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At the Intersection of Land Grievances and Legal Liability: The Need to Reconsider Contract Rights and Expectations at the Supranational Level

*Kaitlin Y. Cordes, Lise Johnson, and Sam Szoke-Burke**

This Article explores how host governments' legal obligations can affect or constrain their ability to address "land grievances," which are defined as concerns raised by local individuals or communities in response to negative impacts of land-based investments. Obligations under international investment law, international human rights law, and investor-state contracts can be in tension or can directly conflict with one another, creating complexity for governments seeking to respond to land grievances. To explore the legal considerations that governments must navigate in this context, this Article considers several options that governments could pursue to respond to land grievances. In all of the options considered, the governmental action would also implicate investors' contract rights or expectations, making the rights and obligations under investment treaties particularly important to consider. Given the challenges arising from these options, and in light of the critical need for governments to protect human rights and address their citizens' concerns, the Article concludes with a call to reassess the elevation of contract rights and expectations to a supranational level via international investment law. In the absence of a more comprehensive overhaul of the investment law system, a more critical approach by arbitral tribunals regarding the nature and scope of contract rights (and expectations) deemed enforceable could help limit the potential for arbitral decisions to undermine governments' abilities to address the concerns, and protect the rights, of their citizens.

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INTRODUCTION

Toward the end of 2015, the government of Ethiopia canceled a land lease contract held by an Indian investor.¹ Under the contract, the investor—which boasts of undertaking agricultural production “on a mega scale”²—leased 100,000 hectares of land for an annual payment of slightly under USD \$1/hectare.³ The Ethiopian government has

1. William Davison, *Karuturi Challenges Ethiopia Decision to Cancel Farm Project*, BLOOMBERG BUSINESS (Jan. 11, 2016, 9:24 AM), <http://www.bloomberg.com/news/articles/2016-01-11/karuturi-challenges-ethiopian-decision-to-cancel-farming-project>; Birhanu Fikade, *Karuturi Contemplates Legal Recourse for Loss in Ethiopia*, THE REPORTER ETHIOPIA (Sept. 30, 2017), <http://www.thereporterethiopia.com/business/karuturi-contemplates-legal-recourse-loss-ethiopia>; Staff Reporter, *Government Agency Strips Karuturi’s Land Privilege*, CAPITAL ETHIOPIA (Jan. 15, 2016), <http://capitalethiopia.com/2016/01/15/government-agency-strips-karuturis-land-privilege/>.

2. KARUTURI GLOBAL LIMITED, <http://www.karuturi.com> (last visited Jan. 21, 2018).

3. Land Rent Contractual Agreement Made Between Ministry of Agric. & Rural Development and Karuturi Agro Prods. Plc., arts. 1.1, 2.2.1, 3.6, 5 (Oct. 25, 2010) [hereinafter Land Lease Agreement] (stating that the annual lease rate/hectare is 20 birr, which converts to slightly under USD \$1. The lease also provided the right to receive an additional 200,000 hectares if

controversially welcomed a number of large-scale agricultural investments despite allegations of associated human rights violations.⁴ The Ethiopian government reportedly asserted that the contract termination was due to the investor's failure to sufficiently develop the land.⁵ The limited development had not, however, prevented negative impacts on local communities; researchers, for example, have alleged that the crops of indigenous people were cleared without consent in the investment area.⁶ In response to the government's decision to cancel, the investor asserted that the government's action constituted an expropriation in contravention of the bilateral investment treaty ("BIT") between India and Ethiopia, and noted that it was prepared to seek arbitration.⁷

Regardless of its outcome, this story may presage a new phase in the recent global land rush. As land-based investments for agriculture or forestry projects stall, fail, or face entrenched local opposition, the action or inaction of governments may be more likely to give rise to potential legal disputes, brought by investors as well as by project-affected individuals or communities. At the same time, host governments are under growing pressure to ensure that land-based investments are responsible, as well as to better protect the tenure rights of land users generally.⁸ As this confluence of factors evolves, host

development goals were met on the first concession area).

4. See, e.g., David Smith, *Ethiopians Talk of Violent Intimidation as Their Land is Earmarked for Foreign Investors*, THE GUARDIAN (Apr. 14, 2015, 7:14 AM), <https://www.theguardian.com/world/2015/apr/14/ethiopia-villagisation-violence-land-grab> (discussing the human impact of villagization, violent conflict, and investment).

5. Amare Asrat, *Agency Terminates Contract with Karuturi*, FANA BROADCASTING CORPORATE (Dec. 31, 2015), <http://www.fanabc.com/english/index.php/news/item/4810-agency-terminates-contract-with-karuturi>.

6. HUMAN RIGHTS WATCH, "WAITING HERE FOR DEATH": DISPLACEMENT AND "VILLAGIZATION" IN ETHIOPIA'S GAMBELLA REGION 56 (2012).

7. Davison, *supra* note 1; Fikade, *supra* note 1; see also Investment Policy Hub: *International Investment Agreements Navigator: Ethiopia, Bilateral Investment Treaties*, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67> (last visited Jan. 21, 2018) (giving information on Ethiopia's BITs). This may be an empty threat: the bilateral investment treaty between Ethiopia and India has been signed but may not be in force. See also Land Lease Agreement, *supra* note 3, at art. 17 (stating that the land lease agreement does not contain an arbitration clause, but rather states that disputes will "be referred to Ethiopian Federal Court").

8. This is partly in response to the perceived "global land rush" that followed the 2007–2008 food price crisis, leading donors, UN technical agencies, civil society, and other stakeholders to have increasingly pushed for responsible land-based investments (or for no large-scale land-based investments at all, as argued by some civil society activists and others). This push led to, among other things, the Principles for the Responsible Investment in Agriculture and Food Systems, which are the product of high-level intergovernmental and multi-stakeholder negotiations at the Committee on World Food Security. COMMITTEE ON WORLD FOOD SECURITY, PRINCIPLES FOR RESPONSIBLE INVESTMENT IN AGRICULTURE AND FOOD SYSTEMS (2014) [hereinafter WFS PRINCIPLES]. The pressure to ensure more responsible land-based investments has occurred

governments will more frequently confront the thorny question of how to deal with problems stemming from existing land-based investments in light of their legal obligations to different individuals, communities, and entities.

This Article explores how governments' legal obligations can affect or constrain the ability of host governments to address "land grievances," which we define as concerns raised by local individuals or communities in response to the actual, perceived, or potential negative impacts of land-based investments. Legal obligations under international investment law, international human rights law, and investor-state contracts are particularly important. If human rights are in tension with investor protections, then one or more of the stakeholders risk bearing a significant burden (communities and individuals risk having their human rights violated), governments risk having to pay large awards (or high legal costs) under international investment law, and investors risk disruption to, or termination of, their business operations. In attempting to identify options to address grievances within the context of governments' complex web of legal obligations, this Article also seeks to advance discussions on the perils of, and possible remedies for, the current fragmentation in international law.

Part I provides an overview of land-based investments and the grievances they engender. Part II focuses on the obligations and redress mechanisms found in international investment law, international human rights law, and investor-state contracts, as well as some of the ways in which these obligations intersect and interact, and the challenges this can create for governments. Part III discusses three options that governments have to address land grievances—renegotiating investor-state contracts, terminating contracts, and modifying the domestic legal framework—as a way to explore the accompanying legal considerations that governments must navigate, in particular when investors' contract rights or expectations stand to be both affected by governmental action and elevated to a supranational level through interpretation of an investment treaty. Part IV concludes with a call to reassess whether, and if so which, contract rights or expectations should be elevated to a supranational level via international investment law.

against the backdrop of a greater push at the international level to ensure better protection of tenure rights of all legitimate land users. This focus on tenure rights is best exemplified by the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security, also the result of high-level intergovernmental negotiations at the Committee on World Food Security. COMMITTEE ON WORLD FOOD SECURITY, VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY (2012) [hereinafter WFS GUIDELINES].

I. LAND-BASED INVESTMENTS AND LAND GRIEVANCES

A. *How Investments Occur and How They are Regulated*

A “global land rush” in the past two decades has been characterized by a marked increase in large-scale investments for agricultural, forestry, and other land-intensive projects, particularly in low- and middle-income countries in Africa, Asia, and Latin America.⁹ Commercial motives, sometimes coupled with food security concerns, have been a main driver of investor interest;¹⁰ on the receiving end, countries have pursued such investment in the hopes that it will generate a range of coveted benefits including new capital, jobs, increased exports, and improved agricultural productivity.¹¹ Although the scale of these land-based investments may not be as large as often described,¹² many land-based investments already implemented have had significant impacts on local communities.

The process for investing in agriculture or forestry in any particular country is highly context-specific, depending on national, and sometimes sub-national, laws and policies.¹³ Yet, some general observations on how such investments occur and are regulated provide a basis for understanding the role of governments in facilitating,

9. See, e.g., EUROPEAN PARLIAMENT, ADDRESSING THE HUMAN RIGHTS IMPACTS OF ‘LAND GRABBING’ 8 (July 15, 2014) [hereinafter Impacts of ‘Land Grabbing’] (discussing the renewed interest in agricultural land); Rabah Arezki et al., *What Drives the Global “Land Rush”?*, 29 WORLD BANK ECON. REV. 207, 207 (2013) (discussing “marked increases in the demand for agricultural land”); Kate Geary, “*Our Land, Our Lives*”: *Time Out on the Global Land Rush*, OXFAM INT’L 2 (Oct. 2012) (discussing the boom in food prices as triggering increased investor interest in land); Smita Narula, *The Global Land Rush: Markets, Rights, and the Politics of Food*, 49 STAN. J. INT’L L. 101, 105–06 (2013) (discussing how “purchasing and leasing agricultural land in developing countries has skyrocketed”).

10. Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT’L L.J. 503, 512–17 (2011); Narula, *supra* note 9, at 105–12.

11. Narula, *supra* note 9, at 103; LORENZO COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENT AND INTERNATIONAL LAND DEALS IN AFRICA 5, 78–83 (2009) [hereinafter LAND DEALS IN AFRICA]; *The Practice of Responsible Investment Principles in Larger-Scale Agricultural Investments: Implications for Corporate Performance and Impact on Local Communities*, THE WORLD BANK REPORT NO. 86175-GLB (2014).

12. See, e.g., Lorenzo Cotula et al., *Testing Claims About Large Land Deals in Africa: Findings from a Multi-Country Study*, 50 J. DEV. STUD. 903, 905 (2014) (finding that “land acquisition accounts for a small share of land suitable for agriculture in each country”).

13. International and extraterritorial laws and policies can also influence and affect such investment. Given this Article’s primary focus on host governments seeking to address land grievances, this Section explores processes for investment within host countries, and sets aside the potential or actual influence of international laws or policies that might shape domestic laws and policies relevant to investment processes, although interactions between international and domestic law are considered in the following Section. This Section also does not consider the extraterritorial laws and policies that could influence how foreign investors undertake investments in certain scenarios.

participating in, and monitoring such investments, as well as the steps they may take to address related grievances.

The land required for an investment may come from the government, a community, or private individuals.¹⁴ This Article focuses on contexts in which the government is involved either in transferring the land directly to an investor, or in otherwise facilitating the investment—for example, signing an investment incentive contract with a particular investor. Direct transfer of land by governments for purposes of agriculture or forestry investments has occurred most frequently in Sub-Saharan Africa and Southeast Asia, where governments have entered into agreements with investors that allow the use of public, national, or state land (which may be technically owned by the government, even when others have legitimate tenure rights over the land in question).¹⁵ In some places, laws may require private land to be transferred to the government before it can be leased to a foreign investor.¹⁶

Investors may acquire land for agriculture or forestry through purchases (sales), leases, or concessions.¹⁷ A review of publicly

14. The question of who has the right to allocate land to investors is highly specific, differing between and sometimes within countries. Even within specific contexts, the answers may be debatable: for example, a central government may claim legal authority to allocate land designated as state or public land, while land users whose families have used that same land for generations may dispute that authority—and may have backing for their position under international human rights law, or from soft law documents such as the Voluntary Guidelines on the Responsible Governance of Tenure. To generalize, however: in countries where land is owned or controlled primarily by the State, as in many countries in Sub-Saharan Africa and Southeast Asia, the government generally allocates land to investors via long-term leases or concessions. Where land is controlled by customary authorities, it is generally those authorities who allocate land. When land is owned primarily by individuals, such as in much of Latin America, those individual landowners are generally the ones to allocate land to investors. See Impacts of ‘Land Grabbing’, *supra* note 9, at 14.

15. This generalization does not hold true of all countries within the regions. In Ghana, for example, most land is not considered to be owned by the state, and customary chiefs frequently sign land leases for investment purposes. LAND DEALS IN AFRICA, *supra* note 11, at 78; COLUMBIA CTR. ON SUSTAINABLE INV., 2015–2016 ANNUAL REPORT (Oct. 7, 2015).

16. In Tanzania, for example, village land or private land must be transferred to a national entity before a derivative right can be given to a foreign investor. *Services to Investors*, TANZANIA INVESTMENT CENTRE, <http://tanzania.eregulations.org/menu/196?l=en> (last visited Nov. 22, 2017).

17. Land acquisition is not always needed for forestry projects. In some jurisdictions, investors in forestry projects can acquire licenses, permits, or “profits a prendre” that provide the investor with access to forest resources without actually transferring possession or control of the land itself. *Governance Principles for Concessions and Contracts in Public Forests*, FOOD & AGRIC. ORG. OF THE U.N., 45–54 (2001). Such licenses and permits generally provide access to resources on public land, but may also be used to help regulate forestry activities on private land, like the Private Use Permits that have been used in Liberia (which have been heavily criticized). See, e.g., An Act Adopting the National Forestry Reform Law of 2006, §§ 5.1–5.7 (Liber.) [hereinafter NFRL] (establishing Private Use Permits); GLOBAL WITNESS, SIGNING THEIR LIVES AWAY: LIBERIA’S PRIVATE USE PERMITS AND THE DESTRUCTION OF COMMUNITY-OWNED

available investor-state contracts for agriculture and forestry projects shows that most contracts take the form of leases or concessions, rather than sales.¹⁸ While such land use transfers are thus time-bound, they can still cover a significant length of time, with many agreements spanning anywhere from twenty-five years to ninety-nine years.¹⁹ The length of these agreements may be governed by law or otherwise standardized within a country.²⁰ This is not always static. For example, in Cambodia, Economic Land Concessions (“ELCs”) for industrial-scale agriculture have been limited to ninety-nine years, but the government has more recently moved to limit the duration of certain concessions to fifty years as part of a larger review of new and existing ELCs mandated in 2012.²¹

Investor-state contracts differ in their complexity, as well as in their purported comprehensiveness. Some contracts are predicated on the receipt of additional permits or approvals, while others may endeavor to settle all relevant issues related to the underlying project, including by obligating the government to ensure that any requisite authorizations are provided as needed.²²

RAINFOREST (Sept. 2012) (also discussing Liberia’s Private Use Permits).

18. At the time of writing, OpenLandContracts.org, a global repository of publicly available investor-state contracts for agriculture or forestry projects, showed 154 unique contracts from fourteen countries (Cambodia, Cameroon, the Democratic Republic of Congo, Ethiopia, Ghana, Ivory Coast, Liberia, Madagascar, Mali, Peru, Sierra Leone, South Sudan, Sudan, and Timor-Leste), and only one involved a sale. However, because investments in land for agriculture and forestry projects are relatively opaque as compared to other types of resource investments, it is impossible to draw definitive conclusions based on publicly available documents.

19. See, e.g., Ministère de l’Environnement, Conservation de la Nature et Tourisme, *Contrat de Concession Forestiere*, République Démocratique du Congo, art. 3 (Oct. 24, 2011) (term of twenty-five years); Land Rent Contractual Agreement Made Between Ministry of Agric. & Saudi Star Agric. Dev. Plc., art. 2.1 (2010) (term of fifty years); Agreement for Plantation of Sugar Cane, & Processing Factory of Sugar Cane Between The Ministry of Agric., Forestry & Fisheries and Koh Kong Sugar Indus. Co. Ltd., Cambodia, art. 2.1 (Aug. 2, 2006) (term of ninety years).

20. In Liberia, for example, the National Forestry Reform Law of 2006 establishes different types of forestry concessions in Liberia, with the larger concessions requiring a term that “approximate[s] the length of a forest rotation on the land based on a sustainable yield of Timber products,” and the smaller concessions restricted to a term of no more than three years. NFRL, *supra* note 17, at § 5.3(b)(viii), § 5.4(b)(iii). A review of publicly available land contracts and other publicly available concession information shows consistency in contract durations within countries as well: for example, all of the publicly available Ethiopian land lease agreements provided to foreign investors are for twenty-five years.

21. *Social Land Concessions*, OPEN DEVELOPMENT CAMBODIA (Aug. 4, 2015) <http://www.opendevelopmentcambodia.net/briefing/economic-land-concessions-elcs/>; *Concessions*, OPEN DEVELOPMENT CAMBODIA (Aug. 4, 2015) <https://opendevelopmentcambodia.net/topics/concessions/#ref->.

22. Without weighing in on the legality of this, the Establishment Convention by & Between The Republic of Cameroon and SG Sustainable Oils Cameroon PLC., which freezes the list of authorizations needed, notes that they shall be provided without payments, and states that the “[g]overnment undertakes to promptly provide to Investor, and to cause any Governmental Authority to provide to Investor all certificates, exemptions, waivers, consents, licenses, permits,

In general, receiving the rights to use land is often only one of many steps to be undertaken before a land-based investment can be implemented. Requirements established by law or articulated in the relevant investor-state contract may, for example, require the investor to conduct an environmental impact assessment or receive an investment license before commencing.²³ While investment promotion agencies may seek to smooth the path for investors in acquiring any necessary authorizations, the extent to which they can do so in practice may be limited, as the processes for granting relevant authorizations are generally handled by different levels of government, or different departments or ministries, that must enforce their own mandates.

Throughout the lifecycle of an investment, the government is responsible for monitoring and enforcing the investor's commitments and obligations—both those arising under domestic law and those flowing from investor-state contracts. Even highly resourced governments struggle to adequately monitor and enforce all relevant regulations pertaining to investors and other corporate actors; this can be an even greater challenge for less-resourced governments.²⁴ Such difficulties are exacerbated when governments allow an expansive use of investor-state contracts to develop—in essence, unique legal regimes for each investment. When issues such as tax payments, local hiring, and water usage are negotiated and regulated via individual contracts rather than under a comprehensive and broadly applicable legal framework, host governments must then find a way to monitor each investor against a set of unique requirements and obligations. In the context of land-based investment, governments—many of which already struggle to monitor and enforce regulations—may not have the resources or capacity to properly monitor the complex agreements into which they enter.

easements, documents and other authorizations, to the extent any of the foregoing are or may be desirable or necessary.” Establishment Convention by & Between The Republic of Cameroon and SG Sustainable Oils Cameroon PLC., § 4.11(c) (Sept. 17, 2009) [hereinafter *Sustainable Oils Cameroon*].

23. See, e.g., Memorandum of Understanding Between The Gov't of The Republic of Sierra Leone and Sierra Akker Agric. Co. Ltd., app'x, arts. 2, 6 (June 2013). Article 2 of the appendix notes that the company will be granted all required permits and authorizations so long as the company complies with all published legal requirements. *Id.* at art. 2. Article 6 of the appendix states that the environmental license will be granted, subject to requisite conditions, unless withheld for lawful reasons or unless the company's environmental management plan and environmental and social assessment are not adequately implemented. *Id.* at art. 6.

24. David Graham & Ngairé Woods, *Making Corporate Self-Regulation Effective in Developing Countries*, 34 *WORLD DEV.* 868, 868 (2006) (“No country boasts perfect regulation—indeed the recent corporate collapses of ENRON and WorldCom exposed significant gaps. However, yet more serious gaps exist in most developing countries where governments have far less capacity to regulate.”).

Governments are dynamic; therefore, laws and policies of general applicability that affect an investment may be enacted, modified, or terminated during an investment. These changes may create or modify other regulatory requirements imposed on the investor. Investors generally must comply with these changes regardless of the impact on their operations, although contractual provisions (such as stabilization clauses) and other domestic or international legal rules may limit the applicability of some (or, increasingly rarely, all) changes, as discussed further in Part II.C.

Using the processes described above, governments have the opportunity to shape the types, design, and implementation of new investments in agriculture or forestry. Some of these processes are also relevant when governments seek to address the grievances related to ongoing investments. For example, a governmental entity may decide to cancel (or not grant) a license or permit required for operations, to request renegotiation of the investor-state contract, or to enact a law that creates new regulatory requirements. Actions that negatively affect an investment, however, may prompt an investor to seek relief, such as through lobbying or by bringing legal challenges in national or international courts or tribunals.

B. Land Grievances: Causes and Incentives for Redress

1. Common Causes of Land Grievances

Investments in land for agriculture or forestry projects have led to numerous types of grievances on the part of local communities and individuals around the world.²⁵ Documented grievances have occurred at all stages of the project cycle, sometimes starting even before project implementation.²⁶ Grievances have arisen not only when the

25. The discussion of land grievances in this sub-section draws primarily from the authors' review of forty cases of grievances arising from agriculture or forestry investments, as well as interviews conducted by the authors with lawyers, advocates, and others who work with communities or host governments. See *Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections*, COLUMBIA CTR. ON SUSTAINABLE INV. <http://ccsi.columbia.edu/work/projects/land-grievances/> (last visited Nov. 26, 2017) (containing a list of examples of grievances and allegations).

26. See, e.g., Rhett Butler, *Malaysian Palm Oil Giant Loses PNG Case, Plantations Declared Illegal*, MONGABAY (May 24, 2014), <https://news.mongabay.com/2014/05/malaysian-palm-oil-giant-loses-png-case-plantations-declared-illegal/> (“[t]he people of Collingwood Bay have spoken clearly through the voices of our chiefs that we are against large scale palm oil development on our lands”); *Villagers Secure Victory Over Malaysian Land Grabbers in Papua New Guinea*, FARMLANDGRAB.ORG (May 21, 2014), <https://farmlandgrab.org/23526> (noting that even though the people of Collingwood Bay were ultimately successful in their battle for their land they are still mindful of the “innocent families and other communities struggling [throughout] the country with the same problem”).

government transferred the land in question, but also when the land was provided by a local community or individuals.²⁷ While land grievances are context-specific, and any particular grievance is unique to the project and the affected community, issues that appear especially likely to create or exacerbate grievances include:

Displacement from land and resources (whether physical or economic,²⁸ and including concerns around a failure to obtain free, prior, and informed consent (“FPIC”), a lack of adequate consultation, and inadequate compensation);

Negative effects on the environment or cultural sites (which may be inherent to the project—for instance, the razing of forested land to make way for a greenfield palm oil plantation—or may be caused by a failure to adequately mitigate such effects);

Failure to realize benefits from projects (including grievances regarding the quality or quantity of jobs reserved for locals, or regarding the provision of infrastructure or social services);

Violence,²⁹ intimidation, the repression of protests, or

27. See, e.g., *Final Monitoring Report: On the Operations and the Scale Down of Addax Bioenergy in Makeni, Sierra Leone*, SIERRA LEONE NETWORK ON THE RIGHT TO FOOD (SILNORF) 3–6 (June 2016) (discussing grievances of community members in Bombali and Tonkolili districts concerning Addax Bioenergy Sierra Leone Ltd.’s Makeni project). See Jennifer Kennedy, *Sierra Leone Farmers Evicted for Sugarcane Biofuel Plantations*, CORPWATCH BLOG (Mar. 5, 2013), <http://www.corpwatch.org/article.php?id=15822> (discussing the fallout from people losing their farms); see also Memorandum of Understanding & Agreement Between the Gov’t of the Republic of Sierra Leone, Addax Bioenergy Sierra Leone Ltd. and Addax & Oryx Holdings BV, art. 2 (Feb. 9, 2010) (allowing for land clearance).

28. The IFC Performance Standards on Environmental and Social Sustainability define physical displacement as “relocation or loss of shelter” and economic displacement as “loss of assets or access to assets that leads to loss of income sources or other means of livelihood.” INT’L FIN. CORP., PERFORMANCE STANDARD 5: LAND ACQUISITION AND INVOLUNTARY RESETTLEMENT 1, ¶ 1 (Jan. 1, 2012).

29. At the most extreme, this can even result in fatalities, including of innocent bystanders. The advocacy group Global Witness has documented more than a thousand murders of land and environmental defenders since 2002, including in the context of land-based investments. In 2015, Global Witness found twenty killings that were linked to “[a]gribusiness grabbing land for large-scale plantations,” and 185 murders in total. *On Dangerous Ground*, GLOBAL WITNESS 18 (June 20, 2016), <https://www.globalwitness.org/en/reports/dangerous-ground/>; see also *Deadly Environment: The Dramatic Rise in Killings of Environmental and Land Defenders*, GLOBAL WITNESS 5, 13 (2014), <https://www.globalwitness.org/en/campaigns/environmental-activists/deadly-environment/> (documenting 908 land/environmental defenders killed in thirty-five countries between 2002 and 2013, and arguing that an increasing death rate is linked to commercial pressures on land). In Cambodia, for example, the military stormed a village to carry out a forced eviction after an investor allegedly encroached on community members’ farms. The military’s action resulted in the death of a fourteen-year-old girl hit by gunfire. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, CAMBODIA 2012 HUMAN RIGHTS REPORT (2013); CAMBODIAN LEAGUE FOR THE PROMOTION AND DEFENSE OF HUMAN RIGHTS, ATTACKS & THREATS AGAINST HUMAN RIGHTS DEFENDERS IN CAMBODIA 11 (Dec. 2012) [hereinafter CAMBODIAN DEFENDERS].

inappropriate detentions or arrests (all of which can be part of a downward spiral in which investments create grievances; individuals or communities air these grievances through demonstrations or other advocacy strategies, and the investor or the government then attempts to clamp down on such actions through violence or arrests³⁰); and

Illegality,³¹ potential corruption³² or conflicts of interest, and lack of transparency (which are not always the initial cause of investment-related concerns, but which can exacerbate grievances and create additional frustration, and may be highlighted in advocacy or legal actions against the investment).

Of the forty cases reviewed for this research, displacement from land and resources was the most common source of grievances. Because land is often important both as an economic asset and for social, cultural, political, or spiritual reasons, displacement can be devastating. At times, investments can be linked to the physical and/or economic displacement of thousands of individuals.³³ Although governments may describe public or state land as “available” for investment, such land is often occupied, used, or relied on by local communities or individuals.³⁴ On

30. See CAMBODIAN DEFENDERS, *supra* note 29, at 13 (discussing the inappropriate violence accompanying arrests).

31. For example, in Cambodia, government officials have granted economic land concessions that have not met requisite pre-conditions, that exceed legal size limits, or that otherwise run contrary to applicable laws. U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, ECONOMIC LAND CONCESSIONS IN CAMBODIA: A HUMAN RIGHTS PERSPECTIVE, ¶¶ 8–12 (June 2007). In Papua New Guinea, a Commission of Inquiry investigating Special Agriculture & Business Leases found that multiple leases failed to comply with statutory requirements, and ultimately recommended replacing the entire system of leases due to serious abuses. John Numapo, *Final Report*, COMMISSION OF INQUIRY INTO THE SPECIAL AGRICULTURE AND BUSINESS LEASES (SABL) (June 24, 2013), <https://pngexposed.files.wordpress.com/2013/12/numapo-sabl-final-report.pdf>.

32. OLIVIER DE SCHUTTER, TAINTED LANDS: CORRUPTION IN LARGE-SCALE LAND DEALS, INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE AND GLOBAL WITNESS (Nov. 2016).

33. See, e.g., *Koh Kong sugar plantation lawsuits (re Cambodia)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <http://business-humanrights.org/en/koh-kong-sugar-plantation-lawsuits-re-cambodia> (last visited Nov. 26, 2017) (discussing the provincial court complaint filed against Koh Kong Plantation and Koh Kong Sugar Industry in Cambodia by 4,000 villagers). Oxfam estimates 22,500 people were evicted between 2004 and 2010 following the granting of licenses by the Ugandan National Forestry Authority. See also MATT GRAINGER & KATE GEARY, THE NEW FORESTS COMPANY AND ITS UGANDA PLANTATIONS, OXFAM CASE STUDY 2 (Sept. 2011) (outlining instances where individuals have been displaced as a result of these licenses. The authors note that Francis, once a model farmer who is now “‘one of the poorest’ . . . is among more than twenty thousand people who have been evicted from their homes and land in Kiboga district, and in nearby Mubende district, to make way for NFC plantations.”).

34. Land governance regimes, and tenure rights within them, are quite context-specific. But in general, when land is deemed to be public or state land, the government has the right to decide how to use or allocate such land. This means that, although there may be individuals or communities who rely on such land for their livelihood strategies, the government may not need

the other hand, even when land is provided directly by communities or individuals, grievances regarding displacement may arise: for example, when communal land was provided without the support of all community members, or when individuals were intimidated into providing rights to use their land. Under either scenario, displacement can reduce food security and negatively affect well-being, particularly when compensation is inadequate.³⁵

The case of U.S.-based Herakles Capital's investment in South-West Cameroon, which centered on a concession for over 73,000 hectares of oil palm plantations,³⁶ illustrates the multiple types of grievances that can arise from a single project. Allies of communities affected by the project claimed that meaningful consultation processes had not taken place, and argued that the FPIC of each affected community had not been obtained, as the agreement of certain traditional authorities and elders alone, without participation of the broader community, fell far short of the FPIC standard.³⁷ It was further alleged that the project would lead to the loss of lands and resources on which local

to technically acquire that land from them. In contexts where land is not deemed to be owned or controlled by the government, a government may decide to acquire land—on a voluntary or compulsory basis, and within the boundaries of what is permitted under domestic law—for investments. It may do this preemptively or for specific projects; the latter scenario is more comparable to how the government of the United States, for example, has used its power of eminent domain.

35. One example of this comes from Uganda, where a British company's investment in timber plantations allegedly led to the evictions of thousands of local community members. LAND AND POWER: THE GROWING SCANDAL SURROUNDING THE NEW WAVE OF INVESTMENTS IN LAND, 151 OXFAM BRIEFING PAPER (Sept. 22, 2011). Those community members sought redress through both judicial and non-judicial means, including in the lodging of a complaint with the Compliance Advisor/Ombudsman of the International Finance Corporation. In that complaint, the communities noted that, "[a]s a result of this physical and economic displacement, the affected communities' livelihoods have been significantly impaired. In particular, and due especially to decreased productive and income-earning potential, many families report . . . eating materially less well." Letter from Barbara Stockin, Chief Exec., Oxfam GB & Jeremy Hobbs, Exec. Dir., Oxfam Int'l, to Meg Taylor, Compliance Adviser/Ombudsman, Int'l Fin. Corp. (Dec. 20, 2011) (on file with authors) (regarding New Forests Company, Namwasa Plantation; IFC financing via Agri-Vie Fund PCC).

36. Sustainable Oils Cameroon, *supra* note 22.

37. ANALYSIS OF SOME CONTESTED LEGAL ISSUES REGARDING THE HERAKLES FARMS/SGSOC'S OIL PALM PLANTATION PROJECT IN CAMEROON, THE LAND AND INVESTMENTS GROUP – SCIENCES PO LAW CLINIC § 4.3 (last viewed Aug. 22, 2017) [hereinafter SCIENCES PO]. While FPIC is a right reserved primarily for indigenous and tribal peoples under international human rights law, it is also required to be applied to all local peoples and communities under the Roundtable on Sustainable Palm Oil's Principles & Criteria. ROUNDTABLE ON SUSTAINABLE PALM OIL, PRINCIPLES AND CRITERIA FOR SUSTAINABLE PALM OIL PRODUCTION (Oct. 2007), <http://www.rspo.org/file/RSPO%20Principles%20&%20Criteria%20Document.pdf> (this 2007 version was the version at issue). Herakles was a member of the RSPO until withdrawing in August 2012 while embroiled in an RSPO complaints process.

communities relied for their livelihood,³⁸ increasing their risk of indirect or economic displacement. Predicted negative effects on the environment included the clearing of forests, reduction of biodiversity, and increased release of greenhouse gases.³⁹ In addition, local activists and organizations focusing on the project's potential impacts on human rights and the environment asserted that they had experienced "intimidation, lawsuits, arrests, and violent attacks."⁴⁰ Two Cameroonian NGOs also alleged illegal activity by the company's Cameroonian subsidiary, including "intimidation and bribery of community leaders, government officials, and local citizens . . . to gain land."⁴¹

2. Responding to Land Grievances: Incentives and Challenges

Host governments and investors may have various incentives for addressing land grievances. Grievances have triggered protests, litigation, international advocacy campaigns, and violent conflict, all of which can create reputational, financial, operational, and legal risks. Governments and investors that work to address land grievances as they arise have a better chance of mitigating, rather than exacerbating, these risks.

Yet despite the compelling reasons to take remedial action, governments and investors alike can find it difficult to rectify land grievances in practice. In some instances, there may be no way to fully remedy certain actions, such as when a sacred site has been destroyed.⁴² At other times, community disagreement on the appropriate remedies may entrench local opposition to any proposed remedial efforts. Additionally, internal disagreements within a government or the investing company may create obstacles that block effective efforts to address grievances. In addition, either a government or an investor might find that the other side is uninterested in addressing grievances.

38. GREENPEACE, HERAKLES FARMS IN CAMEROON: A SHOWCASE IN BAD PALM OIL PRODUCTION 5, 13 (Feb. 2013) [hereinafter GREENPEACE]; SCIENCES PO, *supra* note 37, at § 4.6.

39. GREENPEACE, *supra* note 38, at 5.

40. *Cameroon Activists on Trial for Peaceful Protest Against Wall Street Land Grabber*, GRAIN (Jan. 30, 2014), <https://www.grain.org/article/entries/4879-cameroon-activists-on-trial-for-peaceful-protest-against-wall-street-land-grabber>.

41. U.S. DEP'T OF STATE, U.S. NAT'L CONTACT POINT FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERS., Final Statement, Specific Instance Between the Center for Environment and Development (CED) with Network to Fight Against Hunger (RELUF) and Herakles Farms' Affiliate SG Sustainable Oils Cameroon (SGSOC) in Cameroon (July 28, 2015).

42. *See, e.g., Rubber Barons*, GLOBAL WITNESS 16 (May 13, 2013), <https://www.globalwitness.org/en/campaigns/land-deals/rubberbarons/> (explaining that "[i]n three villages near Hoang Anh Oyadav, Heng Brother and CRD's rubber concessions, village chiefs and elders described how the companies had destroyed spirit forest sites and burial grounds").

While challenging from either perspective, a government might find itself in the particularly unenviable position of trying to placate its citizens as well as the investor.

Another potential complication concerns the attitude and actions of the investor's home government. A supportive home government may attempt to pressure the host government to act favorably toward its outward investor, potentially rendering actions to address grievances at the expense of the investor even more unpalatable to the host government. For instance, in the aforementioned example from Cameroon, the home state of Herakles Capital—the United States—privately urged the Cameroonian government to resolve disputes regarding the plantation, with a high-level U.S. official reportedly advising Cameroon to “act quickly” to “avoid arbitration or protracted legal proceedings.”⁴³ This official also reportedly warned that a failure to act could have “a chilling effect on future foreign investment.”⁴⁴ This allusion to arbitration and legal proceedings provides an example of how the threat of international investment law may loom over governmental efforts to redress land grievances. This may be so even if the host government also has legal obligations under international human rights law to restitute land allocated to an investor or to take other actions to provide redress to aggrieved community members. The web of international, domestic, and contractual legal obligations relevant to governments, and the challenges that arise at the intersection of these legal frameworks, are discussed below.

II. LEGAL OBLIGATIONS, REDRESS MECHANISMS, AND CHALLENGES OF INTERSECTING LEGAL FRAMEWORKS

A government's legal obligations may influence its approach to addressing land grievances. This Section discusses the obligations and

43. According to a U.S. diplomatic cable that was accessed through a Freedom of Information Act request, when a high-level U.S. official visited Cameroon, the official raised the topic of ongoing disputes related to the plantation, including a stop work order issued by the Minister of Forests and Wildlife. The cable notes that the official:

[U]rged the Prime Minister to make a decision and take action to resolve the dispute. She told [the Prime Minister] that the United States does not want to tell Cameroon what decision to make, but Cameroon should act quickly and avoid arbitration or protracted legal proceedings. She warned that a failure to act could cause uncertainty in the local business climate and have a chilling effect on future foreign investment.

U.S. DEP'T OF STATE, COMMERCIAL ISSUES DOMINATE DAS AKUTETEHS CAMEROON VISIT, DOC. NO. CO5446286 (May 31, 2013), <https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/us-embassy-cables-herakles-farms-130531.pdf>.

44. *Id.* (noting, additionally, that “a failure to act could cause uncertainty in the local business climate”).

remedies found in three particularly relevant sources: international investment law, international human rights law, and investor-state contracts. It also considers some of the challenges arising at the interface of these legal frameworks.

A. *International Investment Law*

International investment law is a rapidly developing area of law regulating governments' treatment of foreign investors—with significant implications for governments as they seek to handle grievances arising from investments in land. International investment law's remedial mechanisms render it relatively powerful: most, though not all, of the more than 3,000 existing investment treaties provide foreign investors with a direct private right of action to sue their host governments in international arbitration.⁴⁵ These investor-state dispute settlement (“ISDS”) proceedings, which are typically determined by a panel of three arbitrators, do not generally require exhaustion of domestic remedies.⁴⁶

Monetary damages awarded by arbitrators for violations of the applicable investment treaty may cover both past losses and lost future profits. Some awards have been for staggering sums, both as an absolute number and as a proportion of government expenditures.⁴⁷ Even governments that ultimately prevail in an arbitration may be forced to expend significant time and resources in defending the claim,⁴⁸ and may

45. As of December 15, 2017, the United Nations Conference on Trade and Development (UNCTAD) had “mapped” 2,573 investment treaties. Of those 2,573 treaties, UNCTAD found that 2,442 provided for investor-state dispute settlement. That information is available at UNCTAD's website <http://investmentpolicyhub.unctad.org/>.

46. For an overview of investor-state disputes, see JESWALD SALACUSE, *THE LAW OF INVESTMENT TREATIES* 392–435 (Oxford Int'l Law Library, 2d ed. 2015); M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 172–235 (Cambridge Univ. Press, 3d ed. 2010).

47. As noted by Lauge Poulsen, a 2003 award against the Czech Republic for USD \$350 million damages was:

[E]qual to the entire health budget of the Czech government and effectively doubled the public-sector deficit for the year. Nine years later a split tribunal awarded an American company \$2.37 billion [USD] in compensation from Ecuador including interest . . . The award amounted to almost 7 per cent of the Ecuadorian government's total government budget and, adjusted for GDP, an equivalent award against the United Kingdom would be almost \$70 billion [USD] and for the United States \$458 billion [USD].

LAUGE N. SKOVGAARD POULSEN, *BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES* 3 (Cambridge Univ. Press, 2015). The award against Ecuador was subsequently reduced on annulment, due to the fact that the claimants did not own 100 percent of the investment, but had been ordered damages corresponding to 100 percent of the value of the investment. *Occidental Petroleum Corp. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, ¶¶ 136–302, 585–86 (Nov. 2, 2015).

48. Matthew Hodgson, *Counting the Costs of Investment Treaty Arbitration*, GLOBAL

not be able to recoup those costs even if they are successful in their defense.⁴⁹ Governments concerned about arbitration claims⁵⁰ may thus be wary of addressing land grievances in a way that interferes with an investment, even in circumstances in which the public interest would justify or even require such interference.

International investment treaties commonly contain a core set of obligations regulating governments' conduct. These include: obligations not to treat foreign investors less favorably than domestic investors (the "national treatment" obligation) or less favorably than foreign investors from another state (the "most-favored nation treatment" obligation); the obligation to provide foreign investors "fair and equitable treatment;" the obligation to provide foreign investors "full protection and security;" the obligation to ensure any expropriation is accompanied by payment of compensation; and the obligation to adhere to any commitment entered into with or owed to foreign investors (the "umbrella clause").⁵¹

Investment arbitration tribunals have interpreted these obligations differently, and are not bound by precedent. Combined with the varied and oft-vague language used in treaties, it is difficult to declare definitively what any one obligation requires.

ARBITRATION REVIEW (Mar. 24, 2014), <http://globalarbitrationreview.com/news/article/32513/>.

49. *Id.* (discussing rules on allocation of costs, and finding that states who are found not liable for breaching the treaty may nevertheless be required to bear their legal costs as well as at least a portion of costs of the arbitration); *see also* Memorandum from Iván Zarak A., Acting Minister of Econ. & Fin. to Meg Kinnear, Secretary-General, Int'l Ctr. for Settlement of Inv. Disputes (Sept. 12, 2016) (discussing problems that those states that have received cost awards from tribunals have faced when seeking to enforce cost awards against judgment-proof claimants).

50. Conversely, governments may also be caught off-guard by the relevance of investment treaties, as investment arbitration tribunals have taken a relatively permissive approach toward allowing companies to structure or restructure their holdings so as to gain treaty protection, and to use parent or intermediate companies to secure treaty coverage for their investments. *Gold Reserve Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/09/1, Award, ¶¶ 248–72 (Sept. 22, 2014); *Saluka Invs. BV v. The Czech Republic*, Partial Award, ¶¶ 239–42 (UNCITRAL Arb. Mar. 17, 2006). Some investment arbitration tribunals have even permitted nationals of the host state to obtain treaty protection by "roundtripping"—i.e., establishing a corporate entity in a foreign country and routing investments from the host state through the foreign entity back to the host state. *Tokios Tokelés v. Ukr.*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004). In addition, some tribunals have determined that even indirect and minority non-controlling shareholders can initiate arbitrations, potentially exposing the government to multiple suits arising out of the same underlying issue. *See, e.g.,* *TECO Guat. Holdings LLC v. The Republic of Guat.*, ICSID Case No. ARB/10/17, Award, ¶ 79 (Dec. 19, 2013) (finding that the electricity company which holds an indirect share may initiate arbitration); *Iberdrola Energía S.A. v. La Republica de Guat.*, ICSID Case No. ARB/09/5, Award, ¶ 278 (Aug. 17, 2012) (discussing the claims of an indirect shareholder).

51. For overviews of these treaty standards, see SALACUSE, *supra* note 46, at 422 (discussing the incorporation of arbitration into treaties); SORNARAJAH, *supra*, note 46, at 183–87 (discussing reasons for making bilateral investment treaties).

For example, the non-discrimination provisions have been interpreted to prohibit *de jure* discrimination against foreign investors on account of the investors' nationality, as well as *de facto* discrimination.⁵² While different treatment of differently situated or "unlike" investors is permitted,⁵³ the test for determining "likeness" is not clear. Indeed, the outcome in a dispute may depend on the intensity with which a tribunal decides to scrutinize governments' decisions to distinguish between investors.⁵⁴ The role of intent and nationality is also disputed: Some tribunals have found that a government's different treatment of investors or investments—though not based on or a result of the investors' nationality—may also be unjustified, unreasonable, or illegitimate.⁵⁵

The fair and equitable treatment ("FET") obligation is another core obligation that has been interpreted in divergent ways. The FET obligation may be considered *the* most extensive obligation in terms of the range of duties that it has been interpreted to impose on states⁵⁶ and

52. See, e.g., *Clayton v. Gov't of Can.*, PCA Case No. 2009-04, ¶¶ 685-731 (Mar. 17, 2015) (finding that the government of Canada discriminated against the foreign investors and their investment by treating their proposed mining project less favorably than other mining projects, but declining to conclude that the adverse treatment was due to the investors' foreign nationality).

53. See Freya Baetens, *Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 279 (Stephen Schill ed., 2010) (discussing different treatment bases for different nations); Jurgen Kurtz, *The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 243 (Stephen Schill ed., 2010) (discussing comparativism in treatment of parties).

54. *Compare Occidental Exploration & Prod. Co. v. The Republic of Ecuador*, LCIA Case No. UN3467, Award, ¶¶ 167-77 (July 1, 2004) (investors in the business of growing and exporting flowers were "like" investors engaged in extracting and exporting oil, and therefore did not warrant different treatment under the country's value-added tax system), with *Parkerings-Compagniet AS v. Republic of Lith.*, ICSID Case No. ARB/05/8, Award, ¶¶ 375-97 (Sept. 11, 2007) (two investors seeking a government concession for the same investment activity were not "like" due to the fact that their respective projects had different potential impacts in the host community).

55. See, e.g., *Pope & Talbot Inc. v. Gov't of Can.*, Award on the Merits of Phase 2, ¶ 78 (UNCITRAL Arb. Apr. 10, 2001) (differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA); *Feldman v. Mex.*, ICSID Case No. ARB(AF)/99/1, Award, ¶¶ 183-84 (Dec. 16, 2002) (holding that the distinction between citizenship and nationality is irrelevant to the interim decision); *Clayton*, PCA Case No. 2009-04, ¶¶ 723-24.

56. In addition to contentions that the FET standard protects "legitimate expectations," commentators have asserted that it also imposes duties of good faith, transparency, non-arbitrariness, procedural and substantive due process, legality under domestic law, consistency, and proportionality. See, e.g., *Cervin Investissements S.A. v. Costa Rica*, ICSID Case No. ARB/13/2, Final Award, ¶¶ 460-71 (Mar. 7, 2017) (holding that granting a "fair and equitable

the frequency with which tribunals have found a violation.⁵⁷

At present, there are two main approaches to understanding the FET obligation.⁵⁸ Under one approach, the FET standard embodies the minimum standard of treatment under customary international law: a floor of conduct below which no state is allowed to fall, identified through an assessment of state practice and *opinio juris*. Under the other approach, the FET standard is an “autonomous” standard of treatment: not tethered to the minimum standard of treatment, but rather a more nebulous standard based on a tribunal’s interpretation of the treaty.⁵⁹ This autonomous standard, which is more commonly applied, has been interpreted as embodying a range of requirements that may go well beyond the norms of customary international law and is more likely to result in state liability than the standard tied to customary international law.⁶⁰

Under this standard, the FET obligation has been interpreted to place a number of requirements on states, from protecting an investor’s “legitimate expectations” formed in reliance on the government’s explicit assurances or implicit conduct⁶¹ to maintaining the “stability”

treatment” implies that the parties conduct themselves according to justice, reason, and equity with respect to investments and income of investors); *TECO Guat. Holdings LLC v. The Republic of Guat.*, ICSID Case No. ARB/10/23, Award, ¶¶ 443–65 (Dec. 19, 2013) (determining that if the claimant proves that the other party acted arbitrarily and with willful disregard of the applicable framework, this behavior would constitute a breach of the minimum standard); *MTD Equity v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, ¶ 89 (May 25, 2004) (explaining that a party’s responsibility is limited to the consequences of its own actions to the extent that they breached the obligation to treat the other party fairly and equitably).

57. Data indicate that of the cases for which information about investor claims is known, 80 percent involved FET claims (341 out of 425 cases); additionally, of the cases decided against investors on known grounds, 65 percent involved a finding that the state breached the FET obligation (eighty-four cases decided against investors on known grounds). This data is based on a search of UNCTAD’s database on December 14, 2015. The database is available at <http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches>. Updated data regarding the total number of cases in the database, the total number in which FET claims were brought, and the total number cases in which FET violations were found can all be found on that page.

58. Some commentators and tribunals differ on whether and to what extent these two approaches are actually distinct. One notion that has been argued by investors and accepted by some tribunals is that there remains little difference in practice between the two standards, as the two have converged over time through the minimum standard of treatment evolving and rising to meet the “autonomous” FET obligation.

59. See David Gaukrodger, *Addressing the Balance of Interests in Investment Treaties: The Limitation of Fair and Equitable Treatment Provisions to the Minimum Standard of Treatment under Customary International Law* 6 (OECD Working Papers on Int’l Inv. 2017/03, 2017) (addressing fair and equitable treatment provisions in investment treaties).

60. *Id.* at 10–13.

61. See, e.g., *Gold Reserve Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/09/1, Award, ¶¶ 570–76 (Sept. 22, 2014); see also *Perenco Ecuador Ltd. v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability, ¶ 560 (Sept. 12, 2014); *Bayindir Insaat Turizm Ticaret Ve Sanayi*

of the legal and economic environment.⁶² While the words “fair and equitable” may therefore appear innocuous, the ways in which they have been interpreted by tribunals may raise significant concerns for governments seeking to address potential or actual grievances surrounding large-scale investments in land. In particular, the FET obligation can result in liability for government actions that impact performance of existing concessions, as well as affect the nature and scope of investor rights related to a concession.

For example, some investment arbitration tribunals have effectively allowed investors to transform their “legitimate expectations” about concessions or other investments into enforceable property rights, even if such rights do not exist under domestic law. One example is found in the case of *Awdi v. Romania*,⁶³ which centered on two decisions by the Constitutional Court of Romania finding that property rights claimed by the investors were invalid.⁶⁴ The Court’s first decision had invalidated the investors’ title to contested property (on the ground that the government had wrongfully expropriated the land from its previous owners in 1950 and therefore never possessed valid title that could have been transferred to the investors when the government subsequently sought to privatize that property); the second had found unconstitutional a national law granting the investors a forty-nine-year concession for lands rented from various local governments. In a subsequent action brought by the investors against Romania under an investment treaty, the arbitration tribunal did not find fault with the Constitutional Court’s process or decisions. Nevertheless, the tribunal determined that the investors’ legitimate expectations had been breached and must be compensated.⁶⁵ In this way, the Constitutional Court’s authoritative determination over the validity of the property rights under domestic law led to a breach of the government’s FET obligation.

These and other obligations flowing from investment treaties have ramifications for the governance of land-based investments and

A.S. v. Islamic Republic of Pak., ICSID Case No. ARB/03/29, Award, ¶¶ 178–79 (Aug. 27, 2009).

62. See, e.g., PSEG Glob. Inc. v. Republic of Turk., ICSID Case No. ARB/02/5, Award, ¶¶ 250–55 (Jan. 19, 2007) (discussing the need for a stable business environment in which investors can safely operate); CMS Gas Transmission Co. v. The Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005) (“There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.”); Occidental Expl. & Prod. Co. v. The Republic of Ecuador, Case No. UN3467, Final Award, ¶ 183 (London Ct. of Int’l Arb. 2004) (discussing stability in the same vein).

63. *Awdi v. Romania*, ICSID Case No. ARB/10/13, Award, (Mar. 2, 2015).

64. *Id.* at ¶ 327.

65. *Id.* at ¶ 532.

governments' options for addressing related grievances. And yet, it is likely inappropriate for host states to seek to shape their conduct in a way that fully avoids all potential investment treaty risks. Risks of liability tied to investment treaty obligations should not, for example, discourage good faith actions designed to comply with human rights obligations. Whether and how international investment law can better accommodate public interest objectives and human rights obligations remains an issue ripe for continued interrogation.

B. *International Human Rights Law*

Whereas international investment law obligates governments to protect investors in certain situations, international human rights law sets out fundamental protections for individuals and peoples, including those who risk being negatively affected by investments.⁶⁶

The sources of human rights law are less fragmented than those of international investment law: There are fewer than a dozen core human rights treaties at the international level,⁶⁷ supplemented by other relevant multilateral treaties (such as International Labour Organisation Conventions)⁶⁸ and regional human rights treaties in Africa, the Americas, and Europe. Human rights redress mechanisms are also provided through more established fora, including regional human rights courts, regional human rights commissions, and complaints mechanisms tied to specific treaties.

These human rights redress mechanisms differ from investment arbitration processes in ways that arguably lead to stronger avenues of redress for investors than for individuals whose human rights have been violated. For instance, human rights fora generally require claimants to first exhaust available domestic remedies, which is usually not required

66. In some cases, investors have also sought protections under human rights law related to the right to property. *See, e.g.*, *Rosenzweig & Bonded Warehouses Ltd. v. Pol.*, Eur. Ct. H.R. App. No. 51728/99, Judgment, ¶ 48 (July 28, 2005) (discussing the importance of balancing “the individual’s fundamental rights”); *Zlinsat Spol. S.R.O. v. Bulg.*, Eur. Ct. H.R. App. No. 57785/00, Judgment, ¶ 2 (Jan. 10, 2008) (discussing minimum protections “to which individuals and legal entities were entitled under the rule of law in a democratic society”).

67. *The Core International Human Rights Instruments and their Monitoring Bodies*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>. (last visited Nov. 27, 2017).

68. *See, e.g.*, International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 27, June 27, 1989, ILO Convention 169, 1650 U.N.T.S. 383 (particularly relevant for land grievances, as it sets out legally binding requirements for States Parties regarding free, prior and informed consent). In addition, all International Labour Organization member states are required to comply with the rights set out in the ILO Declaration on Fundamental Principles and Rights at Work.

for investment arbitration proceedings. In addition, investment arbitration decisions are relatively easy to enforce in courts around the world.⁶⁹

States that have ratified human rights treaties have obligations to respect, protect, and fulfill the human rights codified therein.⁷⁰ They thus must refrain from violating those rights, prevent third parties from violating those rights, and take steps to facilitate the enjoyment of those rights.⁷¹ Soft law instruments, such as UN declarations and widely endorsed guidelines, help in interpreting human rights law contained in binding treaties.⁷²

While land-based investment can affect a range of human rights, the rights most commonly affected can be loosely grouped into three categories: human rights tied to land occupation and use; other human rights at risk for those living on, near, or downstream from concession areas; and human rights of employees and contractors. The specific rights falling into these three categories include: the right to property; the right to FPIC; the prohibition of forced eviction; the rights to housing, water, food, health, and a healthy environment; the right to self-determination; the rights to peaceful assembly and freedom of expression; the rights to life and to liberty and security of person; and the right to just and favorable conditions of work, as well as the rights to form and join trade unions and to freedom of association.⁷³

69. Ease of enforcement results from two treaties. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. These two agreements bind States Parties to recognize, enforce, and comply with arbitral awards, except under limited conditions.

70. Human rights instruments create binding obligations for states that have ratified them. States that have signed a treaty but not yet ratified it are prohibited from taking steps to undermine rights set out in the treaty. In addition, some human rights are considered to be binding under customary international law, and therefore bind states regardless of whether or not they have ratified a treaty setting out such rights.

71. International Human Rights Law, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (last visited Nov. 28, 2017).

72. While scholars' perspectives vary, soft law is generally considered to be quasi-legal rules that do not constitute legally binding obligations. *See, e.g.*, Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 172–74 (2010) (setting forth explanations for soft law as more broadly described than before).

73. Most of these human rights are explicitly protected in different binding human rights instruments. *See* International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. No. 95-19, 6 I.L.M. 360, 993 U.N.T.S. 3 (1967). A few of the specific human rights listed above have been authoritatively interpreted to exist based on legally binding instruments: for example, the right to water and the prohibition against forced evictions. *See, e.g.*, U.N. Econ. & Soc. Council, Comm.

Government obligations related to these rights also have important implications for how governments address land grievances. Grievances arising from land-based investments frequently involve failures of the government to respect or protect certain rights. Efforts to redress those grievances should thus be done in a rights-compliant manner to ensure that the government meets its legal obligations under human rights law.

C. *Investor-State Contracts*

Apart from the legal obligations established by international investment law and by international human rights law, governments also have legal obligations that they assume vis-à-vis specific investors in the form of contracts with those investors.⁷⁴ Investor-state contracts are often used in countries where the government sells, leases, or otherwise grants access to land for agriculture or forestry projects. These contracts delineate a range of rights and obligations incumbent on both the government and the investor. When used, such contracts are one of the most important sources of governmental legal obligations related to a land-based investment.

Investor-state contracts differ in their complexity, as well as in their purported comprehensiveness. Some contracts, for example, explicitly note that the investor must receive additional permits or approvals, while others may endeavor to settle all relevant issues related to the underlying project, including by obligating the government to ensure that any requisite authorizations are provided as needed.⁷⁵

One of the more contentious types of provisions included in some investor-state contracts is the stabilization clause, which addresses how changes in the law of the host state will affect the contract. Broad stabilization clauses may aim to apply to all domestic laws; more

On Econ., Soc. & Cultural Rights, General Comment No. 15: The Right to Water, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); U.N. Econ. & Soc. Council, Comm. On Econ., Soc. & Cultural Rights, General Comment No. 7: The Right to Adequate Housing: Forced Evictions, U.N. Doc. E/1998/22 (May 20, 1997).

74. Investor-state contracts are completely separate from international investment treaties. Whereas investment treaties are agreements between governments that govern protection of covered investors and investments operating in the jurisdictions of the treaties' parties, investor-state contracts are simply agreements between a government and an investor that specifically allocate rights and risks between those contracting parties, generally in the context of a specific investment project.

75. See, e.g., Sustainable Oils Cameroon, *supra* note 22, at art. 4, § 4.11(c) (freezing the list of authorizations needed, noting that they shall be provided without payments, and stating that the "Government undertakes to promptly provide to Investor, and to cause any Governmental Authority to provide to Investor all certificates, exemptions, waivers, consents, licenses, permits, easements, documents and other authorizations, to the extent any of the foregoing are or may be desirable or necessary. . .").

narrow ones are drafted to apply only to certain topics (for example, tax laws).⁷⁶ Some stabilization clauses seek to essentially “freeze” the law in effect on the day the contract is signed, while others seek to ensure “economic equilibrium” by obligating the government to compensate the investor for losses incurred in complying with new laws.⁷⁷ Still other stabilization clauses aim for a combination of both objectives.⁷⁸ Given that stabilization clauses can potentially affect applicability of domestic laws protecting human rights, labor rights, or the environment, they are generally discouraged.⁷⁹

Investor-state contracts frequently cover the process to be used in addressing disputes arising out of or in connection with the contract. Many provide for commercial arbitration under the same or similar rules that govern arbitration arising out of investment treaties. As with investment arbitration, these commercial arbitrations often occur outside of the host country.⁸⁰ Even when an international investor has incorporated an entity in the jurisdiction in which it is investing, the contract may still assert that it is to be considered a foreign investor for

76. *Guide to Land Contracts: Forestry Projects*, INT’L SENIOR LAWYERS PROJECT 26–27 (Jan. 2017), <http://ccsi.columbia.edu/files/2017/01/GuidetoLandContracts-ForestryProjects.pdf>.

77. Andrea Shemberg, *Stabilization Clauses and Human Rights*, INT’L FIN. CORP. 19–26 (May 27, 2009), <http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES>.

78. *Id.* at 26–28.

79. *Guidelines for Multinational Enterprises*, ORG. FOR ECON. COOPERATION & DEV. 19, 21–22 (2011), <http://www.oecd.org/corporate/mne/48004323.pdf>. See also *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R 15–19 (Principle 4) (2015) [hereinafter U.N. Responsible Contracts] (discussing the risks that stabilization clauses pose for states seeking to meet their human rights obligations, and noting that, if used, the contracts should be carefully drafted to ensure that the state remains able to meet its obligations under human rights law).

80. A number of publicly available investor-state contracts relating to investments in land and agriculture illustrate this practice. See, e.g., Memorandum of Understanding Between the Gov’t of The Republic of Sierra Leone & Sierra Land Dev. Ltd., art. 8(i) (Apr. 25, 2014), <http://www.openlandcontracts.org/contract/ocds-591adf-2317427356/view#/pdf> (providing that “[a]ll [d]isputes shall be referred to and finally resolved by arbitration in London”); Sub-lease Between Dr. Joseph Sam Sesay & Socfin Agric. Co. Ltd., art. 5.2 (a) (Mar. 5, 2011), <http://www.openlandcontracts.org/contract/ocds-591adf-2434433566/view#/pdf> (including in the contract that “all disputes shall be referred to and finally resolved by arbitration in London before three arbitrators”); Concession Agreement Between the Gov’t of Liber. & the Md. Oil Palm Plantation, §§ 26.2–26.3 (Mar. 4, 2011), <http://www.openlandcontracts.org/contract/ocds-591adf-5085611127/view#/pdf> (providing that any disputes are to be resolved by arbitration in London and administered by the London Court of International Arbitration); Inv. Agreement Between The Republic of Liber. & Liber. Forest Prods. Inc., § 24.6 (May 22, 2008) <http://www.openlandcontracts.org/contract/ocds-591adf-0122591393/view#/pdf> (providing for arbitration of disputes arising under the contract and specifying that such arbitrations are to take place in Washington, D.C., “or such other place as the Parties may agree”).

the purposes of any disputes related to the investment.⁸¹

In general, investor-state contracts are subordinate to domestic law. However, as discussed in the following Section, contractual provisions and investment treaties may work to shield investors from having to comply with aspects of the domestic law.

D. Challenges of Intersecting Legal Frameworks

A government's obligations under these distinct legal frameworks and agreements interact in complicated ways. At times, some obligations may reinforce or elevate other obligations; conversely, obligations may be in tension or may even be in conflict. To date, international tribunals (in both the investment and the human rights regimes) have not provided clear guidance to governments on how to deal with potentially conflicting obligations. In light of the stronger enforceability mechanisms found in international investment law, these interactions between legal obligations may complicate a government's interest in or ability to comply with its human rights obligations—or to address its citizens' grievances arising from land investments.

Understanding how some of these obligations may reinforce or elevate other obligations is key to the argument this Article sets out in Part IV. The most dramatic example is the potential for international investment law, as it has been applied by tribunals, to elevate to a supranational level a state's contractual and quasi-contractual commitments (such as those made in an investor-state contract or through a government official's separate representations to an investor).

How is this possible? Contracts, including those signed by a government, are generally subordinate to domestic law. They provide a specific set of governance rules, and allocate rights and obligations between parties, for a specific arrangement that is otherwise governed by domestic law. They can help to fill gaps in domestic law. They can even strive to modify or circumvent application of domestic law as applied to a specific project—for example, through the provision of special fiscal arrangements, through the imposition of specialized rules on available remedies, or with the use of stabilization clauses, as discussed above. Yet whether such attempts to modify or circumvent

81. *See, e.g.*, Act Ratifying the Concession Agreement Between The Republic of Liber. & LIBINC Oil Palm Inc., § 24.3 (May 22, 2008), <http://www.openlandcontracts.org/contract/ocds-591adf-6459881214/view#/> (“Notwithstanding the incorporation in Liberia of LIBINCO, LIBINCO shall be treated as a Person that is a national of the United States of America for purposes of the Convention and of this Agreement.”). At the time the contract was ratified, the company was a wholly owned subsidiary of Equatorial Palm Oil, PLC, which is a UK publicly listed company.

domestic law are acceptable, and even whether a contract in its entirety is legitimate, traditionally depends on the domestic law governing the contract. For example, a contract that seeks to stabilize certain aspects of applicable law may be permissible in some jurisdictions. In other jurisdictions, a court might determine that a stabilization clause is invalid and unenforceable in light of the domestic legal framework—for example, if the clause would improperly restrict governmental power to act in the public interest.⁸²

Yet, investment treaties mean that the governing domestic legal system may not be the only, or the last, system to interpret the validity of an investor-state contract, or aspects of it. Regardless of how a contract might be interpreted by an applicable domestic court, an investment arbitration tribunal interpreting an investor-state contract might adopt a different view. A tribunal could, for example, hold that promises made under (or even outside of) the contract that would not be binding or enforceable under domestic law are nevertheless valid and must be enforced under the investment treaty's umbrella clause and/or in light of the government's FET or expropriation obligations. In this way, international investment law can elevate contractual obligations above domestic law. This is in stark contrast to the traditional legal hierarchy, in which contracts are subordinate to domestic law.

The effect of elevating contracts to a supranational level extends beyond the protection of particular contractual *provisions* that might otherwise be deemed invalid under domestic law. According to some arbitral tribunal decisions, it can also cover statements and promises that did not make their way into the contract, and can also potentially protect an entire contract that might have been found illegal or unenforceable.⁸³ Such outcomes are unlikely when the illegality is severe. For example, some investment arbitration tribunals have found that they cannot hear claims regarding contracts secured through fraud or corruption.⁸⁴ Yet tribunals have proved willing to accept cases in which contracts are illegal for other reasons, such as when the government signatory was not authorized to sign, or when the contractual process did not comply with domestic legal requirements.⁸⁵

82. See Shemberg, *supra* note 77, at 33 (noting the clauses are generally not enforceable in common law countries, and difficult to enforce in civil law systems); see also, e.g., David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 485 (1999) (discussing some issues of enforceability in United States law).

83. See cases cited *infra* note 154 (providing examples of cases that protect investors' interests despite potential illegality contrary to host countries' laws).

84. See cases cited *infra* note 169 (providing examples of cases where tribunals have found contracts unenforceable for violating international public policy).

85. See, e.g., Kardassopoulos v. The Republic of Geor., ICSID Case Nos. ARB/05/18 &

The web of legal obligations that bind governments may also produce obligations that are in tension and that, in particular circumstances, conflict with one another. While no inherent conflict necessarily exists between, for example, international investment law and international human rights law, these distinct legal regimes and how they are applied can, in specific situations, create the potential that actions taken by a state to address one set of stakeholders' rights or interests may lead to liability for harming another set of stakeholders' rights or interests. Actions to protect human rights may violate investor protections under a treaty or an investor's rights under a contract; similarly, actions to protect investments may violate human rights.

Consider, for example, an investor with contract rights to a land concession and investment treaty protections, and whose operations, or mere presence, are being challenged by a local community as infringing on their own rights. Perhaps the local community has lost access to land over which it had traditional or customary rights, protected under international law. The government may have a legal obligation under international human rights law to restitute that land to the community. Doing so, however, could infringe on the investor's own rights under the contract or investment treaty.⁸⁶ Failure to do so might constitute a continuing violation of the community's human rights. This scenario is not too unlike the case described below, *Sawhoyamaxa Indigenous Community v. Paraguay*.⁸⁷

Any scenario in which a government's obligations toward an investor might directly conflict with its obligations under human rights law raises an obvious question, but one that is often the elephant in the room that no one wishes to speak of: Isn't this situation the fault of the government? In other words, if a government was already complying

ARB/07/15, Award, ¶ 273 (Mar. 3, 2010) (finding concession in violation of Georgian law still valid because agreements "cloaked with the mantle of Governmental authority"); R.R. Dev. Corp. v. Republic of Guat., ICSID Case No. ARB/07/23, Award, ¶ 235 (June 29, 2012) (finding "grossly unfair" the attempt to exact concessions from a party who reasonably relied on governmental representations).

86. Of course, international investment law does not completely tie the hands of government—indeed, treaties generally allow expropriation of property so long as it is coupled with just compensation. Yet the potential complications flowing from such an action can be daunting—an investor that disagrees with the expropriation process or amount of compensation, for example, could lodge claims under multiple standards, including regarding its "expectations" regarding performance of the contract, and whether the expropriation of the investor's property was lawful, placing the government at risk of being found in breach of a treaty for actions undertaken to rectify human rights violations. Such a scenario can be further complicated when a government and investor disagree about the nature or even existence of the investor's rights.

87. *Sawhoyamaxa Indigenous Cmty. v. Para*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006).

with its human rights obligations, then it would only accept or allow investments that are rights-compliant. And rights-compliant investments would not create scenarios in which a government would have to infringe on the investor's rights in order to protect human rights. Under this line of reasoning, arguments that a government must take actions detrimental to the investor in order to comply with human rights are viewed with suspicion, for if the government truly cared, would it not have addressed human rights earlier?

Not necessarily. There are many reasons why a government might find itself in such a scenario: a change to a more democratic or post-conflict regime,⁸⁸ a lack of clarity at the time an investment was approved of the actual human rights impacts that would arise, or the evolution of relevant norms by which the government seeks to abide,⁸⁹ to name a few. More importantly, the particulars of how a government arrived at such a crossroads do not absolve it of its obligations to protect human rights.⁹⁰ Nor does its track record of compliance with human rights to date.⁹¹

In spite of the complicated interactions between legal obligations, international courts and tribunals have not yet provided much assistance in resolving potential conflicts between obligations arising from human rights law and investment treaties. Rather, they have skewed toward avoidance of any finding that a conflict exists or toward resolution of a

88. See generally Philippe Le Billon, *Contract Renegotiation and Asset Recovery in Post-Conflict Settings*, in HIGH-VALUE NATURAL RESOURCES AND POST-CONFLICT PEACEBUILDING 69 (P. Lujala & S.A. Rustad eds., 2012).

89. The international community, for example, has increasingly focused on legitimate tenure rights, which may not be recognized under domestic law, but which ought to be protected by governments. See generally VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY, COMM. ON WORLD FOOD SEC. (2012). Some states have begun to undertake serious efforts to implement these voluntary guidelines, which arguably have the status of soft law. Such efforts include reforming laws and policies to recognize tenure claims to land that was previously classified as public or state land—the type of land most likely to be conceded to investors.

90. See, e.g., U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 24: State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, U.N. Doc. E/C.12/GC/24, ¶ 13 (Aug. 10, 2017) (“States Parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude.”).

91. A separate question, not addressed in this Article, is whether the protections flowing from an investment treaty are influenced by the investor's compliance with its human rights responsibilities. For example, can an investor have legitimate expectations that the government would act contrary to its obligations under human rights law? For one argument that a state's human rights legal obligations are relevant for the determination of whether an investor's expectations are legitimate, see generally *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Submission as an “Other Person” Pursuant to Article 836 and Annex 836.1 of the Peru–Canada FTA (June 9, 2016).

dispute based only on one set of legal obligations. This often means that the outcome of a dispute where such tensions are at play depends on the body deciding it. Although making pragmatic sense for the tribunal in question, this approach leaves governments in limbo—caught between conflicting obligations with no clear sense of how to square them.

In the human rights arena, one prominent exception whereby a human rights body did seek to resolve potentially conflicting obligations arising from investment law and human rights law is found in the Inter-American Court of Human Rights' decision in *Sawhoyamaxa Indigenous Community v. Paraguay*.⁹² That case concerned Paraguay's failure to resolve a legal claim lodged by the Sawhoyamaxa Indigenous Community of the Enxet-Lengua people over the community's ancestral lands. The government had sold the land to foreign investors, who used it to set up cattle ranches.⁹³ While the community initially remained on the land, members eventually moved, establishing temporary residence by the side of a nearby road.⁹⁴ In 1991, they filed a petition against the Paraguayan government seeking recognition of the land as the community's ancestral land.

Paraguay argued, among other points, that the land had been bought by a German national, who refused to sell the land so it could be transferred to the community, and who was protected by a bilateral agreement between Paraguay and Germany that ensured "the promotion and reciprocal protection of capital investments from both countries."⁹⁵ The Court rejected that argument on procedural grounds, noting that the treaty had not been provided to the Court for the purposes of the case.⁹⁶ The Court proceeded, however, to provide two alternative justifications for upholding the community's rights to the land even in the context of an applicable investment treaty.

Under the Court's first alternative rationale, the investment treaty allowed expropriation of capital investments where necessary for a public purpose, and such a purpose could include the restitution of ancestral land to an indigenous community.⁹⁷ Through this line of argument, which did not include any detailed explanation of existing jurisprudence regarding "public purpose," the Court sought to

92. *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146.

93. *Id.* at 16, 30.

94. *Id.* at 10.

95. *Id.* at 70.

96. *Id.* at 77.

97. *Id.* ("[S]aid convention allows for capital investments made by a contracting party to be condemned or nationalized for a 'public purpose or interest,' which could justif[y] land restitution to indigenous people.").

harmonize the commercial treaty with the American Convention on Human Rights.⁹⁸ This approach was also similar to the Court's previous ruling in *Yakye Axa Indigenous Community v. Paraguay* that "restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society."⁹⁹ Yet while the Court noted in *Yakye Axa* that such a restriction could be proportional if fair compensation was paid, it did not reiterate this in *Sawhoyamaxa*, leaving open the question of whether fair compensation would be required when expropriation is carried out to restore ancestral land ownership.

The Court's second alternative rationale in *Sawhoyamaxa* for denying the state's investment treaty-based defense focused on the nature of the investment treaty and of the American Convention. It concluded that the enforcement of "bilateral commercial treaties . . . should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States."¹⁰⁰ This reasoning implies that any investment protection provision conflicting with rights protected by the American Convention, or any other convention containing protections of human rights with which the Court is seized, would need to be interpreted in a way that avoids such a conflict.¹⁰¹

Such reasoning, grounded in an assertion of the primacy of human

98. Pedro Nikken, *Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 246, 260 (P.M. Dupuy, F. Francioni & E.U. Petersmann eds., 2009).

99. *Yakye Axa Indigenous Cmty. v. Para, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 148 (June 17, 2005).

100. *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, at 77.

101. Following the 2006 judgment of the Inter-American Court, the Paraguayan government was slow to implement the ruling. In 2008, the Court noted that few of its orders had been complied with. In 2009, Paraguay's Senate rejected a plan to expropriate the land. By January 2013, negotiations between the government and the community had commenced. In June 2013, the Sawhoyamaxa unilaterally reoccupied part of the ancestral lands, and various civil society organizations launched campaigns to create political pressure for a formal expropriation of the land in question so it could be formally transferred to the Sawhoyamaxa. A law to expropriate the land was approved by Congress and signed by the president in 2014. The ranchers then challenged the decision to expropriate, but had their case rejected by the Supreme Court of Paraguay in October 2014. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, ESCR-NET, <https://www.escri-net.org/caselaw/2013/case-sawhoyamaxa-indigenous-community-v-paraguay> (last visited Nov. 28, 2017); *Paraguay: Senate Approves Expropriation Bill in Favour of Sawhoyamaxa Community*, IWGIA (May 5, 2014), <https://www.iwgia.org/en/paraguay/2025-paraguay-senate-approves-expropriation-bill-in-fav>; David Hill, *Paraguay's Supreme Court Issues 'Historic' Land Ruling*, THE GUARDIAN (Oct. 7, 2014, 8:13 AM), <https://www.theguardian.com/environment/andes-to-the-amazon/2014/oct/07/paraguay-supreme-court-historic-land-ruling>.

rights obligations, is perhaps unlikely to be widely adopted by investment arbitration tribunals, as discussed below. Placing international treaties in some form of hierarchy is not without its critics,¹⁰² and past investment arbitration tribunals have rejected such an approach.¹⁰³ Nonetheless, the *Sawhoyamaxa* judgment signals that the Inter-American Court, and potentially other human rights courts and treaty bodies, may reject any defense supplied by a state that its obligations under investment treaties (and, potentially, investor-state contracts) prevent compliance with its human rights obligations. Even when such obligations conflict, a human rights tribunal is likely to find that the government's obligations under human rights law remain and must be met.¹⁰⁴

The primacy of human rights obligations has also been underscored recently in the UN Committee on Economic, Social and Cultural

102. As one scholar wrote:

This reasoning, reflecting the idea that international human rights law is inherently superior to other branches of international law, is rather weak. It is difficult to deny that treaty commitments entered into by states have under international law the same formal status and rank regardless of their subject matter. Moreover, even considering that this argument may point to a possible development of international law, it is very unlikely that any international tribunal other than a human rights court will be willing to follow this line of reasoning.

Cesare Pitea, *Right to Property, Investments and Environmental Protection: The Perspectives of the European and Inter-American Courts of Human Rights*, in FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS, 265, 269 (Treves et al. eds., 2014)

This notion has been additionally discussed:

[H]uman rights are pervasive and perennially relevant in all adjudication, but not necessarily superior. In this sense, the multiple legal sources available engage in a dialogue, rather than opposition, and all cooperate towards achieving the best possible result. Human rights are an essential consideration, but not one which automatically trumps all other applicable rules.

Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT'L L. 585, 591 (2010).

103. *Suez v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 262 (July 30, 2010) (“The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations . . . and must respect both of them equally.”).

104. Indeed, there exists a draft legally binding instrument, which is currently being elaborated by an open-ended intergovernmental working group under a mandate provided by the U.N. Human Rights Council. See Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, H.R.C. Res. A/HRC/RES/26/9, ¶ 1.4 (Sept. 29, 2017), http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBES.pdf (listing as one of the objectives, “[t]o reaffirm the primacy of human rights law over trade and investments agreements and establish specific State obligations in this regard”).

Rights' General Comment No. 24.¹⁰⁵ The General Comment, which constitutes an authoritative interpretation of governments' binding obligations under the International Covenant on Economic, Social and Cultural Rights, asserts that "States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude."¹⁰⁶ This has implications for the interpretation of existing investment treaties as well as for the design of future ones, and the General Comment notes that States Parties "are encouraged . . . to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements."¹⁰⁷

Ensuring that investor-state disputes adequately consider human rights would require a shift from how most proceedings have been undertaken to date. Detailed inquiries into potentially conflicting legal obligations are also rare in investment arbitration. In multiple investment arbitrations, the host state or amicus curiae have made submissions asking that the state's human rights obligations toward its citizens be considered when assessing the scope of the state's obligations and potential liabilities to foreign investors.¹⁰⁸ Yet tribunals have often dismissed such arguments without in-depth analysis.¹⁰⁹

105. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 24: State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017).

106. *Id.* at ¶ 13.

107. *Id.*

108. *See, e.g.*, cases cited *infra* note 109 (discussing arbitration cases that implicate human rights arguments to varying degrees).

109. At the time of writing, the most significant treatment of the issue of human rights in publicly available arbitral decisions occurred in *Urbaser v. Argentina*. That dispute is one of several that arose out of private investment in water services in Argentina. In that case, the tribunal largely addressed human rights arguments in the context of evaluating Argentina's counterclaim against the investor (as opposed to, as has been more common, addressing the issue of human rights in the context of the investor's alleged human rights or in the context of the respondent state's defense). The tribunal ultimately concluded that Argentina's human rights counterclaim failed. The tribunal, however, also included some discussion of the ways in which states should reconcile their obligations under human rights and investment law. It stated:

Argentina had two kinds of obligations. These are its obligations regarding the population's right to water, and its obligations towards international investors. The Argentine Republic can and should fulfil both kinds of obligations simultaneously. In so doing, the obligations resulting from the human right to water do not operate as an obstacle to the fulfilment of its obligations towards the Claimants. Nonetheless, Claimants' argument is too short. It does not resolve the conflict between the obligation to guarantee the Concessionaire's right under the Concession and the access of the poor and vulnerable population to water when this cannot be ensured otherwise than by failing to comply with the host State's obligations toward the Concessionaire.

There is no need to open at this juncture the debate on whether foreign investors have,

A perfunctory approach by investment arbitration tribunals raises the risk that, in certain cases, arbitral decisions may limit the host government's ability to fully comply with its human rights obligations.¹¹⁰ For instance, a large award ordered as compensation by

under international law, an obligation to contribute on their part to the provision of drinking water to the extent this is required by the human right to water. It is entirely sufficient to note that AGBA and its Concessionaire must have been aware that they were indirectly bound by the fundamental right to water of the population of Region B due to the provision ordering ORAB to take account in its decisions of the "protection of the community's interests" (Sec. 13-II of Law No. 11820), including the "protection of the users' interests," which are a concern based on Section 4.3 of the Concession Contract and in light of Article 42 of the Constitution.

Urbaser S.A. v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶¶ 720–21 (Dec. 8, 2016). Many of the other cases raising human rights arguments have also centered around claims against Argentina arising out of the impact on private concessionaires of its response to its economic crisis. In defending those cases, one argument raised by Argentina and amicus curiae was that the government's measures were necessary in order to fulfill its obligations to guarantee enjoyment of basic human rights threatened by potentially considerable increases in the costs of essential public services. In these and other cases, tribunals have tended to avoid engaging with human rights arguments. *See, e.g.*, *Compania de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award, ¶ 243 (Aug. 10, 2010) (noting that only the second decision on annulment mentioned these issues, but did not discuss them); *United Parcel Serv. of Am., Inc. v. Gov't of Can.*, ICSID Case No. UNCT/02/1, Amicus Curiae Submissions by the Canadian Union of Postal Workers and the Council of Canadians, ¶¶ 26–37 (Oct. 20, 2005) (regarding human rights issues raised by amicus curiae); *Glamis Gold, Ltd. v. United States*, Amicus Curiae Submissions of Friends of the Earth Canada and Friends of the Earth United States, ¶¶ 40–42 (NAFTA Chapter 11 Arb. Sept. 30, 2005) (regarding human rights issues raised by amicus curiae); *Methanex Corp. v. United States*, Submission of Non-Disputing Parties Bluewater Network, Communities for a Better Environment and Center for International Environmental Law, ¶¶ 16–18 (NAFTA Chapter 11 Arb. Mar. 9, 2004) (regarding human rights issues raised by amicus curiae); *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Petition for Amicus Curiae Status, ¶¶ 3–5 (Nov. 27, 2006) (regarding human rights issues raised by amicus curiae). Some tribunals determined that human rights were not at risk, *e.g.*, *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶¶ 331–32 (Sept. 28, 2007), while others concluded that the government's human rights obligations did not excuse its obligations to comply with investment treaty commitments. *See e.g.*, *EDF Int'l S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, ¶¶ 366–69, 913–14 (June 11, 2012).

110. M. SORNARAJAH, *RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 320 (Cambridge Univ. Press 2015) (noting that the treatment of human rights issues and arguments under international investment law to date has been critiqued for the system's potential to "affect the human rights of its people"). *See also* Tamar Meshel, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 J. INT'L DISP. SETTLEMENT 277 (2015) ("Failure of investment arbitration tribunals to give due consideration to such arguments 'may have a chilling effect on host capital state regulatory initiatives that are needed to address non-investment policy objectives. . . .'" (quoting Suzanne A. Spears, *Making Way for the Public Interest in International Investment Agreements*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 271, 272 (Chester Brown & Kate Miles ed., 2011)); Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 678, 679 (Christina Binder et al. eds., 2009) ("The tendency towards considering international investment law in a vacuum is perhaps most

an investment arbitration tribunal that has failed to consider human rights obligations as a defense, mitigating factor, or component of applicable law could reduce the domestic revenue that a government needs to respect, protect, or progressively fulfill certain human rights. Additionally, when good faith efforts to better protect the human rights of project-affected communities give rise to colorable claims under investment law, states fearing reputational impacts and wanting to avoid the costs of litigation and potential liability might be discouraged from taking otherwise available steps to advance human rights.¹¹¹ This risk is particularly problematic in light of the exclusionary nature of arbitral proceedings, in which project-affected communities and rights-holders have either no or very limited ability to provide input into proceedings,¹¹² in addition to the fact that arbitral claims have been lodged—and won—around governments' actions and inactions in the context of community-led protests.¹¹³

The interactions between intersecting legal frameworks and agreements discussed in this Section point to systemic imbalances and governance gaps that governments and other stakeholders must navigate. The application of investment law to date, moreover, creates room for a government's contractual obligations to be elevated to a supranational level, where neither domestic public policy considerations nor norms derived from other aspects of international public law, in particular human rights law, are applied. This scenario has tangible implications for a government's options to address land grievances.

disturbing with regard to human rights law.”).

111. For discussions of such “chilling effects” of investment treaties, see generally Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 606 (Chester Brown & Kate Miles eds., 2011).

112. See, e.g., *Von Pezold v. Republic of Zim.*, ICSID Case Nos. ARB/10/15 & ARB/10/25, Procedural Order 2, ¶ 64 (June 26, 2012) (rejecting the amicus curiae application of indigenous communities who claimed rights regarding the land at issue in the ICSID investor-state dispute).

113. See, e.g., *Copper Mesa Mining Corp. v. The Republic of Ecuador*, PCA Case No. 2012–2, Award (Mar. 15, 2016). In this case, a mining concession—and the mining company's conduct with respect to local communities—generated significant social tensions and violence. The government of Ecuador ultimately cancelled the concession, prior to the company's conducting all necessary consultations and securing requisite environmental approvals. In response, the company brought an investor-state arbitration claim. The tribunal concluded that the government had failed to do enough to affirmatively protect the company against anti-mining protests and activities. The tribunal stated, “[p]lainly, the government in Quito could hardly have declared war on its own people. Yet, in the Tribunal's view, it could not do nothing.” *Copper Mesa Mining Corp.*, PCA Case No. 2012–2 at ¶ 6.83.

III. ADDRESSING LAND GRIEVANCES IN THE CONTEXT OF LEGAL OBLIGATIONS

While potentially conflicting legal obligations pose challenges for governments seeking to address land grievances, options do exist. In an ideal world, governments would seek rights-compliant options that also minimize potential legal liability under investment law or contracts. This may prove difficult to attain in every situation: Sometimes, the best option may leave the government exposed to potential liability under investment law, or may not fully assuage communities' concerns. Yet while an informed understanding of legal obligations (and potential risks of legal liability) can help guide decisionmaking, host governments also should not be dissuaded from taking actions in the public interest, including those to address land grievances.

This Section describes three options that governments may have at their disposal to address land grievances, and highlights how such actions might square with their relevant legal obligations discussed above. These options focus on adjustments to applicable legal rules: renegotiation of contracts, termination of contracts, and modification of the domestic legal framework relevant to the investment. In many cases, any of those options may represent just one of multiple steps that a government might take as it seeks to right the wrongs of land-based investments.

For example, a government may determine that restituting property to displaced individuals or communities is necessary. Displacement from land—particularly when it has occurred through forced evictions or involuntary displacement—is a common trigger of grievances arising from land investments.¹¹⁴ In such scenarios, restitution of land or property¹¹⁵ to previous land users may be one of the most effective remedies that a government can deploy. Of course, restitution is not always possible.¹¹⁶ Yet in some cases, restitution of land or property may be necessary for the government to comply with its human rights

114. See discussion *supra* Section I.B (discussing common causes of land grievances).

115. Restitution refers to “re-establish[ing] the situation which existed before the wrongful act was committed. . . .” G.A. Res. 56/83, art. 35 (Dec. 12, 2001). This discussion focuses on restitution as the return of land or property from which land users were displaced.

116. Basic Principles & Guidelines on Development-Based Evictions & Displacement, Annex 1 of the Rep. of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, at ¶ 64, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007) [hereinafter U.N. Evictions & Displacement Guidelines]. For example, restitution may be materially impossible when land or property has been altered or damaged to the point that its return would not reestablish, for land users, their situation prior to displacement. See also James Crawford, *STATE RESPONSIBILITY: THE GENERAL PART* 513, 513 (Cambridge Univ. Press 2011) (discussing additional situations where restitution may be materially impossible).

obligations. For example, restitution of ancestral lands was ordered by the Inter-American Court of Human Rights in the *Sawhoyamaxa* case discussed above as a critical step toward Paraguay's compliance with its legal obligations.¹¹⁷

Restitution of land previously allocated to an investor via an investor-state contract, however, may require renegotiation or termination of the contract. In such a situation, renegotiating or terminating the contract may be a critical initial step that the government must take in order to both address the concerns of its citizens and comply with its human rights obligations. Yet such actions can also expose a State to the risks of an ISDS claim, as discussed below.

While the three options discussed in this Section are by no means an exhaustive list,¹¹⁸ they help illustrate the accompanying legal and political factors that governments must navigate, and the challenges of doing so. All three options also implicate investors' contract rights and expectations, a topic that we will come back to in greater detail in Part IV of this Article.

A. Renegotiating with the Investor

When land grievances are tied to the legal terms of the investor-state contract or the scope of the investor's rights and obligations under that contract, a government might decide that renegotiation of the investor-state contract would be an appropriate response. For long-term projects, requests from either side to renegotiate a contract are not uncommon;¹¹⁹ as Jeswald Salacuse has noted, "renegotiation of a previous deal seems to be as basic to modern business life as is negotiating a new deal for

117. *Sawhoyamaxa Indigenous Cmty. v. Para.*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, at ¶ 248(6) (Mar. 29, 2006) ("The State shall adopt all legislative, administrative and other measures necessary to formally and physically convey to the members of the Sawhoyamaxa Community their traditional lands, within three years, as set forth in paragraphs 210 to 215 herein."). Indeed, governments' obligations under human rights law require them to prioritize restitution for "all persons, groups and communities subjected to forced evictions." U.N. Evictions & Displacement Guidelines, *supra* note 116, at ¶ 64. Restitution is also particularly important when indigenous peoples' land has been taken without their FPIC. The UN Declaration on the Rights of Indigenous Peoples emphasizes that dispossessed indigenous peoples should be granted "the option of return," and that restitution should be provided for indigenous "cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs." G.A. Res. 61/295, arts. 10–11 (Sept. 13, 2007).

118. These three options are part of a larger set of specific and general actions that the authors have identified and articulated in Cordes, Johnson, and Szoke-Burke, *infra* note *.

119. *See, e.g.*, Act Ratifying the Amended & Restated Concession Agreement Between The Republic of Liber. & Firestone Liber., at 2 (Feb. 22, 2008), <http://www.openlandcontracts.org/contract/ocds-591adf-0966186576/view#/pdf> (noting prior concession agreements entered into in 1926, 1976 (amended in 1987), and 2005).

the first time.”¹²⁰ Government requests for renegotiation in order to address land grievances are therefore possible, and might help to ensure that the contract survives over time.

However, the path to renegotiations may not always be straightforward, particularly when renegotiations are not expressly authorized in the contract.¹²¹ A range of factors may influence an investor’s willingness to give up rights previously secured or to take on new obligations. For example, an investor with other interests in the country, or one that is more interested in the products it would receive through the investment than in monetary compensation, may be more willing to renegotiate than, say, an investor with little else to tie it to the host country, with strong home state support, and/or with access to investor-state arbitration under an investment treaty.¹²² Renegotiation also opens up risks for the party seeking renegotiation: The other party generally has the right to refuse renegotiation,¹²³ resulting in greater leverage if it does agree to return to the negotiating table. A government seeking to renegotiate an investor-state contract may have to concede hard-won points that had been formalized in the original contract in order to secure agreed changes from the investor.

Investment treaties, and how they have been interpreted, further complicate the calculus for governments. Past arbitral decisions have scrutinized governments’ efforts to renegotiate, and have found that a government’s renegotiation request, coupled with political pressure or the threat of sovereign action, can violate its obligations under an investment treaty.¹²⁴ Such findings do not prevent governments from seeking to renegotiate using the weight that a normal contracting party would use. Yet they create uncertainty for governments as to where the line exists over which it is risky to step in their quest to seek renegotiation. To the extent that contract renegotiation may be the most appropriate response to land grievances, or the most effective way to

120. Jeswald Salacuse, *Renegotiating International Project Agreements*, 24 *FORDHAM INT’L L.J.* 1319, 1320 (2001).

121. *See id.* at 1335–42 (discussing context and causes of extra-deal renegotiations).

122. Kaitlin Y. Cordes, Lise Johnson & Sam Szoke-Burke, *Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections*, *COLUM. CTR. ON SUSTAINABLE INV.* 30–31 (2016).

123. Salacuse, *supra* note 120, at 1335–36.

124. *See, e.g.,* *Suez v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, ¶¶ 239–243 (July 30, 2010) (citing various sovereign and political acts that, according to the tribunal, rendered the renegotiation impermissibly “forceful”); *BG Grp. Plc. v. The Republic of Argentina*, Final Award, ¶ 309 (UNCITRAL Arb. Dec. 24, 2007) (stating that sovereign acts aiming to “promote a new deal” with licensees violated FET requirement); *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶¶ 7.4.18–46 (Aug. 20, 2007) (identifying a range of “political” actions and events as improper means of undercutting the concession and forcing a renegotiation).

comply with human rights legal obligations, the risks of liability under an investment treaty may therefore unduly restrict governments' efforts.

B. Terminating an Investor-State Contract

In some scenarios, renegotiation of the investor-state contract may not suffice to address land grievances, and termination of the contract may be needed. For example, a government party to an investor-state contract may desire to exit a controversial arrangement tainted by fraud or corruption. Or, the grievances precipitated by project operations may be so severe that the government and investor may be unable to find any mutually acceptable approach that would support both project continuation and the satisfactory redress of grievances.

Often, the terms of the contract and/or domestic law will specify the grounds on which one or both parties may or must terminate the contract, as well as any related remedies.¹²⁵ This may include, for example, the right to terminate an agreement when the other contracting party has failed to fulfill certain obligations. Even if the contract does not explicitly contemplate termination in certain scenarios, a government party to an investor-state contract may determine that termination of the contract is necessary to address the grievances of its citizens and/or to comply with its legal obligations under human rights law.

In seeking to terminate, a government can face both political and legal risks. If the investor is a foreign investor, for example, the investor's home government may use diplomatic channels to question or seek reversal of the decision to terminate. If there is an international investment treaty in place that covers the investor, the investor may also seek to bring an investor-state arbitration claim to challenge the termination.¹²⁶

Arbitral tribunals have typically determined that a government's breach of an investor-state contract does not constitute a breach of

125. See, e.g., Carin Smaller et al., *The IISD Guide to Negotiating Investment Contracts for Farmland and Water*, INT'L INST. FOR SUSTAINABLE DEV. 52 (2014) (discussing contract termination provisions); MODEL MINE DEVELOPMENT AGREEMENT: A TEMPLATE FOR NEGOTIATION AND DRAFTING 144–49 (2011) (providing examples of different termination clauses and discussing the aims of those clauses).

126. If the investor initiates formal investment arbitration proceedings, the investor's home state may then be prohibited from pursuing diplomatic protection. As explained:

No Contracting State shall give diplomatic protection, or bring an international claim in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

See ICSID Convention, *supra* note 69, art. 27(1).

international law if the government was acting as any normal contracting party.¹²⁷ If, however, the government terminated the contract through an exercise of sovereign powers (by, for example, passing a decree or law, or issuing a judicial decision declaring the contract void as against public policy), then that exercise of sovereign powers could potentially give rise to an international law violation under the FET obligation or obligation to provide adequate compensation for an expropriation.¹²⁸

However, some arbitral tribunals have also elevated contract rights and expectations to a supranational level by finding governments liable for contract termination even without the use of sovereign powers.¹²⁹ For example, government liability for termination of the contract can also arise under the treaty's umbrella clause.¹³⁰ The umbrella clause allows covered foreign investors to bring claims against host governments for contract violations (including unlawful termination) even when the government has not exercised any sovereign powers.¹³¹ Moreover, even if a government's termination of a contract is in accordance with the contract itself, tribunals may still deem such an action inconsistent with international investment law. In one dispute, for example, a tribunal determined that (1) although the contract permitted the government to terminate an investor-state contract for certain types of contractual violations by the investor, and (2) although the investor breached a provision of the contract entitling the government to terminate the agreement,¹³² (3) the government's decision to terminate

127. See, e.g., *Bureau Veritas v. The Republic of Para.*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, ¶¶ 246–77 (Oct. 9, 2012) (finding the case was a “contractual dispute, no more and no less”); *Duke Energy Electroquil Partners v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, ¶¶ 342–66 (Aug. 18, 2008) (finding “no breach of the guarantee of fair and equitable treatment”); but see, e.g., *Teinver S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/01, Award, ¶ 845 (July 21, 2017) (suggesting that the purpose of the contract, not just the nature of the breach, can inject the “sovereign” element necessary to support a finding of breach).

128. See *Teinver S.A.*, ICSID Case No. ARB/09/01, at ¶ 845 (listing cases where a government's breach of an investor-state contract did not constitute a breach of international law).

129. See, e.g., *SGS Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, ¶ 128 (Jan. 29, 2004) [hereinafter *SGS-Philippines*] (concluding that breach of contract is actionable under an umbrella clause even if the state was not acting in its sovereign capacity); but see *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, ¶¶ 138–39 (Aug. 6, 2003) (concluding that sovereign conduct is necessary to establish a treaty breach under the umbrella clause). Most tribunals have tended to follow the *SGS-Philippines* approach.

130. *SGS-Philippines*, ICSID Case No. ARB/02/6 at ¶128 (violation of contractual umbrella clause is a breach).

131. *Id.*

132. In this dispute, the investor had breached a contract provision that required the investor to seek and secure the government's authorization before transferring its contractual rights or

the contract was “disproportionate” to the investor’s breach and therefore violated the FET obligation.¹³³

C. *Modifying the Governing Legal Framework*

Another action that a government might take to address land grievances is to modify the legal framework governing the investment. In some cases, grievances may stem from a gap in the domestic legal framework; in others, domestic laws may create or exacerbate grievances. In either situation, adjusting relevant laws, regulations, or administrative policies may be appropriate or necessary, as a part of the ongoing process of governance in which legal rules are adopted, amended, elaborated, and at times even repealed. Modification of the governing legal framework may be undertaken by entities within the legislative or executive branches; it may also occur in the conduct of judicial proceedings that interpret the legal framework or craft new common law doctrine.

Apart from adopting changes in law to address ongoing grievances, a government might also pursue changes to its legal framework in an effort to prevent future grievances, or as a way to better align its legislative rules with its human rights obligations or with more recently established international instruments and guidelines. For example, multiple countries have worked to develop National Action Plans on business and human rights as a way to assess the types of legal and policy reforms that might be needed to better align with human rights obligations and to ensure greater policy coherency.¹³⁴ Some countries have also begun in-depth efforts to implement the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security—efforts that can

obligations to third parties. The contract specified that the contract “shall terminate” in the event of “a transfer of rights and obligations of the Participation Contract without prior authorization from the Corresponding Ministry.” *Occidental Petroleum Corp. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, ¶ 120 (Oct. 5, 2012) (quoting the Participation Contract at ¶ 21.1.2). The law governing the contract also specified that the Ministry of Energy and Mines could terminate the contract if the contractor “[t]ransfer[red] rights or enter[ed] into a private contract or agreement for the assignment of one or more of its rights, without the Ministry’s authorization.” *Id.* ¶ 121 (quoting Article 74 of Ecuador’s Hydrocarbons Law). As the tribunal found, the investor in fact transferred its rights and obligations under the contract without seeking or securing the necessary authorization. *Id.* at ¶ 381.

133. *Id.* at ¶ 681.

134. For a list of existing national action plans on this topic, see *National Action Plans*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans> (last visited Nov. 28, 2017).

include reforming laws and policies around public or state land.¹³⁵

Changing the law serves as a key tool for governments seeking to effectively address serious concerns of their citizens, including those arising from land investments. Changes may specifically target a particular contract, aiming to use sovereign power to reshape the agreement's terms. Changes may also arise from more general measures that merely impact performance of the contract (e.g., by imposing new obligations on the state or investor, deeming certain types of contractual provisions invalid). In either case, a government confronts the risk that its changes may be challenged by an investor through investment arbitration.

A contract, for example, may set forth certain investor obligations regarding the need to secure relevant environmental permits; subsequently, however, legislation or regulation may be passed that requires human rights and social impact assessments as part of the mandatory permitting process, or provides local communities with stronger legal rights than they previously had to challenge or even block projects.¹³⁶ Investors may allege that such legislation increases their costs, threatens their projects, or violates explicit provisions or the implicit structure of the contract.

Tribunals have tended to agree with the contention that changes to the legal framework that are inconsistent with a specific contractual provision,¹³⁷ or with a quasi-contractual commitment,¹³⁸ will violate an

135. The FAO has worked with a number of countries to begin implementation of the Voluntary Guidelines. See MELINDA DAVIES, IMPLEMENTATION OF THE VOLUNTARY GUIDELINES ON RESPONSIBLE GOVERNANCE OF TENURE IN THE LAND LEGISLATION OF SIERRA LEONE: ANALYTICAL ASSESSMENT REPORT (2015). For further examples from other country contexts, see also *Newsletters Archive*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, <http://www.fao.org/tenure/newsletters/newsletters-archive/en/> (last visited Nov. 28, 2017) (documenting efforts to implement the Voluntary Guidelines).

136. See, e.g., *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Witness Statement of César Zegarra, ¶ 28 n.32 (Oct. 6, 2015) (citing Supreme Decree on the Adjustments of Mining Petitions and Suspension of Admissions of Mining Petitions, Supreme Decree No. 033-2011-EM (June 25, 2011)) (providing that consultation requirements were mandatory for mining or oil operations); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, ¶ 117 (Dec. 27, 2010). See also *Oxus Gold v. The Republic of Uzb.*, Award, ¶ 827 (UNCITRAL Arb. Trib. Dec. 17, 2015) (finding a breach of FET due to legislative changes that contradicted the commitments in a tax stabilization clause).

137. As the ICSID held in *Total S.A. v. Argentine Republic*:

The expectation of the investor is undoubtedly “legitimate”, and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law.

ICSID Case No. ARB/04/01, Decision on Liability, ¶ 117 (Dec. 27, 2010). See also *Oxus Gold v. The Republic of Uzb.*, Award, ¶ 827 (UNCITRAL Arb. Trib. Dec. 17, 2015) (finding a breach of

investment treaty. Tribunals have similarly interpreted contracts as containing implied commitments of stabilization, concluding that investors are entitled to rely on the general contours of the legal and business framework in force at the time the investors made their investments or entered into contracts with the host government.¹³⁹ Changes to the legal framework—even if not precluded by contract—may, if too dramatic in the eyes of the tribunal, result in investment treaty liability.¹⁴⁰

In sum, legitimate options that governments have for addressing human rights concerns arising from land investments include terminating the relevant investor-state contract; renegotiating the contract; or modifying the general legal framework, including in ways that affect performance of the contract or even quasi-contractual

FET due to legislative changes that contradicted the commitments in a tax stabilization clause).

138. *See, e.g.*, Mamidoil Jetoil Greek Petroleum Prods. Societe S.A. v. Republic of Alb., ICSID Case No. ARB/11/24, Award, ¶¶ 649, 651 (Mar. 30, 2015) (reasoning that the tribunal had to identify whether the government had provided the investor “assurances and representations” regarding the stability of its port regime, since “[t]he fact that Respondent was under no contractual obligation to keep the port open for Claimant’s vessels does not answer the question whether Respondent had an obligation under the FET standard to provide stability of the port regime and use for the period of the lease contract.”); Micula v. Rom., ICSID Case No. ARB/05/20, Award, ¶¶ 527–29, 668–69 (Dec. 11, 2013) (noting that an enforceable expectation of regulatory stability can be created through a promise, assurance, or representation that is either explicit or implicit, to which the government need not have intended to bind itself). *See also* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 145 (2d ed. 2012) (stating that “legitimate expectations” regarding the stability of a particular legal framework can be based on “any undertakings . . . made explicitly or implicitly by the host state”). For some tribunals, commitments of stability can arise merely from the legal framework in place at the time the investment is made; for other tribunals, however, something more, such as a specific representation directed at the investor, is required. For a discussion of other relevant cases, see Lise Johnson & Oleksandr Volkov, *Investor-State Contracts, Host-State ‘Commitments,’ and the Myth of Stability in International Law*, 24 AM. REV. INT’L ARB. 361 (2013) (discussing investor-state contracts in the context of both international and domestic law).

139. Some tribunals have indicated that the guarantee of stability is not a total guarantee against change, but a guarantee that change will not be too fundamental or dramatic (as ultimately judged by the tribunal):

[The] obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments. This does not mean that regulatory regimes cannot evolve. Surely they can. . . . However, the . . . obligation to accord fair and equitable treatment means that regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment’s value.

Eiser Infrastructure Ltd. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, ¶ 382 (May 4, 2017). *See also* *Murphy Exploration & Prod. Co. v. The Republic of Ecuador*, Partial Final Award, ¶¶ 281–92 (UNCITRAL Arb. May 6, 2016) (finding Ecuador’s coercive conduct violated claimant’s legitimate expectations of fair treatment).

140. *See, e.g.*, cases cited *supra* note 138 (discussing cases that have violated an investment treaty through inconsistent quasi-contractual commitments).

commitments to the investor. Previous outcomes from investor-state disputes indicate that, when combined with an investor's ability to access treaty-based investor-state dispute settlement, such courses of action may be extremely costly, generating litigation costs, potential liabilities, and even reputational harms.¹⁴¹ Tribunals have effectively elevated contractual and quasi-contractual commitments to a supranational plane on which the commitments are strongly shielded from domestic interference. The next Section discusses in more detail how tribunals have approached some of these issues, the implications of those approaches, and how alternative approaches may produce different outcomes that are more responsive to human rights concerns.

IV. IMPLICATIONS OF SUPRANATIONAL PROTECTIONS, AND A CALL FOR A MORE CRITICAL APPROACH

Once a foreign investor has secured contract rights in the host state, investment treaties—as they have been interpreted by arbitral tribunals—provide that investor with strong protections at the international level from government conduct that frustrates those rights.¹⁴² Additionally, even without clear and vested contract rights, an investor that has developed “expectations” based on specific government commitments or assurances may benefit from similarly strong protections against government conduct that frustrates those expectations. Fairness and utilitarian considerations can provide important reasons to limit a government's ability to directly or indirectly frustrate rights and expectations that the government had previously generated.¹⁴³ At the same time, tribunals' broad approaches toward recognizing and protecting investors' contract rights and expectations may undermine governments' willingness and ability to protect, respect, and fulfill human rights. In recognition of this potential consequence, it is imperative that tribunals be more critical of what alleged rights and interests they protect. This Section elaborates reasons why tribunals

141. On the issue of reputational costs, see Todd Allee & Clint Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment*, 65 INT'L ORG. 401 (2011) (finding that the mere filing of an investor-state claim is associated with reduced foreign direct investment, and a finding of liability is associated with even further declines).

142. As discussed *supra*, Section II.A

143. Fairness and utilitarian considerations similarly are used to justify the doctrine of estoppel, protecting those who had acted in reliance on the promises of another. Policy considerations relevant to whether the doctrine of estoppel should be applied against private parties may not, however, be the same as policy considerations relevant to whether it should be applied against the government. For a discussion of these issues in the U.S. context, see Alan I. Saltman, *The Government's Liability for Actions of Its Agents That Are Not Specifically Authorized: The Continuing Influence of Merrill and Richmond*, 32 PUB. CONT. L.J. 775 (2003).

should take a more critical approach, as well as techniques for how they could do so.¹⁴⁴

The argument advanced here is not that any government entity should be free to breach or nullify what another government entity or its predecessor has granted. Rather, our argument is that, particularly due to the legal force of their awards, tribunals should recognize that not all promises granted in contracts or given through quasi-contractual conduct are worthy of legal protection—a concept recognized by domestic courts across jurisdictions, including in jurisdictions generally deemed to have strong protections for economic rights and interests, such as the United States. For instance, contracts, or specific provisions therein, may be deemed void, voidable, or unenforceable on various grounds, including those relating to the capacity or authority of the promisor,¹⁴⁵ the conduct of the promisee,¹⁴⁶ the circumstances under which the promise was given¹⁴⁷ or recorded,¹⁴⁸ the circumstances during performance of the contract,¹⁴⁹ or the subject matter of the promise.¹⁵⁰ Domestic courts asked to enforce contracts are often requested to apply these contract principles to prevent, or adjust,

144. Another area requiring critical reflection, which we do not engage with in this Article for reasons of scope and space constraints, is of course the standards of protections that tribunals are interpreting investment treaties to provide, such as those related to the FET and umbrella clause obligations. Rather, we focus here on the nature of the rights and interests protected.

145. Legal or mental capacity can be relevant. *See, e.g.*, *Robinson v. Heard*, 2001-1697, p. 5 (La. 2/26/02); 809 So. 2d 943, 946 (addressing the capacity of a sole proprietorship to contract); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (stating, in the context of U.S. law, that “anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority”).

146. A contract may, for instance, be deemed invalid if one party was induced to enter into the contract based on the other party’s misrepresentation of a material fact. 14-81 RICHARD R. POWELL & PATRICK J. ROHAN, *POWELL ON REAL PROPERTY* § 81.02 (1968).

147. Under some conceptions of the doctrine of unconscionability, a contract can be deemed unconscionable if it was concluded between parties of grossly unequal bargaining power. *See Envirotech Corp. v. Halco Eng’g, Inc.*, 364 S.E.2d 215, 220 (Va. 1988).

148. “Statute of Frauds” requirements dictate that certain types of contracts be in writing and signed by the promisor. The requirement that contracts be in writing often applies specifically for contracts relating to the sale of land and other real property. *See, e.g.*, CAL. CIV. CODE § 1624(a) (2015) (discussing the types of contracts subject to the Statute of Frauds).

149. The doctrine of impossibility of performance, for example, can apply when changes in circumstances, including changes in the law, render performance impossible or impracticable. RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1979).

150. This can relate, for instance, to contracts for the sale of illegal goods or services. *See, e.g.*, David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563, 574 (2012) (discussing cases where a bargain will be declared unenforceable); M. P. Furmston, *The Analysis of Illegal Contracts*, 16 U. TORONTO L.J. 267, 308 (1966) (noting the difficulty in determining whether a contract is illegal).

enforcement or performance.¹⁵¹

In international investment law, however, tribunals appear less likely to scrutinize the legitimacy or enforceability of contracts.¹⁵² Although states have asked tribunals to interpret investor-state contracts in accordance with governing law and the limits that governing law places on contracting parties' abilities to strictly enforce contract performance, tribunals have in the past been unresponsive to such pleas.¹⁵³ Indeed, even where states have argued that the contract or promise is invalid and unenforceable under domestic law, tribunals have declared that they will bind the state to the deal anyway—protecting the investors' interests even when doing so may require adherence to an illegal deal that frustrates the rule of law in the respective host countries.¹⁵⁴

151. Some courts have also seized the opportunity to develop new doctrines regarding the conditions and circumstances under which contracts will be enforced. *See, e.g.*, ROBERT W. CLARK, *INEQUALITY OF BARGAINING POWER: JUDICIAL INTERVENTION IN IMPROVIDENT AND UNCONSCIONABLE BARGAINS* 3051 (1987); Colleen McCullough, Comment, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779 (2016) (discussing evolution in the doctrine of unconscionability in U.S. federal and state law).

152. *See, e.g.*, *Bankswitch Ghana Ltd. v. The Republic of Ghana*, Award, ¶ 11.93 (UNCITRAL Arb. Apr. 11, 2014) (applying the doctrine of estoppel against the government to enforce an otherwise unconstitutional contract); *see also* cases cited *infra* note 154 (listing cases where tribunals have been unresponsive to pleas asking for interpretations of investor-state contracts and mostly protecting investors' interests).

153. Illustrating this are cases rejecting the applicability of the theory of *imprevisión*, which can apply in domestic contract law to ease obligations when changed circumstances render performance impossible. *See, e.g.*, *Murphy Exploration & Prod. Co. v. The Republic of Ecuador*, Partial Final Award, ¶ 241 (UNCITRAL Arb. May 6, 2016) (noting that the “principle would purportedly apply to ‘an unprecedented and extraordinary increase of international oil prices’”); *Enron Creditors Recovery Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, ¶¶ 214, 284–91 (July 30, 2010) (recounting Argentina's objections to, and the tribunal's reasoning regarding, rejection of the theory); *BG Grp. Plc. v. The Republic of Argentina*, Final Award, ¶¶ 99–100 (UNCITRAL Arb. Dec. 24, 2007) (“More specifically, Article 1198 of the Argentine Civil Code [setting forth the theory of *imprevisión*] does not apply in the context of an international investment dispute governed by Article 8(4) of the Argentina-U.K. BIT. . . . [T]he domestic law defense of unforeseen changed circumstances is of little assistance to Respondent here.”); *Sempre Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶¶ 243–46 (Sept. 28, 2007) (discussing the theory but not clearly applying it as a distinct doctrine under Argentine law).

154. *See, e.g.*, *Awdi v. Rom.*, ICSID Case No. ARB/10/13, Award, ¶ 289 (Mar. 2, 2015) (finding the government to have violated the FET obligation after the Constitutional Court deemed that different transfers of contract rights and property were illegal under domestic law); *Bankswitch Ghana Ltd.*, ¶ 11.93 (UNCITRAL Arb.); *Micula v. Rom.*, ICSID Case No. ARB/05/20, Award, ¶¶ 675–77 (Dec. 11, 2013) (finding that the government's promised incentives established legitimate expectations that legislative changes could not undo); *Arif v. Republic of Mold.*, ICSID Case No. ARB/11/23, Award, ¶ 547(f) (Apr. 8, 2013) (finding that the country had violated the FET obligation after domestic courts found the relevant investor-state contract to be illegal); *R.R. Dev. Corp. v. Republic of Guat.*, Second Decision on Objections to Jurisdiction, ICSID Case No. ARB/07/23, ¶¶ 146–47 (May 18, 2010) (finding that the government was barred from objecting to the decision based on its own law, which it knowingly

By not taking seriously constraints imposed on investor-state contracts under domestic law, arbitrators allow international investment law to sanction and empower illegal conduct. This expands the rights of investors beyond what they could have legitimately bargained for.

The prospect of expansive investor rights raises additional concerns: both that arbitrations may stymie development of domestic law, and that tribunal decisions regarding the scope and validity of investor rights may be based on that stunted legal framework. Domestic law on contracts can evolve to respond to new issues, policies, and realities. For instance, the meaning of what is an “unconscionable” contract, or conceptions of what is unenforceable as against public policy, may not only differ from jurisdiction to jurisdiction, but may also change over time. Assume the following: An investor-state dispute arises when the state seeks to renegotiate a land-concession agreement that it considers to be unenforceable as against public policy, an agreement with extremely one-sided terms benefitting the investor and with clear negative impacts on non-parties. There is, however, no jurisprudence yet in the host country, the laws of which govern the contract, that clearly addresses unenforceability of contracts due to the specific issues prompting the government’s concern. Will the government be able to succeed before an investment tribunal on its claims that the contract is unenforceable as against public policy? Decisions issued to date indicate that the government’s success on those facts is doubtful. In the absence of jurisprudence establishing a rule of unenforceability applicable to the case, it seems unlikely that arbitral tribunals would accept the government’s arguments.

Even more problematic is the fact that, had the investor-state dispute first gone to domestic courts, and had those courts found all or some of the contract to be invalid, those judicial decisions could subsequently be the basis for a separate investment treaty challenge by the investor.¹⁵⁵

The approaches adopted by tribunals to date are by no means inevitable. Tribunals, for instance, could have followed (and could opt in the future to follow) an approach whereby investors’ economic interests are only protected under investment treaties if they are

overlooked in drafting); *Kardassopoulos v. Geor.*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶ 191 (July 6, 2007) (holding that the government cannot avoid representations in the agreement by claiming they are void under Georgian law). The *Bankswitch* decision was a commercial case, but reaches its holding due to the tribunal’s decision to incorporate “international law” into the terms of the contract. If this were a treaty-based claim, it is the authors’ opinion that this particular tribunal would have likely found a breach of the umbrella clause and the FET provision as well.

155. *Arif*, ICSID Case No. ARB/11/23; *Awdi*, ICSID Case No. ARB/10/13.

recognized as vested rights under the relevant domestic legal system.¹⁵⁶ In practice, this might mean deferring action or refusing protection when it is unclear, or when the investor has been unable to establish, that the rights alleged are actually valid under domestic law. By only protecting valid economic rights recognized under domestic law, tribunals would better preserve the domestic sphere as the primary place for stakeholders to establish and (re)shape conceptions of economic property.¹⁵⁷ Such an approach could help bolster legal norms and institutions within host countries, thereby supporting stronger rule of law within those countries; it might also help to safeguard the voice and power of citizens and communities by preserving their ability to contest the legitimacy of investors' claims to own or use the land.¹⁵⁸

If tribunals were to adopt a rule to only protect legal rights that are valid and vested under domestic law, such an approach might reduce the number of investment arbitration decisions that privilege investor rights and expectations over competing—and potentially valid—claims. Nevertheless, tribunal decisions on the validity of an instrument (or rights granted in that instrument) under domestic law may still be especially protective of investor interests and insensitive to competing rights and claims. This is due both to the closed nature of investor-state arbitration, which limits the opportunities for those with competing rights and claims to directly advance their arguments in the arbitration,¹⁵⁹ and to the reality that the government defending the claim

156. Indeed, that is the approach tribunals have more consistently used when determining whether an investment has been expropriated. Nevertheless, under the FET obligation they have expanded the scope of their protections to cover economic interests that fall short of rights.

157. See also *Lone Pine Res. Inc. v. Gov't of Can.*, ICSID Case No. UNCT/15/2, Submission of the United States of America, ¶ 3 nn.3–4 (Aug. 16, 2017) (counseling against protection of contingent “interests” and emphasizing the need to look at domestic law to determine the existence and scope of a property right).

158. One reason tribunals have bound governments to contracts or promises that are not legal under domestic law is the premise that governments cannot use domestic law as a reason for evading their international law responsibilities. This is a fundamental principle of international law. Yet this principle applies to questions of whether states have *violated* their international law obligations (by, for example, expropriating property rights) and should therefore be held responsible under international law, not to questions of whether and to what extent property rights have been created in the first place. See, e.g., MONIQUE SASSON, *SUBSTANTIVE LAW IN INVESTMENT TREATY ARBITRATION: THE UNSETTLED RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW* 87 (Wolters Kluwer ed., 2010) (discussing property rights in the international investment law context); *Venez. Holdings, B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/27, Decision on Annulment, ¶¶ 168–74 (Mar. 9, 2017) (discussing whether the investors had acquired property rights).

159. As of writing, there were no investment treaties or arbitration rules permitting non-parties to investor-state arbitrations to intervene in disputes as a matter of right. Non-parties may seek to provide input into the dispute as *amicus curiae*, but tribunals generally have wide discretion under applicable treaties and arbitration rules regarding whether to accept such participation. See, e.g.,

may be hesitant to acknowledge or concede limits on its powers to contract.

A government's reluctance to concede those limits may be understandable—such an acknowledgement might call into question the validity of other existing deals, as well as the government's ongoing power to promote investment, raise taxes, or advance its development aims. Yet in eschewing any argument admitting the limits of its powers, a government denies arbitrators the opportunity to better understand the complex disputes that can arise at the domestic level. In particular, this risks keeping arbitrators in the dark about disagreements between central government officials and local land users regarding their respective rights and interests over specific land and decisionmaking around it. While local land users may have legitimate objections under the domestic legal system (and under international human rights law as well), their lack of standing before an arbitral tribunal means that their voice and perspectives may not be heard by arbitrators. Rather, the central government, which lacks incentives to raise those perspectives, is often the only voice representing stakeholders within the respondent state that the tribunal will hear.¹⁶⁰

The exclusionary design of investor-state arbitration thus renders it difficult to ensure that, even if proof of legality under domestic law became a condition for protecting investor rights, the arbitral tribunal's examination of domestic law would take into consideration arguments put forth by other constituencies within the respondent state (such as local land users) that have a stake in the decision. While such constituencies are ostensibly represented by the respondent state, their interests are not always aligned with those of the state, as discussed above.

Arbitrators could seek to proactively overcome these participation barriers, using tools that they have under many arbitral rules.¹⁶¹ For

U.N. COMM'N ON INT'L TRADE L., UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION art. 4 (2014) [hereinafter UNCITRAL Arbitration Rules] (governing non-disputing party submissions, and permitting the tribunal to allow such submissions in certain contexts, but not providing for intervention as of right).

160. See, e.g., *Von Pezold v. Republic of Zim.*, ICSID Case No. ARB/10/25, Procedural Order No. 2, ¶ 5 (“The Respondent stated that it had no objection to [the amicus applicants] being allowed to make submissions provided they . . . do not impinge on or amount to a challenge to the sovereignty and territorial integrity of the Republic of Zimbabwe.”).

161. As a general matter, arbitrators have significant discretion to organize the proceedings. See, e.g., UNCITRAL ARBITRATION RULES, *supra* note 159, at art. 17(1) (2010) (“Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.”); *id.* at art. 27(3) (“At any time during the arbitral proceedings the arbitral tribunal may require the parties to

instance, arbitrators could use their powers to decline to hear cases until competing claims over rights were resolved in other fora, such as domestic courts or human rights bodies,¹⁶² or could dismiss cases altogether when an arbitral decision on alleged rights would substantially harm the rights of affected non-parties. They could also seek and secure input on factual and legal issues from diverse constituencies.¹⁶³ Such steps could increase the information, perspectives, and legal arguments available to arbitrators. Yet given other barriers to participation of affected stakeholders—such as language constraints and limited resources to participate meaningfully—these steps would not foreclose the risk that arbitrators base their decisions regarding the meaning of domestic law on limited inputs provided by a narrow set of stakeholders.

Of course, even if tribunals were to only enforce contract rights that clearly complied with domestic law, inclusively defined and determined, there is still a risk that tribunals would enforce concession rights that are inconsistent with other sources of international law or policy. Such could be the case, for instance, with land investment contracts entered into through non-transparent and non-consultative processes, and with provisions that do not comply with aspects of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security,¹⁶⁴ or that are inconsistent with the United Nations Guiding Principles on Business and Human Rights¹⁶⁵ and their attached Principles for Responsible Contracts.¹⁶⁶ The opportunity for the investor to use international investment law and ISDS to ensure the government's adherence to contracts or projects that ignore or thwart such guidance undermines broader pushes to improve corporate

produce documents, exhibits or other evidence. . . ."); *id.* at art. 29(1) ("After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal.").

162. *Bureau Veritas v. The Republic of Para.*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, ¶ 284 (Oct. 9, 2012) (finding the case inadmissible, but issuing a stay of the proceedings, rather than dismissing them entirely, in order to review the case if the claimant's claims subsequently became admissible).

163. This course of action may, however, be objectionable to the disputing parties. One concern therefore is that arbitrators, who are appointed by disputing parties and presumably would like to be appointed in future investor-state disputes, may be reluctant to take action opposed by both disputing parties.

164. WFS GUIDELINES, *supra* note 8.

165. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (2011).

166. U.N. Responsible Contracts, *supra* note 79.

conduct. It also dampens the incentives for investors to proactively align their strategies and tactics with best practices and with their responsibilities under international human rights law.¹⁶⁷ These risks are especially present when non-compliance with those international law principles helped precipitate the grievances that ultimately led to the investor-state dispute.¹⁶⁸

In some cases, tribunals have deemed contracts unenforceable on the ground that they violated international public policy.¹⁶⁹ They have also affirmed that international law is relevant to defining the content of

167. For arguments speaking to ways in which human rights legal obligations and responsibilities should influence investors' claims, see *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Submission as an "Other Person" Pursuant to Article 836 and Annex 836.1 of the Peru-Canada FTA (June 9, 2016).

168. See, e.g., *Copper Mesa Mining Corp. v. The Republic of Ecuador*, PCA Case No. 2012–2, Award (Mar. 15, 2016). In this case, local communities that stood to be affected by the proposed mining activities underlying the Copper Mesa dispute alleged that they had not been adequately consulted regarding the project, and that they instead had been threatened with and exposed to violence. These allegations were made both in Ecuador and abroad: to domestic officials, including Ecuador's Ombudsman; in Canadian courts; and to Canada's National Contact Point. See also *Courting Justice: Victims of Mining Abuses Sue in Canada*, MININGWATCH CANADA (last updated Feb. 11, 2012), <https://miningwatch.ca/blog/2011/6/6/courting-justice-victims-mining-abuses-sue-canada> (recapping the lawsuit); *More Troubles for Ascendant: Ecuador's Ombudsman Intervenes in the Junin Case*, MININGWATCH CANADA (July 7, 2006, 12:39 PM), <https://miningwatch.ca/news/2006/7/7/more-troubles-ascendant-ecuadors-ombudsman-intervenes-jun-n-case> (Ombudsman addressing irregularities surrounding the mining project); *OECD Complaint against Ascendant Copper: Canadian and Ecuadorian Organizations Allege Vancouver-based Ascendant Copper Breached International Corporate Responsibility Standards in Biodiversity Hotspot*, MININGWATCH CANADA (May 18, 2005, 2:09 PM), <https://miningwatch.ca/news/2005/5/18/oecd-complaint-against-ascendant-copper-canadian-and-ecuadorian-organizations-allege> (discussing complaint under the OECD Guidelines). Community concerns regarding adequacy of consultation under domestic and international law contributed to opposition against the mining project; the failure to consult was ultimately cited by the government as a reason for its decision to terminate the investor's concession. The investor subsequently challenged the government's decision to terminate the concession, and prevailed in investor-state arbitration, securing an award for the majority of the expenses that the investor incurred in trying to develop the project. The tribunal concluded that tensions and violent conflicts between the mining company and affected communities—tensions and conflicts that, according to the tribunal, were made more severe by the investor's negligent (at best) and concessionaire's knowingly wrongful conduct—meant that "the prospects of the Junin concessions being successfully developed by the Claimant were uncertain or even unlikely (albeit not impossible)." *Copper Mesa Mining Corp.*, PCA Case No. 2012–2 at ¶¶ 6.90, 6.97–102. The tribunal's decision therefore cushioned the blow the investor would have likely otherwise felt due to its own misdeeds, an example of how arbitration can reduce the risk to investors of engaging in substandard practices.

169. See, e.g., *World Duty Free Co. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶¶ 138–57 (Oct. 4, 2006) (discussing bribery and finding it "contrary to international public policy"); *Inceysa Vallisoletana S.L. v. Republic of El Sal.*, ICSID Case No. ARB/03/26, Award, ¶¶ 245–52 (Aug. 2, 2006) (finding that fraudulent investment would violate public policy).

contract rights and obligations.¹⁷⁰ Yet tribunals have also read the contents of international public policy through a particular lens, one that emphasizes the role of certain policy principles—such as “*pacta sunt servanda*” (or “promises shall be kept”), promissory estoppel, or proportionality—that may apply to strengthen investors’ alleged rights or expectations.¹⁷¹ This same lens more narrowly circumscribes the roles of other public policies (such as policies of good governance and transparency) that might weaken the investors’ contract or quasi-contract claims.¹⁷² Similarly, tribunals have been reluctant to grapple with contentions that other international law frameworks—including human rights law—place fundamental limits on the scope and nature of investors’ claimed rights.¹⁷³

This Article does not advocate in favor of an international law

170. See, e.g., *Urbaser S.A. v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶¶ 618–25 (Dec. 8, 2016) (“The protection of this universal basic human right constitutes the framework within which Claimants should frame their expectations.”).

171. See, e.g., *Copper Mesa Mining Corp. v. The Republic of Ecuador*, PCA Case No. 2012–2, Award (Mar. 15, 2016) ¶¶ 5.54–60 (holding that the treaty only required legality in the initial making of the investment; illegality in the operation of—which included ongoing investment in—the project could not, according to the arbitrators, preclude the tribunal from taking jurisdiction over the investor’s claims); *Bankswitch Ghana Ltd. v. The Republic of Ghana*, Award, ¶ 11.97 (UNCITRAL Arb. Apr. 11, 2014) (finding an international public policy of estoppel against the government, but placing less weight on adherence to the law and good governance notions of transparency); *Vannessa Ventures Ltd. v. The Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)04/6, Award, ¶ 167 (Jan. 16, 2013) (stating that “the jurisdictional significance of the ‘legality requirement’ in the definition of an investment in Article I(f) is exhausted once the investment has been made”); *Occidental Petroleum Corp. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, ¶ 120 (Oct. 5, 2012) (applying the principle of proportionality to hold the government liable for wrongfully exercising its contract rights).

172. See cases cited *supra* note 170 (discussing the multiple ways in which courts have applied different policy principles).

173. See, e.g., *Copper Mesa Mining Corp.*, PCA Case No. 2012–2 at ¶¶ 2.9, 5.64. In *Copper Mesa*, the tribunal stated that one of the principal issues in the case was whether the Claimant “owned and controlled” its investments in accordance with Ecuadorian law, including international human rights law as incorporated in Ecuadorian law. It nevertheless subsequently determined that the fact that Ecuador had not timely objected to the mining company’s failure to consult with local communities and failure to respect local citizens’ human rights meant that the respondent was subsequently “precluded” from arguing that the company’s claims could not or should not be heard by the tribunal. See also *Von Pezold v. Republic of Zim.*, ICSID Case No. ARB/10/15, Procedural Order No. 2, ¶ 62 (June 26, 2012) (The tribunal stated that the investors/claimants “themselves recognize that [the indigenous communities] have some interest in the land over which the Claimants assert full legal title. . . . It may therefore well be that the determinations of the Arbitral Tribunals in these proceedings will have an impact on the interests of the indigenous communities.” The tribunals ultimately rejected the indigenous communities’ amicus application on the basis that the disputing parties themselves had not put human rights at issue in the case, and that the indigenous communities’ arguments were adverse to and may unduly prejudice the claimants). *Suez v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 262 (July 30, 2010) (“The texts of the three BITs in question do not specifically exclude or allow the admissibility of a defense of necessity.”).

framework that enables governments to terminate or unilaterally modify foreign investors' rights whenever it faces competing claims from domestic constituents. Yet we do argue that investor-state tribunals, to the extent they continue to play a role in adjudicating investment disputes, must be much more critical regarding the nature and scope of contract rights (and expectations) that they deem enforceable. This aligns with arguments that international investment arbitration is a public function, and that this public function should "shape the normative understanding of the role of arbitrators in investment treaty cases, including their professional and ethical obligations and the way they exercise their procedural powers in conducting arbitral proceedings."¹⁷⁴

Even taking a more transactional view of arbitration and arbitrators—a view in which arbitrators solely resolve disputes between parties on a case-by-case basis, and do not effectively create law or have policy impacts on non-parties—one can see that the tools, methodologies, and rationales they employ to decide the disputes¹⁷⁵ are not always inevitable. Rather, their selection reflects tribunals', arbitral institutions', and the arbitration industry's policy choices and value judgments. Indeed, it has been acknowledged that even commercial arbitral tribunals' approaches are informed by policy considerations.¹⁷⁶

174. Stephan W. Schill, *Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator*, 23 LEIDEN J. INT'L L. 401, 406 (2010).

175. This includes, for example, arbitrators' approaches to the applicable burden of proof, their views of what evidence should and should not be relied upon to support that burden, their interpretations of conflicts of law rules, and their interpretations of the content of governing substantive law. Commercial arbitrators have also played a policy role through their decisions to "internationalize" a contract, going beyond the domestic law specified as applying to the dispute in order to apply select principles of international public policy deemed relevant and controlling by the tribunal. See SORNARAJAH, *supra* note 110, at 23 (discussing global public policy in the context of investment protection); Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 215, 230–31 (1996) (discussing as particularly relevant "the imposition of new environmental obligations . . . reinterpreting existing law on which the investment decision may to some extent have been based").

176. See, e.g., *Bankswitch Ghana Ltd. v. The Republic of Ghana*, Award, ¶ 11.72 (UNCITRAL Arb. Apr. 11, 2014) ("Apart from public international law, international public policy as applied consistently in international arbitration . . . has to be considered by this Tribunal."). Further, Joshua Karton has written:

[There is] a widespread attitude among international arbitration practitioners and commentators that the governing law often does not matter much. International arbitration has been described as having a 'lawless' aspect, in that tribunals may decide based on what they see as the most commercially reasonable outcome rather than on strict application of the law.

Joshua Karton, *The Arbitral Role in Contractual Interpretation*, 6 J. INT'L DISP. SETTLEMENT 4, 4 (2015).

To date, tribunals' views of the impacts their decisions can have, and of the sources of law that should inform their decisions, have been relatively myopic. While tribunals have concluded that enforcing contracts and quasi-contractual promises can encourage increased investment (an often-stated objective of investment treaties), they have not similarly recognized that the protections offered by tribunals can negatively affect competing rights and claims. Nor have tribunals noted their potential to marginalize the role of domestic institutions as the core fora in which property rights claims are shaped and reshaped over time.

Tribunals could operationalize a more critical role by employing various complementary strategies and tools. As highlighted above, tribunals should proactively seek input from non-parties whose rights could be adversely affected by a tribunal decision. Tribunals should further clarify that the investor has the burden of establishing the undisputed validity of its alleged contract rights—the rights the investor is claiming to be infringed—under both domestic and international law. This would include establishing that the alleged contract rights do not run contrary to human rights law.¹⁷⁷ Finally, tribunals should dismiss or stay cases when the claimants assert rights that, if recognized by the tribunal, would adversely affect the rights of non-parties. So long as international investment treaties continue to provide a privileged avenue for investors to validate their rights and expectations through ISDS, a fundamentally different approach to such dispute settlement is needed in order to mitigate the risks presented by an investor-centric legal system to other stakeholders and interests. This approach must ensure that the rights protected in this area of international law are consistent with, and do not undermine, broader international norms of law and policy, including human rights law. These recommendations can help, but represent a major shift from current practices.

177. If domestic law deserves deference by investment arbitral tribunals in determining the validity of an investor's alleged contract rights or expectations, why then do we argue that international human rights law must also be considered in such an assessment? Why is "intrusion" of one type of international law in the domestic sphere more appropriate than another? We take this view primarily because of the deep distinctions between international investment law and international human rights law. International human rights law is fundamentally about protecting inherent, universal, and inalienable rights that all humans have. See, e.g., *What Are Human Rights?*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM'R (last visited Nov. 28, 2017), <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>. Because these rights are inherent regardless of a state's specific domestic legal framework, intrusion of international human rights law in the domestic sphere to protect human rights is acceptable. International investment law, on the other hand, is not concerned with inherent rights, but serves essentially as a tool of economic governance. The intrusion of international investment law in the domestic sphere is, at its core, a manipulation of law to protect certain economic interests over others; those economic interests are not inherent or inalienable rights.

CONCLUSION

This Article has explored how host governments' legal obligations—especially under international investment law and investor-state contracts—can affect or constrain their ability to meaningfully address grievances arising from land-based investments. These implications are also relevant for concerns arising from other types of investments. The governmental obligations found in international investment law, international human rights law, and investor-state contracts intersect and interact in complex ways. Differing enforcement mechanisms also complicate the calculus. Resolving these tensions can be difficult for governments, which may struggle to find ways of complying with their human rights obligations to individuals and communities affected by investments without exposing themselves to liability under international investment law or their investor-state contracts. The Article nonetheless proposed three options related to legal frameworks that governments can employ to address land grievances. Knowledge of such options, and their associated drawbacks, will become increasingly relevant as more governments encounter grievances arising from investments.

Given the risks that such options raise in the context of international investment law, the Article also examined current practices of arbitral tribunals adjudicating claims brought by investors under investment treaties, and argued that tribunals must be much more critical regarding the nature and scope of contract rights (and expectations) that they deem enforceable. Key to this is a recognition that the richness of domestic legal contractual doctrines can help to ensure that the interpretation and enforcement of investors' claimed rights does not unduly constrain governments' willingness and ability to comply with international human rights obligations.

We do not advocate for the ability of a government entity to always and with impunity rescind commitments made by its predecessor or by another government entity; rather, we implore arbitrators to more seriously interrogate whether and when express or implied promises made to investors are worthy of legal protection. While this would be an incremental adjustment to the international investment law regime (the future of which is not addressed in this Article), it would still require a substantial shift from current practices. In the absence of a fuller overhaul of the investment law system, this shift would provide a critical stopgap measure to help ensure that arbitral decisions under investment treaties do not undermine governments' abilities to uphold their human rights obligations or to address the concerns of their citizens.