to the failure to match substantive indigenous peoples' rights with concomitant procedure for enforcement of these rights, especially an effective legal framework to secure access to effective remedies when substantive rights are breached. Importantly, the thesis argues that the range of indigenous peoples' rights would be potentially ineffectual in the absence of an effective procedure for access to remedy to guarantee their enjoyment or enforcement in the event of a breach.

1.1.1 The right to an effective remedy

The right to access to remedy is perhaps one of the most critical rights accruable to Indigenous Right Holders in view of the legal aphorism 'ubi jus, ibi remedium' that is 'where there is a right there is a remedy'. Essentially, the key rights of indigenous peoples highlighted above would at best be meaningless in the absence of effective mechanisms for their remediation when breached. Chief Justice Marshall put it aptly in the case of Marbury vs Madison noting that:

> 'It is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded…. [F]or it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress'[27].

The right to remedy is rooted in the general principle of law that every right must be accompanied by effective remedies for its breach as stipulated in Article 8 of the Universal Declaration of Human Rights[28]. The right to remedy is critical to the enjoyment of all human

[27] Marbury vs Madison (1803) 5 U.S. 1 Cranch 137, 163–66, quoting William Blackstone, Commentaries on the Laws of England, vol. 3 (1723–1780) 23.
[28] Universal Declaration of Human Rights, adopted by the United Nations General Assembly as Resolution 217 during its third session on 10 December 1948.

rights[29]. It is the bedrock of international human rights law whereby State parties are obligated to provide access to remedy for right holders within their territory[30].

Apart from the covenant by State parties to protect human rights within their domains, Article 2 of the International Covenant on Civil and Political Rights (ICCPR) contains the covenant by State parties 'to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'[31]. Article 2(3) (b) of the ICCPR contains the covenant by State parties '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'[32]. Further, Article 2(3)(c) of the ICCPR sets out the covenant by State parties with respect to enforcement of remedies 'to ensure that the competent authorities shall enforce such remedies when granted'[33].

With specific reference to indigenous peoples, Article 40 of the UNDRIP provides that indigenous peoples have the right of access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights'[34].

Access to remedy is the third pillar of the United Nations Guiding Principles (UNGPs) which enjoins States and businesses to ensure access to remedy in respect of business-related human

[29] Article 2 (3) of the International Covenant on Civil and Political Rights 1967 adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, date of entry into force 23 March 1976, in accordance with Article 49; Article 1(3) International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 date of entry into force 3 January 1976, in accordance with Article 27; Article 25 of the American Convention on Human Rights adopted on 22 November 1969,; Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U. N.T.S. 222 (now European Convention on Human Rights) entered into force 3 September 1953; Article 7 of the African Charter on Human and Peoples' Rights took effect 21 October 1986,

[30] European Coalition for Corporate Justice; International Corporate Accountability Roundtable; Human Rights Watch 'Text of Recommendation to the Government of Ecuador and the Chair of the OpenEnded Intergovernmental Working Group (OEIWG) on Transnational Corporations and Other Business Enterprises with Respect to Human Rights on the Potential of a Binding Treaty on Business and Human Rights to Address Access to Remedy for Corporate-Related Human Rights Abuses', September 26, 2017, p3 < https://media.business-humanrights.org/media/documents/files/documents/ICAR_ECCJ_HRW_Treaty_Letter.pdf> accessed 7 July 2020.

[31] Ibid n19.

[32] Ibid.

[33] Ibid.

[34] Ibid n12.

rights abuses[35]. More than 10 years after the UNGPs were endorsed by the UN Human Rights Council, the "Access to remedy" pillar of the UNGPs has arguably received the least attention[36], while accountability and remedy often remain elusive[37].

Indeed, the experiences of those seeking remedy suggest that there remains serious deficiencies in the implementation by many States of their international obligations with respect to access to remedy[38]. Apart from State parties, the UNGPs saddle business enterprises with the responsibility to ensure access to effective remedies through legitimate processes where they identify that they have caused or contributed to adverse impacts[39].

The Working Group on the issue of human rights and transnational corporations and other business enterprises (UN Working Group) clarified that to realize the right to an effective remedy, access to appropriate remedial mechanisms should be provided by the bearers of the duty or responsibility concerning this right[40]. According to the UN Working Group, the right to an effective remedy is a human right with both procedural and substantive elements[41]. It imposes a duty on States to respect, protect and fulfil this right. It also imposes responsibilities on non-State actors, including businesses, as articulated in the Guiding Principles[42].

[35] Guiding Principle for Business and Human Rights- Implementing the United Nations "Protect, Respect and Remedy" Framework, HR/PUB/11/04, (2011) see Guiding Principles 1, 22 and 25.
[36] Report of the United Nations High Commissioner for Human Rights 'Improving accountability and access to remedy for victims of business-related human rights abuse' UN Docs A/HRC/32/19, 10 May 2016 para 8 < https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/093/78/PDF/G1609378.pdf?OpenElement> accessed 7 July 2020.
[37] Ibid para 2.
[38] Ibid para 6.
[39] Guiding Principle for Business and Human Rights, (n62) UNGP 22.
[40] Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Docs A/72/162, 18 July 2017, para 14 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/218/65/PDF/N1721865.pdf?OpenElement> accessed 7 July 2020.
[41] Ibid.
[42] Ibid.

1.2 Statement of the problem

Despite the wide-ranging rights accruable to indigenous peoples as detailed in chapter two of this thesis, human rights abuses suffered by indigenous peoples appear to have persisted unabated. From Ogoni land in Nigeria's Niger Delta region[43], the Odisha State in India[44], the Temuan Indigenous community in Malaysia[45] to the indigenous communities of the Ecuadorian Amazon[46] among others, indigenous peoples have been victims of varying degrees of human rights abuses, culminating in some instances in unlawful killings such as in the case of Ken-Saro Wiwa and the Ogoni eight (8)[47].

These human rights abuses range from extensive environmental pollution occasioning serious health implications, loss of lives and livelihood, land grabbing, forced relocation, denial of participatory rights of indigenous peoples, siting of large-scale investment projects near indigenous peoples' land without respect for their right to free, prior, and informed consent (FPIC), exploitation of natural resources which indigenous peoples depend upon for survival, to the destruction of the spiritual and traditional heritage of indigenous people[48].

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[43] Amnesty International 'Nigeria: No Clean-Up, No Justice: An evaluation of the implementation of UNEP's environmental assessment of Ogoniland, nine years on' 27 June 2020, <www.amnesty.org/en/documents/afr44/2514/2020/en/>. See also Amnesty International 'Nigeria: In the dock: Shell's complicity in the arbitrary execution of the Ogoni Nine' 29 June 2017, < www.amnesty.org/en/documents/afr44/6604/2017/en/> accessed 20 October 2019.

[44] Amnesty International 'India: Victims of forced evictions in Odisha must receive effective remedy and reparation'(Amnesty International July 5, 2013, < www.amnesty.org/en/latest/press-release/2013/07/india-victims-forced-evictions-odisha-must-receive-effective-remedy-and-rep/> accessed 20 October 2019.

[45] Amnesty International 'Malaysia: Further information: Indigenous peoples face dispossession' 30 March 2021, < www.amnesty.org/en/documents/asa28/3920/2021/en/> accessed 21 August 2021; see also Amnesty International 'Malaysia: The Forest is Our Heartbeat: The Struggle to Save Indigenous Land in Malaysia' 29 November 2018, available at < www.amnesty.org/en/documents/asa28/9424/2018/en/> accessed 21 August 2021.

[46] Amnesty International 'Ecuador: Authorities and companies threaten the Amazon and its Indigenous Peoples' 4 May 2022, < www.amnesty.org/en/latest/news/2022/05/ecuador-authorities-companies-threaten-amazon-indigenous-peoples/> accessed 7 July 2022.

[47] EarthRights International 'Wiwa vs Royal Dutch Shell - Getting Away with Murder: Shell's Complicity with Crimes Against Humanity in Nigeria < https://earthrights.org/case/wiwa-v-royal-dutch-shell/>, accessed 21 July 2021. See also Amnesty International 'Investigate Shell for complicity in murder, rape and torture' < www.amnesty.org/en/latest/press-release/2017/11/investigate-shell-for-complicity-in-murder-rape-and-torture/> accessed 8 March 2022.

[48] See generally Doyle (n3).

The experiences of the indigenous peoples of Ogoni land in Nigeria's Niger Delta (described in more detail in chapter two) is adopted as the case study in this thesis and probably exemplify all the instances of human rights abuses highlighted above.

In a December 2018 report titled 'inside Ogoni Village where oil spillages kill 10 persons every week' a Nigerian online newspaper, 'Cable Nigeria' provided alarming statistics on the impacts of oil exploration activities on the indigenous community[49]. The report quotes data from the Nigeria Oil Monitor which puts the total number of oil spills recorded in Nigeria between January 2005 and July 2014 at over 5296, of which SPDC as of 2010 admitted to spilling nearly 14,000 tons (about 100,000 barrels) majorly across the oil-rich Ogoni land[50].

Apart from the steady increase in the number of casualties and spread of debilitating disease among others, a major fallout of oil spillages in Ogoni land is the compulsory relocation that followed after the government declared most of the community which depends on fishing and farming a dead zone[51]. According to the Cable Nigeria, instead of receiving redress for the devastation of their land, surviving Indigenous Right-holders have been involuntarily turned into ecological refugees as a result of the government's decision to forcefully relocate them from their ancestral lands and away from their customary trade which is fishing and farming[52].

In 2011, the United Nations Environment Program conducted an extensive scientific evaluation of cases of oil spillages in Ogoni land and produced a comprehensive report (UNEP Report) which catalogued the environmental devastation of Ogoni land. The UNEP Report noted that 'Ogoni land has a tragic history of pollution from oil spills and oil well fires'[53]. According to the report, UNEP's field observations and scientific investigations found that oil contamination in Ogoni land is widespread, severely impacting many components of the environment – soil and groundwater, vegetation, aquatic life, and public health[54]. While recommending a clean-up of the oil spillage among other measures for environmental restoration of Ogoni land, the UNEP

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[49] Chinedu Asadu, Online Newspaper 'Inside Ogoni village where oil spill wipes off '10 persons every week', (The Cable, 3 December 2018) <www.thecable.ng/inside-ogoni-village-where-oil-spill-wipes-off-10-persons-every-week>.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] United Nations Environment Program (UNEP) 'Environmental Assessment of Ogoniland' Full Report 2011 <https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> accessed 18 July 2019, p8.
[54] Ibid p9.

Report concluded that the environmental restoration of Ogoni land is possible but may take between 25 to 30 years[55].

More than 10 years after the UNEP Report[56], the oil spillage caused by SPDC is yet to be cleaned up[57] despite various attempts by Ogoni people to secure remedy for the environmental damage[58]. An online news platform reported that 'in the more than a quarter century since SPDC left Ogoni land, oil has continued to ooze from dormant wellheads and active pipelines, leaving the 386-square mile wetlands shimmering with a greasy rainbow sheen, its once-lush mangroves coated in crude, well-water smelling of benzene and farmlands charred and barren'[59].

Commenting on the oil spillage clean-up exercise recommended in the 2011 UNEP Report, the Nigerian-based Civil Society Legislative Advocacy Centre (CISLAC) reportedly noted that not much has been achieved since the clean-up kicked off in 2016[60]. CISLAC was quoted as noting that 'the wellbeing of the people in Ogoni and the Niger Delta at large is, to say the least pathetic. Life expectancy has dropped to 40, livelihoods destroyed, inhabitants consume contaminated water 900 times above World Health Organisation (WHO) standards'[61].

Amidst the above experiences, Ogoni people have pursued access to effective remedies in judicial and non-judicial fora, especially against SPDC with varying outcomes. To obtain eyewitness accounts of difficulties encountered by the Ogoni peoples in relation to access to effective remedy for investment-related human rights abuses in Ogoni land, two separate anonymised research interviews were conducted based on the ethical approval granted by the University's Research Ethics Committee. A foremost environmental activist in Ogoni land (Participant 1) and a London Based international human rights lawyer who had visited Ogoni land as part of direct efforts to secure remedies for the Ogoni people (Participant 2) were interviewed (see Appendixes 1 and 2 below for full transcripts of the research interviews).

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[55] Ibid p12.
[56] See generally United Nations Environment Program (UNEP) 'Environmental Assessment of Ogoniland' Full Report 2011 <https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> accessed 18 July 2019.
[57] Lazarus Tamana 'It's Ogoniland today, but it could be your home tomorrow' the European Coordinator for the Movement for the Survival of the Ogoni People, Minority Rights Group International, (Minority Rights Group International, 18 July 2019) < https://minorityrights.org/2019/07/18/ogoniland-today-your-home-tomorrow/> accessed 29 August 2020.
[58] Ogoni Peoples' attempts to secure remedy are discussed in more details in Chapter four of these research.
[59] Energy Voice 'One of world's most polluted spots gets worse as $1bn cleanup drags on' (Energy Voice, 31 August 2022) < https://www.energyvoice.com/oilandgas/africa/pipelines-africa/440446/hyprep-ogoniland-shell-spill/> accessed 1 September 2022.
[60] Unrepresented Nations and Peoples Organisation 'Ogoni: Cleanup Exercise by Authorities Questioned by Civil Society Groups' (UNPO, 12 March 2019) < https://unpo.org/article/21411> accessed 22 November 2020.
[61] Ibid.

During the research interview, Participant 1 was asked to provide an overview of the grievances of the Ogoni people, particularly within the context of reported environmental pollution attributed to oil exploration activities of oil multinationals like Shell Petroleum Development Company of Nigeria Ltd (SPDC) and others. In his response, Participant 1 stated that the circumstances of the indigenous peoples of Ogoni land are characterised by wide-ranging environmental destruction mostly attributable to oil spillages by SPDC[62]. Similarly, in response to the question regarding challenges associated with the search for access to remedy, Participant 2 stated that Ogoni people have over the years found it very difficult to gain access to effective remedies in respect of various adverse human rights impacts which they have suffered in connection with natural resources exploitation on their land[63].

Efforts to secure access to remedy by Indigenous people in respect of investment-related human rights abuses exemplified by the case of study of the Ogoni people have been characterised by prospects and limitations across local, regional and international fora. Part of the challenges to access to remedy in the local jurisdiction include the defects associated with the judicial system which militate against speedy dispensation of justice and ineffectiveness of judgment enforcement proceedings.

As highlighted below, decisions and judgments obtained by Indigenous Right Holders in Ogoni land in regional courts such as the African Commission and the ECOWAS Court of Justice have not been obeyed due to lack of enforcement powers against State parties. Further, there is the potential that when judgments are obtained by Indigenous Right Holders against treaty-covered investors in Courts in the local jurisdiction in respect of investment-related human rights abuses such judgments could be undermined through ISDS arbitration.

The above underscores the importance of the search for an effective legal framework to provide access to remedy for Indigenous Right Holders in respect of investment-related human rights abuses, which is the subject matter of this research. Notably, there are opposing arguments on the subject of access to remedy for Indigenous Rights Holders in respect of investment-related human rights abuses. As highlighted below, some scholars contend that State parties should in compliance with their duty under international human right law provide access to remedy to

[62] Virtual Research Interview with Ogoni Environmental Activist, conducted on March 29, 2021. (See full interview transcript is attached as Appendix 1 below).
[63] Virtual Research Interview with UK based international human rights lawyer and Partner at an International Human Rights Law Firm in London, conducted on 26 April 2021. (See full interview transcript attached as Appendix 2).

Indigenous Right Holders in respect of investment-related human rights abuses. However, this argument does not appear to take into account the potential that judgments obtained in Courts of the local jurisdiction could be undermined through the Investor-State Dispute Settlement (ISDS) mechanism.

In this connection, some scholars have argued that IIL ought to provide access to remedy for Indigenous Right Holders for remediation of investment-related human rights abuses. Similarly, these arguments fail to recognise that rights and interests of Indigenous Rights Holders may be implicated in ISDS in more than one way such as highlighted below. Lastly, it would appear that the access to remedy for Indigenous Right Holders may be located in diverse settings as acknowledged in the UN Working Group's 'all roads to remedy' approach clarified below. Such diverse settings may potentially consist of dispute settlement mechanisms embedded in business and human rights frameworks, international development finance institutions such as the World Bank and the International Finance Corporation, company level operational level grievance mechanisms among others discussed in this thesis particularly in chapter four.

1.3 'All roads to remedy' approach

Underscoring the severity of the challenges associated with indigenous peoples' search for access to remedy, the 'all roads to remedy' approach was recommended by the UN Working Group on Business and Human Rights in its 2017 report to the UN General Assembly unpacking the concept of access to effective remedies under the UNGPs[64]. The UN Working Group on Business and Human Rights was established pursuant to UN Human Rights Council resolutions 17/4 and 35/7 (HRC Resolution), and saddled with the mandate to promote the effective and comprehensive dissemination and implementation of the UNGPs[65]. Specifically, paragraph 6 (e) of the HRC resolution 17/4 identified the mandate of the UN Working Group on Business and Human Rights to consist of '… exploring options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas'[66].

[64] Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises to the UN General Assembly (Seventy Seventh Session) 18 July 2017, A/72/162.
[65] UN Human Rights Council Resolution 6 July 2011, A/HRC/RES/17/4.
[66] Ibid.

Examining the issue of access to effective remedies from the perspective of right holders, the 2017 report of the UN Working Group on Business and Human Rights outlined the "all roads to remedy" approach to realising effective remedies, which implies that access to an effective remedy is taken as a lens to guide all steps taken by States and businesses and that remedies for business-related human rights abuses are located in diverse settings[67]. It entails keeping rights holders central to the entire remedy process. The centrality of rights holders would, among other things, mean that remedial mechanisms are responsive to the diverse experiences and expectations of rights holders and that a bouquet of preventive, redressive and deterrent remedies is available to them[68].

This thesis is aligned with the 'all roads to remedy' approach due to the recognition that indigenous peoples' experiences with investment-related human rights abuses are diverse and remediation for these abuses is potentially located in diverse remedial mechanisms critically examined below. More importantly, the 'all roads to remedy' approach is relevant to the search for an effective legal framework to provide access to remedies for Indigenous Rights Holders due to the likelihood that a pluralistic as against a restrictive approach would potentially boost the chances for access to an effective remedy for Indigenous Rights Holders.

1.4 Potential legal frameworks

1.4.1 Grievance mechanisms in the local jurisdiction

State parties have the primary duty in international law to protect human rights and the environment within their domains, including the duty to provide access to remedy where these rights are breached. Generally, State parties should have both judicial and non-judicial grievance mechanisms within their domain including Courts of competent jurisdiction, National Human Rights Commission, the OECD National Contact Points on Responsible Business Conduct among others. These grievance mechanisms are discussed in more detail in chapter four of this thesis. The following consideration sets the background for addressing the fundamental question as to whether judicial and non-judicial grievance mechanisms in the local jurisdiction can provide access to effective remedies for Indigenous Right Holders as an integral aspect of fulfilling the obligation to protect human rights.

[67] Ibid n64, paras 55-57.
[68] Ibid para 7.

The obligations of State parties to protect human rights within their territories are set out in various international law instruments including paragraph 5 of the preamble of the United Nations Declaration of Human Rights which states that Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms[69].

Similarly, Article 2 (3)(a)(b) & (c) of the International Covenant on Civil and Political Rights (ratified in Nigeria on 29 July 1993) provides that each State party to the Covenant undertakes to ensure that any person whose rights or freedoms stipulated in the Covenant are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity[70].

Likewise, under Article 2 of the International Covenant for Economic, Social and Cultural Rights 1966 (ratified by Nigeria on 29 July 1993), State parties to the Covenant undertake to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of their available resources, to achieve progressively the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures[71].

At the regional level, the African Charter on Human and Peoples' Rights (ratified by Nigeria on June 22 June 1983) provides in Article 1 that member States of the Organization of African Unity (now African Union), parties to the present Charter, shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them[72].

Each of the instruments referenced above has binding effect in Nigeria, having been ratified by the Nigerian government at various times, thereby confirming the obligation of the Nigerian State to protect human rights including providing access to remedy for their enforcement in the event of breach.

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[69] Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations.

[70] International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, date of entry into force 23 March 1976.

[71] The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, adopted by the United Nations General Assembly on 16 December 1966.

[72] African Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)

Meanwhile, with particular reference to Indigenous Peoples' Rights stipulated under the two main international law instruments which comprehensively address indigenous peoples' rights – the ILO 169 and the UNDRIP. it is instructive that Nigeria has not ratified ILO 169 even though the country has since independence in 1960 ratified 42 other ILO Conventions[73]. Similarly, the UNDRIP, which is a declaration by the UN General Assembly has no binding effect on countries[74]. This arguably underscores the unfavourable disposition of the Nigerian State towards indigenous peoples' rights. Notwithstanding, Indigenous Right Holders including the Ogoni people are beneficiaries of human rights stipulated in other international human rights instruments having binding force in Nigeria as highlighted above.

Despite its clear obligations to protect human rights and provide access to remedy for victims of human rights abuses, it would appear doubtful that the Nigerian state is fulfilling these obligations. For instance, the decisions of the African Commission and the ECOWAS Court in the respective cases instituted against the Nigerian State by the Social and Economic Rights Action Centre (SERAC)[75] and the Socio-Economic Rights and Accountability Project (SERAP)[76] established that the Nigerian State did not fulfil its duties to protect human rights of the Ogoni communities affected by oil and environmental pollution caused mainly by SPDC. These cases are discussed in detail in chapter four of this thesis.

Further, it would seem that the Nigerian State might have shirked its international law obligation to provide access to remedy in relation to human rights abuses by failing to ensure that the judiciary dispenses justice within a reasonable time or to prevent abuse of the judicial process by litigants determined to frustrate judicial proceedings through induced delays and tactics aimed at undermining the enforcement of judgment obtained by claimants. The case of Isaac Agbara & ORS vs SPDC whereby claimant Ogoni community obtained judgment against SPDC for extensive oil and environmental pollution paints a picture of the shortcomings associated with the Nigerian judicial system with respect to dispensation of justice and abuse

[73] See website of the International Labour Organisation on ratification of the ILO Convention 169 (Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)) available at < https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314> accessed 19 September 2022.
[74] United Nations Declaration on the Rights of Indigenous Peoples, (n5).
[75] The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria (SERAC & CESR v. Nigeria), ACHPR/COMM/A044/1, Decision by the African Commission on Human and Peoples' Rights at its 30th ordinary session, Communication No. 155/96, 27 May 2002, pp15-16.
[76] Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria ECW/CCJ/APP/08/09 Judgment dated 14 December 2012, paras 120 & 121.

of court processes to frustrate the enforcement of judgments[77]. It is noteworthy that it took over 29 years for the Isaac Agbara case characterised by protracted delays, and various frivolous appeals ultimately terminating in the Supreme Court, to end the litany of litigations on the matter[78].

As would be seen later in this thesis, after losing appeals against the judgment entered in favour of the claimant Ogoni, SPDC initiated ISDS arbitration against the Federal Government of Nigeria seeking to block the enforcement of the Judgment[79]. As the ISDS is set up for the determination of disputes between investors and State parties to an investment treaty/contract, third parties are precluded from participating in the ISDS arbitration as actual parties regardless of whether their legal rights are directly at stake and form the subject matter in such arbitration[80].

As such the Ogoni community, the beneficiary of the judgment the enforcement of which SPDC seeks to block through the ISDS mechanism is procedurally excluded from participating as an actual party in the arbitration to defend their rights in enforcing and enjoying the fruits of its judgment.

The thesis argues that such exclusion potentially amounts to a violation of the right of the judgment beneficiaries to fair hearing and a deviation from the principle of natural justice. Therefore, the exclusionary ISDS procedure underpins the primary question in this research, that is whether IIL ought to allow third parties whose legal rights are directly at stake and form the subject matter of an ISDS arbitration to participate as actual parties.

Essentially, a claimant can obtain remedy for human rights abuses in the local Court against a foreign investor. But the ISDS mechanism can potentially be leveraged by the foreign investor to undermine, frustrate or block the enforcement of the judgment or court order. This possibility is further compounded by the fact that the beneficiary of such judgment or court order cannot

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[77] Chief Isaac Osaro Agbara & others and Shell Petroleum Development Company (SPDC) Limited of Nigeria & others, FHC/ASB/CS/57/2010; Chief Isaac Osaro Agbara & others v Shell Petroleum Development Company (SPDC) Limited of Nigeria & others [2001] FHC/ASB/CS/231/2001.

[78] The case was first instituted in year 2001 while interlocutory appeals were finally extinguished at the Supreme Court in 2020.

[79] See ISDS Platform 'Shell files arbitration claim against Nigeria over spill dispute' (ISDS, 14 February 2021) < https://isds.bilaterals.org/?shell-files-arbitration-claim> accessed 23 March 2021. See also Oluwaseyi Awojulugbe 'Shell sues Nigeria over oil spill compensation claim' (The Cable, 15 February 2021) < www.thecable.ng/shell-sues-nigeria-over-oill-spill-compensation-claim> accessed 23 March 2021.

[80] Peter T. Muchlinski 'Multinational Enterprises & the Law' (3rd edn, Oxford University Press 2020) 707 . See also Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention). The ICSID Convention is a treaty ratified by 158 Contracting States. It entered into force on October 14, 1966, 30 days after ratification by the first 20 States. Available at < https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf>

participate in the ISDS arbitration where the attempt to block the enforcement of its judgment would be determined. The cases discussed in this thesis to demonstrate this include Isaac Agbara & ORS vs Shell Petroleum Development Company of Nigeria Ltd[81]; Chevron vs Ecuador[82]; Eli Lilly and Company v. The Government of Canada[83]; Daniel Kappes and Kappes Cassiday & Associates v. Guatemala[84]; Bernhard von Pezold and Others v. the Republic of Zimbabwe[85]; Aguas del Tunari, SA v. Republic of Bolivia[86] and United Parcel Service of America Inc. vs Government of Canada[87] respectively.

In the context of the search for an effective legal framework, the indigenous people of Ogoni land in Nigeria's Niger Delta region and the extractive industry which is adopted as the case study in this research exemplify the experiences of Indigenous Right Holders with respect to judicial and non-judicial grievance mechanisms in the local jurisdiction. Indigenous Right Holders have severally made recourse to local and regional judicial and non-judicial grievance mechanisms in the pursuit of access to an effective remedy and have obtained favourable outcomes on some occasions as discussed in more detail in chapter four[88].

Apart from the contention that the ISDS mechanism could be exploited to undermine judgments obtained in courts in the local jurisdiction, some commentators and scholars argue further that local judicial and non-judicial mechanisms are characterised by various limitations which undermine their potential to provide access to an effective remedy for Indigenous Right Holders. Some of the limitations include the absence of legal aid to otherwise impecunious right holders, judicial corruption, perennial delays in the dispensation of justice, and the difficulty in

[81]Ibid.

[82] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador,[2009] PCA Case No. 2009-23 (UNICITRAL)

[83] Eli Lilly and Company v. The Government of Canada, [2017] Case No.UNCT/14/2 (ICSID).

[84] Daniel Kappes and Kappes Cassiday & Associates v. Guatemala; South American Silver Limited v. Bolivia, [2013] Case No. 2013-15(PCA).

[85] Bernhard von Pezold and Others v. Republic of Zimbabwe,[2015] Case No. ARB/10/15 (ICSID), Award and Decision on Annulment, 28 July 2015 and 21 November 2018 respectively.

[86] Aguas del Tunari, SA v. Republic of Bolivia, [2005] Case No. ARB/02/3 (ICSID) (Petition of La Coordinadora para la defensa del agua y vida et al.) at 3.

[87] United Parcel Service of America Inc. v. Government of Canada, [2001]Case No. UNCT/02/1 (ICSID), Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae 17 October 2001, paras 1 & 73.

[88] Mr Jonah Gbemre (for himself and representing Iwherekan Community in Delta State, Nigeria) vs Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation and Attorney-General of the Federation, [2005] FHC/B/CS/53/05, (FHC) ; Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria [2012] ECW/CCJ/APP/08/09 (ECW) Judgment dated 14 December 2012, paras 120 & 121; The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria (SERAC & CESR v. Nigeria) [2002] ACHPR/COMM/A044/1 (ACHPR). Decision by the African Commission on Human and Peoples' Rights at its 30th ordinary session, Communication No. 155/96, 27 May 2002, pp15-16.

successfully holding multinational enterprises to account in the local jurisdiction. Indeed, as would be seen in chapter four, some commentators argue that multinational enterprises can only be held to account in foreign jurisdictions, particularly in their home States.

For instance, the paramount King of the Ogale community in reaction to the Judgment of the UK High Court in respect of a suit instituted by the Ogale Community against Royal Dutch Shell, was quoted as stating that "You can never, never defeat Shell in a Nigerian Court. A case can go on for very many years. You can hardly get a judgment against an oil company in Nigeria. Shell is Nigeria and Nigeria is Shell.[89]"

Similarly, in answering the question regarding the rationale for Ogoni claimants seeking remedies in foreign courts, Participant 1 expressed concerns regarding the prosecution of cases against multinational companies in the local jurisdiction noting that '…it will take some time up to twenty years to get a judgment by which time some of the litigants have died, some cannot pursue the claims and you now start asking yourself, what is happening'[90].

On the other hand, there appears to be evidence that some of the cases instituted by indigenous people of Ogoni land against SPDC before Nigerian Courts have been successful[91]. Some of these cases are discussed in more detail in chapter four. This would seem to counter the arguments that access to remedy for Indigenous Right Holders is not obtainable in the local jurisdiction.

However, as noted above, there are concerns about the tendency that such favourable judgments may be rendered unenforceable because multinational enterprises could resort to foreign dispute settlement mechanisms such as the ISDS to block the enforcement of the judgment. This possibility is illustrated by the ICSID arbitration instituted by SPDC against Nigeria under the Netherlands – Nigeria BIT to block the enforcement of the judgment obtained against SPDC by indigenous peoples of Ogoni land. This case is discussed in more detail in chapters three and four of this thesis.

[89] Charity Ryerson 'Shell in Nigeria: The Case for New Legal Strategies for Corporate Accountability, (Corporate Accountability Lab, 5 July 2018) <https://corpaccountabilitylab.org/calblog/2018/7/5/shell-in-nigeria-the-case-for-new-legal-strategies-for-corporate-accountability> accessed 23 November 2021.
[90] Virtual Research Interview with Ogoni Environmental Activist, conducted on March 29, 2021. (See full interview transcript is attached as Appendix 1 below).
[91] See the case of Mr Jonah Gbemre (n107); See also Chief Isaac Osaro Agbara & others (n27) pp16-19.

1.4.2 ISDS as a potentially effective legal framework

The main reason for considering the ISDS as a potentially effective legal framework is due to (a) the fact that this thesis is focused on investment-related human rights abuses suffered by indigenous peoples (b) the allegation that ISDS potentially undermines access to remedy in the investment host State as highlighted above and (c) concerns about IIL procedural rules which exclude third party right holders, including Indigenous Right Holders from participating in ISDS arbitration as actual parties when their legal rights form the subject-matter of the ISDS arbitration.

In this connection, the enquiry about the potential of ISDS as an effective legal framework is best typified by questions posed as part of the ongoing discourse around the subject of ''Human Rights-compatible International Investment Agreements (IIAs)"[92] which are of particular relevance to this research. These include whether (1) the current Investor-State Dispute Settlement (ISDS) regime "fit for purpose" to address complaints related to human rights abuses linked to investment projects;[93] (2) IIAs ought to provide mechanisms to allow individuals or communities affected by investment-related projects to seek effective remedy against investors[94]; (3) the amicus briefs before ISDS provides an effective opportunity for affected individuals and communities to seek remedy[95]? (4) counterclaims brought by States against investors have been effective in addressing human rights abuses linked to their investment.[96]

The jurisdiction of Investor-State Dispute Settlement (ISDS) arbitration tribunals is founded on International Investment Agreements (IIAs) comprising of Bilateral Investment Agreements, Investment Contracts, and Investment Chapters in Trade Agreements among others[97]. IIAs typically outline key rights for covered investors comprising mainly of the international minimum standard of treatment including the Fair and Equitable Treatment (FET) standard, guarantees against Expropriation or Nationalization without compensation and due process, National Treatment standard, Most Favoured Nation standard, right to Full Protection and

[92] UN Office of the High Commissioner for Human Rights (OHCHR) 'Open call for input for Working Group on Business and Human Rights' report on "Human Rights-compatible International Investment Agreements (IIAs)" <https://previous.ohchr.org/EN/Issues/Business/Pages/CFI-Human-Rights-compatibleIIAs.aspx accessed> 25 January 2022.
[93] Ibid para 7.
[94] Ibid para 14.
[95] Ibid para 16.
[96] Ibid para 15.
[97] Surya P Subedi 'International Investment Law – Reconciling Policy and Principle' (Hart Publishing 2008) 96.

Security, provisions guaranteeing transfers and repatriation of profits, and right of access to international arbitration[98].

The ISDS mechanism is designed as an exclusive venue for the settlement of disputes between contracting State Parties and treaty-protected investors being the sole actual parties[99]. As would be demonstrated in this thesis, third parties are not allowed to participate as actual parties in ISDS arbitration regardless of the nature of their interest or right implicated in the subject matter of the dispute submitted to ISDS for settlement[100].

Of the various suits instituted against SPDC in Nigerian Courts, the case of Chief Isaac Osaro Agbara & 9 Ors. V. Shell Petroleum Development Ltd & ORS[101] illustrates one of the main difficulties that the Ogoni people and indeed indigenous peoples throughout the world have continued to encounter in the search for an effective legal framework that guarantees access to remedy. In this case, some Ogoni claimants from the Ebubu community of Ogoni land obtained a monetary judgment (Ogoni Judgment Creditors) against SPDC in the sum of N17,180,237,831.00 in June 2010[102]. The suit was instituted against SPDC in 1991 to remediate damages arising from oil spills that polluted and devastated the Ogoni community in 1970[103].

By March 2020, at the end of garnishee proceedings against SPDC's bankers as part of the efforts to enforce the judgment, the Federal High Court in Nigeria ordered SPDC's bankers, First Bank Nigeria Plc to pay to the Ogoni Judgment Creditors the total sum of NGN182.8billion being total of principal judgment sum plus post-judgment interest[104].

After several failed attempts to upturn the judgment through various appeals to the Court of Appeal[105] and the Supreme Court in Nigeria[106], SPDC initiated an ISDS arbitration at ICSID

[98] Ibid p84; See also Peter T. Muchlinski 'Multinational Enterprises & the Law' (3rd edn, Oxford University Press2020) 662-682.
[99] Peter T. Muchlinski 'Multinational Enterprises & the Law' (3rd edn, Oxford University Press2020) 707. See also Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention). The ICSID Convention is a treaty ratified by 158 Contracting States. It entered into force on October 14, 1966, 30 days after ratification by the first 20 States.
[100] Ibid.
[101] Chief Isaac Osaro Agbara & others v Shell Petroleum Development Company (SPDC) Limited of Nigeria & others [2001] FHC/ASB/CS/231/2001.
[102] Ibid pp16-19.
[103] Ibid pp1-3.
[104] Chief Isaac Osaro Agbara & others and Shell Petroleum Development Company (SPDC) Limited of Nigeria & others [2010] FHC/ASB/CS/57/2010
[105] See Shell Petroleum Development Company of Nigeria Plc & ORS vs Chief Isaac Obaro Agbara & ORS, [2012] Appeal No CA/PH/396/2012,
[106] See Shell Petroleum Development Company of Nigeria Plc & ORS vs Chief Isaac Obaro Agbara & ORS, [2017] SC.731/2017.

(SPDC's ICSID Case)[107] to block the enforcement of the judgment obtained against it in Nigeria by the Ogoni Judgment Creditors[108]. The arbitration was filed under the 1992 Netherlands – Nigeria Bilateral Investment Treaty.

The arbitration was reportedly initiated by SPDC to contest the Judgment by a Nigeria Court ordering SPDC to pay the total sum of NGN182billion (judgment sum plus interest) to the Judgment creditors being compensation for oil spills in the Ejama-Ebubu community in the Niger Delta[109]. SPDC unsuccessfully denied responsibility for the oil spill, claiming that the spill was caused by third parties during the Nigerian Civil War which occurred between 1967 and 1970[110].

Given the provisions of Article 25 (1) of the ICSID Convention 1965[111] and Article 9 of the Netherlands-Nigeria BIT[112] which the ISDS arbitration is based upon, the Ogoni Judgment Creditors cannot participate in the ISDS arbitration directly as an actual party even though their legal right to enforce the NGN182billion judgment granted by a Nigeria Court is the subject matter of the ISDS arbitration. However, by the provisions of Article 37(2) of the ICSID Convention Arbitration Rules (2006), the Ogoni Judgment Creditors may be able to participate in the ISDS arbitration as a non-disputing party under the amicus curiae procedure[113].

SPDC's ICSID case appears to be reminiscent of the Chevron vs Ecuador ISDS arbitration where Chevron successfully blocked the enforcement of a US$9.5 billion judgment obtained by Ecuadorian plaintiffs against Chevron in respect of fatal environmental pollution attributed to the latter's oil exploration activities[114]. The Permanent Court of Arbitration (PCA) tribunal ordered the Government of Ecuador to ensure that the judgment against Chevron is not enforced

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[107] Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v. Federal Republic of Nigeria [2021] ICSID Case No. ARB/21/7 < https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/7> accessed 20 March 2022.

[108] See ISDS Platform 'Shell files arbitration claim against Nigeria over spill dispute' (ISDS, 14 February 2021 < https://isds.bilaterals.org/?shell-files-arbitration-claim> accessed 23 March 2021. See also Oluwaseyi Awojulugbe 'Shell sues Nigeria over oil spill compensation claim' (The Cable, 15 February 2021) <www.thecable.ng/shell-sues-nigeria-over-oill-spill-compensation-claim> accessed 23 March 2022.

[109] Ibid.

[110] Ibid.

[111] See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, date of 18 March 1965, Article 25(1).

[112] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Federal Republic of Nigeria, date of entry into force: 01/02/1994, Article 9.

[113] International Centre for Settlement of Investment Disputes (ICSID) Convention Arbitration (2006 Rules).

[114] See Chevron Corporation and Texaco Petroleum Company vs The Republic of Ecuador, Claimant's Notice of Arbitration, [2009] Case No. 2009-23, para 76 (PCA) <www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf> accessed 23 March 2021; see also Lise Johnson 'Case Note: How Chevron v. Ecuador is Pushing the Boundaries of Arbitral Authority', (International Institute for Sustainable Development (IISD), 2012) <www.iisd.org/itn/es/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundariesChevron -of-arbitral-authority/> accessed 12 July 2019.

due to evidence that the judgment was procured fraudulently under circumstances proved to have been characterised by bribery and corruption[115].

Meanwhile, it is important to clarify that reference to the Chevron vs Ecuador case in this thesis does not entail a review of the merit or otherwise of the award by the ISDS tribunal or the allegations of fraud, bribery and corruption which tainted the judgment by Ecuadorian Courts up to the Ecuadorian Supreme Court[116]. Rather, the case is cited in this thesis as an illustration of the legitimacy question (valid or otherwise) which may arise from the exclusion of third parties whose legal rights are directly at stake in an ISDS arbitration such as in the case of the Ecuadorian plaintiffs[117].

The Columbia Centre for Sustainable Investment (CCSI) etal clarified how the rights of third parties may be at stake in an ISDS arbitration and highlighted four practical scenarios[118]. This includes instances where: (1) an environmental organization challenges before national courts a government agency's issuance of an environmental permit to an investor, and the investor brings an ISDS claim to challenge the permit's revocation[119]; (2) an individual plaintiff secures a tort judgment against the investment, and the investor brings an ISDS claim to challenge the tort judgment as being arbitrary and disproportionate[120]; (3) affected communities challenge before national courts a government agency's granting of a concession, arguing that consultation processes were inadequate, and the investor brings an ISDS claim to challenge a court injunction that stopped the continuation of the project until consultation was completed[121]; (4) an indigenous community and a foreign investor have competing claims over rights to a

[115] Chevron Corporation and Texaco Petroleum Company vs The Republic of Ecuador, [2009] Case No. 2009-23 (PCA) Second Partial Award on Track II dated 30 August 2018, paras 10.4 – 10.13.
[116] Joseph Ax 'Ecuador $9.5 billion ruling against Chevron was corrupt: U.S. judge' (Reuter, 4 March 2014) <www.reuters.com/article/us-chevron-ecuador-idUSBREA231CZ20140304> accessed on 21 June 2021.
[117] Nathalie Bernasconi-Osterwalder 'Chevron v. Ecuador' (International Institute for Sustainable Development (IISD), April 2011) <www.iisd.org/projects/chevron-v-ecuador> accessed 20 July 2021.
[118] Jesse Coleman, Lise Johnson, Brooke Güven, Lorenzo Cotula, and Thierry Berger 'Third Party Rights in Investor-State Dispute Settlement: Options for Reform' Submission to UNCITRAL Working Group III on ISDS Reform, Columbia Centre on Sustainable Investment, International Institute for Environment and Development, and International Institute for Sustainable Development 15 July 2019, p2, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_reformoptions_0.pdf> accessed 20 July 2021.
[119] See for example claims by claimants in TransCanada Corporation and TransCanada PipeLines Limited v. United States of America,[2021] Case No. ARB/16/21 (ICSID); Copper Mesa Mining Corporation v. Republic of Ecuador [2012]No. 2012-2 (PCA) and Infinito Gold Ltd. v. Costa Rica, [2021] Case No. ARB/14/5 (ICSID).
[120] See for example Eli Lilly and Company v. The Government of Canada, [201] Case No.UNCT/14/2 (ICSID). Final Award, 16 March 2017; Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, [2009] PCA Case No. 2009-23 (UNCITRAL).
[121] See for example Daniel Kappes and Kappes Cassiday & Associates v. Guatemala [2021] Case No. ARB/18/43 (ICSID); South American Silver Limited v. Bolivia, [2013] PCA Case No. 2013-15 final Award of 22 November 2018; Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID [2015] Case No. ARB/10/15, Award and Decision on Annulment, 28 July 2015 and 21 November 2018 respectively.

piece of land, and the investor sues in ISDS to secure an award ordering the state to provide it clear title to the disputed property[122].

The above illustration by the CCSI is aligned with the clarification by the UNCITRAL Working Group III on ISDS reforms regarding the meaning of third parties as including 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"[123]. Arguably, this clarification implies that persons with a direct stake in the dispute should be regarded as actual parties.

In light of the above practical illustration by the CCSI and UNCITRAL Working group respectively, for the purposes of this thesis and ease of reference, this thesis asserts that Indigenous Right Holders' right to access to effective remedy may arise in an ISDS arbitration in three different categories. These include (a) Access to remedy where the legal rights of Indigenous Right Holders are directly at stake in an ongoing ISDS arbitration. For instance, where their legal right forms the subject matter of the arbitration (b) Access to remedy where Indigenous Right Holders will be potentially affected by the outcome of an ISDS arbitration, even though their legal rights do not form the subject matter of the dispute submitted for arbitration. (c) Access to remedy for Indigenous Right Holders when they are victims of investment-related human rights abuses. These categories are analysed in greater detail in chapter four.

The foregoing illustrates the need for interrogation and analysis of the question of whether IIL is potentially an effective legal framework to provide access to remedy for Indigenous Right Holders in any of the categories identified above. Essentially, this necessitates the inquiry as to whether IIL ought to allow third-party right holders to participate as actual parties in ISDS arbitration in the same way as foreign investors, under any of the three categories identified above.

Against the backdrop of the above three categories, the thesis aims to identify potentials and limitations of the IIL framework to provide access to remedy for Indigenous Right Holders with reference to these categories. However, in consideration of possible limitations that might be associated with the capacity of the ISDS mechanism provide access to effective remedy for

[122] von Pezold v. Zimbabwe (n 46); and Chevron v. Ecuador (n40).
[123] United Nations Commission on International Trade Law (UNCITRAL), Report of Working Group III (Investor State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session (New York, 1-5 April 2019) para. 31.

Indigenous Right Holders, the thesis adopted the 'all road to remedy' approach towards the search for an effective legal framework extending to diverse settings cutting across State-based and non-State based grievance mechanisms, business and human rights (BHR) mechanisms, company level operational-level grievance mechanisms, grievance mechanism embedded within international finance institutions such as the World Bank, International Finance Corporation, and the African Development Bank respectively.

In an attempt to tackle the access to remedy challenge, the WG advocated an 'all road to remedy' approach to realizing effective remedies for rights holders affected by business-related human rights abuses[124]. As noted above, the WG urged that access to effective remedies should be taken as an all-pervasive lens and diverse actors should work individually and collectively towards the common goal of providing access to effective remedies, and remedies should be realized in diverse settings[125].

One of such diverse settings which this research is focused on is the IIL framework which certain State and non-State actors have argued ought to provide access to remedy for victims of investment-related human rights abuses in the same way as investors[126]. As the WG noted, access to effective remedy consists of both substantive and procedural dimensions[127], and these will be analysed in relation to the IIL regime.

Historically, the ISDS was set up primarily as a forum for the resolution of disputes between investors and the host State and in some instances for the settlement of State-State disputes[128]. Both the substantive and procedural frameworks for the ISDS were designed to achieve the purpose of its establishment. As such, consideration of the ISDS as a potential legal framework for providing access to remedy for Indigenous Right Holders would need to be analysed within this historical context.

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[124] Report of the Working Group (n64).
[125] Ibid.
[126] Special Rapporteur on the Rights of Indigenous Peoples etal 'Letter to the UNCITRAL Working Group III on ISDS reforms by the Working Group on the issue of human rights and transnational corporations and other business enterprises' 7 March 2019, P6 < www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf> accessed 21 August 2020; See also Patrick Wieland, 'Why the Amicus Curia Institution is Ill-Suited to address Indigenous People's Rights before Investor-State Arbitration Tribunals: Glamis Gold and the Right of Intervention' (2011) 3(2) TRADE L. & DEV. 336; See also Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, UN Doc. A/72/153 (2017), para. 74.
[127] Mavluda Sattorova ''The Impact of Investment Treaty Law on Host States- Enabling Good Governance'' Hart Publishing (2018)1.
[128] Ibid.

Notwithstanding, there is the recognition that apart from investors and State parties, the interests and rights of third parties including Indigenous Right Holders are often implicated in ISDS arbitration[129]. It is therefore conceded that such occasions warrant critical scrutiny of the ISDS as a potential legal framework to provide access to remedies for affected rights holders such as indigenous peoples.

Indeed, third parties including indigenous peoples have unsuccessfully sought to participate in some ISDS arbitration where their interests or rights were directly at stake. For instance, the amicus curiae petitioners in Aguas del Tunari, SA v. the Republic of Bolivia unsuccessfully applied to be allowed to participate in the arbitration as direct parties with all rights of participation accorded to actual parties to the claim[130]. Similarly in the United Parcel Service of America Inc v. Canada case, the Canadian Union of Postal Workers and the Council of Canadians unsuccessfully requested to participate as actual parties[131].

In the two separate cases, the petitioners predicated their request on the claim that they held a direct interest in the arbitration which they were keen to defend[132]. In both cases, the petitioners argued that it would be appropriate to grant them the same status as the actual parties to the ISDS claim so that they can similarly exercise the specific rights reserved for parties alone (for example, the rights to have one's views considered and to make submissions, consent to open the proceedings and choice of venue)[133].

One of the research questions in this thesis was informed by the opposing arguments regarding whether IIL ought to provide access to effective remedies for Indigenous Right holders, especially by way of participation as actual parties in relevant ISDS arbitration.

In its 2017 Report to the UN General Assembly, the WG raised concerns about international investment Agreements, mostly BITs, citing the predominant focus on investor protection coupled with an insular investor-State dispute settlement mechanism[134]. The WG noted that

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[129] Patrick Wieland (n126).

[130] Aguas del Tunari, SA v. Republic of Bolivia, [2020] Case No. ARB/02/3 (ICSID) (Petition of La Coordinadora para la defensa del agua y vida et al.) at 3 <http://italaw.com/cases/57> accessed 20 July 2020; See also Avidan Kent 'The Principle of Public Participation in NAFTA Chapter 11 Disputes' in Hoi L. Kong and L. Kinvin Wroth (ed) NAFTA and Sustainable Development- History, Experience, and Prospects for Reform, (Cambridge University Press 2015) 293.

[131] United Parcel Service of America Inc. v. Government of Canada [2001] Case No. UNCT/02/1 (ICSID). Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae 17 October 2001, paras 1 & 73.

[132] Supra Avidan Kent (n130).

[133] Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Docs A/72/162 (n70) para 76.

[134] Ibid.

investors, although not party to BITs can sue the relevant State party to protect their commercial interests, State parties or the affected communities cannot generally bring an action against an investor under these BITs for alleged human rights abuses linked to an investment project[135].

The WG in a March 2019 letter to members of the UNCITRAL Working Group III on ISDS reforms noted that 'if the ISDS mechanism continues to allow investors (as third parties to IIAs) a special fast-track path to seek remedies to protect their economic interests, the same pathway should be extended to communities affected by investment-related projects'[136].

Similarly, a UN-appointed Independent Expert observed that 'if the ISDS system is to maintain its legitimacy, it is imperative that affected communities and individuals as well as public interest organizations are able to effectively participate in the ISDS proceedings and present their evidence, views and perspectives in full'[137].

According to the WG, even though some ISDS arbitration may permit third parties to make submissions as amicus curiae, amicus curiae submissions cannot be regarded as a meaningful means of third-party participation[138]. It was argued that when accepted, amicus curiae submissions are given limited consideration by the tribunals, and in many instances rejected altogether[139]. Further, the WG argued that amicus curiae submissions are reportedly restricted to written submissions, whereas the petitioners are allowed limited or no access to information about other case documents or the hearing[140].

In a related dimension, Patrick Wieland contends that the ISDS ought to provide for an absolute right of participation by indigenous peoples, because indigenous peoples are deserving of a peculiar status given their distinct identity and right to self-determination[141]. Likewise, Francioni posed the question of whether the concept of access to remedies as currently entrenched in binding arbitration in favour of foreign investors under IIAs ought to be matched

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[135] Ibid.
[136] Special Rapporteur on the Rights of Indigenous Peoples etal 'Letter to the UNCITRAL Working Group III on ISDS reforms by the Working Group on the issue of human rights and transnational corporations and other business enterprises' 7 March 2019, p6 <https://www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf> accessed 21 August 2020.
[137] Supra Report of the Independent Expert (n126).
[138] Report of the Working Group (n70) p6.
[139] Ibid.
[140] Ibid.
[141] Supra Patrick Wieland, (126) p351.

by an equivalent right to remedial proceedings for private individuals and groups who investments in host states have impacted negatively[142].

The Government of South Africa in its submission to the UNCITRAL Working Group III on ISDS Reforms noted that 'ISDS allows foreign investors to bring claims against host governments to an international arbitral tribunal and gives private parties access to the supranational level. This discriminates against companies operating locally and comes with systemic issues. Yet, people and communities harmed by foreign investments do not have clear mechanisms to claim justice and reparation'[143].

In its submission to the UNCITRAL Working Group III, Ecuador observed that there have been situations where the rights of specific groups with a legitimate interest in a dispute have been affected by an arbitral award and yet those groups were not allowed to be parties to the proceedings[144]. Part of Ecuador's recommendation included that a provision should be made to include parties that could also be directly affected by the arbitral award[145].

In a similar breath, Cotula pointed out that the absence of effective participation in ISDS by third parties has the potential of depriving them of their rights and interests, more importantly, it could potentially foreclose the opportunity to hold foreign investors accountable[146]. Cotula added that failure to guarantee meaningful participation for third-party victims may constitute a deviation from the sustainable development goals (SDG) particularly SDG 16.3 on equal access to justice for all; developing 'effective, accountable and transparent institutions at all

[142] Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law', (2009) 20(3) EUR. J. INT'L L. p738.

[143] Government of South Africa 'Possible reform of Investor-State dispute settlement (ISDS)' Submission to the United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), 17 July 2019, para. 8,< https://uncitral.un.org/sites/uncitral.un.org/files/176-e_submission_south_africa.pdf> accessed 20 July 2020.

[144] Government of Ecuador 'Possible reform of investor-State dispute settlement (ISDS)' Submission to the United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session, A/CN.9/WG.III/WP.175, 17 July 2019, paras. 23-26 < https://uncitral.un.org/sites/uncitral.un.org/files/wp_175_wgiii.pdf> accessed 20 August 2020.

[145] Ibid para. 25.

[146] Lorenzo Cotula and Nicolás M Perrone 'Reforming investor-state dispute settlement: what about third-party rights? (International Institute for Environment and Development and Durham University, February 2019, pp1-3); See also Nicolás Perrone 'The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?' (2016) Transnational Legal Theory, 7:3, 383-405 < https://doi.org/10.1080/20414005.2016.1242249> accessed 21 November 2021; See also Nicolás M. Perrone 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' part of Investor Responsibility: The Next Frontier in International Investment Law, (2019) 113 AJIL Unbound , pp 16-21.

levels' (SDG 16.6) and ensuring 'responsive, inclusive, participatory and representative decision making at all levels' (SDG 16.7)[147].

Importantly, Kent argued that the prospect of allowing non-disputing parties (NDPs) to participate as actual parties in relevant ISDS arbitration should not be entirely dismissed[148]. Specifically, Kent contended that granting such permission to NDPs may be warranted especially in extreme and relatively rare cases in which a third party's significant interests constitute the subject matter of the ISDS arbitration, and the host state is not in a position to effectively represent such third-party interest[149].

However, Kent cautioned that a moderate approach is probably to 'permit the amicus, in similar cases, some of the rights that are usually reserved for the parties, such as effective legal representation and the rights to interrogate witnesses, to bring evidence, or to raise legal and factual arguments before the tribunal'[150]. He submitted that 'such rights can also be limited in scope to avoid imposing a disproportionate burden on the parties, and such interventions can even be subject to the payment of costs'[151].

On the other hand, it is arguable that the third-party participation principle and the enabling procedural rules in ISDS were designed to cater to the interest of NDPs[152] such as Indigenous Right-holders among others, thus obviating the arguments for participation by Indigenous Right-holders as actual parties in ISDS arbitration. The cases of Glamis Gold, Ltd. v. The United States of America[153]; Biwater vs Tanzania[154] and to a limited extent the case of Bear Creek Mining Corporation v. the Republic of Peru[155], discussed in more detail later appear to

[147] Ibid.
[148] Avidan Kent (n 130), p301.
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Gary Born and Stephanie Forrest 'Amicus Curiae Participation in Investment Arbitration (2019) 34 No. 3 ICSID Review pp. 626–665, p639.
[153] See generally Glamis Gold Ltd. v. United States of America, Award dated 8 June 2009 paras 830-838; Glamis Gold Ltd. v. United States of America Decision on Application and Submission by Quechan Indian Nation, 16 December 2005 paras 10-14; See also Howard Mann 'Glamis Gold Ltd. v. United States of America' (Investment Treaty News, International Institute for Sustainable Development, 18 October 2018) < www.iisd.org/itn/en/2018/10/18/glamis-v-united-states/> 12 July 2020; See generally Christina Binder and Jane A. Hofbauer 'Case Study: Glamis Gold Ltd. (Claimant) v United States of America (Respondent), NAFTA/UNCITRAL Award, 8 June 2009', Committee on the Implementation of the Rights of Indigenous Peoples of the International Law Association (ILA), 2009 pp6-10.
[154] Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, [2008] CASE NO. ARB/05/22 (ICSID). Award dated July 24, 2008, para 60.
[155] Bear Creek Mining Corporation v. Republic of Peru, [2017] Case No. ARB/14/2 (ICSID), procedural Order no 5, paras 58 & 59. The Tribunal accepted the application to file amici curiae submission by Association of Human Rights and Environment of Puno, Peru ("DHUMA"), and Dr. Carlos López PhD, Senior Legal Adviser to the International Commission of Jurists.

support the above assertion. In each of the three cases, the respective Tribunals granted the various applications to submit amici curiae briefs. Notably, the amici curiae submissions in each of these cases sought to protect the interests of NDPs implicated in the ISDS arbitration. This does not imply that ISDS Tribunals have granted applications to submit amicus curiae briefs on these three occasions only.

Specifically, the UNCITRAL Working Group III on ISDS reforms noted that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") as well as the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency") addressed submissions by a third person (article 4 of the Rules on Transparency) and by an NDP to the treaty (article 5 of the Rules on Transparency)[156].

Further, it is arguable that some investment treaties have already expressly provided for transparency in the settlement of disputes to be arbitrated under the treaty. For instance, Article 10.21 of the Central America-Dominican Republic Free Trade Agreement (CAFTA-DR) provides for transparency in ISDS arbitration[157].

In a similar vein, it could be argued that IIL already provides for means by which the legal rights or interests of NDPs can be represented or protected in ISDS arbitration through the mechanism of State counterclaims. Some of the cases which seem to illustrate the potential of state counterclaim in this regard include the cases of Urbaser vs Argentina where an ISDS Tribunal for the first-time accepted jurisdiction to hear state human rights-based counterclaim even though the counterclaim failed on the merit[158]; Burlington Resources Inc. v. Republic of Ecuador ICSID case where the ISDS tribunal upheld Ecuador's counterclaim and granted the total sum of USD 41,776,492.77 in respect thereof,[159], and Perenco Ecuador Ltd. v. the

[156] United Nations Commission on International Trade Law (UNCITRAL), Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session (New York, 1-5 April 2019) (hereafter '37th Session Report') para. 32, < https://documents-dds-ny.un.org/doc/UNDOC/GEN/V19/024/04/PDF/V1902404.pdf?OpenElement> accessed 15 January 2021.
[157] See chapter 10 (Investment) of the CAFTA-DR (Dominican Republic-Central America FTA) which came into force in October 2012, < https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> accessed 28 June 2020.
[158] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26 Award dated 8 December 2016 para 1221.
[159] Burlington Resources Inc. v. Republic of Ecuador, ICSID [2017] Case No. ARB/08/5 (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)) Decision on Counterclaim dated 7 February 2017 paras 1075 & 1099.

Republic of Ecuador where the ISDS Tribunal granted Ecuador's environmental counterclaim of US$54,439,517.00 is the cost of restoring the environment[160].

Based on the above, some may argue that IIL has already provided non-disputing parties including Indigenous Right-holders the opportunity for protection of their legal rights or the representation of their interests through the amicus curiae submissions or state counterclaim respectively. To that extent, this thesis aims to test the veracity or otherwise of these arguments in the subsequent chapters through an analysis of the demands that IIL should provide access to remedies for victims of investment-related human rights abuses. Equally, the research will critically review the existing ISDS mechanisms set up to cater to third-party right holders through the amicus curiae submissions or state counterclaim to ascertain their conduciveness to access to remedy for Indigenous Right Holders.

1.4.3 Business and human rights mechanisms and other international grievance mechanisms

In furtherance of the search for an effective legal framework, the research will analyse the prospects and limitations of specific business and human rights mechanisms as potentially effective legal frameworks to provide access to an effective remedy for Indigenous Right Holders.

In answering the question on the potential impacts of the proposed international legally binding instrument to regulate the activities of transnational corporations and other business enterprises 'Proposed Binding Business and Human Rights (BHR) treaty' (Proposed BHR Treaty) could make in the context of access to remedies for victims of human rights abuses by corporations, Participant 2 compared the prospects of a binding international Business and Human Treaty (binding BHR Treaty) with the proposed European Union Proposal for a Corporate Sustainability Due Diligence Directive (Proposed Directive), Participant 2 remarked that the ongoing work towards a binding BHR treaty '…is a very noble effort people are making and a lot of very interesting thinking and energy going into it. I think it is unlikely to see fruits in the short term, doesn't mean people should not be trying to push it in the long term. But I think where there is a lot more promise is on National Human Rights Due Diligence law such as the

[160] Perenco Ecuador Ltd. V. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6 Award dated 27 September 2019, para 1023.

European Human Rights Due Diligence Law, which is also now being conceived of, which is going to be a game changer in this area…'[161].

It is expected that the Proposed Directive would contribute towards deterring corporate impunity by companies causing harm to people and the planet while ensuring that victims are guaranteed access to legal remedies[162]. Similarly, it has been argued that the Proposed BHR Treaty represents an opportunity to enhance prevention, enforcement, and access to remedy for corporate-related human rights abuses[163]. However, specific limitations which may potentially hinder the success of the Proposed Directive including its narrow scope of application have been highlighted[164]. In equal vein, among other criticisms, doubts have been expressed about the prospect of the proposed BHR treaty to bind corporations which are not subjects of international law[165].

These arguments vis-à-vis prospects and limitations of business and human rights mechanisms are explored and analysed in detail in chapter five of this thesis to ascertain their conduciveness to access to effective remedy for Indigenous Right Holders.

1.5 Significance and originality

As noted above, access to an effective remedy is one of the most compelling challenges confronting indigenous people. This is illustrated in this research by the case study of the Ogoni people. In the absence of access to effective remedies, all the other rights accruable to indigenous people under, for instance, the ILO 169 and the UNDRIP would at best be merely academic and unavailing.

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[161] Virtual Research Interview with UK based international human rights lawyer and Partner at an International Human Rights Law Firm in London, conducted on 26 April 2021. (See full interview transcript attached as Appendix 2).

[162] See generally Corporate sustainability due diligence - Fostering sustainability in corporate governance and management systems <https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en> accessed 14 March 2022.

[163] Daniel Blackburn 'Removing Barriers to Justice How a treaty on business and human rights could improve access to remedy for victims' (2017) International Centre for Trade Union Rights (ICTUR) ; See also BHR Treaty Process – OHCHR and Business and Human Rights <www.ohchr.org/en/business-and-human-rights/bhr-treaty-process> accessed 22 May 2022.

[164] See generally Gabrielle Holly and Signe Andreasen Lysgaard 'Legislating for Impact Analysis of the Proposed EU Corporate Sustainability Due Diligence Directive' (2022) The Danish Institute for Human Rights <www.humanrights.dk/publications/legislating-impact-analysis-proposed-eu-corporate-sustainability-due-diligence> accessed 20 August 2022.

[165] Clara Vagas 'A Treaty on Business and Human Rights? A Recurring Debate in a New Governance Landscape in Cesar Rodriguez-Garavito (ed) Business and Human Rights- Beyond the End of The Beginning (Cambridge University Press 2017) pp111-126.

This research is significant in view of the largely unsuccessful but long-standing search by indigenous people for an effective legal framework that would guarantee access to effective remedy through various judicial and non-judicial grievance mechanisms (discussed in chapter four). As would be shown in this thesis, the search for an effective legal framework by indigenous peoples has resulted in varying outcomes characterised mostly by severe limitations. These limitations have informed the demands in some quarters that the search for an effective legal framework should be extended to IIL. The analysis in this thesis relating to the potential of ISDS as an effective legal framework is significant and timely in light of ongoing discourse at the United Nation level on the subject of ‘‘Human Rights-compatible International Investment Agreements (IIAs)”[166] which pose questions cutting across the three pillars of the UNGPs.

Despite the topicality of the issue of access to remedies for Indigenous Right Holders and the propositions that IIL ought to provide access to remedy, a thorough check through the body of literature on indigenous peoples vis-à-vis the literature on business and human rights[167] indicates that the potential or otherwise of the IIL as a legal framework to guarantee access to remedy for Indigenous Right Holders is grossly under-theorised.

Notably, one of the main questions in this research - whether and how, and if at all, to what extent the IIL regime ought to provide access to remedy for Indigenous Right holders, does not

[166] UN Office of the High Commissioner for Human Rights (OHCHR) ‘Open call for input for Working Group on Business and Human Rights’ report on “Human Rights-compatible International Investment Agreements (IIAs)” <https://previous.ohchr.org/EN/Issues/Business/Pages/CFI-Human-Rights-compatibleIIAs.aspx accessed> 25 January 2022.

[167] Brenda L. Gunn ‘International Investment Agreements and Indigenous Peoples’ Rights’ in John Borrows and Risa Schwartz (ed) Indigenous Peoples and International Trade Building Equitable and Inclusive International Trade and Investment Agreements, (Cambridge University Press,\ 2020) pp 194-216; Silvia Steininger ‘The Role of Human Rights in Investment Law and Arbitration State Obligations, Corporate Responsibility and Community Empowerment’ in Ilias Bantekas, Michael Ashley Stein (ed) The Cambridge Companion to Business and Human Rights Law, (Cambridge University Press 2021) pp406-427; Judith Levine ‘The interaction of international investment arbitration and the rights of indigenous peoples’ in Freya Baetens (ed) Investment Law within International Law - Integrationist Perspectives, (Cambridge University Press 2013) pp106-128; Valentina Vadi ‘Heritage, Power, and Destiny: The Protection of Indigenous Heritage in International Investment Law and Arbitration’ George Washington International Law Review, vol 50:4, (2018) pp 725-780; Columbia Centre on Sustainable Investment ‘International Investment and the Rights of Indigenous Peoples’, Workshop Outcome Document, 16 November 2016. Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples, UN Doc A/70/301 (7 August 2015) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/249/09/PDF/N1524909.pdf?OpenElement> accessed 11 November 2021; Report of the Special Rapporteur on the rights of indigenous peoples, UN Doc A/HRC/33/42 (11 August 2016) < https://www.undocs.org/A/HRC/33/42> accessed 11 December 2019.

seem to have been explored substantially in any available existing scholarship on indigenous peoples' rights, access to remedies or business and human rights.

Indeed, several literature on indigenous peoples have explored and analysed issues pertaining to the negative experiences of indigenous peoples including the adverse impacts of business activities on the enjoyment of their rights[168]. Similarly, the difficulties experienced by indigenous people in the search for access to effective remedy has been well documented in existing literature which have identified and attempted to proffer solutions regarding the lack of access to an effective remedy for Indigenous Right Holders[169].

However, none of these pieces of literature has comprehensively explored or analysed the potential or otherwise of IIL as an effective legal framework for access to an effective remedy for Indigenous Right Holders. Indeed, a couple of existing scholarship have documented the negative impacts of the IIL regime on the enjoyment of third parties, including indigenous peoples' rights, without making allowance for such adverse impacts to be remedied under the IIL framework[170]. However, the approach taken in the said scholarship was not aimed towards the search for an effective legal framework for access to remedy particularly with reference to IIL as a potential legal framework.

It is to this extent that this research contributes a significant and original perspective to the existing scholarship on indigenous peoples' rights, access to remedies, business and human rights vis-à-vis the question of whether IIL could serve as an effective legal framework for access to remedies for Indigenous Right Holders. Importantly, this research is timely in light of

[168] Ibid.

[169] Cathal Doyle (n3); International Working Group for Indigenous Affairs 'Extractive Industries, Land Rights and Indigenous Populations'/Community Rights - East, Central and Southern Africa', Report of the African Commission's Working Group on Indigenous Populations/Communities, Adopted by The African Commission on Human and Peoples' Rights at its 58th Ordinary Session, 2017; Amnesty International 'Nigeria: No Clean-Up, No Justice: An evaluation of the implementation of UNEP's environmental assessment of Ogoniland, nine years on' 27 June 2020 < www.amnesty.org/en/documents/afr44/2514/2020/en/> accessed 11 August 2021; Amnesty International 'Nigeria: In the dock: Shell's complicity in the arbitrary execution of the Ogoni Nine' (Amesty International, 29 June 2017) < https://www.amnesty.org/en/documents/afr44/6604/2017/en/> accessed 29 August 2020.

[170] Lorenzo Cotula and Nicholas Perrone '(n92), p3; See also Nicolás M. Perrone 'The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?' Transnational Legal Theory, (2016) 7:3, 383-405, < https://doi.org/10.1080/20414005.2016.1242249> accessed 12 June 2020; See Nicolás M. Perrone 'The 'Invisible' Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' in Symposium on Investor Responsibility: The Next Frontier in International Investment Law, 113 AJIL Unbound 16–21 (2019) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3317934> accessed 20 June 2020.

the ongoing efforts to reform the IIL framework as a whole including both the substantive and procedural aspects[171].

The IIL framework is significant in light of the arguments in some quarters that most large investment projects are cited near indigenous peoples' land, and this has given rise to many cases of human rights abuses mostly attributed to activities of foreign investors operating in the extractive industry[172]. It has been argued that although the ISDS provides access to remedies for foreign investors who allege the violation of their treaty or contractual rights, the ISDS does not avail third parties whose rights have been abused by foreign investors with similar access to remedies[173].

This research is timely in that it is being undertaken at a time when the UNCITRAL Working Group III on ISDS reforms is looking to address challenges connected to the issue of the impact of ISDS on third-party rights vis-à-vis participation in ISDS arbitration by the general public and/or local communities that are specifically affected by pending ISDS disputes[174].

However, the research takes cognisance of the limitations of IIL with respect to providing access to remedy for Indigenous Right Holders, especially in light of the various categories in which indigenous peoples' rights could be implicated in ongoing ISDS arbitration. To this extent, this research is timely in view of its alignment with the recent 'all roads to remedy' approach propounded by the UN Working Group which is based on the recognition that access to remedy is located in diverse settings.

Therefore, the research is anchored on the 'all roads to remedy' approach based on which the research analysed the judicial and non-judicial grievance mechanisms in the host and home States respectively, the ISDS, and key BHR mechanisms including existing and prospective

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[171] See generally UNCITRAL Working Group III on Investor-State Dispute Settlement 'Possible reform of investor-State dispute settlement (ISDS)' A/CN.9/WG.III/WP.142, 34th Session, Vienna, 27 November - 1 December 2017 < https://undocs.org/en/A/CN.9/WG.III/WP.142> accessed 20 June 2020. See also UNCTAD 'Reforming Investment Dispute Settlement – A Stocktaking, IIA Issue Note 1, March 2019 < https://unctad.org/system/files/official-document/diaepcbinf2019d3_en.pdf> accessed 20 June 2020; UNCTAD's Reform Package for the International Investment Regime, 2018, < https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf? accessed 20 June 2020.

[172] First Peoples Worldwide, Indigenous Rights Risk Report for the Extractive industry (U.S.), Preliminary Findings, 28 October 2013, 10, < http://www.firstpeoples.org/images/uploads/R1KReport2.pdf> accessed 20 June 2020.

[173] Lorenzo Cotula and Nicolás M Perrone (n146), p1.

[174] United Nations Commission on International Trade Law (UNCITRAL), Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session (New York, 1-5 April 2019) para. 31 < https://documents-dds-ny.un.org/doc/UNDOC/GEN/V19/024/04/PDF/V1902404.pdf?OpenElement> accessed 20 June 2020.

mandatory human rights due diligence legislations to ascertain their potential to provide access to remedy for Indigenous Right Holders.

Further, the research explored the potential of companies' operational-level grievance mechanisms, and other grievance mechanisms embedded within international finance organisations such as the World Bank Grievance Redress Service, the Compliance Advisor Ombudsman (CAO), the World bank Inspection Panel which respectively have the responsibility for dealing with complaints filed by communities affected by IFC or World Bank -financed projects. Others considered in this thesis include the African Development Bank's (AFDB) Independent Review Mechanism, UNDP's Accountability Mechanism, and the European Investment Complaint Mechanism among others.

Indeed, in the context of BHR, the research is significant for coinciding with the period when the international human rights community marked the 10th anniversary of the UNGPs, amidst unabating incidents of human rights abuses, and importantly in view of "UNGPs 10+" or "next decade BHR" project launched in July 2021[175]. In this connection, this research is timely and significant given the ongoing discourse and consultations at the international level about the prospect of ensuring corporate accountability and access to remedy through BHR mechanisms including those embedded in existing and prospective mandatory human rights due diligence legislations.

Indeed, some existing scholarship have reviewed various existing and prospective BHR mechanisms such as the French Duty of Vigilance Law, Dutch Child Labour Due Diligence Law, and prospective mandatory human rights due diligence legislations such as the proposed EU Corporate Sustainability Due Diligence Directive. Similarly, other existing scholarship have analysed other prospective BHR mechanisms, particularly the proposed binding BHR treaty.

However, none of these scholarship have reviewed and analysed existing and prospective BHR mechanisms from the point of view of indigenous peoples and their quest for access to remedy. As highlighted above, the issue of access to remedy for Indigenous Right Holders is of particular significance given the uniqueness of their experiences and special circumstances with respect to access to remedy. It is on this basis that this research is original and significant due

[175] United Nations Office of the High Commissioner on Human Rights (OHCHR) 'The next decade of business and human rights and UNGPs next 10 years project' (OHCHR, 21 June 2021) < www.ohchr.org/EN/Issues/Business/Pages/UNGPsBizHRsnext10.aspx> accessed 21 December 2021.

to the analysis of potentially effective legal frameworks that could provide access to remedy for Indigenous Right Holders.

In the final analysis, it is expected that the research would hopefully fill a gap in business and human rights literature with respect to an effective legal framework to enable access to remedies for Indigenous Right-holders and the prospects of the IIL, BHR mechanisms, grievance mechanisms in the local jurisdiction and indeed grievance mechanisms by international financial institutions in that regard.

1.6 Research questions

In furtherance of the search for an effective legal framework to provide Indigenous Right Holders access to effective remedy in relation to investment-related human rights abuses, this research aims to interrogate the following questions:

1. Whether remedy for investment-related human rights abuses is obtainable by indigenous peoples through judicial and non-judicial grievance mechanisms available at the local jurisdiction, and if yes, whether such remedy could be challenged or undermined by foreign investors through recourse to the ISDS mechanism.

2. In light of the opposing arguments above regarding the potential or otherwise of IIL to provide access to remedy for Indigenous Right Holders, what constitutes access to an effective remedy in each of the three categories whereby Indigenous Right Holders could be involved in an ongoing arbitration as mentioned above? That is (a) Access to remedy where the legal rights of Indigenous Right Holders are directly at stake in an ongoing ISDS arbitration. For instance, where their legal right forms the subject matter of the arbitration (b) Access to remedy where Indigenous Right Holders will be potentially affected by the outcome of an ISDS arbitration even though their legal rights do not form the subject matter of the dispute submitted for arbitration. (c) Access to remedy for Indigenous Right Holders when they are victims of investment-related human rights abuses.

3. Whether the ISDS ought to provide access to an effective remedy for Indigenous Right Holders by allowing them to participate as actual parties in relevant ISDS arbitration in any of the three categories identified under question (2) above. To that extent, whether there is a compelling basis to dismantle the procedural barriers which prevent third-party right-holders from participating as actual parties in relevant ISDS arbitration, taking into account the reported tendency for ISDS arbitration to impact the interest and legal rights of indigenous right-holders when they are directly at stake in ISDS arbitration.

4. Whether the existing amicus curiae and state-counterclaim mechanisms in ISDS could provide a viable pathway for an effective remedy for Indigenous Rights Holders in any or all of the categories that are identified under question two (2) above.

5. What is the significance of the ‘all road to remedy’ approach recommended by the UN Working Group in the context of the search for an effective legal framework for access to an effective remedy for Indigenous Right Holders? To address this question, the research would aim to juxtapose the prospects/limitations of a streamlined pathway to access to effective remedy with the prospects/limitations of a liberalised pluralistic regime aligned to the theory that remedies are located in diverse settings. A liberalised pluralistic regime would encompass BHR mechanisms, the state-based and non-state-based judicial and non-judicial mechanisms in the local jurisdiction, operational-level grievance mechanisms, and other grievance mechanisms embedded within international finance organisations.

The answers to the above questions will hopefully contribute a critical and balanced perspective and potentially fill the gap in the business and human rights literature concerning the question of whether IIL framework ought to provide access to remedy for Indigenous Right Holders. In the final analysis, it is expected that the research would contribute significantly towards the advancement of the search for an effective legal framework that is conducive to securing access to effective remedies for Indigenous Right Holders.

1.7 Methodology

The research will combine elements of doctrinal research methodology also known as 'black letter law' with a qualitative approach for analysis. This is with a view to proffering answers to the above research questions.

According to Theunis Roux, doctrinal research is aimed at the systematisation and critique of a defined body of positive law[176]. Roux noted that 'since legal norms have external social effects, doctrinal research may, and often does, have consequences beyond the legal system'[177]. In Roux's opinion, 'arguments about deficiencies in the current state of the law also typically draw, not just on a critique of the particular body of law's internal coherence, but also on its external social effects'[178].

The research will be conducted using both primary and secondary sources. The primary sources would include relevant international law instruments particularly those based on indigenous peoples' rights, international investment law, law and natural resources, business and human rights respectively. Further, substantive (including relevant international investment Agreements) and procedural rules for the various ISDS institutions would be reviewed and analysed with particular focus on arbitral proceedings/awards which have implicated third party rights and interests including those affecting indigenous peoples.

It is expected that this analysis would enable a comprehensive understanding of how IIL addresses third party rights and interests including those of indigenous peoples when they are at stake in ISDS proceedings. In this regard, the research would entail a critical review of the amicus curiae procedure which is currently the most viable mechanism for third party participation in ISDS, and the instrumentality of State counterclaim with a view to addressing the question of whether the IIL regime is an effective legal framework to provide access to remedies for Indigenous Right Holders. Similarly, proposed legislative instruments and existing legislations especially those pertaining to BHR mechanisms, grievance mechanisms available in the local jurisdiction and regionally will be analysed with a view to ascertaining their suitability or otherwise as potentially effective legal framework for access to remedy for Indigenous Right Holders.

[176] T. Roux, 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour', 24 Legal Education Review (2014) 177, p2.
[177] Ibid.
[178] Ibid.

Secondary sources would include academic texts, journals, international investment and arbitration blogs, and generally conventional and unconventional but relevant materials. Based on the ethical approval granted by Research Ethics Committee, anonymised virtual research interviews were conducted with an international human rights lawyer and Partner at a London Human Rights Law Firm and a foremost environmental activist based in Ogoni land, Nigeria. Both research participants have several years of first-hand experience (from an eyewitness point of view) of the challenges associated with the search for access to effective remedy, the absence of which continue to negatively impact the indigenous peoples of Ogoni land. It is expected that the interviews would contribute the much-needed practical perspective to the research and enliven the analysis with first-hand accounts of the adverse impacts and unremedied human rights abuses suffered by indigenous people, especially those in Ogoni land.

The approach for evaluation would be analytical and qualitative. Natural resources exploitation by foreign investor led extractive industry and its impact on the rights and livelihood of indigenous peoples is adopted as the case study for this study with apt examples drawn from Ogoni land in Nigeria's Niger Delta region. In the final analysis, the methodology adopted for the research is expected to greatly enable a critical and systematic analysis which should hopefully contribute significantly towards proffering answers to the research questions formulated above.

1.8 Thesis structure

In addressing the above research questions, the thesis will be dimensioned into two major parts consisting of substantive and procedural aspects. Chapter one will entail a statement of the problems in relation to which the thesis aims to proffer solution, a highlight of the main arguments analysed in furtherance of the search for an effective legal framework for access to remedy for Indigenous Right Holders, extending to tone setting and background for the analysis in this thesis, significance of the study, and methodology respectively. Chapter two will explore the subject of indigenous peoples' rights and experiences within the context of the extractive industry using the Indigenous People of Ogoni land in Nigeria's Niger Delta region as a case study.

In furtherance of the search for an effective legal framework, chapter three entails a critical analysis of the prospects, limitations and suitability of the IIL framework as a possible legal framework which could provide access to effective remedies for Indigenous Right Holders. The

analysis would concentrate on substantive IIL with a focus on international investment Agreements (IIAs) vis-à-vis the extent to which they are conducive or could potentially be made conductive to access to remedies for Indigenous Right Holders. The analysis of the substantive aspect would extend to an objective analysis of existing mechanisms in ISDS such as the amicus curiae submission and state counterclaims, vis-à-vis their amenability to access to effective remedies for Indigenous Right Holders.

Chapter four (procedural aspect) entails an analysis of judicial and non-judicial grievance mechanisms at the local jurisdiction to test the veracity of arguments that grievance mechanisms in foreign jurisdictions e.g. homes state of multinational enterprises are more conducive for providing access to remedy for Indigenous Right Holders. Further, chapter four undertakes a critical analysis of the procedural aspect of IIL, particularly its potential and limitations for fulfilling the right to access for remedies of Indigenous Right-holders.

Chapter four will aim to ascertain the extent to which participation by third parties in ISDS arbitration through the amicus curiae submission procedure could be regarded as fulfilling the right to access to effective remedies, if at all. Similarly, the chapter will analyse the prospects of State counterclaims as a means of securing access to effective remedies for indigenous right holders. Importantly, the analysis in chapter four will be guided by the recognition that access to remedies may be located in diverse settings both within and beyond IIL. Against the backdrop of any limitations identified with respect to IIL, the research will consider the prospects of a liberalised, pluralistic approach to access to effective remedy taking into account that access to remedies may not be located in a singular setting.

Further, chapter four will explore the potential of operational level grievance mechanisms, and other grievance mechanisms embedded within international finance organisations such as World Bank Grievance Redress Service, the Compliance Advisor Ombudsman (CAO), the World bank Inspection Panel which respectively have the responsibility for dealing with complaints filed by communities affected by IFC or World Bank - financed projects. Others considered in this research include the African Development Bank's (AFDB) Independent Review Mechanism, UNDP's Accountability Mechanism, the European Investment Complaint Mechanism among others.

Meanwhile, chapter five will in furtherance of the search for an effective legal framework analyse various existing and prospective BHR frameworks vis-à-vis their potential for

enhancing access to remedies for indigenous right holders. The existing BHR frameworks include the French Duty of Vigilance Law 2017, and the Business and Human Rights Arbitration Rules. Meanwhile, the prospective BHR frameworks include the EU Proposal for a Corporate Sustainability Due Diligence Directive, and the draft Binding International Treaty on Business and Human Rights. This set of BHR frameworks will be critically analysed in chapter five in terms of their potential for fulfilling the right to access to remedies of Indigenous Right-holders.

Chapter six will entail a coalescence of arguments and analysis along with answers to the five (5) research questions posed in the research, especially the result of the search for an effective legal framework to secure access to effective remedy for Indigenous Right Holders together with appropriate recommendations.

Chapter 2: Indigenous Peoples

> ‘Petroleum, the symbol of Ogoni agonies and pains, was discovered in Ogoni in 1958, and since then an estimated 100 billion US dollars’ worth of oil and gas has been carted away from Ogoni land. In return for this, the Ogoni people have received nothing. The exploitation has turned Ogoni into a wasteland: lands, streams and creeks are totally and continually polluted; the atmosphere has been poisoned, charged as it is with hydrocarbon vapors, methane, carbon monoxide, carbon dioxide and soot emitted by gas which has been flared 24 hours a day for 33 years in very close proximity to human habitation.
>
> Acid rain, oil spillage and oil blow-outs have devastated the Ogoni territory. High-pressure oil pipelines crisscross the surface of Ogoni farmlands and villages dangerously. The results of such unchecked environmental pollution and degradation include the complete destruction of the ecosystem. Mangrove forests have fallen to the toxicity of oil and are being replaced by noxious neap palms; the rainforest has fallen to the axe of multinational oil companies, all wildlife is dead, marine life is gone, the farmland has been rendered infertile by acid rain and the once beautiful Ogoni countryside is no longer a source of fresh air and green vegetation. All one sees and feels around is death. Environmental degradation has been a lethal weapon in the war against the indigenous Ogoni people’[179].

> The above is a summarised account by the Movement for the Survival of Ogoni People (MOSOP) of the environmental and human rights consequences of oil exploration in Ogoni land[180].

The following critical review of the experiences of the indigenous peoples, their rights and quest for access to remedy in relation to investment-related human rights abuses is important to establishing a comprehensive foundation for the analysis in the subsequent chapters and most

[179] Movement for the Survival of Ogoni People (MOSOP) ‘History’ (MOSOP, 12 September 2021) < www.mosopusa.org/en/about-mosop-usa/history> accessed 12 December 2021.
[180] Ibid.

importantly to contribute towards the addressing the research questions formulated in chapter one.

To contextualise the search for an effective legal framework, it is important to understand the history of indigenous peoples which is exemplified by the case study of the Ogoni people in this thesis. It is pertinent to have an appreciation of what are the key rights of indigenous peoples in international law, how these rights are potentially abused particularly within the context of natural resources-exploitation by foreign investors protected under IIL, and how indigenous peoples' rights are at stake in ISDS arbitration.

The following analysis is expected to demonstrate that access to remedy remains a challenge for indigenous peoples despite their well-documented history of human rights abuses within the context of IIL, and invariably to establish the foundation for the larger interrogation of the research questions in this thesis.

At the outset, it is important to note that as Anaya pointed out, the interest of indigenous communities and the foreign investor-led extractive industry does not always have to be at odds[181]. The aim of this research includes the substantiation of the argument that investments, including those in the extractive sector and host State development, can to a large extent co-exist with minimal incidents[182]. However, this is currently not the prevalent circumstance. Essentially, the violation of indigenous peoples' rights in the context of IIL has persisted not because of the absence of laws, but probably due to the anomaly of having substantive indigenous peoples' rights without commensurate development of procedural rights for their enforcement.

[181] James Anaya 'Report of the Special Rapporteur to the UN Human Rights Council on the rights of indigenous peoples 'Extractive Industries and Indigenous Peoples' A/HRC/24/41, 2013 p3.
[182] Stephan W. Schill, Christian J. Tams and Rainer Hofmann 'International investment law and development: Friends or foes?' In Stephan W. Schill, Christian J. Tams and Rainer Hofmann (ed) 'International Investment law and Development- Bridging the Gap' (Cheltenham: Edward Elgar Publishing, 2015) 3-42. p <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=29342513> accessed 12 June 2021.

2.1 Indigenous peoples- Brief Background

Efforts to define indigenous peoples have often ended in controversy with various scholars failing to agree on what definition accurately describes indigenous peoples. In any event, it would seem 'the concept of indigenous peoples' is not capable of precise, inclusive definition which can be applied in the same manner to all regions of the world'[183]. It would appear safe to rely on the objective and subjective criteria for the identification of indigenous peoples that emerged from the definition by Martins Cobo in his famous 'the Martins Cobo Study'[184].

Features of the objective criteria include- 1) Historical continuity in the occupation of ancestral land beginning from the period predating the invasion by colonial societies. (2) Culture preservation cutting across religion, lifestyle, dress, means of livelihood and language. (3) Sustenance of their unique social and political systems based on customary law. (4) Keenness to maintain and transmit their identity and ancestral land to future generations. Conversely, the subjective criterion is founded on the concept of self-identification by individuals who regard themselves as belonging to an indigenous group which unequivocally accepts such individuals into the fold[185].

Tracing the foundations of indigenous rights in international law, Anaya dimensioned the discourse into state centred frame and a human rights-centred frame[186]. Anaya described the state-centred argument as deriving its essence from the notion of indigenous peoples' sovereignty over land and natural resources which according to him predates the sovereignty of the state itself[187].

Anaya argued that the rules of international law which relate to the acquisition of territory by and among states are illustrative of the assault on indigenous sovereignty and derivative rights over lands[188]. He posits that agitations by indigenous peoples concerning land, group equality,

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[183] E.I Daes, Working Paper on the Concept of Indigenous Peoples.by the Chairperson-Rapporteur, Mrs Erica-Irene A. Daes. UN Doc. E/CN.4/sub.2/AC.4/1996/2, (1996) < https://digitallibrary.un.org/record/236429> accessed 12 June 2021.

[184] See generally, Jose Martin Cobo 'Study of the Problem of Discrimination against Indigenous Populations' 1982 E/CN.4/Sub.2/1982/2, 10 August 1982 <www.un.org/esa/socdev/unpfii/documents/MCS_intro_1982_en.pdf> accessed 12 June 2021.

[185] Ibid.

[186] S. James Anaya, "Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend", (Colo. J. Int'l Envtl. L. & Pol'y 2005) 241 16, 237 (2005) < https://core.ac.uk/download/pdf/151649393.pdf> accessed 10 July 2020.

[187] Ibid.

[188] Ibid.

culture and development are founded on the quest to seek reparations for historical injustices against them[189].

The second argument identified in Anaya's treatise is the human rights frame which draws its significance from the moral and ethical discourse which underlines the contemporary human rights movement centred on the welfare of human beings[190]. The historical dimension of this line of argument alludes to past acts of oppression against indigenous peoples and related remedial procedures to ensure the enjoyment of these rights which together are regarded as moral imperatives vindicated by reference to human rights principles[191].

According to the University of Minnesota Human Rights Centre, issues affecting indigenous peoples have been a subject of interest at the international level probably due to their remarkable population found in nearly all the countries on all continents of the world[192]. Indigenous peoples are said to embody and nurture about 80% of the world's cultural and biological diversity occupying 20% of the world's land surface[193]. In this connection, Guy Ryder in an ILO publication observed that indigenous women and men and their communities risk remaining trapped in a cycle of poverty, discrimination and exploitation[194]. Due to their unique circumstances, indigenous peoples are keen on matters bordering on the preservation of their land, language, culture and natural resources.

Indigenous peoples' interests generally find expression in the quest for the preservation of their cultural ways of life and meaningful participation in matters affecting their land, culture, natural resources, environment and general livelihood[195]. Specifically, the ILO publication discussed the plight of indigenous peoples in light of the attainment of Sustainable Development Goals (SDG) noting that the SDGs are of crucial importance to over 370 million indigenous peoples throughout the world subjected to grave injustices ranging from marginalisation to exploitation

[189] Ibid.
[190] Ibid.
[191] Ibid.
[192] University of Minnesota Human Rights Library, Study Guide: 'The Rights of Indigenous Peoples' (UMN, 2003) < http://hrlibrary.umn.edu/edumat/studyguides/indigenous.html> accessed 10 July 2020.
[193] Ibid.
[194] International Labour Organisation 'Sustainable Development Goals- Indigenous Peoples in Focus', (International Labour Organisation, 26 July 2016) < http://ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_503715.pdf> accessed 10 July 2020. See also ILO Director-General's statement to the World Conference on Indigenous Peoples Rights (September 2014) < www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-director-general/statements-and-speeches/WCMS_308970/lang--en/index.htm> accessed 10 July 2020.
[195] Ibid p5.

and exclusion[196]. The publication noted that despite the strides recorded in the eradication of poverty, indigenous people remain among the 'poorest of the poor'[197].

The traditional ways of life, livelihoods, and practices of indigenous peoples are increasingly threatened due to a range of factors, such as lack of recognition of their rights, exclusionary public policies, and the impacts of climate change[198]. Meanwhile, a range of factors such as loss of access to traditional lands and natural resources, discrimination, forced migration and lack of access to opportunities have combined to render indigenous people more vulnerable in social and economic terms[199].

Anaya, in his statement to the 9th session of the UN Permanent Forum on Indigenous Peoples, acknowledged the post-colonization injustices suffered by indigenous people noting that they are typically confronted with extreme disadvantages across a range of social and economic indicators such as their historical exclusion from state decision making, the dispossession of their lands and natural resources and their determination to preserve and transmit to future generations their distinct cultural identities.[200]

According to the United Nations manual for National Human Rights Institutions indigenous people are among the world's most vulnerable, disadvantaged and marginalized peoples with a very strong connection to the environment, traditional lands and territories[201]. The manual articulated the plight of indigenous peoples as entailing widespread violations of their human rights, culture erosion, oppression, forceful dislodgment from traditional lands and territories, and discrimination among others[202].

Further to the discussion in chapter one, it is important to consider the role of State parties for securing the protection of indigenous peoples' right, particularly through the enforcement of national regulations to protect human rights, the judicial system and the treaty negotiation process. It would seem that attempts at private enforcement of rights by Indigenous Right

[196] Ibid p1.
[197] Ibid.
[198] Ibid p2.
[199] Ibid.
[200] Statement by Professor James Anaya Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people at the Ninth Session of the UN Permanent Forum on Indigenous Issues 22 April 2010 p5 < http://unsr.jamesanaya.org/docs/statements/2010_statement_unsr_to_unpfii_april_2010_en.pdf> accessed 11 April 2020.
[201] A Manual for National Human Rights Institutions 'The United Nations Declaration on the Rights of Indigenous Peoples' (The United Nations Declaration on the Rights of Indigenous Peoples, August 2013) 5 < www.ohchr.org/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf> accessed on 1 May 2020.
[202] Ibid p10.

Holders have led to favourable judgments in some instances. However, such successes are more often than not short-lived or frittered away owing to defects in the judicial system often exploited by the losing party to frustrate the enforcement of the judgment at the local jurisdiction, while efforts to block the enforcement of the judgment are consolidated through the initiation of ISDS arbitration at the international level.

This has been witnessed in the cases of SPDC vs the Federal Republic of Nigeria[203] currently pending before an ICSID Arbitration Tribunal, the earlier case of Chevron vs Ecuador[204] decided by the Permanent Court of Arbitration and others such as Eli Lilly and Company v. The Government of Canada[205]; Daniel Kappes and Kappes Cassiday & Associates v. Guatemala[206]; Bernhard von Pezold and Others v. the Republic of Zimbabwe[207]; Aguas del Tunari, SA v. the Republic of Bolivia[208] and United Parcel Service of America Inc. vs Government of Canada[209]. These cases are analysed later in this thesis.

As noted in chapter one, doubts about the commitment of the Nigerian State to the protection of indigenous peoples' rights are perhaps best illustrated by the failure to ratify the key international law instrument for the protection of indigenous peoples' rights, that is the ILO 169 and the UNDRIP.

According to the Extractive Industry Transparency Initiative (EITI), the oil and gas sector is the dominant player in Nigeria's extractive sector holding 29% of Africa's oil reserve[210]. Statistics from the Organisation of Petroleum Exporting Countries (OPEC) indicate that Nigeria has almost 37.5 billion barrels of proven oil reserves with a maximum crude oil production capacity of 2.5 million barrels per day[211]. Nigeria ranks as Africa's largest producer of oil and the 13th largest oil-producing country in the world. This is without prejudice to other natural

[203] Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v. Federal Republic of Nigeria [2021] Case No. ARB/21/7 (ICSID)
[204] Chevron Corporation and Texaco Petroleum Company vs The Republic of Ecuador, Claimant's Notice of Arbitration, [2009] Case No. 2009-23 (PCA).
[205] Eli Lilly and Company v. The Government of Canada, Case No.UNCT/14/2 (ICSID). Final Award, 16 March 2017.
[206] Daniel Kappes and Kappes Cassiday & Associates v. Guatemala [2021] Case No. ARB/18/43 (ICSID); South American Silver Limited v. Bolivia, [2013] Case No. 2013-15 (PCA) final Award of 22 November 2018.
[207] Bernhard von Pezold and Others v. Republic of Zimbabwe, [2012] Case No. ARB/10/15 (ICSID), Award and Decision on Annulment, 28 July 2015 and 21 November 2018 respectively.
[208] Aguas del Tunari, SA v. Republic of Bolivia, [2003] Case No. ARB/02/3 (ICSID) (Petition of La Coordinadora para la defensa del agua y vida et al.) at 3.
[209] United Parcel Service of America Inc. v. Government of Canada, [2000] Case No. UNCT/02/1 (ICSID), Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae 17 October 2001, paras 1 & 73.
[210] See https://eiti.org/nigeria#overview accessed on February 28, 2019.
[211] See ''Nigeria facts and figures'' available on https://opec.org/opec_web/en/about_us/167.htm accessed on February 28, 2019.

resources available in the country including tin, iron ore, coal, limestone, niobium, lead, zinc, arable land[212] and other 40 solid minerals[213].

The Nigerian 1999 Constitution in section 44(3) vests the ownership of and control of all minerals, oil and gas, territorial waters and exclusive economic zone in the Federal Government[214]. While the ownership and control of all minerals and oil and gas vests in the Federal Government, the ownership and administration of urban land in the respective 36 states of the federation vests in the Executive Head of each state designated as Governor by the Nigerian Land Use Act (the Act). By the provisions of the Act, the Governor holds all the land within the state in trust for the people who at best are restricted to mere rights of occupancy approved by the Governor[215].

Taking cognisance of the ownership structure of lands and natural resources, section 162(2) of the Constitution prescribes a derivative formula for sharing of revenue accruing from the exploitation of natural resources whereby 13% of such revenue is due to state hosting the natural resources[216] while the remaining 77% accrues to the Federation Account.

Being mindful of the tendency for exploitation of natural resources resulting in negative consequences for host communities, the Constitution requires that 'the state shall direct its policy towards ensuring that the material resources of the community are harnessed and distributed to serve the "common good"'[217]. In a similar breath, the Constitution provides that "exploitation of human and material reserves in any form whatsoever for reasons other than the good of the community must be prevented'[218].

Apart from the Constitution and the Land Use Act, the Petroleum Act 1969 is the primary legislation setting out the governance standards for petroleum activities in Nigeria ranging from exploration, production, and transportation[219]. There is a myriad of other legislations relating to various aspects of investment in and exploitation of oil and gas in Nigeria. These include the

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[212] Ibid

[213] See <www.nipc.gov.ng/solid-minerals/> accessed on February 28, 2019.

[214] Constitution of the Federal Republic of Nigeria <www.nigeria law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> accessed on February 28, 2019.

[215] See Nigerian Land Use Act 1978 available on <www.nigeria-law.org/Land%20Use%20Act.htm>

[216] Constitution of the Federal Republic of Nigeria (n214).

[217] Ikhariale, M. "A Constitutional Imperative on the Environment: A Programme of Action for Nigeria" (1997) Paper Presented at the International Conference on Environmental Law and Policy, March 19th – 21st. see also section 16(2) (b) under chapter 2 (Fundamental Objectives and Directive Principles of State Policy) of the 1999 Constitution.

[218] Ibid.

[219] See <https://resourcegovernance.org/sites/default/files/documents/nigeria-pertoleum-act.pdf accessed on February 28>, 2019.

Nigerian Investment Promotion Commission (NIPC) Act which established by the Nigerian Investment Promotion Commission as the primary body for the promotion of investment across various sectors of the nation's economy[220].

Section 22-26 of the Petroleum Act 1969 imbues the Minister for Petroleum with the powers to grant and revoke oil licences for reasons such as failure by the oil company to adhere to relevant provisions of the Act and other allied laws and regulations[221]. Other grounds for revocation of oil licences include failure of the oil company to pay rents or royalties or refusal to submit a report of their activities as required from to time by the Minister[222]. Further, the Nigeria Mineral and Mining Act 2007 (NMMA) was enacted on the 16th of March 2007 to provide the regulatory framework for the exploration and exploitation of natural resources in Nigeria to ensure that these activities contribute towards sustainable national development[223]. The NNMA contains provisions aimed at achieving the goal of sustainable national development through-environmental protection and social obligation; Compensation and community development agreement; economic incentives and compensation; consultative and enforcement mechanisms and environmental degradation and reclamation[224]. Section 17 of the NNMA provides for a Mines Inspectorate Department while section 18 provides for a Mines Environmental Compliance Department towards ensuring compliance[225]. In recognition of the need to curb the negative impact of mining activities on the host communities, chapter 4 of the NNMA sets out comprehensive provisions on environmental considerations and rights of host communities[226].

Similarly, the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (NESREA Act) 2007 established the major environmental protection Agency in Nigeria designated as the National Environmental Standards and Regulations Enforcement Agency[227]. The Agency works in collaboration with the Ministry of Environment to formulate environmental policies and monitor compliance and enforcement respectively. Notably, section 7 of the NESREA Act mandates the Agency to enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment

[220] See <www.nipc.gov.ng/> accessed on February 28, 2019.
[221] Ibid.
[222] Ibid p59.
[223] Nigeria Mineral and Mining Act 2007 available at Nigeria - Nigerian Minerals and Mining Act, 2007 (Act No. 20). (ilo.org) accessed 12 December 2022.
[224] Ibid.
[225] Ibid.
[226] Ibid.
[227] National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (NESREA Act) 2007 https://www.nesrea.gov.ng/wp-content/uploads/2020/04/NESREA_Ammended_Act_2018.pdf accessed 12 December 2022.

and such other agreements as may from time to time come into force[228]. NESREA is responsible for the enforcement of environmental policies and guidelines including the National Policy on the Environment[229].

The Environmental Impact Assessment (EIA) Act 1992 was enacted in response to issues relating to oil and gas development in Nigeria and out of recognition by the Federal Government that the oil and gas sector was perhaps the only industry that require the most serious environmental scrutiny[230]. Importantly, section 5 of the National Oil Spill Detection and Response Agency (NOSDRA) Act 2006 saddles NOSDRA with the responsibility for detection and response to all oil spillages in Nigeria[231]. In addition to this, the Agency is responsible for the coordination and implementation of the National Oil Spill Contingency Plan (NOSCP) in compliance with international standards[232]. The NOSCP is an operational manual designed for tackling the menace of oil spills through a three-pronged approach of containment, recovery, and remediation/restoration[233]. The Agency's operational department, National Control and Response Centre coordinates all reports regarding oil spill incidents and serves as the command and control centre for compliance monitoring of all existing legislation on environmental control, surveillance for oil spill detection and monitoring and coordination of responses required in plan activations[234].

Meanwhile, the Petroleum Industry Act 2021 is one of the recent steps by the Nigerian government aimed at repositioning the oil and gas sector as a whole[235]. According to its explanatory memorandum, the Act provides a legal, governance, regulatory and fiscal framework for the Nigerian Petroleum Industry and the development of host communities[236]. Specifically, chapter 3 sets out comprehensive provisions focused on host community development including provision for a host community development trust[237]. The provision

[228] Ibid.
[229] Ibid.
[230] Environmental Impact Assessment (EIA) Act 1992 <https://faolex.fao.org/docs/pdf/nig18378.pdf> accessed 12 December 2022.
[231] Ibid.
[232] Ibid.
[233] Ibid.
[234] Ibid.
[235] Petroleum Industry Act 2021 <http://www.petroleumindustrybill.com/wp-content/uploads/2021/10/Petroleum-Industry-Act-2021-vs-3-pdf.pdf> accessed 12 December 2022.
[236] Ibid.
[237] Ibid.

obliges oil companies to pay 3% of operating expenses into trusts designed to provide social and economic benefits to communities in oil-producing areas[238].

On the whole, while the legislative framework for the oil and gas sector in Nigeria evinces the intention to effective regulate the sector for sustainable development, it would appear that what is required goes beyond mere intention to do good. As observed in chapter one, the challenge of access to remedy in the Nigerian context is not so much about the absence of a robust legal and regulatory framework but rather more about a strong enforcement regime devoid of corruption.

Ako & Ekhato in their review of the extractive industry in Nigeria cited ineffectual regulation, alleged collusion between the State and MNEs, and ineffectual judicial institutions and processes as giving rise to environmental degradation and human rights abuses in the Niger Delta[239]. This thesis agrees with Ako & Ekhato and argues that the issues of environmental and human rights abuses have remained prevalent in Ogoni land due mainly to the lack of a strong and transparent enforcement regime vis-à-vis existing oil and gas regulations.

2.2 Indigenous Peoples' rights

As highlighted in chapter one, there has emerged a wide body of international law rules and norms that have developed around the subject of indigenous peoples and their rights. Meanwhile, for the purposes of this thesis, the indigenous rights stated in the ILO Convention 169 and the UNDRIP are aggregated into five key rights as follows.

2.2.1 Right to self-determination

The right to self-determination has been described as the fountain and the main pre-requisite for the enjoyment of all other human rights which accrue to indigenous peoples[240]. The International Covenant on Economic and Social and Cultural Rights specifically confers the right to self-determination on all peoples vide Article 1 'all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely

[238] Ibid.
[239] See generally Rhuks Ako and Eghosa O. Ekhator 'The Civil Society and the Regulation of the Extractive Industry In Nigeria' (2016) 7 Afe Babalola University: J. of Sust. Dev. Law & Policy 1.
[240] Report of 1995 African Commission Working Group, E/CN.4/1996/84 (1996) para 51.

pursue their economic, social and cultural development'[241]. Castellino described the right to self-determination as the most romantic of rights within the human fright framework[242].

The centrality of this right and its strategic relevance to the cause of indigenous people can be seen in the wording of Article 1 of the International Covenant on Civil and Political Rights 'all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence'[243]. Similarly, both the ILO Convention 169 and the UNDRIP stipulate that indigenous people have the right to self-determination in recognition of their aspirations to control their institutions, ways of life and economic development within the framework of the State in which they live[244].

In particular, the UNDRIP in Article 3 stipulates that 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development[245].' Further, the Inter-American Court in the Saramaka People vs Suriname case[246] affirmed the right of indigenous peoples to self-determination as entailing the freedom to pursue their economic, social and cultural development and to freely dispose of their natural wealth and resources so as not to be 'deprived of [their] own means of subsistence as stipulated in Article 1 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR)'[247].

The controversy on the substance of indigenous peoples' right to self-determination as addressed by Jeff J. Corntassel and Tomas Hopkins Primeau is insightful. They clarified that

[241] International Covenant on Economic, Social and Cultural Rights (ICESCR) (n71).
[242] Joshua Castellino & Jeremie Gilbert 'Self-determination, Indigenous Peoples and Minorities' (2003) 3 Macquarie Law Journal 155 < www.researchgate.net/publication/228184464_SelfDetermination_Indigenous_Peoples_andMinorities> accessed 19 February 2019.
[243] International Covenant for Civil and Political Rights (n70); International Covenant for Economic, Social and Cultural Rights, (n71).
[244] United Nations Declaration on Indigenous Peoples' Rights (n5).
[245] Ibid.
[246] Inter-American Commission on Human Rights, Report Nº 09/06, Admissibility and Merits. Case 12.338. The Twelve Saramaka Clans (LOS). Suriname. 02 March 2006, para. 93 < www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf> accessed 24 January 2021, accessed 19 January 2021.
[247] International Covenant on Economic, Social and Cultural Rights (n71).

the self-determination demanded by indigenous peoples is not the type understood under international law as the defining characteristic of independent States[248].

Rather, most indigenous groups do not seek to secede from the territories of the States in which they exist, instead, they seek to wield greater control over matters such as natural resources, environmental preservation of their homelands, education, bureaucratic administration, use of language their group's cultural preservation and integrity[249].

Some measure of clarity was similarly brought to the debate on self-determination as it applies to indigenous peoples by the UN Special Rapporteur noting that there is an increasingly positive trend in international law to extend the principle of self-determination to peoples and groups within existing States[250].

While the Special Rapporteur confirmed that this right is no longer understood to entail the right to secession or independence, the Special Rapporteur however noted that 'nowadays the right to self-determination includes a range of alternatives including the right to participate in the governance of the State as well as the right to various forms of autonomy and self-governance[251]. Self-determination in the context of indigenous peoples' rights is therefore within this study confined to the quest for greater control in relation to their affairs.

2.2.2 Land rights and indigenous people

The argument in support of indigenous peoples' rights was founded on the morally compelling assertion by 'first peoples' who were dislocated from their traditional way of life through colonial conquest, dispossession, mass murder, and displacement[252]. The issue of dispossession of indigenous peoples' land is at the centre of their age-long agitation[253].

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[248] Jeff J. Corntassel and Tomas Hopkins Primeau ''Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self-Determination", 17, No. 2 (1995) 17 (2) Human Rights Quarterly Johns Hopkins University Press 344 <www-jstororg.ueaezproxy.uea.ac.uk:2443/stable/pdf/762521.pdf?refreqid=excelsior%3A9199fbc84c4ee4611b45cb4b88954749> accessed 19 January 2021.

[249] Ibid.

[250] Final report of the Special Rapporteur, Erica-Irene A. Daes, ''Indigenous Peoples' Permanent Sovereignty over Natural Resources'' E/CN.4/Sub.2/2004/30 13 July 2004, < http://hrlibrary.umn.edu/demo/IndigenousSovereigntyNaturalResources_Daes.pdf> 19 January 2021.

[251] Ibid para 17.

[252] Inman, D. M 'the Cross-Fertilization of Human Rights Norms and Indigenous Peoples in Africa: From Endorois and Beyond' (2014) 5(4) the International Indigenous Policy Journal , <http://ir.lib.uwo.ca/iipj/vol5/iss4/5> accessed 19 January 2021.

[253] Ibid.

Articles 26 (1) (2) and (3) of the UNDRIP provide that (1) 'Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. (2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired; (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned'[254].

Illustrating the significance of land to indigenous peoples, the United Nations Permanent Forum on Indigenous Issues (UNPFII) summed up the relationship between indigenous peoples and their lands[255]. The Forum observed that 'Indigenous populations/communities' relationship with their lands and territories is profound; it constitutes a fundamental part of their identity and is deeply rooted in their culture and history, transcending the material to become a relationship that is spiritual and sacred[256].

The UNPFII stressed that for indigenous populations/communities, land is the source of all life[257]. This relationship encompasses their natural resources, bodies of water and forests and biodiversity[258]. In the mindset of indigenous populations/communities, land and territory are "the vital space" and guarantee the existence of present and future generations[259]. The above position was affirmed in the Report by the African Commission's Working Group on Indigenous Populations stating that Indigenous Peoples are dependent on their land for their overall sustenance[260].

Land right which is widely regarded as the fountain of indigenous peoples' rights have been legitimized in judicial pronouncements such as in the landmark case of Saramaka People vs

[254] United Nations Declaration on the Rights of Indigenous Peoples (n5).
[255] United Nations Permanent Forum on Indigenous Issues PFII 'Study on Indigenous Peoples and Corporations to Examine Existing Mechanisms and Policies Related to Corporations and Indigenous Peoples and to Identify Good Practices' , (2011), E/C.19/2011/12 7 < https://undocs.org/E/C.19/2011/12> accessed on 25 April 2019.
[256] Ibid.
[257] Ibid p7.
[258] Ibid.
[259] Ibid.
[260] African Commission's Working Group on Indigenous Populations/Communities 'Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights', (2017) International Working Group for Indigenous Affairs (IWGIA) 29. < www.iwgia.org/en/resources/publications/305-books/3294-extractive-industries-land-rights-and-indigneous-populations-communities-rights> accessed 14 February 2021.

Suriname[261] whereby the Inter-American Court of Human Rights held that the Suriname had failed to institute necessary safeguards against likely damage to the Saramaka territory and communities on account of logging and mining concessions thus found that the authority had breached the Saramaka people's right to property[262].

Essentially, the case was submitted by the Inter-American Commission on behalf of the Saramaka community, a tribal community based in the upper Suriname River region alleging violations by the State of Suriname. The community claimed that the State had failed to adopt effective measures to recognise their rights to the use and enjoyment of the territory they have traditionally occupied and used; that the State allegedly violated their right to judicial protection to their detriment by failing to provide them with effective access to justice to ensure the protection of their fundamental human rights especially their right to property in accordance with communal traditions[263].

Further, the community alleged that the State has allegedly failed to adopt domestic legal provisions to ensure and guarantee such rights to the Saramakas[264]. In its determination of the Application, the Court laid down safeguards against restriction on the right to property of indigenous people of Saramaka territory which interferes with their survival[265]. The Committee found that the restriction in question concerned the grant by the State of logging and mining concessions for the exploration and extraction of certain natural resources found within the Saramaka territory[266].

Relying on Article 1(1) of the American Convention on Human Rights, the Court held that ''in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards: First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter "development or investment plan") within Saramaka territory.

[261] Saramaka People. v. Suriname, [2007] Inter-American Court of Human Rights (Preliminary Objections, Merits, Reparations, and Costs), Judgment of Nov. 28, 2007, paragraphs 126-132, < www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.doc> accessed 14 February 2021.
[262] Ibid para 185.
[263] Ibid paras 1-5.
[264] Ibid.
[265] Ibid para. 129.
[266] Ibid.

Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Third, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment'[267]. The Court concluded that these 'safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people'[268].

2.2.3 Permanent sovereignty over natural resources.

The arguments regarding indigenous peoples and natural resources are founded on the notion of permanent sovereignty of peoples on natural resources as enunciated in the historic United Nations General Assembly resolution 1803 (XVII) in 1962[269]. The resolution declared that peoples and nations have permanent sovereignty over their natural wealth and resources and that breach of these rights may hinder international cooperation, development and peace[270].

The resolution touched on the subject of foreign investment agreements in Article 8: 'Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution[271]''. Importantly, Article 15 of the Indigenous and Tribal Peoples Convention 1989 stipulates that 'the rights of the peoples concerned to the natural resources of their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources'[272].

Permanent sovereignty over natural wealth and resources by nations and indigenous peoples has since gained prominence in various international law instruments including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights respectively[273]. Article 1 (2) of the International Covenant

[267] Ibid.
[268] Ibid para 129.
[269] General Assembly resolution 1803 (XVII) entered into force 14 December 1962 "Permanent sovereignty over natural resources <www.ohchr.org/Documents/ProfessionalInterest/resources.pdf> 14 February 2021.
[270] Ibid, Article 1.
[271] General Assembly resolution 1803 (XVII) (n269) Article 8.
[272] Indigenous and Tribal Peoples Convention (n4).
[273] Erica-Irene A. Daes- Prevention of discrimination, prevention of discrimination, and protection of indigenous peoples: permanent sovereignty over natural resources published by the United Nations Economic and Social

on Economic, Social and Cultural rights states that 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence'[274].

In a similar vein, Article 1 of the International Covenant on Civil and Political Rights affirms that 'Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources'[275]. The principle is described as an important precursor to the realisation of other rights accruable to indigenous peoples, particularly the right to self-determination and development[276].

According to the Inter-American Court 'members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries[277].

Without them, the very physical and cultural survival of such peoples is at stake'[278]. The Court affirmed that 'the property rights of indigenous and tribal peoples extend to the natural resources which are present in their territories, resources traditionally used and necessary for the survival, development and continuation of the peoples' way of life'[279]. For the Inter-American human rights system, 'resource rights are a necessary consequence of the right to territorial property'[280].

Council (2004) E/CN.4/Sub.2/2004/30 <http://hrlibrary.umn.edu/demo/IndigenousSovereigntyNaturalResources_Daes.pdf> accessed 14 February 2021; See also International Covenant on Economic, Social and Cultural Rights (n259).

[274] International Covenant on Economic, Social and Cultural Rights (n71).

[275] Ibid.

[276] Declaration on the Right to Development, General Assembly resolution 41/128 of 4 December 1986.

[277] I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs (Judgment of June 17, 2005) Series C No. 125, par. 137, and I/A Court H.R., Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs (Judgment of March 29, 2006) Series C No. 146, par. 118; see Patricia Cruz Marin, 'Compliance of Judgments of the Inter-American Court of Human Rights' (July 9, 2020) <https://ssrn.com/abstract=3647326 or http://dx.doi.org/10.2139/ssrn.3647326> accessed 20 February 2021.

[278] Ibid.

[279] Saramaka People v. Suriname (n261) para. 122; Yakye Axa Indigenous Community v. Paraguay- Inter American Court of Human Rights Court, Merits, Reparations and Costs, Inter American Court of Human Rights Court, (Judgment of June 17, 2005); Series C No 125 para 124, 137; Sawhoyamaxa Indigenous Community v. Paraguay. Inter American Court of Human Rights Court, Merits, Reparations and Costs (Judgment of March 29th, 2006) Series C No 146 paras 118, 121.

[280] Saramaka People v. Suriname (n261).

2.2.4 Right to participate

Essentially, public participation is a crucial aspect of the human rights approach to development projects. It connotes the rights of those affected by an activity to have a say in the determination thereof[281]. Article 7 of the Indigenous and Tribal Peoples Convention 1989 provides with respect to indigenous peoples' right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, that indigenous peoples '…shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly'[282].

Article 15 of the Indigenous and Tribal Peoples Convention 1989 provides for the right of indigenous peoples to participate in the use, management and conservation of these resources[283]. In a similar vein, Article 15(2) of the Indigenous and Tribal Peoples Convention 1989 provides for indigenous peoples' right of participation in situations where the ownership of resources and minerals found on their land vests in the State[284].

Article 15 (2) of the Indigenous and Tribal Peoples Convention 1989 requires such State parties to establish or maintain procedures through which they shall consult indigenous people to ascertain whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources on their lands[285]. In particular, Article 15 (2) stipulates that the indigenous peoples concerned '… shall wherever possible participate in the benefits of such activities and shall receive fair compensation for any damages which they may sustain as a result of such activities'[286].

In equal breath, Article 18 of the UNDRIP stipulates that 'Indigenous peoples have the right to participate in decision-making in matters which would affect 16 their rights, through

[281] Muhammed T. Ladan, 'Biodiversity, Environmental Litigation, Human Rights and Access to Justice: A Case Study of Nigeria' (2007) Faith Printers and Publishers, Zaria 160.
[282] Indigenous and Tribal Peoples Convention (n4).
[283] Ibid.
[284] Ibid.
[285] Ibid.
[286] Ibid.

representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions'[287].

2.2.5 Right to Free, Prior and Informed Consent

The free, prior and informed consent (FPIC) principle is a human rights norm based on the fundamental rights to self-determination and to be free from racial discrimination[288]. This concept derives from the elements of the right to self-determination, on which the Declaration bases its provisions on free, prior and informed consent, as a way of operationalizing the right to self-determination, taking into account the particular historical, cultural and social situation of indigenous peoples[289].

Article 19 of the UNDRIP provides that 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'[290]. Further, Article 32(2) of the UNDRIP requires that 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources'[291]. Similar provisions for free, prior and informed consent of indigenous peoples in relation to activities affecting them are set out in Articles 6 and 16 of the Indigenous and Tribal Peoples Convention, 1989[292].

The UN Permanent Forum on Indigenous Peoples defines FPIC as connoting that (i) people are 'not coerced, pressured or intimidated in their choices of development'; (ii) 'their consent is sought and freely given prior to authorisation of development activities'; (iii) they 'have full information about the scope and impacts of the proposed development activities on their lands,

[287] United Nations Declaration on Indigenous Peoples' Rights (n5).
[288] The Expert Mechanism on the Rights of Indigenous Peoples 'Free, prior and informed consent: a human rights-based approach' (2018) Expert Mechanism advice No. 11, A/HRC/39/62 3.
[289] Ibid para 7.
[290] United Nations Declaration on Indigenous Peoples' Rights (n5).
[291] Ibid.
[292] Indigenous and Tribal Peoples' Convention (n4).

resources and wellbeing'; and (iv) 'their choice to give or withhold consent over developments affecting them is respected and upheld'[293].

The underpinning philosophy entails effective participation of indigenous and tribal peoples since the first stages "in the processes of design, implementation, and evaluation of development projects carried out on their lands and ancestral territories[294]."

Undoubtedly, the recognition of FPIC at the international level by responsible companies among others is a remarkable achievement for indigenous rights activists, however, only a few countries have domesticated its stipulations in their national legal framework[295]. Specifically, the FPIC principle has been enshrined in national laws as seen in Peru, Australia and the Philippines respectively[296].

2.2.6 Indigenous peoples' right to access to remedy

The right to access to remedy is perhaps one of the most critical rights accruable to Indigenous Right Holders given the legal aphorism 'ubi jus, ibi remedium' that is 'where there is a right there is a remedy'. Essentially, the key rights of indigenous peoples highlighted above would at best be meaningless in the absence of effective mechanisms for their remediation when breached. Chief Justice Marshall put it aptly in the case of Marbury vs Madison noting that:

> 'It is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded…. [F]or it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress'[297].

The right to remedy is rooted in the general principle of law that every right must be accompanied by effective remedies for its breach as stipulated in Article 8 of the Universal

[293] United Nations Permanent Forum on Indigenous Issues (UNPFII) 'Resource Kit on Indigenous Peoples' (2008) Issues' Geneva 16 available on < https://undg.org/wp-content/uploads/2017/01/resource_kit_indigenous_2008.pdf> accessed 20 June 2021.

[294] Inter-American Court on Human Rights 'Access to Justice and Social Inclusion: The road towards strengthening Democracy in Bolivia', Follow-Up Report, OEA/Ser/L/V/II.135 Doc. 40 7 August 2009, para. 157, < www.refworld.org/docid/583edeb04.html> accessed 20 June 2021.

[295] Buxton, A and Wilson, E. FPIC and the Extractive Industries: A Guide to Applying the Spirit of Free, Prior and Informed Consent in industrial projects published by the International Institute for Environment and Development, London (2013) p9 < https://pubs.iied.org/pdfs/16530IIED.pdf> accessed 26 September 2021.

[296] Ibid p4.

[297] Marbury vs Madison (1803) 5 U.S. 1 Cranch 137, 163–66, quoting William Blackstone, Commentaries on the Laws of England, vol. 3 (1723–1780) 23.

Declaration of Human Rights[298]. Access to remedy is the third pillar of the United Nations Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council as the first globally agreed standard on business and human rights[299].

The State's duty to protect, the corporate responsibility to respect, and the requirement for access to remedy, are all applicable to indigenous peoples' rights as affirmed under the ILO Convention 169 and the UNDRIP[300].

2.3 Indigenous Peoples and the extractive industry.

According to Valentina Vadi, 'the collision between indigenous rights and transnational business activity frequently occurs in the context of natural-resource development'[301]. Vadi adduced three reasons why indigenous peoples are uniquely impacted by activities of transnational business activities. First, a huge proportion of the World's natural resources are located on indigenous peoples' land with the implication that natural resource development activities traditionally take place on land occupied by indigenous people[302].

Second, the skyrocketing global demand for natural resources has witnessed increased activity by non-western states, such as China and India[303]. Third, the aggressive establishment of liberalised investment regimes and the proliferation of risk-mitigating investment treaties have ensured that the cost of global engagement in resource development is greatly reduced, thus enabling transnational corporations to venture into regions that were previously beyond their reach[304].

Despite the potential adverse outcomes associated with investment activities, foreign direct investments (FDI) tend to confer benefits in developing countries' economies[305]. FDI pave way for technology transfers, encourage human capital development through the creation of

[298] Universal Declaration of Human Rights, adopted by the United Nations General Assembly as Resolution 217 during its third session on 10 December 1948.
[299] See generally International Work Group for Indigenous Affairs (IWGIA) 'Business and Human Rights: Interpreting the UN Guiding Principles for Indigenous Peoples', report 16 (2014) < www.iwgia.org/images/publications/0684_IGIA_report_16_FINAL_eb.pdf> 26 September 2021.
[300] See generally Cathal Doyle (n3).
[301] Valentina Vadi 'The Double Life of International Law: Indigenous Peoples and Extractive Industries' (2016) 129 (1755) Harv. L. Rev. 1755 < https://harvardlawreview.org/2016/04/the-double-life-of-international-law-indigenous-peoples-and-extractive-industries/> accessed 11 June 2020.
[302] Ibid p1756.
[303] Ibid.
[304] Ibid.
[305] Organisation for Economic Co-operation and Development (OECD) 'Foreign Direct Investment for Development- Maximising Benefits, Minimising Costs'', (2002) 4, available at < www.oecd.org.ueaezproxy.uea.ac.uk:2048/investment/investmentfordevelopment/195981pdf> accessed 11 June 2020.

employment opportunities, contributes towards the integration of international trade, and fosters competition in business to enhance enterprise development[306].

Apart from the accruable economic benefits, FDIs are ordinarily reputed for improving the environmental and social conditions in the host country through the transfer of cleaner technologies and leading to more socially responsible corporate policies[307]. Foreign investment constitutes the single largest source of external finance for developing countries[308]. According to an International Institute for Environment and Development publication, the extractive industry and the agricultural sector are the two main foreign investment destinations in low- and middle-income countries[309].

Illustrating the impacts of the extractive industry in the context of human rights, a former UNDP Deputy Country Director expressed concerns that the stress placed on the environment on account of activities in the extractive industries could lead to the irreversible destruction of ecosystems, causing harm to the livelihood of indigenous communities whose existence is dependent on the environment[310].

This supposition is aligned with views expressed by Ruggie who observed that the extractive industry, that is oil, gas and mining- accounts for two-thirds of most grievous abuses extending to complicity in crimes against humanity perpetrated concerning local communities, particularly indigenous peoples[311].

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[306] Ibid.
[307] Ibid
[308] Rudolf Dolzer & Magrete Steven 'Bilateral Investment Treaties', (Martinus Nijhoff Publishers 1995) xiii.
[309] Lorenzo Cotula 'Foreign investment, law and sustainable development - A handbook on agriculture and extractive industries', (2nd edn, International Institute for Environment and Development (IIED) 2016) 4 <https://pubs.iied.org/sites/default/files/pdfs/migrate/12587IIED.pdf> accessed 11 June 2020.
[310] Abdel-Rahman Ghandour 'Extractive Industries and Sustainable Job Creation- Environment and Social safeguards in partnering with the extractive industry' 7th Africa OILGASMINE, Khartoum, 23-26 November 2015 < https://unctad.org/meetings/en/Presentation/17OILGASMINE%20Abdel%20Rahman%20Ghandour%20S3.pdf> 11 June 2020.
[311] John Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/2006/97 (2006) para 25.

2.4 Indigenous People of Ogoni

Before delving into the discussion of the case study of the Ogoni people, it is important to reiterate the status of the main international law instruments, especially within the context of the Nigerian State. As mentioned in chapter one, indigenous peoples do not enjoy any special protections under Nigerian law, which fact is illustrative of the problems associated with access to effective remedies in Nigeria. Notably, the two main international law instruments which comprehensively address indigenous peoples' rights that is ILO 169 and UNDRIP have not been recognised or integrated into national laws in Nigeria. Hence the special rights accruable to indigenous peoples under these instruments as highlighted above, are not protected by the government of Nigeria either through administrative or legislative means. In the context of Nigeria, it is arguable that the lack of recognition for indigenous peoples' rights particularly land rights, sovereignty over natural resources, and right to participation extends to the duty of State parties to obtain the FPIC of indigenous peoples in matters that would affect their interest is inexorably linked to the issues of environmental pollution and human rights abuses associated with the oil exploration activities by MNEs in Nigeria's oil-producing communities including Ogoni land.

Importantly, Ogoni land was selected as a case study in this research because Ogoni people have self-identified as indigenous peoples and have been so recognised at the UN level[312]. Moreover, Ogoni land has received global attention on account of the stiff resistance mounted by the Movement for the Survival of Ogoni Peoples (MOSOP) and other civil society organisations (CSOs) against environmental pollution and human rights abuses perpetrated by oil MNEs[313]. This resistance indeed led to the killing of Saro Wiwa and eight (8) others, human

[312] Virtual Research Interview with Ogoni Environmental Activist, conducted on March 29, 2021. (See full interview transcript is attached as Appendix 1 below); See Movement for the Survival of the Ogoni People (MOSOP) 'Ogoni Bill of Rights' December 1991 available at Ogoni Bill of Rights | Movement for the Survival of the Ogoni People (MOSOP) accessed 10 July 2021.

[313] United Nations Environment Program (UNEP) 'About Ogoniland' <www.unep.org/explore-topics/disasters-conflicts/where-we-work/nigeria/about-ogoniland#:~:text=The%20Ogoni%20people%20are%20predominantly%20farmers%20and%20fishermen.,communications%20and%20administrative%20staff%2C%20as%20well%20as%20drivers> accessed 12 November 2021; Amnesty International 'Investigate Shell for complicity in murder, rape and torture' (Amnesty International, 28 November 2017) < Investigate Shell for complicity in murder, rape and torture – Amnesty International> accessed 12 November 2021; Unrepresented Nations and Peoples Organisation 'Ogoni: A Struggle Against Oppression and Fossil Fuels' (UNPO,17 December 2018); Elena Keates 'After Decades of Death and Destruction, Shell Pays Just $83 Million for Recent Oil Spills', (Greenpeace, 11 January 2015) <www.greenpeace.org/usa/shell-oil-settlement-ogoniland/> accessed 12 November 2021; Unrepresented Nations and Peoples Organisation 'Ogoni: Timeline of the Ogoni Struggle' (UNPO, 30 March 2018) < https://unpo.org/article/20716> accessed 12 November 2021; Unrepresented Nations and Peoples Organisation 'Ogoni: MOSOP calls for social justice in Nigeria' (UNPO, 13 June 2019) < https://unpo.org/article/21540> accessed 12 November 2021.

rights defenders and environmental activists under circumstances allegedly involving the complicity of SPDC, one of the leading oil MNEs operating in Ogoni land[314]. This set of circumstances makes the Ogoni land a worthy case study to exemplify investment-related human rights abuses suffered by indigenous peoples.

The case of Ogoni land is a testament to the deplorable experiences of indigenous peoples which are mostly associated with natural resources exploitation. With a population of approximately 850, 000[315], the Ogoni people are an indigenous minority in Southern Nigeria residing on a land mass covering about 100,000 square kilometres in the popular Niger Delta region of Nigeria[316].

According to Saro-Wiwa, the Ogoni people had been in occupation of their land well before the 15th century[317]. The history of Ogoni peoples as settlers and inhabitants of Ogoni land pre-dates the invasion of British colonialists in 1901 by which time they had established for themselves a well-organised social system and government[318]. By 1960, the British had conscripted Ogoni people into the newly independent nation called Nigeria as minorities thus subjecting them to disabilities, eroding their cultural distinctiveness and destroying the fabric of the pre-existing Ogoni society[319].

The Ogoni people traditionally derive their livelihood mainly from agriculture and fishing. They have a profound spiritual connection to their land and rivers surrounding them. In their culture, Ogoni people worship their land as a god which they regard as the provider of food. To them, the planting season is much more than an agricultural activity but rather a spiritual, religious and social occasion[320].

Legborsi Saro Pyagbara, former President of the Movement for the Survival of Ogoni People (MOSOP) depicted the story of the Ogoni people from a resident stakeholder perspective in a

[314] Amnesty International 'Nigeria: Shell complicit in the arbitrary executions of Ogoni Nine as writ served in Dutch court' (Amnesty International, 29 June 2017) <www.amnesty.org/en/latest/press-release/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/> accessed 12 November 2021; Amnesty International 'Shell: A criminal enterprise?' (Amnesty International, 18 May 2020) <www.amnesty.org.uk/shell-criminal-enterprise> accessed 12 November 2021.
[315] Movement for the Survival of the Ogoni People (MOSOP)- Member Profile, by the Unrepresented Nations and Peoples Organisation (UNPO) < http://unpo.org/downloads/2339.pdf> 12 November 2021.
[316] See generally K Saro-Wiwa Genocide in Nigeria: The Ogoni Tragedy (1992).
[317] Ibid.
[318] Movement for the Survival of Ogoni People (MOSOP) 'Environmental Protection for Powerless Indigenous Ogoni' < https://mosop-usa.org/history/>
[319] Ibid.
[320] R. Boele, 'Report of the UNPO Mission to Investigate the Situation of the Ogoni of Nigeria' (UNPO, February 17–26, 1995) 7 <https://unpo.org/images/reports/ogoni1995report.pdf> accessed 11 October 2021.

paper he presented to the International Expert Group Meeting on Indigenous People and Protection of the Environment[321].

According to Pyagbara:

> 'land is viewed as the abode of our ancestors from where they oversee our lives, it is also a god and we revere it as such. This respect and reverence for land also means that forests are not merely a collection of trees and the abode of animals but also, and more intrinsically, a sacred possession. Therefore, trees in the forests cannot be cut indiscriminately without regard to their sacrosanctity and their influence on the wellbeing of the entire community. There are some animals that you cannot kill because they are said to be totems. That is, they are supposed to be animations of the spirit of somebody and if you kill them, then something disastrous will happen'[322].

Pyagbara noted that 'the Ogoni had a well-established social system that placed great value on the environment before the advent of British colonial rule[323]. Living on a fertile alluvial soil and blessed with a necklace of rivers and creeks, the Ogoni people seized the opportunity of having these resources to become great fisher folks and farmers, producing not only for their own subsistence but also for their neighbours in the Niger Delta and was appropriately referred to as the 'Food basket of the Niger Delta'[324]. He stated that the Ogoni 'created a system of agriculture; their traditional means of livelihood ensured the sustainable management and sustainable exploitation of natural resources. Socio-culturally, the Ogoni people live in closely-knit communities and are more endogenous'[325].

Pyagbara asserted that 'the Ogoni people have a tradition and custom that is deeply rooted in nature, and this helped them to protect and preserve the environment for generations. The land on which they live and the rivers which surround them are viewed by them not just as natural resources for exploitation but with deep spiritual significance'[326]. In the same vein, he pointed out 'that rivers and streams apart from their being the source of water for life are also intricately

[321] Legborsi Saro Pyagbara (Former President of MOSOP) 'the adverse impacts of oil pollution on the environment and wellbeing of a local indigenous community: the experience of the Ogoni people of Nigeria' Paper presented to the International Expert Group Meeting on Indigenous Peoples and Protection of the Environment at Khabarovsk, Russian Federation, August 27-29, 2007.
[322] Ibid pp3-4.
[323] Ibid.
[324] Ibid p3
[325] Ibid.
[326] Ibid.

bound up with the life of the community and are not to be desecrated through oil pollution etc. Thus, our people believe that there is a dynamic interaction that exists between men and women, animals, plants and so on'[327].

According to Pyagbara 'grave consequences follow any erring human conduct or action desecrating the environment and failure by the custodian community to take action to protect it from desecration attracts the wrath of the gods, which visits the community with disaster'[328]. Pyagbara explained that 'the pre-colonial social system, therefore, ensured sustainable exploitation of natural resource and protection of biodiversity'[329]. He observed that 'most of these practices still exist to this day and this explains why the Ogoni people are unanimous when it comes to taking decisions that border on their environment. To them, their lives are intrinsically bound to the survival of the environment'[330].

As noted earlier, as part of the research on indigenous peoples of Ogoni land, which is the case study in this thesis, an interview was conducted with one of the foremost environmental activists leading the campaign against environmental degradation in Ogoni land (Participant 1). Reacting further to the question regarding an overview of the grievances of the Ogoni People, particularly within the context of reported environmental pollution attributed to oil exploration activities of oil multinationals like Shell Petroleum Dev Co (SPDC) and others, Participant 1 noted the closeness of the Ogoni people to nature and observed that:

> 'Shell has accused us that we are using the environment as a means of getting international attention and that belies the point because anybody who lives like all of us in indigenous communities like ours, know that nature is so close to us. In fact, there are certain forests that people believe are sacred, there are certain animals that people hold as totems that if something happens to them it reverberates to human being, and that there is a right of everybody to protect that environment'.
>
> Further, Participant 1 remarked that '…when sacred forests are being mowed down for purposes of exploitation, people are not seeing it as some flora and fauna that is being felled, they are seeing it as the basis of their existence, and this is the point that is lost'. According to Participant 1, 'there are certain rivers that we are not supposed to fish in,

[327] Ibid p4.
[328] Ibid.
[329] Ibid.
[330] Ibid.

may be at certain times unless certain sacrifices are made, so when all those things are polluted, it is that makes people stand up'[331].

Likening the activism against environmental pollution in Ogoni land to a life-or-death struggle with a spiritual significance, Participant 1 pointed out that:

> 'that is why Ogoni people see the struggle about the environment as though it is the whole of their life. If you were to mobilise Ogoni people and told them that you want freedom of movement, freedom of speech, I am not sure that you will get that type of grassroot support, but this is something that touches on our very existence and that is how we saw it'. So, when we came and started the Movement for the Survival of Ogoni People (MOSOP), it was a realisation that our whole existence was threatened and therefore if we didn't do anything the gods will be against us, our society will be extinct, and that is the context in which I believe it ought to be seen, not just like a desecration of flora and fauna'[332].

With regards to the question of their qualification as indigenous peoples, Ako & Oluduro argued that the people of Ogoni land meet the major criteria for identifying indigenous peoples set out in the famous Martin Cobo study[333] based on the fact that: (i) they have a culture and way of life distinct from that of the dominant society ii. They inhabit inaccessible and geographically isolated regions iii. They suffer from political and social marginalisation and are subject to domination and exploitation within national political and economic structures[334].

Ako & Oluduro observed that the Ogoni people of the Niger Delta region similarly meet the self-identification criterion in which regard they cite the Ogoni Bill of Rights which expressly identifies Ogoni people as indigenous peoples[335]. Ako and Oluduro referred to the opinion of another scholar on the subject, Dias who stated that the Ogoni's claim to have a distinct culture,

[331] Virtual Research Interview with environmental rights activist in Ogoni land conducted on March 29, 2021, full interview transcript attached as Appendix 1.
[332] Ibid.
[333] Jose Martin Cobo (n184).
[334] Rhuks Temitope Ako & Olubayo Oluduro, 'Identifying Beneficiaries of the Un-Indigenous Peoples' Partnership (UNIPP): The Case for the Indigenes of Nigeria's Delta Region', (22 Afr. J. Int'l & Comp. L 2014) 380-381.
[335] Ibid p382; See generally Ogoni Bill of Rights 1990 <www.mosop.org/2015/10/10/ogoni-bill-of-rights/> accessed 4 June 2021.

language, history, political system and religion is equivalent to a claim to self-identification that would allow them to be considered indigenous peoples[336].

2.4.1 Ogoni people – abuse of land and environmental rights.

Since the late 1950s, Ogoni land has been the site of oil industry activities[337]. Ogoni land is the first location where oil was discovered in Nigeria in 1958. According to a former President of the MOSOP, from the inception of oil exploration activities in Ogoni to date, an estimated 100 billion US dollars' worth of oil and gas has been commercially exploited from Ogoni land[338].

Responding to the question of how oil exploration by Shell led to the disruption of lives and livelihood in Ogoni land as part of the overview of the grievances of the Ogoni people, Participant 1 recalled: 'I grew up to see lands that are caked because of oil pollution, I grew up to see the exploitation of oil in the manner that it was next to human habitation, Oil pipelines criss-cross in front of peoples' houses'[339].

According to Participant 1, 'my earliest recollection as a person was when I remember I was in the primary school then when we saw vehicles going and as children that were some site that as children we wanted to see in those days and white people. All of a sudden, the teachers told all of us to lie down because there was, I later found out, a huge explosion. I later knew that that was seismic operation just adjacent to our football field, the oil company trying to find out whether oil was there. So, our school where I schooled was some two hundred metres from an oil well. So, apart from the environmental pollution, we also had noise pollution, then the gas flares.[340]'

Similarly, in response to the question regarding an overview of the grievances of the Ogoni people, Participant 2 described how his London law firm became involved with the prosecution of the case of the Ogoni people, Participant 2 narrated that 'it all began with an email from a Nigerian fishing cooperative based in Port-Harcourt, which emailed my colleague, and said look we have real problems of oil pollution in Nigeria, in Ogoni land and we have lots of evidence, could you please come and visit Nigeria?'[341].

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[336] Ayesha K Dias, 'International Standard-setting on the Rights of Indigenous Peoples: Implications for Mineral Development in Africa' (1999) 6 SAJELP, 93 cited in Rhuks Temitope Ako; Olubayo Oluduro (n334).
[337] United Nations Environment Program Report (n53) p10.
[338] See Movement for the Survival of Ogoni People (MOSOP) (n179).
[339] Virtual Research Interview (n62).
[340] Ibid.
[341] Virtual Research Interview (n63).

He clarified that the first contact proved untrustworthy, but he met other key stakeholders. According to Participant 2, '…we drove up to the Bodo Community about an hour, hour and a half from Port-Harcourt to the North deep in Ogoni land and in the creeks. When we arrived, it was a very poor community, we got closer to the riverside and all you could see was oil, everything had been covered in oil, all the mangroves, all the coastlines, the children were swimming in the creek covered in oil and people were building boats next to the oil sleeks'[342].

Further describing the experience, 'we went on a boat, we travelled around the creek for probably an hour, and the devastation had got everywhere, there was nothing that wasn't covered with oil, all these engine mangroves, habitats. We met with village chiefs and the paramount ruler of the community and said look our community is desperate, this is a farming and fishing community, everything is impacted, people can't fish anymore, and they have to travel out to sea for miles and miles to fish before they get any fish anymore, the periwinkle pickers, the traditional job of the women in Bodo, they can't pick periwinkles anymore, when they find any they are covered in oil, they are not fit for human consumption'[343].

According to Participant 2, 'these people had very simple boats that they would carve out of tree trunks, their boats couldn't take them very far, they couldn't go out to the open sea with their boats. The whole community was in a state of total environmental and economic devastation'[344].

Participant 2 explained 'so, we meet with the chiefs and they say to us that you must take our case to London because this was 2011, it was three years, the only thing Shell has offered us is thirty (30) bags of rice and other food for the community, that is it, and we are devastated, and our Nigerian lawyers, are saying the case isn't going to work in Nigeria, it's going to take decades to work through the Nigerian courts and even then you are very uncertain to get a good result because of inequality of arms between Shell and the claimants' lawyers'[345].

2.4.2 Brief highlight of the UNEP report on Ogoni land.

Prior to the United Nations Environmental Program (UNEP) report (discussed in chapter 1 above), the incidents of environmental pollution and attendant human rights violation and

[342] Ibid.
[343] Ibid.
[344] Ibid.
[345] Ibid.

killings defined lives and livelihood in Ogoni land[346]. This state of affairs led to constant conflict between the indigenous community spearheaded by the Movement for the Survival of Ogoni People (MOSOP) and oil multinationals, particularly Shell Petroleum Development Company[347]. It was this face-off that culminated in the tragic 'military tribunal' murder through a sentence of death by hanging passed on the famous environmental activist and MOSOP leader Ken Saro Wiwa and seven (7) others in 1995[348].

This tragic development is illustrative of the risks to which human rights defenders are exposed. Twenty-five (25) years after this execution, evidence emerged allegedly pointing to collusion between the then military junta and Shell Petroleum Development Company in the framing of the Saro Wiwa and others for murder committed by the military in a desperate bid to stifle opposition to Shell's operations in Ogoni[349].

In its 2011 report (more than 63 years after the first oil spillage in Ogoni land[350]), the UNEP noted that oil contamination in Ogoni-land is endemic and negatively impacts the environment[351]. Notably, the UNEP Report noted that the environmental restoration of Ogoni-land could prove to be the world's most wide-ranging and long-term oil clean-up exercise ever undertaken if contaminated drinking water, land, creeks and important ecosystems such as mangroves are to be brought back to full, productive health[352]. The report by UNEP states that it would take between 25- 30 years to completely clean up oil spillage at great financial cost estimated to be about USD1 billion[353]. Interestingly, the recommendation by UNEP came to light '63 years late after the first oil spill happened in Oloibiri in 1953'[354].

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[346] See Friends of the Earth International 'A journey through the oil spills of Ogoniland' (Friends of Earth International, 17 May 2019) <www.foei.org/a-journey-through-the-oil-spills-of-ogoniland/> accessed 14 October 2020.

[347] Ibid.

[348] British Broadcasting Corporation '1995: Nigeria hangs human rights activists' (BBC, 10 November 1995) \< http://news.bbc.co.uk/onthisday/hi/dates/stories/november/10/newsid_2539000/2539561.stm> accessed 14 June 2020.

[349] Andy Rowell and Eveline Lubbers 'Ken Saro-Wiwa was framed, secret evidence shows- Witness statements accuse Nigerian military commander of ordering killings and taking bribes' (Independent Newspaper UK ,5 December 2010) <www.independent.co.uk/news/world/africa/ken-saro-wiwa-was-framed-secret-evidence-shows-2151577.html> accessed 14 June 2020.

[350] The Nigerian Voice 'Ogoni: MOSOP President Calls Shell's Actions in Ogoni Crime Against Humanity' published by the Unrepresented Nations and Peoples Organisation, February 2019 < https://unpo.org/article/21394> accessed 14 June 2020> accessed 14 June 2020.

[351] See United Nations Environment Program Report (n53).

[352] Ibid.

[353] Ibid p15.

[354] Unrepresented Nations and Peoples Organisation (n60).

According to the UNEP report, oil spills continue relentlessly in the Ogoni community notwithstanding cessation of oil exploration activities and Ogoni people are forced to live with this outcome daily[355]. The report noted that 'the Ogoni people live with this pollution every minute of every day, 365 days a year. Since the average life expectancy in Nigeria is less than 50 years, it is a fair assumption that most members of the current Ogoni land community have lived with chronic oil pollution throughout their lives. Children born in Ogoni land soon sense oil pollution as the odour of hydrocarbons pervades the air day in and day out'[356].

As part of its operational recommendations, the UNEP Report recommended that before clean-up begins certain measures should be taken to achieve both environmental improvement and prevention of further oil spills. Specifically, the Report recommended:

1. SPDC should conduct a comprehensive review of its assets in Ogoniland, including a thorough test of the integrity of the current oilfield infrastructure[357].
2. Decommissioning of oilfield facilities: Before decommissioning, an environmental due diligence assessment of the plan should be undertaken, to include feedback from the Ogoni people[358]. Based on the decommissioning plan, prepared as part of the asset integrity assessment, SPDC should initiate decommissioning of those facilities that the company will no longer use[359].
3. Prevention of illegal activities: A campaign to bring to an end illegal oil-related activities (tapping into oil wells/pipelines, transportation of crude, and artisanal refining) should be conducted across Ogoni land[360]. The campaign should be a joint initiative between the Government of Nigeria, the oil companies, Rivers State and local community authorities[361].
4. Technical recommendation for environmental restoration: This extends to clean-up of contaminated soil and sediments, and decontamination of groundwater[362].
5. Recommendations for public health: This identified three categories of people whose health and safety are acutely impacted by environmental contamination as (a) those

[355] United Nations Environment Program Report (n53) p9.
[356] Ibid p204.
[357] Ibid p205.
[358] Ibid.
[359] Ibid.
[360] Ibid.
[361] Ibid.
[362] Ibid p207.

exposed to hydrocarbon pollution in their drinking water (b) those living on oil pipeline rights of way (c) those involved in bunkering and artisanal refining[363]. The Report noted that for each of these groups, reducing the threat that petroleum hydrocarbon poses to their health is an immediate and necessary step[364]. The Report recommended certain measures aimed at reducing the public health threat including monitoring of groundwater, air quality monitoring, and public health monitoring through a public health registry[365].

6. Recommendations for changes to regulatory framework: This extended to recommendations to strengthen the legal and institutional weaknesses identified during the environmental assessment of Ogoni land[366]. Among others, the Report recommended a revision of the relevant regulatory framework for the oil and gas sector to make the provision for social and health impact assessment an integral part of the overall environmental impact assessment (EIA) process for all new oil and gas facilities and upgrades to existing facilities, in line with international best practices[367].

   Further, the report recommended the inclusion of guidance on decommissioning and the environmental due diligence assessment to be undertaken while completing the decommissioning process. In equal breath, the Report recommended improving public access to information, particularly non-classified information regarding the oil industry, such as EIAs, monitoring reports, spill reports and remediation closure reports[368].

[363] Ibid p214.
[364] Ibid.
[365] Ibid.
[366] Ibid pp217-219.
[367] Ibid.
[368] Ibid.

2.4.3 Post-UNEP Report

More than 10 years after the 2011 Report by the United Nations Environment Program which catalogued the extensive environmental and human rights abuses in Ogoni land[369], the Ogoni people's right to remedy is yet to be realised[370] despite the various attempts to secure remedy for these abuses[371]. Indeed, access to effective remedy has continued to elude the Ogoni people as the site of oil pollution is yet to be fully cleaned up to date while health, environmental and economic consequences continue unabated.

A leading Nigerian online newspaper, ' The Cable Nigeria' in a December 2018 report titled 'inside Ogoni Village where oil spill kills 10 persons every week' provided damning statistics on the impacts of oil exploration activities on the indigenous community[372]. The report quotes data from the Nigeria oil Monitor which put the total number of oil spills recorded in Nigeria between January 2005 and July 2014 at over 5296 of which Royal Dutch Shell as of 2010 admitted to spilling nearly 14,000 tons (about 100,000 barrels) majorly across the oil-rich Ogoni land[373]. A 2015 Amnesty International report similarly estimated total oil spillage in Ogoni land to be between 9 and 13 million barrels with Shell, ENI, admitting to more than 550 oil spills in 2014 alone[374].

Apart from the steady increase in the number of casualties, and the spread of debilitating diseases among others, the major fallout of oil spillage in the Ogoni indigenous community is the compulsory relocation that followed after the government declared most of the communities which depend on fishing and farming a dead zone[375]. According to The Cable Nigeria, instead of compensating the surviving Indigenous Right-holders they have been involuntarily turned into ecological refugees as a result of the government's decision to forcefully relocate them from their ancestral lands and away from the practice of customary trade which is fishing and farming[376].

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[369] Ibid.
[370] Lazarus Tamana (n57).
[371] Ogoni Peoples' attempts to secure remedy are discussed in more details in Chapter four of these research.
[372] Chinedu Asadu 'Inside Ogoni village where oil spill wipes off '10 persons every week'(The Cable, 3 December 2018) < www.thecable.ng/inside-ogoni-village-where-oil-spill-wipes-off-10-persons-every-week> accessed 3 January 2021
[373] Ibid.
[374] Amnesty International 'Nigeria: Hundreds of oil spills continue to blight Niger Delta' (Amnesty International, 2015) <www.amnesty.org/en/latest/news/2015/03/hundreds-of-oil-spills-continue-to-blight-niger-delta/> accessed 3 January 2021.
[375] Ibid.
[376] Ibid

It is indeed worrisome that the clean-up recommended by UNEP which commenced 5 years after UNEP's report has progressed at a snail-like pace such that 8 years post the UNEP report very little has been done. Commenting on the clean-up exercise early in 2019, the Nigerian-based Civil Society Legislative Advocacy Centre (CISLAC) noted that not much has been achieved since the clean-up kicked off in 2016. The CISLAC observed that 'the wellbeing of the people in Ogoni and the Niger Delta at large is, to say the least pathetic. Life expectancy has dropped to 40, livelihoods destroyed, inhabitants consume contaminated water 900 times above the World Health Organisation (WHO) standards'[377].

CISLAC pointed out that the 'festival of funerals in the region has become very worrisome, all due to pollution and exposure to environmental hazards'[378]. Given this state of affairs, CISLAC remarked that there is 'the need for an urgent review of the remediation techniques, repair, maintain and decommission non-producing facilities'[379]. The Centre submitted that 'the duty of care point of view upon which the emergency measures are based imposes not just a moral but a legal obligation to prevent harm or compensate victims'[380].

The Director-General of, the National Oil Spill Detection and Response Agency (NOSDRA), Idris Musa in his assessment of the progress of the clean-up exercise remarked that 'the entire process is slow, let me use that word. Because from UNEP recommendation, it should have taken us five years to do the remediation and another 25 years for nature to handle the rest, to restore the environment'[381].

The Director General made this statement during a progress report to the House of Representative Committee on Safety Standards and Regulations. The parliamentary committee expressed concerns that 'if we are spending money for the cleaning up exercise, and the people cannot drink from their water and cannot farm on their land, they cannot fish from their waters, what is the essence of the clean-up? And I asked you can people can now fish in their water, you are not able to answer that question'[382].

[377] Unrepresented Nations and Peoples Organisation (n60).
[378] Ibid.
[379] Ibid.
[380] Ibid.
[381] Bakare Majeed 'Ogoni Clean-up: Reps express concerns about quality of work' (Premium Times, 8 July 2021) <www.premiumtimesng.com/news/top-news/472500-ogoni-clean-up-reps-express-concerns-about-quality-of-work.html> 6 January 2020.
[382] Ibid.

Similarly, a notable body of Civil Society Organisations (CSOs), the Cordaid-led Strategic Partnership (SP) expressed dissatisfaction with the progress made on the clean-up exercise in Ogoni land noting that the clean-up exercise has not been transparent[383]. SP observed that the 'federal government is yet to implement the provisions of the United Nations Environmental Programme (UNEP) report on how the process should be effectively implemented'[384].

According to SP, over $360 million (N137 billion) has been committed to the clean-up of Ogoni land since 2016, without much value to show for the allocated funds[385]. The SP pointed out that the progress of the clean-up process was not satisfactory, and the Ogoni people still drink water polluted with hydrocarbon despite clear recommendations from the UNEP report that the clean-up process must include the provision of portable water to communities where hydrocarbon pollution was 600 times higher[386].

While the Nigerian government claims that the clean-up project in Ogoni is underway having been commissioned in 2016[387] this has been the subject of doubt. As part of the research interview, Participant 1 was asked to expatiate on his claims reported in a local newspaper that the clean-up exercise by the Nigerian government in Ogoni land is a cover-up, Participant 1 argued 'the UNEP if you see their review, they are not excited about what has happened, I think Premium Times conducted, went there and came out with this damning report that was published some time ago and clearly, even the contract process was just a patronage, some companies that are in shoe making are even the people who are cleaning'[388].

Importantly, a recent report on the progress of the oil clean-up in Ogoni land noted that since 2016 when the clean-up exercise began, rising oil spills in the Delta have outpaced clean-up efforts and hamper any possibilities of environmental restoration soon[389]. Specifically, the report pointed out that despite the ongoing clean-up oil spills have continued in Ogoni land with over 60 oil spills of more than 2200 barrels taking place between 2016 and March 2022[390]. This

[383] The Cable Newspaper 'CSOs to FG: There's little to show for N137bn allocated for Ogoni clean-up' (The Cable, 26 November 2020) <www.thecable.ng/csos-to-fg-theres-little-to-show-for-n137bn-allocated-for-ogoni-clean-up> accessed 6 July 2021.
[384] Ibid.
[385] Ibid.
[386] Ibid.
[387] Federal Ministry of Environment Nigeria 'Ogoni Clean-up: Achievements in Three Years', Press Statement dated 23 June 2020 <https://hyprep.gov.ng/ogoni-clean-up-achievements-in-three-years/> last visited on 12 December 2022.
[388] Virtual Research Interview (n62).
[389] Oluwole Ojewale and Alize le Roux 'Endless oil spills blacken Ogoniland's prospects' Institute for Security Studies, 22 March 2022 <https://issafrica.org/iss-today/endless-oil-spills-blacken-ogonilands-prospects> accessed 1 April 2022.
[390] Ibid.

is not unconnected with the Nigerian Government has authorised resumption of oil exploration activities in Ogoni land which development is likely to witness an increase in oil spillages[391].

2.4.4 Ogoni people, land rights and right to development

The plight of the Ogoni people is characterised by political marginalisation especially denial of a wide range of rights accruing to them including land rights. With respect to their land rights, the Ogoni people regard the Nigeria Land Use Act 1978 as one of the legislative tools employed by the Nigerian government in dispossessing the Ogoni people of their land and therefore the greatest impediment to the realisation of their land rights[392].

This position was buttressed by Pyagbara, in his recommendations on the situation of Ogoni People. He demanded the abrogation of what he described as draconian laws concerning oil, gas and land-use that exclude indigenous peoples from participation in the control and use of their resources[393]. According to Pyagbara, the recommendations by the Committee on the Elimination of Racial Discrimination (CERD) should be followed by the government and the 1978 Land Use Act and the 1969 Petroleum Act should be repealed immediately while urgent steps are taken to restore the right of communities to some measure of control over their resources[394].

As oil exploration and extraction expanded in Ogoni and other parts of the Niger Delta, the Nigerian government reportedly ordered the communities to surrender their land for oil operations, without consultation, meaningful compensation or gaining their free and informed consent before alienating their land[395]. Apart from vesting the ownership and ultimate rights over land in the government, the controversial Land Use Act provides that compensation for acquired land would be based on the value of crops on the land at the time of acquisition rather than the actual value of the land itself[396].

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[391] Ibid; see also Premium Times 'Nigerian govt to resume oil production in Ogoni, August 24, 2021, < https://www.premiumtimesng.com/news/top-news/481041-nigerian-govt-to-resume-oil-production-in-ogoni.html> 22 December 2021.

[392] International Labour Organisation and the African Court for Human and People's Rights (ACHPR) 'Country Report of the Research Project on the constitutional and legislative protection of the Rights of Indigenous People in Nigeria, (2009) p6 < https://www.ilo.org/wcmsp5/groups/public/-ednorm/normes/documents/publication/wcms_115929.pdf> accessed 22 December 2021.

[393] Supra Pyagbara (n321) p14.

[394] Ibid.

[395] United Nations Declaration on the Rights of Indigenous Peoples A/RES/61/295, Resolution adopted by UN General Assembly 13 September 2007, Article 30.

[396] See generally Civil Liberties Organization 'Ogoni: Trials and Travails'(Lagos, 1996) 6–8; W. Raji, et al., 'The Boiling Point, Committee for the Defence of Human Rights' (2000) 161; see also Office of the Senior Special

From the outset, the development trajectory linked to oil exploration in Nigeria has been largely paradoxical. The environmental, social and economic costs of oil exploration have been remarkably high for Ogoni and other surrounding oil-producing communities with the national wealth generated from the region eluding them[397].

In the narrative by a Civil Rights group, Unrepresented Nations & Peoples Organisation (UNPO) Ogoni people have been victims of systemic political marginalisation and environmental degradation of their ancestral lands ever since Nigeria's independence[398]. The UNPO identified as a major factor in the experiences of the Ogoni people, the exploitation of natural resources by the Nigerian Federal Government in collaboration with Western energy giants in the oil-rich Niger Delta region[399].

The group described the struggle of the Ogoni people as being centred on the demand for compensation from the Anglo-Dutch oil multinational, Shell for large-scale environmental damage caused by the company's oil drilling and dilapidated pipeline infrastructure which has led to devastating oil spills[400].

In his review of the impact of oil exploration on Ogoni land, Pyagbara decried the far-reaching consequences of exploration activities of oil multinationals which he identified as having negative impacts on health, underground water, traditional institutions of authority and social harmony, cultural values and spirituality, migration and the rise of environmental refugees, destruction of traditional means of livelihood, destruction of the traditional local economic support system of fishing and farming leading food shortages[401].

A similar observation was made by a former President of the MOSOP, Leton on the impact of oil exploration activities in Ogoni. Leton observed that 'all one sees and feels around is death. Death is everywhere in Ogoni. Ogoni languages are dying. Ogoni culture is dying; Ogoni people

Assistant to the President on Constitutional Matters, Report of the Presidential Committee on the review of the 1999 Constitution, Lagos, 1999.

[397] Legborsi Saro Pyagbara 'The Ogoni of Nigeria: Oil and the Peoples' Struggle', in Andy Whitemore (eds.), Pitfalls and Pipelines: Indigenous Peoples and Extractive Industries (Tebtebba, IWGIA and Piplinks 2012).

[398] Unrepresented Nations & Peoples Organisation (UNPO) 'Ogoni: Timeline of the Ogoni Struggle', (UNPO, October 26, 2021) < https://unpo.org/article/20716> accessed 2 January 2021.

[399] Ibid.

[400] Ibid.

[401] Supra Pyagbara (n397).

... are dying because of 33 years of hazardous environmental pollution and resulting food scarcity'[402].

2.5 Indigenous peoples' rights and the impacts of IIL.

In its June 2021 publication, the International Working Group for Indigenous Affairs (IWGIA) noted that transnational corporations wield more economic and even political power than the governments of the many countries in the Global South [403]. However, international human rights law effectively exempt businesses, being non-State actors from legal obligations and accountability mechanisms[404]. Indeed, the rights afforded to corporations under international investment agreements often place them above the national law and against which there is recourse to appeal[405].

Notably, the IWGIA observed that 'indigenous peoples have been victimised for decades by such corporations, often exploiting natural resources within their territories without their consent, colluding with host governments in instigating violence against indigenous communities, destroying their natural basis of life and fostering corruption and authoritarianism'[406]. The publication acknowledged that new generation investment treaties have increasingly incorporated human rights provisions but noted that investments triggered by these treaties have continued to severely have adverse impacts on indigenous peoples' rights[407].

Specifically, a former UN Special Rapporteur on Indigenous Peoples' Rights in a 2016 report on investment treaties pointed out that there are significant impacts on indigenous peoples' rights as a result of the international investment regime[408]. The Special Rapporteur posited that these impacts are manifested in the subordination of those rights to investor protections, generally as a result of serious deficiencies in the dispute resolution process instituted by the investment regime coupled with a phenomenon referred to as regulatory chill[409].

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[402] Movement for the Survival of the Ogoni People 'Ogoni Bill of Rights', 1990 <www.mosop.org/2015/10/10/ogoni-bill-of-rights/> accessed 3 January 2021.

[403] Jose Aylwin and Johannes Rohr 'The UN Guiding Principles on Business & Human Rights and Indigenous Peoples – Progress achieved, the implementation gap and challenges for the next Decade' (International Working Group for Indigenous Affairs (IWGIA) (2021) 5.

[404] Ibid.

[405] Ibid.

[406] Ibid.

[407] Ibid p12.

[408] Report of the Special Rapporteur on the rights of indigenous peoples to the UN Human Right Council, UN Docs A/HRC/33/42, 11 August 2016, para 5, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/178/84/PDF/G1617884.pdf?OpenElement.> 26 September 2021.

[409] Ibid.

The report noted that the ISDS has been used by investors in the Americas and Africa over the last decade to sue States that adopt measures to protect indigenous peoples' rights, including protection of land rights and the right to consultation and FPIC[410]. The Special Rapporteur cited as examples the cases of South American Silver Mining v. the Plurinational State of Bolivia; Bear Creek Mining Corp. v. Peru; Chevron v. Ecuador (2014); and Von Pezold and Border Timbers v. Zimbabwe (2015)[411].

The Special Rapporteur argued that international investment agreements can have serious impacts on indigenous peoples' rights as a result of three main interrelated issues one of which is the exclusion of indigenous peoples from the drafting, negotiation and approval processes of agreements and the settlement of disputes[412].

Meanwhile, it is arguable that Indigenous Rights Holders are not necessarily excluded from participation in relevant ISDS arbitration. As highlighted above, the availability of amicus curiae submissions or non-disputing party submissions provided for under various amendments to ISDS procedural rules is aimed at enhancing transparency and as a safeguard of the public interest[413]. While the transparency rules and various amendments to existing ISDS procedural rules have contributed towards greater transparency in ISDS arbitration, the concerns about the effectiveness of these in practice have persisted.

Indeed, a recent survey of ISDS cases between 2000 and 2020 showed that in nearly all ISDS cases which involved indigenous peoples' rights, participation by indigenous communities was neither easy nor active[414]. Of the 10 cases analysed in the Study which involved indigenous peoples' rights, indigenous peoples' applications for participation in the proceedings by means of submitted petitions or other documentation, and in the capacity of amicus curiae or non-disputing parties (NDPs) were rejected by the ISDS tribunals[415]. The few exceptions which the Study highlighted include the cases of Glamis Gold, Ltd. v. United States of America and the Grand River Enterprises Six Nations, Ltd., et al., v. United States of America, that Indigenous communities or their representatives directly participated[416].

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[410] Ibid para 31.
[411] Ibid pp10-15.
[412] Ibid para 31.
[413] Chao Wang, Jing Ning and Xiaohan Zhang 'International Investment and Indigenous Peoples' Environment: A Survey of ISDS Cases from 2000 to 2020' (2021) 18 (7798) Int. J. Environ. Res. Public Health 4-5, < https://doi.org/10.3390/ijerph18157798> Accessed 26 September 2021.
[414] Ibid p3.
[415] Ibid p5.
[416] Ibid.

The former Special Rapporteur on Indigenous Peoples analysed specific ISDS cases where indigenous peoples' rights were involved and concluded that these cases reflect 'the fact that, at its core, the investor-State dispute settlement system is adversarial and based on private law, in which affected third-party actors, such as indigenous peoples, have no standing and extremely limited opportunities to participate[417]. Amicus submissions and participations at the request of States are grossly inadequate in a context where States and investors are involved in causing and benefiting from harm to indigenous peoples' rights'[418].

[417] Report of the Special Rapporteur on the rights of indigenous peoples to the UN Human Right Council (n327) para 67.
[418] Ibid.

2.6 Access to effective remedy in the host State

As a background to the search for an effective legal framework to provide access to remedy for Indigenous Right-Holders, it is important to critically examine the potentials and limitations of the remedial mechanisms at the host State level as follows.

2.6.1 State-based Judicial mechanism

According to Pillar 1 of the UNGP, the State duty to protect is focused on the traditional role of the State with respect to safeguarding individuals' human rights against abuses perpetrated by non-state actors[419]. With respect to business activities, the human rights obligation of States entails ensuring that such enterprises do not directly infringe on human rights[420].

In essence, the State is the primary bearer of the obligation to protect human rights, however in situations where a State is unable or unwilling to safeguard individuals against business-related human rights abuses, another State (home State of the transnational business) or the business enterprise itself may assume the responsibility to take action[421].

Further, even though pillar 3 of the UNGP pertains to roles of States and non-State actors in securing access to remedy, it however emphasises the State's international human rights duty to "to take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy"[422].

Similarly, at the regional level, the European Convention on Human Rights (the ECHR) for instance does not provide for an obligation on corporations or non-state actors to protect human rights. Rather, article 1 of the ECHR only obligates States to 'secure' the rights of the Convention to 'everyone within their jurisdiction'[423]. Importantly, with respect to access to

[419] Stéphanie Lagoutte 'The State Duty to Protect Against Business-Related Human Rights Abuses- Unpacking Pillar 1 and 3 of the UN Guiding Principles on Human Rights and Business', Matters of Concern Human Rights' Research Papers Series No. 2014/1, Danish Institute for Human Rights. (2014) p7.
[420] Ibid p8.
[421] Ibid.
[422] Ibid.
[423] Daniel Augenstein 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights- Submission to the Special Representative of the United Nations Secretary General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', April 2011 p6 available at https://www.business-humanrights.org/sites/default/files/media/documents/ruggie/augenstein-study-re-state-responsibility-under-eur-convention-for-ruggie-apr-2011.pdf accessed 23 December 2021.

remedy for breach of rights under the ECHR, article 34 of the ECHR only permits applications by individuals claiming to be a victim of a violation committed by a State[424].

Traditionally, Courts at the level of the States are saddled with responsibilities for adjudicating disputes involving citizens as natural persons or against artificial persons such as corporations both local and transnational. As Lord Neuberger[425] put it 'Courts exist to resolve disputes, and also to vindicate rights – and to do so in public' and 'the courts have no more important function than that of protecting citizens from the abuses and excesses of the executive – central government, local government, or other public bodies'[426].

Despite the availability of other avenues for legal accountability and access to remedies such as State based non-judicial mechanisms and non-State grievance mechanisms, however, effective State-based judicial mechanisms are 'at the core of ensuring access to remedy'[427]. In essence, safeguarding the legal accountability of businesses and access to effective remedy for victims of business-related abuses is a crucial aspect of a State's duty to guard against violation of people's rights within its domain[428].

However, the capacity of States to provide effective access to remedies has been a subject of doubts given a wide variety of barriers ranging from fragmented, poorly designed or incomplete legal regimes; lack of legal development; lack of awareness of the scope and operation of regimes; structural complexities within business enterprises; to problems in gaining access to sufficient funding for private law claims; and a lack of enforcement[429].

A. Nigeria as case Study for State based grievance mechanism

I. Brief overview of the Nigerian judicial system.

According to section 6 of the Nigerian Constitution 1999, the judicial powers of the federation of Nigeria shall be vested in the Courts with a hierarchical order from the Supreme Court to the

[424] Ibid.
[425] Lord Neuberger is the former President of the UK Supreme Court.
[426] Lord Neuberger 'Justice in an Age of Austerity', Justice – Tom Sargant Memorial Lecture 15 October 2013 available at <https://www.supremecourt.uk/docs/speech-131015.pdf> accessed 23 December 2021.
[427] United Nations Human Rights Council 'Report by the United Nations High Commissioner for Human Rights 'Improving accountability and access to remedy for victim of business-related human rights abuse' (A/HRC/32/19) 10 May 2016 para 3, available at <https://undocs.org/A/HRC/32/19> accessed 23 December 2021.
[428] Ibid.
[429] Ibid.

Customary Court of Appeal of a State in the federation[430]. Nigeria operates a federal system of government comprising of a Federal Government at the centre and 36 federating units designated as States of the Federation and a Federal Capital Territory[431].

Each State of the Federation has State High Courts and a Federal High Court each while the Court of Appeal Divisions are spread across the six geopolitical zones of the country[432]. According to hierarchy, the State High Courts and Federal High Courts, both of coordinate jurisdiction are the lower courts from which appeal lies to the Court of Appeal and from there to the Supreme Court as the Court of last resort[433].

In a publication which canvassed for the establishment of a global environmental court, some of the difficulties faced in securing access to justice in Nigeria were listed to include weak national environmental law, absence of an independent judiciary and lack of political will to ensure compliance with extant laws[434].

More prominent among the hindrances to justice in the Nigerian context is the high rate of judicial corruption which in the not too distant past culminated in the suspension (and later resignation) from office of the head of the country's judiciary[435], Chief Justice Walter Onnoghen for series of alleged corrupt practices and breach of the Code of conduct for public officers[436]. However, the circumstances of his removal from office by the Executive President were described by critics of the incumbent administration as an attack on the independence of the judiciary[437].

The above reservations with regards to the ineffectiveness of the Nigerian Judiciary as a forum for securing access to justice was documented in a joint publication by Amnesty International and the Business and Human Rights Centre. The publication noted that the choice of the host

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[430] The Constitution of the Federal Republic of Nigeria 1999 <https://www.refworld.org/pdfid/44e344fa4.pdf?> 23 December 2021.
[431] Ibid section 2(2) & (3).
[432] Ibid see section 6.
[433] Ibid section 6(5).
[434] Environmental Rights Action and Friends of the Earth International 'Access to Environmental Justice in Nigeria: The Case for a Global Environmental Court of Justice' October 2016 <https://www.foei.org/wp-content/uploads/2016/10/Environmental-Justice-Nigeria-Shell-English.pdf> accessed 1 April 2021.

[435] The Chief Justice has now been removed from office by an Order of the Code of Conduct Tribunal.
[436] Daily Post (Nigerian Newspaper) 'Onnoghen: How suspended CJN Passed Judgment on himself' January 28, 2019 <http://dailypost.ng/2019/01/28/onnoghen-suspended-cjn-passed-judgment-fg-full-text/> accessed 1 April 2021.
[437] Aljazeera News (Nigeria) 'Nigeria's Buhari suspends Chief Judge; opposition cries foul', January 25, 2019 <https://www.aljazeera.com/news/2019/01/nigeria-buhari-suspends-chief-judge-opposition-cries-foul 190125183533205.html> accessed 1 April 2021.

State courts for redress may not be a viable option due to 'lack of due process, political interference, mistrust of the courts or lack of affordable legal assistance'[438].

In another breath, the publication pointed out that recourse to the home state of the investor is similarly characterised by barriers such as 'legal restrictions which result from the corporate form, jurisdictional hurdles resulting from the use of forum non conveniens[439]. In essence, the experiences of those seeking remedy tend to suggest the existence of serious shortcomings in relation to the fulfilment by States of their international human rights obligations with respect to access to remedies[440].

While the availability of non-State based grievance mechanisms is crucial to widening the options for Indigenous Right-holders to pursue remedies, the role of States as far as providing effective access to remedies as part of its international human rights obligation to protect human rights should not be de-emphasised.

This point is buttressed in the commentary to GP 26 which stipulates that 'ensuring access to justice through domestic judicial system for all citizens and residents is a core duty and function of States[441]. The commentary begins by stating, that 'effective judicial mechanisms are at the core of ensuring access to remedy'[442]. In fact, like every other citizen, indigenous peoples depend on a functional judicial system for the protection of their rights[443].

Specifically, principle 26 of the UNGP notes that States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy[444]."

Indigenous Right-holders have over time witnessed varied outcomes from submitting grievances to State-based judicial mechanisms in relation to which the Nigerian context is adopted in this chapter as a case study. The choice of Nigeria as case study is based on the fact

[438] Amnesty International and Business & Human Rights Resource Centre, ''Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse" 2017 p2. <https://www.amnesty.org/download/Documents/POL3070372017ENGLISH.PDF> accessed 1 April 2021.
[439] Ibid.
[440] Report of the United Nations High Commissioner for Human Rights 'Improving accountability and access to remedy for victims of business-related human rights abuse' A/HRC/32/19 para 6 available at < https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/093/78/PDF/G1609378.pdf?OpenElement > accessed 1 April 2021.
[441] International Working Group on Indigenous Affairs (IWGIA) 'Business and Human Rights: Interpreting the UN Guiding Principles for Indigenous Peoples', Report 16, June 2014, p33 <https://www.iwgia.org/images/publications/0684_IGIA_report_16_FINAL_eb.pdf> accessed 1 April 2021.
[442] Ibid.
[443] Ibid.
[444] Guiding Principles on Business and Human Rights (n62).

most of the business-related human rights abuses often taken place within the extractive sector[445] of which the Nigerian extractive industry, comprising majorly of the oil and gas sector is quite extensive in terms of size being 'Africa's largest producer of oil, and the 13th largest oil producing country'[446] in the world with a huge presence of oil multinationals[447].

According to the Corporate Accountability Lab, the indigenous people of the Niger Delta are reportedly averse to prosecuting claims against Shell in Nigerian Court due to alleged strong tendency to corrupt judicial officers[448]. The paramount King of Ogale community in reaction to the Judgment of the UK High Court in respect of a suit instituted by the Ogale Community against Shell was quoted as stating that 'you can never, never defeat Shell in a Nigerian Court. A case can go on for very many years. You can hardly get a judgment against an oil company in Nigeria. Shell is Nigeria and Nigeria is Shell'.[449] The suspicion of corruption may not be unfounded. Royal Dutch Shell has faced prosecution in the US, Netherlands and the UK for notorious and repeated alleged bribery of Nigerian government officials running into billions of US dollars[450].

It is noteworthy that contrary to the presumption against the Nigeria Judiciary, there have been instances of successful claims against Shell in Nigerian Courts at the instance of the Indigenous Right-holders from Ogoni land. An example is the NGN182 billion Nigerian Court judgment obtained against SPDC in the Agbara case which has already been discussed in chapter one.

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[445] See John Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/2006/97 (2006) Para 25; See also Abdel-Rahman Ghandour (UNDP Deputy Country Director – Head of Programmes) at the 7th Africa OILGASMINE, Khartoum, 23-26 November 2015 titled 'Extractive Industries and Sustainable Job Creation-Environment and Social safeguards in partnering with the extractive industry ' <https://unctad.org/meetings/en/Presentation/17OILGASMINE%20Abdel%20Rahman%20Ghandour%20S3.pdf> accessed 1 April 2021.

[446] Extractive industry Transparency Initiative (EITI) Country Profile- Nigeria <https://eiti.org/nigeria> accessed 1 April 2021.

[447] E.g Shell Petroleum Development Company, ELF Petroleum Nigeria ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria Plc and Exxon Mobil.

[448] Corporate Accountability Lab 'Shell in Nigeria: the Case for a New Legal Strategies for Corporate Accountability' 5 July 2018 <https://corpaccountabilitylab.org/calblog/2018/7/5/shell-in-nigeria-the-case-for-new-legal-strategies-for-corporate-accountability> accessed 1 April 2021.

[449] Ibid.

[450] See CNBC Europe news 'Shell Facing multiple charges over corruption, emissions and an explosion' 3 March 2019 <https://www.cnbc.com/2019/03/01/shell-to-be-prosecuted-with-criminal-charges-over-nigerian-oil-deal.html> accessed 1 July 2021; See also Bloomberg Market News 'Shell, Eni Officials named in $1billion Nigeria Lawsuit' 7 May 2019 <https://www.bloomberg.com/news/articles/2019-05-07/shell-eni-executives-named-in-1-billion-nigeria-bribery-suit> accessed 1 July 2021; see also Order Instituting Cease and Desist Proceedings (File No. 3-14107) United States of America against Royal Dutch Shell Plc & Anor <https://www.sec.gov/litigation/admin/2010/34-63243.pdf> accessed 1 July 2021.

Despite the above, it is acknowledged that the protracted length for disposal of cases in Nigerian Courts is indeed worrisome. For example, the Agbara case referred to above was finally determined 28 years after commencement at the lower court in 1991 ultimately going through the Court of Appeal and Supreme Court respectively. It could be imagined that some of the claimants might have become deceased, relocated or generally unavailable at the time of conclusion and enforcement of the judgment 28 years after the suit commenced typifying the often-cited legal maxim 'justice delayed is justice denied'.

2.6.2 Remedies obtained in Nigerian Courts and the ISDS Mechanism

With specific reference to judgments obtained against treaty-protected foreign investors by Indigenous Right-Holders in the host State, the main concern is the tendency that such remedies could be challenged, frustrated and undermined by a foreign investor against whom the judgment giving rise to the remedy was obtained.

In this context, when the judgment obtained by indigenous peoples against the foreign investor at the local Court is challenged by the foreign investor at ISDS, key ISDS rules do not allow for third parties to participate as actual parties in ISDS arbitration which is strictly between the investor and the State. This is the main access to remedy challenge within the context of the ISDS mechanism, which is the reason why this thesis poses the question of whether IIL ought to provide access to remedy for indigenous victims by allowing them to participate as actual parties in relevant ISDS arbitration where their rights are directly at stake.

As noted above, the case of Isaac Agbara & ORS vs SPDC discussed above lends credence to the above concern. After the Court in Nigeria entered judgment against SPDC for environmental pollution and other human rights abuses in Ogoni land, SPDC initiated investor-State arbitration against the Nigerian government seeking to block the enforcement of the judgment. It would appear that the SPDC might have drawn inspiration from the Chevron vs Ecuador ISDS arbitration (already discussed above) where an ISDS arbitration tribunal successfully ordered the Ecuadorian government to prevent the enforcement of a judgment obtained against Chevron by an indigenous group for environmental pollution and human rights abuses.

While there were allegations of bribery and corruption which tainted the judgment obtained before the Ecuadorian Court, the main criticism against the ISDS award is that the beneficiaries of the judgment were denied their right to fair hearing. This is as a result of the fact that the

judgment beneficiaries could not participate meaningfully in the proceedings to defend their right in the judgment that was the subject matter of the ISDS arbitration.

The thesis seeks to address the question of whether IIL needs to change procedural stipulations that prevent third parties from participating as actual parties in ISDS arbitration where their rights are directly at stake.

2.7 Regional Courts

I. The case of Socio-Economic Rights & Accountability Project (SERAP) Vs Federal Republic of Nigeria and SERAC & Anor vs Federal Republic of Nigeria

At the regional level, an Ogoni community obtained a favourable decision against the Nigerian government in a case instituted on their behalf by the Socio-Economic Rights & Accountability Project (SERAP) against the Nigerian government at the Court of Justice of ECOWAS[451].

In essence, the decision found that Nigerian government failed in its duty to prevent oil-related pollution and environmental damage on agriculture and fisheries in the Ogoni community[452]. In effect, the Court Stated that it is precisely this omission to act, to prevent damage to the environment and to make accountable the offenders, who feel free to carry on their harmful activities with clear expectation of impunity, that characterises the violation by the Federal Republic of Nigeria of its international obligations under Articles 1 and 24 of the African Charter on Human and Peoples' Rights (The Charter)[453].

Notably, Article 1 of the Charter states that ″The Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them[454]. Article 24 of the Charter provides that ″All peoples shall have the right to a general satisfactory environment favourable to their development″[455].

The Court clarified that 'Article 24 of the Charter thus requires every State to take every measure to maintain the quality of the environment understood as an integrated whole, such

[451] Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) vs Federal Republic of Nigeria, Judgement No. ECW/CCJ/JUD/18/12.
[452] Ibid.
[453] Ibid para 111.
[454] African Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)
[455] Ibid.

that the state of the environment may satisfy the human beings who live there and enhance their sustainable development'[456].

The Court noted that 'it is by examining the state of the environment and entirely objective factors, that one judges, by the result, whether the State has fulfilled this obligation. If the State is taking all the appropriate legislative, administrative and other measures, it must ensure that vigilance and diligence are being applied and observed towards attaining concrete results'[457].

The Court held that 'as a State Party to the African Charter on Human and Peoples' Rights, the Federal Republic of Nigeria is under international obligation to recognise the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative or other measures to give effect to them'[458].

The Court reached the conclusion that 'if, notwithstanding the measures the Defendant alleges having put in place, the environmental situation in the Niger Delta Region has still been of continuous degradation, this Court has to conclude that there has been a failure on the part of the Federal Republic of Nigeria to adopt any of the "other" measures required by the said Article 1 of African Charter to ensure the enjoyment of the right laid down in Article 24 of the same instrument'[459].

The Court further held that 'it is significant to note that despite all the laws it has adopted and all the agencies it has created, the Federal Republic of Nigeria was not able to point out in its pleadings a single action that has been taken in recent years to seriously and diligently hold accountable any of the perpetrators of the many acts of environmental degradation which occurred in the Niger Delta Region'[460].

The Court adjudged that 'the Federal Republic of Nigeria, by comporting itself in the way it is doing, in respect of the continuous and unceasing damage caused to the environment in the Region of Niger Delta, has defaulted in its duties in terms of vigilance and diligence as party to the African Charter on Human and Peoples' Rights, and has violated Articles 1 and 24 of the said instruments'[461].

[456] Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) vs Federal Republic of Nigeria, Judgement (n451) para 101.
[457] Ibid.
[458] Ibid para 106.
[459] Ibid para 107.
[460] Ibid para 110.
[461] Ibid para 112.

In the final analysis, the Court rejected the plaintiff's claim for damages in the sum of USD1billion on the ground that the plaintiffs failed to identify a single victim to whom the requested pecuniary compensation could be awarded[462]. However, the Court ordered the Nigerian Government to

i. Take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta.

ii. Take all measures that are necessary to prevent the occurrence of damage to the environment.

iii. Take all measures to hold the perpetrators of the environmental damage accountable[463].

II. Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs Nigeria

In this case, the African Commission entered judgment against the Nigerian Government in favour of some Ogoni communities represented by the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights[464]. In the Communication submitted to the African Commission, the claimants alleged that the military government of Nigeria has been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation, extra-judicial killing of the Ogoni nine (9) and health problems resulting from the contamination of the environment for the Ogoni People[465].

In a judgment similar to that of the ECOWAS Court in the SERAP case above, the Commission held the Nigerian government liable for failure to fulfil its international human rights obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and People's Rights. Specifically, the Commission held that Article 24 of the African Charter which guarantees the right to a general

[462] Ibid para. 114.
[463] Ibid para 121.
[464] The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria (SERAC & CESR v. Nigeria), [2001] decision by African Commission on Human and Peoples' Rights at its 30th ordinary session, Communication No. 155/96, 13-27 October 2001.
[465] Ibid para 2.

satisfactory environment or right to a healthy environment imposes a clear obligation on the Nigerian government[466].

As reassuring as the decisions are, their enforceability is doubtful. Till date, the Nigerian government has failed to implement the decisions given by the two regional human rights institutions without any consequences for this failure.

The statement by the Corporate Accountability Lab[467] seems to affirm this, noting that even though the Courts found the Nigerian government liable for many of the harms caused in the Niger Delta, the Courts were unable to compel the government to comply with the decisions, to hold Shell and the other oil corporations responsible or importantly to obtain remedy for the victims[468]. Notably, while the regional human rights institutions have been successful in securing obedience of judgments in some instances, however, they lack the same enforcement abilities as domestic courts[469].

2.7 Conclusion

This chapter contributes towards proffering answers to the research questions that this study interrogates by laying a comprehensive foundation for the analysis conducted in the subsequent chapters through a critical review of the experiences of Indigenous Rights Holders vis-à-vis access to remedy.

Therefore, the above discussion about un-remediated human rights abuses which characterise the experiences of indigenous peoples provides a strong basis and justification for the search for an effective legal framework to provide access to an effective remedy for Indigenous Rights Holders. In particular, the chapter undertook a case study of the indigenous peoples of Ogoni land to illustrate issues of un-remediated human rights abuses suffered by indigenous peoples throughout the world owing mainly to the activities of extractive industry operators including exploration of natural resources which are typically located near indigenous peoples' land.

The chapter puts in perspective the adverse impact of IIL on indigenous peoples' rights which probably forms the basis for arguments that IIL ought to provide access to remedy for Indigenous Rights Holders. As noted in chapter one, it has been argued that IIL provides a fast-

[466] Ibid para 52.
[467] The Corporate Accountability Lab is a US based Non-Governmental Organisation focused on utilising legal and human rights expertise to protect people and the planet from corporate abuse.
[468] The Corporate Accountability Lab 'Shell in Nigeria: The Case for New Legal Strategies for Corporate Accountability' July 5, 2018 <https://corpaccountabilitylab.org/calblog/2018/7/5/shell-in-nigeria-the-case-for-new-legal-strategies-for-corporate-accountability> accessed 1 July 2022.
[469] Ibid.

track mechanism for foreign investors to seek remedies for treaty rights without providing the same pathway for remedy for victims of investment-related human rights abuses. Some commentators contend that this situation exemplifies allegations of asymmetry severally levelled against the IIL regime.

The chapter reviewed the 2011 UNEP report which catalogued extensive environmental damage in Ogoni land caused by oil exploration activities by SPDC. According to the UNEP report, it would take up to 25 years to achieve environmental restoration in Ogoni land. However, available reports discussed above indicate that 11 years after the UNEP report, the oil clean-up exercise which the UNEP report recommended is yet to record any meaningful progress. The chapter highlighted various human rights accruing to indigenous peoples under the UNDRIP and the Indigenous and Tribal Peoples' Convention 1989 respectively and argued that the right to access to remedy is the most essential among indigenous peoples' rights without which other rights such as land rights, permanent sovereignty over natural resources among others would be effectively academic and unavailing.

Ultimately, the chapter considered the prospects for Indigenous Right-Holders to obtain access to effective remedy in the host State along with the tendency that such remedy may be undermined through the ISDS mechanism. This sets the background for the review in chapter three which is aimed at addressing the question of whether IIL ought to provide access to remedy for Indigenous Right-Holders.

Chapter Three- Substantive international investment law and access to remedy for Indigenous Right Holders.

> "This is not a decision we take lightly but, given the history of this particular case, we are seeking protection of our legal rights from an international tribunal,"[470].
>
> Reuters (February 2021).

The above statement was credited to the SPDC regarding recourse to ICSID arbitration against judgment entered against the company by a Nigerian Court for environmental pollution and human rights abuses in Nigeria's Niger Delta[471].

3.1 Introduction

To address the research questions set out in chapter one, it is important to appreciate the historical foundations of IIL, and its significance within the context of indigenous peoples' rights vis-à-vis the potential and limitations to provide access to remedy for Indigenous Rights Holders. This chapter entails an enquiry as to whether IIL could potentially provide an effective legal framework for Indigenous Right Holders. This is in view of the opposing arguments highlighted in chapter one regarding whether IIL ought to allow Indigenous Right Holders to participate as actual parties in relevant ISDS arbitration. In this connection, the chapter discussed the three categories by which Indigenous Right Holders could be involved in an ISDS arbitration, preparatory to a more detailed analysis in chapter four of how IIL should respond to each of these categories from the point of view of access to effective remedy.

To this extent, the chapter critically considers the capacity or otherwise of IIL as an effective legal framework for Indigenous Right Holders to access effective remedy and ultimately proposes the adoption of specific wording in investment treaties that could potentially enhance access to remedy for Indigenous Right Holders in IIL from a substantive law point of view.

As highlighted in chapter one, the following analysis is conducted against the backdrop of the three main ways by which Indigenous Right Holders could potentially be involved in ISDS arbitration. Essentially, the thesis argues below that the amicus curiae submission which is currently the main existing pathway for third-party participation in ISDS is grossly inadequate

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[470] Reuters Staff 'Shell files int'l arbitration against Nigeria over oil spill case' (Reuters, 15 February 2021), <www.reuters.com/article/uk-shell-nigeria-arbitration-idUSKBN2AF0VF> accessed 20 June 2021.

[471] Shell files arbitration claim against Nigeria over spill dispute, Bilaterals.org, 14 February 14 2021 available at < www.bilaterals.org/?shell-files-arbitration-claim> accessed 20 June 2021; See also Oluwaseyi Awojulugbe 'Shell sues Nigeria over oil spill compensation claim' (The Cable,15 February 2021) <www.thecable.ng/shell-sues-nigeria-over-oill-spill-compensation-claim> accessed 20 June 2021.

to address situations where the legal rights of Indigenous Right Holders are directly at stake in an ISDS arbitration.

3.2 IIL and access to remedy for Indigenous Right Holders

The treaty-based dispute settlement mechanism has come under scrutiny given the number of high-profile investment disputes involving social issues. These include the many cases arising from the Argentine economic crisis of the early 2000s (investment and human rights),[472] and more recent cases involving developing country host states such as Tanzania (investment and public health),[473] newly industrialized host states such as Mexico (investment and environmental protection),[474] and developed host states such as Australia (investment and public health),[475] and Germany (investment and environmental safety).[476]

As highlighted in chapter one, some scholars and state actors have argued that part of the legitimacy crisis in IIL includes the tendency to afford access to remedy for covered investors/investments to the exclusion of victims of the adverse impacts of their activities[477]. In this connection, it would appear that IIAs negotiated by States, which form the basis for ISDS arbitration may not be conducive to the fulfilment of indigenous peoples' rights, especially the right to access to effective remedy.

Remarkably, the question of whether IIL ought to provide access to effective remedy for third-party right holders has continued to generate interest at the international level in light of ongoing discourse at the United Nation level on the subject of 'Human Rights-compatible International

[472] Leading cases involving water include Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic, Case No. ARB/03/19 (ICSID) Leading cases involving gas include CMS Gas Transmission Company v The Republic of Argentina, Case No. ARB/01/8 (ICSID); Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic, Case No. ARB/01/3 (ICSID); LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic, [2007] Case No. ARB/02/ (ICSID); Sempra Energy International v The Argentine Republic [2002] Case No. ARB/02/16 I(CSID)
[473] Biwater Gauff (United Republic of Tanzania) Ltd. v United Republic of Tanzania [2008] Case No. ARB/ 05/22 (ICSID) (foreign investor-initiated arbitration proceedings against the Tanzanian Government after the latter terminated a contract due to the investor's alleged failure to meet certain performance guarantees (specifically, the investor raised prices while failing to improve the water and sewage system in Dar Es Salaam).
[474] Te´cnicas Medioambientales Tecmed, S.A. v United Mexican States [2003] Case No. ARB(AF)/00/2) (ICISID] (tribunal ruled in favour of the foreign investor despite the host state's allegations of violations of its environmental laws related to investor's waste management operations).
[475] Philip Morris Asia Limited v The Commonwealth of Australia [2012] , PCA Case No. 2012-12 (UNCITRAL)
[476] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany, [2009] Case No. ARB/09/6 (ICSID).
[477] Special Rapporteur on the Rights of Indigenous Peoples etal (n72) p6; Report of the Independent Expert (n72) para. 74; Patrick Wieland, (n72) p351; Government of South Africa (n88) para. 8; Government of Ecuador (n89) paras. 23-26.

Investment Agreements (IIAs)'[478] which pose a variety of questions cutting across the three pillars of the UNGPs.

Some of the questions posed which are of particular relevance to this research include whether (1) the current Investor-State Dispute Settlement (ISDS) regime is "fit for the purpose" to address complaints related to human rights abuses linked to investment projects;[479] (2) IIAs ought to provide mechanisms to allow individuals or communities affected by investment-related projects to seek effective remedy against investors[480]; (3) the amicus briefs before ISDS provides an effective opportunity for affected individuals and communities to seek remedy[481]? (4) Do counterclaims brought by States against investors have been effective in addressing human rights abuses linked to their investment[482]?

3.3 Overview of International Investment Agreements

International Investment Agreements (IIAs) are divided into two types: (1) bilateral investment treaties and (2) treaties with investment provisions[483]. The majority of IIAs are BITs[484], and to that extent, this research will focus primarily on BITs. A bilateral investment treaty (BIT) 'is an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory'[485]. Most foreign investments are the subject of protection under IIAs described by Jeswald W Salacuse (2010) as the "basic building block" of the investment regime[486].

According to UNCTAD statistics, IIAs which currently include about 2219 bilateral investment treaties (BITs), and about 336 treaties with investment provisions currently in force coupled with several international investment contracts between host country governments and foreign investors form the pillar of foreign direct investments[487].

Despite its historical essence as a regime conceived for the protection of foreigners abroad[488], IIL is arguably well suited to engender positive impacts in host States ranging from

[478] UN Office of the High Commissioner on Human Rights (OHCHR) (n92).
[479] Ibid para 7.
[480] Ibid para 14.
[481] Ibid para 16.
[482] Ibid para 15
[483] United Nations Conference on Trade and Development (UNCTAD) 'Investment Policy Hub' International Investment Agreements Navigator, < https://investmentpolicy.unctad.org/international-investment-agreements> accessed 15 September 2021.
[484] Ibid.
[485] Ibid
[486] Jeswald W.Salacuse 'The Law of Investment Treaties' (Oxford: OUP:2010) 6.
[487] United Nations Conference on Trade and Development (UNCTAD) (n483).
[488] Mavluda Sattorova (n127).

strengthening good governance to fostering sustainable development[489]. The stated object of most IIAs is to foster economic cooperation among states that sign them essentially by promoting the influx of capital from developed to developing countries[490]. Jeswald W. Salacuse & Nicholas P. Sullivan argued that the impetus for the proliferation of BITs is evident in the determination of companies of industrialised states to invest safely and securely in developing countries as well as the need to secure a stable international legal framework for the facilitation and protection of such investments[491].

Posing the question of whether investment and development are foes, Schill et al pointed out that contrary to popular expectation, IIL has often been perceived as an obstacle to sustainable development[492]. Schill et al however clarified that the First Recital in the preamble of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) indicates a development nexus[493].

Similarly, the preamble to the World Bank's Guidelines on the Treatment of Foreign Direct Investment emphasized the strategic role of the private sector in the process of development while summarizing the now dominant approach to development. The preamble noted 'that a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and economies of developing countries in particular, in terms of improving the long-term efficiency of the host country through greater competition, transfer of capital, technology, and managerial skills and enhancement of market access and in terms of the expansion of international trade'[494].

This position aligns with Annan's view that FDI engenders job creation, raises productivity, and enhances exports and the transfer of technology[495]. Notably, the potential of foreign

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[489] Ibid.

[490] Jeswald W. Salacuse and Nicholas P. Sullivan 'Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain. Harvard International Law Journal, 46, 67-130. 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' in Sauvant, K.P & Sachs, L.E 'The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows' published to Oxford Scholarship Online (2009) p118, <https://academic.oup.com/book/32651/chapter-abstract/270582080?redirectedFrom=fulltext> accessed 15 September 2021.

[491] Ibid.

[492] Stephan W. Schill (n182) p13.

[493] Ibid.

[494] Preamble to the World Bank's Guidelines on Treatment of Foreign Direct Investment in Rudolf Dolzer & Christoph Schreuer (2012) p1 <www.acerislaw.com/wp-content/uploads/2018/11/World-Bank-Guidelines-on-the-Treatment-of-Foreign-Direct-Investments.pdf> accessed 15 September 2021.

[495] United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2003 (Geneva: UNCTAD, 2003), p. iii, < www.unctad.org/en/docs/wir2003light_en.pdf>

investments to enhance the renewable energy sector is an example of the positive impacts of foreign investments on development in the host State[496].

Notwithstanding, there is the downside of IIAs underscored by their potential adverse impact on the lives of millions of people[497]. Some of the aspects that have been allegedly affected by IIAs in the past or in the near future soon range from the protection of citizens' health, access to energy, water and sanitation, workers' salaries, protection of the environment, and action on climate change to the growth of democracy itself[498]. This perhaps explains why some States seem to have realised the varying implications that characterise IIAs, thus spurring termination or extensive review and changes to these IIAs while on the other hand, capitalist interests have continued to push for their expansion[499].

Indeed, some policymakers have remarked that IIAs do not do enough to promote investment for development, but rather focus almost exclusively on protecting investors[500]. This is allegedly typified by a common feature of old-generation treaties whereby foreign investors are accorded a variety of rights under investment treaties without concomitant obligations while on the other hand, State parties bear a broad range of obligations[501].

In this connection, Muchlinski noted that first-generation IIAs with their emphasis on investor rights and host State obligations might have outlived their usefulness and should give way to modern agreements that aim to balance investor rights and duties while preserving the State's regulatory jurisdiction and to essentially prioritise not only economic but also social and environmental goals in their design[502].

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[496] See generally World Business Council for Sustainable Development, 'Investing in a Low-Carbon Energy Future in the Developing World' (2007) < www.wbcsd.org/eng/Programs/People-and-Society/Tackling-Inequality/Resources/Investing-in-a-Low-Carbon-Energy-Future-in-the-Developing-World> accessed 15 September 2021

[497] The Southern African and East African Trade, Information and Negotiations Institute (SEATINI) and Traidcraft 'International Investment Agreements: An advocacy guide for CSOs' (2015) 8 <www.tjm.org.uk/documents/reports/Traidcraft-SEATINI_BITs_Advocacy_Guide_Complete-1.pdf> accessed 15 September 2021.

[498] Ibid.

[499] Ibid.

[500] UNCTAD 'Investment Policy Framework for Sustainable Development'(2015) UNCTAD/DIAE/PCB/2015/5 p19.

[501] Patrick Dumberry and Gabrielle Dumas-Aubin, 'How to Impose Human Rights Obligations on Corporations Under Investment Treaties? (2014). 4 Yearbook on International Investment Law and Policy, 2011-2012, p569 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404054> accessed 15 September 2021.

[502] Peter Muchlinski 'Negotiating New Generation International Investment Agreements New Sustainable Development Oriented Initiatives' in Steffen Hindeland & Markus Krajewski (ed) 'Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified' (Oxford Scholarship Online 2016) 41 <https://academic.oup.com/book/25332> accessed 15 September 2021.

3.4 Contractual Nature of IIAs

It is argued in this chapter that IIAs could potentially engender reforms that could foster access to remedy for Indigenous Right Holders in certain circumstances because IIAs are essentially an Agreement between contracting parties. Contracting State parties possess the required freedom to contract to negotiate and agree on IIA terms that are conducive to access to effective remedies for Indigenous Right Holders in circumstances specified in this thesis.

Gazzini in his treatise on BITs and sustainable development noted that BITs are reflective of the deliberate choice of contracting parties[503]. Gazzini's analysis focused on an assessment of treaty practice while highlighting means by which States can take full advantage of investment treaties as a vehicle for economic development without sacrificing the goal of environmental protection, labour standards and human rights[504].

Essentially, Gazzini cautioned that BITs must be considered as a means and not an end, especially from a sustainable development standpoint in the sense that they are neither sufficient nor necessary to enhance economic development[505]. In the same vein, UNCTAD clarified that IIA impact would depend on the actual drafting and design of the IIA and the capacity of national and sub-national entities to effectively implement the treaty[506]. To the extent that IIAs ought to contribute towards the public good, it would seem desirable that the public is enabled to participate in the treaty negotiation process and make input towards the determination of what is the good of the public.

Further, the potential of IIAs to redress complaints of asymmetry in the ILL framework was buttressed by Gazzini[507]. Gazzini suggested that if the imbalance that characterizes the normative content of BITs is unacceptable, it is important to recall that the flexibility of a bilateral framework enables States to adapt their commitments in accordance with their specific and changing needs by efficiently and rapidly concluding, modifying and renegotiating their BITs[508].

According to Gazzini, such flexibility enables the regular revision of BITs to ensure that they are consistent with the evolution of international law, especially in relation to the protection of

[503] Gazzini, T 'Bilateral Investment Treaties and Sustainable Development', (2014) 15 J. World Investment & Trade 929.
[504] Ibid.
[505] Ibid.
[506] Ibid.
[507] Ibid.
[508] Ibid.

the environment, labour standards and human rights[509]. Gazzini argued that based on this perspective, States that are more responsive to these issues may take the lead and increasingly adopt appropriate provisions in their model BITs and at the negotiating table[510].

Undeniably, State parties by the natural consequence of their sovereignty reserve the autonomy to fashion out national investment policies which define how FDI and investors are treated[511]. Subedi noted that since international foreign investment law provides only a framework of principles, it leaves a great deal of room for manoeuvring by individual States to fashion out their relationship with a State of their choice in the manner they wish[512]. Further, Sornarajah noted that BITs are the outcome of individual bargaining relationships, creating lex specialis between the parties, not customary international law[513].

Given the contractual character of IIA, it would appear that States as contracting parties are in a position to facilitate the achievement of a balance that guarantees international minimum protections to foreign investors without compromising the interest of host States and their citizens particularly in the context of sustainable development[514]. It should be noted that reference to sustainable development in this context implies the three pillars of economic development, environmental protection, and social justice[515]. According to David Victor, boosting the economy, protecting natural resources, and ensuring social justice are not conflicting but interwoven and complementary goals[516].

Indeed, new generation BITs are increasingly challenging the primacy of investor protection inherent in the international minimum standard to balance the protection of investors and the host state's 'right to regulate'[517]. This new approach emphasizes that IIAs are not insurance policies against bad business judgments[518], but agreements based on the premise that inward

[509] Ibid.
[510] Ibid.
[511] Surya P Subedi 'International Investment Law – Reconciling Policy and Principle' (Hart Publishing 2008) p91.
[512] Ibid.
[513] Muthucumaraswamy Sornarajah 'Resistance and Change in the International Law on Foreign Investment' (Cambridge University Press, 2015) 43-5, in Peter T. Muchlinski 'Multinational Enterprises & the Law' (3rd Oxford University Press, 2020) 662.
[514] See generally Kevin C. Kennedy, 'A WTO Agreement on Investments: A Solution in Search of a Problem' (2003) 24 U. Pa. J. Int'l Econ. L. 77, 183.
[515] See generally the Report of the World Commission on Environment and Development: Our Common Future, (1987) available at <www.un-documents.net/our-common-future.pdf> accessed 15 September 2021.
[516] David G. Victor 'Recovering Sustainable Development' (2006) p1 < https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/Recovering_Sustainable_Development.pdf> accessed 15 September 2021
[517] Muthucumaraswamy Sornarajah (n513) p663.
[518] See Maffezini v Spain case No ARB/97/7 Award of 13 November 2000, 16 ICSID Rev-FLIJ 248 (2001) para 64.

FDI and legitimate host state development-oriented regulation can co-exist and contribute to sustainable development[519].

The foregoing, therefore, warrants a closer examination of IIAs and how these could potentially enable access to remedy for Indigenous Right-holders, particularly in the context of actual claims in ISDS. In this regard, a shared view is emerging on the need for reform of the IIA regime to ensure that it works for all stakeholders[520].

3.5 IIAs and the public good

As highlighted above, State parties to IIAs can negotiate treaty provisions that are conducive to the fulfilment of their international human rights obligations including the protection of indigenous peoples' rights and ultimately the public good. However, this thesis argues that what amounts to the protection of indigenous peoples' rights and the public good generally must be determined from the point of view of the affected right holders and the society. Meanwhile, this needs to be ascertained through public participation in the treaty negotiation process.

UNCTAD observed that society's expectations about the role of foreign investment have become more demanding[521]. It is no longer enough that FDIs create jobs, contribute to economic growth or generate foreign exchange in countries. It is increasingly expected that States should look for investments that are not harmful to the environment, which bring social benefits, promotes gender equality, and help them to move up the global value chain[522].

In this connection, Choudhury submitted that modern IIAs progressively subscribe to dual goals, that is ensuring a stable investment framework for the foreign investors and their investments on one hand while on the other hand putting in place standards to guarantee that FDIs fulfil the objective of developing the host state either through sustainable economic contribution or at the minimum by refraining from endangering the public interest of the State[523].

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[519] Muthucumaraswamy Sornarajah (n513).
[520] United Nations Conference on Trade and Development (UNCTAD) 'Reforming the International Investment Regime: An Action Menu'(2015) World Investment Report, p120, <https://unctad.org/system/files/official-document/wir2015ch4_en.pdf> accessed 15 September 2021.
[521] Ibid.
[522] United Nation's Conference on Trade and Development (UNCTAD) 'UNCTAD's Reform Package for the International Investment Regime (2018) p15.
[523] Barnali Choudhury, 'International Investment Law as a Global Public Good', (17 Lewis & Clark L. Rev. 481 2013) p490.

Analysing the potential of IIAs to promote the public good, Sattorova conceded that IIL has potentially positive effects on the host state in that it tends to enable good governance not only in favour of the investor but also for the host communities[524]. However, Sattorova observed that extant institutional and procedural arrangements fail to enable input from host communities in the process of formulating investment protection priorities[525].

Against the above background, Choudhury's appraisal of IIL in terms of its public good component is quite apposite[526]. Choudhury referred to the public good as consisting of a key characteristic which is to serve the well-being of the public[527]. Choudhury identified two main cross-border public good benefits which may be credited to IIL, including the provision of an overarching legal framework that guides FDI activity while guaranteeing its predictability; affording a mechanism by which FDI inflows could be advantageous to both the state and the investor[528]. However, Choudhury argued that despite its capacity to deliver, IIL has largely failed to confer these benefits[529]. While IIAs may possess the potential for fostering public good, this potential would probably not be realized unless there is an appreciation of what amounts to public good from the standpoint of the public.

The above overview is indicative of the fact that IIAs being a contract between two contracting State parties could be reformed to enhance indigenous peoples' right to access to remedy if the State parties are genuinely committed to the protection of indigenous peoples' rights as mandated by relevant international law standards, however with necessary input from the public.

3.6 Potentials and limitations of IIL to provide access to remedy for Indigenous Right Holders

The search for an effective legal framework that could enhance access to effective remedies for Indigenous Rights holders gave rise to a wide variety of options, and international investment law is one of these[530].

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[524] Sattorova (n127) p1.
[525] Ibid.
[526] Barnali Choudhury (n523).
[527] Ibid.
[528] Ibid.
[529] Ibid.
[530] See generally Jesse Coleman 'Access to Justice and Corporate Accountability for Investment-Related Harms: Opportunities and Limitations of the International Investment Regime' (Columbia Centre on Sustainable Investment , 14 January 2020) < http://ccsi.columbia.edu/2020/01/21/access-to-justice-and-corporate-accountability-for-investment-related-harms-opportunities-and-limitations-of-the-international-investment-regime/> accessed 16 September 2021.

According to the 2019 UN Forum on Business and Human Rights (the Forum), the entire spectrum of investment law and policy-making at national, regional and international levels provides a fertile context to implement the "protect, respect and remedy" pillars of the UN Guiding Principles on Business and Human Rights (UNGPs)[531]. Further, the Forum noted that 'investment law and policy-making provides States an opportunity to align strategies and tools for attracting FDI with their human rights obligations and in turn achieve greater policy coherence'[532].

As already demonstrated in chapter two, indigenous peoples' rights can be disproportionately affected by IIL due in part to the rich presence of natural resources in indigenous territories as well as the nature of the relationship that indigenous peoples often have with their lands[533].

In the context of IIL, it has been recommended that states' international human rights obligations would need to be reflected in IIAs[534], such human rights obligations include States' duty to provide access to remedy. The UN Committee on Economic, Social and Culture Rights, General Comment No. 24 clarified that States' obligation to protect means that States' parties must prevent infringements of economic, social and cultural rights in the context of business activities[535].

3.7 Limitations of the current IIL regime

The current indiscriminate procedural barriers to actual participation by third-party right holders in ISDS arbitration is a key limitation which undermines the suitability of IIL as a potentially effective legal framework to provide access to remedy for Indigenous Right Holders. Using ICSID as an example, both substantive and procedural rules restrict actual participation in ISDS arbitration exclusively to investors or nationals of a contracting State, and another

[531] UN Forum on Business and Human Rights (commentary), 'Aligning international investment policy and practice with the pillars of "Protect, Respect, Remedy" - what States should do' Session organized by the UN Working Group on Business and Human Rights in collaboration with the London School of Economics and Political Science (LSE), the Southern and Eastern Africa Trade Information and Negotiations Institute (SEATINI) and the Columbia Center on Sustainable Investment (CCSI) Geneva 25-27, 2019.
[532] Ibid.
[533] Columbia Centre for Sustainable Investment 'International Investment and the Rights of Indigenous People', Workshop Outcome Document, November 16, 2016, p5 <https://ccsi.columbia.edu/sites/default/files/content/docs/publications/Workshop-on-International-Investment-and-the-Rights-of-Indigenous-Peoples-Outcome-Document-November-2016.pdf> accessed 16 September 2021..
[534] UN Committee on Economic, Social and Culture Rights, General Comment No. 24 (2017) on State Obligations under the ICESCR in the context of business activities, E/C.12/GC/24 (August 10, 2017), para. 13.
[535] Ibid para. 14.

contracting State[536]. Third-party right holders or interested parties are only allowed qualified participation as non-disputing parties[537]. Article 25 of the ICSID Convention provides that 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[538].

Similarly, Article 14-D of the USMCA provides that the actual parties to an investment dispute which may be submitted to ISDS (particularly ICSID) shall be an investor of either Mexico or the United States (Annex Party(ies) initiating ISDS arbitration against an Annex Party[539].

Consequently, while ICSID rules take into account the interest of non-disputing parties through the non-disputing party submission procedure, it fails to take cognisance of third-party right holders whose legal rights are at stake in an ongoing ISDS arbitration thus constituting a gap in IIL substantive and procedural rules. This would seem to undermine the prospects of IIL as a potentially effective legal framework to provide access to remedy for Indigenous Right Holders whose legal rights are at stake in relevant ISDS arbitration.

However, given the three categories under which Indigenous Right Holders may be involved in ISDS as identified in this research, this chapter will concentrate on the first category 'where legal rights of Indigenous Right Holders are at stake in ISDS arbitration' and seek probable means by which this limitation can be addressed, if at all. Meanwhile, the full analysis of the three categories will be undertaken in chapter four of this research.

3.7.1 IIL and participation of third-party right holders whose legal rights are at stake in an ongoing ISDS arbitration

The February 2021 ICSID arbitration initiated by SPDC against Nigeria to block the enforcement of a judgment obtained against it by Ogoni claimants before Nigeria Courts is illustrative of how the legal rights of third parties can be at stake in an ISDS arbitration. Another related example is the Chevron vs Ecuador PCA arbitration the outcome of which effectively blocked the enforcement of a judgment obtained in Ecuadorian Courts, although the judgment was proved to have been procured by fraud, bribery and corruption.

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[536] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159, date of entry into force: 14 October 1966, Article 25. ICSID Institution Rules, Article 1; ICSID Arbitration Rules, Articles 1 & 2.
[537] International Centre for Settlement of Investment Disputes [ICSID] Arbitration Rules (Amended), July 1, 2022, Rule 67.
[538] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (n536).
[539] United States-Mexico-Canada Agreement, signed on November 30, 2018, Chapter 31, Article 14-D.

The common denominator between these cases is the fact that regardless of the merit or otherwise of the claim submitted to ISDS arbitration, the third parties whose legal rights (the enforcement of judgment) were directly at stake in the ISDS arbitration cannot participate as actual parties, be legally represented, file pleadings and tender evidence to defend their legal right. This is simply due to the substantive law and procedural barriers embedded in IIL.

Indeed, it has been asserted by some scholars that investors tend to exploit the ISDS platform to undermine or invalidate the enforcement of court judgments obtained against them in the local courts[540]. This might have been witnessed in the Chevron vs Ecuador case and the recently filed ISDS arbitration initiated by Shell against Nigeria which reportedly sought to block the enforcement of a Court judgment obtained against SPDC by indigenous claimants in the local jurisdiction[541].

3.7.2 SPDC & Another vs Federal Government of Nigeria

Shell Petroleum Development Company Nigeria Ltd (SPDC) initiated ICSID arbitration against Nigeria in February 2021 under the Netherlands–Nigeria BIT seeking to block the enforcement of a judgment entered against it by a Nigerian Court for extensive environmental pollution and human rights abuses in Nigeria's Niger Delta region[542].

The judgment was obtained against SPDC by indigenous peoples of Ogoni land in the suit between Chief Isaac Osaro Agbara & 9 Ors. V. Shell Petroleum Development Ltd and Ors[543] (the Judgment). The ICSID arbitration reportedly seeks to block the enforcement of the Judgment in Nigeria[544].

In November 2020, the Supreme Court of Nigeria dismissed an appeal by SPDC seeking to set aside a N17 billion judgment entered against the company in 2010 for extensive oil spills which severely damaged the Ejama-Ebubu community in Ogoni land in Rivers State Nigeria[545]. The

[540] Penelope Simons and J. Anthony VanDuzer 'Using International Investment Agreements to Address Access to Justice for Victims of Human Rights Violations Associated with Transnational Resource Extraction' (AfronomicsLaw, November 2019), /<www.afronomicslaw.org/index.php/2019/12/04/using-international-investment-agreements-to-address-access-to-justice-for-victims-of-human-rights-violations-associated-with-transnational-resource-extraction>

[541] Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v. Federal Republic of Nigeria
(n33).

[542] Ibid.

[543] Chief Isaac Osaro Agbara (n77).

[544] ISDS Platform (n79).

[545] William Clows 'Shell Will Pay $111 Million to End Nigerian Oil-Spill Case', (Bloomberg, August 11, 2021), < www.bloomberg.com/news/articles/2021-08-11/shell-to-pay-110-million-to-end-30-year-nigeria-oil-spill-case>18 September 2021.

Supreme Court judgment was perhaps the high point in the series of litigations from a cause of action which arose 50 years ago, on account of oil spillage perpetrated by SPDC in the Ejama-Ebubu community in Nigeria's Niger Delta region[546].

The suit which was first commenced in 1991 was instituted to remediate damages arising from a 1970 oil spill that allegedly polluted the claimant's Ogoni community. Following the hearing of the suit, the Federal High Court entered judgment against SPDC Nigeria in the sum of N17bn in favour of the claimants. By February 2021, after many unsuccessful appeals against the Judgment, the initial judgment sum of N17bn had accrued post-judgment interest and risen to N182.8 billion[547].

It is noteworthy that even though SPDC might have opted for an out-of-court settlement of the judgment agreeing to pay the sum of $111million to the Ejama-Ebubu community in full settlement of the judgment sum of N182billion[548], there are currently no available records of discontinuance of the ICSID arbitration initiated by SPDC or the payment of the supposed settlement sum to the Ejam-Ebubu community (the Judgment Creditors) by the SPDC.

Shell Petroleum Development Company of Nigeria (SPDC) has the largest acreage in the country from which it produces some 39 per cent of the nation's oil[549]. SPDC enjoys IIL protection as a foreign investor and national of a contracting party under the Netherlands-Nigeria Bilateral Investment Treaty which came into force on February 1, 1994[550]. Article 9 of the BIT stipulates that a dispute between a Contracting Party and the national of the other Contracting party shall be submitted to ICSID for conciliation or arbitration[551]. SPDC is Nigeria's oldest energy company having been actively operating in Nigeria since 1937 with the largest footprint of all the international oil and gas companies operating in the country[552].

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[546] Ibid.

[547] Adedapo Adesanya 'Court Orders CBN to Deduct N183bn from First Bank's Account', (BusinessPost, March 9, 2020, available at <https://businesspost.ng/banking/court-orders-cbn-to-deduct-n183bn-from-first-banks-account/> 18 September 2021.

[548] Kingsley Nwezeh 'As Shell Finally Agrees to Pay Ogoni Communities N45.9bn', (Thisday Newspaper, August 13, 2021), < www.thisdaylive.com/index.php/2021/08/13/as-shell-finally-agrees-to-pay-ogoni-communities-n45-9bn/> Accessed 18 September 2021.

[549] See SPDC – The Shell Petroleum Development Company of Nigeria < https://www.shell.com.ng/about-us/what-we-do/spdc.html> 19 September 2021.

[550] Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Federal Republic of Nigeria, date of entry into force- February 1, 1994 < https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2067/download> 19 September 2021.

[551] Ibid.

[552] Charity Ryerson 'Shell in Nigeria: The Case for New Legal Strategies for Corporate Accountability (n89).

According to Amnesty International, SPDC by its admission has since 2011 been responsible for the spillage of at least 17.5 million litres of crude oil in Nigeria's Niger Delta region[553]. The claim by SPDC that most of the oil spills are attributable to third-party sabotage has been severally challenged including in the recent judgment of a Netherland Court which concluded that SPDC has a duty of care to secure its pipeline against vandalism through the installation of a leak detection system (LDS)[554].

As highlighted in chapter two, oil spills and the attendant environmental pollution have caused untold economic, social, environmental and health consequences on host communities in the Niger Delta, particularly Ogoni land. This state of affairs has led to several lawsuits against SPDC in local and international Courts as already highlighted in chapter two and discussed in more detail in chapter four.

Further, it has been alleged that SPDC had in the past reportedly employed investment claims at ICSID[555] to pressurise the Nigerian government into approving the acquisition of a large offshore oil field called OPL 245 under extremely favourable conditions[556]. Allegedly, SPDC's internal emails show that SPDC actively used its investment claim to increase pressure to come to a favourable agreement: Shell was expecting no real gains from winning the arbitration case but gambled on the fact that Nigeria, afraid of an "embarrassing outcome", could be persuaded to come to a favourable agreement[557].

In a manner reminiscent of the plight of the Ecuadorian plaintiffs in the above Chevron vs Ecuador case, it is noteworthy that the Ogoni claimants whose legal rights, that is the judgment against SPDC, are at stake in the ICSID arbitration cannot participate in the proceedings as

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[553] Amnesty International 'Niger Delta Negligence – How 3500 activists are taking on two oil giants' 2018 < https://www.amnesty.org/en/latest/news/2018/03/niger-delta-oil-spills-decoders/> accessed19 September 2021; See also Kingsley Jeremiah etal 'Stemming tide of unending spillages, degradation of oil-bearing communities' Guardian Newspaper Nigeria, July 2021, < https://guardian.ng/saturday-magazine/cover/stemming-tide-of-unending-spillages-degradation-of-oil-bearing-communities/> 19 September 2021.

[554] See Fidelis Ayoro Oguru, Vereniging Milieudefensie & ANOR vs Royal Dutch Shell, Shell Petroleum Development Company, case numbers [2021] C/09/365498 / HA ZA 10-1677 (case a) + C/09/330891 / HA ZA 09-0579 (case b), Court of Appeal, the Hague, January 29, 2021, paras 6.25-6.26 < https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2021:132> 19 September 2021; See also Amnesty International 'Niger Delta Negligence' (n429).

[555] Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria, [2018] Case No. ARB/07/18 (ICSID) (21 January 2019).

[556] Bart-Jaap Verbeek and Maarten Bakker 'Bend or Break. How Shell used an international investment treaty to browbeat Nigeria into a lucrative deal on OPL 245 oil field' (Technical Report, May 2019) < www.researchgate.net/publication/345766403_Bend_or_Break_How_Shell_used_an_international_investment_treaty_to_browbeat_Nigeria_into_a_lucrative_deal_on_OPL_245_oil_field/link/5fad2c75a6fdcc9389ab549e/download> accessed 19 September 2021.

[557] Ibid.

actual parties due to both substantive and procedural barriers in IIL discussed in this chapter. Meanwhile, it is possible that they can participate as amicus curiae if they so apply. But the question arises as to whether the amicus curiae procedure suffices in cases where third-party legal rights are directly at stake in an ISDS arbitration.

3.7.2 The Chevron vs Ecuador case

An Ecuadorian Court held that in the 26 years during which Texaco (later acquired by Chevron) performed oil operations, the company dumped billions of gallons of toxic water and dug hundreds of open-air oil sludge pits in Ecuador's Amazon, poisoning the communities of some 30,000 Amazon residents, including the entire populations of six indigenous groups (one of which is now extinct)[558].

After a suit spanning two decades and two countries, in November 2013 Ecuador's highest court upheld prior rulings against Chevron for contaminating a large section of Ecuador's Amazon and ordered the corporation to pay $9.5 billion to provide desperately needed clean-up and health care to afflicted indigenous communities[559].

Dissatisfied with the judgment of the Ecuadorian Court, Chevron initiated ISDS arbitration against Ecuador seeking to block the enforcement of the judgment. The ISDS case was reported with the caption 'investor-State tribunal of three private lawyers ignores years of U.S. and Ecuadorian Court Rulings, tries to extinguish indigenous communities' rights to sue Chevron for contamination'[560].

The Chevron vs Ecuador arbitration is very instructive in light of some of the reliefs sought by Chevron. Specifically, in its Notice of Arbitration, Chevron argued that the Ecuadorian Court's handling of ongoing environmental litigation by some Ecuadorian plaintiffs claiming against Chevron for environmental pollution was unjust and unfair and therefore constituted a violation of Chevron's rights under the U.S.-Ecuador Bilateral Investment Treaty (BIT)[561]. Chevron, therefore, requested the arbitral tribunal to order Ecuador to prevent enforcement of any

[558] Trade Watch, Ecuador's Highest Court vs. a Foreign Tribunal: Who Will Have the Final Say on Whether Chevron Must Pay a $9.5 Billion Judgment for Amazon Devastation? (Trade Watch, 11 December 2013) < https://citizen.typepad.com/eyesontrade/2013/12/ecuadors-highest-court-vs-a-foreign-tribunal-who-will-have-the-final-say-on-whether-chevron-will-pay.html> accessed 19 September 2021..
[559] Ibid.
[560] Ibid.
[561] Chevron Corporation and Texaco Petroleum Company vs the Republic of Ecuador [2009] CASE NO. 2009-23 (PCA) (Notice of Arbitration) < www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf> accessed 19 September 2021.

judgment issued by its courts in favour of the Ecuadorian Plaintiffs against Chevron. Specifically, the reliefs sought by Chevron include but are not limited to the following:

i. An order and award requiring Ecuador to inform the Court in the Lago Litigation that TexPet, its parent company, affiliates, and principals have been released from all environmental impact arising out of its former Consortium's activities and that Ecuador and Petroecuador are responsible for any remaining and future remediation work[562];

ii. an order and award requiring Ecuador to indemnify, protect, and defend Chevron in connection with Lago Agrio Litigation, including payment to Claimants of all damages that may be awarded against Chevron in the Lago Agrio Litigation'[563].

Chevron's ISDS claim was among other grounds predicated on allegations that the judgment was corruptly procured through acts ranging from bribery of the judge by the plaintiff's lawyers, ghost writing of the judgment, falsification of the environmental report to show that the site of environmental damage had not been cleaned up among other[564]. Chevron relied on these allegations as the basis for its claim that it had suffered a denial of justice in violation of its treaty rights under the Ecuador-US BIT[565]. In summary, the key highlights of the decision by the ISDS tribunal at different stages of the proceedings include:

- The Tribunal rejected the petition by two NGOs, the International Institute for Sustainable Development and Fundación Pachamama which sought to file an amicus curiae submission according to the U.S.-Ecuador investment treaty. The Tribunal cited the Tribunal's discretion and Chevron's argument that the amicus would not be helpful at the jurisdictional stage[566].

- The Tribunal ordered the Respondent (whether by its judicial, legislative or executive branches) to take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgments rendered in favour of the Ecuadorian plaintiffs[567].

- The Tribunal issued an award finding that the Republic of Ecuador was in breach of its obligations under international treaties, investment agreements and international law.

[562] Ibid para 76(3).
[563] Ibid para 76(5).
[564] Ibid para 76 (Request for Relief).
[565] Ibid.
[566] Chevron (n561) Procedural Order No. 8, dated 18 April 2011, paras 17-20.
[567] Ibid (Second Partial Award on Track II dated 30 August 2018) para 10.13.

> The unanimous award held that a $9.5 billion judgment rendered against Chevron in Lago Agrio, Ecuador, in 2011 was obtained under fraudulent circumstances characterised by fraud, bribery and corruption and was based on claims that had been already settled and released by the Republic of Ecuador years earlier[568]. The tribunal reached the conclusion that the judgment by the Ecuadorian courts "violates international public policy" and "should not be recognized or enforced by the courts of other States."[569]

It is noteworthy that attempts by Ecuador to appeal against the award have severally failed, the attempts to enforce the judgment against Chevron in Canada, Brazil and Argentina similarly failed. The lawyer for the Ecuadorian plaintiffs, Steven Donziger has since been disbarred and found guilty in the US for violating the Federal Racketeer Influenced and Corrupt Organizations Act (RICO) in obtaining the Ecuadorian judgment[570].

While the above outcome has been applauded in some quarters[571], others have faulted the ISDS proceedings for failure to consider the interest of the indigenous peoples whose legal rights, the enforcement of the judgment was put on trial in the ISDS proceeding and determined without allowing the voices of those affected by Chevron's actions to be heard[572]. Further, it was noted 'that the Chevron case sets an incredibly dangerous precedent that could lead to ISDS tribunals trespassing into domestic courts all over the world, rewriting justice in favour of corporate power'[573].

Similarly, one of the lawyers to Union of the People Affected by Texaco (UDAPT), Pablo Fajardo who was quoted as describing the award as "tremendously arbitrary and illegal" queried 'what is the point of a country's law if legal decisions can be suspended by decisions of

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[568] Ibid paras 10.4 – 10.13.
[569] Ibid para 10.10.
[570] Michael Krauss 'Steven Donziger Is Disbarred' (Forbes, 13 August 2020) < www.forbes.com/sites/michaelkrauss/2020/08/13/steven-donziger-is-disbarred/?sh=581f19c5771a> accessed 20 August 2022.
[571] The Amazon Post 'The Facts: Chevron in Ecuador & Plaintiffs' Strategy of Fraud' (The Amazon Post) < https://theamazonpost.com/fact-sheet/the-facts-about-chevron-in-ecuador-and-the-plaintiffs-strategy-of-fraud/> accessed 20 August 2022 See also Press Release by Chevron 'U.S. Court Declares Ecuador Judgment Against Chevron Corporation Fraudulent, Unenforceable' March 2014 www.chevron.com/ecuador/press-releases/archive/u-s-court-declares-ecuador-judgment-against-chevron-corporation-fraudulent-unenforceable> accessed 20 August 2022
[572] ISDS, Investigating the impact of corporate courts on the ground – the truth is out there!, War on Want and Global Justice Now < https://waronwant.org/sites/default/files/ISDSFiles_Chevron_April2019.pdf#:~:text=An%20Ecuadorian%20court%20subsequently%20found%20Chevron%20guilty%20of,Chevron%20was%20ordered%20to%20pay%20%2418.2bn%20in%20compensation> accessed 20 August 2022.
[573] Ibid.

international authorities in processes which the citizens of this country do not have access to?' [574]. Fajardo reportedly observed that "ordering the Ecuadorian State to violate its own constitution, to break the separation of powers between the executive branch of government and the judiciary, and to get the Executive to interfere in judicial matters in order to have the sentence annulled"[575].

From the point of view of this thesis, the procedural barrier in ISDS which precludes third parties whose legal right forms the subject matter of the ISDS arbitration from being heard meaningfully is the crux of the matter. As noted earlier, the merits or otherwise of the award and the implications for the judicial system and sovereignty of State parties is a separate matter which is outside the scope of this thesis.

Of all the criticisms against the award, the separate but aligned positions by Osterwalder and Smit, Executive Director and Legal Consultant at the International Institute for Sustainable Development (IISD) respectively are quite instructive with regard to the impact of the ISDS proceedings on third party legal rights[576]. It is noteworthy that the IISD and an Ecuadorian NGO, Fundacion unsuccessfully filed an amicus curiae petition before the ISDS tribunal citing among other grounds the following:

- That the 'arbitration raises a number of issues of vital concern to specific indigenous communities and peoples in Ecuador, and other indigenous communities and individuals living in areas potentially affected by foreign investments in Ecuador and elsewhere'[577].
- That 'a decision of this Tribunal to accept jurisdiction can directly (in the case of the current plaintiffs in Ecuador) and indirectly (as a key precedent) affect the rights and interests of persons who are parties to private disputes with companies claiming rights

[574] Aldo Orellana López 'Chevron vs Ecuador: international arbitration and corporate impunity', (OpenDemocracy, 27 March 2019) < www.opendemocracy.net/en/democraciaabierta/chevron-vs-ecuador-international-arbitration-and-corporate-impunity/> accessed 20 August 2022.
[575] Ibid.
[576] Nathalie Bernasconi-Osterwalder 'Chevron v. Ecuador' (International Institute for Sustainable Development (IISD), April 2011) < www.iisd.org/projects/chevron-v-ecuador> accessed 20 August 2022; See also Lise Smit 'Case Note: How Chevron v. Ecuador is Pushing the Boundaries of Arbitral Authority' (International Institute for Sustainable Development (IISD) April 2012) < www.iisd.org/itn/en/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority/> accessed 20 August 2022.
[577] 'Petition for Participation as Non-Disputing Parties' in Chevron Corporation and Texaco Petroleum Company vs the Republic of Ecuador, [2009] CASE NO. 2009-23 (PCA), (Fundación Pachamama and the International Institute for Sustainable Development (IISD), 22 October 2010), para 3.1.

under a BIT, and who may not participate in or contest the decisions of this Tribunal as of right'[578].

Rejecting the amicus petition, the Tribunal held among other things that:

> the disputing parties "agree that they do not believe that the amicus submissions will be helpful to the Tribunal and neither side favours the participation of the petitioners during the jurisdictional phase of the arbitration, in which the issues to be decided are primarily legal and have already been extensively addressed by the Parties' submissions"[579].

In an analysis of the rejection of the amicus petition, Osterwalder observed that since the Ecuadorian plaintiffs cannot be parties to the investment arbitration and are not represented—legally or otherwise—by Ecuador, it would be improper for the tribunal to hear Chevron's claims involving the allegations of one party in the underlying and centrally figured domestic litigation in the absence of the other party to it[580].

Osterwalder noted that:

- the Tribunal's procedural order rejecting the amicus curiae petition by the IISD and Fundacion heightens concerns that 'tribunals are resolving matters of significant public interest but are doing so without giving those affected an opportunity to access all relevant information or provide relevant input regarding the disputes'[581].
- By accepting jurisdiction to hear Chevron's ISDS claim, the Tribunal 'would foreseeably inspire other companies to use investment arbitration as a strategy to prevent or nullify unfavourable decisions in any ongoing litigation in foreign countries in which they have been sued'[582].
- International tribunal interference would jeopardize domestic court proceedings and limit the fundamental human right to access justice and pursue effective remedies[583].
- the respondent government has no legal authority to represent in the arbitration the legal interests of those private parties involved in the underlying and separate legal

[578] Ibid.
[579] Chevron Corporation and Texaco Petroleum Company vs the Republic of Ecuador (n561) Procedural Order No. 8, para 18.
[580] Nathalie Bernasconi-Osterwalder (n576).
[581] Ibid.
[582] Ibid.
[583] Ibid.

proceedings. This leaves parties who are involved in private litigation against the foreign investor with no avenue to make their own arguments to the tribunal, even though their rights may be impacted by the tribunal's decision[584].

- Chevron's pleas to the tribunal are unique in investment-treaty arbitration. What in particular sets them apart is that Chevron seeks orders from the tribunal that would directly impact the rights of non-parties to the arbitration: the private plaintiffs in the underlying lawsuit against Chevron who currently hold a judgment against Chevron[585].

- Chevron argues that fraud and legal and procedural errors in the conduct of the underlying dispute have left Chevron on the hook to the plaintiffs in breach of the BIT. But rather than claiming damages from Ecuador in the form of litigation expenses incurred, or indemnification or compensation for amounts paid to the Ecuadorian plaintiffs, Chevron is aiming directly at the plaintiffs' judgment, seeking to use the tribunal to strip that award from those non-parties to the BIT arbitration''[586].

Meanwhile, Smit observed that:

- ''…without having determined that it had jurisdiction over the dispute, the tribunal on 16 February 2012 issued a Second Interim Award that deleted the "at its disposal" language and replaced it with stronger text. The tribunal ordered "the Respondent (whether by its judicial, legislative or executive branches) to take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgments" rendered in favour of the Ecuadorian plaintiffs[587].

- By broadly asserting its powers and unconvincingly brushing aside the rights of non-parties to the arbitration, the tribunal has prompted challenges to the authority of its orders in other national courts and tribunals[588].

The main point which is critical to this research is the fact that the Ecuadorian plaintiffs ought to have been allowed to participate in the proceedings, perhaps as actual parties since their legal

[584] Ibid.
[585] Ibid.
[586] Ibid.
[587] Lise Smit 'Case Note: How Chevron v. Ecuador is Pushing the Boundaries of Arbitral Authority' (International Institute for Sustainable Development (IISD), April 2012) < www.iisd.org/itn/en/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority/> accessed 20 August 2022.
[588] Ibid.

rights were in contention in the ISDS arbitration. While it cannot be said with certainty that the participation of the Ecuadorian Plaintiffs as actual parties in the ISDS arbitration would have led to a different outcome, it would in any event have ensured that the principle of natural justice is fulfilled, especially the audi alteram partem rule. Essentially, allowing their participation would have been in accordance with Lord Hewart's (Former Chief Justice of England) famous dictum in the case of Rex v. Sussex Justices, [1924] 1 KB 256.

> "It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done"[589].

In the same case of Rex v. Sussex Justices, Lord Hewart went further to remark that:

> "Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice"[590].

The SPDC case and the Chevron case above concretise concerns regarding how ISDS arbitration with the potential for serious adverse impacts on the legal rights of non-disputing parties, excludes such NDPs from full participation as actual parties and the potential danger such exclusion portends for the protection of legal rights. This eventuality underscores the question posed in this study as to whether Indigenous Right Holders who will potentially be affected by the outcome of ISDS arbitration ought to be allowed to participate as actual parties.

As mentioned earlier, the amicus curiae submission pathway is perhaps the only possible avenue for limited participation by NDPs in ISDS arbitration. However, this avenue for participation is limited by constraints which undermine its potential to provide access to effective remedies for Indigenous Rights Holders. These constraints, therefore, warrant the enquiry in the research as to whether Indigenous Rights Holders should be allowed to participate as actual parties in ISDS arbitration and whether the existing avenue for third-party participation through amicus curiae submissions could enhance access to an effective remedy for Indigenous Right Holders.

While the third-party participation in ISDS through the amicus curiae procedure has been has been useful in some instances as a means of enabling non-disputing parties to bring matters of public interest implicated in the dispute to the attention of the tribunal, the procedure is ill-suited and clearly irrelevant in instances where the legal rights of third parties such as Indigenous Right Holders are at stake in an ISDS arbitration. As such, this thesis argues that

[589] See generally Rex v. Sussex Justices, [1924] 1 KB 256.
[590] Ibid.

the amicus curiae procedure is not suitable to provide access to remedy for Indigenous Right Holders with respect to investment-related human rights abuses.

However, as mentioned earlier the amicus curiae procedure is perhaps designed for cases where third parties seek to bring to the attention of the ISDS tribunal matters of public interest, facts or law which may assist the tribunal in reaching a fair and just determination of the dispute submitted for adjudication.

From the Methanex vs USA[591], and UPS vs Canada[592] cases under the NAFTA framework, to the NAFTA Free Trade Commission Statement[593], arbitral tribunals have increasingly allowed participation of amicus curiae submission in ISDS proceedings. Likewise, under the ICSID framework, that is by virtue of article 37(2) of the amended ICSID arbitration rule 2006[594], and some foremost cases such as the Biwater Ltd. v. Tanzania[595] and Suez. v. Argentina, third participation through amicus curiae submission is largely entrenched in ISDS.

In fact, a growing number of BITs now provide for third-party participation through amicus curiae submissions. Articles 28 and 29 of the US model Bilateral Investment Treaty contain far-reaching provisions aimed at guaranteeing the transparency of arbitral proceedings[596]. Similarly, article 37 of Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model provides for the participation of a non-disputing party in relation to which the UNCITRAL Transparency Rules shall apply[597].

Generally, as would be seen in chapter four, the amicus curiae procedure is characterised by prospects and limitations. Importantly, the effectiveness of the amicus curiae submission to enhance access to remedy for Indigenous Right Holders and other third parties whose legal

[591] Methanex Corporation v. United States of America, [2000] UNCITRAL < www.italaw.com/cases/683> accessed 24 June 2021.
[592] See United Parcel Service of America, Inc. v. Government of Canada, (n87) (copy of Award on the merit dated 24 May 2007).
[593] Statement of the Free Trade Commission on non-disputing party participation (2003), < www.sice.oas.org/TPD/NAFTA/Commission/Nondispute_e.pdf> accessed 24 June 2021.
[594] Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (2006).
[595] See Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, [2007] Case No. ARB/05/22 (ICSID) Procedural Order no 5, February 2, 2007 < www.italaw.com/sites/default/files/case-documents/ita0091_0.pdf> accessed 24 June 2021.
[596] Treaty Between the Government of the United States of America and the Government of (Country) Concerning the Encouragement and Reciprocal Protection of Investment, 2004 Model BIT, < https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf> accessed 24 June 2021.
[597] Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model < www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng#article-37> accessed 24 June 2021.

rights are implicated in the ISDS arbitration has been cast in doubt[598]. It is against this backdrop that the prospect of participation by Indigenous Right Holders as actual parties in relevant ISDS arbitration continues to seem compelling.

3.8 Actual participation by Indigenous Right Holders in ISDS arbitration?

In view of the current procedural barriers in IIL which precludes actual participation by Indigenous Right Holders in an ongoing ISDS arbitration where their legal right is at stake, it is important to consider the prospects of addressing this limitation. The aim of this consideration is to address the sub-question in this research of whether in light of the access to remedy challenge as highlighted above, there is justification for retaining or dismantling procedural barriers in ISDS to enable Indigenous Right Holders to participate in relevant ISDS arbitration as actual parties.

This thesis argues that where third-party legal rights are directly at stake in an ISDS arbitration, it doesn't appear that there is justification for retaining the procedural barriers (as mentioned above) which preclude actual participation by such third parties. However, rather than dismantle the procedural barriers, the thesis proposes reform of IIL substantive and procedural rules to protect the legal rights of third-party right holders.

Indeed, the case for reforms is further reinforced by the procedural gaps associated with a recent paradigm shift in new generation IIAs which impose obligations on investors to respect human rights and promote sustainable development in the host state without a concomitant procedural mechanism for the enforcement of the investor obligations. However, the gap remains that investor obligations are not matched with the necessary procedural mechanism to ensure their enforcement when breached.

As already noted above, IIL was designed primarily to protect the investors and their investments from possible arbitrariness of the host State where they carry out their business operations[599]. However, recent paradigms in IIL indicate a shift away from the narrow prism of

[598] Lorenzo Cotula and Nicolas Perrone (n146) p3; See also UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises Report 'Impacts of the International Investment Regime on Access to Justice Roundtable Outcome Document' (Columbia Centre on Sustainable Investment (CCSI), 2018) < http://ccsi.columbia.edu/files/2018/09/CCSI-and-UNWGBHR-International-Investment-Regime-and-Access-to-Justice-Outcome-Document-Final.pdf> accessed 24 June 2021; See also Patrick Wieland (n71) Submission from the Government of South Africa (n89) para. 8.
[599] Supra Surya Subedi (n97) p56.

investor protection towards sustainability objectives of economic development, environmental protection, and human rights in the host State of the investment[600].

This has been increasingly seen in some new-generation BITs including the Morocco-Nigeria BIT[601], Indian Model BIT[602], the 2012 South-African Development Community (**SADC**)[603] Model bilateral investment treaty (**BIT**), the 2016 draft Pan-African Investment Code[604] (the **draft PAI Code**) among others. A common feature of these new-generation BITs is the creation of investor obligations. Notably, some of the key obligations imposed on investors under new generation BITs is the corporate responsibility to respect human rights and to contribute towards sustainable development in the host State[605].

For instance, Article 23 (1) of the draft PAI Code provides that 'Investors shall not exploit or use local natural resources to the detriment of the rights and interests of the host State' while Article 23(2) stipulates that 'Investors shall respect rights of local populations and avoid land grabbing practices vis-à-vis local communities'[606]. Further, paragraphs a & b of Article 24 of the draft PAI code provide that compliance by investors with business ethics and human rights shall entail supporting and respecting the protection of internationally recognized human rights and ensuring that they are not complicit in human rights abuses[607].

Similarly, Article 14 of the Morocco-Nigeria BIT, imposes on investors/investments the obligation to conduct environmental and social impact assessments prior to the establishment

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[600] United Nations Conference on Trade and Development 'Investment Policy Framework for Sustainable Development' UNCTAD/DIAE/PCB/2015/5, 2015, p6 < https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf> accessed 24 June 2022.

[601] Reciprocal Investment Promotion and Protection Agreement between the Government of Morocco and the Federal Republic of Nigeria signed in Abuja Nigeria signed on December 3, 2016 <https://investmentpolicyhub.unctad.org/Download/TreatyFile/5409> 24 June 2021.

[602] Model Text for the Indian Bilateral Investment Treaty (2016) < www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf> accessed 24 June 2022.

[603] South-African Development Community Model Bilateral Investment Treaty Template with Commentary, Southern African Development Community, (2012) <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> accessed 24 June 2022.

[604] Draft Pan-African Investment Code, African Union Commission, (2016) < https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf> accessed 24 June 2022.

[605] Kabir A.N Duggal and Nicholas J. Diamond 'Model Investment Agreements and Human Rights: What Can We Learn from Recent Efforts?' (2021) Columbia Journal of Transnational Law, < www.jtl.columbia.edu/bulletin-blog/model-investment-agreements-and-human-rights-what-can-we-learn-from-recent-efforts> accessed 24 June 2022.

[606] Pan-African Investment Code (n480). The Pan-African Investment Code (PAIC) is the first continent-wide African model investment treaty elaborated under the auspices of the African Union. The PAIC has been drafted from the perspective of developing and least-developed countries with a view to promote sustainable development.

[607] Ibid.

of their investments[608]. Further, Article 18 (3) of the Morocco-Nigeria BIT provides that 'investments shall uphold human rights in the host state'[609]. Likewise, Article 18 (4) of the Morocco-Nigeria BIT provides that 'Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties'[610]. However, it is important to note that the Morocco-Nigeria BIT is yet to come into force even though it has been signed by the parties since 2016.

The SADC Model BIT in Article 13 (1) imposes on investors/investments the responsibility to conduct environmental and social impact assessment before establishing their investment[611]. Meanwhile, Article 13(2) clarifies that 'the impact assessments required under paragraph 13.1 shall include assessments of the impacts on the human rights of the persons in the areas potentially impacted by the investment, including the progressive realization of human rights in those areas'[612].

Further, Article 15 (1) provides that 'Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights'[613]. Similarly, Article 15(3) provides that 'Investors and their investments shall not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher'[614].

While the above stipulations in new generations investment treaties are aimed in the right direction of creating investor obligations to respect human rights, it is not clear how these obligations can be enforced against the investors, thus creating the impression that they are probably merely aspirational.

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[608] Reciprocal Investment Promotion and Protection Agreement between the Government of Morocco and the Federal Republic of Nigeria signed in Abuja Nigeria on December 3, 2016 <https://investmentpolicyhub.unctad.org/Download/TreatyFile/5409> 24 June 2021.
[609] Ibid.
[610] Ibid.
[611] South-African Development Community Model Bilateral Investment Treaty Template with Commentary, Southern African Development Community, (2012) <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> accessed 24 June 2022.
[612] Ibid.
[613] Ibid.
[614] Ibid.

Further, while the beneficiaries of these human rights stipulations are arguably identified in the BITs as including host communities among others, a fundamental gap in the (model) treaties is the failure to provide for the mechanism to enforce these obligations either by the State parties or the beneficiaries. Essentially, if the State parties to the BIT are not enabled to enforce these obligations against the investors, then there may be justification for allowing the beneficiaries to do so.

Undoubtedly, obligations on investors to respect human rights create third-party legal rights which should ordinarily be enforceable given the position in law that 'where there is a right there must be remedy'. It is contended in this thesis that the right to enforcement of judgment constitutes the 'right to remedy' in law like in the SPDC case and the Chevron case respectively is a legal right which should be respected. Therefore, an attempt to block the enforcement of a judgment may amount to a violation of the right to remedy.

As such, where the legal right of a third-party right holder is at stake in an ISDS arbitration, there would appear to be a strong case for reforms to IIL substantive and procedural rules to allow such third-party right holder to participate in the ISDS arbitration as an actual party. The case for actual participation is further strengthened by the constraints on the ability of State parties to enforce investor obligations to protect human rights or to defend the legal rights of third parties when they are at stake in ISDS arbitration in relation to which the State is an actual party.

3.9 State Counterclaims

It is doubtful whether State parties can enforce investor obligation on behalf and in favour of third-party beneficiaries such as Indigenous Right Holders. Even though the report of the Executive Directors of the World Bank seems to clarify that State parties can initiate ISDS arbitration or counterclaim[615], this seems idealistic and may not be practicable. This is due mainly to the fact that to satisfy the consent requirement for the arbitration Agreement to take effect, the State parties are deemed to have made a standing offer of arbitration by concluding the treaty which an aggrieved covered investor/investment accepts by initiating a notice of arbitration[616].

By natural consequence, it is impracticable for State parties to make an offer of arbitration and accept the same by issuing a notice of arbitration against an investor. In equal breath, the instrumentality of counterclaims which State parties are entitled to under ISDS arbitration does not seem to have been deployed by State parties sufficiently and efficiently.

As the UNCITRAL Working Group III on ISDS reforms observed, the issue of counterclaims by respondent States is fraught with challenges[617]. One of such challenges includes the fact that investment treaties generally impose State obligations aimed at protecting investors without reciprocal obligations for investors[618]. It would therefore seem that respondent States may lack the legal grounds to file a counterclaim against the investor under the treaty[619].

However, the emerging trend of new-generation treaties has increasingly imposed obligations on investors along the lines of respect for human rights, corporate social responsibility, and environmental protection among others, and these obligations could form the basis for counterclaims by respondent States[620].

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[615] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between State and Nationals of Other States, para. 13, <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf> accessed 24 June 2022.

[616] See generally Jan Paulsson 'Arbitration Without Privity' (Oxford Public International law July 2019), Max Planck Encyclopedias of International Law [MPIL] <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3289.013.3289/law-mpeipro-e3289?prd=MPIL> accessed 24 June 2022.

[617] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) 'Possible reform of investor-State dispute settlement (ISDS) Multiple proceedings and counterclaims' UN Docs A/CN.9/WG.III/WP.193, 22 January 2020 para 35 < https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/006/03/PDF/V2000603.pdf?OpenElement> accessed 24 June 2022.

[618] Ibid.

[619] Ibid.

[620] Barnali Choudhury 'Investor Obligations for Human Rights' , (2020) 35(1-2) ICSID Review 82–104, 88-92.

Nevertheless, there is still the challenge of the admissibility of State counterclaims in ISDS arbitration[621]. The UNCITRAL Working Group cited as an example the provision of Article 46 of the ICSID Convention which provides that 'unless the parties had agreed otherwise, counterclaims should (a) arise directly out of the subject matter of the dispute; (b) be within the scope of the consent of the parties; and (c) be otherwise within the jurisdiction of ICSID'[622].

If both parties had consented to arbitration under the ICSID Arbitration Rules, the question arises whether the investor's consent is sufficient to imply consent to the counterclaim or whether affirmative consent is further required[623]. This question needs to be considered also in light of the specific language in the investment treaties regarding the State's offer to arbitrate and claims that can be brought as well as any dispute resolution clause which may exist in the relevant investment contract[624].

While acknowledging that States have brought counterclaims against investors in some ISDS arbitration with varying outcomes[625], the question of whether the counterclaim falls within the jurisdiction of the tribunal has often been questioned. The determination of this question has on many occasions been informed by an examination of the issue of the consent of the investor claimant and the connection of the counterclaim with the subject matter of the dispute[626].

Ultimately, it is doubtful that State parties would possess the political and moral will to institute counterclaims against investors in an ISDS arbitration. This is especially the case in disputes pertaining to natural resources exploitation whereof the interest of State parties and the investor are otherwise aligned against indigenous peoples. The example of Shell and the Nigerian

[621] United Nations Commission on International Trade Law Working Group III (n493) para 36.
[622] Ibid para 36.
[623] Ibid.
[624] Ibid.
[625] For example, Spyridon Roussalis v. Romania, (2011) Case No. ARB/06/1 (ICSID) Award dated 7 December 2011 paras. 859–877; Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi, [2012] Case No. ARB/01/2 (ICSID) Award dated 21 June 2012 paras. 267–287; Hesham T. M. Al Warraq v. Republic of Indonesia Award [2014] dated 15 December 2014 paras. 655–672; Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, [2012] Case No. ARB/07/26 (ICSID) Award dated 8 December 2016 paras. 1110–1221; Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, [2016] Case No. ARB(AF)/12/15 (ICSID) Award dated 22 August 2016 paras. 618–629; Oxus Gold plc v. Republic of Uzbekistan (2015) Award dated 17 December 2015 paras. 906–959; See generally Burlington Resources Inc. v. Republic of Ecuador, [2017] Case No. ARB/08/5 (ICSID) Decision on Counterclaims 7 February 2017; Perenco Ecuador Ltd. v. The Republic of Ecuador, [2021] Case No. ARB/08/6 (ICSID).
[626] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) 'Possible reform of investor-State dispute settlement (ISDS) Multiple proceedings and counterclaims' UN Docs A/CN.9/WG.III/WP.193, 22 January 2020 para 43 < https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/006/03/PDF/V2000603.pdf?OpenElement> accessed 24 June 2022.

government is characterised by undue influence, corruption, and cronyism which are factors that converged in the extra-judicial killing of Ken Saro Wiwa and the Ogoni 8 in 1995[627].

Notwithstanding, State counterclaim could also be explored as a means by which State parties can fulfil their duty to protect human rights extending to the duty to provide access to remedy for victims of business-related human rights. However, to be effective, the current template for State counterclaims would require reforms.

According to the UNCITRAL Working Group III, more IIAs need to increasingly provide for investor obligation as this would form the legal basis for counterclaims[628]. Further, the Working Group, argued that the admissibility of such counterclaims could be expressly stipulated in investment treaties, arbitration rules or a multilateral instrument on procedure reform[629]. In addition, guidance could be provided to arbitral tribunals on how to address counterclaims in a consistent manner[630].

Meanwhile, this research is not unmindful of the fact that the prospect of State counterclaim providing access to remedy for Indigenous Right Holders is faced with certain deep-rooted constraints. Some of these constraints include that State parties may not have the political and moral will to defend the interest of Indigenous Right Holders, particularly in instances where the economic interest of the State and that of the investor are aligned.

Further, another constraint is the prospect for IIL to depart from its historical origin of protecting investors to the exclusion of all others in a manner prevalently criticised for fostering asymmetry in IIL. According to Arnaud de Nanteuil, in view of the asymmetric system that is principally directed at allowing investors to protect their rights, counterclaims would appear counterintuitive to investment arbitration[631].

Subject to proposed reforms, the State counterclaim option could be considered as contributing towards addressing the access to remedy the challenge, albeit to a limited extent. However, it doesn't seem to take into account the importance of participation of the right-holder who has

[627] Amnesty International 'Nigeria: Shell complicit in the arbitrary executions of Ogoni Nine as writ served in Dutch court' (Amnesty International, June 29, 2017) < www.amnesty.org/en/latest/news/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/> accessed 21 March 2022.
[628] United Nations Commission on International Trade Law Working Group III (n626) para 45.
[629] Ibid.
[630] Ibid.
[631] Arnaud de Nanteuil, 'Counterclaims in Investment Arbitration: Old Questions, New Answers?' (2018) 17(2) The Law & Practice of International Courts and Tribunals 374, 376.

suffered a violation, more so, access to remedy for such violation. It illustrates the old aphorism that 'you don't shave a man's head in his absence'.

Rather, the recommendation seems to support a situation where the State party undeservingly exploits human rights violations suffered by third-party right holders within its territory as a shield against investor claims. Unless the relevant right holders expressly authorise the State party to defend their rights through State Counterclaims, attempts by State parties to take advantage of alleged violations of human rights by the suing investor as a means of defending claims against the State seem to be exploitative. This is particularly concerning where such human rights-based counterclaims are not aimed at remediating human rights abuses suffered by relevant right holders such as Indigenous Right Holders but merely devised as a means resorted to by State parties to defeat an investment claim or avoiding liability that may arise from such claims.

Based on the above limitations, this thesis considers whether IIL could borrow a leaf from the recently launched Hague Rules on Business and Human Rights Arbitration (Hague Rules) in terms of how the Hague Rules addressed the issue of the joinder of third-party right holders to an arbitration. Essentially, the Hague Rules is considered here and in more detail in chapter five to ascertain whether its technique for third-party right holders could be adapted in the context of IIL to enable actual participation by Indigenous Right Holders in relevant ISDS arbitration when their legal rights are directly at stake.

3.10 The Hague Rules template.

The recently launched Hague Rules on Business and Human Rights Arbitration (Hague Rules)[632] (discussed in more detail in chapter five) seems to have taken cognisance of the above challenge and probably offers a solution that could be adapted in the IIL context.

The Hague Rules are a set of procedural rules providing for the administration of arbitrations concerning disputes related to the impact of business activities on human rights[633]. The Hague Rules are based on the UNCITRAL Arbitration Rules (as adopted in 2013) with modifications needed to address issues likely to arise in the context of business and human rights disputes[634]. A business and human rights dispute can only be resolved by arbitration if all the

[632] The Hague Rules on Business and Human Rights Arbitration, December 2019 <www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf> accessed 2 August 2020.
[633] Ibid.
[634] Ibid.

parties involved consent to arbitration. The consent could be expressed in the arbitration agreement contained in parties' contract, or through a submission agreement by the disputing parties opting to adopt the Hague Rules as the procedural rules to govern the business and human rights arbitration[635].

Specifically, Article 19 of the Hague Rules empowers the arbitral Tribunal to allow one or more third persons to join in the arbitration as a party, provided such person is a party to or a third-party beneficiary of the underlying legal instrument that includes the relevant arbitration agreement[636]. To actualise the above provision on third parties joining the arbitration as an actual party, the Rules, proposed in the annexe thereto, a model clause that could be inserted into underlying contracts, including BITs.

''Model clause to grant third party arbitration rights

The parties irrevocably consent that any dispute, controversy or claim arising out of or in relation to the obligations undertaken by the parties under this [contract] [agreement] [treaty] [instrument] [rule] [decision] [relationship] for the benefit of: [insert defined class of third-party beneficiaries] may be submitted by any such third person to arbitration in accordance with the Hague Rules on Business and Human Rights Arbitration.

Defined scope of third-party claims entitled to be arbitrated:

The parties irrevocably consent that any dispute, controversy or claim arising out of or in relation to: [insert defined subject matter, which may include:

(a) selected national laws.

(b) selected international instruments.

(c) other industry or supply chain codes of conduct, statutory commitments or regulations from sports' governing bodies, or any other relevant business and human rights norms or instruments] may be submitted by any third-party beneficiary of such [law(s)] [instrument(s)] to arbitration in accordance with the Hague Rules on Business and Human Rights Arbitration.

Note — Parties should consider whether to define also the class of potential beneficiaries as above in lieu of the general phrase "any third-party beneficiary[637]."

[635] Ibid.
[636] Ibid Article 19.
[637] Hague Rules (n632) annex (Model Clauses) p106.

3.11 Conclusion

The chapter contributes towards addressing the main research question of whether IIL ought to provide access to remedy for Indigenous Rights holders. The chapter advanced the search for an effective legal framework that is conducive to access to an effective remedy for Indigenous Rights Holders through a critical review focused on whether IIL could potentially provide the much-desired effective legal framework. In this connection, the chapter highlighted the three categories by which Indigenous Right Holders could be involved in an ISDS arbitration in advance of a more detailed analysis in chapter four of how IIL should respond to each of these categories from the point of access to an effective remedy.

The main research question of whether IIL ought to provide access to remedy for Indigenous Right Holders cannot be answered effectively without an enquiry into whether IIL has the potential to provide access to remedy for third parties, including Indigenous Right Holders. Essentially, this important enquiry was undertaken in this chapter from a substantive IIL point of view.

Following the analysis above, while IIL may possess the potential to provide access to remedy for Indigenous Right Holders, the potential is beset by inherent limitations and substantive barriers which undermine the capacity of IIL as an effective legal framework to provide access to remedy for Indigenous Right Holders. The chapter argues that such limitations and substantive law barriers are however not justifiable where the legal rights of Indigenous Right Holder are directly at stake in an ongoing arbitration like in the case of the ICSID arbitration which SPDC initiated against Nigeria as highlighted above.

The chapter argued that IIL has a potential for fostering public good including respect for human rights as has been witnessed in many new generation BITs with the increasing incorporation of investor obligation to respect human rights. Importantly, the chapter argued that investment treaties are Agreements whereby the contracting parties have the freedom of contract to determine the terms that are agreed upon. As such, State parties in furtherance of their international human rights obligations to protect human rights can negotiate and agree to treaty provisions that support the fulfilment of these obligations.

This has been increasingly witnessed in many modern BITs whereby state parties now impose obligations on protected investors and investments to respect human rights, protect the environment and contribute towards sustainable development in the host State. However, the chapter argued that imposing obligations on investors to respect human rights is not sufficient

in the absence of a clear path for the enforcement of these obligations when they are breached, which is missing from new-generation BITs. This was considered a key access to remedy gap in the framework of new generation BITs.

The chapter argues that the existing mechanisms for third-party participation in ISDS arbitration, such as the amicus curiae procedure (discussed in greater detail in the next chapter) are not suitable to address this access to remedy gap. Although the amicus curiae submission is considered in more detail and from a procedural point of view in chapter four, it was argued in this chapter that the amicus curiae submission may not be suited to enhancing access to remedy for Indigenous Right Holders due to procedural constraints and the fact that the procedure was not designed for this purpose.

In another breadth, the chapter considered the prospect and limitations of the State counterclaim arguing that with the necessary reforms, State counterclaim could contribute towards enhancing access to remedy for Indigenous Right Holders in IIL, albeit to a limited extent. Arguably, state counterclaims are conceptually advantageous to State parties as a shield against claims by investors, and State parties often lack the political or moral will to deploy counterclaims towards providing access to remedy for victims of investment-related human rights abuses or those whose legal rights are implicated in ISDS arbitration.

The chapter argued that assuming that State parties are inclined to deploy counterclaims towards providing a remedy to victims of investment-related human rights abuses, this would still not be as useful as allowing the right holders to ventilate their grievances and seek appropriate remedy through participation in relevant ISDS arbitration. It was argued in this chapter that such relevant ISDS arbitration will be those where the legal rights of Indigenous Rights Holders are directly at stake, for example, the ICSID arbitration which SPDC instituted against Nigeria to block the enforcement of the judgment obtained against SPDC by Ogoni claimants.

In the final analysis, the chapter considered viable means by which access to remedy for Indigenous Right Holders could be attained in substantive IIL, particularly within the context of investment treaties. The chapter argued that relevant provisions of the recently published Hague Rules particularly the text of the provision on third-party arbitration rights could be adapted into investment treaties as probable means of addressing the access to remedy gap. However, the chapter recognised that providing access to remedy in investment treaties alone would not be sufficient. Indeed, the procedural limitations which restrict the actual parties to

ISDS arbitration to investors and state parties to the underlying investment treaty would need to be revisited with a view to reforms.

Chapter Four- Indigenous Right-holders and the search for an effective legal framework for access to remedy

Chapters one and two have demonstrated that State parties have a duty to protect human rights within their domain and provide for access to effective remedy when such rights are breached. As such the State judicial and non-judicial grievance mechanisms should be the first port of call with respect to the search for an effective legal framework to provide access to effective remedy in relation to investment-related human rights abuses. This chapter will therefore entail a consideration of State judicial and non-judicial grievance mechanisms with a view to ascertaining their potentials and limitations as an effective legal framework to provide Indigenous Right Holders with access to effective remedy.

Indeed, chapters one and two have established specifically with respect to suits instituted against treaty-protected foreign investors, that Indigenous Right-Holders have, on some occasions, obtained remedy for investment-related human rights abuses in host State Courts. Similarly, it was argued in chapters one and two that in some instances where Indigenous Right-Holders have obtained remedy against treaty-protected foreign investors before host State Courts, there is the potential that such remedy could be undermined through the recourse by such treaty-protected foreign investor to ISDS mechanism.

It has also been established in the preceding chapters that the ISDS mechanism excludes actual participation in ISDS arbitration by third-party right holders even where their legal rights are directly at stake in the arbitration. As argued in the earlier chapters, the foregoing concern forms the rationale for the question in this thesis regarding whether IIL ought to provide access to remedy for Indigenous Right-Holders. Indeed, as earlier noted, there have been debates as to whether IIL ought to provide Indigenous Right-holders with access to its dispute settlement mechanism in the same way as the traditional parties, that is, investors and States parties[638].

In this connection, chapter three posits that IIL has the potential to provide access to remedy for Indigenous Rights Holders whose legal rights form the subject matter of an ongoing ISDS arbitration subject to specific limitations which could be addressed based on the recommendations in chapter three. As chapter three has demonstrated from a substantive law point of view, Indigenous Right Holders ought to be allowed to participate in ISDS arbitration

[638] Special Rapporteur on the Rights of Indigenous Peoples etal 'Letter to the UNCITRAL Working Group III on ISDS reforms by the Working Group on the issue of human rights and transnational corporations and other business enterprises' (n126) p6; Submission from the Government of South Africa (n89) para. 8; Submission from the Government of Ecuador (n90) paras. 23-26. Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law', (2009) 20(3) EUR. J. INT'L L. 738.

as actual parties when their legal rights are directly at stake, this chapter will consider whether this could be realised from a procedural perspective. The chapter will analyse the prospects and limitations of possible reforms to the ISDS procedural rules to enable actual participation by third-party right holders together with an analysis of the existing mechanism for third party participation in ISDS arbitration to determine whether it is adequate to provide access to remedy for third party holders.

Following from a critical analysis of the potential or otherwise of IIL in the above regard, this chapter will critically review other potentially effective legal frameworks that could enhance access to remedy for Indigenous Right Holders. It is to this extent that this chapter explores the experiences of Indigenous Right Holders in securing access to remedy at the national, regional and international levels with a view to a validation or otherwise of the argument that IIL ought to provide access to remedy for Indigenous Right Holders.

4.1 Introduction

The rationale for seeking access to remedy for Indigenous Right-holders in IIL includes the wide-ranging impact that ISDS decisions could have on a broad range of public interest governmental regulations and measures[639]. Secondly, the legal rights of rights holders such as indigenous peoples are reportedly often at stake in ISDS arbitration, of which some argue that the outcome has in more than a few instances undermined or prejudiced such legal rights. Despite these, the affected right holders are precluded from participation in the arbitration[640].

Over the years, investors have relied on investment treaties to challenge the legality of a wide range of measures taken by local or national governments, courts and by parliaments[641]. Public actions challenged through investor-state arbitration have included impact assessment procedures and government refusals to issue environmental permits; legislation to discourage

[639] Report of the Special Rapporteur on the rights of indigenous peoples, Human Rights Council Thirty-third session, A/HRC/33/42, 11 August 2016, paras 26-28 <https://undocs.org/A/HRC/33/42> accessed 26 September 2021. See the cases of Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v. Federal Republic of Nigeria (n203); Eli Lilly and Company v. The Government of Canada (n205); Chevron Corporation and Texaco Petroleum Company vs the Republic of Ecuador n (204).

[640] United Nations Commission on International Trade Law (UNCITRAL), Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session (New York, 1-5 April 2019) paras. 31.

[641] See for instance the case of Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, where the claimant challenged the plain tobacco packaging legislation; See also Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, where the claimants challenged the decision by the German government to phase out the use of nuclear power; See generally International Institute for Sustainable Development Report 'Assessing the Impacts of Investment Treaties: Overview of the evidence' September 2017, available at www.iisd.org/system/files/publications/assessing-impacts-investment-treaties.pdf> accessed 26 September 2021.

smoking; measures to promote locating part of "research and development" activities in the host country; contract termination to sanction contractual breaches; affirmative action to redress historical injustice; environmental regulations to protect sensitive cultural and environmental heritage; and programmes to promote more equitable land distribution[642].

Meanwhile, in light of the decisions in the case of Glamis Gold, Ltd. v. The United States of America[643] and to a limited extent the case of Bear Creek Mining Corporation v. the Republic of Peru[644] (both discussed in more detail below) it may seem that the third-party participation mechanism in ISDS potentially enables third party right holders including Indigenous Right Holders to bring their interests and facts relevant to the dispute at hand to the attention of the arbitration tribunal.

However, while the amicus curiae procedure may be credited with the capacity to bring the public interest element of investment disputes to the attention of the ISDS arbitration[645], it has been argued that the procedure falls short in terms of enhancing access to remedy for relevant third parties in certain respects. One of the reasons adduced is that the procedure is not suitable for remediating human rights abuses that already occurred[646].

Conversely, insisting on seeking remedies in IIL for human rights abuses may be tantamount to shifting the focus away from the State's international human rights obligations to protect human rights and provide access to remedies at the national level. This was buttressed by the UN Office of the High Commission for Human Rights (OHCHR) noting that effective State-based judicial mechanisms are "at the core of ensuring access to remedy"[647]. In essence,

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642 Lorenzo Cotula 'Democratising International Investment Law- Recent Trends and Lessons From Experience' (2015) International Institute for Environment and Development, London p11 <www.iied.org/sites/default/files/pdfs/migrate/12577IIED.pdf> accessed 23 December 2021.

643 See generally Glamis Gold Ltd. v. United States of America [2009] (NAFTA Arbitration) Award, 8 June 2009 and Decision on Application and Submission by Quechan Indian Nation, 16 December 2005; See also Howard Mann 'Glamis Gold Ltd. v. United States of America' Investment Treaty News, (International Institute for Sustainable Development, 2018), <<www.iisd.org/itn/en/2018/10/18/glamis-v-united-states/> 23 December 2021. See generally Christina Binder and Jane A. Hofbauer 'Case Study: Glamis Gold Ltd. (Claimant) v United States of America (Respondent), NAFTA/UNCITRAL Award, 8 June 2009', Committee on the Implementation of the Rights of Indigenous Peoples of the International Law Association (ILA), 2009.

644 See generally Bear Creek Mining Corporation v. Republic of Peru, [2015] Case No. ARB/14/2 (ICSID)

645 See generally Glamis Gold Ltd. v. United States of America (n516); See also Katia Fach-Gómez, "Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest", (2011–2012) 35 Fordham Journal of International Law, 510–564; Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic, [2015] Case No. ARB/03/19 (ICSID), Order in Response to a Petition by five nongovernmental organizations for permission to make an amicus curiae submission, 12 February 2007 Order of 19 May 2005, at para. 19.

646 See Patrick Wieland, '(n 140) p351.

647 United Nations Human Rights Council 'Report by the United Nations High Commissioner for Human Rights 'Improving accountability and access to remedy for victim of business-related human rights abuse' (A/HRC/32/19) May 10, 2016 para 3, <https://undocs.org/A/HRC/32/19> accessed 23 December 2021

safeguarding the legal accountability of businesses and access to effective remedy for victims of business-related abuses is a crucial aspect of a State's duty to guard against violation of people's rights within its domain[648]. With particular reference to Indigenous Right Holders, Article 32(3) of the UNDRIP provides that State parties must provide effective mechanisms for redress with regards to the taking of indigenous lands and resources by private actors, as well as to mitigate the negative consequences that result therefrom (e.g., environmental and spiritual consequences)'[649].

4.2 Background

The right to remedy is a core tenet of the international human rights system[650]. As already discussed in chapters one and two, the right to remedy is strategic to the realisation and enjoyment of all the other rights accruable to indigenous people in international law.

However, the experiences of those seeking access to an effective remedy is an indication that the implementation by many States of their international human rights obligations with respect to access to remedy is still characterised by several deficiencies[651]. Efforts have continued to be intensified at the international level to hold corporations to account for the human rights impacts of their operations[652].

One of the most remarkable efforts in this regard is Ruggie's United Nations Guiding Principles for implementation of the Protect, Respect and Remedy framework (UNGPs) which was endorsed by the UN Human Rights Council in 2011[653]. In the context of business activities, ensuring access to effective remedy is essential and forms one of the three pillars of the UNGPs[654].

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[648] Ibid.
[649] Supra UNDRIP (n247).
[650] United Nations General Assembly 'Human rights and transnational corporations and other business enterprises Note by the Secretary-General' A/72/162, July 18, 2017 available <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/218/65/PDF/N1721865.pdf?OpenElement> accessed 23 December 2021.
[651] United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General 'Improving accountability and access to remedy for victims of business-related human rights abuse' (A/HRC/32/19) May 10, 2016, para 6.
[652] See for instance Text of the third revised draft legally binding instrument with the concrete textual proposals submitted by States during the seventh session (A/HRC/49/65/Add.1); European Commission's Proposal for a Directive on corporate sustainability due diligence which sets out mandatory human rights and environmental due diligence obligations for corporates, together with a civil liability regime to enforce compliance with the obligations to prevent, mitigate and bring adverse impacts to an end; See also the Hague Rules on Business and Human Rights Arbitration (n508).
[653] Guiding Principles on Business and Human Rights (n62).
[654] Columbia Centre for Sustainable Investment etal 'Impacts of the International Investment Regime on Access to Justice' Roundtable Outcome Document, September 2018 p7

According to Ruggie, 'the UNGPs are the first authoritative guidance that the Council and its predecessor body, the Commission on Human Rights, have issued for States and business enterprises on their respective obligations in relation to business and human rights; and it marked the first time that either body "endorsed" a normative text on any subject that governments did not negotiate themselves'[655]. Describing the underpinning philosophy of the UNGPs, among others, Ruggie noted that with respect to 'affected individuals and communities, the UNGPs stipulate ways for their further empowerment to realize a right to remedy'[656].

4.3 Access to remedies for Indigenous Right-holders under judicial or non-judicial grievance mechanisms.

As articulated above, the argument that victims of investment-related human rights abuses ought to be allowed to participate as actual parties in relevant ISDS arbitration invariably presupposes that attempts to secure access to remedy under other grievance mechanisms have been made without success. As discussed in chapters one and two above, Indigenous Right-holders options in terms of access to remedy both within and without the local setting of the host and home States respectively. The fact that in some instances Indigenous Right-holders make recourse to the home State of the investor perhaps cast doubts on the capacity of most host States particularly those in the global South to fulfil their obligations to "prevent, investigate, punish and redress private actors' abuse"[657] and in relation to access to remedy pillar to provide access to remedy through judicial, administrative and legislative means[658].

As highlighted in chapter two, this was confirmed vide the statement credited to the paramount king of the Ogale Community in Nigeria's Niger Delta region in relation to the community's case against Royal Dutch Shell for business-related human rights abuses and tortious abuse. The Paramount ruler in his comments in the aftermath of the UK High Court ruling which denied jurisdiction to hear the community's case against Royal Dutch Shell noted albeit without any concrete evidence 'that there is no hope of justice in the Nigerian courts. We still very much

<https://ccsi.columbia.edu/sites/default/files/content/docs/events/CCSI-and-UNWGBHR-International-Investment-Regime-and-Access-to-Justice-Outcome-Document-Final.pdf> accessed 23 December 2022.

[655] John Gerard Ruggie 'Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises' in César Rodriguez-Garavito, Universidad de los Andes, Colombia (ed) (Cambridge University Press 2017) 46-61, 46-47.

[656] Ibid.

[657] Guiding Principles on Business and Human Rights (n12), Guiding Principle 25.

[658] Ibid.

believe in the British justice system and so we are going to appeal this decision'[659]. Indeed, some lawyers reportedly observed that 'the case would take 20 years in the Nigerian courts because of its complexity'[660].

4.3.1 State-based Judicial mechanism

Chapters one and two already featured an analysis of State-based judicial mechanisms and the capacity and limitations to provide access to remedy for Indigenous Right Holders, albeit at an introductory level. However, this chapter points out the seeming aversion to judicial mechanisms in the host State, particularly from the point of view of the countries in the Global South. Meanwhile, it is argued in this chapter that this aversion is not always justified. In this regard, some examples of favourable judgments obtained against treaty-protected foreign investors such as SPDC are cited below.

4.3.3 Seeming aversion to claims in national courts

According to the Corporate Accountability Lab, the indigenous people of the Niger Delta are reportedly averse to prosecuting claims against Shell in Nigerian Court due to alleged strong tendency to corrupt judicial officers[661].

As already mentioned in chapter two above, the paramount King of Ogale community in reaction to the Judgment of the UK High Court in respect of a suit instituted by the Ogale Community against Shell was quoted as stating that 'you can never, never defeat Shell in a Nigerian Court. A case can go on for very many years. You can hardly get a judgment against an oil company in Nigeria. Shell is Nigeria and Nigeria is Shell'.[662] The suspicion of corruption may not be unfounded. Royal Dutch Shell has faced prosecution in the US, Netherlands and the UK for notorious and repeated alleged bribery of Nigerian government officials running into billions of US dollars[663].

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[659] Emma Howard, Unearthed 'High Court rules Shell not liable in UK for Nigeria oil spills <https://unearthed.greenpeace.org/2017/01/26/shell-nigeria-court-case-oil-spills-not-liable/> accessed 23 December 2021.

[660] Ibid.

[661] Corporate Accountability Lab 'Shell in Nigeria: the Case for a New Legal Strategies for Corporate Accountability' 5 July 2018 <https://corpaccountabilitylab.org/calblog/2018/7/5/shell-in-nigeria-the-case-for-new-legal-strategies-for-corporate-accountability> accessed 1 April 2021.

[662] Ibid.

[663] See CNBC Europe news 'Shell Facing multiple charges over corruption, emissions and an explosion' 3 March 2019 <https://www.cnbc.com/2019/03/01/shell-to-be-prosecuted-with-criminal-charges-over-nigerian-oil-deal.html> accessed 1 July 2021; See also Bloomberg Market News 'Shell, Eni Officials named in $1billion Nigeria Lawsuit' 7 May 2019 <https://www.bloomberg.com/news/articles/2019-05-07/shell-eni-executives-named-in-1-billion-nigeria-bribery-suit> accessed 1 July 2021; see also Order Instituting Cease and Desist

In response to questions about the rationale for Ogoni claimants seeking remedies in foreign courts, Participant 1 expressed concerns similar to the above commentary by the paramount King of Ogale community with respect to the capacity of Nigerian Courts to provide access to remedy. According to Participant 1, '…it will take some time twenty years to get judgment by which time some of the litigants have died, some cannot pursue the claims and you now start asking yourself, what is happening'.

Participant 1 clarified 'there is one matter that we are doing against AGIP, which was delayed for two years because AGIP asked for a motion to restrain us from suing them abroad in Italy. So, why is it that they are afraid to be sued in their own home country, because one thing that you see is that I and several others have accused these companies, the multinationals of environmental racism? That is, things that they are not going to do in their own country, they allow it to be done in our own country'.

Participant 1 also clarified that cases prosecuted abroad by foreign law firms are probably cheaper and, in some instances, do not even require that witnesses attend court physically to give oral evidence which are taken instead by video link. Specifically, Participant 1 mentioned that 'my understanding of the situation is that the clients pay nothing. My understanding of the way the no win-no pay arrangement works abroad is that when they win, they get from the loser, the loser pays for the actual cost of the litigation, which takes away the cost including the logistics. So, there is nothing the client pays. Most of these things, I am not sure it even requires people coming physically. I am a witness in that Okpabi case, I sent my witness deposition, if there was any need, they could talk to me just the same way we are talking (virtually)'.

Participant 1 also observed that some of the cases prosecuted abroad are funded by international NGOs unlike the situation in Nigeria where such facilities are reportedly lacking. In particular, he clarified that '…I believe some of those things affect the cost, again like in the case in the Netherlands, the Amnesty International and some of those very established NGOs can take up the funding of some of these cases, but we don't have that level of civil society organisation or human rights groups with such capacity at home that can do that, spend money on expert witnesses and some of those things required to do the case. So that makes it cheaper'.

However, in the judgment of the UK High Court in the case involving the Ogale community and SPDC (discussed in more detail below) whereby the claimants sought to institute civil

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Proceedings (File No. 3-14107) United States of America against Royal Dutch Shell Plc & Anor <https://www.sec.gov/litigation/admin/2010/34-63243.pdf> accessed 1 July 2021.

litigation in England to hold the parent company Royal Dutch Shell liable for harm caused by its subsidiary in Nigeria, SPDC, the Court differed substantially[664]. Judge Fraser distinguished the fact of the present case from that in the Vedanta case and remarked quite aptly that no modern legal system is without its delays, including the UK legal system[665]. Further, the Court remarked that in ancient times some legal systems seem not to have been unduly troubled by delay, but they were generally rather arbitrary and the swift justice available would not stand scrutiny today[666].

Further, the Court remarked that there is nothing in the evidence before it that suggests that those responsible for the administration of justice in Nigeria, most notably the current Chief Justice, are doing anything other than taking concrete and effective steps to improve the speed with which cases such as this one is dealt with in Nigeria[667]. Finally, the Court determined that the claimants do at least potentially have other means of redress available to them in Nigeria against SPDC[668]. However, it is noteworthy that despite the UK High Court Judgment, the UK Supreme Court held that the case could proceed and be heard in the UK[669].

Further adducing reasons for the seeming preference to take cases abroad, Participant 1 argued that '…the companies themselves, beyond the cost, would take the matter far more seriously, because you are doing it at the doorstep of their investors, their shareholders, some of whom are concerned ethically about the behaviour of where they put their investment in, so that has more deterrent effect, making them behave better'. Meanwhile, it is remarkable that despite the claims by Participant 1, there have been instances where judgment was obtained against oil multinational in environmental litigations instituted before Nigerian Courts.

As already discussed in chapter one, the NGN182 billion Nigerian Court judgment obtained against SPDC in the Agbara case is reportedly the basis for SPDC's pending ICSID arbitration. The Judgment was the culmination of 28 years of environmental litigation by some Ogoni communities ravaged by oil pollution attributed to Shell's activities. As discussed in chapter

[664] His Royal Highness Emere Godwin Bebe Okpabi and Okpabi and Ors vs Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd [2017] EWHC 89 (TCC) para 121 <https://www.bailii.org/ew/cases/EWHC/TCC/2017/89.html> accessed 1 July 2021.
[665] Ibid.
[666] Ibid.
[667] Ibid.
[668] Ibid.
[669] See Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents) [2021] UKSC 3, para 160.

one, it is instructive that SPDC initiated ICSID arbitration against Nigeria after all judicial appeals up to the Nigerian Supreme Court to block the enforcement of the Judgment had failed.

In another but related dimension, an Ogoni community obtained judgment against the Nigerian government in the case of Mr Jonah Gbemre vs Nigerian National Petroleum Corporation & ORS[670] for declaration that spillage of oil in the community constituted a violation of their right to life and dignity of the human person guaranteed under sections 33 & 34 of the Constitution of the Federal Republic of Nigeria and relevant articles of the African Charter on human and people's rights[671].

Despite the above, it is acknowledged that the protracted length for disposal of cases in Nigerian Courts is indeed worrisome. For example, the Agbara case referred to above with a judgement sum of N187.8billion was finally determined 28 years after commencement at the lower court in 1991 ultimately going through the Court of Appeal and Supreme Court respectively. It could be imagined that some of the claimants might have become deceased, relocated or generally unavailable at the time of conclusion and enforcement of the judgment 28 years after the suit commenced typifying the often-cited legal maxim 'justice delayed is justice denied'.

The above are just a few examples that could be referenced as casting doubts on the position that Indigenous Right-holders cannot secure remedies in Nigerian Courts particularly with respect to cases involving oil multinationals. Notwithstanding, the experience from other attempts at securing remedies overseas are considered below. Importantly, what the cases submitted to the African regional Courts seem to illustrate is the fact that remedies for violation of human rights may be pursued against State parties on the premise that their failure to fulfil their international human rights obligations to protect, fulfil and respect human rights have enabled businesses to violate human rights. Of course, this may not be construed as absolving businesses of liability for human rights violations.

4.5 Cases instituted in Courts in Parent company's jurisdiction

Recent decisions on parent company liability across three key jurisdictions – the United Kingdom, the Netherlands and Canada might have potentially broadened the options for access to remedy for Indigenous Right Holders. Essentially, this is the common thread cutting across the respective cases of Okpabi and others (Appellants) v Royal Dutch Shell Plc & Another;

[670] Mr Jonah Gbemre (for himself and representing Iwherekan Community in Delta State, Nigeria) vs Shell Petroleum Development Company Nigeria Ltd (n107)
[671] Ibid paras 1-5

Vedanta Resources PLC and another (Appellants) v Lungowe & ORS; Fidelis Ayoro Oguru & vs SPDC, Royal Dutch Shell and ORS; and Nevsun Resources Ltd. v Araya.

Recourse to the parent company's jurisdiction, usually in the developed world, would appear to be necessary in cases where the host State is either unable or unwilling to ensure an impartial investigation, prompt cessation of the violation and due reparation, including restitution and compensation in respect of human rights abuses committed by business enterprises operating within its jurisdiction[672].

This happens often where suits are instituted by Indigenous Right-holders in the home States of transnational corporations whose operations take place in States with weak regulatory regimes, providing no effective remedy for victims of human rights abuses. In this connection, there have been varied outcomes even though more recently there has been growing tendency to accept extra-territorial cases as witnessed specifically across Courts in the UK, Canada, and the Netherlands. However, on earlier occasions discussed below claimants were unable to surmount the jurisdictional bar.

Subsequent to the Kiobel vs Royal Dutch Shell and Ken Saro Wiwa vs Royal Dutch Shell cases instituted against Shell's parent company in US Courts, which were at various times dismissed in US Courts on jurisdictional grounds, the prospect of success in environmental and human rights litigation against parent companies liability for actions of their overseas subsidiaries, seem to have received a boost in light of the recent decisions on jurisdiction in the Okpabi case, Vedanta and Nevsun cases respectively, among others.

On February 12, 2021, in a unanimous Judgment, the UK Supreme Court in the Okpabi case[673] relying on its earlier decision in the Vedanta Resources Plc & Anor vs Lungowe and ORS[674] case, reversed the judgments of the lower Courts and held that it was at least arguable, based on degree of control and de facto management, that Royal Dutch Shell owed a duty of care to the claimant Nigerian citizens in respect of alleged environmental damage and human rights abuses by Shell's Nigerian subsidiary[675]. In effect, the UKSC held that contrary to the decision

[672] International Working Group on Indigenous Affairs (IWGIA) 'Business and Human Rights: Interpreting the UN Guiding Principles for Indigenous Peoples', Report 16 (n443) p32.
[673] Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents) [2021] UKSC 3 (n669).
[674] Ibid.
[675] Ibid paras 152-153.

of the lower Courts the claimants' claims raise triable issues[676], thus clearing the path for the matter to be heard in a UK Court[677].

It is noteworthy that after the dismissal of their claims in the US Courts, the claimants in the Kiobel case[678] have since filed their suit in Netherlands Court where Shell's parent company is domiciled. Essentially, the claimants are demanding damages for harm caused by Shell's unlawful actions, and a public apology for the role that Shell played in the events leading to the deaths of their husbands.

Notably, the Netherland Court has since ruled that it has jurisdiction to determine whether Royal Dutch Shell was complicit in the Nigerian government's execution of the Ogoni Nine [679]. Commenting on the ruling of the Dutch Court assuming jurisdiction to hear the suit, the lawyer to the claimants noted that the ruling promised to have positive ramifications for anyone seeking justice against a major corporation[680]. It is noteworthy that the Kiobel Case before the Netherlands Court was decided on the 23rd of March 2022 in favour of Royal Dutch Shell dismissing the claim of the claimants[681].

Further, in a recent judgment by a Netherland Court of Appeal in the case of Fidelis Ayoro Oguru & ORS vs SPDC, Royal Dutch Shell and ORS, the Court entered judgment in favour of the claimants ordering Shell's Nigerian subsidiary to compensate farmers in two villages for the extensive damage to their land resulting from oil leaks in 2004 and 2005[682]. The Court dismissed Shell's defence which alleged that third party sabotage of its pipeline was responsible

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[676] Ibid para. 159.
[677] Ibid para. 160.
[678] See generally the Decision by the US Supreme Court in Kiobel, Individually and on Behalf of Her Late Husband Kiobel, et al vs Royal Dutch Petroleum Co, et al, No. 10–1491, Supreme Court of the United States, 17 April 2013 <https://cja.org/wp-content/uploads/downloads/Kiobel-Opinion.pdf> accessed 1 September 2022.
[679] Guardian Newspapers 'Dutch court will hear widows' case against Shell over deaths of Ogoni Nine' 1 May 2019 available at https://www.theguardian.com/global-development/2019/may/01/dutch-court-will-hear-widows-case-against-shell-over-deaths-of-ogoni-nine-esther-kiobel-victoria-bera-hague; see also In the Dock-Shell's Complicity in the Arbitrary Execution of the Ogoni Nine, Amnesty International (2017) <https://www.amnesty.org/download/Documents/AFR4466042017ENGLISH.pdf> accessed 1 September 2022.
[680] Ibid.
[681] Toby Sterling 'Dutch court rejects suit of Nigerian widows against Shell' Reuters, March 23, 2022, <https://www.reuters.com/business/energy/dutch-court-rejects-suit-nigerian-widows-against-shell-2022-03-23/> accessed 1 September 2022.
[682] Fidelis Ayoro OGURU, Alali EFANGA, and VERENIGING MILIEUDEFENSIE vs SHELL PETROLEUM NV, ROYAL DUTCH SHELL PLC, SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD, Case numbers C/09/365498 / HA ZA 10-1677 (case a) + C/09/330891 / HA ZA 09-0579 (case b), Judgment delivered on January 29, 2021 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2021:132&showbutton=true> accessed 1 September 2022; ABC News 'Dutch court orders Shell Nigeria to compensate farmers', 29 January 2021 <https://abcnews.go.com/International/wireStory/dutch-court-rule-nigerian-farmers-case-shell-75559885> accessed 1 September 2022.

for oil spills and held the company liable for two leaks in the claimant community[683]. Essentially, the Hague Court of Appeal held that it could not be established "beyond a reasonable doubt" that saboteurs were responsible for the oil spill[684].

Shell had sought to avoid liability by citing Nigerian law, which was applied in the Dutch civil case, which provides that a company is not liable if the leaks were the result of third-party sabotage[685]. While the Court held that the amount of compensation payable by Shell will be determined subsequently, the court ordered that the parent company, Royal Dutch Shell and its Nigerian subsidiary must fit a leak-detection system to a pipeline that caused one of the spills, in a bid to prevent future spills[686].

Other remarkable jurisprudential developments which highlight the prospect for victims of business-related human rights abuses seeking access to justice in the investor's home jurisdiction include the widely acclaimed case of Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Ors[687], where the UK Supreme Court upheld the decisions by the lower Courts and determined that the UK parent of an overseas subsidiary could be liable for the harmful operations of its overseas subsidiary[688].

The Court considered the issue of whether England was the proper place to hear and determine the claim and noted that the search is for a single jurisdiction in which the claim against all the defendants could be suitably tried. In essence, the Supreme Court upheld the High Court's finding that lack of funding and of local legal expertise presented a real risk that the victims would not obtain substantial justice in Zambia where the corporate harm took place[689].

This case was an appeal to the UK Supreme Court by Zambian claimants who had instituted a group tort claim in the UK High Court against a Zambian based mining company, Konkola Copper Mines (KCM) and its UK registered parent company, Vedanta Resources Plc[690]. The claimants alleged that Vedanta was liable for the actions of its Zambian subsidiary, KCM which included toxic emissions from the Nchanga Copper Mine belonging to KCM which the

[683] Ibid para 5.2.7.
[684] Ibid.
[685] Ibid para 5.2.
[686] Ibid para 11.5.
[687] Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents) [2019] UKSC 20 <https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf> accessed 1 September 2022.
[688] Ibid para 102.
[689] Uta Kohl 'Civil Litigation in Home States - A Willingness to Discipline Corporate Groups?' Investment Law and Natural Resources: Online Mini-Symposium | Part 4 (2019)
[690] Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents) (n687).

company continually emptied into their waterways causing damage to their health and farming activities to the claimants from 2005 onwards.[691]

Similarly, the Canadian case of Nevsun Resources Ltd. v Araya[692] is instructive. Three Eritrean workers claimed that they were indefinitely conscripted through Eritrea's military service into a forced labour regime where they were required to work at a mine in Eritrea. The mine is owned by a Canadian company, Nevsun Resources Ltd[693]. The Canadian Supreme Court confirmed that Eritreans can seek legal redress against the Canadian parent company for alleged violations of customary international law[694]. Importantly, the Court held that 'with respect specifically to the allegations raised by the workers, like all state parties to the International Covenant on Civil and Political Rights, Canada has international obligations to ensure an effective remedy to victims of violations of those rights'[695]. Based on the following, the Court held that the claims by the Eritrean workers should be allowed to proceed in Canada[696].

A review of the above cases would indicate that cases of business and human rights abuses can and have indeed been pursued at the national and international levels respectively where victims were allowed access to remedy and indeed gained remedy for human rights abuses.

4.6 Access to effective remedy in State based non-judicial mechanisms

Basically, State-based non-judicial mechanism can be divided into five broad categories- complaints mechanisms, inspectorates, ombudsman services, mediation or conciliation bodies, arbitration, and specialised tribunals[697]. Recognising that there could be pressure on the judicial system which may curtail its effectiveness, principle 27 of the UNGP emphasised the requirement for States to provide access to non-judicial remedy mechanism in addition to the judicial system considering that certain claimants may in fact prefer a non-judicial grievance mechanism over a judicial one[698].

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[691] Ibid.
[692] Nevsun Resources Ltd. v. Araya, 2020 SCC 5 available at <https://www.canlii.org/en/ca/scc/doc/2020/2020scc5/2020scc5.html> accessed 1 September 2022.
[693] Ibid para 4.
[694] Ibid para 313.
[695] Ibid para 119.
[696] Ibid para 132.
[697] Report of the United Nations High Commissioner for Human Rights 'Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms' (n36) p4.
[698] International Working Group on Indigenous Affairs (IWGIA) Report 16 (n443) p34.

4.6.1 OECD National Contact Point (NCPs)

Beginning from the year 2000, National Contact Points for Responsible Business Conduct (NCPs) have been mandated to act as the non-judicial grievance mechanisms under the OECD Guidelines for Multinational Enterprise (the Guidelines). Twenty years later, NCPs are in 49 countries that have collectively handled over 500 cases related to responsible business conduct (RBC) issues in over 100 countries and territories[699].

Some of the features which distinguish the NCPs as a State-based non-judicial mechanism include ease of accessibility with little formalities at no cost and without the need for legal help[700]. Some of the parties that have used the NCP mechanism range from indigenous communities, individuals and businesses to trade unions and civil society organisations[701]. Notably, NCPs have reportedly actively facilitated concrete remedies for the persons affected, including through financial or in-kind compensation or changes in companies' policies and operations[702].

NCPs have reportedly provided grievance mechanism aligned to the effectiveness criteria under UNGP 31[703]. Some of the issues which NCPs have considered cut across human rights comprising of cultural rights, indigenous peoples' rights, right to health, child labour, migration detention centres, core labour rights, right to livelihood[704]. According to OECD statistics, between 2011 and 2019, over a third of all cases (36%) which were accepted for further examination by NCPs resulted in some form of agreement between the parties; approximately 33% resulted in an internal policy change by the company in question[705].

Remarkably, NCPs have arguably promoted access to remedy by keeping barriers to participation as low as possible[706]. The Guidelines do not set precise limits on who can submit a case to an NCP, and submitters do not need to be direct victims of the issues at hand[707]. The Guidelines simply instruct NCPs to verify 'the identity of the party concerned and their interest

[699] Organisation for Economic Cooperation and Development (OECD) 'Providing access to remedy 20 years and the road ahead' 2020, p4, <http://mneguidelines.oecd.org/NCPs-for-RBC-providing-access-to-remedy-20-years-and-the-road-ahead.pdf> accessed 2 June 2022.
[700] Ibid p5.
[701] Ibid.
[702] Ibid.
[703] Ibid p14.
[704] Ibid p19.
[705] Organisation for Economic Cooperation and Development (OECD) 'Cases handled by the National Contact Points for Responsible Business Conduct' 2020 <Flyer-OECD-National-Contact-Points.pdf> accessed 22 November 2021.
[706] Organisation for Economic Cooperation and Development (OECD) 'Providing Access to Remedy 20 years and the Road Ahead' (n699) p23.
[707] Ibid.

in the matter', and to ensure that all parties are of good faith[708]. Therefore, any party with a legitimate interest in reporting issues regarding the implementation of the Guidelines may submit a case. As a result, NCPs have been available to a wide range of actors[709].

OECD statistics indicate that since 2011, NGOs and/or trade unions have submitted over two-thirds of cases. Other submitters have included Indigenous communities, individuals among others[710]. Arguably, the NCP process is relatively affordable. Although, the process for securing remedy will ordinarily entail monetary cost, NCPs aim to limit the amount of resources that parties have to commit to the process of seeking remedy[711]. Importantly, instituting an NCP case is free of charge and does not require legal help, and NCPs have also put in place strategies to assist parties, including assisting submitters in ensuring their submission includes all the required information, conducting mediation themselves or hiring a professional mediator at no cost to the parties[712]. NCPs have reportedly enabled remote participation by submitters where travelling is unaffordable for a party[713].

Notably, NCPs have provided remedy for submitters in the form of in-kind reparation among others on several occasions[714]. For instance, in the case of ENI S.p.A., ENI International BV, and CWA and ACA (2019) which was filed by local communities in Nigeria against Eni S.P.A, a major Italian oil and gas multinational enterprise, the Italian NCP considered issues related to chronic flooding that had negatively affected the local communities near oil drilling operations in Nigeria by ENI S.p.A. and affiliates since 1971[715]. At the conclusion of mediation, ENI S.P.A and a group of NGOs in Nigeria, signed Terms of Settlement whereby the parties concluded that the company would construct a drainage system that would remedy impacts caused by violent flooding[716]. OECD records indicate that as at 2020 phase one (out of three) of the works was already in progress[717].

Despite their seeming suitability as a potentially effective legal framework for providing access to remedy, NCPs are confronted by a number of challenges some of which were identified by the OECD in its 2020 report[718]. They include issues bordering on visibility and exposure of the

[708] Ibid.
[709] Ibid pp23-24.
[710] Ibid p5.
[711] Ibid p21.
[712] Ibid.
[713] Ibid.
[714] Ibid p23.
[715] Ibid.
[716] Ibid.
[717] Ibid.
[718] Ibid pp28-34.

NCP mechanism, accessibility, occasional delays, lack of compulsive powers to compel participation by an affected company, and lack of ability to guarantee equitable and safe proceedings[719].

Some of the measures proposed for maximising the NCPs contributions to access to remedy range from increasing NCPs' resources which involves Governments fulfilling their obligations to make available human and financial resources to their National Contact Points so that they can effectively fulfil their responsibilities, taking into account internal budget priorities and practices[720]. Further, some of the other measures proposed and elaborated on in the OECD report include improvement to the structure of NCPs, better coordination of practices across the network, streamlining joint case-handling, harmonising rules of procedure, ensuring consistency in interpreting the OECD Guidelines for MNEs, and monitoring the effectiveness of NCPs[721].

4.6.2 National Human Rights Institutions (NHRIs)

Specifically, the commentary to the UNGP underlines the significance of National Human Rights Institutions (NHRIs). Apart from reducing pressure on state based judicial mechanisms, indeed, barriers to access to justice such as prohibitive cost of pursuing judicial remedies and reported delays in disposal of cases may be addressed through availability of State-based non judicial mechanisms. They have the potential to protect indigenous peoples' human rights in view of the ease of accessibility, significant lower costs, dialogue-oriented approach to resolving conflicts, and the capacity for speedier resolution of disputes According to the UNDP-OHCHR toolkit for collaboration with NHRIs, the roles and responsibilities of NHRIs under the Paris Principles consists of two main categories: (1) Human rights protection (2) Human rights promotion[722].

According to the Manual for NHRIs as their activities relate to indigenous peoples, NHRIs are strategically positioned to function as a bridge between the international human rights system and the on-the-ground reality experienced by indigenous peoples[723]. Complaint handling and

[719] Ibid.
[720] Ibid pp36-43
[721] Ibid.
[722] United Nations Development Program and the Office of the High Commissioner for Human Rights 'UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions' 2010 p31 <https://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf> accessed 1 July 2022; See also section 1 of the Paris Principles- Principles relating to the status of National Institutions Competence and responsibilities.
[723] Asia Pacific Forum of National Human Rights Institutions and the Office of the United Nations High Commissioner for Human Rights, 'The United Nations Declaration on the Rights of Indigenous Peoples- A

dispute resolution is an integral function of NHRIs even though not all NHRIs carry out this function. Under the Paris Principles, NHRIs are obliged to seek amicable settlement of complaints or disputes through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality[724].

By their broad mandate under the Paris Principles, NHRIs are expected to engage with key actors at the national level, extending to interaction with international mechanisms with a view to contributing and advancing the promotion, protection and realization of indigenous peoples' human rights[725].

NHRIs could employ their technical expertise to monitor and advise Governments in order to ensure that laws and policies are consistent with, and provide protection for, the rights contained in the UNDRIP[726].

Further, the functions of NHRIs extend to creating awareness with respect to indigenous peoples' human rights and how they may be exercised[727]. NHRIs generally possess quasi-judicial powers which enable them to investigate violations of indigenous peoples' human rights and in some instances initiate complaints, as well as conduct public hearings to that end[728].

I. The Nigerian National Human Rights Commission

The National Human Rights Commission of Nigeria was established by the National Human Rights Commission Rights Act 1995 (as amended) in accordance with Resolution 48/134 of the United Nations General Assembly which enjoins all member states to establish independent National Institutions for the promotion, protection and enforcement of human rights[729]. The NHRC's strategic objectives are framed as Human Rights promotion; protection and enforcement to which extent a National Action Plan for the promotion and protection of human rights deposited with the with the office of the United Nations High Commissioner for Human

Manual for National Human Rights Institutions', August 2013 p40 <https://www.ohchr.org/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf> accessed 1 July 2022.

[724] Ibid.

[725] Ibid p41.

[726] Ibid.

[727] Ibid.

[728] Ibid.

[729] National Human Rights Commission (NHRC) (Nigeria) 'Background, Structure and Departments' NHRC Website <http://www.nigeriarights.gov.ng/about/overview.html> accessed 1 July 2022.

Rights (UNHCHR) as a benchmark for assessing Nigeria's human rights records, as well as government's commitment towards the promotion and protection of human right[730].

Specifically, the mandate of the NHRC extends across various categories. However, primarily its mandate consists of dealing with all matters relating to the promotion and protection of human rights as guaranteed by the Constitution of the Federal Republic of Nigeria, the United Nations Charter and the Universal Declaration on Human Rights, the International Convention on Civil and Political Rights, the International Convention on the Elimination of all forms of Racial Discrimination, the International Convention on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights and other international and regional instruments on human rights to which Nigeria is a party[731].

Further, by its mandate the NHRC is obliged to monitor and investigate all alleged cases of human rights violations in Nigeria and make appropriate recommendation to the federal government for the prosecution and such other actions as it may deem expedient in each circumstance and to assist victims of human rights violations and seek appropriate redress and remedies on their behalf[732]. Importantly, the NHRC's mandate similarly extends to acting as a conciliator between parties to a complaint[733].

The NHRC website lists the focal areas of the Commission as including Rights of Women and Gender-related Matters; Child Rights; Freedom of Expression and Media; Human Rights Defenders; Labour and Right to Health respectively[734].

It is noteworthy that the set priority areas do not necessary extend to indigenous peoples' rights. However, it is noteworthy that the NHRC is at the forefront of efforts aimed at establishing National Action Plan on Business and Human Rights as discussed in chapter five of this thesis[735]. Meanwhile, it is noteworthy that the Nigeria's National Action Plan on Business and Human Rights is yet to be launched and has remained at the consultative draft stage since 2017[736].

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[730] Ibid.
[731] Ibid.
[732] Ibid.
[733] Ibid.
[734] Ibid.
[735] See Consultative Draft of National Action Plan on Business and Human Rights in Nigeria (2017) available at <https://globalnaps.org//wp-content/uploads/2017/11/nhr-national-action-plan.pdf> accessed 1 July 2022.
[736] International Centre for Investigative Reporting (ICIR) 'Seven years after, Nigeria — 'Giant of Africa' has no action plan on business and human rights' 16 May 2018, https://www.icirnigeria.org/seven-years-after-nigeria-giant-of-africa-has-no-action-plan-on-business-and-human-rights/ accessed 1 July 2022.

Remarkably, in spite its clear mandate and strategic objectives, it would appear that gross human and environmental rights violations have persisted in Nigeria's Niger Delta region including Ogoni land without any significant intervention from the NHRC. In a newspaper article published in a frontline newspaper in Nigeria, the author decried the ineffectiveness of the NHRC in the above regard.[737]

Some commentators have argued that the agency may not be able to investigate issues of human rights violations in the absence of complaint or petition from affected peoples or communities[738]. On another note, some argue that human right violations are attributable to faulty/weak legal framework which the nation's parliament alone is competent to address[739]. In another breath, it is believed that the NHRC is incapacitated to conduct the necessary investigations due to lack of required technical knowledge and expertise to detect when organizations are not applying international best practices in their operations[740].

The above arguments would seem to be rather unavailing when considered against the provision of section 5 of the NHRC's enabling legislation which lists the powers and functions of the Commission as including dealing with all matters relating to the promotion and protection of human rights as guaranteed by the constitution of the Federal Republic of Nigeria and other human rights instruments to which Nigeria is a party; monitor and investigate all alleged cases of human rights violations in Nigeria and make appropriate recommendation to the federal government for the prosecution and such other actions as it may deem expedient in each circumstance; and assist victims of human rights violation seek appropriate redress and remedies on their behalf[741].

Admittedly, the NHRC lacks the power to make legislations as contended by some commentators. However, it could collaborate with the Legislature to devise a people-purposed oil exploration and production regime through sponsorship of Bills and Memoranda[742]. Further, NHRC could meaningfully partner with other government Ministries and agencies saddled with

[737] Jerome-Mario Utomi 'The National Human Right Commission's role in Niger Delta' the Sun Newspaper, October 28, 2019, <https://www.sunnewsonline.com/the-national-human-right-commissions-role-in-niger-delta/> accessed 1 July 2022
[738] Ibid.
[739] Ibid.
[740] Ibid.
[741] Ibid.
[742] Ibid

the responsibility to investigate or detect operator's non-adherence to the international best practice in a bid to cure its reported technical disempowerment to perform this function[743].

In a similar vein, the NHRC has the capacity to assist communities where such violation has taken place with legal actions against such violator as a way of addressing its constraints with respect to enforcing standards[744]. Undoubtedly, such assistance would potentially enhance the prospects of litigations by communities to the advantage of affected communities while relieving communities of rather exorbitant litigation cost[745].

In fact, with respect to litigation cost, the NHRC could partner with the local Legal Aid Council to facilitate payment of litigation cost etc. Apart from litigation, the NHRC is similarly empowered and expected to broker mediation and conciliation as part of its human rights protection mandate. However, there is no record of that aspect of its function being discharged especially within the context of the conflicts between indigenous communities in the Niger Delta and oil multinationals.

While the role of the NHRC clearly entails complaints management through conciliation or mediation between disputing parties may not be attainable unless there is enough awareness among local communities about the capability, independence and trustworthiness of the Commission to provide access to remedy.

Further, another factor is the seeming penchant of indigenous communities for filing claims in overseas jurisdictions usually where the parent company of oil multinationals are domiciled. It would appear for instance that the Commission's duty to investigate human rights violations would be greatly enhanced where aggrieved communities found them worthy or feel persuaded to submit complaints to the Commission.

4.7 Non-State Based Grievance Mechanism

In a report prepared for the Office of the UN High Commissioner for Human Rights, non-State based grievance mechanism was described as 'mechanisms by which individuals, groups or communities, whose human rights have been adversely impacted by business activities, or their legitimate representatives, can seek remedy with respect to those adverse impacts'[746].

[743] Ibid.
[744] Ibid.
[745] Ibid.
[746] Prof. Dr. Stefan Zagelmeyer, Dr. Lara Bianchi and Andrea R. Shemberg 'Non-state based non-judicial grievance mechanisms (NSBGM): An exploratory analysis' A report prepared for the Office of the UN High Commissioner for Human Rights, Alliance Manchester Business School, (2018) p6 available at

The report noted that the distinguishing characteristic of the non-State based grievance mechanism with respect to other mechanisms is, 'that the state is neither involved in establishing or setting the framework nor is actively intervening into the operations of the grievance mechanisms (as in the example of statutory arbitration and conciliation services), nor is the grievance mechanism in any way directly linked to the legal and judicial system of a particular country (as for example general domestic courts)'[747].

According to the commentary to the UNGP 28, non-state-based grievance mechanism are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes[748]. The benefits of these mechanisms may include speed of access and remediation, reduced costs and/or transnational reach[749]. The categories of non-State based grievance mechanisms identified in the UNGPs include the operational level grievance mechanism and industry, multi-stakeholder and other collaborative initiatives respectively[750].

4.7.1 Industry, multi-stakeholder and other collaborative initiatives.

According to the UNGP, industry bodies, multi-stakeholder and other collaborative initiatives have increasingly committed to human rights-related standards through codes of conduct, performance standards, global framework agreements between trade unions and transnational corporations, and similar undertakings[751]. UNGP 30 recommends that such collaborative initiatives should ensure the availability of effective mechanisms through which the affected parties or their legitimate representatives can raise concerns when they believe the commitments in question have not been fulfilled[752]. Part of the expectations from such mechanism include the entrenchment of accountability and remediation of adverse human rights impacts[753].

4.7.2 Operational-level Grievance Mechanisms

There have been well documented instances where remedies afforded by the host State through its judicial and regulatory systems with respect to serious harm occasioned by companies'

<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ARP/ManchesterStudy.pdf> accessed 1 July 2022.
[747] Ibid.
[748] Guiding Principles on Business and Human Rights (n12) UNGP 28.
[749] Ibid.
[750] Ibid UNGPs 29 & 30.
[751] Ibid UNGP 30.
[752] Ibid.
[753] Ibid.

activities have proved entirely inadequate or unavailable altogether[754]. It is in this connection that operational level grievance mechanism derives its significance.

Operational level grievance mechanism entails a grievance procedure designed for addressing complaints and concerns by individuals, workers and communities that have been or fear that they will be negatively affected by business activities[755]. In order for grievances to be addressed early with enhanced chances of direct remedies, business enterprises are required to create or engage in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted[756]. The essence of such mechanism include: first, is to permit stakeholders (including local communities) to raise concerns along with feedback regarding adverse human rights impacts that the activities of business enterprises may cause; second, to complement the human rights due diligence process; and third, where the adverse effect has already occurred to enable stakeholders to claim appropriate remedy[757].

According to the commentary to the UNGP, operational level grievance mechanisms perform two primary functions with respect to the responsibility of business enterprises to respect human rights: 'First, they support the identification of adverse human rights impacts as a part of an enterprise's ongoing human rights due diligence. They do so by providing a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be adversely impacted. By analysing trends and patterns in complaints, business enterprises can also identify systemic problems and adapt their practices accordingly'.

Second, 'these mechanisms make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating'[758].

GP 31 which sets out effectiveness criteria for non-judicial grievance mechanisms provides with respect to operational level grievance mechanism for engagement and dialogue and consultation with stakeholder groups for whose use they are intended on their design and performance and focusing on dialogue as the means to address and resolve grievances[759]. In

[754] International Commission of Jurists 'Effective Operational-level Grievance Mechanisms' November 2019 p18 <https://www.icj.org/wp-content/uploads/2019/11/Universal-Grievance-Mechanisms-Publications-Reports-Thematic-reports-2019-ENG.pdf> accessed 1 September 2022.
[755] Ibid.
[756] See Guiding Principles on Business and Human Rights (n12) UNGPs 29.
[757] Toolbox, Human Rights for Business and Organisation 'Operational-level Grievance Mechanisms' available at <https://business-humanrights.be/tool/9/what> accessed 1 September 2022.
[758] Guiding Principles on Business and Human Rights (n12), UNGP 29 (see commentary) p32.
[759] Guiding Principles on Business and Human Rights (n12), UNGP 31.

this connection, the commentary to the GP 31 clarified that a grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it[760].

With specific reference to operational level grievance mechanism, the commentary to GP 31 emphasised the need to engage with affected stakeholder groups with respect to the design and performance of the mechanism[761]. The mechanism should concentrate on reaching agreed solutions through dialogue considering that a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, to which extent an independent third-party mechanism should preside where adjudication is required[762]. An example of the operational level grievance mechanism can be seen in the internal mechanism by financial institutions for dealing complaints from financed projects.

4.7.3 Grievance Mechanism by International Finance Institutions

Because of the extensive impact that projects financed by international finance institutions could have on human rights, many of these institutions have devised internal grievance mechanisms which project affected peoples or communities could make recourse to for redress or remedies.

A. The World Bank Grievance Redress Service

The World Bank's Grievance Redress Service (GRS) is a World Bank managed corporate-level grievance mechanism providing a fast and accessible compliant mechanism for individuals and communities who believe that a World Bank-financed project has occasioned harm to their community[763]. The GRS is supplementary to already existing project-level grievance redress mechanisms. For instance, where issues cannot be resolved at the project level, such grievances could be escalated to the Management of the World Bank through the GRS[764].

The World Bank has set environmental and social standards that are aimed at improving social and environmental performance with a view to avoiding harm to communities and the

[760] See Guiding Principles on Business and Human Rights (n12) commentary to GP 31, p34
[761] Ibid p35.
[762] Ibid.
[763]Operational Procedures for the World Bank's Grievance Redress Service (GRS) available at <https://consultations.worldbank.org/consultation/operational-procedures-world-banks-grievance-redress-service-grs> accessed 1 July 2022.
[764]Ibid.

environment with respect to Bank-financed projects[765]. The objective of the Grievance Redress Service is to assist in ensuring prompt resolution of project-related complaints towards making the Bank more responsive and accessible to project-affected communities[766]. The GRS is accessible to all those who believe they have been suffered adverse consequences attributable to World Bank-financed projects[767].

The World Bank's Grievance Redress Service (GRS) provides a readily available mechanism for individuals and communities to lodge complaints directly to the World Bank where they believe that a World Bank financed project had or would potentially have adverse effects on them or their community[768]. The GRS enhances the World Bank's responsiveness and accountability by ensuring that grievances are swiftly reviewed and responded to, and problems and solutions are identified by working together[769]. Specifically, the GRS' jurisdiction extends to complaints related to an active World Bank supported project and could be filed by a person, community, or their representatives arising from actual or potential harm from a World Bank-supported project[770].

B. Compliance Advisor Ombudsman (CAO)

Compliance Advisor Ombudsman (CAO) is responsible for dealing with complaints filed by communities affected by IFC-financed projects, and functions as an independent accountability body for the IFC and MIGA respectively[771]. Acknowledging the significance of accountability and that the grievances and objections and complaints of project-affected people should be addressed in a manner that is fair, objective, and constructive, the CAO was established to afford individuals and communities affected by IFC projects the opportunity to raise their concerns to an independent oversight authority[772]. Specifically, the CAO's mandate extends to addressing the concerns of individuals or communities affected by IFC/MIGA projects;

[765]See World Bank Grievance Redress Service available at <http://pubdocs.worldbank.org.uea.idm.oclc.org/en/354851523028390136/GRS-Brochure-2018.pdf> accessed 1 July 2022.
[766] Ibid.
[767] Ibid.
[768] Ibid.
[769] Ibid.
[770] Ibid.
[771] International Finance Corporation 'Good Practice Note Addressing Grievances from Project-Affected Communities- Guidance for Projects and Companies on Designing Grievance Mechanisms', Issue 7, September 2009 p(I) <https://www.ifc.org/wps/wcm/connect/f9019c05-0651-4ff5-9496-c46b66dbeedb/IFC%2BGrievance%2BMechanisms.pdf?MOD=AJPERES> accessed 1 September 2022.
[772] Ibid.

enhancing the social and environmental outcomes of IFC/MIGA projects; and fostering of greater public accountability of IFC and MIGA[773].

The CAO discharges its duties as a body independent of the IFC management and is accountable to the President of the World Bank Group[774]. The CAO reviews, investigate and act on complaints from those affected by IFC-financed projects and aims to address them by means of a flexible problem-solving method, and to enhance the social and environmental outcomes of projects[775]. Further, the CAO oversees audits of IFC's social and environmental performance, especially in relation to sensitive projects, to determine compliance with policies, guidelines, procedures, and systems[776]. Complaints may be connected to any aspect of an IFC-financed project that is within CAO's mandate. Such complaints can be submitted by any group, community, entity, individual, or other party affected or likely to be affected by the social or environmental impacts of an IFC-financed project[777].

C. World bank Inspection Panel

The Panel was established in 1993 by the Executive Board of the World Bank as an independent complaints mechanism for people who believed that they have been or likely to be harmed by a World Bank-funded project[778]. At the time of its creation, the Panel represented an unprecedented attempt to increase the accountability of the Bank. Prior to its establishment of the Panel, the World Bank had financed various projects which led to devastating consequences to local populations including extensive environmental damage[779].

An example is the loan the bank advanced to India in the late 1980s to build the Sardar Sarovar Dam which would supply water to 30 million people and irrigate crops to feed another 20 million[780]. The project was allegedly flawed leading to unanticipated relocation of thousands of people while threatening to cause widespread soil erosion[781].

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[773] Compliance Advisor Ombudsman (CAO) 'About the CAO- Who we are' <http://www.cao-ombudsman.org/about/whoweare/index.html> accessed 1 September 2022.
[774] Good Practice Note Addressing Grievances from Project-Affected Communities (n771).
[775] Ibid.
[776] Ibid.
[777] Ibid.
[778] The World Bank Inspection Panel- where your concerns available at <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/publications/Brochure%20Inspection%20Panel.pdf> accessed 1 September 2022.
[779] Carrasco, Enrique R. and Guernsey, Alison K. (2008) "World Bank's Inspection Panel: Promoting True Accountability through Arbitration," Cornell International Law Journal: Vol. 41: Iss. 3 Fall 2008, Article 1, p578.
[780] Ibid.
[781] Ibid.

This development occasioned the set-up of the Morse Commission to carry out an independent review of the project. In the end, the Commission's report revealed that the Bank had neglected to follow its own social and environmental policies in project lending[782]. In the light of the foregoing events, the World Bank established the Panel as a form of response to unrelenting pressure from environmental and human rights non-governmental organizations (NGOs), with a view to bringing transparency to the Bank's project lending[783].

The Panel is charged with review and investigation of complaints filed by aggrieved parties in borrower countries who believe that the Bank is violating its policies or procedures in the design, preparation, or implementation of a project financed by the Bank[784]. The jurisdiction of the Panel is exclusive to claims relating to the International Bank of Reconstruction and Development (IBRD) which is primarily concerned with providing loans to "middle income and creditworthy poor countries" and the International Development Association (IDA), which "focuses on the poorest countries in the world[785]."

D. African Development Bank's (AFDB) Independent Review Mechanism

The Independent Review Mechanism (IRM) affords people adversely affected by projects financed by the African Development Bank Group with an independent mechanism through which they can request the Bank Group to comply with its own policies and procedures[786].

E. UNDP's Accountability Mechanism

The Accountability Mechanism[787] has two key components: 1. A Social and Environmental Compliance Review Unit (SECU) to respond to claims that UNDP is not in compliance with applicable environmental and social policies; and 2. A Stakeholder Response Mechanism (SRM) that ensures individuals, peoples, and communities affected by projects have access to appropriate grievance resolution procedures for hearing and addressing project-related

[782] Balakrishnan Rajagopal, From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions, 41 HARV. INT'L L.J. 529, (2000) 568.
[783] David B. Hunter, Civil Society Networks and the Development of Environmental Standards at International Financial Institutions, 8 CHI. J. INT'L L. 437, (2008) 438-39.
[784] Maurizio Ragazzi, 'Inspection Panel Operating Procedures Including Executive Directors' Resolution and Explanatory Memorandum of the General Counsel: Introductory Note 34 I.L.M. 503, (1995) 503-04.
[785] Ibid.
[786] Independent Review Mechanism of the African Development Bank (AFDB) available at <https://www.afdb.org/en/independent-review-mechanism-irm> accessed 1 September 2022.
[787] United Nations Development Program 'Guidance Note UNDP Social and Environmental Standards (SES) Stakeholder Engagement' p13 available at <https://info.undp.org/sites/bpps/SES_Toolkit/SES%20Document%20Library/Uploaded%20October%202016/Final%20UNDP%20SES%20Stakeholder%20Engagement%20GN_Oct2017.pdf> accessed 1 September 2022.

complaints and disputes. UNDP's Accountability Mechanism is available to all of UNDP's project stakeholders[788].

F. European Investment Complaint Mechanism

The Complaints Mechanism[789] team receives project complaints including, among others: environmental degradation; threats to community health and safety and involuntary resettlement. The underpinning objective of the mechanism is that by addressing citizens' concerns at the earliest possibility, the EIB can ensure that EIB Group policies, projects and activities uphold the highest environmental, social and governance standards and deliver fair and sustainable outcomes for everyone. Complaints are taken through a resolution process comprised of investigation, mediation, advisory and monitoring[790].

4.8 Investor-State Dispute Settlement (ISDS)

Indeed, as earlier noted the rationale for an analysis of the arguments that IIL ought to provide access to third-party right holders is due to the recognition that treaty-protected foreign investors can use the ISDS mechanism to undermine judgments granting remedy to third parties including Indigenous Right-Holders in the host State.

However, the broad argument by some scholars (already highlighted in chapter one) that IIL ought to provide access to remedy for third-party right holders in the same way as treaty-protected foreign investors warrant a careful analysis. This is because third-party rights are implicated in ISDS arbitration in a variety of ways and it would not be logical for the same approach to be adopted across the board. Rather, this chapter aims to analyse the question of whether IIL ought to provide access to remedy to Indigenous Right Holders, taking into account the various ways by which their rights and interest could be implicated in an ISDS arbitration, as follows.

[788] Ibid.
[789] European Investment Bank (EIB) Complaint Mechanism available at <https://www.eib.org/en/about/accountability/complaints/what-we-do/index.htm> accessed 1 September 2022.
[790] Ibid.

4.8.1 Indigenous Right-Holders and access to remedy in IIL.

As early as the year 2003, NAFTA paved the way for the ascendancy of third-party participation in the wake of the arbitral decisions in Methanex vs USA[791] and UPS vs Canada[792]. Specifically, the NAFTA Free Trade Commission (FTC) issued a statement outlining the procedure to be adopted for non-disputing party submissions in investor-State arbitration[793].

As a concept, third-party participation in ISDS is largely restricted to disputes involving matters which implicate public interest to the extent that they become relevant to the settlement of investor-State disputes[794]. This is the crux of the 2006 amendments to the ICSID rules vide Rule 37(2) which laid down the procedure for third-party submissions in ICSID arbitration[795].

Remarkably, in subsequent years these procedural rules have been cascaded to various FTAs and BITs alongside the development of investment treaty jurisprudence in that area ultimately culminating in Article 4 of the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration.[796] This effectively sets up best practice rules for addressing the issue of third-party participation[797].

Some of the advantages conferred by the amicus curiae procedure include the opportunity of new perspectives to the dispute which parties have not already canvassed, which generally helps the Tribunal in arriving at a fair determination of the dispute[798]. Further, the procedure potentially contributes towards enhancing procedural legitimacy, protection of third-party interests, and quality of the award[799].

The amicus curiae procedure has been credited for having a positive effect on public scrutiny of the future of Investment Arbitration and its significance as starting point for the

[791] See Methanex Corporation v United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', January 15, 2001 <www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf> accessed 21 June 2021.
[792] See United Parcel Service of America Inc. v. Government of Canada (n87)
[793] Ibid.
[794] Mariel Dimsey 'Article 4. Submission by a third person' in Dimitrij Euler, Markus Gehring, Maxi Scherer (ed), 'Transparency in International Investment Arbitration- A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration', Cambridge University Press (2015)..
[795] Ibid.
[796] Ibid.
[797] Ibid.
[798] Nicolette Butler 'Non-Disputing Party Participation in ICSID Disputes: Faux Amici?' (2019) 66(143-178) Netherlands International Law Review; See Dora Marta Gruner 'Accounting for Public Interest in International Arbitration: The Need for Procedural and Structural Reform' (2003) 41 COLUM. J. TRANSNAT'L L. 923
[799] See generally Daniel Barstow Magraw Jr. & Niranjali Manel Amerasinghe 'Transparency and Public Participation in Investor-State Arbitration' (2009)15 ILSA J. INT'L & COMP. L. REV. 337

implementation of public interest in investment arbitration[800]. Third-party participation can provide an extra layer of expertise or perspective to the issues discussed, providing factual information and legal arguments that the parties may choose not to raise[801], and infuses the arbitration process with elements of democracy, and to help dissipate the criticisms based upon secrecy.

In short, as Wieland observed, letting amici curiae "enter the dark room" can show the world how concerned international arbitrators are about issues like the environment, welfare or public health[802]. Importantly, a convincing justification for third-party participation in ISDS as amicus is that investment arbitration, unlike commercial arbitration, warrants greater public participation because of the potential effect that awards may have on a state's fiscal or regulatory policy and other issues of public interest[803].

However, other schools of thought regard the amicus curiae submission procedure as tokenism whereby non-disputing parties (NDPs) are at best only able to participate as friends of the Court, even though their interests and legal rights are at stake[804]. It is argued that there is a difference between 'cases where third parties seek to intervene as impartial "friends of the court" representing a broad public concern from those where the arbitration award has the potential to impinge on their rights or interests'[805].

Although factual, technical or expert opinions of nongovernmental organizations ("NGO") can be channelled through an amicus brief, this procedure is unsuitable to safeguard the right of parties who hold a legitimate, direct interest in the outcome of the ISDS arbitration[806].

Further, Gary Born (etal) in a recent article noted that the traditional role of an amicus is to help the decision-maker arrive at its decision by providing the decision-maker with arguments, perspectives, and expertise that the litigating parties may not provide[807]. To this extent, Born argued that it is implausible to portray amicus participation in arbitral proceedings as simply

[800] Katia Fach Gómez 'Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favourably for the Public Interest', (2012) 35 Fordham International Law Journal2543-548. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1999374>. accessed 21 June 2021
[801] See Kyla Tienhaara, Third Party Participation in Investment-Environment Disputes: Recent Developments',(2007) 16 Rev. Eur. Community & Int'l Envtl. L. 230, 239
[802] Patrick Wieland (n126) p340.
[803] Gary Born and Stephanie Forrest 'Amicus Curiae Participation in Investment Arbitration'(2009) 34(3) ICSID Review, 626–665, 661.
[804] Ibid.
[805] Ibid.
[806] Ibid.
[807] Gary Born and Stephanie Forrest (n803) p627.

'procedural' and therefore subordinate to a tribunal's general procedural authority[808]. Born contended that amicus participation grants important rights to non-disputing parties, who specifically intend to influence the outcome of an arbitration, and this participation can have significant effects on the parties' rights and the structure and outcome of the arbitration[809].

Notwithstanding the clear advantages cited above, Born recognised that interpreting the UNCITRAL Rules and the ICSID Convention as allowing for amicus participation, without the consent of one or both parties to the arbitration, conflicts with the consensual nature of arbitration[810]. As opposed to national court proceedings, parties' consent is the basis for investment arbitration or commercial arbitration, and springs from an agreement to arbitrate between specific parties[811].

The tribunal's authority derives majorly from the arbitration agreement and extends no further than, the parties' agreement to arbitrate[812]. Invariably, consent-based arbitration imposes significant limitations on who may participate in the arbitral process. In the same way that a non-party to an arbitration agreement cannot be required to arbitrate without its consent, a party to an arbitration cannot be obliged to arbitrate, without its consent, with a non-party[813]. Put simply, parties cannot be obligated to arbitrate with strangers, with whom they have not agreed to arbitrate their disputes[814]. Parties have the last word on how the process is structured, including under what circumstances non-signatories of the arbitration agreement should be able to participate in it[815].

4.8.2 The arguments in support of the participation of Indigenous Right-holders as actual parties.

Some of the above scenarios and concerns perhaps informed Patrick Wieland's arguments on why amicus curiae briefs are ill-suited to address concerns regarding access to remedy for indigenous peoples[816]. Wieland stressed the importance of differentiating instances where third parties aim to participate in proceedings as impartial 'friends of the Court' representing a broad public concern from cases where their rights are actually at stake such as where the outcome of

[808] Ibid p639.
[809] Ibid.
[810] Ibid.
[811] Ibid.
[812] Ibid.
[813] Ibid.
[814] Ibid.
[815] Ibid.
[816] Patrick Wieland (n126).

the arbitral proceedings is likely to impact their rights or interests[817]. For instance, while the amicus curiae window can be leveraged by NGOs to effectively channel their expert, factual or technical opinions, it is unsuitable to safeguard the rights of parties who hold a legitimate and direct interest in the final determination of the dispute before the tribunal[818].

This view was corroborated by Cotula noting that amicus curiae submissions are not designed to afford third-party actors whose rights are directly at stake in the dispute any meaningful or effective voice or protection[819]. Doubts about the effectiveness of amicus curiae submissions in the context of Indigenous Right-Holders have similarly been expressed by stakeholders in ISDS disputes where recourse to amicus curiae submissions became a concern.

This reportedly played out in a recent ICSID arbitration between Romania and a mining Company Gabriel Resources regarding a destructive gold mine proposal in Western Transylvania. The tribunal accepted the amicus curiae brief however with a condition that excluded the participation of villagers of Rosa Montana in the hearings as well as their legal arguments and testimonial[820]. The President of the Romania Non-Governmental Organisations that filed the brief, Alburnus Maior was quoted as expressing reservations that 'the tribunal can't say that justice will be done and at the same time ignore what we had to endure in the name of greed, the tribunal must prove that they understand the case, and this means to include our arguments. Until then, our fight continues''[821].

Further, at a stakeholders' roundtable organised by the UN Working Group in September 2018, reservations about the prospects of amicus curiae submissions were noted in the outcome document.[822] Participants at the roundtable reportedly agreed that 'within the investment law framework, opportunities for individuals and communities affected by investment to access justice do not currently exist'[823]. Contributions by participants at the roundtable indicated that

[817] Ibid.
[818] Ibid.
[819] Lorenzo Cotula (n146) p3.
[820] Centre for International Environmental Law (CIEL) 'Rosia Montana ISDS: World Bank Tribunal Partially Admits Romanian Villagers' Arguments over Controversial Goldmine' (February 2019) <www.ciel.org/news/rosia-montana-isds-world-bank-tribunal-partially-admits-romanian-villagers-arguments-over-controversial-goldmine/> accessed 1 June 2022.
[821] Ibid.
[822] UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business 'Impacts of the International Investment Regime on Access to Justice Roundtable Outcome Document' (Columbia Centre on Sustainable Investment (CCSI) Enterprises Report September 2018) <http://ccsi.columbia.edu/files/2018/09/CCSI-and-UNWGBHR-International-Investment-Regime-and-Access-to-Justice-Outcome-Document-Final.pdf> accessed 1 June 2022
[823] Ibid p10.

investor-state arbitration remains exclusionary in that individuals and communities affected by investment activities are shut out and effectively precluded from having meaningful access to justice[824].

Submissions by participants, especially representatives of communities that have been victims of negative consequences of investment projects were to the effect that amicus curiae submissions by investment-affected rights holders provide neither an effective nor practical means of accessing justice[825]. Sharing their direct knowledge and experience from the amicus curiae process, they submitted that communities are generally far removed from investor-state arbitration proceedings and that participation as amicus curiae is rather complicated, capital intensive, and devoid of adequate leeway and support for investment-affected rights holders to meaningfully register their concerns or assert their rights[826].

Two representatives from an indigenous community in South America noted that despite that the investment dispute before the tribunal had a direct impact on them; the determination of the dispute took place in an environment that was not conducive to community participation[827]. One of the representatives remarked, "[t]hey were talking about my land, my territory, my life, my existence, but I didn't have a voice?" Underscoring the crucial nature of the right to remedy, the report emphasized that the three pillars of the UNGP ought to be viewed through the lens of the right to meaningful remedy and also that mere access to remedy would not suffice in the circumstances without an effective remedy at the end of a process which has right holders at its very centre[828].

Against the above backdrop, Patrick Wieland contends that ISDS ought to provide for an absolute right of participation by indigenous peoples, because indigenous peoples are deserving of a peculiar status given their distinct identity and right to self-determination[829].

Patrick Wieland's views regarding the inadequacies of the amicus curiae procedure align with the position of a combined team of UN Experts in a March 2019 letter to the UNCITRAL Working Group (WG) III on the Investor-State Dispute Settlement System (ISDS) Reform[830].

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[824] Ibid.
[825] Ibid.
[826] Ibid
[827] Ibid p9
[828] Ibid p8
[829] Patrick Wieland, (n126) above p351.
[830] Special Rapporteur on the Rights of Indigenous Peoples etal 'Letter to the UNCITRAL Working Group III on ISDS reforms by the Working Group on the issue of human rights and transnational corporations and other business enterprises' (n72).

The WG observed that there is currently very little prospect for affected third parties to participate in ISDS proceedings, even in instances where the particular investment project has caused a significant adverse impact on the environment and the human rights of communities and individuals[831].

Specifically, the WG pointed out that 'although some ISDS processes may allow third parties to make submissions as amicus curiae, the investment tribunals have the full discretion in determining whether or not to accept an amicus curiae submission. If the ISDS system is to maintain its legitimacy, it is imperative that affected communities and individuals as well as public interest organizations are able to effectively participate in the ISDS proceedings and present their evidence, views and perspectives in full'[832].

The WG pointed out that 'if the ISDS mechanism continues to allow investors (as third parties to IIAs) a special fast-track path to seek remedies to protect their economic interests, the same pathway should be extended to communities affected by investment-related projects'[833]. Importantly, it encouraged the establishment of 'additional avenues to hold corporate investors accountable for human rights abuses with a view to partly addressing the systematic asymmetry in the ISDS'[834].

Similarly, Francioni posed the question of whether the concept of access to remedies as currently entrenched in binding arbitration in favour of foreign investors under IIAs ought to be matched by an equivalent right to remedial proceedings for private individuals and groups whose investments in host states have impacted negatively[835].

The Government of South Africa in its submission to the UNCITRAL Working Group III on ISDS Reforms noted that 'ISDS allows foreign investors to bring claims against host governments to an international arbitral tribunal and gives private parties access to the supranational level. This discriminates against companies operating locally and comes with systemic issues. Yet, people and communities harmed by foreign investments do not have clear mechanisms to claim justice and reparation'[836].

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[831] Ibid.
[832] Ibid.
[833] Ibid p6.
[834] Ibid.
[835] Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law', (2009) 20(3) EUR. J. INT'L L. 738.
[836] Submission from the Government of South Africa '(n143) para. 8.

In its submission to the UNCITRAL Working Group III, Ecuador observed that ISDS awards tend not to be mindful about whether an arbitral award will affect only the parties to the proceedings – i.e., the investor or the State – or whether it might directly affect other parties as well[837]. Ecuador noted that there have been situations where the rights of specific groups with a legitimate interest in a dispute have been affected by an arbitral award and yet those groups were not allowed to be parties to the proceedings[838].

Part of Ecuador's recommendation included that provision should be made to include parties that, aside from having a legitimate interest in a dispute, could also be directly affected by the arbitral award, subject to the Agreement of the tribunal and the parties[839].

In a similar breath, Cotula pointed out that the absence of effective participation in ISDS by third parties has the potential of depriving them of their rights and interests, more importantly, it could potentially foreclose the opportunity to hold foreign investors accountable[840]. Cotula added that failure to guarantee meaningful participation for third-party victims may constitute a deviation from the sustainable development goals (SDG) particularly SDG 16.3 on equal access to justice for all; developing 'effective, accountable and transparent institutions at all levels (SDG 16.6) and ensuring 'responsive, inclusive, participatory and representative decision making at all levels (SDG 16.7)[841].

Meanwhile, as argued in chapter one, the arguments for actual claims tend to lump together the potentially varied and compartmentalised interests of relevant non-disputing parties to the ISDS arbitration. Analysis of the arguments needs to be framed along the lines of the three scenarios in which the rights or interests of Indigenous Right-holders could be potentially implicated as highlighted in chapter one. That is, (1) access to remedy where the legal rights of non-disputing parties are implicated in an ongoing ISDS arbitration. (2) access to remedy where NDPs that will potentially be affected by the outcome of an ISDS arbitration, where a foreign investor has challenged a public interest regulation or laws in the host country which are meant for the protection of the rights accruable to the relevant NDP; (3) access to remedy from the standpoint of the NDPs that are victims of investment-related human rights abuses.

[837] Submission from the Government of Ecuador (n144) paras. 23-26.
[838] Ibid para. 24.
[839] Ibid para. 25
[840] Lorenzo Cotula and Nicholas Perrone (n146) p3.
[841] Ibid.

4.8.3 Access to remedy where the legal rights of non-disputing parties are implicated in an ongoing ISDS arbitration

Clarifying how the legal rights of third parties may be at stake in ISDS, the Columbia Centre on Sustainable Investment et al highlighted four practical scenarios. These include instances where: (1) an environmental organization challenges before national courts a government agency's issuance of an environmental permit to an investor, and the investor brings an ISDS claim to challenge the permit's revocation[842]; (2) an individual plaintiff secures a tort judgment against the investment, and the investor brings an ISDS claim to challenge the tort judgment as being arbitrary and disproportionate[843]; (3) affected communities challenge before national courts a government agency's granting of a concession, arguing that consultation processes were inadequate, and the investor brings an ISDS claim to challenge a court injunction that stopped the continuation of the project until consultation was complemented)[844]; (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 clear title to the disputed property[845].

In light of the practical scenarios by the CCSI and the analysis above, it would appear rather implausible that third parties in this category should be excluded from participation as actual parties in proceedings where their legal rights would be determined in one way or the other.

Realistically, actual participation may not be interpreted literally as conferring on third-party all the rights of the actual parties to the dispute. At the minimum, actual participation should go beyond the ambit and limitation of the amici curiae participation and ought to potentially satisfy the objective standard of fair hearing in such a manner that justice would not only be done but be seen by an objective bystander as having been done.

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[842] See e.g., TransCanada Corporation and TransCanada PipeLines Limited v. United States of America, [2017] Case No. ARB/16/21 (ICSID); Copper Mesa v. Ecuador (n43); and Infinito Gold Ltd. v. Costa Rica, [2021] Case No. ARB/14/5 (ICSID).

[843] See e.g., Eli Lilly and Company v. The Government of Canada, Final Award, UNCITRAL, ICSID Case No.UNCT/14/2, 16 March 2017; Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador (n82).

[844] See e.g., Daniel Kappes and Kappes Cassiday & Associates v. Guatemala; South American Silver Limited v. Bolivia, [2013] Case No. 2013-15 (PCA), Award dated 22 November 2018; and Bernhard von Pezold and Others v. Republic of Zimbabwe, [2015] , Case No. ARB/10/15 (ICSID) Award and Decision on Annulment, 28 July 2015 and 21 November 2018 respectively.

[845] Von Pezold v. Zimbabwe (n85); and Chevron v. Ecuador (n82).

Responding to the question asking for his views on the demands in some quarters up to the UN level for host communities to be allowed to participate in relevant investor-State arbitration as actual parties, Participant 1 speaking from a stakeholder perspective remarked that '…when it comes to issues between the two of them (investors & State parties), we think communities should also participate because these two people can go and connive and do a lot of things. So, anything that would affect our own interest, perhaps we should be there. You don't shave someone's head in their absence and that is why I think we should be there.

Similarly, Participant 2 reacted to the question of whether host communities ought to be allowed to participate in relevant investor-State arbitration as actual parties and commented that '…it is an excellent idea, human rights are increasingly becoming an issue in investor-state arbitration and can now be used as a defence, as I understand it has been successfully used in a Kenyan arbitration and maybe more. So, if that is the case, it would be entirely logical to make sure that victims from host communities have a voice that is not just going through the government, but they have an independent voice which can be considered.

Importantly, the above presupposes that the basis for the participation of Indigenous Right Holders as actual parties would need to be demonstrable legal rights which are at stake in the dispute before the ISDS tribunal. For the avoidance of doubt, the proposition does not entail allowing such third parties to initiate an ISDS arbitration. That is, the proposition argues for the right to participate as actual parties being used as a shield rather than a sword. Essentially, the right to initiate ISDS arbitration would notwithstanding possible reforms remain the exclusive preserve of investors and State parties.

4.8.4 Access to remedy where non-disputing parties will be potentially affected by the outcome of an ISDS arbitration

In light of the above analysis, it would seem defensible that the amicus curiae submission procedure would to a large extent potentially offer respite for NDPs in this category. As highlighted above the amicus curiae procedure allows facts and arguments that the Tribunal would otherwise not have access to be laid before the Tribunal by relevant third parties to assist the tribunal in the fair determination of the dispute.

Meanwhile, it is important to reiterate that the amicus curiae submission is not suitable for providing access to remedy to third parties whose rights are directly at stake in an amicus curiae submission. As earlier noted, given their status as 'friends of the Court', the amicus curiae

submission procedure was designed to cater to the interest of third parties seeking to bring relevant facts or information to the attention of the Court with a view to fair and just determination of the dispute. The various limitations (highlighted above) on the extent of the participation of an amicus are aimed at ensuring that the amicus does not overreach their permission to assist the tribunal with relevant facts and information necessary for the fair determination of the dispute before the Tribunal.

However, it is conceded that the amicus curiae submission may be useful in instances where third parties would potentially be affected by the outcome of an ISDS arbitration, even though their rights do not constitute the subject-matter of the arbitration. Importantly, the amicus curiae submission may be helpful in a situation where the interest of certain third parties may be significantly impacted by the outcome of a pending ISDS arbitration. Such third-party participation through the amicus submission may bring to the attention of the Tribunal the interest of the third parties who would be affected by the outcome of the arbitration while also providing the tribunal with a full picture of the dispute beyond what the parties have stated in their pleadings.

For example, third-party interest would be potentially involved when a host State revokes the permit granted to a foreign investor for the construction of a mine due to community protest arising from concerns about likely environmental pollution, and the foreign investor initiated an ISDS arbitration against a State party challenging the revocation of a government permit. On such occasions, the affected community bring their interest and concerns about likely environmental pollution to the attention of the tribunal by filing an amicus curiae submission such that the Tribunal would take cognisance of their interest in the final determination of the investor-State dispute regarding the permit.

Such a situation is however materially different from instances where the rights of third parties are directly at stake and forms the subject matter of the dispute submitted to the ISDS arbitration for adjudication. It is argued here that the amicus curiae submission will provide access to remedy for such third parties whose rights are directly at stake and forms the subject matter of the dispute before the Tribunal. As noted above, such parties should be allowed to participate as actual parties to the dispute to guarantee their right to fair hearing and uphold the principle of natural justice.

4.8.5 Access to remedy from the standpoint of the non-disputing parties that are victims of investment-related human rights abuses

Apart from the fact that NDP participation as actual parties under this category may potentially constitute an abuse of the ISDS mechanism given its historical significance, this argument would seem to suggest that remedies for investment-related human rights abuses are not available in other appropriately constituted fora for remediating such grievances. It is understood that as in the first category, such remedies could for instance be obtainable in the local jurisdiction for instance, but with the potential that the enforcement of such remedy could be undermined and rendered nugatory through ISDS arbitration. However, in that scenario, the argument in the first category above would be applicable. Otherwise, the potential or otherwise of existing judicial and non-judicial grievance mechanisms to provide access to remedy under this category would need critical interrogation as set out below.

4.9 Conclusion

The analysis above contributes towards addressing the main research question of whether IIL ought to provide access to remedy for Indigenous Right Holders along with research questions three, four, and five respectively. As the UN Working Group pointed out remedies for right holders are located in diverse settings[846] and remedial mechanisms ought to be responsive to the diverse experiences and expectations of right holders[847]. From the above, it would seem that the diverse experiences and expectations of Indigenous Right Holders do not need to be addressed solely within the purview of IIL but could be located in diverse settings cutting across the national, and international levels and the ISDS mechanism itself.

This finding is important to addressing the sub-question in this research, that is whether there are alternative avenues to which victims of investment-related human rights abuses could make recourse. It is in this light that this chapter highlighted various State- based and non-State based grievance mechanisms which Indigenous Right Holders could resort to for access to remedies.

Essentially, some of these mechanisms may indeed be better suited to respond to the diverse experiences and expectations of Indigenous Right Holder. For instance, victims of investment-related human rights abuses arising from an IFC-financed project may have a brighter prospect

[846] Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises to the UN General Assembly, submitted pursuant to Human Rights Council resolutions 17/4 and 35/7 (n341) p2-4.
[847] Ibid p4.

of securing remedies under the IFC's grievance mechanism set up for addressing project-related human rights abuses and complaints, than the ISDS mechanism.

In any event, the arguments for the participation of Indigenous Right-holders in ISDS arbitration as actual parties are illustrative of concerns about possible exclusionist tendencies in ISDS whereby the legal rights or interests of non-investing stakeholders are shunned. However, the arguments would seem not to be systematic or analytical as they fail to consider the specific contexts in which third-party rights are implicated in ISDS arbitration.

This chapter has attempted to address this gap by delineating the argument for actual participation of Indigenous Rights Holders in relevant ISDS arbitration into three categories. That is (a) Access to remedy where the legal rights of Indigenous Right Holders are directly at stake in an ongoing ISDS arbitration. For instance, where their legal right forms the subject matter of the arbitration (b) Access to remedy where Indigenous Right Holders will be potentially affected by the outcome of an ISDS arbitration. (c) Access to remedy for Indigenous Right Holders when they are victims of investment-related human rights abuses. In this chapter, the argument was made out that while the existing procedure for third-party participation in ISDS arbitration may not avail third parties whose legal rights are directly at stake, the amicus curiae submission procedure may be suitable for category 2 above. However, it was argued above that achieving category 3 within the framework of the ISDS arbitration would be ultimately impracticable, and an overreach, more so in view of the many other avenues for remedies that could be pursued outside of the purview of the ISDS.

It was also noted in this chapter that when remedies are for example secured in the local jurisdiction by Indigenous Right-holders against foreign investors such as SPDC, there is the potential risk that the enforcement of such remedy may be blocked or undermined through the ISDS. In any event, such eventuality would fall under category 1 above, that is a legal right (right to enforcement of the judgment) accruing to a third party that would be directly at stake in the arbitration.

This chapter argues that where third-party legal rights are directly at stake in an ongoing ISDS arbitration, there is justification for actual participation of such third-party rightsholders in light of the procedural right to fair hearing. Chapter three considered possible ways (from a substantive law perspective) for realising actual participation in ISDS arbitration by third parties whose legal right is directly at stake in an ongoing ISDS arbitration

Finally, for category 3, there isn't any conclusive evidence that access to remedies is better guaranteed in foreign courts such as those in the parent companies' country of domicile as against local Courts where the harm took place notwithstanding the various constraints that might have been associated with the latter. The 'all road to remedy' approach to effective remedies for business-related human rights abuses which according to the UN Working Group are located in diverse settings is an advisable course to securing access to remedy for Indigenous Right-holders[848]. Further, remedies ought to be viewed from the perspective of rights holders while remedial mechanisms should be responsive to their diverse experiences and expectations[849].

Rather than claiming against businesses solely, the status of State parties as duty bearers under international human rights law should not be overlooked and Indigenous Right-holders must be able to seek to establish their liabilities where they have failed to perform their duty to protect against breach of human rights by third parties including businesses. This was illustrated in the cases of SERAC vs Nigeria and SERAP vs Nigeria as discussed above. Although the two cases have not been implemented by the Nigerian government due mainly to the lack of bindingness of the decisions by the African Commission and the ECOWAS Court respectively. However, there is a glaring need for concerted action in this direction. This would potentially compel State parties to fulfil their international human rights obligations to protect human rights and provide access to remedy in their territories.

The foregoing found expression in the 3rd revised draft of the proposed legally binding Business and Human Rights (BHR) Treaty which has the objective of imposing a binding duty on corporations to respect human rights. Despite its stated objective, the proposed BHR treaty published in August 2021 acknowledged in its preamble '…that the primary obligation to respect, protect, fulfil and promote human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise under their jurisdiction or control, and ensure respect for and implementation of international human rights law'[850]. This aspect and others

[848] Ibid pp2-4.
[849] Ibid p4.
[850] Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, 'of Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, 17.08.2021,2 <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> accessed 2 September 2022.

would be discussed in chapter five which entails an analysis of BHR frameworks as potentially effective legal frameworks to provide access to remedy for Indigenous Rights Holders.

Chapter Five - Business and Human Rights frameworks and access to remedies for Indigenous Right holders.

Pursuant to the analysis in chapter four, this chapter is focused on a critical assessment of the prospects and limitations of the various current and prospective business and human rights frameworks vis-à-vis their potential for providing access to effective remedy for Indigenous Right Holders. Specifically, the business and human rights frameworks considered in this chapter include the current French Duty of Vigilance Law, Business and Human Rights Arbitration, the Proposal for the EU Corporate Sustainability Due Diligence Directive, and the proposal for a binding international treaty on business and human rights respectively.

5.1 Significance and justification

The analysis of the aforementioned BHR frameworks is important given that investment activities as well as the associated potential adverse impacts are within the scope of problems which the business and human rights field aims to address. This analysis is therefore significant and timely considering that three out of the four frameworks identified above are presently in their formative stages, while the French Duty of Vigilance Law 2017 is already in force, and the Hague Rules for Business and Human Rights launched in December 2019 is still in its early implementation phase.

It is expected that in the final analysis, the analytical discussion of the prospects and limitations of the access to effective remedy mechanisms under each of these BHR frameworks would hopefully contribute a critical perspective to the search for an effective legal framework to provide access to remedy for Indigenous Rights Holders while also contributing meaningfully to ongoing public discourse and consultation on these frameworks, especially from an access to effective remedy point of view.

5.2 Business and Human rights – brief historical perspective

Since the Bhopal disaster in 1984 which led to the death of more than a thousand people, the issue of impact of business activities on people and the need for accountability has been topical[851]. The Bhopal disaster was as a result of the leak of 27 tonnes of deadly methyl isocyanate gas into the air from a defective tank at the Union Carbide factory in Bhopal. Further, emblematic cases and situations include the environmental devastation of Nigeria's oil-rich Niger Delta region arising mainly from SPDC's oil exploration activities[852], environmental pollution and abuse of indigenous peoples' rights in Ecuador's amazon rainforest[853], the collapse of the Rana Plaza factory are examples of corporate human rights abuses which were not adequately prevented or remedied[854].

Business and human rights as a field seeks to ensure the accountability of businesses in relation to adverse human rights impacts resulting from their operations[855]. Bridging the accountability gap is to be understood as both setting standards and holding corporations and businesses to account if violations occur[856]. The corporate accountability discourse has underlined the business and human rights agenda since the 2001 ill-fated UN Draft Norms on the Responsibilities of Transnational Corporations with regard to Human Rights[857]. However, key authoritative frameworks such as the United Nations Guiding Principle on Business and Human

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[851] See the 'Bhopal Gas Disaster' <www.bhopal.org/continuing-disaster/the-bhopal-gas-disaster/> accessed 20 August 2022. See also Improving accountability and access to remedy for victims of business-related human rights abuse, report of the United Nations High Commissioner for Human Rights (n62); Anna Grear and Burns H. Weston 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel', (2015) 15 Human Rights Law Review, , 21–44, 21-25; See generally Carl Middleton and Ashley Pritchard 'Corporate Accountability in ASEAN: A Human Rights-Based Approach' (Asian Forum for Human Rights and Development (FORUM-ASIA), 2013) <www.forum-asia.org/uploads/publications/2013/September/Corporate-Accountability-ASEAN-FINAL.pdf> accessed 1 August 2022.

[852] Anna Grear and Burns H. Weston (n851) p25; Amnesty International 'The Niger Delta is One of the Most Polluted Places on Earth <www.amnesty.org/en/latest/news/2018/03/Niger-Delta-Oil-Spills-Decoders/> accessed on 20 August 2022.

[853] Business and Human Rights Resource Centre 'Ecuador to clean up Amazon region areas polluted by Texaco's oil spill' (Business and Human Rights Resources Centre, 10 March 2019) <www.business-humanrights.org/en/latest-news/ecuador-to-clean-up-amazon-region-areas-polluted-by-texacos-oil-spill/>, last accessed on August 20, 2022. See also Aljazeera 'Ecuador oil spill pollutes river, protected Amazon area: Ministry' <www.aljazeera.com/news/2022/1/31/ecuador-oil-spill-pollutes-river-protected-amazon-area-ministry> accessed 20 August 2022.

[854] International Labour Organisation 'The Rana Plaza Accident and its aftermath' <https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm> accessed 20 August 2022.

[855] See generally Nadia Bernaz 'Business and Human Rights History, Law and Policy - Bridging the Accountability Gap' (Routledge, 1st edition, 2017)

[856] Ibid.

[857] Amnesty International Publication 'The UN Human Rights Norms For Business: Towards Legal Accountability' (Amnesty International, 2004), <www.amnesty.org/en/documents/ior42/0002/2004/en/> accessed 20 August 2022.

Rights[858], and the OECD Guidelines on Multinational Enterprises[859] among others have since emerged to advance corporate accountability.

The UNGPs are the most authoritative global framework for business and human rights given their wide acceptability across the board – State parties and businesses. In a recent commentary, the UN Working Group noted that the unanimous endorsement of the UNGPs by the United Nations Human Rights Council in 2011 represented a watershed moment in efforts to tackle adverse impacts on people resulting from globalization and business activity in all sectors[860]. For the first time, the UNGPs provided a globally recognized and authoritative framework for the respective duties and responsibilities of Governments and business enterprises to prevent and address adverse human rights impacts[861].

The UNGPs are underpinned by the Protect, Respect and Remedy framework exemplified by three main pillars – State duty to protect, the corporate responsibility to respect and access to remedy[862]. Since its launch in 2011, the implementation of the third pillar, access to remedy appears to be the most problematic, often referred to as the forgotten pillar[863]. This underscores the difficulty associated with holding corporations accountable for human rights abuses which they have caused or contributed to.

As a result, the UN Office of the High Commissioner on Human Rights launched the Accountability and Remedy Project (ARP) in 2014 to strengthen the implementation of the "Access to Remedy" pillar of the UNGPs[864]. Since its official launch in 2014, three substantive phases have been completed, with each phase focusing on one of the three different categories of grievance mechanisms referred to in the Access to Remedy pillar.

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[858] See Guiding Principles on Business and Human Rights (n12).
[859] Organisation for Economic Cooperation and Development 'OECD Guidelines for Multinational Enterprises', (2011) OECD Publishing <http://dx.doi.org/10.1787/9789264115415-en> last accessed on August 20, 2022.
[860] UN Working Group on Business and Human Rights 'Corporate human rights due diligence – identifying and leveraging emerging practices', <OHCHR | Corporate human rights due diligence – identifying and leveraging emerging practices> accessed 25 August 2022.
[861] Ibid.
[862] See Guiding Principles on Business and Human Rights (n12).
[863] Lorna McGregor 'Activating the Third Pillar of the UNGPs on Access to an Effective Remedy' EJIL Talk, November 23, 20www.ejiltalk.org/activating-the-third-pillar-of-the-ungps-on-access-to-an-effective-remedy/> accessed 20 August 2022.
[864] Office of the High Commissioner on Human Rights 'Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses', OHCHR and business and human rights. ARP I: Enhancing the effectiveness of judicial mechanisms <www.ohchr.org/en/business/ohchr-accountability-and-remedy-project/phase1-judicial-mechanisms> accessed 20 August 2022.

The first phase (ARP 1) was dedicated to enhancing the effectiveness of judicial mechanisms[865], the second phase (ARP II) focused on enhancing the effectiveness of State-based non-judicial mechanisms[866] while the third phase (ARP III) had the objective of enhancing the effectiveness of non-State-based grievance mechanisms[867]. The fourth phase (ARP IV) commenced in 2020 with the declared objective of enhancing the accessibility, dissemination and implementation of the findings from the first three phases of the project[868].

Harmonising the findings from the reports from the first three ARP projects, the ARP IV report noted that while the Guiding Principles clarify standards of business conduct, the application of those standards in practice remains problematic[869]. Importantly, the report observed that urgent attention from both State and business actors is required to address the lack of accountability and remedy in business and human rights cases, especially because the right to remedy is a core tenet of the international human rights system[870].

As noted in the first three ARP reports, the access to remedy pillar of the Guiding Principles exemplifies the vital role played by both judicial and non-judicial remedial systems in realizing the right to an effective remedy[871]. The report asserted that 'people seeking to use those systems to obtain a remedy for harm and to hold business enterprises to account face many challenges in practice. The mechanisms can be difficult, if not impossible, to access and, even where access is obtained, in many cases they can deliver only a partial remedy[872].

Meanwhile, in the context of indigenous peoples, a recent publication by the International Working Group for Indigenous Affairs (IWGIA) and the Indigenous Peoples Rights International considered progress achieved by the UNGPs in advancing indigenous peoples' rights in addition to identifying the implementation gap and challenges for the next decade[873].

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[865] Ibid.

[866] OHCHR Accountability and Remedy Project II: Enhancing effectiveness of State-based non-judicial mechanisms in cases of business-related human rights abuse, <www.ohchr.org/en/business/ohchr-accountability-and-remedy-project/phase2-state-based-non-judicial-mechanisms> accessed 20 August 2022.

[867] OHCHR Accountability and Remedy Project III: Enhancing effectiveness of non-State-based grievance mechanisms in cases of business-related human rights abuse, www.ohchr.org/en/business/ohchr-accountability-and-remedy-project/phase3-non-state-based-grievance-mechanisms> accessed 20 August 2022.

[868] OHCHR Accountability and Remedy Project IV: Enhancing the accessibility, dissemination and implementation of ARP findings, <www.ohchr.org/en/business/ohchr-accountability-and-remedy-project/phase4-accessibility-dissemination-implementation> accessed 20 August 2022.

[869] Ibid para.5.

[870] Ibid.

[871] Ibid para. 6.

[872] Ibid.

[873] See Jose Aylwin and Johannes Rohr 'The UN Guiding Principles on Business and Human Rights and Indigenous Peoples – Progress achieved, the implementation gap and challenges for the next Decade',

In its finding, the IWGIA noted that 'there is a vast gap between policies and declarations, on the one hand, and practice on the ground, on the other'[874]. According to the IWGIA, 'one central reason for this difference lies in the voluntary nature of most frameworks, which do not enforce themselves by imposing liability'[875].

Specifically, the UNGPs clarify that States' international human rights law obligations include the duty to protect against human rights abuse by businesses. The UNGPs set out the legal and policy implications for how to operationalize this duty through a "smart mix" of measures that include legally binding measures, particularly where voluntary measures continue to leave significant gaps in human rights protections[876]. The UN Working Group observed that civil society organisations, businesses and investors are calling for effective mandatory human rights due diligence legislation[877].

5.3 Human rights due diligence

Before shifting attention to mandatory human rights due diligence (mHRDD), it is important to clarify the meaning of human rights due diligence. The concept of HRDD was first introduced by the UNGPs and subsequently incorporated into various other standards including the OECD Guidelines for MNEs[878].

As clarified above, the UNGPs are a set of authoritative global standards endorsed by the UN Human Rights Council in 2011, albeit voluntary, for preventing and addressing the risk of adverse human rights impacts linked to business activity[879]. Pillar 2 of the UNGPs provides for corporate responsibility to respect human rights. This means that businesses should avoid infringing on the human rights of others and should address adverse human rights impacts with

(International Working Group for Indigenous Affairs (IWGIA) and the Indigenous Peoples Rights International, June 2021).

[874] Ibid p6.

[875] Ibid.

[876] See Guiding Principles on Business and Human Rights (n12), commentary to UNGP 3; see also UN Working Group on Business and Human Rights 'Mandatory human rights due diligence (mHRDD)' <www.ohchr.org/en/special-procedures/wg-business/mandatory-human-rights-due-diligence-mhrdd> accessed 20 August 2022.

[877] Ibid.

[878] British Institute for International and Comparative Law (BIICL) Final Report 'Study on due diligence requirements through the supply chain', (European Union commissioned Study, January 2020), p156, <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en/format-PDF> 1 September 2022.

[879] UN Resolution /HRC/RES/17/4 endorsing the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework adopted by the UN Human Rights Council on 16 June 2011.

which they are involved[880]. The scope of the UNGPs extends to all enterprises regardless of their size, sector, operational context, ownership and structure[881].

According to UNGP 12, the responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work[882].

In order to fulfil their responsibility to respect human rights, UNGP 15 expects businesses to take three key steps:

- have in place a policy commitment to respect human rights
- conduct human rights due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights
- Put in place processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute[883].

Of the three steps above, this chapter is focused on human rights due diligence (HRDD). It is the duty of States to translate their international human rights law obligations into domestic law and provide for their enforcement especially as international human rights law does not impose direct legal obligations on businesses[884]. Specifically, the commentary to Principle 1 of the UNGP clarified that the State duty to protect is a "standard of conduct", which implies that 'States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse'[885].

Similarly, GP 17 provides for the responsibility of business enterprises in terms of HRDD to identify, prevent, mitigate and account for how they address their adverse human rights impacts[886]. Further, GP 22 provides that where business enterprises identify that they have caused or contributed to adverse impacts, whether in relation to the human rights due diligence

[880] Ibid UNGP 11
[881] Ibid UNGP 14
[882] Ibid UNGP 12.
[883] Ibid UNGP 15.
[884]See Guiding Principles on Business and Human Rights (n12).
[885] Ibid commentary to GP 1.
[886] Guiding Principles on Business and Human Rights (n12), UNGP 17.

process or other means, or their responsibility to respect human rights, they are expected to actively engage in remediation, by themselves or in cooperation with other actors[887]. Apparently, a significant number of business enterprises have publicly made official statements about their corporate commitment to uphold human rights including compliance with the UNGPs[888]. Being a non-binding responsibility, there is yet to be any framework for enforcing this responsibility.

Human Rights due diligence connotes the process or rather a bundle of interrelated processes[889] through which businesses can identify, prevent, mitigate and account for their actual and potential adverse human rights impacts[890]. Under the OECD Guidelines, due diligence 'is understood as the process through which enterprises identify, prevent and mitigate actual and potential adverse impacts and account for how these impacts are addressed'[891].

Pursuant to the UNGPs, adverse human rights impacts arising from activities of businesses are designated as human rights risks which both State parties and businesses are expected to identify, prevent, mitigate and account for how they address them[892]. Ruggie clarified in his progress report to the Human Rights Council that due diligence is used under the UNGP in a broader sense connoting a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, to avoid and mitigate those risks'[893]. Rather than merely managing the commercial risks of the business, due diligence is primarily concerned with understanding the specific impacts on specific people[894].

[887] Guiding Principles on Business and Human Rights (n12), UNGP 22 and the commentary thereto.
[888] See the Human Rights Policy of these multinationals – Shell, Coco-Cola, Chevron among others.
[889] UN Working Group on the issue of human rights and transnational corporations and other business enterprises, "Corporate human rights due diligence – emerging practices, challenges and ways forward", A/73/163 (16 July 2018), at para 10.
[890] Guiding Principles on Business and Human Rights (n12), UNGP 17
[891] See Chapter II, Paragraphs A11 and A12 in OECD Guidelines for Multinational Enterprises, 2011 Edition, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264115415-en> 1 September 2022.
[892] Office of the High Commissioner for Human Rights (OHCHR), 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011) para 21.
[893] Office of the High Commissioner for Human Rights (OHCHR) 'Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework, Report to the UN Human Rights Council' (Business and Human Rights Report), UN Doc. A/HRC/11/13, 22 April 2009, para. 25.
[894] John Gerard Ruggie and John F. Sherman, 'The Concept of 'Due Diligence in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28 (3) The European Journal of International Law 921–928, 924.

In relation to the subject of due diligence, the EU Parliament noted that 'corporate human rights and environmental due diligence are necessary conditions to prevent and mitigate future crises and ensure sustainable value chains'[895]. In a similar vein, the EU Commissioner for Justice noted that "businesses that have better risk mitigation processes across their supply chains cause less harm to people… Good environmental, social, and governance practices pay off… We need to make sure that responsible business conduct and sustainable supply chains become the norm.''[896]

The concept of HRDD has increasingly gained prominence as a potential tool for addressing the twin challenges of shaping better business behaviour and lack of access to justice for victims when businesses fail to meet the benchmarks set by society[897]. By virtue of UNGPs 17-21, businesses are obliged to carry out HRDD to identify, prevent, mitigate and account for harm that results from their activities[898].

While UNGP 17 defines the parameters for HRDD, UNGPs 18-21 elaborate its essential components cutting across human rights impact assessment (HRIA), and integration of findings from the HRIA into internal policies and processes with a view to taking action.[899] Further, these principles set out specific steps necessary to implement the HRDD cutting across human rights impact assessment, tracking the effectiveness of responses and reporting on measures taken to address identified potential adverse impacts[900].

[895] European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP) <www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.pdf> accessed 1 September 2022.
[896] European Commission Promises Mandatory Due Diligence Legislation in 2021, Webinar Hosted by the European Parliament's Responsible Business Conduct Working Group, 29 April 2020 <https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/> accessed 1 September 2022.
[897] Professor Olivier De Schutter Professor Anita Ramasastry Mark B. Taylor Robert C. Thompson 'Human Rights Due Diligence: The Role of States', Coalition of The International Corporate Accountability Roundtable, the European Coalition for Corporate Justice, the Canadian Network on Corporate Accountability (2012) p1 <http://humanrightsinbusiness.eu/wp-content/uploads/2015/05/De-Schutter-et-al.-Human-Rights-Due-Diligence-The-Role-of-States.pdf> accessed 1 September 2022.
[898] Guiding Principles on Business and Human Rights (n12).
[899] Ibid.
[900] Ibid.

5.3.1 Access to remedy under the UNGPs

Notwithstanding the HRDD, GP22 includes the recognition that even with best policies and practices, a business enterprise may cause or contribute to adverse human rights impacts that it has not foreseen or been able to prevent[901]. Thus, GP 22 specifically requires that 'where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes'[902].

Specifically, the UNGP listed operational-level grievance mechanisms as one of the effective means of enabling remediation, particularly to the extent that this complies with the effectiveness criteria set out under GP31[903]. For the avoidance of doubts, the effectiveness criteria require that non-judicial grievance mechanisms both State-based and non-State based should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, source of continuous learning and with particular reference to operational level grievance mechanisms it is expected that such mechanism should be based on engagement and dialogue[904].

Meanwhile, for the purposes of this research, it is important to clarify how HRDD interacts with indigenous peoples' rights to understand how such rights may be breached in the context of carrying out HRDD and the attendant access to remedies implications.

5.3.2 HRDD and indigenous peoples' rights.

HRDD consists of human rights impact assessment (HRIA) which is a critical part of the steps prescribed under the UNGPs to systematically investigate, measure, and address the potential or actual human rights impacts of a project or business operations.[905] HRIA is significantly different from Environmental and Social Impact Assessment, which extractive industry operators among other business actors are ordinarily obliged to conduct, in that it employs a human rights framework which consists of benchmarking against human rights instruments and

[901] Ibid.
[902] Ibid.
[903] Ibid.
[904] Ibid UNGP 31.
[905] Columbia Center on Sustainable Investment, Danish Institute for Human Rights, and Sciences Po Law School Clinic, A Collaborative Approach to Human Rights Impact Assessments, March 2017. p13 <www.humanrights.dk/sites/humanrights.dk/files/media/migrated/paper_collaborative_approach_to_hrias_2017.pdf> accessed 12 September 2022.

standards with a view to identifying risks to right holders[906]. Importantly, the HRIA process also involves adherence to far-reaching human rights principles, especially participation and non-discrimination[907].

Notwithstanding the extent to which Environment Impact Assessment (EIA) and Social Impact Assessment (SIA) consider human rights issues, the International Working Group on Indigenous Affairs (IGWIA) pointed out that while EIA and SIA take human rights into account, it is still not sufficient[908]. The IWGIA observed that human rights are at best at the periphery of EIA and SIA respectively[909]. The IWGIA noted that as opposed to EIA and SIA, HRIA is a methodology for conducting HRDD to 'holistically assess the variety of rights that might be impacted by a project based on both national regulations and appropriate international human rights principles and conventions'[910].

Despite its increasingly widespread use by companies and project-affected people, a major challenge that has become associated with the HRIA process is the limited consultation and participation of relevant stakeholders which tends to erode trust and efficacy of the HRIA process[911]. A second challenge that attends the HRIA process is the limited involvement of the government given its strategic position as the bearer of the greatest obligations under human rights law[912].

Cathal Doyle emphasised the central role of indigenous people in the human rights impact assessment process[913]. Doyle clarified that due to their unique knowledge of the territory, the community's role in the impact assessment process is indispensable considering that they are in the best position to provide key information on the real value of the area and identify the natural resources, as well as historical, cultural and sacred sites which could be affected[914].

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[906] Ibid; see also BSR, 'Conducting an Effective Human Rights Impact Assessment: Guidelines, Steps, and Examples' (2013), p6 <http://www.bsr.org/reports/BSR_Human_Rights_Impact_Assessments.pdf> accessed 12 September 2022.
[907] Ibid.
[908] Kanyinke Sena 'Renewable Energy Projects and the Rights of Marginalised/Indigenous Communities in Africa' (International Working Group for Indigenous Affairs 21) 12 <www.iwgia.org/images/publications/0725_REPORT21.pdf> 12 September 2022.
[909] Ibid.
[910] Ibid.
[911] Ibid.
[912] Ibid.
[913] Cathal Doyle & Jill Cariño "Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector" London: Indigenous Peoples Links (PIPLinks), (Middlesex University School of Law, The Ecumenical Council for Corporate Responsibility, 2013), 21.
[914] Ibid.

Indeed, one of the most compelling grievances expressed by indigenous peoples to extractive industry activities centres on inadequate and manipulative consultation or the complete lack thereof. Therefore, it is critical that the framework for discussions on proposed activities by governments or companies on indigenous peoples' land must be predicated on the relevant provisions of the UNDRIP, particularly the aspect that pertains to consultation, participation and the principle of free, prior and informed consent[915]. Reportedly, the first inkling of a major development on indigenous peoples' land may well be when trucks arrive without any forewarning and temporary housing is set up for the workforce[916]. Further, in instances where consultation is ostensibly carried out, indigenous peoples more often than not allege manipulation or coercion[917]. Indeed, this may be manifested in the form of a business only engaging with a small unrepresentative group while ignoring traditional elders and actual representatives of the people, or threatening communities with force, or even bribing and compromising spokespersons with money and other favours[918].

Painting a picture of how disputes could quickly develop with reference to stakeholder related risks, Ruggie observed that very often, companies have witnessed how adverse environmental impacts including spills from a tailings dam can give rise to significant negative social impacts as well, for example on local community health and livelihoods[919]. According to Ruggie, '[l]ocal communities' reactions to these impacts can quickly escalate from complaints to protests and road blockades, raising the risks of the company or its security providers using heavy-handed tactics that can lead to even more serious impacts, such as injury or even deaths'[920].

Instructively, in the context of the impact of community-investor disputes on businesses, a Study of about 190 projects operated by major international oil companies showed that the time needed for projects to come online has nearly doubled in the last decade, causing a significant

[915] Ibid.
[916] Ibid.
[917] Ibid.
[918] Ibid.
[919] Professor John Ruggie in Davis, Rachel and Daniel M. Franks. "Costs of Company-Community Conflict in the Extractive Sector." (Corporate Social Responsibility Initiative Report No. 66. Cambridge, MA: Harvard Kennedy School, 2014) 6 <https://shiftproject.org/wp-content/uploads/2020/01/Costs_of_Conflict_Davis-Franks.pdf> accessed 12 September 2022.
[920] Ibid.

increase in cost[921]. Further, a subsequent follow-up Study submitted that non-technical risks accounted for nearly half of the total risks faced by such businesses and that stakeholder-related risks constituted the single largest category[922].

The Study also estimated that, over two years, one company may have experienced a US$6.5 billion value erosion from stakeholder-related risks and other non-technical risks, amounting to a double-digit percentage of its annual operating profits[923]. To this extent, there is growing recognition within the extractive sector about the significance of obtaining a 'social licence to operate' for their operations[924].

It is against the backdrop of the challenges identified above that a collaborative HRIA process is probably a possible solution which would assure a more effective and inclusive HRIA process. Essentially, collaborative (HRIA) was referred to as involving bringing project-affected people, a company, and other relevant stakeholders together to jointly design and implement an assessment, with the objectives of improving communication, increasing the information sources that can be drawn upon, and encouraging greater engagement by all participants in the HRIA's findings and recommendations[925].

The intended ultimate result of such an approach is the effective prevention or mitigation of a project's negative human rights impacts[926]. The collaborative HRIA entails a joint process carried out by project-affected people in conjunction with a company, and potentially with the involvement of the host government or other stakeholders, to investigate, measure, and respond to a business project or operation's potential or actual human rights impacts[927]. It involves formal processes to facilitate collective decision-making among participating stakeholders, who together design and conduct the HRIA[928].

[921] Ibid p11.
[922] Ibid
[923] Ibid.
[924] Ibid
[925] Columbia Centre on Sustainable Investment, Danish Institute for Human Rights, and Sciences Po Law School Clinic, A Collaborative Approach to Human Rights Impact Assessments, March 2017. p13 <www.humanrights.dk/sites/humanrights.dk/files/media/migrated/paper_collaborative_approach_to_hrias_2017.pdf> accessed 12 September 2022 p7.
[926] Ibid.
[927] Ibid.
[928] Ibid.

Collaborative HRIA improves on or differs from existing approaches which are typically employed by either a company or project-affected people but characterised by limited or zero interaction among stakeholders[929]. The implication is that in the absence of interaction among stakeholders, the result of HRIA could be prone to suspicion causing them to be ineffective or contentious[930].

Within the context of extractive industry operations as they affect indigenous peoples' rights, this thesis argues that the Free, Prior and Informed Consent (FPIC) of potentially affected indigenous groups along with the social licence to operate ought to be one of the reasonable logical ends to which the HRDD process should aspire. Notably, the FPIC principle[931] is a specific right that pertains to indigenous peoples and is recognised in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[932]. It allows them to give or withhold consent to a project that may affect them or their territories. Once they have given their consent, they can withdraw it at any stage[933]. Furthermore, FPIC enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated. This is also embedded within the universal right to self-determination which is one of the cardinal principles of the United Nations Declaration on Indigenous Peoples' Rights (UNDRIP), which reinforces indigenous peoples' right to self-determination[934].

5.4 Mandatory Human Rights Due Diligence

According to a recent UN Human Rights 'Issue Paper'' by the OHCHR, legislative regimes aimed at encouraging or requiring companies and corporate groups to carry out mandatory human rights due diligence have either been recently introduced or have been announced by several governments particularly in some European Union (EU) and European Economic Area (EEA) member states and also within EU institutions[935]. Indeed, there is already a wave of

[929] Ibid.
[930] Ibid.
[931] See UNDRIP (n5) Articles 10 (2); 11(2); 19; 28 (1), 29(2); 32(2) respectively.
[932] See UNDRIP (n5) Articles 10 (2); 11(2); 19; 28 (1), 29(2); 32(2) respectively; See generally Food and Agricultural Organisation of the United Nations 'Free Prior and Informed Consent An indigenous peoples' right and a good practice for local communities' Manual for Project Practitioners <i6190e.pdf (fao.org)> accessed on 1 September 2022.
[933] Ibid.
[934] See UNDRIP (n5) Article 3.
[935] OHCHR 'UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies' June 2020, p1

responsible business legal requirements across markets across the world, with mandatory human rights due diligence (mHRDD) regimes already in place or in development across a growing number of jurisdictions[936]. The mandatory human rights due diligence regime is an important aspect of the smart mix of measures with potential to play a vital role in fostering business respect for human rights and enabling access to remedy for victims[937].

Answering the question on the prospects and limitations of the proposed EU mandatory environmental and human rights due diligence legislation (mHRDD) in terms of holding corporations to account, Participant 2, highlighted the prospects of an mHRDD in comparison with the proposal for a binding international treaty on business and human rights. Participant 2 argued that '… where there is a lot more promise is on National Human Rights Due Diligence law such as the European Human Rights Due Diligence Law which is also now being conceived of, which is going to be a game changer in this area…'. Further, Participant 2 noted that 'I think that is a lot more promising short-medium term objective. It doesn't mean we should drop the treaty. I think the pressure and the thinking should carry on, but I think it should not be at the expense of the gains we could make nationally and regionally in developing these models.

Responding to the question on the potential of an environmental and human rights due diligence legislation in terms of holding corporations to account, Participant 2 argued that 'I think the main advantage of this is that it places, instead of having to argue in each case that there is a common law duty of care which is fact sensitive, which is what we had to deal with at the firm through the common law, it is a way of automatically putting a statutory duty of care on the corporation and that is of utmost benefit to human rights lawyers who are thinking of how to hold corporations to account'.

According to Participant 2, 'this is because so much of the argument is about whether there is a duty of care and therefore whether there should be jurisdiction. If you get through those two hurdles, automatically then you are getting into a discussion about look this is the human rights abuse, how did you allow this to happen under your watch within your corporate group? Then

<www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf> 1 September 2022.

[936] European Coalition for Corporate Justice 'Corporate due diligence laws and legislative proposals in Europe' March 2022
< Corporate-due-diligence-laws-and-legislative-proposals-in-Europe-March-2022.pdf (corporatejustice.org)> accessed on 1 September 2022

[937] Ibid.

that is a much more straightforward argument for the kind of corporate accountability cases that we do instead of having to every time persuade the court that there is a duty of care in each particular case. So, I am very much in favour'.

Strengthening the case for MHRDD, it is remarkable that in the context of investments, a group of 105 international investors representing US$5 trillion in assets under management called on governments to introduce regulatory measures mandating businesses to undertake human rights due diligence towards addressing risks to people associated with their business activities on an ongoing basis[938].

Stressing the potential of mHRDD to foster corporate accountability, the statement, coordinated by the Investor Alliance for Human Rights, 'makes the 'investor case' for regulatory measures that facilitate corporate accountability for human rights harms, particularly where voluntary corporate measures continue to leave significant gaps in human rights protections[939].

5.4.1 Current Mandatory Due Diligence Laws

A. France's Duty of Vigilance Law 2017

The European Coalition for Corporate Justice (ECCJ) summed up the purpose of the French corporate duty of vigilance law as establishing a legally binding obligation for parent companies to identify and prevent adverse human rights and environmental impacts resulting from their own activities, from activities of companies they control, and from activities of their subcontractors and suppliers, with whom they have an established commercial relationship[940].

Under the French Duty of Vigilance law, eligible companies are required to execute a vigilance plan for large multinational firms carrying out all or part of their activity in France[941]. Remarkably, the scope of the law is restricted to businesses with more than 5,000 employees in France or 10,000 globally (including their subsidiaries)[942]. The law extends to the company's

[938] Investor Alliance for Human Rights 'Investors with US$5 trillion call on governments to institute mandatory human rights due diligence measures for companies' April 21, 2020, <https://investorsforhumanrights.org/news/investor-case-for-mhrdd> last accessed on August 21, 2022.
[939] Investor Alliance for Human Rights 'The Investor Case for Mandatory Human Rights Due Diligence' <https://investorsforhumanrights.org/sites/default/files/attachments/2020-04/The%20Investor%20Case%20for%20mHRDD%20-%20FINAL_3.pdf>, accessed on August 21, 2021.
[940] European Coalition for Corporate Justice 'French Corporate Duty Of Vigilance Law' <https://media.business-humanrights.org/media/documents/files/documents/French_Corporate_Duty_of_Vigilance_Law_FAQ.pdf>.
[941] Ibid.
[942] Ibid Art. L. 225-102-4.-I.

activities, those of its subsidiaries, as well as activities of third parties including contractors and suppliers[943].

One of the main features of the law includes the empowerment of affected people and communities to hold companies to account[944]. The law provides that affected people and communities can seek and obtain a Court order to compel the company to establish, publish and implement a vigilance plan, or account for its absence[945]. The judge can in addition to granting the order impose a fine of up to 10million euros[946]. Further, affected parties can institute a civil action against eligible companies where there has been a violation of the legal obligation to conduct HRDD which gave rise to damages[947]. The judge is empowered to impose a fine of up to 30 million euros, in addition to the compensation[948].

While the enactment of the French Duty of Vigilance Law has been applauded as a significant milestone from a corporate accountability point of view, certain aspects of the law have been criticised as weak links[949]. Given its limited scope, the legislation would reportedly cover around 100 large companies[950], with the implication of excusing smaller companies from accountability and liability for business-related human rights abuses, at least as far as the legislation is concerned.

Further, it has been pointed out that victims would still grapple with the burden of proof to establish the culpability of the affected business enterprise[951]. The implication of this has been described as compounding the problem of lack of access to justice which victims typically suffer and in addition, the imbalance of power between large companies and victims of abuse becomes more pronounced[952]. It is against this background that it may be best for the burden of proof to be reversed within this context. That is, the burden of proof should fall on the affected business to demonstrate through cogent evidence that it has not breached the law.

Importantly, a major shortcoming which allegedly plagues the law is that companies are absolved from liability for negative human rights impacts which result from their activities

[943] Ibid.
[944] Ibid
[945] Ibid.
[946] Ibid.
[947] Ibid.
[948] Ibid.
[949] Ibid.
[950] Ibid.
[951] Ibid.
[952] Ibid.

provided they can demonstrate implementation of an adequate vigilance plan[953]. In essence, the company is not required to ensure positive results on account of putting a vigilance plan in place, but rather to merely establish that it has done what is necessary within its power to avoid damages[954].

The above gaps are significant in the context of indigenous people given that it continues to perpetuate the barriers to access to remedy confronting Indigenous Right Holders. That is, the burden of proof requirement which requires Indigenous Right-Holders to prove the culpability of the business enterprise alleged to have caused the human rights abuse. As noted above, there have been agitations for the reversal of the burden of proof requirements mainly on the ground that for instance, on many occasions, Indigenous Right-holders lack the wherewithal to access the needed proof to establish the culpability of companies involved in the abuse of their rights. As highlighted above, it has been argued that this procedural hurdle has the effect of perpetuating the imbalance of power between victims of investment-related human rights abuses as against powerful multinationals. Indeed, in recognition of this barrier to access to remedy for victims of adverse human rights impacts, Article 7.5 of the proposed binding BHR treaty provides that 'States Parties shall enact or amend laws allowing judges to reverse the burden of proof in appropriate cases to fulfil the victims´ right to access to remedy, where consistent with international law and its domestic constitutional law'. This is discussed in more detail below as part of the review of the proposed BHR treaty.

Similarly, as noted above, the narrow scope of the Duty of Vigilance Law has significant implications for Indigenous Right-Holders. This is because the law might have effectively excluded several businesses from being held accountable for human rights abuses. Such that Indigenous Right-holders would probably have to look beyond the purview of the Duty of Vigilance Law for access to remedy against businesses which are outside the scope of the legislation. At least from the point of the view of the legislation, this provision effectively constrains the opportunity for Indigenous Right-Holders for seeking access to remedy under the legislation.

Significantly, other subject matter-specific mandatory human rights due diligence laws focused on addressing modern slavery and human trafficking risks within the supply chain include the Modern Slavery Act 2015, the German Supply Chain Due Diligence Act, the Dutch Child Labour Due Diligence Law, the California Transparency in Supply Chain Act 2010, the Dodd

[953] Ibid.
[954] Ibid.

Frank Act 2010, and the EU Conflict Minerals Regulation 2017. Meanwhile, a remarkable feature of these due diligence laws is the absence of a comprehensive mechanism for access to remedy for victims of failure to conduct human rights due diligence mandated under the laws.

While indigenous peoples are susceptible to modern slavery and human right trafficking risks in the supply chain, the gaps identified above mean that like other potential victims, indigenous victims may not be able to secure access to remedy for damages which they suffer as a result of the failure by in-scope companies to comply with the mandatory requirements to conduct human rights due diligence under the laws highlighted above.

B. EU Proposal for Corporate Sustainability Due Diligence Directive and access to remedy for Indigenous Right-Holders

Exactly two years after the publication of the British Institute for International Comparative Law (BIICL) led Study on due diligence requirements through the supply chain (BIICL Study)[955], the European Commission released the much-awaited proposal for an EU Corporate Sustainability Due Diligence Directive on February 23, 2022 (Proposed Directive)[956].

The Proposed Directive has been applauded in various quarters. Some scholars have described the release of the Proposed Directive 'as a historic moment for the field of business and human rights, ESG and the strive towards sustainable and responsible business conduct that upholds respect for human rights, decent work and environmental standards throughout the entire global value chain'[957].

Since the adoption of the UNGPs in 2011, there has been substantial unanimity about the responsibility of businesses to respect human rights, but many companies still haven't taken the necessary steps to prevent and mitigate harm[958]. The Proposed Directive introduces mandatory human rights and environmental due diligence obligations at the EU level in the most extensive

[955] British Institute for International and Comparative Law (BIICL) Final Report (n878).
[956] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23.2.2022 COM(2022) 71 final 2022/0051 (COD), Article 2.
[957] Claire Bright and Lise Smit 'The new European Directive on Corporate Sustainability Due Diligence' (British Institute for International and Comparative Law and the Nova School of Law, 23 February 2022), <www.biicl.org/documents/11164_ec_directive_briefing_bright_and_smit_1_march_update.pdf> accessed 20 August 2022.
[958] Alison Berthet & Celine Da Graca Pires 'Corporate Sustainability Due Diligence Directive: Seven Recommendations for Business' BSR, March 17, 2022, <www.bsr.org/en/our-insights/blog-view/corporate-sustainability-due-diligence-directive-seven-recommendations> accessed 24 August 2022.

effort to date[959]. Specifically, the EU Commission sets the expectation that the Proposed Directive would improve access to remedies for those affected by adverse human rights and environmental impacts of corporate behaviour[960]. The Proposed Directive aims to translate the principles laid out in the UNGPs and the OECD Guidelines for Multinational Enterprises into legal requirements for companies[961].

Specifically, Articles 4 to 11 of the Proposed Directive mandates in-scope companies to conduct human rights due diligence consisting of integrating due diligence into their policies, identifying actual or potential adverse impacts, preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent, establishing and maintaining a complaints procedure, monitoring the effectiveness of their due diligence policy and measures, and publicly communicating on due diligence[962].

Article 25 of the Proposed Directive, seeks to impose on company Directors the duty to take into account the consequences of their decisions for sustainability matters, including human rights, environment, local communities and other stakeholders when fulfilling their fiduciary duty[963].

Apart from the Proposed Directive, on April 21, 2021, the EU Commission adopted the proposal for a Corporate Sustainability Reporting Directive (Draft CSRD) which complements the Proposed Directive to foster corporate accountability. The Draft CSRD lists respect for human rights as part of the information that companies within the scope of the Directive must disclose[964].

Further, the EU Commission noted that the 'two initiatives are closely interrelated and will lead to synergies while the Draft CSRD will cover the last step of the due diligence duty, namely the reporting stage, for companies that are also covered by the Draft CSRD'[965].

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[959] Ibid.
[960] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (n956) p3.
[961] Ibid.
[962] Ibid.
[963] Ibid Article 25.
[964] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards Corporate Sustainability Reporting, 2021/0104 (COD).
[965] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (n956) p4.

It is expected that both the Proposed Directive and CSRD would upon legislative approval deeply entrench corporate accountability and set positive precedents for other jurisdictions. Meanwhile, it is noteworthy that the provisions of the Proposed Directive and the Draft CSRD are directed at EU Member States to implement national laws to give effect to the provisions of both directives.

I. Scope of the Proposed Directive

Article 2 sets out the scope of applicability of the Proposed Directive specifying that it shall apply to companies which are formed in accordance with the legislation of a Member State or in accordance with the legislation of a third country, and which fulfil one of the following conditions:

- Large EU companies (500 employees and net worldwide turnover of EUR150m)
- Medium EU companies (250 employees and net worldwide turnover EUR40m) in 'high impact sectors'.
- Large non-EU companies (turnover EUR150m in the EU)
- Medium non-EU companies (turnover EUR40m in the EU) and in a 'high impact sector'[966].

However, the Proposed Directive has been criticised for its narrow scope of applicability which means that only an estimated 13,000 EU companies and 4,000 non-EU companies will be required to comply, translating to about 1% of EU companies[967]. SMEs are therefore effectively excluded from the scope of the Proposed Directive, although the explanatory memorandum to the Proposed Directive admits that SMEs account for 99% of all EU companies.

Meanwhile, the justification for this approach seems to be the projection that SMEs would similarly be impacted by the Proposed Directive on account of their business relationships with medium and large businesses having the obligation to conduct due diligence with respect to their established business relationships[968]. As a result, the expectation is that the human rights due diligence obligations imposed on medium and large companies would ultimately trickle to SMEs that are in an established business relationship with them. This appears to be at variance with the scope of applicability under the UNGPs which the Proposed Directive is essentially

[966] Ibid Article 2.
[967] Ibid p4.
[968] Ibid Articles 7 & 8.

based on. UNGP 14 provides that 'the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure' which can be discharged in part by conducting human rights due diligence[969].

Meanwhile, with respect to the scope of the Proposed Directive, the Danish Institute for Human Rights (DIHR) argued that the scope of the Proposed Directive needs to be expanded for alignment with the scope of the Draft CSRD which extends to large businesses and listed SMEs to ensure regulatory consonance[970]. Further, the DIHR argued that large businesses should be incentivised sufficiently to encourage engagement with SME partners to trickle down human rights due diligence obligations to them[971].

II. Access to remedies under the Proposed Directive

The Proposed Directive provides for three different pathways through which access to remedies could be secured by aggrieved persons. These include (a) the complaints procedure put in place by the business (b) the supervisory authority and (c) through national courts.

- **Company's complaint procedure:** Article 9 of the Proposed Directive stipulates that Member States shall ensure that companies provide a complaints procedure which enables specified persons to submit complaints to them where they have legitimate concerns regarding actual or potential adverse human rights impacts and adverse environmental impacts with respect to their own operations, the operations of their subsidiaries and their value chains[972]. The specified persons who can submit a complaint are identified in Article 9 (2) as (a) persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact, (b) trade unions and other workers' representatives representing individuals working in the value chain concerned (c) civil society organisations active in the areas related to the value chain concerned[973].

[969] Guiding Principles on Business and Human Rights (n12) UNGP 14.
[970] Gabrielle Holly and Signe Andreasen Lysgaard 'Legislating for Impact Analysis of the Proposed EU Corporate Sustainability Due Diligence Directive' The Danish Institute for Human Rights (2022) p11 <https://www.humanrights.dk/publications/legislating-impact-analysis-proposed-eu-corporate-sustainability-due-diligence> accessed 1 November 2022.
[971] Ibid.
[972] Ibid Article 9.
[973] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (n956) Article 9(2).

- **Supervisory authority:** According to Article 17, Supervisory Authorities shall be designated by the Member State to supervise compliance with national laws implementing obligations on businesses to conduct due diligence and remediate adverse human rights impacts resulting from their operations, those of their subsidiaries or those caused entities within their value chain[974].

  Article 19 of the Proposed Directive provides that Member States shall ensure that natural and legal persons are entitled to submit substantiated concerns to the supervisory authority. Substantiated concern is defined as the belief (based on objective circumstances) that a company is failing to comply with the national due diligence laws adopted by the relevant member State pursuant to the Proposed Directive[975].

  According to Article 18, Supervisory Authorities shall be granted adequate powers and resources by the Member State to carry out the tasks assigned to them under the Proposed Directive, including the power to request information and carry out investigations related to compliance with the obligations set out in the Proposed Directive[976].

  Article 18(5) stipulates that Supervisory Authorities shall at least have the power to (a) order the cessation of infringements of the relevant national law enacted pursuant to the Proposed Directive, to order the affected business to abstain from any repetition of the relevant conduct and, where appropriate, remedial action proportionate to the infringement and necessary to bring it to an end; (b) to impose pecuniary sanctions (c) to adopt interim measures to avoid the risk of severe and irreparable harm[977].

  Meanwhile, Article 18(7) provides that a natural or a legal person shall have the right to an effective judicial remedy against a legally binding decision by a supervisory authority concerning them[978]. Similarly, Article 19 (5) provides that Member States shall ensure that persons submitting substantiated concern shall have access to a court or other

[974] Ibid Article 17.
[975] Ibid Article 19.
[976] Ibid.
[977] Ibid.
[978] Ibid.

independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the supervisory authority[979].

- **Civil liability mechanism:** According to Article 22, Member States shall ensure that companies are liable for damages if (a) they failed to comply with the obligations laid down in Article 7 (preventing potential adverse impacts) and Article 8 (bringing actual adverse impacts to an end) and; (b) as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 occurred and led to damage[980].

  However, Article 22 (2) provides that a company may avoid liability for damages where it has taken steps to develop and implement a prevention action plan, secured contractual assurances from entities with whom it has an established business relationship to comply with the preventive action plan, put in place necessary investments and infrastructures to implement the prevention action plan, and collaborated with other entities to bring the adverse impact to an end[981].
  It is noteworthy that unlike the provisions pertaining to supervisory authorities under Articles 17, 18 and 19, the provisions of Article 22 are non-specific in terms of the venue where the civil liability claim could be brought, the jurisdiction of the Court hearing the civil liability claim and the type of sanctions that could be imposed, and the right of access to a superior court competent to review the procedural and substantive legality of the decisions[982].

  In any case, Article 22(4) contains the condition that the civil liability rules under the Directive shall be without prejudice to Union or national rules on civil liability related to adverse human rights impacts or to adverse environmental impacts that provide for liability in situations not covered by or providing for stricter liability than the Directive[983].

[979] Ibid.
[980] Ibid.
[981] Ibid.
[982] Ibid.
[983] Ibid.

While this condition is not sufficiently clear, it seems to imply that an aggrieved party can seek remedy under other national civil liability regimes in respect of adverse human rights impacts or environmental impacts, providing liability in situations not covered by the Proposed Directive or providing for stricter liability than the Proposed Directive. However, it is not clear if the respondent party can be sued under two different civil liability rules in relation to the same claim without amounting to double jeopardy or being caught by the res judicata rule.

B (I) Prospect of access to effective remedies for Indigenous Right Holders under the Proposed Directive

Essentially, the material scope of the Proposed Directive is of particular relevance to Indigenous Right Holders. The material scope entails covered human rights as set out in Annex A of the Proposed Directive. The rights which have significant bearing for Indigenous Right Holders include (1) the right to dispose of a land's natural resources and to not be deprived of means of subsistence (2) the right to life and security (3) prohibition of causing any measurable environmental degradation (4) prohibition to unlawfully evict or take land, forests and waters (5) indigenous peoples' right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired[984].

As far as Indigenous Right Holders are concerned, Articles 7 (Preventing potential adverse impacts) & 8 (Bringing actual adverse impacts to an end) of the Proposed Directive imply that Member States must ensure through legislation or other administrative means that businesses have the obligations to prevent potential adverse impacts or infringement of the rights highlighted above as they affect indigenous peoples[985]. Further, Member States are required under the Proposed Directive to ensure through legislation or other administrative means that businesses have the obligation to bring actual adverse impacts or infringement of the rights highlighted above to an end[986].

In the above connection, by a combined reading of Articles 9, 17, 18, 19 and 22, the Proposed Directive provides for access to remedy for Indigenous Right Holders where adverse human rights impacts have not been prevented by the business or the business has failed to bring an

[984] See Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence (956).
[985] Ibid Articles 7 & 8.
[986] Ibid.

actual adverse impact to an end, and either the failure to prevent or to bring an adverse impact to an end have led to damages[987]. As noted above, Indigenous Right Holders may pursue remedy through the company's complaint procedure, the Supervisory Authority and through civil liability claims before a national Court.

The above applies to EU Member States. As noted earlier in preceding chapters, most multinational enterprises responsible for adverse human rights impacts are domiciled in the Global North including some member States of the EU. This raises the question of parent company liability which arises when subsidiaries of MNEs operating abroad cause or contribute to adverse human rights impacts in the host country. This has been quite contentious and was addressed in the decided cases discussed in chapter four and highlighted below.

B (II) Parent company liability

The main question is whether the Proposed Directive overrides procedural barriers which make it difficult for rightsholders in the host country of an investment to institute proceedings against a parent company in the home country of the investment in respect of adverse human rights impacts caused or contributed to by its overseas subsidiary. The controversial question of parent company liability for adverse human rights impacts caused by its subsidiary was variously addressed in the cases of AAA v Unilever PLC[988], Vedanta Resources PLC v Lungowe[989], and Okpabi v Royal Dutch Shell Plc[990].

For instance, in the Okpabi v Royal Dutch Shell Plc case, the UK Supreme Court held that a parent company may incur liability if it holds itself out as exercising supervision and control of its subsidiaries, even if in reality, it did not do so[991]. Essentially, the Supreme Court held that a parent company is more likely to be exerting operational control when it imposes internal corporate policies and procedures on its subsidiaries[992].

[987] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (n956).
[988] AAA & Ors v Unilever plc & Unilever Tea Kenya Limited [2018] EWCA Civ 1532.
[989] Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents) [2019] UKSC 20.
[990] Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents) [2021] UKSC 3.
[991] Ibid para. 148.
[992] Ibid.

By natural consequence, a parent company may not be held liable for adverse human rights impacts caused by its subsidiary unless the parent company has exerted operational control on the subsidiary. While this decision by the UK Supreme Court was a step forward in addressing the controversy on parent company liability, it probably provided an opportunity for parent companies to avoid liability for harmful activities of subsidiaries by refraining from actions capable of demonstrating control over the subsidiary. Indeed, the Proposed Directive might have potentially addressed the controversies surrounding holding parent companies liable for adverse human rights impacts caused or contributed to by their overseas subsidiaries. By the combined effect of the judgments by the UK Supreme Court in the cases involving Unilever, Vedanta, and the Okpabi cases discussed above, a parent company may not be held liable for adverse human rights impacts caused by its subsidiary unless the parent company has exerted operational control on the subsidiary.

While the said judgments by the UK Supreme Court represent a step forward in addressing the controversy on parent company liability, it probably provided an opportunity for parent companies to avoid liability for harmful activities of subsidiaries by refraining from actions capable of demonstrating control over the subsidiary.

However, the Proposed Directive might have addressed this challenge by requiring Member States to ensure that companies exercise the necessary control over their subsidiaries with a view to putting in place a due diligence policy which would contain among others a code of conduct describing rules and principles to be followed by the company's employees and subsidiaries[993]. Further, Member States are required to make sure that companies take appropriate measures to identify potential adverse human rights and environmental impacts in their operations and their subsidiaries and established business relationships in accordance with Article 6[994].

The Proposed Directive similarly requires Member States to ensure that companies take appropriate steps to prevent adverse human rights and environmental impacts identified pursuant to Article 6[995]. In the same vein, Member States are obligated to make sure that

[993] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (n956) Articles 1 & 6.
[994] Ibid Article 6.
[995] Ibid Article 7(1).

companies take steps to end actual adverse impacts that have been, or should have been, identified pursuant to Article 6[996].

By virtue of the above, the Proposed Directive will effectively make it obligatory for companies to exercise control over their subsidiaries towards identifying, preventing, mitigating and where appropriate remediate adverse human rights and environmental impacts arising from their own operations or that of their subsidiaries. By virtue of that control, in-scope parent companies arguably have a duty to care to rightsholders adversely impacted by the operations of their subsidiaries.

In light of the above, the Proposed Directive will effectively remove the barriers to hold the parent company liable for adverse human rights and environmental impacts which they cause or are caused by their subsidiaries. This is bound to have positive implications for Indigenous Right Holders seeking to hold parent companies liable for adverse human rights impacts caused or contributed to by their overseas subsidiaries. As a result, Indigenous Right Holders would potentially be able to overcome procedural barriers (such as the limitations of the parent company liability principle discussed above) to holding parent companies to account for adverse human rights impacts by their overseas subsidiaries.

As highlighted above, the Proposed Directive would potentially be a strong legal framework that is conducive to access to effective remedy for Indigenous Right Holders. As discussed above, the material scope of the Proposed Directive is of particular relevance to Indigenous Right Holders. The material scope entails covered human rights as set out in Annex A of the Proposed Directive. The rights which have significant bearing for Indigenous Right Holders include (1) the right to dispose of a land's natural resources and to not be deprived of means of subsistence (2) the right to life and security (3) prohibition of causing any measurable environmental degradation (4) prohibition to unlawfully evict or take land, forests and waters (5) indigenous peoples' right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired[997].

[996] Ibid Article 8 (1).
[997] See Annex A of the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (n956).

As mentioned above, the Proposed Directive provides for three possible ways by which right holders can hold companies including parent companies to account through the provisions of Articles 9, 17, 18, 19 and 22 respectively. That is, through the (i) company's complaints mechanism, (ii) the Supervisory Authority administered by the State, (iii) and the option of bringing civil liability claim against the affected business. In connection with the option of a civil liability claim, Article 22 provides that Member States shall ensure that companies are liable for damages if (a) they fail to comply with the obligations laid down in Article 7 (preventing potential adverse impacts) and Article 8 (bringing actual adverse impacts to an end) and; (b) as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 occurred and led to damage.

However, an impediment to the effectiveness of the Proposed Directive in terms of access to remedy, including from an Indigenous Right Holders perspective, is perhaps its narrow scope of applicability which means that only an estimated 13,000 EU companies and 4,000 non-EU companies will be required to comply, translating to about 1% of EU companies[998]. SMEs are therefore effectively excluded from the scope of the Proposed Directive, although the explanatory memorandum to the Proposed Directive admits that SMEs account for 99% of all EU companies.

This is contrary to the expectation under the UNGP 14 which provides that 'the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure' which can be discharged in part by conducting human rights due diligence[999]. It is therefore important that the scope of applicability of the Proposed Directive should be reconsidered to ensure alignment with expectations under the UNGPs.

5.5 Binding Business and Human Rights Treaty and access to remedies for Indigenous Right Holders

At its 26th session, on 26 June 2014, the UN Human Rights Council (UNHRC) adopted resolution 26/9 'to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall

[998] See Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (n956).
[999] See Guiding Principles on Business and Human Rights (n12) UNGP 14.

be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'[1000].

The treaty process was initiated by the UNHRC following a resolution by Ecuador and other states that were exasperated by what they considered to be slow and limited international progress on business and human rights[1001]. Expectedly, there are different arguments for and against the proposition for a binding BHR treaty. The issue of asymmetry which reportedly characterises IIL has been cited as one of the bases for a binding treaty on business and human rights (Proposed BHR Treaty). In particular, it was argued that while multinational enterprises (MNEs) enjoy substantial rights secured through trade and investment agreements, their human rights obligations are less clear and more difficult to enforce[1002].

Further, it is contended that the power wielded by MNEs in today's globalised world is such that domestic law cannot reasonably be expected to impose human rights obligations and to hold the MNEs accountable for abuses[1003]. In particular, it is extremely difficult to hold those in the highest position of the command of supply chains accountable[1004]. Arguably, due to fear of losing foreign investment, host States of MNEs tend to lack the capacity to act against them[1005]. Similarly, home States of MNEs are not keen, to avoid placing them at a competitive disadvantage and therefore refuse to take action against errant MNEs [1006].

Meanwhile, Ruggie's UNGPs being the first UN initiative on business and human rights that came to fruition has been the subject of polarised debates. In a concept note marking the 10th anniversary of the UNGPs, the UNGPs was described as 'a major step forward in efforts to prevent and address business-related human rights abuse'[1007]. The concept note clarified that

[1000] Resolution adopted by the UN Human Rights Council '26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights A/HRC/RES/26/9 14 July 2014 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement> accessed 15 September 2022.
[1001] Sara McBrearty 'The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity' (2016) 57 Spring Online Symposium, <https://harvardilj.org/wp content/uploads/sites/15/McBrearty_0615.pdf> accessed 15 September 2022.
[1002] Ionel Zamfir 'Towards a binding international treaty on business and human rights' (European Parliamentary Research Service, April 2018), p5 <www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI(2018)620229_EN.pdf> accessed 15 September 2022.
[1003] Ibid.
[1004] Ibid.
[1005] Ibid.
[1006] Ibid.
[1007] UN Guiding Principles on Business and Human Rights at 10 "Business and human rights: towards a decade of global implementation" Concept Note, United Nations Human Rights Special Procedures, June 2021, available at <www.ohchr.org/Documents/Issues/Business/UNGPsBHRnext10/CN.pdf> accessed 15 September 2022.

the UNGPs 'provide a global authoritative framework for State duties and business responsibilities to achieve the UNGPs' vision of 'tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.'[1008]

However, one of the major criticisms of the UNGP derives from the tendency to equate them to voluntary norms similar to the widespread voluntary corporate codes and standards published or subscribed to by corporations[1009]. This tendency is informed by the belief that soft law and voluntarism are ineffectual in terms of changing corporate behaviour hence the advocacy for a binding treaty to address the perceived weaknesses of the UNGPs which perception Juana Kweitel described as misguided[1010].

Juana Kweitel however observed that while the UNGPs cannot be rightly regarded as mere voluntary standards, the framework lacks a consistent mechanism for enforcement, which development explains the resurgence of calls for a binding treaty by civil society organisations[1011]. Addressing the polarised debates about the interplay between the UNGPs and the proposed treaty, the view was widely endorsed at the Fourth Session of the UN Working Group in 2015 that the Guiding Principles and the treaty process should be complementary[1012]. It was noted that 'the treaty process should not undermine, but rather build upon, the implementation of the Guiding Principles and the "United Nations 'Protect, Respect and Remedy' framework"[1013]. It was further noted that the treaty process presents 'an opportunity to clarify issues, such as the principle of parent company liability, mandatory human rights due diligence requirements, and the steps that States should take to regulate the extraterritorial activities of businesses domiciled inside their jurisdiction'[1014].

[1008] UN Guiding Principles on Business and Human Rights at 10 "Business and human rights: towards a decade of global implementation" Concept Note, United Nations Human Rights Special Procedures, June 2021, <www.ohchr.org/Documents/Issues/Business/UNGPsBHRnext10/CN.pdf> accessed 15 September 2022.
[1009] Juana Kweitel 'Regulatory Environment on Business and Human Rights: Paths at the International Level and Ideas about the Roles for Civil Society Groups' in "Business and Human Rights- Beyond the End of the Beginning" César Rodriguez-Garavito (ed) (Cambridge University Press 2017) p160 available at <www-cambridge-org.uea.idm.oclc.org/core/books/business-and-humanrights/1F93438D6219D4D14501E1631C370F4A> accessed 21 November 2021.
[1010] Ibid.
[1011] Ibid p161.
[1012] Fourth session of the Forum on Business and Human Rights: summary of discussions, UN Doc: A/HRC/FBHR/2015/2, para 38, <https://undocs.org/A/HRC/FBHR/2015/2> accessed 15 September 2022.
[1013] Ibid.
[1014] Ibid.

5.6 The Proposed BHR Treaty and access to remedy

In a joint statement on the potential of the Proposed BHR Treaty to address the issue of access to remedy for corporate-related human rights abuses, the European Coalition for Corporate Justice et al emphasised that remedy and accountability for human rights abuses should be a key focus of the proposed treaty[1015]. It was argued that the Proposed BHR Treaty represents an opportunity to enhance prevention, enforcement, and access to remedy for corporate-related human rights abuses[1016]. Importantly, the Human Rights Watch argued that the proposed treaty should also be used to clarify the subordination of investment treaty provisions to human rights obligations[1017].

With particular reference to the access to remedy aspect of the UNGPs, there has been growing discontent regarding its implementation by States and corporations. The International Federation for Human Rights (FIDH) criticised the UNGPs for what it described as a 'weak and ambiguous interpretation of the right to an effective remedy, and for focusing too much on non-judicial remedies, falling short of providing strong recommendations to bring justice and reparations to victims'[1018].

In particular, Surya doubted the 'manufactured consensus' around the UNGPs which he described as a fallout of the exclusion of the views of victims of human rights violations[1019]. Surya argued that it is concerning that Ruggie denied victims of corporate human rights violations an opportunity to raise their concerns directly through the failure or negligence to engage directly with the victims[1020].

In a publication focused on how a binding BHR treaty could improve access to remedy for victims, Blackburn made seven major recommendations on how the proposed treaty can enhance access to remedy for victims. In broad terms, the recommendations include 'using the Treaty (i) to make it easier to overcome jurisdiction barriers; (ii) to remove legal barriers to

[1015] European Coalition for Corporate Justice; International Corporate Accountability Roundtable; Human Rights Watch, 'The Potential of a Binding Treaty on Business and Human Rights to Address Access to Remedy for Corporate-Related Human Rights Abuses', (The Human Right Watch, September 26, 2017, <www.hrw.org/sites/default/files/news_attachments/icar_eccj_hrw_treaty_letter.pdf> accessed 15 September 2022.
[1016] Ibid.
[1017] Ibid.
[1018] V. V. Der Plancke et al., Corporate Accountability for Human Rights Abuses – A Guide for Victims and NGOs on Recourse Mechanisms, 3rd edn. (Worldwide Movement for Human Rights, 2016), 29.
[1019] S. Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and Language Employed by the Guiding Principles' in S. Deva and D. Bilchitz (eds.), Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? (Cambridge University Press, 2013), 83.
[1020] Ibid p84.

corporate liability and to place upon corporations a broad duty of care; (iii) to promote convergence of criminal law around basic modern approaches to corporate liability; (iv) to improve corporate responsibility by giving binding legal force to the due diligence framework from the UNGPs; (v) Use the Treaty to affirm and extend protection for human rights defenders; (vi) Use the Treaty to improve access to courts; (vii) Use the Treaty to improve the effectiveness of State enforcement'[1021].

In a similar breath, the European Coalition for Corporate Justice (ECCJ) et al recommended that the treaty should prescribe measures to ensure that rules on jurisdiction and forum non-conveniens cannot be used to defeat remedies for individuals and communities where a corporation is subject to jurisdiction in multiple legal systems[1022].

The ECCJ argued that the treaty should ensure the corporate veil and the notion of corporate "separateness" are not used to insulate corporations from liability for the harms caused by their subsidiaries[1023]. Acknowledging that the nature of modern business activities and global value chains raise significant challenges related to the promotion and protection of human rights, the ECCJ et al proposed solutions to these problems[1024]. They argued that this can only be achieved through collaboration across jurisdictions, making an internationally binding treaty on business and human rights an ideal medium to address issues of accessing effective remedy for cross-border corporate-related human rights abuses''[1025].

The Open-Ended Intergovernmental Working Group (OEIWG) on Transnational Corporations and Other Business Enterprises for Human Rights, has so far produced three drafts of the proposed binding BHR treaty[1026]. The 3rd revised draft published in August 2021 is the latest of

[1021] Daniel Blackburn 'Removing Barriers to Justice - How a treaty on business and human rights could improve access to remedy for victims' (International Centre for Trade Union Rights (ICTUR), 2017) 70-76.
[1022] Text of Recommendation to the Government of Ecuador and the Chair of the OpenEnded Intergovernmental Working Group (OEIWG) on Transnational Corporations and Other Business Enterprises with Respect to Human Rights by the European Coalition for Corporate Justice; International Corporate Accountability Roundtable; Human Rights Watch 'The Potential of a Binding Treaty on Business and Human Rights to Address Access to Remedy for Corporate-Related Human Rights Abuses', September 26, 2017.
[1023] Ibid.
[1024] Ibid.
[1025] Ibid.
[1026] See the (Zero Draft) Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, 16.7.2018, <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> accessed 15 September 2022; See (Revised draft) Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, 16.7.2019, <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> accessed 15 September 2022; See (2nd Revised Draft) Legally Binding Instrument to Regulate, in International Human

the drafts so far released to the public for input and comments[1027]. The 3rd revised draft purports to be an improvement on the three earlier drafts pursuant to comments and recommendations received in relation to the two earlier drafts[1028].

Article 2 of the 3rd draft sets out the purpose of the proposed legally binding treaty in five (5) paragraphs which among others includes ensuring 'access to justice and effective, adequate and timely remedy for victims of human rights abuses in the context of business activities'[1029]. Remarkably, the 3rd draft seems to acknowledge the circumstances of indigenous peoples and certain peculiar rights in international law which are unique to them. For instance, Article 6.4(c) provides for consultation with indigenous peoples in relation to business activities that would potentially impact their rights, based on the FPIC principle[1030]. Further, the preamble of the 3rd draft recognised the otherwise non-binding United Nations Declaration on the Rights of Indigenous People as being part of the internationally agreed human rights Declarations[1031].

Importantly, the preamble of the 3rd draft affirmed the distinctive and disproportionate impact of business-related human rights abuses on indigenous peoples among others, as well as the need for a business and human rights perspective to take cognisance of their specific circumstances and vulnerabilities and the structural obstacles for obtaining remedies for them[1032].

With respect to the financial barriers to access to remedies, the 3rd draft provides for an international fund for victims funded by State parties, with the aim of providing legal and financial aid to victims, in recognition of the additional obstacles that confront indigenous peoples among others in seeking access to remedies[1033]. Apart from special recognition of

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Rights Law, the Activities of Transnational Corporations and Other Business Enterprises 06.08.2020, <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf> accessed 15 September 2022.

[1027] See the (3rd Revised Draft) Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, 17.08.2021, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> accessed 15 September 2022.

[1028] See UNHRC website 'Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' <www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx> accessed 15 September 2022.

[1029] 3rd Revised draft, (n991), Article 2.1 (d).

[1030] 3rd Revised Draft (n991) Article 6.4(c).

[1031] See paragraph 3 of the Preamble to the 3rd Revised Draft (n1027).

[1032] Paragraph 13 of the Preamble to 3rd Revised Draft (n1027).

[1033] Ibid Article 15.7.

indigenous peoples along with other vulnerable categories of peoples, the 3rd draft, largely in keeping with one of its stated purposes, attempted to address well-documented obstacles to access to remedies.

The issue of forum non-conveniens often exploited by MNEs to escape liability for human rights abuses of a transnational character was addressed in Article 7.3(d)[1034]. Article 7.5 purports to reverse the burden of proof in appropriate cases to fulfil the victims´ right to access to remedy, however with the condition that such appropriate cases must be consistent with international law and domestic constitutional law[1035]. Article 7.3 provides for adequate and effective legal assistance by the State to victims throughout the legal process[1036]. Further, Article 7.6 provides for prompt enforcement of the remedies for human rights abuses in accordance with domestic and international legal obligations[1037].

Essentially, the 3rd draft went to considerable length to feature and attempt to tackle barriers to access to remedies. However, it is concerning that the 3rd draft appears to place all the obligations for the fulfilment of the right to access to remedies on State parties[1038]. Indeed, the 3rd draft seems to have paid lip service to the widely endorsed stance at the fourth session of the UN Working Group on Business and Human Rights that 'the treaty process should not undermine, but rather build upon, the implementation of the Guiding Principles and the "United Nations 'Protect, Respect and Remedy framework. Despite the foregoing, it is noteworthy that the 3rd draft only made a passing reference to the UNGPs on a single occasion, that is in its preamble[1039].

Further, in what appears to be a departure from the letter and spirit of the UNGPs, the 3rd draft failed to stipulate any direct obligations for businesses or non-state actors for the fulfilment of the right to access to remedies as comprehensively set out in the UNGPs. As against the provisions of the 3rd draft, the UNGPs stipulated a direct responsibility on businesses with respect to access to remedies. GP 22 provides that where business enterprises identify that they

[1034] Article 7.3(d) of the 3rd Revised Draft (n1027).
[1035] Article 7.5 of the 3rd Revised Draft (n1027).
[1036] Ibid.
[1037] Ibid.
[1038] See for instance the entire provisions of Article 7 of the 3rd Revised Draft (n1027) which is focused on State obligations solely.
[1039] See paragraph 16 of the Preamble to the 3rd Revised Draft (n1027).

have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes[1040].

The responsibility for ensuring that human rights due diligence is conducted by businesses was again placed on State parties[1041], also in a manner that is at variance with the provisions of the UNGPs which first introduced the Human Rights Due Diligence. Specifically, GP 15 provides that 'in order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: … (b) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute'[1042].

Article 6.2 of the 3rd Revised Draft seems to amount to an erosion of the direct responsibility of businesses to respect human rights as explicitly set out under the second pillar of the UNGPs, that is from Articles 11-24 of the UNGP[1043]. In particular, Article 6.2 instead places the obligations solely on States Parties to '…take appropriate legal and policy measures to ensure that business enterprises, including transnational corporations and other business enterprises that undertake activities of a transnational character within their territorial jurisdiction, or otherwise under their control, respect internationally recognized human rights and prevent and mitigate human rights abuses throughout their business activities and relationships'[1044].

In light of the above, it would then seem doubtful that the 3rd Revised Draft is aimed at producing a binding instrument to regulate the activities of MNEs and other business enterprises as the title suggests. Rather, it appears that in reality, the 3rd Revised Draft was designed to regulate State Parties, invariably affirming the position that business enterprises are not subject to international law and do not bear any direct obligation to respect human rights.

While it is conceded that State actors have greater responsibility for protecting human rights and providing access to remedies in their domains, the concerns that gave rise to efforts to put in place a binding BHR treaty were such that required stipulating binding human rights obligations for business enterprises at the international level. While the UNGPs might have arguably moved international law closer to that objective, the 3rd Draft seems to symbolise

[1040] Guiding Principles on Business and Human Rights (n12) UNGP 22.
[1041] Article 6.3 of the 3rd Revised Draft (n1027).
[1042] Guiding Principles on Business and Human Rights (n12) UNGP 15.
[1043] Articles 11-24 to the 3rd Revised Draft (n1027).
[1044] Article 6.2 to the 3rd Revised Draft (1027).

backward steps away from the objective of creating direct binding obligations for business enterprises.

Under the terms of the 3rd draft, it would be seem practically challenging for victims to hold business enterprises to account for transnational human rights abuses. Generally, it does not appear clear how the 3rd draft enhances access to remedies in view of the serious emphasis on state-based judicial and non-judicial grievance mechanisms almost to the exclusion of non-state-based grievance mechanisms. Specifically, Article 4 of the 3rd Revised Draft which sets out the rights of victims provides that victims shall 'be guaranteed the right to submit claims, including by a representative or through class action in appropriate cases, to courts and non-judicial grievance mechanisms of the States Parties[1045]. It probably would have been more effectual if the Proposed BHR Treaty lives up to its original design and aligns with the UNGPs by imposing a direct obligation on businesses to respect human rights and remediate adverse human rights which they caused or contributed to. To enforce these obligations, the Proposed BHR Treaty could have imposed on State parties the obligation to create strong judicial systems that guarantees access to effective remedy for victims of the businesses' failure to comply with their obligations to respect human rights as provided for under the UNGP 15.

Meanwhile, it remains unclear how victims of human rights abuses can enforce the obligation of State parties to provide access to remedy where the relevant State is in breach. It seems doubtful that the reporting requirements imposed on State parties under Article 15 would be effective in securing the fulfilment of their obligations.

Specifically, Article 15.2 provides that 'States Parties shall submit to the Committee, through the Secretary General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this (Legally Binding Instrument), within one year after the entry into force of the (Legally Binding Instrument) for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request[1046]. While it is conceded that the reporting requirement is laudable as it could potentially instil a sense of accountability, however, the reporting requirement as a means of enforcement alone may not be sufficient. The proposed treaty ought to do more by enabling victims to hold State parties to account and to compel the fulfilment of their obligations to secure access to remedy, among others.

[1045] See Article 4.2(d) to the 3rd Revised Draft (n1027). See also Article 9.1 to the 3rd Revised Draft (n1027).
[1046] Article 15.2 to the 3rd Revised Draft (n1027).

Participant 2 was asked questions on his views about the efforts at the international level for binding the BHR treaty from the standpoint of an international human rights practitioner with extensive experience in securing access to remedies for vulnerable communities against MNEs. In his response, Participant 2 remarked that the ongoing work towards a binding BHR treaty '…is a very noble effort people are making and a lot of very interesting thinking and energy going into it. I think it is unlikely to see fruits in the short term, doesn't mean people should not be trying to push it in the long term.

Notwithstanding the gaps highlighted above, the 3rd Draft is an indication that considerable progress is being recorded in the corporate accountability sphere, but the access to remedy dimension of the 3rd draft requires greater alignment with pillar III of the UNGP. In the final analysis, the transparency and public participation that the treaty process allows is a welcome development and would hopefully enable well-meaning contributions including those set out in this chapter in producing a binding BHR treaty that truly fulfils the victims' rights to remedy.

Meanwhile, with reference to Indigenous Right Holders, the 3rd revised draft of the Proposed BHR Treaty acknowledged Indigenous Right Holders as belonging to the category of vulnerable individuals and groups at heightened risk of human rights violations[1047]. Further, the 3rd revised draft in its preamble acknowledged the distinctive and disproportionate impact of business-related human rights abuses on specified vulnerable individuals and groups including indigenous peoples as well as the structural obstacles they encounter in their efforts to obtain remedies[1048].

As such, States are required under the 3rd revised draft to give special attention to women, children, persons with disabilities, indigenous peoples, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas[1049]. Specifically, Article 7.1. of the 3rd Revised Draft mandates States to "overcome the specific obstacles which women, vulnerable and marginalised people and groups face" in accessing courts, non-judicial mechanisms and remedies[1050].

With respect to the question of parent company liability, Article 7.3 (d) provides that States Parties shall provide adequate and effective legal assistance to victims of human rights abuses throughout the legal process, including by removing legal obstacles, including the doctrine of

[1047] 3rd Revised draft, (n1027) pp13.
[1048] Ibid.
[1049] Ibid Article 16.4.
[1050] Ibid Article 7.1.

forum non conveniens, to initiate proceedings in the courts of another State Party in appropriate cases of human rights abuses resulting from business activities of a transnational character.

Generally, Article 7 of the 3rd Revised draft which is focused on access to remedy aims to address most of the barriers that vulnerable and marginalised peoples such as Indigenous Right Holders face in their search for a remedy. Notably, Article 7.5 sought to make stipulations about the reversal of burden of proof providing that 'States Parties shall enact or amend laws allowing judges to reverse the burden of proof in appropriate cases to fulfil the victims´ right to access to remedy, where consistent with international law and its domestic constitutional law'. However, the qualification that reversal of the burden of proof would need to be consistent with international law and domestic constitutional law creates a bottleneck which may potentially undermine the effectiveness of Article 7.5.

Unless the issue of burden of proof is reversed, this could be a serious limitation for Indigenous Right Holders given their rather impecunious status and the power imbalance which often characterises their attempts to hold corporations to account. Indeed, as mentioned above, there have been calls for the reversal of the burden of proof under various BHR mechanisms including the French Duty of Vigilance Law and the Proposed Directive discussed above.

Traditionally, the responsibility of proving an allegation (burden of proof) lies with the party making a claim. Where the burden is reversed, the respondent company would instead have to demonstrate it has not caused harm[1051]. The justification adduced to support the calls for reversal of the burden of proof includes the recognition that individuals and communities who have suffered adverse human rights impacts more often than not lack access to information, funds or social capital to obtain the kind of evidence required in legal proceedings[1052].

As mentioned above, these constraints are of particular significance for Indigenous Right Holders among others belonging to the category of vulnerable groups[1053]. Therefore, reversing the burden of proof is a critical precondition to level the playing field and correct the power imbalance between affected communities and businesses, and fulfilling victims' access to justice and remedies[1054].

[1051] Maysa Zorob 'The road to corporate accountability: UN business and human rights treaty under scrutiny' (Business & Human Rights Resource Centre, 22 October 2021).
[1052] Ibid.
[1053] Ibid.
[1054] Ibid.

In light of the above, while the Proposed BHR treaty holds considerable prospects as a potentially effective legal framework to provide access to remedy for Indigenous Rights Holders, it would seem that there are limitations which may hinder its effectiveness as highlighted above. In comparison with the Proposed Directive, it seems that the Proposed BHR treaty is not affected by concerns regarding the narrow scope of the Proposed Directive, which is a welcome development. However, it appears that the Proposed Directive has a better chance of coming to fruition given the seeming acceptability across various segments including businesses and investors. The Proposed Directive also provides for a more comprehensive access to remedy mechanism which includes three options cutting across non-judicial and judicial grievance mechanisms respectively.

5.7 Business and Human Rights Arbitration

As highlighted above, a lot of efforts have over time been devoted to the search for access to justice for victims of business-related human rights abuse, one of the most recent of such efforts is the recently launched Hague Rules on Business and Human Rights Arbitration (the Hague Rules). As already discussed in chapter three, the introductory note to the Hague Rules on Business and Human Rights Arbitration clarified the purpose of the Hague Rules as including the provision of a set of procedures for the arbitration of disputes related to the impact of business activities on human rights[1055]. The said purpose was similarly confirmed in paragraph 1 of the preamble to the Rules[1056].

Further reinforcing the focus of the Hague Rules on human rights impacts of business activities, paragraph 2 of the preamble noted with specific reference to the third pillar of the UNGPs that 'arbitration under the Rules can provide: (a) for the possibility of a remedy for those affected by the human rights impacts of business activities, as outlined in Pillar III of the United Nations Guiding Principles on Business and Human Rights (the "UN Guiding Principles"), serving as a grievance mechanism consistent with Principle 31 of the UN Guiding Principles; and (b) businesses with a mechanism for addressing adverse human rights impacts with which they are involved, as outlined in Pillar II and Principles 11 and 13 of the UNGPs'[1057]. Indeed, the commentary to the preamble clarified the intention behind the Rules as being to provide both a

[1055] The Hague Rules on Business and Human Rights Arbitration, December 2019, Introductory Note, p3. <www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf> accessed 2 August 2020.
[1056] Ibid Preamble to the Hague Rules p13.
[1057] Ibid.

means for access to remedy for rights-holders affected by business activities and a human rights compliance and risk management strategy for businesses themselves[1058].

Although based on the "2013 UNCITRAL Arbitration Rules'', the Rules uniquely incorporated changes to reflect (a) the particular characteristics of disputes related to the human rights impacts of business activities; (b) the possible need for special measures to address the circumstances of those affected by the human rights impacts of business activities… among others[1059]. The Rules have been credited for creating an international private judicial dispute resolution avenue aimed at helping to address the significant remedy gap faced by victims of business-related abuses[1060].

The Hague Rules noted that proper and informed consent remains the cornerstone of business and human rights arbitration[1061]. The Hague Rules named the category of consent as including (i) consent that can be established before a dispute arises, e.g., in contractual clauses, or (2) after a dispute arises, e.g., in a submission agreement (compromis)[1062].

The Hague Rules outline the procedure for arbitration of disputes related to the impact of business activities on human rights[1063]. Notably, the Rules were modelled on the UNCITRAL Arbitration Rules (as revised in 2013) albeit with revisions necessary to customise it to arbitrate business and human rights disputes[1064]. The Hague Rules may assist and encourage the widening of the ambit of arbitration beyond commercial disputes to those concerning the effect of commercial activities on human rights[1065].

Similar to the UNCITRAL Rules, the scope of the Hague Rules allows for submission of disputes for determination without restriction to the type of claimants or respondents or the subject matter of the dispute and extends to any disputes that the parties to an arbitration agreement have agreed to resolve by arbitration under the Hague Rules[1066]. The Rules identified possible parties to a Business and Human Rights Arbitration proceedings as including business

[1058] Ibid p14.
[1059] Ibid preamble to the Hague Rules para 6 (a) & (b).
[1060] Columbia Centre on Sustainable Investment 'Business and Human Rights Arbitration' <https://ccsi.columbia.edu/content/business-and-human-rights-arbitration>.
[1061] Hague Rules (n1055) pp3-4.
[1062] Ibid.
[1063] Ibid p3.
[1064] Brigitta John 'The Hague Rules on Business and Human Rights Arbitration' (Global Arbitration Review & Baker Mckenzie, April 2020) <https://globalarbitrationnews.com/the-hague-rules-on-business-and-human-rights-arbitration/#_ftn5> accessed 19 September 2022.
[1065] Michiel Coenraads Sarah Ellington etal 'Update: The Hague Rules on Business and Human Rights Arbitration' (DLA Piper, February 18, 2020).
[1066] Ibid.

entities, individuals, labour unions and organisations, States, State entities, international organisations and civil society organisations as well as any parties of any kind[1067].

A remarkable feature of the Rules is that much like UNCITRAL Rules, it did not specify the modalities by which the parties to the arbitration may consent to arbitration, or what form such consent should take[1068]. Specifically, Article 1 of the Hague Rules defined the scope of application, stipulating that disputes that shall be settled in accordance with the Hague Rules shall be those where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under these Rules[1069].

The Rules would ordinarily seem to hold bright prospects in terms of access to remedy for victims of adverse human rights impacts resulting from business activities. As highlighted above, the Hague Rules lay claim to contributing towards the implementation of pillars 2 and 3 of the UNGPs. Ultimately, the Rules are illustrative of a serious commitment to filling the access to remedy gap with the potential for entrenching corporate accountability.

However, the major drawback to the Rules concerns the question of how they can guarantee access to remedy for victims of adverse human rights impacts resulting from business activity. As highlighted above, there are two ways by which consent to arbitration can be established under the Rules, that is (i) consent that can be established before a dispute arises, e.g., in contractual clauses, or (2) after a dispute arises, e.g., in a submission agreement. In this context, it would ordinarily seem difficult to envisage how victims could possibility fit into either of these categories. Essentially, it would appear doubtful that businesses would enter into contracts with potential victims before or after a dispute.

Brigitta John appears to have attempted to address the above concern. John clarified that parties' consent could potentially be established in two scenarios[1070]. The first scenario pertains to business and human rights disputes which arise from a contract, such as a supplier Agreement etc, whereby the arbitration agreement already contains the parties' consent to arbitration. An illustration of the first scenario includes a multilateral agreement for the protection of human rights, which contains an arbitration clause.

[1067] Ibid.
[1068] Diane Desierto 'Why Arbitrate Business and Human Rights Disputes? Public Consultation Period Open for the Draft Hague Rules on Business and Human Rights Arbitration' (Blog of the European Journal of International Law, July 12, 2019), <www.ejiltalk.org/public-consultation-period-until-august-25-for-the-draft-hague-rules-on-business-and-human-rights-arbitration/> accessed 19 September 2022.
[1069] Hague Rules (n1055) Article 1.
[1070] Ibid.

An example of such multilateral agreement for the protection of human rights is the Accord on Fire and Building Safety in Bangladesh (the Bangladesh Accord)[1071]. The Bangladesh Accord is an independent, legally binding agreement between brands and trade unions, the IndustriALL Global Union and UNI Global Union and eight of their Bangladeshi affiliated unions, to work towards a safe and healthy garment and textile industry in Bangladesh[1072]. The Bangladesh Accord was created following the Rana Plaza disaster in 2013, when the Rana Plaza factory building collapsed on 24 April leading to 1,133 fatalities and thousands more critically injured[1073].

Signatories to the Accord included over 200 global brands, retailers and importers across 20 countries in Europe, North America, Asia and Australia, eight Bangladeshi trade unions, two global trade unions, and four non-governmental organisations that witnessed the signing[1074]. The consent to arbitrate disputes arising out of the Accord is contained in Clause 5 of the Accord[1075]. The parties to the Accord are labour unions and companies, so only those parties can submit any dispute to arbitration under the Accord. Workers from factories cannot directly initiate arbitration[1076].

The Accord provides for a two-tier dispute resolution mechanism. Disputes arising from the terms of the Agreement are first submitted to the Steering Committee for determination using a revised Dispute Resolution Process (DRP)[1077]. The DRP is aimed at establishing a fair and efficient process and entails an initial investigation at the end of which facts and recommendations will be presented by a member of the Secretariat for the Accord which carried out the investigation[1078]. The DRP will provide parties to the dispute with an opportunity to participate in a mediation process to settle the dispute without reference to arbitration[1079].

[1071] See generally Accord on Fire and Building Safety in Bangladesh, May 13, 2013, <https://bangladesh.wpengine.com/wp-content/uploads/2018/08/2013-Accord.pdf> accessed 19 September 2022.
[1072] Database of Business Ethics, available at <www.db-business-ethics.org/bangladesh-accord>.
[1073] Ibid.
[1074] Brigitta John 'The Hague Rules on Business and Human Rights Arbitration' (n1064).
[1075] Ibid.
[1076] Ibid.
[1077] Ibid.
[1078] Ibid.
[1079] Ibid.

However, where a party to the dispute is not satisfied with the decision of the Steering Committee, such decision may be appealed before an arbitration tribunal in a final and binding arbitration process governed by the UNCITRAL Arbitration Rules[1080]. The seat of the arbitration shall be the Hague and administered by the Permanent Court of Arbitration. Any arbitration award shall be enforceable in a court of law of the domicile of the signatory against who the enforcement sought and shall be subject to the New York Convention[1081].

Based on the above, the option available to a signatory foreign investor against whom the Steering Committee has made a decision is limited to an appeal to the arbitration tribunal set up in accordance with the arbitration Agreement set out in clause 5 of the Accord of which any arbitration award emanating from the arbitration tribunal shall be final and binding[1082]. Such foreign investor is therefore precluded from initiating an ISDS arbitration to upturn the arbitration award.

The second scenario is the submission Agreement which is entered into after the dispute has arisen. Notably, the Hague Rules didn't take into account claims by communities or class actions and seem to be predicated on the assumption that businesses would readily submit to the jurisdiction of business and human rights arbitral tribunals in respect of claims brought by victims of their activities, in the absence of a subsisting arbitration Agreement[1083]. The prospect that businesses would do so is rather remote given the history of stringent opposition to claims brought by communities in the past such as the Kiobel vs Shell[1084] and more recently Jesner vs Arab Bank Plc[1085].

In essence, it is quite doubtful that victims would be able to scale the jurisdictional hurdle in a claim against businesses in the absence of an underlying arbitration agreement embedded in either a pre-dispute contract or a submission Agreement. However, the latter could be laden with uncertainties which may entail the question of whether the affected business would

[1080] Ibid.
[1081] Ibid.
[1082] Ibid.
[1083] Lisa Sachs, Lise Johnson, Kaitlin Cordes, Jesse Coleman, Brooke Guven 'The Business and Human Rights Arbitration Rule Project: Falling short of its access to justice objectives' (Columbia Centre of Sustainable Investment, 2019) 4.
[1084] Kiobel v. Royal Dutch Petroleum [2013] 569 U.S. 108 the U.S. Supreme Court significantly limited the extraterritorial application of the Alien Tort Statute2 (ATS), the federal statute enacted in 1789 that allows noncitizens to bring claims in federal court for violations of "the law of nations," or customary international law.
[1085] In Jesner v. Arab Bank, [2018] No. 16-499, 584 U.S (PLC). the US Supreme Court again cut back on the scope of ATS litigation, this time holding that foreign corporations could not be sued under the ATS.

willingly enter into a submission Agreement to among other things vest the arbitral tribunal with jurisdiction to hear and determine the dispute[1086].

Meanwhile, the Hague Rules seem to have provided a way out of the above uncertainty. Article 19 of the Hague Rules empowers the arbitral Tribunal to allow one or more third persons to join in the arbitration as a party, provided such person is a party to or a third-party beneficiary of the underlying legal instrument that includes the relevant arbitration agreement[1087].

The constraints associated with the third-party beneficiary principle have already been discussed in chapter three of this thesis and include the rather remote chance of businesses agreeing to list potential victims of business-related human rights abuses as third-party beneficiaries in their business contracts[1088]. In a similar vein, it is indeed doubtful that businesses would consciously identify potential victims as third-party beneficiaries of the arbitration agreement in their contracts.

This thesis proposes that the model clause in the Hague Rules (as discussed in chapter three above) should be adapted in new generation BITs to address the challenge posed by the imposition of obligations on investors without a concomitant procedure for the enforcement of the investor obligations. Some new generation BITs identified above impose on covered foreign investors obligations such as contribution to sustainable development in the host state and the respect for human rights.

However, the question that arises is how these obligations which potentially benefit host state citizens and communities, especially with regard to respecting human rights, could be enforced in the event of a breach. The research identified this gap as undermining the usefulness of investor obligations in new generation BITs.

As discussed above, a key point which the Hague Rules underscores is the prospect of third-party arbitration rights, particularly within the context of business-related human rights abuses. The provisions serve as an example of how the legal rights of third parties implicated in an arbitration can be suitably accommodated by allowing such third parties to participate as actual

[1086] Lisa Sachs etal (n1083).
[1087] Article 19 (2) of the Hague Rules (n1055).
[1088] See Youseph Farah, Improving accountability through the contractualisation of human rights.(2013) 2 (11-17) Business and Human Rights Review, 2, 11-17, (2013) p13 <www.allenovery.com/en-gb/global/news-and-insights/publications/allen--overy-publishes-second-issue-of-the-business-and-human-rights-review> accessed 11 September 2022. See generally Youseph Farah & Valentine Kunuji 'Contractualisation of Human Rights, and public participation- Challenges and prospect' in Avidan Kent, Eric De Brabandere, & Tarcissio Gazzini (Eds.), Public Participation and Foreign Investment Law: From the (2020) 16, Bril Creation of Rights and Obligations to the Settlement of Disputes, Nijhoff International Investment Law Series, 122–147.

parties. Essentially, the model clause demonstrates that third-party rights could be recognised within the context of an arbitration provided that the underlying contract or BIT identifies such third party as a third-party beneficiary of obligations imposed on either or both parties to the underlying contract or BIT.

In the final analysis, the adaptation of the model clause in the Hague Rules that provides for third party arbitration rights into BITs could potentially address the concerns about exclusion of third parties whose legal rights are implicated in an ISDS arbitration from participating as actual parties. As argued in chapter three, this will potentially enable Indigenous Right-Holders whose legal rights are implicated in an ISDS arbitration to apply to join the arbitration proceedings as an actual party. It is expected that that this would potentially boost the prospects for Indigenous Right-Holders to access remedy within the context of IIL, particularly on occasions when their legal rights are directly at stake.

5.8 Conclusion

This chapter contributes towards addressing the main research question highlighted in chapter one and specifically addresses the research question from the point of view that the specific business and human rights frameworks discussed above could potentially serve as effective legal frameworks to provide access to remedy for Indigenous Rights Holders. The business and human rights field holds significant prospects for advancing access to remedy for Indigenous Rights Holders with respect to investment-related human rights abuses as exemplified by the various current and upcoming BHR frameworks highlighted above.

In light of the above, this chapter has aimed to discuss the prospects and limitations of the proposition for a binding BHR treaty, the Proposed Directive, and the recently launched Hague Rules for Arbitration of Business and Human Rights Disputes and the already operational French Duty of Vigilance law along with other subject-matter specific human rights due diligence laws respectively.

Broadly, the above frameworks are relevant to the extent that they advance the ‘all roads to remedy’ approach adopted in this thesis. Essentially, it is preferrable that victims of investment-related human rights abuses have wide-ranging options to pursue access to effective remedy. However, there is the serious challenge which pertains to the tendency to continue to swell the

ranks of legislations, regulations and best practices with less emphasis on the enforcement aspect. It is noteworthy that the field of corporate accountability has not necessarily been lacking in extensive legislative frameworks. However, State mechanism for enforcement have been far from adequate. This places the issue of compelling State parties to discharge their international human rights obligation to protect, fulfil and respect human rights at the centre of the entire corporate accountability discourse.

In essence, how can State parties be compelled to fulfil their obligations? In this connection, chapter four of this thesis and to a limited extent the present chapter has considered the international human rights obligations of State parties vis-à-vis the imperative of instituting proceedings against State parties by Indigenous Right-holders and others for failure to fulfil this important duty. The cases of SERAP vs the Federal Republic of Nigeria and the SERAC vs the Federal Republic of Nigeria discussed in chapter four are both illustrative of the above point.

Indeed, while the global North may not present so much of a problem in terms of strong enforcement regimes, the global South may experience much of a challenge in this aspect. This likelihood is not unconnected with the problems of corruption, weak institutions, some of which have been discussed in chapter four.

It is to this extent that the frameworks discussed above especially the Proposed Directive and the Proposed Binding BHR treaty are very significant. This is because they further place on State parties comprehensive duties to put in place the necessary enabling legal framework to compel businesses to respect human rights and to remediate adverse human rights impacts when they occur.

Chapter Six - Conclusion and Recommendations.

6.1 Conclusion

Based on the analysis undertaken in chapters one to five, this thesis argues for a pluralistic approach to the search for an effective legal framework as this holds the best prospect for Indigenous Right Holders to secure access to effective remedy in relation to investment-related human rights abuses. In this connection, this thesis is aligned to the 'all roads to remedy' theory propounded by the UN Working Group as a potentially viable approach to enable access to remedy for Indigenous Right Holders. The thesis concurs that access to remedy is located in diverse settings ranging from judicial to non-judicial mechanisms, including the IIL dispute settlement mechanism under specific circumstances. As such, this chapter entails an overview of the various legal frameworks for access to remedy for Indigenous-Right Holders analysed in the preceding chapters of this thesis, the conclusions reached based on the analysis conducted and practical recommendations for action by key stakeholders cutting across judicial and non-judicial grievance redress mechanisms.

6.1.1 Judicial mechanisms in the host State

As noted above, State judicial mechanisms are at the core of providing access to remedy for investment-related human rights abuses. This is recognised in various international law instruments imposing on State parties the duty to provide access to remedy in their domains. As discussed in preceding chapters, such international law instruments include the International Covenant on Civil and Political Rights (the ICCPR). Article 2 of the ICCPR, contains the covenant by State parties 'to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'[1089]. Under Article 2(3) (b) of the ICCPR State parties covenant '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'[1090]. Further, Article 2(3)(c) of the ICCPR sets out the covenant by State parties with respect to enforcement of remedies 'to ensure that the competent authorities shall enforce such remedies when granted'[1091].

[1089] Ibid (n70).
[1090] Ibid.
[1091] Ibid.

As argued in the preceding chapters, State judicial mechanism should be the first port of call in the search for access to remedy by Indigenous Right-Holders. This is in line with the recognition that State parties have an international human rights duty to protect human rights within their domain, of which a central aspect of the duty to protect is the obligation to provide access to remedy to citizens whose rights have been breached or at the risk of being breached. Consequently, the thesis argued in chapter four that the seeming aversion of Indigenous Right-Holders to judicial mechanisms in the host State must be discouraged. At least, within the context of the Nigerian State adopted as a case study in this thesis, there have been instances where Indigenous Right Holders such as the Ogoni people secured access to remedy in Nigerian Courts against foreign investors such as SPDC. As such, it would appear that there is no justification for indiscriminate recourse to the international fora for access to remedy.

Notwithstanding the above, this thesis acknowledges that there are significant challenges with the judicial mechanism in the host State, particularly in the Global South context. With respect to the Nigerian jurisdiction, some of the challenges which characterise the judicial mechanism include protracted delay in the dispensation of justice and undue bureaucracy, knowledge gap with respect to business and human rights, and procedural bottlenecks associated with enforcement of judgments.

Meanwhile, as discussed in chapter two, a major concern affecting the prospect for access to remedy for Indigenous Right-Holders, particularly in the context of Nigeria, is the failure of the Nigerian State to ratify key international instruments for the protection of indigenous peoples' rights including the ILO 169 and the UNDRIP. As discussed in chapter two, this perhaps underscores the rather unfavourable disposition of the Nigerian State to the protection of indigenous peoples' rights.

However, as acknowledged above, Ogoni claimants have in some instances secured access to remedy and favourable judgments against treaty-protected foreign investors in Nigerian Courts, but a major source of concern is the tendency for the enforcement of such favourable judgments to be blocked by the affected treaty-protected investors through the ISDS mechanism. The above issues have been analysed in this thesis and the conclusions are set out below.

6.2 Investor-State Dispute Settlement

As the preceding chapters have demonstrated, the argument that IIL ought to provide access to effective remedy for Indigenous Right Holders appears to be inherently weak to the extent that the nature of third-party rights and interests implicated in ISDS arbitrations are not necessarily the same on every occasion. To this extent, chapters two to five laid the basis for proffering answers to the research questions highlighted in chapter one which are set out below for ease of reference.

1. Whether remedy for investment-related human rights abuses is obtainable by indigenous peoples through judicial and non-judicial grievance mechanisms available at the local jurisdiction, and if yes, whether such remedy could be challenged or undermined by foreign investors through recourse to the ISDS mechanism?

2. In light of the opposing arguments regarding the potential or otherwise of IIL to provide access to remedy for Indigenous Right Holders, what constitutes access to an effective remedy in each of the three categories whereby Indigenous Right Holders could be involved in an ongoing arbitration as mentioned above? That is (a) Access to remedy where the legal rights of Indigenous Right Holders are directly at stake in an ongoing ISDS arbitration. For instance, where their legal right forms the subject matter of the arbitration (b) Access to remedy where Indigenous Right Holders will be potentially affected by the outcome of an ISDS arbitration even though their legal rights do not form the subject matter of the ISDS arbitration. (c) Access to remedy for Indigenous Right Holders when they are victims of investment-related human rights abuses.

3. Whether the ISDS ought to provide access to an effective remedy for Indigenous Right Holders by allowing them to participate as actual parties in relevant ISDS arbitration in any of the three categories identified under question (2) above? To that extent, whether there is a compelling basis to dismantle the procedural barriers which prevent third-party right-holders from participating as actual parties in relevant ISDS arbitration, taking into account the reported tendency for ISDS arbitration to impact the interest and legal rights of indigenous right-holders when they are directly at stake in ISDS arbitration?

4. Whether the existing amicus curiae and state-counterclaim mechanisms in ISDS could provide a viable pathway for an effective remedy for Indigenous Rights Holders in any or all of the categories that are identified under question two (2) above?

5. What is the significance of the 'all road to remedy' approach recommended by the UN Working Group in the context of the search for an effective legal framework for access to an effective remedy for Indigenous Right Holders? To address this question, the research would aim to juxtapose the prospects/limitations of a streamlined pathway to access to effective remedy with the prospects/limitations of a liberalised pluralistic regime aligned to the theory that remedies are located in diverse settings. A liberalised pluralistic regime would encompass BHR mechanisms, the state-based and non-state-based judicial and non-judicial mechanisms in the local jurisdiction, operational-level grievance mechanisms, and other grievance mechanisms embedded within international finance organisations.

In relation to research question one, the thesis established that indeed Indigenous Right-Holders have on some occasions secured access to remedy for investment-related human rights abuses in the host State. This was illustrated by the cases against SPDC won by Ogoni claimants as discussed in chapter four. However, the thesis argued that judgments obtained against treaty protected foreign investors could be challenged and potentially undermined at ISDS with view to blocking their enforcement. This tendency was illustrated in the preceding chapters, particularly with reference to the cases of Isaac Agbara & ORS vs SPDC & ORS, the case of Chevron vs Ecuador, Eli Lilly and Company v. The Government of Canada; Daniel Kappes and Kappes Cassiday & Associates v. Guatemala; Bernhard von Pezold and Others v. the Republic of Zimbabwe; Aguas del Tunari, SA v. Republic of Bolivia and United Parcel Service of America Inc. vs Government of Canada respectively.

In relation to questions two and three, the research showed that the participation of Indigenous Right Holders as actual parties in relevant ISDS arbitration would depend strictly on an analysis of the categories in which the legal rights and interests of Indigenous Rights Holders are involved in ISDS arbitration. In this connection, the thesis addressed the question of what constitutes access to remedy for Indigenous Right Holders.

The thesis argues that access to effective remedy for Indigenous Right-holders in the context of IIL should not be construed narrowly in the manner that has been suggested by proponents of

the arguments that Indigenous Right-holders should be allowed to participate as actual parties in ISDS arbitration. This approach lumps together the potentially varied and compartmentalised interests of relevant third parties to an ISDS arbitration. In equal breath, the argument that ISDS already provides access to remedy for Indigenous Right Holders through the amicus curiae procedure was established in the preceding chapters to be inherently weak and not conclusive of the fact.

Rather, as noted above, the question of access to remedy in IIL is contingent on a deconstruction of the various arguments, particularly in light of the various ways by which third-party rights and/or interests are implicated in ISDS arbitration. The thesis highlighted the various arguments dimensioning them into three main categories to arrive at the most effectual pathway that guarantees access to effective remedy for Indigenous Right-holders in each of the categories.

As mentioned earlier, the first category involves instances where the legal rights of third parties are directly at stake in an ongoing ISDS arbitration. The second category relates to third parties that could potentially be affected by the outcome of an ISDS arbitration, even though their legal rights are not directly implicated or form the subject matter of an ongoing ISDS arbitration. An example includes where a foreign investor has challenged a public interest regulation or laws in the host country which are meant for the protection of the rights of such third parties. The third category entails access to remedy from the standpoint of the third parties that are victims of investment-related human rights abuses. This research concludes that Indigenous Right-Holders could be implicated in any of the three categories, however, access to remedy in relation to each category may be potentially located in diverse settings.

6.2.1 Where the legal rights of an Indigenous Right Holder are directly at stake in an ISDS arbitration.

The first category is perhaps best illustrated by the example of the ISDS arbitration which SPDC initiated against the Nigerian government as discussed in the preceding chapters. Essentially, the arbitration was reportedly aimed at blocking the enforcement of a judgment obtained against SPDC by Ogoni claimants.

Although the ISDS arbitration was not initiated against the Ogoni claimants undoubtedly, their legal rights were at stake in the ISDS arbitration with the implication that their right to the enjoyment of the fruit of their judgment against SPDC in Nigerian Courts may potentially be abrogated or frustrated in the aftermath of the ISDS arbitration. This is a potential threat to the

right to remedy of the Ogoni claimants in relation to the favourable judgment obtained against SPDC in Nigeria.

In the above circumstances, it would seem defensible that the Ogoni claimants should at least be granted the right of full participation, almost the same as that accorded to the actual parties to the ISDS arbitration. This would appear to be in accordance with one of the pillars of the principle of natural justice, that is 'audi alteram partem' meaning 'listen to the other side'. However, it is acknowledged that such allowance is currently not obtainable in IIL owing to procedural barriers.

In relation to question three in this research, there would seem to be a compelling basis for dismantling procedural barriers in ISDS which prevent third parties from participating as actual parties where their legal rights are directly at stake or form the subject matter of the ISDS arbitration, unlike the other two categories below. The removal of these barriers, identified earlier in this research, would entail substantive and procedural reforms in IIL. As noted in the preceding chapters, the barriers include dispute resolution provisions of IIAs which recognise actual parties solely as investors and State parties as well as IIL procedural rules including, for instance, Article 25 of the ICSID Convention and Article 14-D of the USMCA respectively.

With particular reference to question four in this research, it is impracticable for the amicus curiae procedure or state counterclaims to constitute access to effective remedy for third parties whose legal rights are directly at stake in an ISDS proceedings. As argued in chapters three and four, the amicus curiae submission was designed to aid the fair and just determination of a dispute pending before the ISDS arbitration. That is, the amicus curiae submission is helpful for third parties seeking to bring to the attention of the ISDS tribunal relevant matters of facts or law which the actual parties to the dispute have not put forward. As demonstrated in chapters three and four, the purpose of the amicus curiae submission is not amenable to cases where legal rights of third-parties are directly at stake in an ISDS arbitration. However, the amicus curiae procedure and state counterclaims could potentially be helpful in relation to category two mentioned above. That is, where the interest of certain third parties could potentially be affected by the outcome of an ISDS arbitration.

This thesis aimed to proffer solutions to what seems to be a difficult path to realising the participation of relevant third parties as actual parties in ISDS arbitration where their legal rights are directly at stake. The substantive and procedural aspects of this, including the limitations thereto, were discussed in chapters three and four respectively. The thesis argues that State

parties would need to, as part of their duty to fulfil their international human rights duty to provide access to remedy, review their treaty-making practices to ensure that IIAs do not fetter the right to access to effective remedy in instances where the realisation of such rights is merited within the purview of IIL.

It was argued in chapter three that BITs should include provisions to guarantee participation in ISDS arbitration by third parties where their legal rights are directly at stake. Specifically, chapter three proposed that State parties should consider adapting the wording of the 'model clause to grant third party arbitration rights' on page 108 of the Hague Rules on Business and Human Rights into BITs negotiated or renegotiated by State parties, as a viable means of enabling third parties whose legal rights are directly at stake in an ISDS arbitration to participate as actual parties. A proposed adapted version of the 'model clause to grant third party arbitration rights' is highlighted below.

As noted in the preceding chapters, new generation BITs have increasingly imposed obligations on treaty-protected foreign investors, for instance, to respect human rights and contribute to sustainable development in the host State. By virtue of these obligations, treaty protected foreign investors invariably commit to respect human rights in the host State thus making persons in the host State third-party beneficiaries of the obligation to respect human rights. Consequently, adoption by State parties of the proposed adapted version of the model clause below would potentially enable Indigenous Right Holders who qualify as third-party beneficiaries under BITs to apply to be joined as an actual party to an ISDS arbitration where the legal rights are directly at stake.

> Model clause to grant third party arbitration rights
>
> The parties irrevocably consent that any dispute, controversy or claim arising out of or in relation to the obligations undertaken by the parties under this [treaty] for the benefit of: [insert defined class of third-party beneficiaries] may be submitted by any such third person to ICSID for arbitration in accordance with the ICSID Arbitration Rules.
>
> Defined scope of third-party claims entitled to be arbitrated:
>
> The parties irrevocably consent that any dispute, controversy or claim arising out of or in relation to: [insert defined subject matter, which may include:

(a) selected national laws.

(b) selected international instruments.

(c) other industry or supply chain codes of conduct, statutory commitments or regulations from sports' governing bodies, or any other relevant business and human rights norms or instruments]

may be submitted by any third-party beneficiary of such [law(s)] [instrument(s)] to arbitration in accordance with the ICSID Arbitration Rules.

Note — Parties should consider whether to define also the class of potential beneficiaries as above in lieu of the general phrase "any third-party beneficiary[1092]."

The thesis argues that the prospect of enabling third parties whose legal rights are directly implicated in the dispute to participate as actual parties in ISDS arbitration could be potentially realised if the above text is adapted into the dispute resolution clause of BITs. Essentially, such third parties could, depending on specifications prescribed in the BIT qualify as third-party beneficiaries of BIT provisions meant for the protection of human rights.

Apart from the arguments advanced by academic scholars, and relevant institutions as variously highlighted in the previous chapters, a few State parties support the argument that third-party interests should be considered for actual participation in relevant ISDS arbitration especially where such third party's legal rights are directly at stake. Examples of this include the positions taken by Ecuador and South Africa respectively as discussed in the previous chapters. While the arguments are rather broad and, in some instances, non-specific beyond alluding generally to third-party rights, this research came to the conclusion that where legal rights of third parties are at stake in an ISDS arbitration, the relevant third-party ought to be allowed to participate as an actual party.

As argued above, this is perhaps a veritable means by which the principle of natural justice could be upheld. The arbitration rules of the various arbitration are indeed ripe for an amendment to allow for greater inclusion in the form of allowing relevant third parties with legal rights that are directly at stake in ISDS arbitration to be allowed full participation rights.

[1092] Hague Rules (n1055) annex (Model Clauses) p106.

Of course, the above proposition would need to be fine-tuned as appropriate to ensure its workability within the framework of the rules and procedures of various arbitration institutions.

Once the substantive law aspect is addressed vide changes to the relevant IIAs as proposed above, the arbitration rules would need to similarly change to reflect the choices of the contracting parties to the underlying IIA from which the arbitral tribunal derives its jurisdiction. Importantly, the above presupposes that the basis for the participation of Indigenous Right Holders as actual parties would need to be demonstrable legal rights which are at stake in the dispute before the ISDS tribunal. For the avoidance of doubt, the proposition does not entail allowing such third parties to initiate an ISDS arbitration. That is, the proposition argues for the right to participate as actual parties being used as a shield for the defence of threatened legal rights rather than as a sword. Essentially, the right to initiate ISDS arbitration should notwithstanding possible reforms remain the exclusive preserve of investors and State parties.

6.2.2 Third parties with interest in the subject matter of the investor-state dispute.

Meanwhile, the second category pertains to access to effective remedy for third parties whose interest will be impacted by the outcome of the ISDS dispute, particularly those bordering on the host State's public interest regulations which confer benefits or protection on the relevant third party. This category would seem to admit an approach quite different from that proposed in respect of the first category discussed above.

As argued in chapter four, for Indigenous Right-holders with interest in the subject matter of the investor-state dispute, it doesn't seem that participation as actual parties in ISDS is the most practical means by which such interests can be protected. For instance, the amicus curiae procedure was established to allow non-disputing parties with interest in the subject matter of the arbitration to be heard and to assist the tribunal towards the fair determination of the dispute.

In a similar breath, State parties to the ISDS arbitration where the interest of the public is at stake are ordinarily expected to protect such legitimate public interest, as defendants in the ISDS arbitration. The ISDS rules provides for this as discussed in the preceding chapters, through state counterclaims. Indeed, as pointed out in the previous chapters, the intention behind the ICSID Convention, for example, is such that State parties are not precluded from initiating ISDS arbitration against investors. Where this is not desirable or practicable, State parties can utilise human rights-based counterclaims as a means of safeguarding public interest regulations and laws in the final analysis of ISDS arbitrations.

6.2.3 Access to remedies for investment-related human rights abuses.

The third category pertains to Indigenous Right-holders seeking access to effective remedy in respect of investment-related human rights abuses before ISDS tribunals as actual parties. This approach has been shown in chapter four as being prone to contradictions.

This category is relevant to proffering an answer to question five with reference to the significance of the 'all roads to remedy' theory. The thesis argues that access to effective remedies for investment-related human rights abuses is located in diverse settings ranging from judicial to non-judicial grievance mechanisms discussed in chapters four and five of this thesis.

Essentially, the thesis argues that both the grievance mechanisms in the local jurisdiction and the grievance mechanism located in the international fora have their prospects and limitations which depend on the three categories identified in this thesis (as discussed above). Essentially, with respect to the first category, there would appear to be justification for third parties to make recourse to an international forum such as the ISDS where their legal rights are directly at stake in an ISDS arbitration proceedings.

Similarly, there would seem to be justification for third parties whose interests would be potentially affected by the outcome of the ISDS arbitration to seek to participate in such proceedings held in an international forum such as the ISDS, as amicus curiae. However, in relation to category three which pertains to access to remedy for investment-related human rights abuses, chapter four argued that recourse to the international fora may not necessarily be justified except for rare instances where there is a real danger that justice may not be obtainable in the local jurisdiction such as in the Vedanta case discussed in chapter four.

Meanwhile, in chapter four, the research aimed to address the question regarding the extent to which judicial mechanisms in the local jurisdiction or at the regional level can provide access to remedy for Indigenous Right-Holders in respect of human rights abuses. To this extent, chapter four attempted a comparison between judicial outcomes from cases instituted in the local jurisdiction by Indigenous Right-holders who have suffered human rights abuses or at the regional level and outcomes from cases instituted before foreign courts. In this regard, chapter four concluded that recourse to neither the local and foreign jurisdiction is necessarily better that the other. Instead, both are characterised by prospects and limitations which define the outcomes of cases instituted in either jurisdictions.

Importantly, chapter four argued that State parties must provide access to remedies for their citizens and this duty is to a large extent fulfilled through the setting up of judicial mechanisms and other state-based non-judicial mechanisms for the settlement of disputes including those involving foreign investors operating in the host state. Importantly, the argument was made in chapter four that the correct position cannot be to rush to foreign grievance mechanisms in the search of remedies while condoning an abdication by State parties of their international law-sanctioned duties. Specifically, chapter four highlighted decided cases where judgment was entered in favour of the Indigenous Right-Holders exemplified by Ogoni claimants, at the national, regional and international levels respectively.

Therefore, the argument that IIL ought to provide access to remedies for victims of foreign investment-related human rights abuses by allowing them to seek remedies at ISDS as actual parties, does not seem justifiable or logical. The thesis argues that access to remedy for investment-related human rights abuses can be secured through the judicial and non-judicial mechanisms at the host State level, and in addition the grievance mechanisms embedded in current and upcoming BHR frameworks discussed in chapter five are expected to boost the prospect of access to effective remedy for Indigenous Right-Holders.

Importantly, State parties need to concentrate on reforming and strengthening local grievance mechanisms in light of the growing popularity of BHR grievance mechanisms under the proposed EU Corporate Sustainability Due Diligence Directive (the Proposed Directive) and the proposed binding BHR treaty which would largely rely on local grievance mechanisms for enforcement of their provisions.

Undoubtedly, these frameworks hold the prospect of enhancing access to remedy for victims of human rights abuses perpetrated by foreign investors in the host state context. However, these are not without limitations as discussed in chapter five. None of these frameworks contemplate the ISDS as a venue for ventilating grievances arising from human rights abuses, but will instead leverage the mechanism of host State Courts, a dedicated administrative body or companies' operational-level grievance mechanisms, as discussed in chapter five.

Essentially, these frameworks are structured to in the first instance impose a due diligence obligation on corporations and businesses to prevent potential adverse human rights impact associated with their business activities and to remediate such adverse impacts where they invariably occur, failing which affected third parties would have a right of remedy against the erring business.

This is already operational in the French jurisdiction under the French Duty of Vigilance Law, however with areas of shortcomings as discussed in chapter five. As earlier noted, Participant 2 answered the question regarding the potential impacts the proposed BHR Treaty could make in the context of access to remedies for victims of human rights abuses by corporations by comparing the proposed binding BHR treaty with the Proposed Directive, Participant 2 clarified that:

'Well, I think it is a very noble effort people are making and a lot of very interesting thinking and energy going into it (the proposal for a binding BHR treaty). I think it is unlikely to see fruits in the short term, doesn't mean people should not be trying to push it in the long term[1093]. However, Participant 2 argued: ' But I think where there is a lot more promise is on National Human Rights Due Diligence law such as the European Human Rights Due Diligence Law which is also now being conceived of, which is going to be a game changer in this area because we are moving from a model where it was totally unregulated, there was no real thinking about what the human rights and environmental impact of multinationals were, it was all left to countries to do their regulations in this space, to a model where there is recognition that there must be some form of binding regulation on companies who are operating around the world sometimes in regulatory vacuum'[1094].

According to Participant 2 'in those circumstances you need to be placing obligations on those companies to ensure that there is human rights compliance within their corporate group, but also in their supply chain. I think that is a lot more promising short-medium term objective. It doesn't mean we should drop the treaty. I think the pressure and the thinking should carry on, but I think it should not be at the expense of the gains we could make nationally and regionally in developing these models'[1095].

Highlighting the benefits which the MHRDD would likely confer particularly with respect to holding corporations to account, Participant 2 stated: 'Well, I think the main advantage of this is that it places, instead of having to argue in each case that there is a common law duty of care which is fact sensitive, which is what we had to deal with at my law firm (name withheld for

[1093] Virtual Research Interview with UK based international human rights lawyer and Partner at an International Human Rights Law Firm in London, conducted on 26 April 2021. (See full interview transcript attached as Appendix 2).
[1094] Ibid.
[1095] Ibid.

anonymity) through the common law, it is a way of automatically putting a statutory duty of care on the corporation and that is of utmost benefit to human rights lawyers who are thinking of how to hold corporations to account.

According to Participant 2, 'because so much of the argument is about whether there is a duty of care and therefore whether there should be jurisdiction. If you get through those two hurdles, automatically then you are getting into a discussion about look this is the human rights abuse, how did you allow this to happen under your watch within your corporate group. Then that is a much more straightforward argument for the kind of corporate accountability cases that we do instead of having to every time persuade the court that there is a duty of care in each particular case. So, I am very much in favour'[1096].

Although the BHR frameworks have limitations as discussed in chapter five, it is however expected that they could potentially boost the prospect for victims of investment-related human rights abuses including Indigenous Right-holders to have access to effective remedy, notably outside the precincts of the IIL. However, the success or otherwise of the foregoing would largely depend on State parties' commitment to strengthen access to remedy in local jurisdictions through State-based judicial and non-judicial grievance mechanisms.

Further, imminent BHR frameworks such as the Proposed Directive might have engineered a paradigm shift with respect to parent companies' liability for adverse human rights impacts caused by their overseas subsidiaries. This is in view of the provisions of the Proposed Directive as discussed in chapter five which puts parent companies in a position of control over subsidiaries with respect to conducting human rights due diligence to identify, prevent, mitigate and remediate potential and actual human rights abuses.

As such, third parties who have suffered damages on account of the parent company's failure to fulfil its due diligence obligations in relation to the operations of its overseas subsidiary may be entitled to seek remedy against the parent company. Under these circumstances, it may be justified for third parties to make recourse to the international fora in search of remedies for potential or actual human rights abuses.

Rather than host State citizens making recourse to the ISDS for access to remedy in relation to investment-related human rights abuses, State parties, particularly those in the Global South

[1096] Ibid.

need to fulfil their international human rights obligation to provide access to remedies for citizens. The Proposed Directive has set an example for other regional blocs or countries about how to address barriers to corporate accountability and access to remedy, particularly in the context of the parent company liability principle. Although, it should be noted that the laudable provisions of the Proposed Directive are expected to apply to in-scope companies only as defined in chapter five.

The Proposed Directive requires Member States to make human rights and environmental due diligence laws to impose on businesses including parent companies the duty to carry out human rights and environmental due diligence as mentioned above, failing which third parties that have suffered damages will be entitled to hold the business to account. The Proposed Directive identified three mechanisms through which affected third parties can hold businesses to account, that is through company's operational-level grievance mechanism, the Supervisory Authority and the civil liability regime respectively. The Proposed Directive effectively removed the barriers to holding parent companies to account for harm caused by their subsidiaries including those operating abroad. Under the Proposed Directive, parent companies would no longer be able to avoid liability for adverse human rights impacts of their subsidiaries by disowning responsibility for control, direction or policymaking based on the standard set by the UK Supreme Court in the Okpabi case, discussed in chapter four.

Given the experiences of African countries, particularly the indigenous people of Ogoni land with investment-related human rights abuses, a mandatory human rights and environmental due diligence legislation borrowing good practice examples from the Proposed Directive would undoubtedly contribute towards addressing the problem of lack of access to remedy for investment-related human rights abuses. State parties, particularly those from Africa should take a cue from legislative developments in the EU and make laws that will guarantee access to remedy for victims of investment-related human rights abuses, like the civil liability regime under the Proposed Directive.

For instance, Nigeria has since 2017 produced a draft National Action Plan on Business and Human rights (NAPBHR) as discussed in chapter five with a view to implementing the three pillars of the UNGPs including the access to remedy pillar. The NAPBHR identifies mandatory human rights due diligence legislation as a key action plan. It is expected that if the action plans are implemented rigorously and religiously, they could potentially move Nigeria closer towards achieving the goal of securing the protection of human rights and fulfilment of the international

human rights obligation to provide access to remedy for victims of business-related human rights impacts. Some of the action plans cover human rights due diligence, FPIC for indigenous peoples, and access to remedy through State-based judicial mechanisms, State-based non-judicial mechanisms, and non-State based judicial mechanisms respectively.

According to the Nigerian National Human Rights Commission 'the action plan seeks to operationalise the United Nations Guiding Principles in practical, real and specific terms, exploring how government discharges the duty to protect in the context of business and how businesses operationalize the responsibility to respect human rights and more importantly how to ensure access to remedy for individuals or communities adversely affected by business operations. It also encourages the adoption of effective grievance mechanisms by companies to address human rights issues.'[1097]

Notably, the NAPBHR includes plans for mandatory human rights due diligence stating that 'regulatory bodies and agencies shall ensure the conduct of human rights due diligence and human rights impact assessment in all business operations.'[1098] Similarly, the action plans made reference to the FPIC of indigenous peoples stating that 'Free, Prior and Informed Consent (FPIC) of the host community must be ensured to enable a community have the right to give or withhold consent with respect to proposed projects that may affect the lands they customarily own, occupy or otherwise use.'[1099]

Despite these action plans, no meaningful action has been taken by the Nigerian government to officially launch the NAPBHR. The lethargic attitude towards implementing the NAPBHR does not reflect the need for urgent action to protect the rights of indigenous people in Nigeria's oil-producing communities, especially the right to access to remedy of the indigenous people of Ogoni land.

As already noted, African countries are still lagging behind with respect to BHR frameworks that could boost the prospects for access to remedy in respect of investment-related human

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[1097] National Human Rights Commission 'the Draft National Action Plan on Business and Human Rights' 12 August 2021, <www.nigeriarights.gov.ng/activities/nap/202-draft-national-action-plan-nap-on-business-and-human-rights.html> accessed 8 September 2022.

[1098] See generally National Action Plan on Business and Human Rights in Nigeria to support the implementation of the United Nations Guiding Principles on Business and Human Rights, Consultative Draft, February 2017. See also the Report of the National Human Rights Commission on the Draft National Action Plan on Business and Human Rights, 12 August 2021 p11 <https://www.nigeriarights.gov.ng/files/nap/NAP%20on%20BHR%20for%20Final%20Review%20in%20July-converted.pdf> accessed 8 September 2022.

[1099] Ibid.

rights abuses which are quite pronounced on the continent as exemplified by the case study of the Ogoni people. Despite the prevalence of investment-related human rights abuses on the continent, the legal framework for access to remedy is insufficient and inchoate in many instances. Remarkably, the NAPBHR acknowledges some of the challenges to access to remedies within the context of State judicial mechanism such as delay in the judicial process, overbearing political interference, lack of judicial independence, judicial corruption, and low level of judicial awareness of the UNGPs, which need to be prioritised for remedial action by the State.

6.3 Other non-judicial grievance mechanisms

6.3.1 OECD's National Contact Points for Responsible Business Conduct

As discussed in chapter four, the OECD Guidelines for Multinational Enterprises (the Guidelines) established the National Contact Points for Responsible Business Conduct (NCP) which is a grievance redress mechanism for matters where non-observance of the Guidelines by in-scope companies has been alleged. As already pointed out in chapter four, some of the features which distinguish the NCPs as a State-based non-judicial mechanism include ease of accessibility with little formalities, at no cost, together with the necessary legal aid.

Any individual or organisation with a legitimate interest in a matter can submit a case to an NCP regarding a company, operating within or outside the country of the NCP which has not observed the Guidelines. Some of the parties that have used the NCP mechanism range from indigenous communities, individuals and businesses to trade unions and civil society organisations. Notably, NCPs have actively facilitated concrete remedies for victims of business-related human rights abuses, including through financial or in-kind compensation or changes in companies' policies and operations.

As noted in chapter four, OECD statistics indicate that between 2011 and 2019 over a third of all cases which were accepted for further examination by NCPs (36%) resulted in some form of agreement between the parties and approximately 33% resulted in an internal policy change by the affected company.

However, it is noteworthy that National Contact Points (NCPs) are offices set up by State parties that have adhered to the OECD Guidelines for Multinational Enterprises. Currently, only 48 countries have adhered to the Guidelines including the United States, Germany, United Kingdom, Canada, and Australia respectively. Meanwhile, despite the prevalence in African

countries of investment-related human rights abuses which are contrary to responsible business conduct mandated under the Guidelines, it is instructive that only two African countries, Morocco and Tunisia have adhered to the Guidelines and set up NCPs.

6.3.2 National Human Rights Institutions

As discussed in chapter four, the commentary to UNGP 27 recognised National Human Rights Institutions (NHRIs) as having the potential to contribute towards filling gaps in the provision of remedy for business-related human rights abuses and to reduce pressure on state-based judicial mechanisms. Importantly, the Paris Principles identify the roles and responsibilities of NHRIs as the promotion and protection of human rights. They have the potential to protect indigenous peoples' human rights given the ease of accessibility, significantly lower costs, dialogue-oriented approach to resolving conflicts, and the capacity for speedier resolution of disputes.

As noted in chapter four, NHRIs could employ their technical expertise to monitor and advise Governments towards ensuring that laws and policies are consistent with and protect the rights contained in the UNDRIP. Further, the functions of NHRIs extend to creating awareness concerning indigenous peoples' human rights and how they may be exercised. NHRIs generally possess quasi-judicial powers which enable them to investigate violations of indigenous peoples' human rights and in some instances initiate complaints, as well as conduct public hearings to that end. Meanwhile, despite their salutary functions, State parties seem to have neglected to take advantage and empower NHRIs to provide access to effective remedy for business related human rights in the local jurisdiction.

6.4 Business and Human Rights mechanisms

Chapter five analysed the potentials and limitations of business and human rights frameworks to provide access to effective remedy for Indigenous Right Holders. In the final analysis, the thesis argues that grievance mechanisms proposed in business and human rights frameworks such as the Proposed Directive will potentially boost the prospects for access to effective remedy for Indigenous Right Holders. As discussed in chapter five, the proposed Directive provides for three avenues through which victims of business-related human rights abuses could seek access to effective remedy – i.e. through operational level grievance mechanisms, the Supervisory Authority and the Civil Liability mechanism respectively. Specifically, the duty to conduct human rights due diligence in relation to the company's own operations (including

subsidiaries) and supply chain will potentially address concerns about the controversial parent company liability principle.

Therefore, the Proposed Directive provides that parent companies will be liable for damages suffered by third parties arising from the failure of a company, its subsidiaries and companies in its supply chain to conduct human rights due diligence. Undoubtedly, this provision is expected to boost the prospect of Indigenous Right Holders holding a parent company to account for harm caused by their subsidiaries or companies in their supply chain including those in the global South. Apart from the Proposed Directive, the existing French Duty of Vigilance law provides for similar duty to conduct human rights due diligence failing which a company can be liable for harm caused by its subsidiaries and companies in it supply chain.

Further, as demonstrated in chapter five, the Hague Rules on Business and Human Rights Arbitration provides victims of human rights abuses an opportunity to seek redress through Business and Human Rights Arbitration, with particular reference to the provision on third-party arbitration rights analysed in chapters three and five of this thesis. Indeed, chapter three proposes the adaptation of ‘model clause on third party arbitration’ into BITs as a viable means of enabling actual participation of Indigenous Right Holders in ISDS arbitration where such third party legal rights are directly at stake in an ongoing ISDS arbitration.

6.5 Recommendations

Given the analysis undertaken in this thesis along with answers proffered to the five research questions set out in chapter one, the following practical recommendations are apposite to the search for an effective legal framework to secure access to effective remedy for Indigenous Rights Holders. The recommendations are structured along the lines of the various legal frameworks for access to remedy for Indigenous Right-Holders analysed in this thesis.

I. Judicial mechanisms in the host State

As noted above, State judicial mechanisms are at the core of providing access to remedy for investment-related human rights abuses. This is recognised in various international law instruments imposing on State parties the duty to provide access to remedy in their domains.

This thesis recommends that State parties, especially those in the global South should address gaps within the judicial system as highlighted in preceding chapters. These include inefficient judgment enforcement mechanisms, corruption, intractable delays in the dispensation of justice and knowledge gaps with respect to the adjudication of business-related human rights disputes. The thesis recommends that State parties implement credible judicial reforms aimed at developing capability and expertise on business and human rights disputes along with decisive action to to fight judicial corruption.

For instance, in the case of Nigeria, there are at least two main anti-corruption bodies, the Economic and Financial Crimes Commission and the Independent Corruption Practices Commission dedicated to the fight against corruption. It is recommended that these anti-corruption bodies should be deplored to investigate and prosecute corrupt judicial officers as part of steps to rid the judicial system of corruption. Still along the line of fighting judicial corruption, it is recommended that adequate funding of the judiciary should be prioritised as part of steps to guarantee a corruption-free judicial system and independence of the judiciary.

Similarly, as part of the judicial reforms recommended in this thesis, State parties should undertake a revision of the various procedural rules and paraphernalia for the administration of justice to prescribe timelines for conclusion of civil proceedings and to discourage indiscriminate adjournments and frivolous appeals induced by ill-meaning litigants.

- Business and Human Rights Courts

In the final analysis, considering the specialised nature of cases bordering on business-related human rights which are time-sensitive and require advanced technical knowledge, this thesis recommends that State parties should consider setting up special Business and Human Rights Courts to adjudicate cases of business-related human rights abuses. It is recommended that judicial officers with specialised training and background in business and human rights should be appointed as judges in the Business and Human Rights Courts. Further, such Courts should have special procedures for adjudication of business-related human rights disputes aimed at addressing problems of incessant delays, frivolous delays and abuse of court process generally. The Court should be seised with original and exclusive jurisdiction to adjudicate cases of business-related human rights, in respect of which appeals will be limited to the Court of Appeal.

This recommendation draws inspiration from the Hague Rules on Business and Human Rights Arbitration which was set up in recognition of the specialised nature of business-related human rights abuses. It is believed that such dedicated Business and Human Rights Courts will potentially restore confidence in the competence of judicial officers to adjudicate business-related human rights disputes, while addressing concerns about protracted delays in the dispensation of justice and ineffective judgment enforcement mechanisms.

With specific reference to Indigenous Right Holders, the thesis recommends that State parties, particularly those in the global south should demonstrate commitment to upholding indigenous peoples' rights by ratifying and adopting key international law instruments for the protection of indigenous peoples' rights, especially the ILO 169 and the UNDRIP respectively.

Many investment host States have robust regulatory framework that could be leveraged for providing access to effective for Indigenous Right Holders, as illustrated in chapter two with the example of Nigeria. However, the main challenge is the lack of commitment or political will to enforce these regulations when they are breached. This thesis recommends that host State governments should address these challenges and match the regulatory regime with corruption-free and effective enforcement mechanisms as part of steps for fulfilling their international human rights obligations to protect human rights and provide access to effective remedy.

Without losing sight of the possibility that treaty-protected investors could resort to the ISDS to challenge unfavourable judgments against them in the host State, it is recommended that

State parties should empower Business and Human Rights Courts (as recommended above) to mandate treaty-protected investors to deposit judgment sums in an interest yielding account in the name of the Court as security for the enforcement of monetary judgments. This is expected to go a long way in strengthening the judgment enforcement mechanism and hopefully reduce the spate of frivolous appeals and other tactics to block the enforcement of judgments including through recourse to the ISDS mechanism.

II. ISDS

Based on the analysis in chapters one to four, the thesis established that access to effective remedy and indeed favourable judgments could be obtained in the host State against treaty-protected foreign investors. However, the thesis demonstrated that such favourable judgments could be challenged at ISDS with a view to blocking their enforcement. As a result, the thesis analysed the arguments that IIL ought to provide access to effective remedy for victims of investment-related human rights by allowing them to participate in ISDS arbitration as actual parties. As set out in the conclusion section above, these arguments appear to have been conceived narrowly and do not take into account the various ways by which third-parties interests and rights could be implicated in an ISDS arbitration. Consequent to the conclusions highlighted above, the following recommendations are structured according to the three main categories under which Indigenous Right-Holders' interests or rights could be implicated in an ISDS arbitration.

1. Access to remedy for Indigenous Right Holders whose legal rights are at stake in ISDS arbitration.

a. This thesis recommends both substantive and procedural reforms in IIL towards alignment of its framework to internationally recognised right to remedy and the principle of natural justice, especially the right to fair hearing respectively. As established in the preceding chapters, third party legal rights, such as those rights accruing to Indigenous Right Holders could be directly at stake or indeed form the subject matter of an ISDS arbitration. It is therefore recommended that in such instances, affected third parties should be granted an opportunity to participate in the ISDS arbitration as an actual party with full right of participation including full access to pleadings, the right to adduce evidence and cross-examine witnesses among others. Undoubtedly, this would require comprehensive amendments to the respective ISDS arbitration rules which presently restrict actual parties to an ISDS arbitration to a national of a Contracting State to an IIA and a Contracting State respectively.

Importantly, this thesis recommends that State parties should consider incorporating into their IIAs clauses to guarantee right to actual participation to third parties, such as Indigenous Right Holders, whose legal rights form the subject matter of an ongoing ISDS arbitration. To this end, it is recommended that State parties adapt the model clause in the Hague Rules on Business and Human Rights focused on third party arbitration rights (as discussed above and in preceding chapters). This thesis contends that, by so doing State parties would be fulfilling their international human rights obligations to protect human rights in their domain, particularly the internationally recognised right to remedy and the right to fair hearing respectively.

2. Access to remedy where the interest of Indigenous Rights would potentially be adversely impacted by the outcome of an ISDS arbitration.

a. As discussed in the preceding chapters, ISDS arbitration rules such as Article 37(2) of the ICSID Arbitration Rules empower an arbitration tribunal to exercise its discretion to refuse a petition for amicus curiae submission where for instance, such submission is considered to have the potential to prejudice the interests of any of the parties to the arbitration. As argued in chapter four, this provision understandably seeks to protect parties to the arbitration proceedings. However, the provision fails to take into the account the interest of third parties, including Indigenous Right Holders that would potentially be adversely impacted by the outcome of the ISDS arbitration.

   Based on the above, the thesis recommends that ISDS arbitration tribunals should ensure judicious exercise of the discretion conferred by ISDS arbitration rules and procedures, guided by the need to balance the competing interests of the parties to the arbitration and third parties likely to be adversely impacted by the outcome of the arbitration with a view to guaranteeing meaningful participation of the relevant third-parties. It is believed that such meaningful participation will potentially enrich the perspective of the arbitration tribunal and enable a fair and just determination of the subject matter dispute.

b. Apart from the amicus curiae submission by third parties, State counterclaims similarly could be employed where the interests of third parties, including Indigenous Right Holders are likely to be adversely impacted by the outcome of an ISDS arbitration. As discussed in chapter four, State counterclaims have on some occasions been instrumental in this regard. However, as argued in chapter four, the concern is that State

parties do not demonstrate sufficient political will and determination to protect public interest in their domains, as such State counterclaims are rarely deplored in ISDS arbitrations.

In view of the above, this thesis recommends that State parties should employ the mechanism of State counterclaims to protect legitimate public interest within their domains, including those of Indigenous Right Holders. For instance, where a public interest legislation is challenged by a treaty-protected foreign investor, State parties must seek to protect such public interest legislations through the State counterclaim mechanism with a view to protecting legitimate public interest.

3. Access to remedies for Indigenous Right Holders who are victims of investment-related human rights abuses.

Based on the analysis in chapters one to four, the thesis reached the conclusion (as highlighted above) that ISDS is not a suitable forum for addressing investment-related human rights abuses. Therefore, it is recommended that both judicial and non-judicial grievance mechanisms should be leveraged to provide Indigenous Right Holders with access to effective remedy in relation to investment-related human rights abuses. It is expected that this would, as much as possible broaden the options for access to effective remedy available to Indigenous Right-Holders while giving effect to the 'all roads to remedy' approach propounded by the UN Working Group as discussed in chapters one to five of this thesis. As clarified in the preceding chapters, the all roads to remedy' approach implies that access to effective remedy is taken as a lens to guide all steps taken by States and businesses and that remedies for business-related human rights abuses are located in diverse settings.

A. Judicial grievance mechanism

With respect to judicial mechanisms in the host State, it is recommended that State parties should undertake the reforms recommended in point 1 above towards strengthening the judicial grievance mechanisms discussed in the thesis.

B. Non-judicial grievance mechanisms

Some of the non-judicial grievance mechanisms discussed in this thesis include National Human Rights Commission, National Contact Points, grievance mechanisms embedded

in international development finance institutions and grievance mechanisms provided for under various BHR frameworks. In this connection, the thesis recommends as follows:

- **National Human Rights Commission**: State parties should support National Human Rights Commission with the much-needed funding and advocacy to enable them achieve their purpose of promoting and protecting human rights, and to reduce pressure on the judicial system. As part of efforts to promote and protect human rights, National Human Rights Commission should in appropriate circumstances support Indigenous Right Holders to identify the appropriate forum to secure access to effective remedy and provide the necessary assistance, including legal aid to submit complaints with a view to obtaining redress. For instance, where human rights abuses suffered by an Indigenous Right Holder entail the involvement of an international development Finance Institution such as the World Bank, International Finance Corporation or the African Development Bank, NHRIs could assist Indigenous Right Holders to make recourse to the grievance redress mechanisms provided by these institutions.

- **OECD National Contact Points**: Non-adherent State parties, particularly those in African States where business-related human rights are more pronounced, should take steps to adhere to international law standards such as the OECD Guidelines for Multinational Enterprises and set up National Contact Points on Responsible Business. As highlighted above, National Contact Points have successfully provided access to effective remedy for Indigenous Right Holders and other parties alleging breach of the OECD Guidelines by corporations.

- **Implement National Action Plan on Business and Human Rights (NAPBHR)**: Many States have produced or are in the process of developing a national action plan on business and human rights. NAPBHRs are part of the responsibility of States to disseminate and implement the UNGPs including the third pillar thereof which is 'access to remedy'. However, many State parties are yet to launch the NAPBHR and are lagging behind with the implementation of the UNGPs.

For instance, as highlighted above, Nigeria produced a draft NAPBHR since 2017 which contained action plans covering human rights due diligence, FPIC for indigenous peoples, and access to remedy through State-Based Judicial Mechanisms, State-Based Non-Judicial Mechanism, and Non-State Based Judicial Mechanism among others. Undoubtedly, these provisions will go a long way in securing access to remedy for Indigenous Right-Holders, if implemented. Meanwhile, the Nigerian Government is yet to launch the NAPBHR and the implementation of the UNGPs in the country has therefore suffered a setback. It is therefore recommended that State parties should urgently launch the NAPBHR to disseminate and implement the UNGPs, particularly the third pillar focused on 'access to remedy'.

- **Mandatory human rights due diligence laws:** The approach to addressing the access to remedy challenge is shifting away from voluntary standards towards mandatory human rights due diligence requirements for companies. As discussed in chapter five, mandatory human rights due diligence is the subject matter of the Proposed Directive and the current French Duty of Vigilance Law. Importantly, mandatory due diligence laws have been developed or currently in development in at least 14 jurisdictions across the world, with the exception of African States.

  As clarified above and in more detail in chapter five, mandatory human rights due diligence requirements impose on in-scope companies duty to conduct human rights due diligence to identify, prevent, mitigate and account for how they are addressing human rights impacts within the company's own operations, subsidiaries and supply chain at the risk of being civilly liable for damages caused to third parties on account of the failure to conduct due diligence.

  Based on the above, this thesis recommends that African States including Nigeria should urgently embrace the paradigm shift from voluntary standards towards mandatory due diligence requirements for corporations, as part of steps to guarantee access to effective remedy. Essentially, it is recommended that African States should urgently begin the process for enacting laws that require

companies to conduct human rights due diligence. In addition, such mandatory human rights due diligence laws should borrow a leaf from the Proposed EU Corporate Sustainability Due Diligence Directive and the existing French Duty of Vigilance Law which provide for civil liability mechanisms and other enforcement mechanisms to enforce the corporate duty to conduct human rights due diligence and remediate harms caused by the failure to conduct human rights due diligence.

Further, it is recommended that such mandatory human rights due diligence laws should incorporate and place a premium on indigenous peoples' rights stipulated in the UNDRIP and ILO Convention 169 among others.

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Appendixes

Appendix 1 - Research Interview with Participant 1

Date: Monday, March 29, 2021

Duration: 45minutes to 1hr.

Venue: Microsoft Teams

Topic: The interview focused on indigenous peoples' rights, oil multinationals and environmental pollution of Ogoni land, Nigeria and access to remedies for victims as more particularly detailed in the participant information sheet.

Interviewer- Valentine Kunuji, PhD Researcher, University of East Anglia UK.

Interview Participant 1- Lawyer and environmental activist based in Ogoni land, Rivers State, Nigeria.

Transcript – Interview Participant 1

1. Short opening comments and introductions-

2. As a leader and widely acclaimed environmental activist in Ogoni land and the Niger Delta, could you please give a brief overview of the grievances of the Ogoni People particularly within the context of reported environmental pollution attributed to oil exploration activities of oil multinationals like Shell Petroleum Dev Co (SPDC) and others.

Answer -Well, as you must have known, Shell started exploiting oil in Ogoni in the late 1950s. We grew up to see as part of our daily lives, pollutions, gas flares, in fact I grew up in a community, my village is called Kedere which Shell refer to most times as Bomu Oil field. In that village we have about 58 oil wells, one flow station and one manifold. The flow stations as you know, that is where oil from the respective oil wells go there and there is some filtration process to remove sand, water before the oil is now sent to the manifold and then to the export terminal. So, I grew up to see lands that are caked because of oil pollution, I grew up to see exploitation of oil in the manner that it was next to human habitation.

Oil pipelines criss-cross in front of peoples' houses and in fact my earliest recollection as a person was when I remember I was in the primary school then when we saw vehicles going and as children that was some site that as children we wanted to see in those days and white people. All of a sudden, the teachers told all of us to lie down because there was, I later found out, a huge explosion. I later knew that that was seismic operation just adjacent to our football field, the oil company trying to find out whether oil was there. So, our school where I schooled was some two hundred metres from an oil well.

So, apart from the environmental pollution, we also had noise pollution, then the gas flares. Now, when we talk about pollution most times, many people have asked why is it that our people are talking about the environment. In fact, Shell has accused us that we are using environment as a means of getting international attention and that belies the point because anybody who lives like all of us indigenous communities like ours, you know that nature is so close to us. In fact, there are certain forests that people believe are sacred, there are certain animals that people hold as totems that if something happens to them it reverberates to human being, and that there is a right of everybody to protect that environment.

So, when sacred forests are being mowed down for purposes of exploitation, people are not seeing it as some flora and fauna that is being felled, they are seeing it as the basis of their existence, and this is the point that is lost. There are certain rivers that we are not supposed to fish in, may be at certain times unless certain sacrifices are made, so when all those things are polluted, it is that makes people stand up. That is why Ogoni people see the struggle about the environment as though it is the whole of their life. If you were to mobilise Ogoni people and told them that you want freedom of movement, freedom of speech, I am not sure that you will get that type of grassroot support, but this is something that touches into our very existence and that is how we saw it. So, when we came and I started the Movement for the Survival of Ogoni People (MOSOP), it was a realisation that our whole existence was threatened and therefore if we didn't do anything the gods will be against us, our society will be extinct, and that is the context in which I believe it ought to be seen, not just like a desecration of flora and fauna.

3. Are Ogoni People indigenous people within the definition under the UNDRIP and ILO Convention 169, particularly the criteria of self-identification.

Answer: Well, I think the world has grown past this question of definition and all that. I think it is mostly about how the people see themselves. I think the question of the Ogoni people, we have passed that stage several years ago. Because if you look at the list of indigenous peoples

recognised by the UN, Ogoni people are there, so we have passed that threshold of whether you are indigenous or not. More importantly, from my answer to your last question, you would have understood those identities, how we see nature, how we approach nature and the fact that we see ourselves in that particular way and that is my understanding of all the current way of looking at how the history of indigeneity has been, how do the people see themselves, we already see ourselves as such and we have driven this through the UN over the years since 1993 we have been recognised and if you look at that list, we still stand there, so I think we have passed that threshold.

4. You recently granted an interview to the Cable Newspaper where you stated that the oil clean-up activities commissioned in the wake of the UNEP report on Ogoni land is a cover up, could you please expatiate on this.

Answer: Well, when there is a pollution, what people want to see if you want to clean up, people want to see their land in a manner that you want to get the land back to a situation where it had been. I grew up, my earliest recollection, personal recollection of a 'clean-up' was in 1970, 1971 I can't recollect, when there was a major blow up in my community at Bomu well 11, where even rocks from the ground were thrown into the sky and it was burning and they had to bring experts from abroad to go and fix it and what happened after a while, the Shell came around brought some Professor who said they are going to do this thing, what did they do!

They carried, maybe they excavated from somewhere drum sand mixed with fertiliser, poured it over and said they had removed the initial crust and poured those ones on top and when the rains were coming, they asked us to go and plant on it and of course those things grew and the community signed off, oh the place has been cleaned up. When the sun came, all those things the oil that was there started to go up and all those things died. Till today from 1970, you go there you can pick all those bits of things there, they are like gravel, maybe some of those fertilisers that they poured there. They are black, thing cannot grow. So, that is what we have seen over the years about what is called clean-up. Now when the UN came, the UNEP, when they came and made the report that has gone all over the world, my immediate reaction then, I was still President of MOSOP, we thanked them, they had only confirmed with USD10million what we already knew. We already knew our land was devastated, so put everything that the UN said was maybe a scientific confirmation of what we have been saying that our land has been devastated.

So, for me we already knew, you don't need anybody to tell you that your land was devastated or not, except that perhaps for scientific purposes you say. So, you expect certain things to happen. What did they do in the so-called clean-up they are doing? First, the areas where they have gone to start their so-called clean up are not the areas where you will say there has been the worst environmental nightmares. Indeed, some of those areas had been cleaned by Shell themselves by their own records. So, over the years by natural means vegetation has started to grow that people have even forgotten that these are the areas they say they are cleaning. Now, what are they doing, they have just dug down according to them, and when you dig down, then you carry sand and pour again. Is that clean-up, I mean you are only covering up what is bad and that is not a clean-up.

My little understanding that is not scientific is that when you dig the ground, you bring up the red earth from the ground and by the time you fill it up, that is the one that goes up, the red earth which does not support growth, because that is not the one that people plant things on. That is what is now happening. Indeed, the UNEP if you see their review, they are not excited about what has happened, I think Premium times conducted, went there and came out with this damning report that was published sometime ago and clearly even the contract process was just a patronage, some companies that are in shoe making are even the people who are cleaning. This thing has just been a job for the boys, and you find out that they just shared the thing just to give people jobs. Some people who got contract didn't even know where Ogoni was, they came to start asking where is the place? Because you just got to Abuja that there is money, millions of dollars, if you have the right connections, you get the jobs with no experience or expertise whatsoever in what you are doing. So, you just see people digging the ground and covering up at an area that is not there and that for me is not clean-up. Clean-up should have a better way of expressing itself than what we are seeing in that place. That is why I said it is cover-up.

Follow up question: Was the clean-up exercise commissioned by the Federal Government of Nigeria or Shell.

Answer: Now, what happened was that the United Nations after its report when this government came, purely for I can say now, in my view for political reasons said oh we are going to do the

clean-up of Ogoni, to which we all clapped. So, the President came, through the vice-president. They said they are going to do ground-breaking, after that ceremony some years passed, they now created what they call HIPREP which is an outfit that is controlled from the Ministry of Environment in Abuja, that is where the people appointed, most of the people appointed are politicians, their party people that they appoint, including some Ogoni people, I must say.

Now, everything is controlled from the Ministry of Environment in Abuja. Shell, some of the oil companies, the usual suspects, NNPC are members of the so-called Board. That is how the contracts are being done even though it is not purely a Shell thing, Shell sits on it, although I think the funding comes from Shell mostly, but it is controlled by the Ministry of Environment. Mind you, if you look, Ministry of Environment is not one of the most funded government ministries in Nigeria. In fact, if you look at the paucity of their own budgetary allocation, you will understand the dynamics of what I am saying. When you see an outfit that has very little statutory funding, now has a project that is about USD1billion, you now know why that becomes the ATM machine for that ministry just like the Niger Delta Ministry also poorly funded sees NDDC as its own ATM machine. That is what is responsible in my view for this patronage system that is driving the whole thing. Unfortunately, while others see it as a means of making money, this is a life and death situation.

Follow up question – Is corruption playing a major role in terms of constraints to the effective clean-up of the devastated land.

Answer: Yes, it plays a major role. By the way, so that I do not sound as if I am excusing what is happening, there is also something that you will always be hearing that some of the pollution of the land is caused by artisanal refining, what we call local refining. Obviously, there is truth in that, but what I say is that if you look at the UNEP report and its recommendations, that was acknowledged, and it was therefore recommended that USD10million should be set aside to provide alternative means of livelihood for those involved in that so that they can transit from helping to pollute to something. Nothing has been done about that. I am not excusing it, but you do not sit down and see someone that is doing something in a situation that they have no jobs, then people are doing things that are getting them some money, it takes a lot to say just move away without at least finding what they should do.

That is one of the issues that I think is lost in this conversation. I was the chairman in 2015 of the NEITI, as chairman then, I sat on the National Economic Council committee on oil theft and pipeline vandalization and they made me the chairman of the sub-committee for community outreach and sensitisation over these issues. I went to every community, met with those who are involved in these bunkering and they looked me in the face everywhere from Delta to Bayelsa to Rivers everywhere and in the places I went, they said they were speaking to me not because I was in a Federal Government Committee, but because of who I was, and almost all of them said we even want to leave this, if we see something to give us something else, but we are not getting it and you now see some people living on by our own account about half a million youths are being 'employed' in that kind of situation. Their own GDP is about three times the national average, so how do you push such people away without finding something for them.

5. Recently Judgments have been entered in favour of Ogoni claimants by Courts in Netherlands and London respectively in suits instituted against Shell Nigeria and Royal Dutch Shell seeking reparation for extensive environmental pollution. Placing these side by side with a number of suits against Shell in Nigerian Courts which granted Judgment in favour of Ogoni claimants, what would you say is the rationale for seeking remedies in foreign courts.

Answer: Absolutely! In fact, I am happy to share with you my witness deposition in the case that went to the Supreme Court here in the UK. Because I dealt with reasons why we thought the case should be heard in the UK rather than Nigeria. I spent some time to talk about how long it takes for us to obtain justice, how expensive it is and the fact that you are not likely to go through, the Courts in Nigeria are a bit shy of going to that level when it comes to quantum of damages. I explained some of my personal experiences, I mean as a Lawyer. A case where you will go to court and there is for want of a better language, legal filibustering, where someone will say we sued Shell as Shell Petroleum Development Company Ltd and then an objection is taken that the correct name of Shell as registered in the company's registry is The Shell Petroleum Company of Nigeria Ltd, in other words that we omitted 'the' and 'of' and that took over six months in the Nigerian Courts to settle whether 'the' and 'of' should therefore determine the fate of the case.

Now when you find that, it will take some time twenty years to get judgment by which time some of the litigants have died, some cannot pursue the claims and you now start asking yourself, what is happening. In fact, there is one matter that we are doing against AGIP, where they had to take for two years we have been arguing, because AGIP asked for a motion to restrain us from suing them abroad in Italy. So, why is it that they are afraid to be sued in their own home country, because one thing that you see is that I and several others have accused these companies, the multinationals of environmental racism. That is, things that they are not going to do in their own country, they allow it to be done in our own country. So, the arrangement between them and Nigeria, they say we have the technology, we can exploit oil, Nigeria says we have oil, you come and deploy your technology.

So, that your technology is the same you are supposed to do in your own country, then do here. But because our institutions are lax, the sanctions are easily broken and nothing happens, they then decide to do it in 'the Nigerian way'. Sometimes, it becomes therefore important, give that sense of justice that you are able to at least tell them in their country that this your boy is behaving badly to us and that has given hope, it has given the space for people to get justice timeously, cheaply and at the same time sends a message that that can be a window to be exploited. I have had cases that I personally dealt with that stayed in court, that the clients told me, look forget about it, we don't want it, withdraw the case. I know one particular case I was doing in Biceni several years ago and the people said, look withdraw the case and I said let's go on and they said no withdraw the case and we withdrew the case. I ran into one of the clients, just about a year after, he said Lawyer do you know what has happened to that case, we have won the case. I said which court did you go to, he said we didn't go to any court, we sent our youths to go and 'block' them and all those sorts of things and they stopped work for one month, they came and begged us and they paid us. So, what does that say, when the doors of the court, access to court becomes tight or made inaccessible easily to the litigants, it creates an excuse for them to use self-help expressing itself in some of the violence you see against oil exploitation in the country.

Follow up question: You mentioned that it is really expensive to prosecute many of these cases in Nigerian courts, so that leads to the question of how these cases funded when they are prosecuted in foreign courts. What is the role of this conditional fee arrangement used

in the Okpabi case heard in the London Court? How is the aspect of logistics for witness attendance etc financed?

My understanding of the situation is that the clients pay nothing. My understanding of the way the no win-no pay arrangement works abroad is that when they win, they get from the loser, the loser pays for the actual cost of the litigation, which takes away the cost including the logistics. So, there is nothing the client pays. Most of these things, I am not sure it even requires people coming physically. I am a witness in that Okpabi case, I sent my witness deposition, if there was any need, they could talk to me just the same way we are talking (virtually).

So, I believe some of those things affect the cost, again like in the case in the Netherlands, the Amnesty International and some of those very established NGOs can take up the funding of some of these cases, but we don't have that level of civil society organisation or human rights groups with such capacity at home that can do that, spend money on expert witnesses and some of those things required to do the case. So that makes it cheaper. What the contingency fee works in Nigeria is at the end, the Court would just award you nominal cost, maybe NGN50,000 if you win, which has nothing to do with the actual cost of the litigation and what the lawyer does is to now go into a percentage of the actual award given to the client in contradistinction to what happens here. So, that is why the cost becomes cheaper to go abroad than home. Again, I think the companies themselves, beyond the cost, would take the matter far more seriously, because you are doing at the doorstep of their investors, their shareholders, some of whom are concerned ethically about the behaviour of where they put their investment in, so that has more deterrent effect, making them behave better.

6. Within the context of suits maintained against Shell by Ogoni communities, could please shed light on why these suits tend to target SPDC's parent company as an overseas defendant for wrongs perpetrated by SPDC considering that SPDC is duly incorporated under Nigerian laws with capacity to sue and be sued?

Well as I said in my previous response, our understanding is that the relationship between the Nigerian government and the foreign companies is that we have the technology to exploit oil in your country and you have the oil. Most of what they have done is to then put a local boy as it

were to be our face to deal with you and if the manner in which you exploit oil on our land is faulty, then it means the owner of that technology is not doing it well and therefore we should ask you at the end of the day where does the profit go from the Shell Nigeria, it goes to their parent company. Their global profit, how do they do it there. Have you seen Shell or any of those companies, what investments do they have in Nigeria, most of what they are doing creates more jobs in their home country than here in Nigeria. At home, they hire everything, they just come with briefcase. Have you seen an estate built by Shell or anything? The people who are actually the directing minds, don't mind whatever façade that they try to create, are based in their home country and if you send your own agent as it were, and he commits these things, we should go after the principal especially when we know you are the person that is there.

Follow up question: would there be any concerns about the financial capacity of Shell Nigeria to pay judgment debts.

Answer: Well, we are not looking at that too much. Our concern mainly, particularly for me because I have been one of those pushing for them to be targeted in their home country, stems from what I have told you in the response to your earlier question, what I consider to be environmental racism, that they would not do those things in their home country. People will be shocked, people will go on the street in this part of the world, but at home we live with it. At home, for me as I was growing up they told us that crude oil was medicinal, I drank crude oil as a child, because I was made to understand that these things are okay. So, they can get away with it, I think it is important to bring to reality in their home country how they are operating abroad. For me, that is one of the main motivations why I encourage litigants to take it to their home country.

7. SPDC recently instituted an investor-State arbitration against the Nigerian government in connection with the Judgment entered against SPDC in the Isaac Ogbara case in favour of Ogoni claimants. What is your take on the demands in some quarters up to the UN level for host communities to be allowed to participate in relevant investor-State arbitration as actual parties?

Answer: Well, first on one hand I have always felt that the issue between Nigerian government and Shell is that of two partners in crime. Because it is difficult for a person in the local level

to say this where the responsibility of the government stops and then Shell's own begins and people sometime use to say we are targeting Shell instead of the government. But what do you expect someone to do, if you have a business that you are doing in Nigeria and you are here and then you give it to your brother to be operating in Nigeria? Who do I see, anybody I see on the ground is the person I am going to deal with and that is how it is. But when it comes to issues between the two of them, the area we think communities should also participate because these two people can go and connive and do a lot of things.

So, anything that would affect our own interest, perhaps we should be there. You don't shave someone's head in their absence and that is why I think we should be there. Otherwise, the natural reaction would be that is for them let them sort it between themselves. By extension, whatever Shell puts on the Nigerian government will have two effects either it will make Nigerian Government put so much pressure on the court system, of which they can, to frustrate the realisation by the claimants of the fruits of their judgment or if they get that kind of money from the Nigerian government it affects the fulfilment of the government's responsibilities towards its own citizens, including the claimants in that case. So, either way the claimants have something to suffer.

8. Would you say that there is an awareness of alternative avenues for seeking remedies for business-related human rights abuses in the Niger Delta other than litigation such as National Human Rights Commission, operational level grievance grievances etc?

Answer: Well, the question of awareness, I will say people are aware but are they excited about them, when there is no enforcement mechanism. The question is awareness, another thing is how effective? When you go to Human Rights Commission, how many decisions of the Commission does the government even look in that direction, even the ECOWAS court, how many decisions have they taken, how many times did they order the release of the former National Security Adviser, Dasuki, how many times did government even comply with it? Some of those things merely exist on paper. Litigants or aggrieved people, what they want is redress, they want justice, they want something, what does it take for someone to just give them paper. When you look at the case we took up, this case that went to the African Commission, the SERAC vs Nigeria case. How many years did it take for that decision to come out, what did government do with it? So, when you have all those avenues and you have judgments that no

one implements, does it matter whether you are aware, or you are not aware? What people are looking at is what are the means by which we can get effective remedy. That is why people don't bother to blink an eye to look in those directions.

9. Generally, what are the ways by which access to remedies for indigenous victims could be improved on.

Answer: Well, for some time ago, I have said there needs to be a fast-track court system that can make judgments reached easily that is not bogged down by technicalities. That is, one means by which we can help. Two, why the legal aid mechanism can be expanded to make sure it covers victims, or you make it in such a way that it looks like what is here that once I win, I am entitled to actual cost of litigation over the years like I said once there is closure of that space or you make it difficult, then the alternative is self-help. So, government realises the benefit to the stability of the region, the oil company realises the benefits to the stability of the region that is one of the things that it will do. It will also help companies to realise that going into legal filibustering or to delay is in the long run going to be counterproductive to them. Therefore, if there are matters to be settled, they need to have to settle, create an arbitration system that should be binding so once some of these things happens, people can go and seek arbitration that is binding. Some of the things that make it easier less technical and less costly will help and will help the stability of the system.

10. Brief summary of interview, appreciation and general comments about the debrief form.

Appendix 2 - Research Interview with Participant 2

Date of interview: Monday April 26, 2021

Venue: Microsoft Teams

Topic: The interview focused on indigenous peoples' rights, oil multinationals and environmental pollution of Ogoni land, Nigeria and access to remedies for victims as more particularly detailed in the participant information sheet.

Interviewer- Valentine Kunuji, PhD Researcher, University of East Anglia UK.
Interview Participant 2 – UK based international human rights lawyer and Partner at an International Human Rights Law Firm in London.

TRANSCRIPT – Interview Participant 2.

1. **Question: As a leader and widely acclaimed environmental activist in Ogoni land and the Niger Delta, could you please give a brief overview of the grievances of the Ogoni People particularly within the context of reported environmental pollution attributed to oil exploration activities of oil multinationals like Shell Petroleum Dev Co (SPDC) and others.**

Answer: It all began with an email from a Nigerian fishing cooperative based in Port-Harcourt, which emailed my colleague, and said look we have real problems of oil pollution in Nigeria, in Ogoni land and we have lots of evidence. Could you please come and visit Nigeria? So, we were sent to see find what these cases were about, and for various reasons that particular contact did not work out, we didn't think he was a credible individual, we though he was essentially trying to manufacture claims, but what I did was while I was in Port-Harcourt I met key actors in civil society organisations and had a lot of advice from Amnesty International who had recently done some work in Nigeria on oil pollution and they said, look you need to meet these people and I met them all.

One of them was a professor, he was then a lecturer at the University of Port-Harcourt, but now he is a Professor Zabi Nian-Barry who had worked in Amnesty. He came to me, and we met in

Port-Harcourt in a hotel and said the issue is you need to come to the Bodo Community where there has been a terrible spill back in 2008, you need to come and see it with your eyes, here are some of the paperwork around it, the community is desperate for redress, the entire Bodo creek which he had been studying for years for his PhD thesis is now devastated and covered in oil, so please come and visit the Bodo community and take their case because there are Nigerian Lawyers but the case is not going anywhere.

So, I flew back to the Niger Delta a few weeks later and I met with Zabi with a colleague of mine and we drove up to the Bodo Community about an hour, hour and a half from Port-Harcourt to the North deep in Ogoni land and in the creeks. When we arrived, it was a very poor community, we got closer to the riverside and all you could see was oil, everything had been covered in oil, all the mangroves, all the coastlines, the children were swimming in the creek covered in oil and people were building boats next to the oil sleeks. We went on a boat, we travelled around the creek for probably an hour, and the devastation had got everywhere, there was nothing that wasn't totally covered with oil, all these engine mangroves, habitats. We met with village chiefs and the paramount ruler of the community and said look our community is desperate, this is a farming and fishing community, everything is impacted, people can't fish anymore, they have to travel out to sea for miles and miles to fish before they get any fish anymore, the periwinkle pickers, the traditional job of the women in Bodo, they can't pick periwinkles anymore, when they find any they are covered in oil, they are not fit for human consumption.

These people had very simple boats that they would carve out of tree trunks, their boats couldn't take them very far, they couldn't go out to the open sea with their boats. The whole community was in a state of total environmental and economic devastation. So, we meet with the chiefs and they say to us that you must take our case to London because this was 2011, it was three years, the only thing Shell has offered us is thirty (30) bags of rice and other food for the community, that is it, and we are totally devastated, and our Nigerian lawyers, are saying the case isn't going to work in Nigeria, its going to take decades to work through the Nigerian courts and even then you are very uncertain to get a good result because of inequality of arms between Shell and the claimants' lawyers. Then we wrote to Shell and to our surprise Shell said they were going to accept liability for these spills and would want to get into a mediation process to discuss how to resolve these cases.

So, we get into a mediation process and we produce all our evidence about the nature of the devastation, that there were about 30,000 people in the community, that the oil has destroyed everything and essentially Shell argued that although this community is only coast, there are hardly any fishermen here, that is if they don't say they are fishermen on their ID cards, then they were not fishermen and said out of a population of 30,000 there were only about 150 fishermen. Shell said the devastation that you see has been caused by bunkering, tampering of the pipeline to siphon the oil and the spills we are responsible for are very small and we cleaned them up in 2009 and so the damage that you have suffered is absolutely minuscule.

I can't tell you what Shell offered, because it is confidential, but they offered absolute pittance. So, we rejected that, stating that they clearly don't understand, and we don't have the same idea of the degree of devastation that have been caused by Shell. So, the process then took three years and we had 15 different expert disciplines, the most important of which was satellite imagery because when Shell got satellite imagery and we got satellite imagery we were able to show them that their narrative that this was a small spill and had been caused by bunkering didn't make sense.

We actually showed that bunkering hadn't taken off, bunkering only happened after the creek was devastated and we were able to show with satellite imagery that the 2008 spill went everywhere in the creek because the spill had been left running for five weeks on each occasion and oil just spread all over the entire 9000 hectares. It was only when Shell's expert said this is the reality of the situation that Shell said OKAY, we are willing to settle this for substantially more money and it took three years and three mediations and in the end agreed to a settlement of £55million for the Bodo community and a clean up process which was sponsored by the Dutch government which is still going on till today and which I am still very much involved in. That is the biggest settlement any community has ever had for a spill and that money wasn't paid directly to the 15000 families who we opened bank accounts for and the money was transferred directly to them from London so no one could get their hands on the money. That is always the danger when you a large pot, someone will try to get their hands on it, dare I say particularly in Nigeria.

Follow up question – Did this matter ever come to the London High Court?

Answer – Yes it did, preliminary issue trial and in terms of legal issue we sued Royal Dutch Shell and SPDC Nigeria. Shell said we would submit to the jurisdiction of UK Courts, and we would put up Shell Nigeria as the sacrificial lamb if you drop the case against Royal Dutch Shell. At that point, we said okay we will do that and then they started to narrow the case down as much as possible because we were claiming aggravated damages, exemplary damages and saying look we have got the losses but on top of it because Shell behaved so badly by allowing the spills to carry on for five (5) weeks on each occasion because they wanted to keep pumping oil to the Bonny terminal, we said that would attract both aggravated damages and exemplary damages. Shell said no, this is all about the Oil Pipeline Act 1956 and because there is a statutory regime in Nigeria that displaces the common law causes of action. That issue went before a High Court judge, they had Mr Justice Ayoola, former Supreme Court judge, very erudite, Mr Justice Oguntade. So Shell was able to convince the High Court that the statutory regime did displace the common law so we couldn't get all these other damages, so that was the issue which was an extraordinary judgment because all the Nigerian law decisions allowed for statutory and common law remedies so the High Court basically said that if all these issues were decided by Nigerian Court they would say the old regime had been displaced by the statutory framework. I think it is rather ridiculous. So that was the road to settlement, we were able to carry on fighting.

2. Question - Would you necessarily consider that as part of the legal barriers to access to remedies for victims?

Answer: The ruling of the London High Court agreed with Shell that the common law regime was displaced by the statutory regime. The impact of that ruling was minor in the end because we were able to argue wayleave damages. Wayleave damages occur where a polluter uses your land and dumps a whole lot of oil on your land and leaves it there for a period of time, they will in theory have to pay you for the rent of that land for using your land in that way and when you get into that then you also consider whether there would what proportion of profit they have made from using your land in that way and consider how much money was made by Shell for dumping of oil on your land because they carried on pumping oil onto the Bonny terminal.

So, all these are the issues they were trying to get out of were eventually reignited by the fact that we were claiming wayleave damages such that we would be looking at did they actually fail to shut down the pipeline because they wanted to continue to pump oil to the Bonny terminal and was the Bodo people expendable for Shell as long as they were making their money. So, all these issues remained live and put a huge amount of pressure on Shell.

3. Question: So, knowing there was a prospect of success in the case that was filed in London pushed Shell to a position where they were willing to settle out of Court eventually.

Answer: Yes.

4. Question - From your point of view, could you please give an overview of the legal challenges and barriers to holding Shell to account and ultimately obtaining justice in relation to environmental pollution in Ogoni land.

I would say the main legal challenge was around the conduct issue, that is how could we get the conduct issues before the Court because that was what Shell really didn't want and I think I have explained that in that even though exemplary damages weren't allowed, we were able to keep the conduct issues in by claiming wayleave damages. With regard to the other legal challenges was with respect to finding the evidence of the spill, both on the extent of the spill the area that it covered and explaining how that translated legally into damages to the livelihood to people in the community. That was very complicated, because we had to prove the number of claimants, the number of people that fished in the community and basically what they would have lost in terms of earnings and evidentially that was quite complicated. We had to work with experts on fisheries, population density, mangrove and other things that were really involved.

Follow up question – So you will not say that there was so much of a jurisdictional barrier in terms of being able to bring the case to London. So, you didn't really encounter serious barriers on the jurisdictional front?

Yes, because unlike the Okpabi case they conceded jurisdiction.

5. Indigenous victims are more often than not of indigent status which fact tends to impact their ability to hold oil corporations to account and effectively pursue remedies. Your firm has commendably leveraged the contingency fee arrangement to address this constraint to access to justice. Could you please discuss the prospect and challenges of this for access to remedies for indigenous victims and would you recommend popularising this initiative as a financial template in the prosecution of corporate accountability litigation.

Well, it makes this work possible because clearly, we are talking about very poor communities who couldn't possibly instruct lawyers. So, what the fee structure for litigation in the UK allows you to do is to pursue litigation and not charge the victims/claimants anything but you are able to essentially charge the defendants if you win the case. This means you need to invest yourself in the case, you need to be able to put a lot of money into the case, so you need to have fairly sizeable resources to be able to do that. But it does mean that the burden, the legal cost falls on the defendant when you win the case, it doesn't fall on the victim/claimant although that has slightly changed. You can now charge up to 25% of the damages as well, although we try not to do that to cover the initial filing cost.

It is a good model, in Nigeria the model like America, it is contingency fee, so basically Lawyers would work for a large cut of the damages which is I find it difficult when you are doing a human rights or environmental case and you are fighting for victims and taking half of the damages. The argument in favour of that is, look if we didn't do that they wouldn't get anything and this is how the system works, and we have to be able to finance our cost by doing contingency fee. So, I think the model we have in the UK is a good model but it is a model that many other countries have. So, I know for instance that on the continent in Europe you are not able to get your cost this way and it actually very hard to recoup the cost of an expensive litigation like this in Europe. This means there are only a few cases that take place, it is in common law jurisdiction where this kind of work is possible, class action, group action.

6. Follow up question- One of the facts that I got from my earlier interview with an environmental activist in Ogoni land is that these case could be prosecuted abroad without the claimants physically present. So, I wanted to crosscheck that with you, in light of the

fact that electronic evidence is not admissible in Nigerian Courts as opposed to the UK where this is possible.

It is not so much of electronic evidence, rather it is that you can hear oral evidence by way of video link which is acceptable, both in criminal and civil trials. We haven't done that much because the links from Port-Harcourt or some other remote areas are not reliable. But what we have done is, we have a trip down to.., in Sierra Leone we had a trial where the whole Court moved to Sierra Leone and the evidence was heard in Sierra Leone in a hotel room. The parties paid between them for the cost of that. There may have been some costs from the court service, I don't know who paid for that. But look as links get better, we would be looking for more remote trials. I think you lose quite a lot by not having the claimants before the judge physically because you learn a lot from having, it is a lot more effective when you have someone explaining in person what has happened to them and you can see their body language, making an assessment on that basis. So, I think we are moving that way but it's going to be slow.

Follow up question- With respect to finance templates, I think there is an insurance side to this whereby insurance companies get involved at some point that is this contingency fee arrangement where the law firm prosecuting the case will take out an insurance from an insurance company. So I was hoping you could shed some light on that.

Answer- So, it is basically an after-the event insurance, and you are protecting the victim from having cost ordered against them that would then be covered by the defendant company. Because of recent changes, it is much harder to get an after the event insurance because for these kinds of cases, it is really not clear whether we need them because the cost ordered against the victims are pretty much unenforceable. There is no way Shell was going to get the cost from poor rural villagers in Bodo. They are not going to the Nigerian Court and say look we are owed thousands of pounds by these individuals. So, we generally don't worry about the after the event insurance anymore because we don't think it is a realistic risk, that our clients are going to be run after for cost.

7. Question - The parent company liability principle has become increasingly potent along the lines of holding corporations to account in international law especially in terms of vesting foreign courts with jurisdiction to hear and determine suits involving alleged

liability of overseas subsidiaries. Meanwhile, there have been queries suggesting that such allegedly culpable overseas subsidiaries are incorporated as separate legal entities with capacity to sue and be sued in the local jurisdiction, thus raising questions about the need for filing suits in the parent company's jurisdiction. Could you please share your thoughts on this?

Answer – The reason we at my law firm do this work as opposed to other types of human rights litigation is precisely because of the barriers to access in so many of these jurisdictions. We are talking of impoverished communities who have absolutely no means of paying for legal advice and I have worked in the legal system in Kenya, Congo, and I have worked with Lawyers, and I have seen with my own eyes, and I have seen the impossibility of impoverished people getting access to Lawyers and to be able to bring complex litigation against wealthy, very powerful corporate interests. It is absolutely a non-starter. In Nigeria there are some case laws against oil companies, but what you see is that the oil companies use every trick in the book to string up litigation as much as possible so the case will often take decades. An example of is a case where Shell sought to strike out a suit because the suit said Shell Petroleum Company rather than 'the Shell Petroleum Company' and that took two years to resolve or there was a full stop missing in the pleading.

So, all these issues are exploited by Shell or other corporates to grind down claimant lawyers who are not being paid because no one has any money, they simply don't have the capacity to hold these wealthy corporations to account in so many jurisdictions. It is an impossibility. To give you another example, I did a case against the Mozambique Gem Stone company where the major shareholders were the local politicians and there was a prosecutor that was looking into the violations and wanted to prosecute some people in the mine for very serious human rights abuses. He was shut down, dismissed and the idea that anyone could bring a case against these really wealthy corporate interests that are highly connected with government is impossible.

So, you stand back and say where do we go from here? In so many parts of the world it is impossible for these impoverished communities to get justice. One of the answers is internationalising the case where else can we sue, where can we get access to justice and one of those possibilities is the United Kingdom or other jurisdictions where you can sue the parent

company. That is an option. This is the reason why we bring these cases against the parent company. Because it is in so many parts of the world, the only hope for these communities.

But where it is possible to sue locally, we would work with local lawyers to sue locally, we do that now in South Africa, we have got big litigation against Anglo-American company on minor health and safety, occupational health litigation. We are doing another case now that has to do with lead poisoning in Zambia and also in South Africa. So, where it is possible to do it locally, we would do it locally. I think Leigh Day in the future will like us to have an office in Johannesburg, Nairobi and who knows maybe an office in Lagos to bring these cases through well-functioning legal systems where they can get remedy. But at the moment, very difficult in many parts of the globe sadly in Africa, Latin America, and Indian sub-continent.

8. Question: SPDC recently instituted an investor-State arbitration against the Nigerian government in connection with the Judgment entered against SPDC in the Isaac Ogbara case in favour of Ogoni claimants. Please what is your take on the demands in some quarters up to the UN level for host communities to be allowed to participate in relevant investor-State arbitration as actual parties?

Answer: I think it is an interesting idea, how will that work because arbitration is built into the treaty. I mean it is an excellent idea, human rights are increasingly becoming an issue in investor-state arbitration and can now been used as a defence, as I understand it has been successfully used in a Kenyan arbitration and maybe more. So, if that is the case, it would be entirely logical to make sure that victims from host communities have a voice that is not just going through the government, but they have an independent voice which can be considered. It will take some thinking about how it can be achieved because it is a different model because arbitration is essentially a contractual model where two parties agree that this is how we are going to do dispute resolution so you will be injecting a third party into it beyond the contractual model. But there is no reason why it can't be as long as that is how the treaty is structured. You will then have to think about who will cover the fees for the representation of the communities. Will that something both parties would have to fund, would there be an independent fund for victim representation. There are some complex issues around it. But I think it is a very good idea. So at the moment, communities can have amicus briefs and that would be funded by NGOs

etc. Is there an amicus in the Ogbara case? Is there anyone talking of an amicus brief on this. Maybe we would be interested in doing an amicus brief.

9. Question - There are ongoing efforts at the international level with respect to a binding business and human rights treaty, please what is your take on the potential impacts this treaty could make in the context of access to remedies for victims of human rights abuses by corporations?

Answer – Well, I think it is a very noble effort people are making and a lot of very interesting thinking and energy going into it. I think it is unlikely to see fruits in the short term, doesn't mean people should not be trying to push it in the long term. But I think where there is a lot more promise is on National Human Rights Due Diligence law such as the European Human Rights Due Diligence Law which is also now being conceived of, which is going to be a game changer in this area because we are moving from a model where it was totally unregulated, there was no real thinking about what the human rights and environmental impact of multinationals were, it was all left to countries to do their regulations in this space to a model where there is recognition that there must be some form of binding regulation on companies who are operating around the world sometimes in regulatory vacuum and in those circumstances you need to be placing obligations on those companies to ensure that there is human rights compliance within their corporate group, but also in their supply chain. I think that is a lot more promising short-medium term objective. It doesn't mean we should drop the treaty. I think the pressure and the thinking should carry on, but I think it should not be at the expense of the gains we could make nationally and regionally in developing these models.

10. Question - Many countries and regions around the world including the EU and others are contemplating environmental and human rights due diligence legislation for safeguarding against adverse human rights impacts related to activities of corporations. What do you think are the prospects and limitations of such environmental and human rights due diligence legislation in terms of holding corporations to account?

Answer: Well, I think the main advantage of this is that it places, instead of having to argue in each case that there is a common law duty of care which is fact sensitive, which is what we had to deal with at my law firm through the common law, it is a way of automatically putting a statutory duty of care on the corporation and that is of utmost benefit to human rights lawyers

who are thinking of how to hold corporations to account. Because so much of the argument is about whether there is a duty of care and therefore whether there should be jurisdiction. If you get through those two hurdles, automatically then you are getting into a discussion about look this is the human rights abuse, how did you allow this to happen under your watch within your corporate group. Then that is a much more straightforward argument for the kind of corporate accountability cases that we do instead of having to every time persuade the court that there is a duty of care in each particular case. So, I am very much in favour.

11. Question - Generally, what are the ways by which the access to remedies for indigenous victims could be improved on?

Answer – Well, I think a lot of progress has been made over the last thirty years and I think we are at the moment living through a period of enormous change because 20 years ago people weren't really thinking about business and human rights, human rights was about state to citizen relationship, it was not about the impact of businesses. That has changed and I think it has changed permanently for the good and we are moving now to a situation where people are thinking about voluntary mechanisms towards hard law regulations but that change needs to carry on.

I think we are at the start of it, part of that is through the common-law cases that we bring, parent company liability cases, what will really make a difference is if we do have these human rights due diligence laws which would make it really difficult for corporations to wriggle out of accountability. I think that is where we need to be focusing, and these due diligence laws should have a hard edge to them, they can't be simply saying look you the companies need to be thinking about these laws and having some vague report. It must be a system where the action of the company is capable of challenge and there is accountability that these companies would face if they were breaching human rights, there must be remedy for the victims. So, I am optimistic that there is a huge corporate impunity problem that we are having to tackle I think this is a space, at least now people are having the right conversations but there is a long way to go in closing the accountability gap.

Brief summary of interview, appreciation and general comments about the debrief form.