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Contextualizing the Doctrine of Privity of Contract in Relation to International Investment Arbitration

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Abstract
International investment arbitration, though within the sphere of public international law, is organically linked with conflict of laws and private contract law. International investment arbitration will, therefore, always, follow the same trajectory as the contract law of the country whose laws parties have chosen to govern their contract or relationship. Scholarly conversation now emerges with regard to third-party rights in municipal contract law and the dwindling influence of the doctrine of privity in both municipal and international laws. This work aims at examining the effect of the evolving legal order relating to privity of contract on international investment arbitration. The contract law of the country, which the parties have chosen as the *lex loci*, undoubtedly, impacts the conduct of the arbitration between the parties; especially, as it relates to third-party rights to join in arbitration, enforcement of arbitration agreements, and enforcement of arbitral awards. Qualitative research methodology is adopted in the work and this enabled the interrogation of previous literature on the dwindling status of the doctrine of privity and emerging third-party rights in municipal contract law. The selected research methodology particularly enabled the researchers to examine the effect which emerging third-party rights may have on international investment arbitration. The work finds: (i) that international investment arbitration and private contract law are, indeed, organically connected and that this connection is causal; (ii) that international investment arbitration will, continually, follow the same trajectory as the domestic contract law of the country whose laws parties have chosen to govern their contract or relationship; and (iii) that the national contract laws of some countries now contain third-party rights, which provide leeway for participation by third parties in arbitral proceedings in certain instances. The work recommends that the inroad of the privity of contract doctrine in international investment arbitration is salutary and that maximizing the gains of this massive inroad necessitates increased legislative intervention, which will empower third parties who are able to show *prima facie* that the outcome of the arbitral proceedings will affect them one way or the other, to join in such arbitral proceedings in order to protect their rights or interests. This is especially so in international investment arbitration ensuing from the petroleum and mining sectors, where investment activities fundamentally disrupt the lives of locals and violate their internationally recognised human rights.
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1. Introduction

The development of the doctrine of privity of contract under common law has had a long history. Yet, it was not always sacrosanct, but it was susceptible to change with changing times. Common-law courts developed a few exceptions to the doctrine, as exemplified by cases, such as *Trident General Insurance Co. Ltd. v McNiece Bros. Pty. Ltd.*[1]and *UBA Plc. v Mrs. Ogundokun*.[2] There were also statutory interventions by the direct entrenchment of third-party rights in contract and related laws by the legislature, as can be seen in the English Married Women's Property Act 1882, Married Women's Property Law 1958 (defunct Western Region of Nigeria),[3] Marine Insurance Act 1906 (U.K.), Law of Property Act 1925 (U.K.), Road Traffic Act 1972 (U.K.) and Property and Conveyancing Law (Western Nigeria) 1958.

The above judicial exceptions and statutory interventions were adjudged fragile and inadequate in mitigating the hardship caused by the doctrine.[4] Arishe and Akpeme, for example, make a strong case for the abolishment of the common law doctrine of privity of contract in Nigeria and its replacement with statutory provisions, allowing third-party rights in contract law, as has been done in the United Kingdom.[5]

In the context of arbitration, non-signatories to an arbitration agreement could only become involved in the

[1] [1988] 165 CLR 107; [1988] HCA 44; [1988] 62 ALJR 508 (High Court of Australia, per Gaudron J), delivered on 8 September, 1988.
[2] [2009] 31 WRN 21; [2009] 6 NWLR (Pt.1138) 450; [2010] All FWLR (Pt.504) 1512 (Court of Appeal, Nigeria).
[3] This Law is still applicable in the Nigerian constituent states carved out of the defunct Western Region.
[4] Gabriel Arishe and Emmanuel Akpeme, 'Reforming the Privity of Contract Rule in Nigeria' (2014) 12 *Nigerian Juridical Rev* 185.
[5] ibid.

arbitration based on the common-law exceptions of implied consent and agency.[1] The issue of third-party rights is more apt in international investment arbitration. This assertion rests on three grounds. Firstly, though international investment arbitration often involves a host State and a foreign investor, the activities of the foreign investor often have a direct impact on the citizens of the host State, and where this is inimical to the rights or interests of the host State's citizens, correlative rights and obligations are triggered. Secondly, under the agent-principal relationship between the State and its citizens, the principal should be able to intervene in international investment arbitration, in appropriate cases, by way of exercising third-party rights under the common law exception of agency mentioned above, where there is a breach of the rights or interests of the principal. Thirdly, treaty-based arbitrations are founded on third-party rights because investors enjoy benefits under BITs to which they are not parties.

After the introduction, section 2 examines the emerging third-party rights in contract law. Section 3 deals with the doctrine of privity under public international law. Section 4 goes on to evaluate the effect of third-party rights laws on international investment arbitration. While section 5 examines the position of the law regarding class actions and civil society participation in international investment arbitration, section 6 concludes the work.

2. The Emerging Third-party Rights in Contract Law

The concept of third-party rights is gradually leaving the realm of common law as common law jurisdictions have started enacting third-party rights laws. The Contracts (Rights of Third Parties) Act 1999 (U.K.) serves as a flagship in this regard and tool for exploring third-party rights in international investment arbitration. Third-party rights that started gathering momentum in 2007 have since gained traction. Although mindful that there is an international concept of privity, the researchers will examine the extent to which the abolishment of privity of contract under municipal contract laws may influence international law, in general, and international investment arbitration, in particular.

The United Kingdom introduced the Contracts (Rights of Third Parties) Act, 1999, to provide a far-reaching exception to the doctrine of privity of contract.[2] Under the Act, where the contract in question contains an arbitration agreement whose scope is wide enough to cover the dispute, a third party is considered a party to the arbitration agreement as regards the enforcement of his right under the contract, such that he is not just entitled but can be required to arbitrate any dispute relating to the contract.[3]

An equally valuable legislation in this regard is the Contracts (Rights of Third Parties) Law 2014 (Cayman Islands), which allows for the direct enforcement of contractual rights by third parties in contracts to which they are not a party.[4] That law provides that, where the parties to the relevant contract have entered into an arbitration agreement relating to the contract, a third party may be considered a party to such arbitration agreement concerning disputes arising in connection with the third party's enforcement of the relevant term of the contract.[5]

More recently, certain jurisdictions, such as Singapore and Hong Kong, have also introduced laws that expressly allow third-party funding in international arbitration.[6] In 2017, Singapore's parliament passed the Civil Law Amendment Act and the Civil Law (Third-Party Funding) Regulations 2017, which effectively abolished the common law crime and tort of champerty[7] and maintenance,[8] respectively, and permitted third-party funding in respect of international arbitration.[9]

Another pertinent issue to the discourse on privity doctrine is that of joinder and consolidation. Some scholars have argued that, because of the consensual nature of arbitration, an arbitral tribunal will usually lack

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[1] Michael P Daly, 'Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration' (2007) 62 *U Miami L Rev* 95.

[2] Elinor Thomas, 'Third Parties and Arbitration Agreements: Fortress Value v Blue Skye' (*Intl Arbitration Newsletter*, June 2013) <https://www.dlapiper.com/en/uk/insights/publications/2013/06/third-parties-and-arbitration-agreements-infotre_/> accessed May 1, 2017.

[3] Sutton, David St John, Gill J and Gearing M, *Russell on Arbitration* (23rd edn, Sweet & Maxwell 2007) para 3-014.

[4] Harneys Law Firm, 'Cayman Islands: The Contracts (Rights of Third Parties) Law 2014' (*Harneys Publication*, 22 June 2014) <www.mondaq.com/caymanislands/x /320740/Contract+Law/The+Contract+Rights+of+Third+Parties+Law+2014> accessed July 7, 2017.

[5] Conyers Dill & Pearman, 'Cayman Islands: Contracts (Rights of Third Parties) Law 2014' (May 2014) <https://www.conyers.com/wp-content/uploads/2018/06/2014_05_Article_Cayman_Islands_The_Contracts_Rights_of_Third_Parties_Law_2014.pdf>3 accessed 31 May 2021.

[6] Wordsford, 'Funding Litigation: Third-Party Funding in International Arbitration' (3 February 2021) https://www.lexology.com/library/detail.aspx?g=5ffe7efc-c2b9-466e-a5bc-a4c5d7084ec6 accessed 31 May 2021.

[7] Maintenance involves the procurement, direct or indirect, of the financial assistance of another person to institute, or carry on or defend civil proceedings without lawful justification. See UK Law Commission, *Proposal for Reform of the Law Relating to Maintenance and Champerty* (1966. Her Majesty's Stationery Office, London) para 9.

[8] Champerty involves maintaining a civil action with the consideration or a promise to the share of the proceeds, if successful. Champerty is, therefore, a segment of maintenance. See UK Law Commission, *Proposal for Reform of the Law Relating to Maintenance and Champerty* (1966. Her Majesty's Stationery Office, London) para 9; see also Zhuang WenXiong, 'The Subsumation of Maintenance and Champerty under Third Party Orders' (2014) Singapore J L Studies 377.

[9] Wordsford (n 115) .

the power to join a third party to an arbitral proceeding without the consent of all the existing parties.[1] The learned authors, Sutton, Gill, and Gearing, state that in the ordinary course, third parties who have not entered into any agreement to refer their disputes to arbitration would not be allowed to join in the arbitration proceedings unless the parties and, if already appointed, the arbitral tribunal agree.[2] However, parties may provide in their arbitration agreement that third parties be allowed to join the proceedings.[3] Sutton, Gill, and Gearing refer to article 22.1(h) of the LCIA Rules, which expressly empowers the arbitral tribunal to allow a third party to join the proceedings if the third party and one of the existing parties agree.[4]

As seen above, the UK Contracts (Rights of Third Parties) Act 1999, by its section 8, provides specifically for third-party rights in arbitration. Although that provision was momentous in 1999, it fails to address the current privity question of whether a third party who has a *prima facie* interest or right to protect should not be allowed to participate in an ongoing arbitration without the consent of the parties. The provision in the LCIA Rules, article 22.1(h), which expressly empowers the arbitral tribunal to allow a third party to join the proceedings if the third party and one of the existing parties agree, addresses the question better by improving on the requirement that both parties agree to the joinder. Yet, that still falls short of adequately protecting third-party rights in arbitration, as can be seen in the case of *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador* (*Chevron v Ecuador*).[5]

In the above case, the International Institute for Sustainable Development and Fundación Pachamama applied to the arbitral tribunal to permit them to participate in the arbitration as amici curiae to highlight the human rights dimension in the dispute. The tribunal refused to grant the permission because, according to it, the disputing parties did not believe that the amicus submissions would help the tribunal and that neither side favoured the petitioners' participation.[6]

The tribunal's decision seems to align with the requirement set by article 22.1(h) of the LCIA discussed above. We suggest that the threshold should extend and that legislative intervention is required to allow third parties who can show *prima facie* that the outcome of the arbitral proceedings will affect them one way or the other to join in such arbitral proceedings to protect their rights or interests. In this regard, it is pertinent to note the momentous and revolutionary decision of the Nigerian Court of Appeal in *Statoil (Nigeria) Limited and Anor. v Federal Inland Revenue Services and Anor.,*[20a] where the court held that a third party non-signatory to an arbitration agreement has the right to intervene in an ongoing arbitration to stop the continuation of the process where the third party can show that his interest is likely to be affected by the outcome of the arbitration proceedings. This decision is a bold judicial pronouncement begging for legislative support.

3. The Doctrine of Privity under Public International Law

Just as there is privity of contract under municipal law, there is also the privity of treaties under public international law. In other words, a treaty benefits and binds only parties to it. This principle is well-enunciated in article 34 of the Vienna Convention on the Law Treaties (VCLT), which states that a treaty applies only to the parties to it and that a treaty can neither impose obligations nor confer rights on a third State without its consent. The defunct Permanent Court of International Justice (PCIJ) confirmed article 34 of the VCLT in *Certain German Interests in Polish Upper Silesia*,[7] when it held that a treaty only creates law between the States which are parties to it. Furthermore, the PCIJ reiterated that no rights favouring third parties are derivable from a treaty.

However, just as privity of contract under municipal law has been losing its position to judicial exceptions and legislative interventions, which have culminated in the new dispensation of third-party rights in contract law, present-day public international law has also shifted away from the parties-only notion when, among other things: the *erga omnes* rule, which obligates States to fulfil certain international norms without their consent, became part of international law; and the BIT system introduced conferral of rights on foreign investors,[8] though they are not parties to such instruments.[9]

There is a middle point of interest to this work. That point is characterised by States entering into contracts with individuals or other private entities, either for commercial or investment purposes. In addition to the

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[1] Elinor Thomas, 'Third Parties and Arbitration Agreements: Fortress Value v Blue Skye'(26 June 2013) <*International Arbitration Newsletter* https://www.dlapiper.com/en/uk/insights/publications/2013/06/third-parties-and-arbitration-agreements-infotre_/ > accessed 1 May 2017.
[2] David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration*. (23rd ed., Sweet & Maxwell 2007) 14.
[3] ibid.
[4] ibid.
[5] *Chevron v Ecuador,* PCA Case No 2007-02/AA277.
[6] International Institute for Sustainable Development, 'Chevron v Ecuador ' <www.iisd.org/projects/chevron-v-ecuador> accessed 30 November 2021.
[20a] (2014) LPELR-231444 (CA).
[7] *Case Concerning Certain German Interests in Upper Silesia*: Germany v. Poland (1926) PCIJ Ser. A., No. 7, 29.
[8] The BIT system is discussed in some details under section 4 of this work.
[9] Michael Waibel, 'The Principle of Privity' in University of Cambridge Faculty of Law, Legal Studies Research Paper Series (Paper No. 44/2016, September 2016) 1.

changing nature of public international law by recognising non-State actors, States themselves have had to descend into the private arena to transact business or seek investment for infrastructural development. When States enter into contracts with private entities, they instigate the principles of municipal contract law, as agreed to by the parties. Thus, as non-State actors can now play in the international plane, so have States been actively involved in the private sphere, thereby bringing themselves under domestic law obligations of private contracts.

4. Effect of Third-party Rights Laws on International Investment Arbitration

Investment arbitration is regarded by some scholars as arbitration without privity,[1] although not in all cases is this so. An investment arbitration based on a specific contract between a given State and an investor is certainly not an arbitration without privity.[2] So, generally, it is a treaty-based arbitration that is without privity because the foreign investor takes benefits from an agreement to which he is not a party. Although granted that treaty-based arbitration is an exception to the doctrine of privity in international law, we shall examine in this section the extent to which that is applicable as well as the extent to which international investment arbitration has generally been or is being affected by the emerging third-party rights in contract law. We shall undertake the examination from the perspective of the ICSID arbitration system and the narrower perspective of treaty-based arbitration.

4.1 The ICSID Arbitration System and the Privity Question

Parties may choose to conduct their international investment arbitration under a variety of rules, namely, under the ICSID Convention (together with the ICSID Arbitration Rules), ICSID Additional Facility Rules, the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), Permanent Court of Arbitration (PCA) Rules, or the International Chamber of Commerce (ICC) Rules, amongst others. While all ICSID arbitrations proceed under the ICSID Convention or the ICSID Additional Facility Rules, parties to a non-ICSID arbitration may base it on any rules they both choose. The focus of this section is on investment arbitrations conducted under article 25 of the ICSID Convention. Article 25 provides for the jurisdiction of the arbitral tribunal to decide an investment dispute.

An invaluable element of ICSID arbitration is the consent of the parties. Whenever the consent of any party is lacking, the arbitral tribunal would lack jurisdiction to determine the dispute. Article 25(1) of the ICSID Convention provides that the jurisdiction of ICSID shall include any legal dispute arising directly out of an investment, between a contracting State and a national of another contracting State, where the parties to the dispute consent in writing to submit to the centre. When the parties have given their consent, no party may withdraw its consent unilaterally. A contracting State includes any of its constituent subdivisions or agencies it designates to the centre as such.

From the above, for a dispute to qualify for ICSID arbitration, it must meet the three different criteria for jurisdiction, namely: (i) jurisdiction *ratione materiae*; (ii) jurisdiction *ratione personae*; and (iii) jurisdiction *ratione voluntatis*. In addition to the above three jurisdictional criteria, specified in article 25(1) of the ICSID Convention, a fourth criterion must be satisfied whenever the parties make arbitration contingent upon the happening of a prior event (precondition to arbitration). For instance, arbitration may be made contingent on negotiation between the parties or exhaustion of local remedies, among other things. In that case, a fourth criterion must be met, namely: jurisdiction *ratione temporis*.

Of the four jurisdictional criteria mentioned above, only jurisdiction *ratione personae* has a direct link with the issue of privity and third-party rights. Under article 25(1) of the ICSID Convention, for an ICSID tribunal to have jurisdiction to entertain an investment dispute, the dispute must be between a contracting State (including any of its constituent subdivision or agency it designates to the centre) and a national of another contracting State. The ICSID Convention is a multilateral treaty with only States as parties but admits one class of third parties to take benefits under the Convention. This class comprises nationals of contracting States who are investing in other contracting States. In other words, in respect of an investment dispute, the jurisdiction of an ICSID tribunal extends to only a contracting State (including any of its constituent subdivision or agency it designates to the centre) and a national of another contracting State investing in the former.

The ICSID Convention does not emphasise an all-party privy to the investment agreement but an all-party consent to ICSID arbitration. The issue of privity becomes compulsory on both parties if the investment agreement is between the two disputing parties. For example, where there is an investment contract between the State and the foreign investor. Where the investment agreement is a BIT or an MIT, the foreign investor would be a third party to such an agreement, and the issue of privity as touching him will be entirely out of the point. In that case, what the investor would require to qualify to bring a claim at ICSID will be the privity of his home State and host State to the ICSID Convention. Thus, at the level of investment contracts, the privity doctrine seems to continue to play an important role. Since not all ICSID arbitrations are treaty-based, we will now move

[1] Waibel (n 17) 20 citing J. Paulsson, 'Arbitration without Privity', ICSID Rev., 10 (1995), 232-257.
[2] ibid 21.

on to specifically examine the issue of privity and third-party rights regarding treaty-based investment arbitrations, with its peculiar nuances.

4.2 The Doctrine of Privity under Treaty-based investment arbitration

The introduction of BITs into the international legal order has resulted in 'extremely generous' awards made by arbitral tribunals in favour of foreign investors.[1] This trend, principally, is because, traditionally, BITs make provisions for investor rights without counterbalancing those rights with investor obligations. The present BIT system evolved due, in large part, to the miscalculated and ill-fated nationalisation policies of developing countries in the 1970s, backed by the Charter of Economic Rights and Duties of States,[2] which was contrary to the earlier consensus,[3] which provided a balanced way to codify the principle of permanent sovereignty over natural resources.[4]

Santa Elena v Costa Rica.[5] In that case, although the respondent signed the ICSID Convention in September 1981, it delayed its ratification until 1993.[6] The tactical delay was to allow Costa Rica's municipal courts to decide the pending Santa Elena expropriation case, where the American company was claiming US$6.4 and Costa Rica had offered to pay US$1.9million on the basis that the expropriated investment was US$395,000 in 1970 when the company acquired it. In the absence of agreement, and after Costa Rica was compelled to ratify the ICSID Convention before it could access a US$175 million loan from the Inter-American Development Bank, the company, in May 1995, instituted an ICSID arbitration against Costa Rica, claiming US$41 million,[7] in place of its earlier claim of US$6.4. The ICSID tribunal decided to order Costa Rica to pay compensation of US$16million.[8]

The above facts show how easy it has been for foreign investors to bring outrageous claims under ISA, especially treaty-based ones, against States which they would likely not have been able to sustain under any other mechanism.[9] Thus, ISA appears to be giving investors too much bite into national economies, more than they deserve. The corollary to this is that outrageous damage awards against States undermine their economies.

There is an emerging paradigm shift. The Norway model BIT, which makes provisions for investor rights and obligations, introduces one way to bring about the needed justice equilibrium between foreign investors and host States. The older generation of BITs made it impossible for States to bring claims under them against investors and emboldened the latter to easily violate the human rights of the indigenes of the communities where they carry out their investment activities[10] and to make claims they could not sustain under any other mechanism.[11]

5. Class Actions and Civil Society Participation in International Investment Arbitration: Where Does the Law Stand?

In *Chevron v Ecuador*,[12] the issue of class actions and civil society participation in international investment arbitration came up for consideration. In that case, the activities of Chevron, and its predecessor Texaco Petroleum Company, had led to severe pollution and complete degradation of the Ecuadoran Amazon. Since Ecuador could not, under the relevant BIT, sue Chevron for the damage done, the inhabitants of the Amazon brought a group action in the *Lago Agrio* claim against Chevron for US$18billion in damages and got a municipal court judgment for US$9.5 billion.[13] Despite the palpable damages caused by Chevron, it responded by suing Ecuador based on the US-Ecuador BIT[14] and prayed the arbitral tribunal to override the Ecuadorian Constitution and its obligations under human rights treaties in favour of the BIT, which the tribunal regrettably did.[15] And, though the judgment of the trial court has been upheld by Ecuador's Supreme Court, Chevron

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[1] Asha Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009) 50 Harv Intl LJ 491, 510.
[2] U.N. Doc. A/5217 (14 December 1974).
[3] Resolution 1803(XVII) of 14 December 1962.
[4] Kaushal (n 15) 499-501.
[5] *Santa Elena v Costa Rica* Final Award dispatched to parties on 17 February 2000, para 111.
[6] Boeglin (n 5).
[7] ibid.
[8] *Santa Elena v Costa Rica* Final Award (n 444).
[9] Kaushal (n 100) 497.
[10] See, for example *Chevron v Ecuador* (n 19), *Aguas del Turani S.A v Republic of Bolivia* (ICSID Case No. RB/02/3), and *The Renco Group Inc. v The Republic of Peru* (ICSID Case No. UNCT/13/1).
[11] *Santa Elena v Costa Rica* Final Award (n 446); see also Kaushal (n 100) 497.
[12] *Chevron v Ecuador* (n 19); see Global Justice Now, 'Investigating the Impact of Corporate Courts on the Ground - The Truth is out there' <https://waronwant.org/sites/default/files/ISDSFiles_Chevron_April2019.pdf> accessed 28 May 2021.
[13] 'Investor-State Dispute Settlement' (n 32).
[14] US-Ecuador BIT signed in 1997. This BIT provides only for investor rights, with no corresponding investor obligations.
[15] 'Investor-State Dispute Settlement' (n 32); see, generally, Fola Adeleke, 'Human Rights and International Investment Arbitration' (2016) 32(1) South Africa J on Human Rights 48-70.

refused to pay the judgment sum.[1]

The *Chevron v Ecuador* award seems to give credence to the argument that bilateral investment treaties (BITs) enable investors to commit corporate misdeeds in host States, which they do not do in their own countries, and that they do so without repercussions.[2] Rather than being held accountable for their misdeeds, these investors are sometimes rewarded with exorbitant damages against their host States because these States decide to regulate their actions.[3] This prevailing circumstance is the reason some scholars believe that ISA skews towards investors.[4] They cite, as examples, the violations of indigenous peoples' human rights in host communities, where oil exploitation and other mining activities take place without regard for how these activities affect the indigenes.[5] It is against this backdrop that we view, as a welcome development, Resolution 26/9 of the United Nations Human Rights Council (UNHRC),[6] which established a new intergovernmental Working Group (IGWG) to develop an international legally binding instrument to regulate TNCs and other businesses regarding human rights issues.[7]

The class action in the *Lago Agrio* case, which relates to municipal courts, was sustained based on Chevron's violation of the plaintiffs' human rights. Regarding an investment arbitration, should not a class of persons whose rights have allegedly been impinged be able to join in the arbitration and protect their rights as third parties? This question continues to trail the decision of the Permanent Court of Arbitration tribunal in *Chevron v Ecuador*,[8] an arbitration matter that brings to the fore the human right abuses associated with foreign investments and the injustice an ISDS tribunal may dispense if human rights norms are sacrificed for investor rights.

The requirement that both parties to an arbitration must agree before third parties may be allowed to participate in arbitration[9] may be sounding the death knell for cases where both parties mutually want to shut out interested third parties from the proceedings. Randazzo refers to a possible legal restraint on the Ecuadorian government and the reason why the government might have been wary of third-party interventions, namely, Chevron's allegation that Ecuador in the 1990s granted its predecessor a release from liability after a cleanup and that Petroecuador, an Ecuadorian government's entity, was in partnership with Chevron's predecessor when the pollution took place and that they were jointly liable.[10]

6. Conclusion

One of the elements established in this work is the link between international investment arbitration and private contract law. The link is causal. International investment arbitration will always follow the same trajectory as the contract law of the country whose laws parties have chosen to govern their contract or relationship. The contract laws of some countries now contain third-party rights, which provide leeway for participation by third parties in arbitral proceedings in certain instances. However, more legislative intervention is required to allow third parties who can show *prima facie* that the outcome of the arbitral proceedings will affect them one way or the other to join in such arbitral proceedings to protect their rights or interests.

This is more so in international investment arbitration, especially in the petroleum and mining sectors, where investment activities fundamentally disrupt the lives of locals and violate their internationally recognised human rights. The Norway Model BIT now recognises investor obligations on human rights, and this is the recommended path to tread, going forward, by all investment-seeking countries. These investor obligations should create a new vista that allows individuals or class of individuals whose rights are, allegedly, infringed to join in an ongoing arbitration or bring an action before an international Commission for actual redress.

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

[2] See Udombana (n 34) 242.

[3] See Mas (n 30).

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

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

[6] UNHRC Resolution 26/9 (A/HRC/RES/26/9).

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

[8] Chevron v Ecuador (n 19).

[9] Sutton, Gill, and Gearing (n 16).

[10] Sara Randazzo, 'Litigation without End: Chevron Battles on in 28-Year-old Ecuador Lawsuit' (2 May 2021) Wall Street J <https://www.wsj.com/articles/litigation-without-end-chevron-battles-on-in-28-year-old-ecuador-lawsuit-11619975500> accessed 17 November 2021.