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Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals

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ABSTRACT

Investor accountability in international investment law (IIL) has been gaining increasing traction in recent years. Most visibly, some states have included investor obligations in their investment treaties, while others have made them part of their model treaties. While highly significant for the substance of IIL, these duties need adequate procedural tools to enforce them. Otherwise, investor obligations will be only decorative features of investment treaties without any legal meaning. The oft-discussed option of counterclaims is limited insofar as it may only be launched after an investor has made a claim against a state. As a result, it is important to identify other potential pieces of the procedural infrastructure for investor accountability. This article analyses three such methods: indirect actions that link an investor's access to arbitration to its compliance with legal rules and standards, whether in domestic or international law; direct actions by states against investors; and direct actions by individuals against investors. In each case, we assess the existing legal landscape of arbitral and treaty practice, the most promising legal avenues for advancing that method of accountability, and potential challenges to these avenues. Given the procedural focus of the negotiations for ISDS reform taking place at UNCITRAL Working Group 3, it is a particularly opportune time for this exploration of these options.

1. INTRODUCTION

Investor-state dispute settlement (ISDS) emerged on the international stage in the 20th century as a method of empowering foreign investors to assert legal claims against host states without the intervention of their home state through diplomatic protection. Whether through contractual arbitration clauses or international investment agreements (IIAs), its purpose was clear—to protect multinational corporations and to hold

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host states accountable for violating contractual or international commitments. Advocates for ISDS, both the capital-exporting states and their companies, were generally unconcerned about the negative effects that either a particular investment, or foreign investment generally, might have on host states. To the extent they considered the issue, their easy answer was that the host state had the authority to address those negative effects through its domestic law and remedies. ISDS would serve as a limit on the operation of the domestic legal order to the extent that it breached the host state's obligations under the contract or the IIA.[1]

This simple, one-way approach to ISDS and international investment law (IIL)—investor rights and host state duties—is now a relic of the past. It was the product of a particular historical period and political dynamic when capital-exporting states sought to develop and deploy international law for their economic and political ends. Even as arbitrations against host states under IIAs proliferate, many participants in the international legal process appreciate that because of their asymmetrical nature, ISDS and IIL do not effectively regulate investors' conduct. Some key decision-makers have made it clear that they want to see IIL expand its scope of application.[2] They see IIL as doing more than regulating states' treatment of investments, advocating an expansion into the territory of investor duties.[3] But if any of these ideas are going to become realities, then innovations in the procedural infrastructure for IIL are needed. Fundamentally, states need procedural tools to hold investors to account. This essay seeks to assist in the designing of these tools.[4]

The evidence of this new sensibility among some states—and even investors themselves—can be seen in numerous fora and forms of law. Most important is the broad acceptance of the 2011 UN Guiding Principles on Business and Human Rights (UNGPs). Pillar I of the UNGPs calls on states, while carrying out their legal duty to protect human rights against business-related harms, to ensure that their IIAs provide them with adequate policy space to address those harms; and Pillar II recognizes business' responsibilities not to violate human rights.[5] Another example is the recalibration of IIAs to exempt the state's regulation of business activities for public

1 For example, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2d edn, OUP 2012) 20, 24.

2 For a sampling of analyses of these concerns, refer to Peter Muchlinski, 'Towards a Coherent International Investment System: Key Issues in the Reform of International Investment Law', in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy* (CUP 2013); Steven R Ratner, 'International Investment Law Through the Lens of Global Justice' (2017) 20 JIEL 747; Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 AJIL 410. For one of many critical perspectives on the current system, refer to M Sornorajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015).

3 Steven R Ratner, 'Global investment Rules as a Site for Moral Inquiry' (2018) 27 J Political Philosophy 107, 119 (non-reciprocity as part of a systemic critique of IIL).

4 This article thus fits within UNCITRAL Working Group III's mandate to reform the procedure infrastructure for IIL to make it more legitimate; indeed states involved in that process have already shown their interest in these issues. 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)' (2019) A/CN.9/970, paras 26–27, 31–35, 39.

5 OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) HR/PUB/11/04 pillar I, principle 9, and pillar II, principle 11 (hereinafter UNGPs). For information on the ongoing process to create a treaty on business and human rights, refer to 'Open-Ended Intergovernmental Working Group on Transnational Corporations and

welfare purposes (e.g., health, environmental, and other reasons) from the scope of certain investment protection standards or from the jurisdiction of ISDS tribunals.[6] In similar vein, we are beginning to see the inclusion of investor duties in IIAs. They are broad in their scope, ranging from anti-corruption to public health to environmental protection.[7] Finally, a small number of tribunals (thus far) are taking tentative steps to enforce, or at least recognize, investor duties in particular arbitrations.[8]

As a conceptual matter, the protection of individuals and communities from investor misconduct and any negative effects of foreign investment need not manifest itself through changes to substantive IIL or incorporation of those concerns into tribunal rulings. Arguably, these concerns could be addressed through a stove-piped legal and institutional architecture where the duties of investors are defined and adjudicated quite separately from the rights of foreign investors. But international law does not grow in such an idealized and top-down fashion. Rather, the most realistic way, in our view, to address newly recognized challenges, at least in the short-term, is to alter existing bodies of law and institutions. A similar movement is also apparently taking place at the domestic level. Most specifically, domestic courts in the home states of foreign investors are beginning to accept that they have jurisdiction to hear claims from citizens in host states that allege investor misconduct.[9]

In the case of ISDS, the option of making it more responsive to issues of investor misconduct is particularly compelling. States and investors have generally accepted the ISDS system; with significant improvements, such as those under consideration by UNCITRAL, it can offer a fair hearing for at least some stakeholders; and, thanks to the International Centre for Settlement of Investment Disputes (ICSID) Convention and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), judgments can be enforced in many instances. So, without discounting the possibility of other fora for recognition, clarification, and enforcement of investor duties, this article proceeds on the assumption that ISDS can be utilized as one forum to hold investors accountable for misconduct.

The possibilities for enforcing investor obligations through ISDS should be considered holistically. Here we address three key strategies, presented in order of ambitiousness. Section 2 discusses what we term *indirect methods of addressing investor obligations,* insofar as such actions do not involve a procedurally distinct claim by the state (or anyone else) against the investor. The key strategies in this regard are denying companies access to arbitration when they have breached certain duties and reducing damages to take account of investor misconduct. Section 3 turns to *direct*

Other Business Enterprises with Respect to Human Rights' (*UN Human Rights Council*) <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx> accessed 8 April 2021.

6 UNCTAD, 'UNCTAD's Reform Package for the International Investment Regime' (2018).

7 See text accompanying notes 15–32.

8 For example, *Perenco Ecuador Ltd v Republic of Ecuador*, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015); *Urbaser SA and Others v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016); *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Counterclaims (7 February 2017).

9 For example, *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20; *Nevsun Resources Ltd v Araya and others*, 2020 SCC 5 (Canada); *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3.

claims by states against foreign investors (distinct from counterclaims), a process that maintains the bilateral dynamic, but requires a change from the lack of reciprocity of current IIL wherein only investors can initiate claims. Finally, Section 4 addresses possibilities for *direct claims by individuals* to hold investors accountable to their corporate duties through arbitration, which requires granting legal standing to those currently excluded (except through the limited amici filings) from ISDS. A fourth strategy, beyond the scope of this article (and raising numerous additional issues), is through counterclaims by states against foreign investors, a process that has already transpired in several arbitrations.[10] Counterclaims have also been discussed at recent sessional meetings of UNCITRAL Working Group III.[11]

Finally, we add one clarification regarding the scope of this article. When we speak of investor misconduct and duties, we have a broad understanding of these concepts. That misconduct may be defined under domestic law or international law; under hard law or soft standards; it may not be a criminal offence under domestic law; and it need not involve the human rights of individuals or communities in the host state. Moreover, we do not need, for purposes of this article, to delve into the endless doctrinal discussion of whether companies are, can be, or should be bearers of direct duties under international law. As we discuss, the scope of investor misconduct that can be effectively addressed through ISDS is an open question with many possibilities on the horizon.

2. INDIRECT METHODS OF ADDRESSING INVESTOR OBLIGATIONS

Current practice in IIAs and arbitration allows for indirect methods for holding investors accountable for certain misconduct or breach of duties. As noted earlier, these methods are indirect in that they do not entail procedurally distinct claims against the investor for misconduct, through counterclaims or direct claims. We focus on two key strategies, one conditioning access to arbitration on investor conduct and the other reducing compensation for investor misconduct.

A. Conditioning Access to Arbitration on Investor Conduct

Because ISDS is the key benefit for investors for enforcement of the host state's IIA obligations, any conditions on the investor's ability to initiate arbitration, or on the jurisdiction of the tribunal, are likely to be taken seriously by foreign investors—assuming they are also taken seriously by tribunals. Regardless of whether an IIA can legally create duties for investors to comply with international law or domestic law, conditioning access to arbitration on compliance with international or national law or even non-binding standards creates a powerful incentive for investors to follow those norms.

10 *Perenco Ecuador Ltd* (n 8); *Burlington Resources Inc* (n 8). For recent defences of counterclaims as a strategy for addressing investor obligations, refer to Ted Gleason, 'Examining Host-State Counterclaims for Environmental Damage in Investor-State Dispute Settlement from Human Rights and Transnational Public Policy Perspectives' (2020) International Environmental Agreements: Politics, L & Economics <https://link.springer.com/article/10.1007/s10784-020-09519-y> accessed 8 April 2021; Tomoko Ishikawa, 'Counterclaims and the Rule of Law in Investment Arbitration' (2019) 113 AJIL Unbound 33.

11 For example, UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020)' (2020) A/CN.9/1044, paras 57–63.

(i) Arbitral approaches

Since their inception, most IIAs have defined protected investments as those, in one way or another, made in accordance with the laws of the host state—what we will short-handedly refer to as 'in conformity' provisions, though their wording varies across treaties.[12] Nevertheless, tribunals have overall been unreceptive to claims that illegal conduct by the investor per se deprives them of jurisdiction.[13] First, they have made clear, in the context of rejecting various claims of illegality raised by respondent states, that IIA 'in conformity' provisions concern only the investor's conduct at the establishment phase, not at subsequent violations of host country law;[14] thus a failure of the investor to comply with host country law during the operation of the investment does not divest a tribunal of jurisdiction.[15] Second, not all violations of host country law, even at the establishment phase, seem sufficient to deprive a tribunal of jurisdiction, with some tribunals insisting on a requirement of seriousness or gravity.[16] Support for a clean hands doctrine that would deny an investor access to arbitration due to its own conduct is mixed.[17]

In a small number of cases, tribunals have dismissed cases on jurisdictional grounds based on a finding that the investment was not protected due to its establishment in serious violation of local law. In *Fraport v Philippines*, the tribunal relied on the presence of an 'in conformity' clause in the underlying IIA and found the investment to be established in violation of the state's anti-dummy law.[18] In *Anderson v*

12 UNCTAD's Treaty Mapping Project shows that 1648 out of 2577 mapped treaties include such a requirement in the definition of investment. 'Mapping of IIA Content' (*UNCTAD*) <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> accessed 8 April 2021.

13 For useful overviews of the caselaw and doctrine, refer to Michael Polkinghorne and Sven-Michael Volkmer, 'The Legality Requirement in Investment Arbitration' (2017) 34 J Intl Arb 149; Johannes Hendrik Fahner, 'Assessing Investor Misconduct in Mining Disputes – Legality Requirements, Clean Hands, and Contributory Fault' in Cory Kent and others (eds), *Social License and Dispute Resolution in the Extractive Industries* (forthcoming 2021).

14 *Gustav F W Hamester GmbH & Co KG v Ghana*, ICSID Case No ARB/07/4, Award (18 June 2010) paras 127–29; *Quiborax SA, Non Metallic Minerals SA, and Allen Fosk Kaplún v Plurinational State Bolivia*, ICSID Case No ARB/06/2, Decision on Jurisdiction (27 September 2012) para 266; *Georg Gavrilovic and Gavrilovic DOO v The Republic of Croatia*, ICSID Case No ARB/12/39, Award (26 July 2018) para 303.

15 *Urbaser SA and others v The Argentine Republic*, ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) para 260; *Teinver SA and others v The Argentine Republic*, ICSID Case No ARB/09/1, Decision on Jurisdiction (21 December 2012) paras 326–27.

16 *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) para 86; *Hochtief AG v The Argentine Republic*, ICSID Case No ARB/07/31, Decision on Liability (29 December 2014) para 199; *Krederi Ltd v Ukraine*, ICSID Case No ARB/14/17, Award (2 July 2018) paras 348, 356. For criticism of this approach, refer to Jarrod Hepburn, 'In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration,' (*Investment Treaty News*, 19 November 2014), <https://iisd.org/itn/2014/11/19/in-accordance-with-which-host-state-laws-restoring-the-defence-of-investor-illegality-in-investment-arbitration/> accessed 10 April 2021.

17 Compare *Hulley Entreprises Ltd v Russian Federation*, PCA Case No 2005-03/AA226, Final Award (18 July 2014) paras 1357–63; *South American Silver Ltd v Bolivia*, PCA Case No 2013-15, Award (22 November 2018) paras 444–53 (not a general principle); with *Hesham Talaat M. Al-Warraq v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014) paras 646–47; *Rusoro Mining Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/12/5, Award (22 August 2016) para 492 (recognizing the doctrine).

18 *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/11/12, Award (10 December 2014) paras 398–404.

Costa Rica, the investment resulted from a Ponzi scheme in violation of local law and was thus not protected due to the IIA's 'in conformity' clause.[19] The tribunal relied on a similar clause in *Inceysa v El Salvador*, finding a violation of a number of general principles of law incorporated into host state law as well as the host state's investment statute.[20] Other tribunals have dismissed claims on grounds of illegal investor conduct despite the absence of any 'in conformity' clause in the underlying IIA requiring that investments be made in accordance with local law.[21] Indeed, in one case, *Churchill Mining v Indonesia*, the tribunal dismissed a case where the investment authorization resulted from fraud that could not be linked to the investor, in part on the ground that the investor should have been able to identify the fraud if it had carried out due diligence.[22] As result, the tribunal effectively conditioned access to arbitration not merely on the investor's compliance with local law, but on carrying out a due diligence process that would show that the investor could not have been aware of behavior by others that renders the investment illegal.

Although few in number, one set of cases has proved particularly significant—those concerning investor obligations not to engage in bribery or corruption. Thus, in *Metaltech v Uzbekistan*, the tribunal found that the investor's use of 'fixers' to influence host state officials violated Uzbek criminal law so as to render the investment not protected by the Israel-Uzbek Bilateral Investment Treaty (BIT) (which had an 'in conformity' clause).[23] Probably the most famous corruption case, *World Duty Free v Kenya*, was not brought under an IIA, but the tribunal nonetheless dismissed the case on grounds of violation of an international public policy against bribery.[24] Other tribunals have accepted that illegality based on a violation of state's bribery laws would deprive the tribunal of jurisdiction but in the end found that the evidence did not justify such a finding.[25] Other cases have addressed corruption at the merits phase, though without finding sufficient evidence of bribery.[26]

19 *Alasdair Ross Anderson and others v Republic of Costa Rica*, ICSID Case No ARB(AF)/07/3, Award (19 May 2010) paras 51–59.

20 *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006) paras 230–64. For a dismissal based on good faith as an implicit requirement for use of the ICSID system, refer to *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) paras 106–13.

21 *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008) paras 135–46; *Alvarez y Marin Corporacion SA, and others v Republica de Panama*, ICSID Case No ARB/15/14, Award (12 October 2018) paras 134–36.

22 *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID ARB 12/14 and 12/40, Award (6 December 2016), paras 510–29.

23 *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013).

24 *World Duty Free Company Ltd v Republic of Kenya*, ICSID Case No ARB/00/07, Award (4 October 2006).

25 *Vladislav Kim et al v Republic of Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction (8 March 2017) (insufficient proof that acts met criminal law definition of bribery); *Unión Fenosa Gas SA v Arab Republic of Egypt*, ICSID Case No ARB/14/4, Award (31 August 2018) para 7.48; *Krederi Ltd v Ukraine* (n 19) para 385.

26 *Lao Holdings NV v Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Award (6 August 2019). See also *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration and Production Co Ltd and Bangladesh Oil Gas and Mineral Corp*, ICSID Case No ARB/10/11 and ARB/10/18, Decision on the Corruption Claim (25 February 2019). *Lao Holdings* is particularly creative insofar as the investor's misconduct is found not to deprive the tribunal of jurisdiction but rather to demonstrate that the host state's conduct vis-à-vis the investor was not a violation of underlying treaty.

The tribunal's choice to address an investor's obligations at the jurisdictional phase or the merits phase is a complex issue, on which views greatly differ.[27] Some commentators have sought to distinguish different ways in which an investment can be illegal, with different options for tribunals in each situation, suggesting that the jurisprudence is now showing some convergence about how to treat different fact situations.[28] Yet disagreements remain over the best approach to a violation of investor duties under domestic law. In the particular case of corruption, *World Duty Free* and *Metaltech* have fostered significant debate over whether dismissal of a case as a way to enforce the investor's obligations not to bribe ends up rewarding—even incentivizing—host state officials to solicit or accept bribes. This approach unfairly places all of the costs of bribery on the bribe-giver.[29] Indeed, the variety—and unpredictability—of approaches that a tribunal may use to enforce investor duties indirectly suggests that specific clauses in an underlying IIA would be useful.

(ii) IIA reform efforts

A handful of recent IIAs have explicitly conditioned access to ISDS on compliance by an investor with specific obligations, thus going beyond the more typical reference to host country law in the definition of a covered investment. (IIAs with investor duties are also discussed in Section 3 below concerning direct actions by host states.) Indeed, this idea was proposed long ago by the International Institute for Sustainable Development.[30] For example, the 2016 Iran-Slovakia BIT states that ISDS tribunals lack jurisdiction if the investor violates host country law, singling out fraud, tax evasion, and corruption as grounds for dismissal.[31] The 2016 Morocco-Nigeria BIT (not yet in force) contains anti-corruption obligations on the investor, and states that a violation of them would violate host country law, compliance with which during the operation (not merely the establishment) of the investment is part of the definition of a protected investment.[32] The Canada-EU Comprehensive Economic and Trade Agreement states that an investor may not submit a claim if the investment

27 For a view that most claims of illegality should not be addressed at the jurisdictional stage, refer to Zachary Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) 29 ICSID Rev/FILJ 155.

28 Stephan W Schill, 'Illegal Investments in International Arbitration' (2012) 11 LPICT 281; Jean Engelmayer Kalicki, Mallory Silberman, and Bridie McAsey, 'What Are Appropriate Remedies for Findings of Illegality in Investment Arbitration?' in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity* 721 (ICCA and Kluwer Law International 2017).

29 Refer to Andrew T Bulovsky, 'Promises Unfulfilled: How Investment Arbitration Tribunals Mishandle Corruption Claims and Undermine International Development' (2019) 118 Mich L Rev 117.

30 Howard Mann and others, 'IISD Model International Agreement on Investment for Sustainable Development' (International Institute for Sustainable Development 2005) <https://www.iisd.org/system/files/publications/investment_model_int_agreement.pdf> accessed 10 April 2021. For an overview of the push for investor obligations in investment treaties, refer to Karsten Nowrot, 'Obligations of Investors' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (Hart 2015) 1159–64.

31 Agreement Between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (adopted 19 January 2016, entered into force 30 August 2018) (Slovakia-Iran BIT) art 14(2).

32 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, (adopted 3 December 2016) (Morocco-Nigeria BIT) art 17.

was made through 'fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process'.[33] Other clauses contain various obligations on investors without conditioning the jurisdiction of a tribunal to a party's compliance with them.[34] These treaties are too recent to be the basis for any claims.

(iii) Towards revised IIAs: advantages and disadvantages

The case law certainly suggests that arbitral tribunals can at times indirectly enforce some investor duties through decisions on jurisdiction or the merits under existing treaties. It might indeed be said that we are seeing some convergence in the case law on the time and nature of an investor's violations of host state law that will cause a tribunal to reject a claim on jurisdiction or admissibility grounds—one that generally leaves the tribunal open for investors even if they do not meet many duties under domestic or international law during the operation of the investment.

For this reason, textual provisions to IIAs linking access to ISDS to investor conduct or duties—not merely during the establishment of the investment but throughout its life—are a far more promising way to enforce those obligations. Rather than leaving to the tribunal the determination of whether a particular act is serious enough to deprive the tribunal of jurisdiction or dismiss the claims on the merits, the parties decide this matter up front. Treaty drafters already have some models and can easily include other standards of conduct that they regard as important. Some treaty partners may choose to have an expansive list and time frame while others will choose a narrower set of parameters.

Such clauses could make greater reference to international standards of conduct for investors. IIAs might explicitly incorporate the widely accepted UNGPs or other soft law such as that promulgated by the OECD.[35] Thus, an investor's access to arbitration might be conditioned on its having engaged in due diligence to identify human rights risks in its operations and respond to them, as required under UNGP Pillar II.[36] IIAs could also incorporate more sector-specific standards that have emerged from the OECD,[37] or multi-stakeholder initiatives like the Voluntary Principles on Security and Human Rights[38] or the Extractive Industries Transparency Initiative.[39] Either way, the aim would be to effectively harden various soft law standards by making compliance with them a condition for access to arbitration. This strategy would avoid some of the

33 Comprehensive Economic and Trade Agreement (CETA) (Canada-EU) (entered into force 21 September 2017) OJ L 11/23 62, art 8.18(3). Another example is Economic Community of West African States, 'Supplementary Act A/SA.3/12/08 adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS' (19 December 2008) Art 18(1) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3266/download> accessed 10 April 2021 (no arbitration if investor engages in corrupt practices not limited to the establishment phase).

34 Morocco–Nigeria BIT (n 32), arts 14, 18.

35 Organization for Economic Cooperation and Development, 'OECD Guidelines for Multinational Enterprises' (2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 10 April 2021.

36 UNGPs (n 5), principles 16–21.

37 Organization for Economic Cooperation and Development, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (OECD 2016).

38 'The Voluntary Principles on Security and Human Rights' (2000) <http://www.voluntaryprinciples.org/wp-content/uploads/2019/12/TheVoluntaryPrinciples.pdf> accessed 10 April 2021.

39 'The EITI Standard' (15 October 2019) <https://eiti.org/document/eiti-standard-2019> accessed 13 April 2021.

shortcomings of attempts by states and others to use soft law as a defence to investor claims where such soft law may not be seen as 'relevant rules of international law applicable in the relations between the parties' under the Vienna Convention on the Law of Treaties.[40]

Finally, the parties to an IIA might even condition an investor's access to ISDS on its willingness to include arbitration clauses in contracts that would allow potential victims of any human rights abuses to institute arbitration against the company.[41] This option is discussed further in Section 4 below.

At the same time, these proposals have some potential risks. First, treaty drafters will need to be sure that the requirements do not completely undercut the purpose of the IIA. A broadly worded provision that made *any* violation of national law grounds for denial of access to arbitration could allow the state to circumvent key IIA protections. Second, given the open-textured nature of some of the business responsibilities under UNGP Pillar II (e.g., the precise course of action it must take if a business partner within the overall supply chain violates human rights),[42] it may be difficult for a tribunal to determine whether an investor has truly complied with its responsibilities. This would leave a great deal of discretion to tribunals regarding the meaning of the UNGPs. Finally, it remains possible that future tribunals may retreat into formalism by finding that investors lack binding obligations under the UNGPs (and under some orthodox approaches to human rights law).

Finally, one might ask whether, in the context of ICSID cases, tribunals could rely more on the *Salini* framework, under which tribunals have jurisdiction over only investments according to a definition that includes, in its elements, the contribution to the economic development of the host state (in addition to the definition in the IIA).[43] For our purposes, we do not advocate this route because of our reservations about the *Salini* test; the limited support for the test among tribunals; the enormous discretion such an option places with tribunals; and the lack of any reason to believe that tribunals would interpret the *Salini* criterion to deny access to investors who engage in misconduct.

B. Reduction of Damages due to Violation of Investor Duties

A second possibility for creating some accountability on investors for violating national or international law is through the reduction of damages awarded. The notion that an investor's conduct may have contributed to the losses it faced, justifying a

40 Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31(3)(c). In general, Barnali Choudhury, 'Investor Obligations for Human Rights' (2020) 35 ICSID/FILJ 82. For another example, refer to Jorge E Viñuales, 'Foreign Investment and the Environment in International Law: Current Trends' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar Publishing 2019) 12, 34.

41 For procedural rules to this effect, refer to Center for International Legal Cooperation, 'The Hague Rules on Business and Human Rights Arbitration' (December 2019) <www.cilc.nl> accessed 13 April 2021.

42 UNGPs (n 5), principle 19.

43 Refer to *Salini Costruttori S.P.A. and Italstrade S.p.A v Kingdom of Morocco*, ICSID Case No Arb/00/4, Decision on Jurisdiction (16 July 2001) paras 52, 57. For one assessment of the Salini factors, refer to Dai Tamada, 'Must Investments Contribute the Development of the Host State?' in Piotr Szwedo and others (eds), *Law and Development: Balancing Principles and Values* (Springer 2020).

reduction of damages, derives from analogous doctrines of domestic law, and is now well-accepted in IIL.[44]

(i) Arbitral approaches

Tribunals have at times reduced damages due to contributory fault (or sometimes unclean hands) by the investor. In some cases, tribunals have found that the investor's contribution to the ultimate harm was based on a violation of host country law. In *Occidental Petroleum v Ecuador*, the tribunal found that the investor's failure to seek ministerial authorization for transferring certain contractual rights violated the state's hydrocarbon law, and that that illegal act contributed to the host state's violations of the BIT (a violation of the obligation of fair and equitable treatment by cancelling the investor's contract). It wrote that 'the Claimants should pay a price for having committed an unlawful act which contributed in a material way to the prejudice which they subsequently suffered . . . '.[45] It eventually reduced damages by 25%.

In *Copper Mesa Mining v Ecuador*, various violent acts by agents of the investor, criminal under Ecuadorian law, formed the basis for a finding that the investor was 30% responsible for the injury. At the same time, the tribunal did not say that the illegality per se justified reduction of damages, but rather that these acts aggravated the situation of the investor with the local community and thus made matters worse for it.[46]

Yet reductions in damages are hardly the norm. The doctrine on contributory fault makes clear that these violations will be the basis for reduction of damages only if they are willful or negligent, as well as materially significant.[47] Tribunals have frequently found that illegal acts by an investor did not contribute to the harm it eventually suffered at the hands of the host state.[48] As a result, an investor's violations of local law unrelated to the underlying conduct by the host state will not reduce the damages paid to the investor. In one case going somewhat further than this position, *South American Silver v Bolivia*, the tribunal found that the investor's misconduct had indeed been the grounds for the state's nationalization of its mining concession, but it still refused to reduce compensation to the investor. Instead, it ruled that once it had determined that the state had nationalized the property, the state's failure to pay effective compensation as required by the treaty was the state's doing alone.[49]

44 Martin Jarrett, *Contributory Fault and Investor Misconduct in Investment Arbitration* (CUP 2020); Jean-Michel Marcoux and Andrea K Bjorklund, 'Foreign Investors' Responsibilities and Contributory Fault in Investment Arbitration' (2020) 69 ICLQ 977. For a rare ruling in which the investor's misconduct was determined to justify the state's actions against it and thus defeat the investor's claim of a fair and equitable treatment violation (not merely reduce the investor's damages), refer to *Lao Holdings NV* (n 26).

45 *Occidental Petroleum Corp and Occidental Exploration and Production Co v The Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012) para 680.

46 *Copper Mesa Mining Corp v Republic of Ecuador*, PCA Case No 2012-2, Award (15 March 2016) paras 6.98–99 (violent acts by investor's agents).

47 ILC, 'Responsibility of States for Internationally Wrongful Acts' (2001) A/56/49(Vol. I)/Corr.4 art 39.

48 *Hulley Entreprises Ltd* (n 17) sec X.E (most but not all illegal acts by investor do not affect contributory fault).

49 *South American Silver Ltd* (n 17) paras 559–78, 875. The tribunal did not consider the possibility that the state's actions that it asserted were to protect the human rights of its residents did not render the act an expropriation in the first place on the grounds that the Bolivia did not fully argue that point. ibid para 541.

One notable case presenting contrasting visions on this issue is *Bear Creek Mining v Peru*, where the majority downplayed the investor's failure to engage in sufficient community relationship-building and consultation as a contributory factor to the state's actions against it. Stressing that the investor did all that was required of it, the majority refused to reduce damages based on contributory fault.[50] Dissenting arbitrator Sands found that the investor's conduct significantly contributed to the harm it experienced from the host state, focusing on the deviation between the investor's conduct and that required by the International Labour Organization's (ILO) Convention Number 169 (dealing with rights of Indigenous and Tribal Peoples). While not finding the investor directly bound by the treaty (or that any violation per se justified reduction of damages), he noted that the underlying IIA allowed the tribunal to 'take the Convention into account in determining whether the Claimant carried out its obligation to give effect to the aspirations of the Aymara peoples in an appropriate manner, having regard to all relevant legal requirements, including the implementing Peruvian legislation'.[51]

(ii) Towards revised IIAs: pros and cons

Even more than in Part A above, the case law to date shows only limited willingness of tribunals to enforce investor duties through a reduction of damages. While of course future tribunals could move in a different direction over time, the most direct way to clarify the scope and consequences of investor misconduct would be for a treaty to specify that various violations of investor duties will result in a reduction of damages—or even excuse liability on the merits—for treaty violations, regardless of any connection between the investor's violations and the host state's conduct. Such a clause would permit the tribunal to hear a case notwithstanding violations of investor duties but make clear to the investor that those violations would have monetary consequences in terms of the final award. It would also clarify which investor violations will reduce its damages.

A relatively rare instance incorporating such an approach appears in the Netherlands' most recent model IIA. It requires a tribunal in considering compensation 'to take into account non-compliance by the investor with its commitments under the UNGPs, and the OECD Guidelines for Multinational Enterprises'.[52] The incorporation of this soft law instrument into an IIA is another example of the way to harden standards for investors by making their compliance a factor in damages. Properly drafted, such clauses represent a promising way to ensure that tribunals reduce awards to investors and thus, indirectly, encourage investors to act according to the relevant standards in the first place. The number of investor standards to include, and their effects on liability and compensation, are ultimately a matter for treaty parties, but we believe that such a discussion needs to be part of

50 *Bear Creek Mining Corp v Republic of Peru*, ICSID Case No ARB/14/21, Award (30 November 2017) paras 664–67.

51 ibid Partially Dissenting Opinion of Professor Philippe Sands para 11.

52 Netherlands Model Investment Agreement (*UNCTAD* 22 March 2019), art 23, <https:// investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> accessed 10 April 2021. See also Economic Community of West African States (n 33) arts 18(2) and (4); Marcoux and Bjorklund (n 44) 900–04.

future IIA negotiations. At the same time, this proposal faces the same risks as those in Part A above.

3. DIRECT ACTIONS BY STATES

Indirect methods of addressing investor misconduct have a conceptual cousin, direct actions. Direct actions are claims brought by states against investors. Procedurally, they are different from counterclaims because they operate to initiate adjudicative proceedings in respect of the underlying investor-state disputes. In contrast, indirect actions and counterclaims are advanced by states in response to claims submitted by investors against them. Practically, if states could take direct actions against investors in ISDS, then they would not have to wait for investors to first take action against them—direct actions let states take the initiative against investors in respect of their misconduct.[53]

Direct actions at the international level come in two forms: (i) contract-based and (ii) treaty-based.[54] Each is described below. As treaty-based direct actions are not part of existing IIL, but hold the most potential to address investor misconduct, they are most in focus. We thus include an in-depth description of them, proposals on how the law might be changed to make them possible, and various advantages and disadvantages of these proposals.

Contract-based direct actions can be made when investor-state relations are regulated via contract. The procedural infrastructure for contract-based direct actions is well established. Although they can be heard by domestic courts, many investor-state contracts contain arbitration clauses.[55] When an investor-state contract includes an arbitration clause, a state has to submit any claim it has against an investor to arbitration, assuming that such claim complains about the investor's performance under the contract. Such arbitration can be conducted on an *ad hoc* basis or administered by an institution, including ICSID.[56] For an arbitration of a contract-based direct action to be conducted under the ICSID Convention, both the investor's home state and the host state must be contracting parties to the ICSID Convention.[57] If these states are not contracting states, ICSID might still be used as the arbitral institution subject to the ICSID Additional Facility Rules.

In contrast, treaty-based direct actions by states against investors involve allegations that treaty obligations of the investor have been breached. Currently, the procedural infrastructure to bring forward such allegations is not place. Over the past years, however, a movement towards making them a reality has been

53 For scholarship advocating for direct claims by states against investors, refer to Gustavo Laborde, 'The Case for Host State Claims in Investment Arbitration' (2010) 1 JIDS 97.

54 Adopting the same terminology used in scholarship on direct claims by states, refer to Mehmet Toral and Thomas Schultz, 'The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010) 578.

55 Jean Ho, *State Responsibility for Breaches of Investment Contracts* (CUP 2018) 63.

56 Antonio R Parra, *ICSID: An Introduction to the Convention and Centre* (OUP 2020) 40–41.

57 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1995, entered into force 1 October 1966) 575 UNTS 159 (ICSID Convention), art 25.

gathering steam. The most prominent manifestation of this movement has been the inclusion of investor obligations in IIAs, as first discussed in Section 2 above. Investor obligations are an important building block for treaty-based direct actions by states because any direct action must ultimately be founded on a complaint that the investor has breached some legal obligation that applies to it. Accordingly, if an IIA contains an investor obligation and the investor (allegedly) fails to comply with it, then the host state would file a direct action in ISDS to complain about this non-compliance.

One example of an investor obligation can be found in the India-Kyrgyzstan BIT:

> *Chapter III - Investor obligations*
> *Article 11*
> *Compliance with laws*
> . . .
> *(iv) An investor shall provide such information as the Parties may require concerning the investment in question and the corporate history and practices of the investor, for purposes of decision making in relation to that investment or solely for statistical purposes.*[58]

This clause is an obligation for the investor to provide information. Though seemingly mundane, it is likely to cause some controversy insofar as investors jealously guard sensitive business information. Few IIAs contain such obligations of this nature—that obligate directly an investor to perform (or not perform) some conduct, as indicated by the use of 'shall'.[59] But, as noted above, momentum is building for investor obligations to become standard features in IIAs. During the last decade, at least four states and the Southern African Development Community have released model IIAs with hard investor obligations.[60] These movements on the substantive front need procedural support; in other words, changes to the procedural infrastructure are needed to allow treaty-based direct actions.

58 2019 Bilateral Investment Treaty between the Government of the Republic of Kyrgyzstan and the Government of the Republic of India (signed 3 June 2019) art 11(iv) ('Kyrgyzstan-India BIT') <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download> accessed 1 May 2021.

59 Beyond those discussed in Section 2 linking compliance with investor obligations to access to ISDS, others include the 1981 Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (1981) art 9 (OIC Arbitration Agreement) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2399/download>; and the 2018 Treaty between the Republic of Belarus and the Republic of India on Investments, Art 11, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5724/download> accessed 1 May 2021. Some of Brazil's IIAs contain (hard) investor obligations but provide for state-state arbitration. An example is 2020 Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India (signed 25 January 2020) art 11. For a case where it was applied to the investor's disadvantage, refer to *Hesham Talaat M. Al-Warraq* (n 17).

60 The model IIAs for India (art 11), Morocco (art 18), Nepal (art 8); Netherlands (art 23); and the SADC (part 3) may be found at 'Investment Policy Hub' (*UNCTAD*) <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements> accessed 1 May 2021.

A. Current Procedural Infrastructure for Direct Actions

The current procedural infrastructure for treaty-based direct actions consists of one provision: Article 36 of the ICSID Convention. It reads as follows:

> *Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.*

The commentary on this provision confirms that it can accommodate both contract-based direct actions and treaty-based direct claims.[61] There is, however, no record of any such claim being filed at ICSID. The explanation for this situation is clear: a lack of investor consent. Interestingly, the first investment treaty containing a clause on ISDS, namely the now-terminated 1968 Indonesia-Netherlands BIT, did require investors to submit to state-investor arbitration under the ICSID Convention.[62] The relevant clause read:

> *The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national and any such national shall comply with any request of the former Contracting Party, to submit, for conciliation or arbitration, to the Centre established by the Convention of Washington of March 18, 1965, any dispute that may arise in connection with the investment.*[63]

In the more than 3000 IIAs since the 1968 Indonesia–Netherlands BIT, most clauses on ISDS make clear that only the investor can file a claim in arbitration against the host state. The 1994 Indonesia–Netherlands BIT provides a good example:

> *If such a dispute cannot be settled according to the provisions of paragraph 1 above within period of three months from the date either party requested amicable settlement, the dispute shall, at the request of the national concerned, be submitted either to the judicial procedures provided by the Contracting Party concerned or to international arbitration or conciliation.*[64]

61 Alejandro A Escobar, 'Arbitration' in Julien Fouret and others (eds), *The ICSID Convention, Regulations and Rules: A Practical Commentary* (EE 2019) 273–74 and Christoph Schreuer with others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 458.

62 Jose Daniel Amado and others, *Arbitrating the Conduct of International Investors* (CUP 2018) 92.

63 Agreement on Economic Cooperation (Indonesia-Netherlands) (signed 17 June 1968, entered into force 4 November 1971) (Indonesia–Netherlands BIT) art 11, <https://investmentpolicy.unctad.org/ international-investment-agreements/treaty-files/3329/download> accessed 1 May 2021 (emphasis added).

64 Agreement Between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia on Promotion and Protection of Investment (signed 6 April 1994, entered into force 1 July 1995, terminated 30 June 2015) art 9(2).

A small number of IIAs, however, implicitly indicate that a state could bring a claim in arbitration against an investor.[65] Along with various other Australian IIAs,[66] the Australia-Sri Lanka BIT provides an example:

> *If the dispute in question cannot be resolved through consultations and negotiations within 90 days of the commencement of such consultations and negotiations, either party to the dispute may [refer the dispute to arbitration].*[67]

But even if a state seeking to rely on this provision could convince the arbitral tribunal that the investor, through its home state, has consented to arbitration (which itself would be very challenging),[68] it would still have to present some kind of cause of action.[69] Except for situations where IIAs include investor obligations on which a host state could base its claim, the host state would have to establish that a certain body of law governs its relations with the investor and then argue that the investor has breached some rule in that body of law.

The most likely candidate is the domestic law of the host state. The state has the challenge of making the domestic law the applicable substantive law of the dispute between it and the investor. To achieve this goal in the context of a state-investor arbitration, the state could file a claim under the ICSID Convention and then point to Article 42. It provides:

> *The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*[70]

Whether this play is likely to succeed is another question. Given that only a small number of IIAs make provision for 'either party' to bring a claim, we leave aside this question for now.[71] The point remains that, generally speaking, IIAs do not give options for states to bring direct actions against investors. The same point can also be made regarding the proposed Multilateral Investment Court. Currently, the European Union-negotiated IIAs that use the Investment Court System (which is the forerunner to the proposed Multilateral Investment Court) as the dispute

65 For a view that these clauses can be used by states for direct actions, refer to Stephen Schwebel, 'A BIT about ICSID' (2008) 23 ICSID Rev/FILJ 1, 5. For another example, refer to *Urbaser v Argentina* (n 8) para 1142 (tribunal enjoys jurisdiction over a counterclaim launched by Argentina because of breadth of arbitration clause).

66 For an analysis of these 'Australian clauses', see Laborde (n 53) 107–08.

67 Agreement Between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments (signed 12 November 2002, tabled 14 May 2003) art 13(2)(b) (emphasis added).

68 For the argument why the arbitral tribunal should decline jurisdiction, see Laborde (n 53) 107–08.

69 ibid 111; Toral and Schultz (n 54) 579–82.

70 ICSID Convention (n 57) art 42(1).

71 For an overview of clauses of this nature, refer to Laborde (n 53) 106–09.

resolution system for investor-state disputes do not provide for treaty-based direct actions by states.[72]

B. Potential Future Procedural Infrastructure for Direct Actions

Changing this situation could be achieved one of three ways. First, states could seek out consent from individual investors, e.g., by asking investors to sign an arbitration agreement when making their investments. Practically speaking, such an approach would be difficult and expensive. A second option is to better promote the Hague Rules on Business and Human Rights Arbitration.[73] For example, when seeking out any permit needed for its investment, the state could ask the investor to enter into a free-standing arbitration agreement with it, with the Hague Rules serving as the arbitral rules for any eventual arbitration.

A third option is to have home states make standing offers of arbitration in IIAs for their investors, following the example from the 1968 Indonesia–Netherlands BIT mentioned above. The relevant treaty provision might read as follows:

Article X - Settlement of Investment Disputes

1. *For the purposes of this Article, an 'investment dispute' means a dispute between an investor and a state relating to an investment where one party (the 'claimant') alleges that the other party (the 'respondent') has breached a provision of this treaty [or another body of law designated as an applicable substantive law in the governing law clause of this treaty].*
2. *[Provision mandating negotiation and/or conciliation].*
3. *If an investment dispute cannot be settled pursuant to Article X(2), the respondent consents to the resolution of the dispute via the procedures provided for in Chapter [Y] [for the proposed Multilateral Investment Court/Investment Court System]*
4. *If an investment dispute cannot be settled pursuant to Article X(2), the respondent consents to the initiation of arbitration of the investment dispute by the claimant. Such arbitration may, at the option of the claimant, be conducted under one of the following arbitral rules . . . [for typical ISDS].*[74]

If a multilateral treaty emerges from the reform process, provisions of this kind could be included in it. If this treaty amended the existing IIAs between its signatory

72 For example, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the One Part, and the European Union, and its Member States (signed 30 October 2016, provisional entry into force 21 September 2017) art 8.18(1) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3593/download> accessed 6 May 2021; 2019 Investment Protection Agreement between the European Union and its Member States, of the One Part, and the Socialist Republic of Viet Nam (signed 27 June 2012) (EU-Vietnam BIT) art 3.27 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5868/download> accessed 6 May 2021.

73 December 2019, <https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf>.

74 Indonesia–Netherlands BIT (n 63) art X.

states according to its provisions, the possibility of treaty-based direct actions could be imported into many IIAs with relative ease.[75]

At the same time, such clauses raise the question of whether a home state can legally bind its investors to treaty obligations that make them submit to arbitration initiated by states against them. The legal personality of individuals is a vexed issue in international law.[76] The weight of authority[77] is in favour of the view that individuals can assume treaty obligations[78] and their home states can create such obligations for them.[79] But, as McNair admitted in his seminal work on the law of treaties, it is difficult to find specific authority to support these views.[80]

C. Advantages of Direct Actions

If this legal difficulty were overcome and there were sufficient political will to make them part of IIL, then treaty-based direct actions offer four potential advantages for holding investors accountable for their misconduct. First, they are the most effective procedural tool to address the overall asymmetry problem in IIL because they give states the most control. With indirect actions and counterclaims, states have to wait for investors to claim against them. With direct actions, states can take the initiative.

Second, this strategy could provide better access to justice, compared to taking action in domestic courts, for states seeking to hold investors accountable.[81] While states usually have the option to sue, regulate, or even prosecute investors in their domestic fora, these options might be inadequate in some circumstances, e.g., if domestic law does not apply to the actions of the investor or a judgment in favour of the state cannot be effectively enforced. As an example, consider a case where the investor operates its investment activities through a local company, which carried out the relevant (mis)conduct. This local company also has very few assets in the state's territory against which a judgment debt could be enforced. While the state might wish to sue the asset-rich investor (parent company of the local company) in its domestic courts, host state domestic law might not reach the activities of foreign companies with no presence there.[82] For example, if host state domestic law provides for a strong corporate veil between the local company and its shareholders, the state will have difficulties attributing the conduct of the former to one of the shareholders; and questions would arise regarding which shareholder should be liable.

75 Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?' (2016) CIDS Research Paper, para 70 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455511> accessed 6 May 2021.

76 For a comprehensive survey, refer to Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (CUP 2016) 60–66.

77 For a conflicting argument, refer to Antonio Cassese, 'The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 ICLQ 416, 423.

78 Christine Chinkin, *Third Parties in International Law* (OUP 1993) 13–14.

79 Lord McNair, *The Law of Treaties* (OUP 1961) 324.

80 ibid.

81 Refer to Laborde (n 53) 99.

82 In general, Trevor Hartley, *Civil Jurisdiction and Judgments in Europe* (OUP 2017) 84–85.

Even if its domestic law covered the alleged conduct, enforcing any judgment against the investor in the host state would be difficult if the investor has no or limited assets there. The location where the investor is likely to have assets is its home state, meaning that enforcement of the judgment (handed down in the host state) will often have to be sought in the investor's home state.[83] A treaty-based direct action against an investor can overcome these problems. The awards would be enforceable because decisions from arbitrations or the proposed Multilateral Investment Court[84] will be covered by the ICSID Convention or New York Convention.[85]

Third, this method (of using treaty-based direct actions to address investor misconduct) avoids the risk of claims of denial of justice arising out of the domestic proceedings against investors for their misconduct. If, for example, a state sues an investor for its misconduct in its domestic courts and the investor believes that the presiding court did not follow international minimum standards for procedural justice, then the investor might bring a claim for denial of justice.[86] If proven, the state will be found in violation of an IIA, which will usually mean that it will have to pay compensation to the investor.[87] Procedural irregularities in state-investor disputes in arbitration or the proposed Multilateral Investment Court could not give rise to claims of denial of justice because those cases would be arising in international tribunals and not in domestic courts.[88] They would rather serve as grounds for a challenge to any arbitral award or appeal against any judgment, respectively.

Finally, treaty-based direct claims by states can have an unencumbering effect on domestic courts, the default adjudicative bodies for hearing state-investor disputes.[89] In developing states, their resources are sometimes not adequate for their caseload.[90] Accordingly, elevating state-investor disputes from domestic courts to international adjudication can reduce courts' caseload. Additionally, some domestic courts are ineffective on account of more nefarious reasons, particularly the corruption of judges, which might be initiated by either the host state or the investor. If the host state fears that investor-judge corruption would mean that it could not receive a fair hearing, then taking the same claim to international adjudication becomes more attractive.

83 See Amado and others (n 62) 7.

84 In the investment treaties providing for the Multilateral Investment Court, investors file their claims in arbitration, either under the ICSID Convention or the UNCITRAL Arbitration Rules; for example, EU–Vietnam BIT (n 72) art 3.33(2).

85 Note, however, that it is contentious whether decisions made by the adjudicative bodies of the proposed Multilateral Investment Court can qualify as arbitral awards, UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session' (A/CN.9/1004/Add.1) paras 70, 78, 79. In general, Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (2nd edn, Springer 2020) 155.

86 Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 EJIL 729, 738.

87 Jan Paulsson, *Denial of Justice in International Law* (CUP 2005) 208.

88 ibid 39.

89 Francioni (n 86) 738.

90 Matthew C Stephenson, 'Judicial Reform in Developing Economies: Constraints and Opportunities' in François Bourguignon and Boris Pleskovic (eds), *Beyond Transition* (World Bank 2007) 314; Steinitz, *The Case for an International Court of Civil Justice* (CUP 2019) 99. In general, Lisa Hilbink, and Matthew C Ingram, 'Courts and Rule of Law in Developing Countries' (*Oxford Research Encyclopaedias: Politics*, May 2019), <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-110> accessed 6 May 2021.

D. Disadvantages of Direct Actions

At the same time, treaty-based direct actions have at least four disadvantages. First, there could be a conflict between domestic courts and international adjudicative bodies (arbitral tribunals or the proposed Multilateral Investment Court) over their adjudicative competence. Conflict is most likely to arise when a state brings a treaty-based direct action, fails to establish it, and then retreats to a domestic court to file essentially the same claim under domestic law. If the domestic court found that the claim was admissible, it would likely prompt the investor to file a claim at the international level for denial of justice.

The same problem can also arise in respect of investor-state disputes[91] because an investor can first approach a domestic court to resolve its claim against the state and then, after suffering defeat there, file the same claim in ISDS. But because investors covered by an IIA (and aware of it) rarely approach domestic courts[92] (perceiving that their chances of success are low),[93] the risk of this specific problem of double-claiming by investors is low. When it does materialize, it is dealt with via fork-in-the-road clauses in IIAs. They specify that after an investor brings its claim before one forum (a domestic court), then it cannot subsequently bring it before another forum (an ISDS arbitral tribunal).

A clause inspired by these fork-in-the-road clauses might be crafted in respect of state-investor disputes—one that specified that once a state brought a claim at the international level, it would be barred from bringing the same claim at the domestic level. But as this clause would be in a treaty, it might not bind a domestic court. Additionally, the domestic court would be left to decide on what 'same claim' means. If it adopts a wide interpretation of 'same claim,' then the investor will not have to fight again in the domestic court. If the domestic court adopted a narrow interpretation of 'same claim,' it could decide that any claim based on international law is not the 'same claim' as a claim based on domestic law. If it then entertained the host state's domestic-level claim against the investor, the investor would likely file a denial-of-justice claim. As a result, a fork-in-the-road provision for state-investor disputes should define the 'same claim' to give some guidance to domestic courts.

The second disadvantage relates to the legal validity of treaty-based direct actions under domestic law. If host states begin litigating their claims against investors in international fora, the practical consequence is that domestic courts lose their jurisdictional competence over these claims. This is unusual because litigation started by a host state against an investor would ordinarily take place in domestic courts.

Recognizing their loss of jurisdiction over disputes that they would ordinarily hear, domestic courts might push back against treaty-based direct actions citing constitutional provisions to the effect that they enjoy exclusive competence over state-investor disputes.

91 For a list of investor-state arbitrations where this issue has arisen, refer to Serena Lee and Myron Phua, 'Supervisión y Control v Costa Rica: Developing the Pantechniki v Albania Standard for "Fork in the Road" Provisions in Investment Treaties' (2019) 34 ICSID Rev fn 4.

92 The one exception is when access to investment treaty arbitration is conditioned on first approaching domestic courts. This condition typically requires that the investor have recourse to the host state's courts for a minimum of 18 months. Refer to Gabrielle Kaufmann-Kohler and Michele Potestà, *Investor-State Dispute Settlement and National Courts* (Springer 2020) paras 105–10.

93 Dolzer and Schreuer (n 1) 235.

An example of this type of push-back is the *Achmea Decision*, where the European Court of Justice (ECJ) held that the arbitration of investment disputes involving an EU member state and an investor from another Member State was incompatible with European law.[94] With this decision, the Court attempted to interdict intra-EU investment arbitrations, although arbitral tribunals have refused to bow to the ruling in *Achmea*. But while the ECJ might lose its battles with ISDS arbitral tribunals, it will ultimately prevail in the war because its order has translated into a treaty among EU member states terminating the IIAs between them. If, for example, a domestic court found that the international adjudication of state-investor disputes was incompatible with its constitution, it might issue an *Achmea*-inspired order to the host state's executive arm to revoke the treaty clauses that facilitated this international adjudication.

The third disadvantage is the technical challenge of deciding whether treaty-based direct actions should be made against investors (*in personam* claims) or against investments (*in rem* claims).[95] Following the axiom that a person should be held responsible for his or her (mis)conduct, the draft clauses providing for treaty-based direct claims in '*Potential Future Procedural Infrastructure for Direct Actions*' (section 3(b)) above assume that claims should lie against investors. But there might be circumstances where the claim should properly be filed against the investment.[96] For example, consider, an investor who built a high-rise apartment building. To save on costs, it was constructed from materials that are not fire-retardant, which is a clear violation of the local building regulations. This first investor later sells this apartment building to a subsequent investor. Sometime after the latter takes ownership, the misconduct comes to light. In this situation, a host state's direct action might be better served against the investment itself. Yet even if the direct action was legally filed against the investment, practically speaking, it is the current owner (subsequent investor) who will pay the price for the misconduct.

Insofar as the earlier owner engaged in the misconduct, some will regard it as unfair to impose punishment on the current owner, unless they specifically knew about the misconduct and profited from it, for example by paying a lower price for the investment. This concern is well grounded, but it has to be balanced against the risk that if the host state cannot effectively take action against the current owner, it might not be able to secure any justice for the misconduct. Most particularly, it is hard to imagine that any international tribunal for investment law-based disputes would have jurisdiction over a former owner of an investment. Second, after the earlier owner sells the investment, it might become impossible to track it down for the purpose of suing it. Third, in making its purchase of the investment, the current owner should have conducted due diligence with a view to ascertaining potential legal liabilities with the investment.[97]

94 Case C–284/16 *Slowakische Republik (Slovak Republic) v Achmea BV* [2018]. For a review of the reasoning, refer to Csongor Istvan Nagy, 'Intra-EU Bilateral Investment Treaties and EU Law after Achmea: Know Well What Leads You Forward and What Holds You Back' (2018) 19 German L J 981, 988.

95 This distinction is well known in private international law; Hartley (n 82) 84.

96 Compare to the situation under domestic law where claims *in rem* ultimately derive the sovereign power that states have in respect of title, status, or condition of property within its borders. George B Fraser Jr, 'Actions in Rem' (1948) 34 Cornell L Q 29.

97 For further information, Martin Jarrett, *Contributory Fault and Investor Misconduct in Investment Arbitration* (CUP 2019) 134.

Finally, direct actions create a risk that the host state will take into account irrelevant considerations in deciding whether to file a claim.[98] An irrelevant consideration is one that bears no relationship to the legal merits of the claim. An example would be fearing that an investor would choose to make its next major investment in another state if the host state took legal action against it. But the same problem will arise also in respect of legal actions taken by states against investors in their own domestic courts, so this is not a peculiar disadvantage of treaty-based direct actions. Moreover, in cases where the investor's misconduct causes harm to a citizen of the host state, there is a potential fix—giving standing to that person, the issue to which we turn now.

4. DIRECT ACTIONS BY INDIVIDUALS

While IIL practice does not generally feature the possibility of direct claims by individuals before investment tribunals, the idea has been proposed and such actions against investors should probably be contemplated within the UNCITRAL reform efforts to increase accountability of corporate actors.[99] As explained in Section 3 above, states and investors may consent to adjudicate legal disputes arising out of an investment when the investor's conduct directly or indirectly affects the state (or its interests) in violation of an enforceable legal commitment. In this final section, we offer some ideas for reforms that we think could help individuals (as opposed to the state) enforce investor obligations.

A. Direct or derivative private actions

Although direct actions by states against foreign investors may help holding investors accountable for certain misconduct or breach of duties, states may lack the resources, interest, or capacity to initiate such actions directly. In others, a state may be reticent or deem it inconvenient to bring such actions itself for political or budgetary reasons. As an alternative, a state may choose to grant standing and create a right of action to affected subjects (individuals, communities and other collectives) or to delegate what could be considered its right of standing to a private party. We briefly explain both options.

(i) Private-led actions by state beneficiaries

Under international law, states can delegate a right to bring a claim against a third party.[100] ISDS tribunals have confirmed the importance of this concept and the delegation (in favour of investors) for the proper operation of IIL.[101] Just as states can

98 See Francioni (n 86) 738.

99 Emmanuel T Laryea, 'Making Investment Arbitration Work for All: Addressing the Deficits in Access to Remedy for Wronged Host State Citizens Through Investment Arbitration' (2018) 59 Boston College L Rev 2845 (2018).

100 Sergio Puig, 'No Right without a Remedy: Foundations of Investor-State Arbitration' (2014) 35 U. Penn. J. Int L 829.

101 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v The United Mexican States,* ICSID AF Case No ARB(AF)/04/5, Award (21 November 2007) paras 177–79; *Corn Products International, Inc v The United Mexican States,* ICSID Case No ARB(AF)/04/01, Decision on Responsibility (15 January 2008) paras 170–76. In addition, Anthea Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) 56 Harv Intl L J 353, 380.

delegate rights to an investor to enforce legal obligations expressed in IIAs, states may decide to delegate rights to private actors to enforce legal obligations of foreign investors.[102] Parties to contracts may also create rights for third party beneficiaries—which can be enforced in arbitration.[103]

A system of private-led actions may build on the infrastructure suggested for a model of direct claims by states plus the practice to delegate rights to beneficiaries. While perhaps revolutionary (and challenging to implement) in IIL, this type of citizen-led action is not completely uncommon in some domestic law contexts of business wrongdoing. For example, in *Qui Tam* claims under US law, a private party (or relator) has standing to bring a legal action directly on the government's behalf against a corporate wrongdoer. A key point of these actions is that the government, not the relator, is considered the rights-holder. The relator simply exercises a procedural right to prosecute a claim, and if the case succeeds, the compensation is due to the government, which commits in advance to share part of the award with the relator.[104] The adoption or resurrection of similar proceedings to tackle corporate fraudulent behavior has been proposed in other jurisdictions and more recently for arbitrating the conduct of investors.[105]

In a similar fashion, states create the possibility for private parties to bring actions, including before an international arbitration tribunal, by law, by contract or by treaty. The legal source establishing the delegation could specify the conditions and elaborate on the rights and obligations as well as procedural safeguards to avoid abuse of such a delegation. The intention should also be clear that the rights allegedly infringed by injurious conduct of the investor are held by the host state itself. The host state remains a rights-holder and a (third) party to the dispute, with the private party appointed to prosecute the claim. To be sure, for a claim of this nature to be viable, the same considerations explained in Section 3 above apply (namely consent in writing from investors); moreover, ICSID may not be available as a dispute settlement venue depending on how one views Article 25 of the ICSID Convention (although several other arbitration rules and venues could serve for these proceedings).[106] Under this model, as the host state remains the rights-holder, the state might decide to prosecute the claim without the participation of the private party—a possibility that must be contemplated in the legal instrument enabling private-led actions.

102 Amado and others (n 62).

103 David M Summers, 'Third Party Beneficiaries and the Restatement (Second) of Contracts' (1982) 67 Cornell L Rev 880.

104 David F Engstrom, 'Private Enforcement's Pathways: Lessons from Qui Tam Litigation' (2014) 114 Colum L Rev 1913.

105 For a comparative analysis, refer to Roman Artemiev, 'Qui Tam legal concept and practice: evolution of the legislation in the United Kingdom and the United States of America' (Dissertation, University of Westminster 2017) <https://westminsterresearch.westminster.ac.uk> accessed 6 May 2021. For ISDS, refer to Amado and others (n 62).

106 Art 25(3) of the ICSID Convention states: '(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.' ICSID Convention (n 57) art 25(3). Compare with Amado and others (n 62) 64.

If states elect this model, they would also be well advised to include mechanisms to filter (e.g., veto) or to dissuade unmeritorious claims (e.g., cost shifting rules).[107] Nevertheless, when designing a system to enhance accountability with claims against investors, states should consider the delegation of prosecution rights to a third party to leverage resources and enforce legal commitments adopted by inventors, which could be exercised outside of domestic courts. Should states wish to pursue this avenue and delegate the right to bring a claim, the delegation of state rights could be exercised with a clause including language similar to the following:

> *Delegation of Rights to Bring Claims on Behalf of the State*
>
> *The jurisdiction of the tribunal shall extend to any legal dispute arising directly out of an investment, between a State and a national of another State. The State may designate any constituent subdivision or agency, public or private body, or natural or moral person to bring a dispute or claim on behalf of the State and the conditions of this delegation. Unless otherwise stated, when a State has consented to the delegation of its rights to bring a claim, the State may withdraw its consent unilaterally.*

We recognize the important challenges ahead and discuss the most obvious of them below. We also realize that this kind of delegation has not yet taken place in practice against corporate actors/investors.[108] Yet, we offer these ideas to inform the reform efforts and believe that this remains a possible avenue for effective relief for individuals or collectives injured from the breach of an obligation owed to the state.

(ii) Private-led actions by rights-holders

States may also choose to grant direct standing to arbitration to rights-holders affected by violations of law—domestic or international. Although this possibility is not currently available in IIAs, some scholars suggest that the arbitration clause in the Indonesia–Netherlands BIT referred above could also be read to permit a 'two-way street', and to allow direct actions against investors.[109]

In any case, the model for direct claims suggested in '*Potential Future Procedural Infrastructure for Direct Actions*' section above may lay a basis for investor liability not only to actions led by states (or exercised by private parties on a state's behalf), but also actions brought by directly impacted individuals, communities, or collectives within the host state. For example, arbitration clauses could grant jurisdiction to hear disputes brought by an individual for investor's violations of human rights law. As with all arbitration, proper and informed consent remains a cornerstone for international arbitration involving violations by investors. Consent could result from the investor's initiation of a claim, from the application for an investment authorization, from contractual clauses, or after a dispute arises, e.g., in a submission agreement (*compromis*). In the instrument providing for consent, the jurisdiction of the

107 In general, Sergio Puig, 'Contextualizing Cost Shifting: A Multimethod Approach' (2019) 58 Virginia J Int L 261.

108 However, 'Bangladesh Arbitration Accords' (*Permanent Court of Arbitration*) <https://pca-cpa.org/en/cases/152/> accessed 6 May 2021.

109 Jackson Shaw Kern, 'Investor Responsibility as Familiar Frontier' (2019) 113 AJIL Unbound.

arbitration tribunal to hear claims by host state nationals could be explicitly included as well as the specific causes of action. The jurisdiction could well include the possibility of hearing a pleading of breaches of investor conduct standards, which may be enumerated by reference to different legal instruments, including international law or other legal instruments.

At the same time, where individuals are the rights-holders as opposed to the state, the ICSID infrastructure would not support this type of arbitration, unless the state espouses the claim of its national. As established by Article 25 (1) of the ICSID Convention:

> *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.*[110]

To circumvent the requirement of a dispute between 'a Contracting State', some commentators have suggested a hybrid model under which 'the host state first *accepts* assignment of a claim held by its national arising from a right allege to be breached by a foreign investor. Rather than prosecute the claim via its own machinery, the host State then *appoints* a representative to perform the role'.[111] The main point is that the option of the state espousing the claim of the individual rights-holder should be contemplated too, as the state may conclude that it is convenient to prosecute the claim without the direct participation of the private party.

The type of parties with standing to bring claims should be addressed for these claims to be viable. For arbitral tribunals it may be difficult to solve all issues that arise in cases with a large number of claims and parties with varied positions, goals and interests. More importantly, instruments like the Hague Rules on Business and Human Rights Arbitration may be more suitable as the rules establish some default options to solve some key questions; but it is advisable to address such issues expressly in the arbitration agreement, to the extent possible. Attention should also be given to the possibility of making written submissions by the state(s) of nationality of the parties, the state(s) on whose territory the conduct that gave rise to the dispute occurred and the state(s) parties to any IIA applicable to the arbitration.

B. Some Caveats with Respect to Direct Claims

Before discussing some procedural challenges of our proposal, we must disclose that there are important institutional challenges of adding individual claims to ISDS or the proposed Multilateral Investment Court. ICSID and other institutions that support ISDS are designed with investors in mind—a situation reflected in the arbitration rules, the cost structure or the background of the arbitrators, just to mention a few structural issues. The institutional implications of allowing direct claims are far greater than the other two proposals by introducing private parties quite directly,

110 ICSID Convention (n 57) art 25(1).
111 Amado and others (n 62) 67 [emphasis in original].

creating new, as well as affecting other, vested interests. The current architecture of IIL is designed to hear from states and investors but not claims by individuals or communities like Indigenous groups. While nothing is insurmountable, the challenges demand political commitment of states as these claims will create very different dynamics and potentially a renewed interest in the system.

More specifically, in thinking about direct claims, reformers should recall that rules designed primarily with investors as claimants in mind could have limited use for actions seeking monetary compensation against them.[112] To be sure, the possibility of direct claims against investors is not excluded by the procedural rules generally applicable for investment disputes—although issues of enforcement of arbitral awards may arise. Hence, some rules may be more conducive for citizen-led actions that contemplate the extent of complications that can result of enforcement, which are governed by national laws and various treaty obligations, including, in most cases, the New York Convention.[113]

In this context, special procedural rules may be particularly helpful for claims by individuals. One notable example is the above-mentioned Hague Rules on Business and Human Rights Arbitration.[114] The Hague Rules are not limited by the type of claimant(s) or respondent(s) or the subject-matter of the dispute and extends to any disputes that the parties to an arbitration agreement have consented to resolve by arbitration. Parties could thus include business entities, individuals, labor unions and organizations, states, state entities, international organizations and civil society organizations, as well as any other parties of any kind. Most notably, the rules preclude a party from making an objection to the enforcement of an award rendered under the Hague Rules, while ensuring that decisions are human rights-compatible and otherwise satisfy the internationally accepted requirements for recognition and enforcement. At the same time, because the Hague Rules were designed specifically for human rights-related claims against 'business entities' (although that term is deliberately left undefined in the Hague Rules), they may not provide precise rules for other claims, whether environmental or otherwise.[115]

5. CONCLUSION

We have outlined three methods for securing investor accountability in IIL. The first of these methods, indirect actions, is already part of the fabric of IIL. Provisions

112 ICSID Convention (n 57) art 54 (referring to the enforcement of the pecuniary obligations of an award).

113 Amado and others (n 62) section 6, classifies issues with respect to enforcement of arbitral awards against investors in three categories: (a) relating to Lex Arbitri, (b) regarding 'Agreement in Writing' and (c) concerning the 'Commercial' Reservation.

114 Diane Desierto, 'Why Arbitrate Business and Human Rights Disputes? Public Consultation Period Open for the Draft Hague Rules on Business and Human Rights Arbitration' (*EJIL Talk!* 12 July 2019) <https://www.ejiltalk.org/public-consultation-period-until-august-25-for-the-draft-hague-rules-on-business-and-human-rights-arbitration/> accessed 6 May 2021.

115 In 2001, the PCA issued Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment. Permanent Court of Arbitration, 'Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment' (PCA, 19 June 2001) <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf> accessed 6 May 2021.

enabling indirect actions take various forms. The most prominent is the inclusion of a legality requirement—that the investor must comply with the host state's law when establishing its investment. If the investor fails to comply, it risks losing access to ISDS because the arbitral tribunal can rule that it lacks jurisdiction (or that the case is inadmissible) on account of its illegal conduct. And as for post-establishment illegality on the part of the investor, the main weapon in the arsenal of states is contributory fault. If the investor contributes to the loss that it complains about and its contribution can be described as faultworthy, then the concept of contributory fault can be marshalled by the state to transfer some of the blame over to the investor.

But indirect methods have inherent limitations. In all cases, they can only be used after an investor has brought a claim against a state. For the state that sees investor misconduct and wants to take action against it at the international level, another course is needed. That course is direct action. Direct actions are claims launched by states against investors. In ISDS, they are unknown. But some existing infrastructure in the ICSID Convention could accommodate a claim brought by a state against an investor pursuant to an IIA. The ICSID Convention lays a foundation. To build on top of it, treaty clauses are needed. In these clauses, home states would give consent on behalf of their investors to 'state-investor dispute settlement'. By instituting this new form of dispute settlement, various advantages could be secured for states to make investors legally accountable for their misconduct.

Direct actions by states against investors are not a silver bullet for investor accountability. One disadvantage is that the state might lack the appetite to bring a claim, notwithstanding that the claim looks to have good chances of success. This is the moment when individual-led actions enter the stage. When states are unwilling to act, individuals and communities might seek to enforce corporate obligations. To make this idea a reality, ISDS needs to be reimagined. It has to change from a system where investors complain about state conduct to a multi-party system which provides access to justice for all of those people who are affected by investment activities. In addition, the procedural rules for citizen-led actions would need to be drafted. Fortunately, there are already models that could be drawn on for this purpose, most particularly the *qui tam* claims from US law and the Hague Rules on Business and Human Rights Arbitration.

In closing we note that all these options for making investor accountability a more prominent part of IIL will require re-thinking of some of the assumptions and institutional architecture behind ISDS. But these efforts do not involve reinventing the wheel; instead they draw on various features of ISDS. The outstanding question is a political one: do states want to deploy ISDS as an additional method for providing some form of international accountability for investors?