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Between the Devil and the Deep Blue Sea—Towards Access to Justice for Local communities in Investor-state Arbitration or Business and Human Rights Arbitration

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Between the Devil and the Deep Blue Sea—Towards Access to Justice for Local communities in Investor-state Arbitration or Business and Human Rights Arbitration

Abstract

ABSTRACT

This paper focuses on the proposal to adapt international arbitration to business disputes involving human rights (Business and Human Rights Arbitration—BHR arbitration). The BHR Arbitration proposal seeks to give local communities, who are victims of MNCs' human rights and environmental abuse, access to justice in a specialized international arbitration tribunal— Business and Human Rights Arbitration Tribunal (BHR Arbitration Tribunal). Through a comparison between investor-state Arbitration (ISA) and BHR Arbitration, this paper contends that it is more efficient to reform ISA than to create a BHR Arbitration tribunal. Reforming ISA prevents possible parallel arbitration system that may arise from the duplication of international governance efforts. It also reduces local communities' resort to transnational litigation, which is procedurally complex and often unsuccessful. Therefore, a possible ISA reform makes the BHR arbitration proposal superfluous or, at best, limited in its application. Creating a new arbitral structure that is untested and fraught with procedural and substantive complexities may not worth the trouble.

The major research question that this paper answers is:

considering the parallels between the ISA and proposed BHR Arbitration, and the prospect of creating a one-stop shop for business and human rights abuse, is BHR Arbitration a necessary governance effort in international arbitration?

Keywords

Investmenat law, Business and Human Rights, International Commercial Arbitration,International Investment Arbitration, Business and Human Rights Arbitration, Access to Justice,

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Between the Devil and the Deep Blue Sea—Towards Access to Justice for Local Communities in Investor-state Arbitration or Business and Human Rights Arbitration

Akinwumi Ogunranti*

Abstract

This article focuses on the proposal to adapt international arbitration to business disputes involving human rights. The Business and Human Rights arbitration (BHR arbitration) proposal seeks to give local communities who are victims of multinational corporations' human rights and environmental abuses access to justice in a specialized international BHR arbitration tribunal. Through a comparison between investor-state arbitration (ISA) and BHR arbitration, this article contends that it would be more efficient to reform ISA than to create a BHR arbitration tribunal. Reforming ISA would avoid the possible parallel arbitration systems that may arise from the duplication of international governance efforts. It would also reduce local communities' need to resort to transnational litigation, which is procedurally complex and often unsuccessful. Therefore, the possibility of ISA reform makes the BHR arbitration proposal superfluous or, at best, limited in its potential application. Creating a new arbitral structure that is untested and fraught with procedural and substantive complexities may not be worth the trouble. Considering the parallels between the ISA and proposed BHR arbitration, and the prospect of creating a one-stop shop for business and human rights abuse, this article suggests that BHR arbitration is an unnecessary governance effort in international arbitration and a distraction from necessary ISA reform.

Globalization in the twenty-first century has transformed the world's economic, social, and political structures in diverse and indelible ways.[1] The continued need for national economic growth has melted national borders, which ultimately encourages interactions between states and multinational corporations (MNCs) as global actors.[2] MNCs in particular have evolved as one of the most important influencers of economic growth through foreign direct investments (FDI).[3] In

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[1] Globalization in this context refers to "a process (or set of processes) which embodies a transformation in the spatial organization of social relations and transactions, generating transcontinental or interregional flows and networks of activity, interaction and power." See David Held et al, "Global Transformations: Politics, Economics and Culture" in Chris Pierson & Simon Tormey, eds, *Politics at the Edge: The PSA Yearbook 1999* (Macmillan Press, 2000) 14 at 15.

[2] There is no legally acceptable definition of multinational corporations (MNCs). In this article, I descriptively refer to MNCs as corporate entities that engage in direct investment outside their home countries. See Peter Muchlinski, *Multinational Enterprises and the Law*, 2nd ed (Oxford University press, 2007) at 12-15. See also B Kogut, "Multinational Corporations" in Neil Smelser & Paul Baltes, eds, *International Encyclopedia of the Social & Behavioural Sciences* (Oxford University Press, 2001) 10197.

[3] See Jörn Kleinert, "The Role of Multinational Enterprises in Globalization: An Empirical Overview" (2001) Kiel Working Papers No 1069 at 1; Jeffery A Hart, "Globalization and Multinational Corporations" in Phil Harris & Craig Fleisher, eds, *The SAGE Handbook of International Corporate and Public Affairs* (SAGE Publications, 2017) at 323

contrast, states have "shrunk in importance and influence" in shaping matters relating to global economic activities and investment.[4] The enormous rise in influence of MNCs in FDI has eroded states' power and sovereignty, especially as it relates to states' policy space.[5]

International law's governance framework of International Investment Agreements (IIAs), which includes Bilateral Investment Treaties (BITs) and the Investor-State Dispute Settlement (ISDS), regulates investors' and host states' FDI activities in a global market.[6] Through its principles and dispute settlement mechanism, international investment law seeks to encourage FDI, protect foreign investments, and settle investment disputes between foreign investors and host states.

This article focuses on investor-state arbitration (ISA) under the *International Center for Settlement of Investment Disputes (ICSID) Convention*.[7] Although there are other means of dispute resolution in the ISDS regime, including conciliation, mediation and a fact-finding process, this article is limited to discussions of ISA, and it uses the term ISDS and ISA interchangeably to

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(MNCs are both beneficiaries and agents of globalization); AO Osibanjo, AE Oyewunmi, & OP Salau, "Globalization and Multinational Corporations: The Nigerian Business Environment in Perspective" (2014) 16:11 ISOR-JBM (3rd) 1 at 3.

[4] Constantine E Passaris, "The Business of Globalization and the Globalization of Business" (2006) 9 J Comp Intl Mgmt 3 at 3. See also Saskia Sassen, "Embedding the Global in the National: Implications for the Role of the State" (1999) 7 Macalester Intl 31.

[5] See Paul A Haslam, "The Firm Rules: Multinational Corporations, Policy Space and Neoliberalism" (2007) 28 Third World Q 1167; Steve Kapfer, "Multinational Corporations and the Erosion of State Sovereignty" (Paper prepared for the Illinois State University Conference, 7 April 2006), [unpublished], online: <https://pol.illinoisstate.edu/downloads/conferences/2006/Kapfer2006.pdf> [https://perma.cc/G7BC-B3Y7].

[6] Foreign direct investment is defined as "investment by a person or entity domiciled in one country ('the investor'), in a business domiciled in another country ('the investment'), in which the former has significant influence on the management of the latter." See Daniel Schwanen, "Foreign Direct Investment in Canada - The Case for Further Openness and Transparency" (CD Howe Institute, 26 July 2018), online: <https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/FDI%20-%20The%20Case%20for%20Further%20Openness%20and%20Transparency.pdf> [https://perma.cc/WHN5-3A7Q]. The International Momentary Fund and Organization for Economic Cooperation and Development define direct "foreign investment" as "cross-border investment made by a resident entity in one economy (the 'direct investor' or 'multinational enterprise') with the objective of establishing a lasting interest in an enterprise resident in an economy other than that of the direct investor (the 'foreign affiliate')." See OECD, *Detailed Benchmark Definition of Foreign Direct Investment*, 3rd ed (OECD, 1996). See generally, Samuel KB Asante, "International Law and Foreign Investment: A Reappraisal" (1988) 37 Intl & Comp LQ 588.

[7] The ICSID is an autonomous intergovernmental organization established under the Convention on the Settlement of Disputes between States and Nationals of Other States (*ICSID Convention*). The primary purpose of ICSID is to provide facilities for conciliation and arbitration of international investment disputes. The *ICSID Convention* is a multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). It was opened for signature on March 18, 1965, and entered into force on October 14, 1966. See Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (1972) 136 Rec des Cours 331. Although there are other dispute settlement mechanisms in multilateral trade agreements like the North American Free Trade Agreement (NAFTA), Trans-Pacific Partnership (TPP), the Canada-EU Trade Agreement (CETA), and the Trans-Atlantic Trade and Investment Partnership (TTIP), ICSID accounts for 62 percent of publicly known investor arbitration. Therefore, the investor-state dispute settlement under ICSID presents robust case studies and literature for analysis. See also Jonathan Bonnitcha, Lauge N Skovgaard Poulsen & Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017) at 69.

represent dispute settlement under the *ICSID Convention*.[8] In particular, it examines issues of access to justice in ISA, especially as it relates to local communities' inability to directly participate in ISA proceedings. It has been noted that "[f]urther studies are needed to explore how those who ultimately bear the costs of investment rules—developing country states and host communities—could be included in the process of redefining international investment governance and shaping the content of investment protection policies."[9]

This article does not answer the question of "how" local communities can participate in ISA proceedings.[10] Rather it asks the preliminary question of whether local communities can (or should) directly participate in ISA proceedings in the first place. It answers this question positively and goes on to argue that, rather than creating a new arbitration forum where local communities can file claims, the ISDS could be reformed to include local communities' direct participation in matters that concern them. It contends that if the ISDS were to be reformed in this manner, it would prevent the fragmentation of international dispute resolution mechanisms that could result in parallel proceedings between two or more arbitration tribunals.

The recent ICSID and United Nations Commission on International Trade Law (UNCITRAL) ISDS reform efforts are reflections of the challenges that limit local communities' access to justice.[11] The ICSID and UNCITRAL secretariats' working papers on ISDS reform include issues relating to the appointment of arbitrators, cost of arbitration, and confidentiality in ISA proceedings.[12] Also, governments, non-government institutions, and scholars have submitted proposals on the joinder of affected third parties (local communities) in ISA proceedings to the

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[8] Indeed, Laryea notes that "the term ISDS has become synonymous with investor–state arbitration ("ISA")." Emmanuel T Laryea "MAKING INVESTMENT ARBITRATION WORK FOR ALL: ADDRESSING THE DEFICITS IN ACCESS TO REMEDY FOR WRONGED HOST STATE CITIZENS THROUGH INVESTMENT ARBITRATION" (2018) 59 Boston College L Rev 2845 at 2846.

[9] Mavluda Sattorova, "Do Developing Countries Really Benefit from Investment Treaties? The Impact of International Investment Law on National Governance," (21 December 2018), online: International Institute for Sustainable Development <https://www.iisd.org/itn/2018/12/21/do-developing-countries-really-benefit-from-investment-treaties-the-impact-of-international-investment-law-on-national-governance-mavluda-sattorova/> [https://perma.cc/S87E-RWH7].

[10] The definition of "local community" is highly problematic because it involves political and nationality considerations. See generally Lisa Thompson, Chris Tapscott & Pamela Tsolekile De Wet, "An Exploration of the Concept of Community and its Impact on Participatory Governance Policy and Service Delivery in Poor Areas of Cape Town, South Africa" (2018) 45 SAJ Pol Stud 276. However, the term "local community" as used in this article generally refers to a group of people who constitute a community at local levels or grass-root levels of government, especially in developing countries. See *e.g.* David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Hart, 2007).

[11] See "Proposals for Amendment of the ICSID Reform Rules" (15 March 2019), Working Paper No 2, online: ICSID <https://icsid.worldbank.org/sites/default/files/amendments/Vol_1.pdf > [https://perma.cc/ZL3X-V4L6].

[12] *Ibid*. See also *Report of the United Nations Commission on International Trade Law*, UN GAOR 72nd Sess, Supp No 17, UN Doc A/72/17 (2017); *Report of the Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 35th Session* (14 May 2018), UNCITRAL 51st Sess, UN Doc A/CN.9/935.

UNCITRAL Working Group III.[13] Similarly, Odumosu,[14] Laryea,[15] and Perrone[16] have in their scholarly contributions argued for local communities' participation in ISA proceedings. Although Odumosu believes that participation does not necessarily mean a formal (direct) participatory status in ISA proceedings,[17] Laryea and Perrone advocate for a direct participatory status in ISA proceedings.[18] Also, Gus Van Harten, Jane Kelsey, and David Schneiderman argue that the exclusion of affected third party participation in ISA proceedings is a "striking procedural flaw."[19]

This article contributes to the call for local community participation in ISA proceedings. It argues that this reform is more compelling because of the recent proposal to adapt international arbitration to business disputes involving human rights, the Hague Rules on Business and Human Rights Arbitration ("Hague Rules").[20] The Hague Rules seek to give local communities that are victims of MNCs' human rights and environmental abuse access to justice in a specialized international arbitration tribunal—the Business and Human Rights Arbitration Tribunal.[21] Through a comparison of ISA and Business and Human Rights arbitration (BHR arbitration), this article contends that it is more efficient to reform ISDS in relation to local community participation than to create a BHR arbitration tribunal. This approach prevents possible parallel arbitration systems that may arise from the duplication of international governance efforts. It also reduces

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[13] "Summary Comments to the Proposals for Amendments of the ICSID Arbitration Rules" (2019), online: International Institute for Sustainable Development <https://www.iisd.org/system/files/publications/comments-proposals-amendment-icsid-arbitration-rules.pdf> [https://perma.cc/5W7V-E39F].

[14] Ibironke T Odumosu, "Locating Third World Resistance in the International Law on Foreign Investment" (2007) 9 Intl Community L Rev 427 [Odumosu, "Locating Third World Resistance"]; Ibironke T Odumosu-Ayanu, "Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework" (2014) 15 Melb J Intl L 473; Ibironke T Odumosu, "The Law and Politics of Engaging Resistance in Investment Dispute Settlement" (2007) 26 Penn St Intl L Rev 251; Ibironke T Odumosu, *ICSID, Third World Peoples and the Re-Construction of the Investment Dispute Settlement System* (PhD Dissertation, University of British Columbia, 2010) [unpublished], [Odumosu, "ICSID"].

[15] Laryea, *supra* note 8.

[16] Nicolás Perrone, "The International Investment Regime and Local Communities: Are the Weakest Voices Unheard?" (2016) 7 Transnat'l Leg Theory 383 at 384 [Perrone, "Weakest Voices"]; Nicolás Perrone, "The 'Invisible' Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime" (2019) 112 AJIL 16 [Perrone, "Invisible Local Communities"].

[17] Odumosu, ICSID, *supra* note 14 at 309. Odumosu notes:

> Participation in this sense does not need to involve formal participation or legal participatory status in the manner that such status applies to states and investors. It is sufficient that a tribunal may be willing or unwilling to consider the activities of actors that a party to a dispute settlement proceeding pleads, because of the actors' identity. Tribunals' constructions of these activities have significant impacts not only on activist groups, but also on the state parties or foreign investors that plead the incidences of resistance.

See also Odumosu, "Locating Third World Resistance" *supra* note 14 at 444.

[18] Laryea, *supra* note 8. See generally Perrone, "Weakest Voices"; Perrone, "Invisible Local Communities," *supra* note 16.

[19] See generally Gus Van Harten, Jane Kelsey & David Schneiderman, "Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters Really Matter,'" (2019) [unpublished, archived in the Osgoode Hall Law School Digital Commons].

[20] See Claes Cronstedt, Jan Eijsbouts & Robert Thompson, "International Business and Human Rights Arbitration" (13 February 2017) Working Group Paper on Business and Human Rights Arbitration 23, online: Center for International Legal Cooperation <https://www.cilc.nl/cms/wp-content/uploads/2018/03/INTERNATIONAL-ARBITRATION-TO-RESOLVE-HUMAN-RIGHTS-DISPUTES-INVOLVING-BUSINESS-PROPOSAL-MAY-2017.pdf> [https://perma.cc/4KDV-KXYT].

[21] See The Hague Rules on Business and Human Rights Arbitration 2019, online: Center for International Legal Cooperation <https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf> [https://perma.cc/PGN5-JDYC] [Hague Rules].

local communities' resort to transnational litigation, which is procedurally complex and often unsuccessful.[22] In effect, ISDS reform makes the BHR arbitration proposal superfluous or, at best, limited in its potential application.[23]

"Access to justice" in this article refers to the "ability of people, particularly from poor and disadvantaged groups, to seek and obtain a remedy through formal and informal justice systems, in accordance with human rights principles and standards."[24] This article takes a narrow procedural approach that focuses on access—that is, the means by which rights are made effective—rather than a wider approach that focuses on judicial outcomes.[25] It examines access to justice for local communities as rights holders in investment law and their opportunity to meaningfully participate in legal proceedings that directly affect their socio-economic well-being. To be clear, this article does not seek to construct a new alternative ISDS structure that includes local communities because other commentators like Emmanuel Laryea, Nicholas Perrone, and Ibironke Odumosu have done so.[26] Rather, it seeks to provoke thoughts on the proposal made by these commentators in light of the adoption of the new Hague Rules in 2019. I draw on these commentators' proposals in this article to strengthen the argument that it is time to seriously consider an ISDS reform to include local communities instead of creating a new arbitral regime.

Generally, ISDS, as a dispute resolution mechanism, has been the subject of scholarly debates.[27] Some scholars attack the ISDS regime on a variety of grounds including the impropriety of delegating adjudicatory powers to private individuals on disputes relating to host states' policy decisions,[28] the marginal role of human rights and environmental protection considerations in

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[22] See Peer Zumbansen, "Beyond Territoriality: The Case of Transnational Human Rights Litigation" (2005) [unpublished, archived in the Osgoode Hall Law School Digital Commons]. See also Axel Marx et al, "Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries" (2019), online: European Parliament, Policy Department for External Relations <http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf> [https://perma.cc/XKS6-KLZS].

[23] This article proceeds with the argument that most business and human rights disputes are interwoven with investment issues. If ISDS is reformed in relation to local community participation, BHR arbitration will be limited to only cases where there is no existing BIT and where the issues are purely commercial.

[24] United Nations Development Programme, "Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice" (2005) at 5, online: <https://www.un.org/ruleoflaw/files/Justice_Guides_ProgrammingForJustice-AccessForAll.pdf> [https://perma.cc/4PHZ-MB2A].

[25] See generally Nahakul Subedi, "A Normative Dilemma on Access to Justice: Much Emphasis on ACCESS and Little on JUSTICE - Need to Revisit the Socio-Legal Interface" (2012) 6 NJA LJ 50; Garth Bryant & Mauro Cappelletti, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) 27 Buff L Rev 181.

[26] Laryea, *supra* note 8; Odumosu, ICSID, *supra* note 14 at 309; Odumosu, "Locating Third World Resistance" *supra* note 14 at 444. See generally Perrone, "Weakest Voices"; Perrone, "Invisible Local Communities," *supra* note 16.

[27] See *e.g.* Muthucumaraswamy Sornarajah, "A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration" in Karl P Sauvant with Michael Chiswick-Patterson, eds, *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) 39; Leon E Trakman, "The ICSID Under Siege" (2012) 45 Cornell Intl LJ 603; Cecilia Olivet, Natacha Cingotti, Pia Eberhardt, *Winning the Debate against Pro-ISDS Voices: An Activist's Argument Guide* (Transnational Institute, Friends of the Earth International and Corporate Europe Observatory, 2017); J Anthony VanDuzer, "Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation" (2007) 52 McGill LJ 681.

[28] See Ayelet Banai, "Is Investor-State Arbitration Unfair? A Freedom-Based Perspective" (2017) 10 Global Justice: Theory, Practice, Rhetoric 57; Lisa Diependaele, Ferdi De Ville & Sigrid Sterckx, "Assessing the Normative

investment disputes,[29] ISA tribunal's bias towards investors,[30] inconsistent arbitral decisions,[31] the lack of an appeal system,[32] and non-transparent proceedings.[33] They conclude that these problems culminate in a legitimacy crisis in ISA.[34] Other scholars defend the ISDS regime on the basis that ISDS protects foreign investors and encourages the flow of foreign investment.[35] In their view, criticisms of ISDS are overstatements and exaggerations that are unsupported by hard evidence.[36] This article does not engage in these debates because they are well rehearsed in the literature. Rather, it asks whether the BHR arbitration proposal is a testament to the irredeemable failure of the ISDS regime, especially as it relates to human rights and local community participation in ISA proceedings.

Legitimacy of Investment Arbitration: The EU's Investment Court System" (2019) 24 New Political Economy 37; "230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) From NAFTA and Other Pacts," online: Public Citizen <https://www.citizen.org/wp-content/uploads/migration/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf> [https://perma.cc/4LHL-C37W].

[29] See Mehmet Toral & Thomas Schultz, "The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations" in Michael Waibel et al, eds, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010) at 577; Bruno Simma, "Foreign Investment Arbitration: A Place for Human Rights?" (2011) 60 The Intl & Comparative LQ 573.

[30] See Olivia Chung, "The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration" (2007) 47 Va J Intl L 953 at 956-57; Julien Fouret, "The World Bank and ICSID: Family or Incestuous Ties?" (2007) 4 Intl Org L Rev 121; Sergio Puig & Anton Strezhnev, "The David Effect and ISDS" (2017) 28 Eur J Intl L 731.

[31] See Susan D Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2005) 73 Fordham L Rev 1521.

[32] See Michael Wilson, "The Enron v. Argentina Annulment Decision: Moving a Bishop Vertically in the Precarious ICSID System" (2012) 43 U Miami Inter-Am L Rev 347 at 372-73; Sachet Singh & Sooraj Sharma, "Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap" (2013) 29 Utrecht J Intl& European L 88.

[33] See Barnali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?" (2008) 41 Vand J Transnat'l L 775 at 808-810; Alessandra Asteriti & Christian Tams, "Transparency and Representation of the Public Interest in Investment Treaty Arbitration" in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 787.

[34] See *e.g.* Julius Cosmas, "Legitimacy Crisis in Investor–State International Arbitration System: A Critique on the Suggested Solutions & the Proposal on the Way Forward" (2014) 4 Intl J Scientific & Research Publications 1; David Schneiderman, "Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?" (2011) 2 J Intl Dispute Settlement 471; Susan Franck, *supra* note 31.

[35] See *e.g.* Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law (Oxford University Press, 2008) at 214-15. See also Armand de Mestral, INVESTOR-STATE ARBITRATION BETWEEN DEVELOPED DEMOCRATIC COUNTRIES (Centre for International Governance Innovation, 2015) at 7-23.

[36] See Charles N Brower & Sadie Blanchard, "What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States" (2014) 52 Colum J Transnat'l L 689; Charles N Brower, Charles H Brower II & Jeremy K Sharpe, "The Coming Crisis in the Global Adjudication System" (2003) 19 Arb Intl 415; Charles N Brower & Stephan W Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?" (2009) 9 Chi J Intl L 471; Sergio Puig, "EMERGENCE & DYNAMISM IN INTERNATIONAL ORGAIZATIONS: ICSID, INVESTOR-STATE ARBITRATION & INTERNATIONAL INVESTMENT LAW" (2013) 44 Geo J Intl L 531; Daphna Kapeliuk, "THE REPEAT APPOINTMENT FACTOR: EXPLORING DECISION PATTERNS OF ELITE INVESTMENT ARBITRATORS" (2010) 96 Cornell L Rev 47; "A response to the criticism against ISDS" (17 May 2015), online (pdf): *European Federation for Investment Law and Arbitration* <efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf> [perma.cc/4XJJ-LZW4].

Some scholars propose abolishing ISDS and replacing it with an independent world investment court (WIC),[37] an international court system,[38] state-state dispute settlement,[39] or domestic courts.[40] Indeed, one commentator states: "I think it is better to recognize that the system was poorly designed and has been malfunctioning for three decades, and that dismantling it and starting from scratch is the wiser course."[41] I do not advocate any of these possible options because the solution to ISDS legitimacy crises does not lie in throwing away the baby with the bathwater.[42] Rather, it lies in institutional and systemic reform, which entails redefining stakeholders' entrenched interests in the international investment law regime.[43] This reform involves recalibrating the political and economic interests of states and MNCs as global actors. In effect, the realization of an inclusive ISDS depends on investment actors' resolve to build a participatory regime where investors, host states, and local communities settle investment disputes in a single forum.

This article proceeds in seven sections. Part I briefly notes the history, nature, and justification for establishing ISA and distinguishes it from international commercial arbitration. While international commercial arbitration recognizes reciprocal rights between parties, ISA downplays investors' obligations to host states and local communities, especially in relation to human rights and the environment. Part II argues that the marginal role of investors' obligations in ISA contributes to the lack of (or limited) local community representation in ISA proceedings. It notes that notwithstanding the role of local communities in international investment discourse, they have limited access to justice in ISA proceedings. Part III explores the BHR arbitration proposal, which seeks to give local communities direct access to justice in a specialized arbitration tribunal. It compares ISA with BHR arbitration to draw a parallel between both systems. Part IV argues that while it is important in some ways to develop specialized regimes like BHR arbitration, the BHR arbitration proposal is an unnecessary effort to secure access to justice for local

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[37] See David M Howard, "CREATING CONSISTENCY THROUGH A WORLD INVESTMENT COURT" (2017) 41 Fordham Intl LJ 1; Nicolette Butler & Surya Subedi, "The Future of International Investment Regulation: Towards a World Investment Organisation?" (2017) 64 Netherlands Intl L Rev 43.

[38] See UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform) Secretariat, *Possible reform of investor-State dispute settlement (ISDS)*, 36th Sess, UN DOC A/CN.9/WG.III/WP.149, 5 September 2018 at 10.

[39] See Denis Côté, "Whose rights are we protecting? Ensuring the primacy of human rights over investors protections in the international legal regime" (March 2016) at 23, online (pdf): *Cooperation Canada* <cooperation.ca/wp-content/uploads/2018/08/2016_03_Whose_rights_are_we_protecting.pdf> [perma.cc/W3UX-VPR4].

[40] See Roderick Abbott, Fredrik Erixon & Martina Francesca Ferracane, "Demystifying Investor-State Dispute Settlement (ISDS)" (2014) ECIPE Occasional Paper (5th) at 17. This proposal is criticized for creating an imbalanced or selective treatment between developed and developing countries. See Hugo Perezcano, "RISKS OF A SELECTIVE APPROACH TO INVESTOR-STATE ARBITRATION" (13 April 2016) online (pdf): *Centre for International Governance Innovation* <www.cigionline.org/static/documents/isa_paper_no.3.pdf> [perma.cc/K8TJ-7YTX]; Armand de Mestral, ed, *Second Thoughts: Investor-State Arbitration between Developed Democracies* (CIGI Press, 2017).

[41] George Kahale III, "The Inaugural Brooklyn Lecture on International Business Law: ISDS: The Wild, Wild West of International Practice" (2018) 44 Brook J Intl L 1 at 10.

[42] It has been noted that "investor-state arbitration may change, and is changing, but is unlikely to disappear anytime soon." See Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press, 2018) at 250.

[43] Stakeholders include MNCs, states, international organizations, local communities, and non-governmental organizations. I use the term "regime" in the same way that Steven Ratner defines it: "A self-identified field of international law comprising norms to regulate a certain type of conduct and institutions to make decisions within it." See Steven Ratner, "REGULATORY TAKINGS IN INSTITUTIONAL CONTEXT: BEYOND THE FEAR OF FRAGMENTED INTERNATIONAL LAW" (2008) 102 AJIL 475 at 485.

communities. The prospect of creating parallel arbitral systems and peculiar procedural challenges make the BHR arbitration proposal problematic. This section argues that a reformed ISDS regime would achieve result identical to BHR arbitration. It therefore advocates for an inclusive ISDS reform that resolves investment disputes in a one-stop shop manner. Part V considers possible objections to the proposed reform. It classifies them as procedural and politico-economic challenges. Although these objections are legitimate, it argues that international investment law must rise beyond them to facilitate access to justice for all. Part VI concludes with a reflection: Although BHR arbitration is problematic, an ISDS reform is also a difficult task. The preference for an ISDS reform should therefore be motivated by the principle of choosing the lesser of two evils.

I. The Nature of Investor-state Arbitration

Before the creation of ISDS, domestic courts were the only avenue that investors could use to complain about states' behaviours, and any complaint had to be based on the domestic law of the state whose conduct was being impugned.[44] If foreign investors were unsatisfied with domestic court decisions and had exhausted all local remedies, they would resort to customary international law principles to seek diplomatic protection from their home countries.[45] This is because, under customary international law, individuals or corporations cannot challenge states' administrative or policy actions.[46] Therefore, in cases where host states' measures are inadequate or not forthcoming in investment disputes, home governments exercise diplomatic rights to protect their nationals' investments.[47]

Due to reservations about domestic courts' independence and the political issues involved in seeking diplomatic protection, ISDS was established as an independent international forum to assuage investors' concerns regarding disputes arising from investment treaties.[48] Although there were earlier non-treaty investor-state arbitrations, like the ARAMCO Arbitration, the Qatar Arbitration, and the Abu Dhabi Arbitration, ISDS was established through a treaty in 1966—the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* ("*ICSID Convention*").[49] The International Center for Settlement of Investment Disputes (ICSID) provides a procedural arbitral framework for dispute settlement between host states and foreign investors. In contrast to diplomatic relations under customary international law, ISDS "[offers] to investors assurances that disputes that might flow from their investments would not be subject to the perceived hazards of delays and political pressures of adjudication in national courts."[50] In

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[44] See Eric De Brabandere, *Investment Treaty Arbitration as Public International Law* (Cambridge University Press, 2014) at 20.

[45] *Ibid*. It has been noted that "it is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels." Sachet Singh & Sooraj Sharma, *supra* note 32 at 90, citing *Mavrommatis Palestine Concessions (Greece v UK)* (1924), PCIJ (Ser B) No 3 at para 21 [*Mavrommatis*].

[46] See *Mavrommatis*, *supra* note 45.

[47] See Jeswald W Salacus, "The Emerging Global Regime for Investment" (2010) 51 Harv Intl LJ 427 at 463.

[48] See Nigel Blackaby, "Public Interest and Investment Treaty Arbitration" (2004) 1 TDM 355; Alan O Sykes, "Public versus Private Enforcement of International Economic Law: Standing and Remedy" (2005) 34 J Legal Stud 631 at 643.

[49] 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) [*ICSID Convention*].

[50] *Gas Natural SDG, SA v Argentine Republic* (2005) at 29 (International Centre for Settlement of Investment Disputes) (Arbitrators: Prof Andreas F Lowenfeld, Mr Henri C Álvarez, Dr Pedro Nikken).

effect, ISDS is posited to be a neutral dispute resolution mechanism created to depoliticize investment disputes between states.[51]

This protection was necessary because of the political and economic climate at the time the *ICSID Convention* was signed. The *ICSID Convention* came into force during a decolonizing period when newly independent developing states, who are primarily capital importing countries, were moving to eliminate the economic and political influence of their former colonizers.[52] To protect the business interests of developed countries' nationals in newly formed independent states, developed countries negotiated and signed BITs with their counterparts in the global south.[53] Through non-expropriation clauses in BITs, investors were assured of non-expropriation of their capital. Also, through other clauses, investors were assured of fair and equitable treatment, as well as national and "most favored nation" treatment in host states.[54]

In case of disputes as to the interpretation or protection offered to investors in BITs, ad hoc ISA tribunals interpret and clarify investors' rights.[55] Thus, without exhausting local remedies, investors reserve the right to claim monetary compensation for host state measures that adversely affect their proprietary rights under BITs at ISA tribunals.[56] Although host states can also claim or counterclaim against investors in ISA, ISA tribunals rarely recognize these rights.[57] In sum, ISA

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[51] See Ursula Kriebaum, "Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes" (2018) 33 ICSID Review 14 at 14 ("Depoliticization means the transfer of such conflicts from the political arena of diplomatic protection to a judicial forum with objective, previously agreed standards and a pre-formulated dispute settlement process").

[52] See Won Kidane, "CONTEMPORARY INTERNATIONAL INVESTMENT LAW TRENDS AND AFRICA'S DILEMMAS IN THE DRAFT PAN-AFRICAN INVESTMENT CODE" (2018) 50 Geo Wash Intl L Rev 523 at 526 ("International investment law [IIL] comes with a very old and lingering historical baggage that continues to engender doctrinal confusion and outright suspicion...[IIL] is not made *by Africa*, it was made *for Africa* as a replacement for colonial rules for the protection of capital" [emphasis in original]).

[53] See M Sornarajah, *The International Law on Foreign Investment*, 3rd ed (Cambridge University Press, 2010). At inception, de Mestral notes, "very few BITs were concluded between developed states." de Mestral, *supra* note 35 at 3. See also Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) at 43 (noting that "[a] characteristic of BITs during this period was the asymmetrical economic and political relationship that existed between capital exporting and importing states. Although the obligations on the state parties to BITs were formally reciprocal, BITs were developed by capital exporting states to protect the economic interests of their nationals abroad." I use the terms "global north" (developed countries) and "global south" (developing countries) as defined by Lemuel Odeh. See Lemuel Ekedegwa Odeh, "A COMPARATIVE ANALYSIS OF GLOBAL NORTH AND GLOBAL SOUTH ECONOMIES" (2010) 12 J Sustainable Development in Africa 338 at 338:

> While Global North countries are wealthy, technologically advanced, politically stable and aging as their societies tend towards zero population growth the opposite is the case with Global South countries. While Global South countries are agrarian based, dependent economically and politically on the Global North, the Global North has continued to dominate and direct the global south in international trade and politics.

[54] Kenneth J Vandevelde, "A Brief History of International Investment Agreements" in Karl P Sauvant & Lisa E Sachs, eds, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press, 2009) 4 at 5. Most treaties contain standard clauses, which explain the scope of investment, standards of treatment for investment, the scope of expropriation, and dispute settlement procedures. See Salacuse, *supra* note 47 at 432.

[55] Joshua Karton, "Choice of Law and Interpretive Authority in Investor-State Arbitration" (2017) 3 Can J Comp & Contemp L 217.

[56] See Sergio Puig, "NO RIGHT WITHOUT A REMEDY: FOUNDATIONS OF INVESTOR-STATE ARBITRATION" (2014) 35 U Pa J Intl L 829 at 843-46.

[57] See Yaraslau Kryvoi, "Counterclaims in Investor-State Arbitration" (2012) 21 Minn J Intl L 216; Pierre Lalive & Laura Halonen, "On the Availability of Counterclaims in Investment Treaty Arbitration" (2011) CYIL 141. See also Brower & Blanchard, *supra* note 36 at 713-15.

performs the dual function of resolving investment disputes (in the narrower context of international investment law) between investors and host states and clarifying and interpreting aspects of international law relating to FDI.[58] ISA is a special adjudicatory structure that is uncommon in international law.[59] Indeed, it has been noted that "[the] private right to sue a government for damages and to choose the forum in which to do so constitutes the most revolutionary aspect of the international law relating to foreign investment in the past half-century."[60]

Disputes submitted to ISA can arise from investment contracts, BITS, and other instruments, which means that ISA tribunals derive their jurisdiction from these documents.[61] It should be noted that BITs existed before the *ICSID Convention*. The first recorded example of a BIT was between Germany and Pakistan in 1959, long before the *ICSID Convention* in 1966.[62] However, "[i]n 1969, ICSID issued a set of 'Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Bilateral Investment Treaties.'"[63] The clauses included texts that states could use to show consent to the ICSID dispute resolution system. Parties have increasingly adopted these clauses in their resolve to settle their disputes via the ICSID system.[64] While BITs contain the substantive agreements, parties may or may not choose the dispute resolution mechanisms under ICSID, which include arbitration, facilitated mediation and negotiation, conciliation, early neutral evaluation, and fact-finding process.[65]

The ICSID Rules regulate procedural aspects of ICSID proceedings. However, if one of the parties is not a signatory to the *ICSID Convention*, the dispute may be regulated by "the ICSID Additional Facility Rules, or under other rules as the consent to arbitration permits."[66] ISA relies substantially on the procedural design of international commercial arbitration, which includes UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("UNCITRAL Rules") and the London Court of International Arbitration Rules.[67] ISA's reliance on a commercial arbitration procedure raises the debate of whether ISA is a private or public international law institution. While some commentators argue that it is a public international law institution with a

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[58] See Kendall Grant, "ICSID's Reinforcement?: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration" (2015) 52 Osgoode Hall LJ 1115 at 1120; Susan L Karamanian, "Overstating the Americanization of International Arbitration: Lessons from ICSID" (2003) 19 Ohio St J on Disp Resol 5 at 9.
[59] See generally Stephen E Blythe, "The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties" (2013) 47 Intl Law 273.
[60] Beth A Simmons, "BARGAINING OVER BITS, ARBITRATING AWARDS: The Regime for Protection and Promotion of International Investment" (2014) 66 World Pol 12 at 17.
[61] See Andrea K Bjorklund, "The Emerging Civilization of Investment Arbitration" (2009) 113 Penn St L Rev 1269 at 1271.
[62] See Antonio R Parra, "ICSID AND THE RISE OF BILATERAL INVESTMENT TREATIES: WILL ICSID BE THE LEADING ARBITRATION INSTITUTION IN THE EARLY 21st CENTURY?" (2000) 94 Soc'y Intl L Proc 41 at 41.
[63] *Ibid* at 42.
[64] See generally Antonio R Parra, *The History of ICSID*, 2nd ed (Oxford University Press, 2017).
[65] See "Other Alternative Dispute Resolution Mechanisms," online: *ICSID* <icsid.worldbank.org/services-arbitration-other-adr-mechanisms> [perma.cc/RNA8-JBGS].
[66] Bjorklund, *supra* note 61 at 1271.
[67] See Tomoko Ishikawa, "THIRD PARTY PARTICIPATION IN INVESTMENT TREATY ARBITRATION" (2010) 59 Intl & Comp LQ 373 at 374-75.

public law function,[68] others argue that ISA is *sui generis* because it combines the private nature of commercial arbitration with the public international law nature of investment claims.[69] Without delving into the debate, I adopt the latter view; I characterize ISA as a hybrid regime that combines a public law model of adjudication with the procedures of international commercial arbitration.[70] This characterization helps us to appreciate the parallels between ISA and BHR arbitration. It also reflects the special character of ISA as a forum in international law where MNCs and states have standing.

Notwithstanding the procedural similarities between both arbitral structures,[71] the subject matter in ISA differs substantially from that of commercial arbitration.[72] International commercial arbitration is concerned with the adjudication of private rights between two parties established under a contract. However, ISA resolves disputes between states as sovereign entities and their obligation towards foreign investors. In effect, while international commercial arbitration determines reciprocal duties and obligations between private parties, ISA determines only the obligation of states towards foreign investors.[73] This is because "the main objective of contemporary investment treaty arbitration is to assess whether or not the state has violated its obligations under the applicable investment treaty and other applicable rules and principles of international law."[74] In sum, "[ISA] as we know it today provides preferences to foreign investors, in comparison to local stakeholders including domestic investors as well as third parties impacted by the foreign investment."[75]

Considering investors' lack of reciprocal obligations in ISA proceedings, it is unclear why host states agree to arbitral clauses in BITs.[76] One of the reasons for including an arbitration clause

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[68] See generally Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007); Stephan W Schill, "Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach" (2011) 52 Va J Intl L 57; Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford University Press, 2010).

[69] See generally Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration" (2003) 74 British Yearbook Intl L 151; Bernado M Cremades & David JA Caims, "The Brave New World of Global Arbitration" (2002) 3 J World Investment 173.

[70] See Hendrik Hugh Angus Van Harten, *The Emerging System of International Investment Arbitration* (PHD Thesis, London School of Economics, 2005) [unpublished] at 10-11.

[71] See Choudhury, *supra* note 33 at 787.

[72] See James Allsop, "Commercial and Investor-State Arbitration: The Importance of Recognising their Differences" (Opening Keynote Address delivered at The ICCA Congress, Sydney, 16 April 2018) [unpublished] at para 21.

[73] See "Human rights must be integrated into international investment agreements" (14 November 2016), online (pdf): *Business and Human Rights Resource Center* <www.business-humanrights.org/sites/default/files/documents/Human-rights%2Binvestment-agreements-statement-14-Nov-2016.pdf> [perma.cc/3DF2-T4WD] ("[T]he current international investment system gives rights to multinational corporations while doing nothing to protect the rights of people affected by foreign investment to access effective remedy. It does not sufficiently protect governments' space to pursue sustainable development policies from investors' challenges").

[74] De Brabandere, *supra* note 44 at 51.

[75] Kinda Mohamadieh, "The Future of Investor-State Dispute Settlement Deliberated at UNCITRAL: Unveiling a Dichotomy between Reforming and Consolidating the Current Regime" (March 2019) at 2, online (pdf): *The South Centre* <www.southcentre.int/wp-content/uploads/2019/03/IPB16_The-Future-of-ISDS-Deliberated-at-UNCITRAL_EN.pdf> [perma.cc/X8QV-SM3C].

[76] It should, however, be noted that some BITs are beginning to recognize obligations for investors, although these remain limited. For example, article 7 of the 2019 Netherlands Model bilateral investment treaty (BIT) provides a specific requirement that "[i]nvestors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights." See "Netherlands model Investment Agreement" (22 March 2019), online (pdf): *UNCTAD* <investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> [perma.cc/6JL3-6YE9].

in BITs is to assure foreign investors of the security of their investments, which will, in turn, encourage FDI—a situation which some commentators argue will foster economic development in host states.[77] In effect, these commentators equate FDI to economic development. However, the circumstances under which most BITs are concluded make this argument narrow.[78] Host states still have an independent obligation to improve the economic lives of their citizens because FDI is not a substitute for strong domestic property rights, good governance, and strong democratic institutions, which are factors for development in any state.[79] Therefore, developing countries' submission of their sovereign powers in BITs with the expectation of economic development may not necessarily materialize without their independent and concerted efforts to implement favourable economic policies.[80] This is because FDI can have positive and negative effects on host states—it can exponentially improve states' economic growth through job creation, increase in capital flow, and transfer of new technologies;[81] it can also constrain state policies, cause negative environmental disasters, and generate gross human rights abuses.[82]

ISA tribunals' interpretation of BITs negatively affects host states' regulatory space because tribunals protect investors' economic objectives at the expense of host states' public

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[77] See Augustus A Agyemang, "AFRICAN COURTS, THE SETTLEMENT OF INVESTMENT DISPUTES AND THE ENFORCEMENT OF AWARDS" (1989) 33 J Afr L 31 at 42; St John, *supra* note 42 at 255; Dolzer & Schreuer, *supra* note 35 at 20; Salacuse, *supra* note 47 at 440-44 (noting that other reasons include: "(2) relationship building; (3) economic liberalization; (4) encouraging domestic investment; and (5) improving governance and strengthening rule of law").

[78] See Susan D Franck, "Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law" (2007) 19 Pac McGeorge Global Bus & Dev LJ 337 at 339; Jason Webb Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence" (2011) 51 Va J Intl L 397; Jason Yackee, "DO BITS REALLY WORK? REVISITING THE EMPIRICAL LINK BETWEEN INVESTMENT TREATIES AND FOREIGN DIRECT INVESTMENT" in Karl P Sauvant & Lisa E Sachs, eds, *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS* (Oxford University Press, 2009) 379 at 381-82.

[79] See Mary Hallward-Driemeier, "Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit ... and They Could Bite" (2003) The World Bank Development Research Group Policy Research Working Paper No 3121 at 2. See also Andrew Newcombe, "Sustainable Development and Investment Treaty Law" (2007) 8 World Investment & Trade 357 at 358 (noting that an investment treaty is not concomitant to development because "FDI flows occur within a complex framework of public and private international law").

[80] As a result, some developing countries are terminating BITS with developed countries. See Diana Marie Wick, "THE COUNTER-PRODUCTIVITY OF ICSID DENUNCIATION AND PROPOSALS FOR CHANGE" (2012) 11 J Intl Bus & L 239; Salacuse, *supra* note 47 at 472-73. For example, South Africa, Indonesia, Nicaragua, Venezuela, Bolivia and Ecuador have terminated and signalled their intention to terminate BITs. See Butler & Subedi, *supra* note 37 at 44. Indeed, the Ecuadorian president declared that its "withdrawal from the ICSID is necessary for 'the liberation of our countries because [it] signifies colonialism, slavery with respect to transnationals, with respect to Washington, with respect to the World Bank.'" See "ICSID in crisis: Straight-jacket or investment protection?" (10 July 2009) online: *Bretton Woods Project* <www.brettonwoodsproject.org/art-564878> [perma.cc/QM77-NZ2Y].

[81] See Halil Kukaj & Faruk B Ahmeti, "The Importance Of Foreign Direct Investments On Economic Development In Transitional Countries: A Case Study Of Kosovo" (2016) 12:7 ESJ 288 (noting that FDI contributes to economic development in two main ways: (1) "augmentation of domestic capital," and (2) "the enhancement of efficiency through the transfer of new technology, marketing and managerial skills, innovation, and best practices").

[82] See Jiajia Zheng & Pengfei Sheng, "The Impact of Foreign Direct Investment (FDI) on the Environment: Market Perspectives and Evidence from China" (2017) 5:1 Economies 1; Hasrat Arjjumend, "REGULATORY CHILL, CORPORATE TAKEOVER AND ENVIRONMENTAL GOVERNANCE" (2017) 6 Intl J Current Advanced Research 7923; David Shea Bettwy, "THE HUMAN RIGHTS AND WRONGS OF FOREIGN DIRECT INVESTMENT: ADDRESSING THE NEED FOR AN ANALYTICAL FRAMEWORK" (2012) 11 Rich J Global L & Bus 239 at 242-43.

regulatory powers.[83] ISA tribunals' interpretation of BITs affects host states' regulatory space in two ways: (1) through compensatory awards in cases of an alleged breach of investors' proprietary rights, and (2) through host states' fear of arbitration claims, which discourage them from taking legitimate regulatory measures to protect human rights or the environment (regulatory chill).[84] In effect, host states' sovereignty to make and enforce law for the good of their citizens is largely undermined because of the ISA tribunal's interpretive role. Therefore, in addition to potentially promoting FDI, "[ISA] clearly poses a significant threat to the paradigm of public health, human rights, and sustainable development."[85]

Indeed, most investment disputes arise from host states' administrative or executive regulatory powers in response to local community pressure.[86] Host state obligations to local communities trigger investment claims in two scenarios. The first is where local community mobilization prompts state action—that is, local communities object to the investment approval process or the implementation of projects through mass protest or litigation, which prompts host states, in the exercise of their regulatory powers, to take actions that adversely affect investors' proprietary interests.[87] Second, it may arise from host states' inaction—that is, in situations where host states fail to protect foreign investment in the face of, for example, physical security risks posed by of local communities to investors' property.[88]

However, although the reason for a treaty breach may be a host state's need to respond to public concerns relating to environmental protection and human rights, ISA tribunals rarely consider human rights and environmental factors as sufficient to justify interference with the

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[83] See Joshua Boone, "HOW DEVELOPING COUNTRIES CAN ADAPT CURRENT BILATERAL INVESTMENT TREATIES TO PROVIDE BENEFITS TO THEIR DOMESTIC ECONOMIES" (2011) 1 Global Bus L Rev 187 at 188; Johannes Schwarzer, "Investor-State Dispute Settlement: An Anachronism Whose Time Has Gone" (December 2018), online (pdf): *The South Center* <www.southcentre.int/wp-content/uploads/2018/12/IPB12_Investor-State-Dispute-Settlement-An-Anachronism-Whose-Time-Has-Gone_EN.pdf> [perma.cc/8CHZ-T89W]. Schwarzer argues that ISA is counterproductive to developing states.

[84] See Kyla Tienhaara, "Regulatory chill and the threat of arbitration: A view from political science" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011).

[85] Matthew Rimmer, "THE CHILLING EFFECT: INVESTOR-STATE DISPUTE SETTLEMENT, GRAPHIC HEALTH WARNINGS, THE PLAIN PACKAGING OF TOBACCO PRODUCTS, AND THE TRANS-PACIFIC PARTNERSHIP" (2017) 7 Victoria UL & Just J 76 at 85.

[86] See Jeremy Caddel & Nathan M Jensen, "Which host country government actors are most involved in disputes with foreign investors," (2014) 120 Columbia FDI Perspectives 1. See *e.g. Pac Rim Cayman LLC v the Republic of El Salvador* (2016), (International Centre for Settlement of Investment Disputes) (Arbitrators: Professor Dr Guido Santiago Tawil, Professor Brigitte Stern, VV Veeder Esq).

[87] See Lorenzo Cotula & Mika Schröder, "Community perspectives in investor-state arbitration" (2017) at 10-19, online (pdf): *International Institute for Environment and Development* <pubs.iied.org/sites/default/files/pdfs/migrate/12603IIED.pdf> [perma.cc/NR3B-JWW5]. See *e.g. Aguas del Tunari, SA v Republic of Bolivia* (2005), (International Centre for Settlement of Investment Disputes) (Arbitrators: David D Caron, José Luis Alberro-Semerena, Henri C Alvarez) [*Aguas*]; *Metaclad Corporation v The United Mexican States* (2000), (International Centre for Settlement of Investment Disputes) (Arbitrators: Professor Sir Elihu Lauterpacht QC CBE, Mr Benjamin R Civiletti, Mr José Luis Siqueiros); *Técnicas Medioambientales Tecmed, SA v The United Mexican States* (2003), (International Centre for Settlement of Investment Disputes) (Arbitrators: Dr Horacio A Grigera Naón, Prof José Carlos Fernández Rozas, Mr Carlos Bernal Verea).

[88] See *e.g. Vestey Group Limited v Bolivarian Republic of Venezuela* (2016), (International Centre for Settlement of Investment Disputes) (Arbitrators: Professor Gabrielle Kaufmann-Kohler, Professor Horacio Grigera Naón, Professor Pierre-Marie Dupuy).

private rights of investors.[89] The marginal role of human rights and public considerations in ISA awards may be attributed to many factors, including the tribunal's composition of persons trained in commercial law and ISA's history of protecting investors' economic interests.[90] However, a more plausible reason is the tribunals' neglect of local communities' contribution in the analysis of investment rights and obligations.[91] Recognizing local community participatory rights in ISA proceedings may fundamentally change how tribunals interpret rights and obligations flowing from BITs or investment agreements. The next section examines this neglected area. It argues that the existing procedure in ISA is inadequate to secure support for local community participatory rights.

II. Local Community Representation—A Superfluous or Necessary Right in ISA Proceedings?

It is arguable that, because human rights and environmental protection arguments play a marginal role in ISA proceedings, it is unnecessary to allow local communities, who are directly impacted by investors' human rights and environmental abuse, to seek redress in ISA proceedings. Even if it is conceded that local community participation is necessary in ISA proceedings, it is arguable that states, as representatives of their citizens under international law, competently represent local community interests.[92] It may been noted in support of this position that "the crucial task of the IIR [international investment regime] is reviewing state behaviour after the establishment of the investment, and drawing the correct line between foreign investor rights and the state's regulatory authority."[93]

The foregoing argument, however, treats local communities as an absent actor in international investment law. It assumes that a state is an abstract entity whose interest always aligns with the local populace. This assumption is erroneous because local community interests may sometimes be at odds with states' interests.[94] Therefore, in such cases, host states may not be motivated to raise public concerns in ISA proceedings. For example, in cases where investors demand that states should ensure local communities' free and prior informed consent before embarking on investment projects, states' failure to obtain such approval before signing a BIT may

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[89] See *e.g.*, *Compañia del Desarrollo de Santa Elena SA v Republic of Costa Rica* (2000) at para 72, (International Centre for Settlement of Investment Disputes) (Arbitrators: L Yves Fortier CC QC, Sir Elihu Lauterpacht CBE QC, Professor Prosper Weil) (holding that "[e]xpropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains"). But see Yannick Radi, "Philip Morris v Uruguay: Regulatory Measures in International Investment Law: To be or Not To Be Compensated" (2018) 33 ICSID Rev 74.

[90] See Jason Webb Yackee, "PACTA SUNT SERVANDA AND STATE PROMISES TO FOREIGN INVESTORS BEFORE BILATERAL INVESTMENT TREATIES: MYTH AND REALITY" (2009) 32 Fordham Intl LJ 1550 at 1611.

[91] See Perrone, "Weakest Voices," *supra* note 16 at 384. See generally Odumosu, *supra* note 14; Muthucumaraswamy Sornarajah, "A Law for need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment" (2006) 6 Intl Environment Agreements 329 at 332.

[92] See generally Mark Chinen, "Complexity Theory and the Horizontal and Vertical Dimensions" (2014) 25 Eur J Intl L 703.

[93] See Perrone, "Weakest Voices," *supra* note 16 at 385.

[94] See generally Perrone, "Invisible Local Communities," *supra* note 16.

amount to willful negligence that may establish their liability in an ISA proceeding.[95] Also, states may not be motivated to further community interests in cases where they are complicit in human rights and environmental abuses. These situations cause a conflict of interest between states and local communities, which may dissuade states from advancing local community interests in ISA proceedings. Therefore, it is difficult to argue that states represent community interests in these cases.[96]

Again, it is arguable that the submission of amicus curiae briefs to ISA tribunals is an opportunity for local communities to present environmental protection and human rights perspectives to treaty claims.[97] Rule 37(2) of the ICSID Rules provides that "[a]fter consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'non-disputing party') to file a written submission with the Tribunal regarding a matter within the scope of the dispute."[98] Therefore, the submission of a non-disputing party (NDP) brief is an opportunity for civil societies and non-governmental organizations (NGOs) to raise the negative impacts of investors' activities on local communities in ISA proceedings.[99] Indeed, it has been noted that "the increased acceptance in international dispute settlement of NGO participation as amici curiae can be hailed as 'permitt[ing] the emergence in international law of the idea of civil society as an important participant in the resolution of investment disputes.'"[100]

However, submission of NDP briefs is an insufficient procedure to represent local community interest or in ISA proceedings because "amicus was never meant as a substitute for the right of standing."[101] Aside from the fact that they "are grossly underutilised," their scope and application are limited.[102] This is because, unless investors' human rights abuse is in issue or put in issue by one of the parties during the proceeding, an NDP brief remains inadmissible.[103] Since arbitrators have discretionary powers to admit or reject NDP briefs, it is not uncommon to reject

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[95] See Cotula & Schröder, *supra* note 87 at 3. In such cases, investors may claim that the state failed to guarantee the physical security of their investments.
[96] *Ibid*.
[97] Francioni argues that "amicus curiae participation has become and will remain in the foreseeable future an important feature of the administration of justice in the field of foreign investments." Francesco Francioni, "Access to Justice, Denial of Justice and International Investment Law" (2009) 20 Eur J Intl L 729 at 740. See also Joseph (Yusuf) Saei (2017) "Amicus curious: structure and play in investment arbitration" (2017) 8 Transnat'l Legal Theory 247.
[98] International Centre for Settlement of Investment Disputes, *ICSID CONVENTION, REGULATIONS AND RULES*, (ICSID, 2006) [*ICSID Rules*]; Article 15 of the *UNCITRAL Rules* has a similar provision. See UNCITRAL, *Rules on Transparency in Treaty-based Investor-State Arbitration*, (UN, 2021) at 36 [*UNCITRAL Rules*].
[99] See James Harrison, "Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?" in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni, eds, *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 396 at 413 ("[t]he language and obligations of human rights is the chosen method by which a great number of amici have chosen to frame their arguments. The noise of 'social justice' is translated into the 'signal' of human rights").
[100] Dr Eric De Brabandere, "NGOs and the 'Public Interest': The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes" (2011) 12 Chi J Intl L 85 at 111, citing Francioni, *supra* note 97 at 742.
[101] Van Harten, Kelsey & Schneiderman, *supra* note 19 at 4. See also Fernando Dias Simoes, "Myopic Amici: The Participation of Non-Disputing Parties in ICSID Arbitration" (2017) 42 NCJ Intl L 791.
[102] Nicolette Butler, "Non-Disputing Party Participation in ICSID Disputes: Faux Amici?" (2019) 66 Nethl Intl L Rev 143 at 172.
[103] See *Bernhard von Pezold and Others v Republic of Zimbabwe* (2012) at para 57, (International Centre for Settlement of Investment Disputes) (Arbitrators: Mr L Yves Fortier CC QC, Professor David AR Williams QC, Professor An Chen) [*Bernhard*].

NDP briefs on this ground.[104] Therefore, ISA tribunals have the power but no obligation to accept NDP briefs.[105]

Similarly, NDP briefs can be admitted only in cases where third parties are neutral and independent. Where the NDP has a connection to one of the parties (even a distant one), the NDP may be adjudged as biased.[106] Therefore, ISA tribunals may reject a brief because the NDP has a strong public interest in the outcome of the proceedings. For example, it has been held that, where the NDP's participation will unfairly prejudice the claimant through its public interests, the brief ought to be rejected.[107] The independence and neutrality criteria for accepting NDP briefs raise peculiar complexities when interpreted together with Rule 37(2) of the ICSID Rules, which requires NDPs to have "significant interest" in ISA proceedings. It is difficult to imagine NGOs and civil organizations, who represent a substantial (public) interest,[108] maintaining neutrality or independence from a local community or host state's cause.[109]

Even if ISA tribunals unconditionally accept NDP briefs, NDPs are not physically represented in any aspect of ISA proceedings, and the tribunals limit the length and number of the briefs.[110] NDPs are therefore not privy to the tribunals' records or documents submitted by parties.[111] In any event, it is doubtful whether the submission of briefs enhances NDPs' access to justice in ISA proceedings. For example, at a United Nations' round table discussion on access to justice in ISA proceedings, a participant, who is a member of the local community, noted that "if you believe amicus works, that is false."[112] Another participant lamented that "[t]hey were talking about my land, my territory, my life, my existence, but I didn't have a voice."[113] In sum, it is important to differentiate between participation by "affected persons" (local communities) and

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[104] See Harrison, *supra* note 99 at 415 (noting that "[t]here is no general legal principle which gives rise to an obligation upon a tribunal to consider, either explicitly or implicitly, arguments made by an *amicus curiae*"). See also *Bernhard*, *supra* note 103 at para 62.

[105] See *Aguas*, *supra* note 87; Nathalie Bernasconi-Osterwalder, "Chevron v Ecuador: The arbitral tribunal in Chevron v. Ecuador has heightened concerns about the legitimacy of the proceedings after it closed them off to the public" (April 2011), online: *International Institute for Sustainable Development* <www.iisd.org/project/chevron-v-ecuador> [perma.cc/W6V6-G55E].

[106] See Lucas Bastin, "Amici Curiae in Investor-State Arbitration: Eight Recent Trends" (2014) 30 Arb Intl 125 at 141.

[107] See *Bernhard*, *supra* note 103 at para 62 ("We are of the view that the circumstances surrounding these Petitioners are such that the Claimants may be unfairly prejudiced by their participation and the Application must therefore be denied").

[108] See *Methanex Corporation v United States of America* (2005) 44 ILM 1345 at para 35 (International Centre for Settlement of Investment Disputes) (Arbitrators: William Rowley QC, Warren Christopher Esq, VV Veeder QC) [*Methanex*] ("Amici are not experts; such third persons are advocates (in the non-pejorative sense) and not 'independent' in that they advance a particular case to a tribunal"); Rule 37(2) of the *ICSID Rules* mandates that, to qualify as amici, a non-disputing party must have a significant interest in the proceeding. See *ICSID Rules*, *supra* note 98 at 117.

[109] See Eugenia Levine, "Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation" (2011) 29 BJIL 200 at 215-16.

[110] See *United Parcel Service of America Inc v Government of Canada* (2001) at para 69, (International Centre for Settlement of Investment Disputes) (Arbitrators: Dean Ronald A Cass, L Yves Fortier CC QC, Justice Kenneth Keith) [*United Parcel*].

[111] *Ibid*.

[112] Michelle Chan & Kanika Gupta, "Impacts of the International Investment Regime on Access to Justice: Roundtable Outcome Document (18 October 2017) at 9, online (pdf): *UN OHCHR* <www.ohchr.org/Documents/Issues/Business/CCSI_UNWGBHR_InternationalInvestmentRegime.pdf> [perma.cc/G765-8VST].

[113] *Ibid.*

participation by "concerned persons" (amicus curiae).[114] While the former is personal, the latter is indirect.

As such, although investment activities negatively affect local communities, they remain invisible in ISA proceedings.[115] In *United Parcel Service of America Inc v Government of Canada* ("*United Parcel*"), the tribunal noted that third parties are not rights holders in investment arbitration.[116] It held that parties to ISA proceedings are investors and states respectively. Also, the tribunal in *Corn Products International*, *Inc. v Mexico* held that "[t]he paradigm in investor-States disputes, . . . is a dispute between the first party (nearly always the investor) as plaintiff and the second party (nearly always the host state or state agency) as respondent. There is no third party."[117] These decisions portray states as "a not-so-abstract but artificial entity without a population, viewed only as the government and territory."[118] It neglects the socio-political and economic context that surrounds local community participation in the investment regime.[119] This state of affairs is a major drawback in the access to justice campaign in ISA proceedings.[120]

It is no gainsaying that there is a need for an inclusive structure that creates corresponding rights and obligations between investors, host states, and local communities in ISA proceedings. However, this access to justice problem poses a dilemma—it raises the question of whether to reform ISDS or create a new international dispute resolution framework that reflects an inclusive structure. Although some commentators argue that ISDS cannot accommodate this inclusive reform,[121] other scholars enthusiastically support the reform within the ISDS regime.[122] The next section contributes to this debate—it examines the *United Nations Guiding Principles on Business and Human Rights*,[123] and the proposal to solve disputes relating to businesses' human rights abuse

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[114] See Odumosu, "ICSID," *supra* note 14 at 314.

[115] See Odumosu, "Locating Third World Resistance," *supra* note 14 at 436. See also Katia Fach Gomez, "RETHINKING THE ROLE OF AMICUS CURIAE IN INTERNATIONAL INVESTMENT ARBITRATION: HOW TO DRAW THE LINE FAVORABLY FOR THE PUBLIC INTEREST" (2012) 35 Fordham Intl LJ 510 at 528.

[116] *United Parcel*, *supra* note 110 at para 41. The Tribunal held that "[t]he Investor and Canada are the parties whose rights and obligations are to be determined by the arbitration, and no one else's." See also *Methanex*, *supra* note 108 at para 27.

[117] Case No ARB(AF)/04/01 (2009), at para 4 (International Centre for Settlement of Investment Disputes) (Arbitrator: Andreas F Lowenfeld).

[118] Odumosu, "Locating Third World Resistance," *supra* note 14 at 445 ("By discounting popular protests in investment dispute settlement, the state is constructed as a not-so-abstract but artificial entity without a population, viewed only as the government and territory").

[119] Rajagopal condemns the oversimplification of local actors' role in social movements. He objects to the role of traditional state as the sole defender of the rights of individuals and communities. See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press, 2003) 11-13.

[120] Indeed, it has been noted that "[h]istorically, investor-state arbitration emerged out of a concern to 'depoliticise' investment disputes, placing their settlement within the purview of legal adjudication. As would be expected, arbitral jurisprudence emphasises the legal, technical dimensions of disputes. But it also struggles to understand and address the inevitable political dimensions." See Cotula & Schröder, *supra* note 87 at 24.

[121] See generally Perrone "Invisible Local Communities," *supra* note 16.

[122] See Laryea, *supra* note 8; Barnali Choudhury, "SPINNING STRAW INTO GOLD: INCORPORATING THE BUSINESS AND HUMAN RIGHTS AGENDA INTO INTERNATIONAL INVESTMENT AGREEMENTS" (2017) 38 U Pa J Intl L 425; P Acconci, "Is It Time to Integrate Non-investment Concerns into International Investment Law?" (2013) 10 TDM 1.

[123] UNOHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, (UN, 2011) [*Guiding Principles*].

with a special BHR arbitration mechanism. It asks whether BHR arbitration is a more efficient means to give local communities access to justice than an ISDS reform.

III. Access to Justice for Local Communities—A Better Model in Business and Human Rights Arbitration?

The *United Nations Guiding Principles on Business and Human Rights* (*Guiding Principles*) is a product of the United Nations High Commissioner's mandate to the Special Representative of the Secretary-General (SRSG) on the issue of human rights, transnational corporations, and other business enterprises.[124] The SRSG was charged with the obligation to produce a report that would identify standards of corporate social responsibility (CSR), clarify often used CSR concepts such as "complicity" and "sphere of influence," develop materials and methodologies for human rights impact assessments, compile best practices of states and corporations, and elaborate on the regulatory role of states with regard to human rights.[125] In 2011, the SRSG, John Ruggie, completed his work and submitted the *Guiding Principles*, a set of thirty-one recommendations containing foundational and operational principles, to the United Nations Human Rights Council.[126] The Council unanimously approved the document.[127] Although there had been previous efforts, the *Guiding Principles* became the first widely accepted standard document that seeks to prevent and address the risk of adverse impact on human rights linked to business activities.[128]

The *Guiding Principles*' conceptual framework is grounded in the three pillars of "Protect, Respect, and Remedy."[129] To implement the third pillar—that is, providing victims of human

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[124] See generally Martin Jena & Karen E Bravo, *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press, 2015).

[125] UN Commission on Human Rights, *Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises*, UNOHCHR, 2005, UN Doc E/CN.4/RES/2005/69 at 1.

[126] See UN Human Rights Council, *Human rights and transnational corporations and other business enterprises*, UNHRC, 17th Sess, UN Doc A/HRC/RES/17/4 (2011).

[127] *Ibid* at 4; *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, UNHRC, 17th Sess, UN Doc. A/HRC/17/31 (2011) [Report to UNHRC].

[128] See generally John Gerard Ruggie, "The Social Construction of the UN Guiding Principles on Business & Human Rights" (2017) HKS Working Paper No RWP17-030; John G Ruggie, "Presentation of Report to United Nations Human Rights Council, Professor John G Ruggie, Special Representative of the Secretary-General for Business and Human Rights" (Opening Statement delivered at the UNHRC, Geneva 30 May 2011) [unpublished].

[129] Report to UNHRC, *supra* note 127 at para 6:

> The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.

See generally, John Ruggie, "REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES" (2011) 29 Netherlands Q Human Rights 224.

rights violations in the course of business greater access to an effective remedy[130]—a private group of international practicing lawyers and academics under the aegis of the Center for International Cooperation proposed a special international arbitration where local communities can claim compensatory damages for environmental protection and human rights abuse arising from business activities in host states.[131]

This new face of international arbitration is regulated by the procedural framework of the Hague Rules, which are based on the 2013 UNCITRAL Arbitral Rules.[132] The "Draft Arbitration Rules on Business and Human Rights" (Draft Rules) was released in June 2019 by the Business and Human Rights Arbitration Working Group[133] and was officially launched at a ceremony in The Hague on 12 December 2019.[134] Generally, the Hague Rules focus on the special requirements of human rights issues in business disputes.[135] They are drafted in a way that ensures that the BHR arbitral structure meets the *Guiding Principles*' requirements of legitimacy, equitability, procedural transparency, accessibility, predictability, and rights-compatibility of outcomes.[136] In effect, the Hague Rules provide a set of procedures for the arbitration of disputes related to the impact of businesses on human rights. The scope of the Hague Rules is not limited to the type of parties to the arbitration proceedings. Parties can extend the scope of arbitrable issues if they agree to resolve the issues with the Hague Rules. To be clear, the Hague Rules do not create new international obligations, rather they are a voluntary procedural tool for dispute settlement that parties can choose to apply to resolve their disputes.[137] Essentially, it is the adoption of the Hague Rules that classifies an arbitration proceeding as a BHR arbitration. In other words, notwithstanding the subject matter of the dispute or the form of the parties' agreement (whether

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[130] See Jonathan Drimmer & Lisa J Laplante, "The Third Pillar: Remedies, Reparation, and the Ruggie Principles" in Jena Martin & Karen E Bravo, eds, *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press, 2015) 316 at 323.

[131] See "The Hague Rules on Business and Human Rights Arbitration" online: *Center for International Legal Cooperation* <www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/> [perma.cc/HTL5-K4R6].

[132] Claes Cronstedt, Jan Eijsbouts & Robert C Thompson, "International arbitration: remedy for victims in business and human rights disputes" (10 February 2017), online (blog): *Business & Human Rights Resource Centre* <https://www.business-humanrights.org/fr/derni%C3%A8res-actualit%C3%A9s/international-arbitration-remedy-for-victims-in-business-and-human-rights-disputes/> [perma.cc/L7AT-Q4Q4].

[133] See Bruno Simma et al, "DRAFT ARBITRATION RULES ON BUSINESS AND HUMAN RIGHTS" (2019) online (pdf): *Center for International Legal Cooperation* <www.cilc.nl/cms/wp-content/uploads/2019/06/Draft-BHR-Rules-Final-version-for-Public-consultation.pdf> [perma.cc/B5N9-EW2N] [Draft Rules].

[134] See Judge Bruno Simma et al, "The Hague Rules on Business and Human Rights Arbitration" (2019) online (pdf): *Center for International Legal Cooperation* <www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf> [perma.cc/3ZXU-JFF9] [Simma, "Hague Rules"].

[135] *Ibid*.

[136] *Ibid*. See also Bruno Simma et al, "INTERNATIONAL ARBITRATION OF BUSINESS AND HUMAN RIGHTS DISPUTE: ELEMENTS FOR CONSIDERATION IN DRAFT ARBITRAL RULES, MODEL CLAUSES, AND OTHER ASPECTS OF THE ARBITRAL PROCESS" (2018) at 5, online (pdf): *Center for International Legal Cooperation* <https://www.cilc.nl/cms/wp-content/uploads/2019/01/Elements-Paper_INTERNATIONAL-ARBITRATION-OF-BUSINESS-AND-HUMAN-RIGHTS-DISPUTE.font12.pdf> [perma.cc/2F2S-QEX2] [Simma, "Draft Elements"].

[137] See Simma, "Hague Rules," *supra* note 134 at 13 ("[n]othing in these Rules should be read as creating new international legal obligations or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with respect to human rights").

contract or treaty), once parties adopt the Hague Rules to resolve the dispute, the proceedings become a BHR arbitration.[138]

Therefore, the Hague Rules may generally be described as a bespoke arbitration procedural rule that could be applied to disputes arising from various industries including commerce, sports, labour, trade, and investment. Parties to the arbitration agreement may include "business entities, individuals, labor unions and organizations, States, State entities, international organizations and civil society organizations, as well as any other parties of any kind."[139] By adopting the Hague Rules, parties impliedly deem their disputes to have arisen out of a commercial relationship as stated in Article 1 of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (*New York Convention*).[140] Parties, especially states, also expressly agree to waive immunity relating to the execution of the arbitration award when adopting the Hague Rules.[141] It should be noted, however, that the Hague Rules do not address issues relating to the enforcement of arbitral awards, which are governed by national laws and various treaty obligations, including, in most cases, the *New York Convention*.[142] Also, the Hague Rules do not address other modalities for ensuring compliance with an award, such as monitoring by intergovernmental institutions, non-governmental organizations, or multi-stakeholder initiatives.

The Hague Rules aim to provide a means for rights holders whose human rights are infringed by business activities to access effective remedies, as well as serving as a risk management strategy for businesses themselves. Therefore, businesses, in proceedings to enforce their contractual human rights obligations, for example in supply chain and development contracts, can adopt the Hague Rules. The International Bureau of Permanent Court of Arbitration (PCA) is the repository institution for BHR arbitration.[143] Where parties have not agreed on an arbitrator, the appointing authority is the Secretary-General of the PCA.[144] Parties can agree to submit their disputes to a BHR Arbitral panel either contractually or in a treaty. This is because Article 1(1) of the Hague Rules provides that "[w]here parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under these Rules, then such disputes shall be settled in accordance with these Rules."[145]

The Hague Rules are meant to be employed where it is reasonable to presume that all parties have a minimum of resources at their disposal to cover the basic costs of the arbitration and their own representation, either by themselves or through a "legal aid" system, contingency funding, or an agreement on the asymmetric distribution of costs and deposits between the parties. This provision presupposes that the Hague Rules are unsuitable in cases where there is an imbalance in the parties' economic power and strength. Reference to the unequal bargaining power of parties may be a defence to the jurisdiction of a BHR tribunal that is applying the Hague

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[138] Article 1 (1) of the Hague Rules provides that "[t]he characterization of the dispute as relating to business and human rights is not necessary for jurisdiction where all the parties to the arbitration have agreed to settle a dispute under these Rules." *Ibid*, art 1(1).
[139] *Ibid* at 3.
[140] *Ibid*, art 1(2).
[141] *Ibid*.
[142] *Ibid* at 4.
[143] *Ibid*, art 1(5).
[144] *Ibid*, art 6.
[145] *Ibid*, art 1(1).

Rules.[146] BHR arbitration is based on a contractual framework that seeks to settle disputes between victims or local communities and businesses, which are often MNCs.[147] Parties can adopt the Hague Rules in ad hoc proceedings or proceedings conducted by an arbitral institution. The BHR tribunal panel will include arbitrators with expertise appropriate to business and human rights disputes.[148] In effect, the Hague Rules arbitral framework offers: (1) a potentially neutral forum for dispute resolution, independent of both parties and their states; (2) a specialized dispute resolution process wherein parties select competent and expert adjudicators on their case, (3) the possibility of obtaining binding awards that are subject to limited judicial intervention and enforceable across borders, and (4) the autonomy to choose procedural and substantive laws for the proceedings. In sum, BHR arbitration is a specialized arbitration that provides a "one-stop contractually-selected forum for [parties and] businesses to have their BHR disputes solved in a fair, transparent, and unbiased manner."[149]

The BHR Arbitration Working Group describes international arbitration as holding "great promise" for business and human rights disputes.[150] However, some commentators have indicated some potential challenges. They argue that arbitrating human rights with business claims raises some concerns because (i) there may not be real consent to arbitrate between victims of human rights abuse and businesses; (ii) there is inequality of arms (bargaining power) between victims and businesses; (iii) choice of law rules may create uncertainty in the applicable rules to arbitral proceedings; (iv) the role of states in human rights abuses may cause jurisdictional problems in the tribunals; (v) enforcement of judgment may be refused on the ground that human rights are not arbitrable and that the dispute falls under the public policy exceptions in the *New York Convention*.[151] Some of these concerns, which relate to the suitability of arbitration for human rights disputes, will be further explored below.

However, beyond these BHR arbitration concerns, parallels can be drawn between ISA and BHR arbitration. Both systems decentralize and privatize the decision-making process— they seek to avoid national courts that are dysfunctional, corrupt, politically influenced, or unqualified.[152] Also, the ICSID and Hague Rules are both dependent on parties' substantive rights and obligations as set out in treaties and contracts respectively. One fundamental difference, however, is the nature of protection offered in both forums. BHR arbitration protects local communities from investors' human rights abuses arising from investment activities. In contrast, ISA protects investors'

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[146] For example, MNCs may object to the application of the Hague Rules where local communities cannot provide security for cost or where local communities are unable to secure the representation of legal aid or contingency fund agreement with third parties.

[147] See Cronstedt, Eijsbouts & Thompson, *supra* note 20.

[148] See Antoine Duval & Catherine Dunmore, "The Case for a Court of Arbitration for Business and Human Rights" (2018) 2 Asser Institute Intl & European L Policy Brief.

[149] Simma, "Draft Elements," *supra* note 136 at 5.

[150] Cronstedt, Eijsbouts & Thompson, *supra* note 20.

[151] See generally Ioana Cismas & Sarah Macrory, "The Business and Human Rights Regime under International Law: Remedy without Law?" in J Summers & A Gough, eds, *Non-State Actors and International Obligations: Creation, Evolution and Enforcement* (Brill, 2018) at 224; Katerina Yiannibas, "The Adaptability of International Arbitration: Reforming the Arbitration Mechanism to Provide Effective Remedy for Business-related Human Rights Abuses" (2018) 36 Netherlands Q Human Rights 214; Antony Crockett & Marco de Sousa, "Arbitrating Business and Human Rights Disputes: Viable for Victims?" (2018) 7 Asian Dispute Rev 104.

[152] See Stephan Schill, "Editorial: The Mauritius Convention on Transparency" (2015) 16 J World Investment & Trade 201 at 203 (describing "the dominant conceptualization of investor-State dispute settlement as a form of commercial arbitration and private justice").

proprietary rights from risks arising from local community and host state activities.[153] Similarly, participatory rights in ISA and BHR arbitration also differ—while local communities do not directly participate in ISA proceedings, communities have direct access and participation in BHR arbitration proceedings.[154] The Hague Rules clearly distinguish between third-party intervention and amicus curiae participation.[155] In sum, BHR arbitration is an inclusive arbitral structure that gives victims of MNC's human rights abuses, who would ordinarily be precluded from directly participating in ISA proceedings, access to justice and effective remedy.

The parallels between ISA and BHR arbitration raise the question of whether, considering the prospect of creating a one-stop shop for business and human rights abuse, BHR arbitration is a necessary governance effort in international arbitration. In other words, will an ISDS reform that includes elements of the Hague Rules achieve the same result as BHR arbitration? The next section answers this question. It argues that ISDS reform will avoid parallel arbitration proceedings that are time consuming, costly, and prone to abuse. Also, it will prevent additional procedural challenges to an area of law that is largely controversial.

IV. Is BHR Arbitration Worth the Trouble? — Towards an ISDS Reform

The problem with BHR arbitration starts with its lack of a legitimacy appeal.[156] Generally, privatizing disputes through international arbitration generates procedural and democratic concerns.[157] The legitimacy argument against international arbitration is exacerbated in proposals that seek to arbitrate human rights claims. This is because "[t]he classical concept of protection of human rights is generally perceived as appertaining to the public sphere."[158] States exercise sovereign powers over human rights issues through statutory regulations, constitutional provisions, and dispute settlement in domestic courts. The introduction of BHR arbitration implies that states will surrender their juridical sovereignty to private arbitrators, in a similar manner as the submission under the *ICSID Convention*. It also means that victims and local communities, who do not have equal bargaining power with MNCs, will be left to negotiate public adjacent matters without state support or backing. It is difficult to imagine states (especially developing ones) who are dissatisfied with the present ISA framework permitting further erosion of their juridical

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[153] See Cronstedt, Eijsbouts & Thompson, *supra* note 20 at 26.

[154] See Simma, "Hague Rules," *supra* note 134, art 19(2):

> The arbitral tribunal may allow one or more third persons to join in the arbitration as a party provided such person is a party to or a third party beneficiary of the underlying legal instrument that includes the relevant arbitration agreement, unless, after giving all parties and the person or persons to be joined the opportunity to be heard, the arbitral tribunal finds that joinder should not be permitted.

[155] See *ibid*, art 28.

[156] See Stephan Schill, "Conceptions of Legitimacy of International Arbitration" in David Caron, et al, eds, *Practising Virtue: Inside International Arbitration* (Oxford University Press, 2015) at 106. See also *Report of the Launch Symposium of the Hague Rules on Business and Human Rights* (12 December 2019), online: Center for International Legal Cooperation <https://www.cilc.nl/cms/wp-content/uploads/2020/02/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_Launch-Report-.pdf> [https://perma.cc/MDJ7-P3L5].

[157] See generally Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (University of Toronto Press, 2013).

[158] Frances Raday, "Privatizing Human Rights and the Abuse of Power" (2000) 13 Can JL & Jur 103 at 103; Hugh Collins, "On the (In)compatibility of Human Rights Discourse and Private Law" (2012) LSE Law Society and Economy Working Paper No 7/2012, online: < https://www.lse.ac.uk/collections/law/wps/WPS201207_Collins.pdf> [https://perma.cc/LW55-VPKD].

sovereignty through BHR arbitration because privatizing human rights claims between victims, local communities, and MNCs has sovereignty implications.

The independent implementation of BHR arbitration creates a web of procedural complexities for users, especially when interpreted in light of other proposals to resolve investment disputes such as the multilateral investment court,[159] ICSID Investor-State Dispute Settlement,[160] and the Union of South American Nations (UNASUR) Arbitration Center.[161] The BHR arbitration tribunal's coexistence with these dispute resolution initiatives in investment law may create fragmentation of international law which may result in parallel proceedings.[162] The Study Group of the International Law Commission (ILC), in its 2006 Report, recognizes the fragmentation of international law arising from duplication of efforts in different fields of international law including trade law, environmental law, investment law, and human rights law as a concerning issue.[163] The ILC Group describes fragmentation as the "emergence of specialized and relatively autonomous spheres of social action and structure... [which in turn] has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice."[164] The problem is that the law-making process in a specialized field of international law takes place with relative ignorance of the legislative and institutional activities in adjoining fields—in this case, business and human rights and investment law. This results in conflict between rules or rule systems and deviating institutional practices.[165] The Report defines a conflict as a situation where two rules or principles suggest different ways of dealing with a problem.[166]

Considering the similarity in the subject matter, parties (states and MNCs), and instruments that create parties' obligations in international investment law and BHR, the introduction of BHR

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[159] See generally Hongling Ning & Tong Qi, "Multilateral Investment Court: The Gap between the EU and China" (2018) 4 Chines J Global Governance 154. See also, *The State of the Union, 2017: A Multilateral Investment Court* online: European Commission <http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf> [https://perma.cc/L4EQ-PK9M]; José Manuel Alvarez Zaráte, "Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?" (2018) 59 Boston College L Rev 2765.

[160] See *About ICSID*, online: ICSID <https://icsid.worldbank.org/en/Pages/about/default.aspx> [https://perma.cc/UP7S-BCWP].

[161] See Daniela Páez-Salgado & Fernando Pérez-Lozada, "New Investment Arbitration Center in Latin America: UNASUR, A Hybrid Example of Success or Failure?" (27 May 2016), online: Kluwer Arbitration <http://arbitrationblog.kluwerarbitration.com/2016/05/27/unasur/> [https://perma.cc/QKR6-DL7X]. See also "South American Union of Nations Constitutive Treaty" (2009) 15 L & Bus Rev Americas 465. The constitutive countries to the UNASUR Treaty, Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela, signed the treaty on 23 May 2008.

[162] See Choudhury, *supra* note 122 at 477.

[163] See Martti Koskenniemi ed, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UNGA A/CN.4/L.682 Corr.1 (13 April 2006), online: International Law Commission <https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> [https://perma.cc/E5G3-TE8B].

[164] *Ibid* at 11.

[165] The Group gave an example of the procedural and institutional complexity arising from the dispute arising from the "MOX Plant" nuclear facility at Sellafield, United Kingdom, where three institutional procedures—an Arbitral Tribunal set up under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS), the compulsory dispute settlement procedure under the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), and the European Community and Euratom Treaties within the European Court of Justice (ECJ)—applied to the same facts of a case. *Ibid* at 12.

[166] *Ibid* at 19.

arbitration may be an unnecessary governance effort.[167] This is because a state may enter into a contract with a foreign investor and, at the same time, have a treaty relationship with the foreign investor's home state. In such cases, a business or commercial contract may double as an investment instrument.[168] In effect, commercial contracts play an important role in investment law because states' obligations can arise from a treaty or contract.[169] Therefore, a foreign investor may rely on an existing treaty between its home state and the host state to protect itself in a commercial contract with the host state.[170] Indeed, it has been noted that "an investment treaty would transform a mere contractual obligation between state and investor into an international law obligation, in particular, if the treaty included a clause obliging the state to respect such contract."[171] In sum, a BHR issue that arises from a commercial contract between a state and foreign investor may double as an investment dispute that falls under a treaty protection.

Specialized autonomous rules of ISA and BHR arbitration that cover similar issues exacerbate the potential for further fragmentation of international law.[172] This is because various facts or multiple causes of action may lead to an investment or commercial dispute contemporaneously or consecutively.[173] There are already incidents of parallel proceedings in ISA[174] and international commercial arbitration.[175] Adding BHR arbitration to the existing arbitral regimes exacerbates the potential for fragmentation of international law which may create parallel proceedings across two or more arbitral regimes.[176] It may be argued that there is no likelihood of

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[167] See Veijo Heiskanen, "Of Capital Import: The Definition of 'Investment' in International Investment Law" in Anne K Hoffmann, ed, *Protection of Foreign Direct Investments through Modern Treaty Arbitration: Diversity and Harmonisation* (Swiss Arbitration Association, 2010) 51 at 53.

[168] Article 1(2) provides that "[t]he parties agree that any dispute that is submitted to arbitration under these Rules shall be deemed to have arisen out of a commercial relationship or transaction…." Hague Rules, *supra* note 21, art 1(2).

[169] See Muthucumaraswamy Sornarajah, *supra* note 53 at 301. Indeed, it has been noted that BITs facilitate international commercial transactions. See Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (Leiden: Martinus Nijhoff, 1995) at 12.

[170] In effect, foreign investors can rely on procedural rights conferred by a treaty between the host state and their home state. See Bonnitcha, Poulsen & Waibel, *supra* note 7 at 71.

[171] Catherine Yannaca-Small, "Interpretation of the Umbrella Clause in Investment Agreements" in *International Investment Law: Understanding Concepts and Tracking Innovations—A Companion Volume to International Investment Perspectives* (OECD, 2008) at 101.

[172] See generally Choudhury, *supra* note 122.

[173] See Hanno Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (Oxford University Press, 2013) at 40, 42, 70-71.

[174] See Hanno Wehland, "The Regulation of Parallel Proceedings in Investor-State Disputes" (2016) 31 ICSID Rev 576; Robin F Hansen, "Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties" (2010) 73 Modern L Rev 523; Charles N Brower and Jeremy K Sharpe, "Multiple and Conflicting International Arbitral Awards" (2003) 4 J World Investment & Trade 211.

[175] See Norah Gallagher, "Parallel Proceedings, Res Judicata and Lis Pendens: Problems and Possible Solutions" in Loukas A Mistelis & Julian DM Lew, eds, *Pervasive Problems in International Arbitration (Kluwer Law International* (2006) at 329; Bernardo M Cremades, Ignacio Madalena, "Parallel Proceedings in International Arbitration" (2008) 24 Arb Intl 507.

[176] Creating BHR arbitration tribunals that touch on investment issues exacerbates the risk of parallel proceedings, not only with ISA and other investment dispute methods but also with domestic courts. A parallel proceeding played out in the Bophal case where, notwithstanding that an Ecuadorian court found Chevron liable for environmental and human rights abuse, the Permanent Court of Arbitration discharged Chevron from obligations arising from the court judgment because of Ecuador's treaty breach. It is arguable that this procedural maneuvering is one of the reasons

parallel proceedings because while ISA focuses on disputes between MNCs (who are usually claimants) and states, BHR arbitration focuses on disputes between states, MNCs, and local communities, as well as businesses inter se. However, this argument overlooks the overlapping issues that arise from both proceedings. For example, in a case before an ISA tribunal, a state may raise its human rights and environmental obligation as a defence to a treaty or contract breach. As stated above, most ISA tribunals do not consider these factors strong enough to justify a treaty or contract breach.[177] Now, with the introduction of BHR arbitration, local communities (and states) may sue MNCs on the same facts as those before ISA tribunals for human rights and environmental violations. If the BHR arbitral tribunal finds in favour of the claimant(s), it raises the question of whether the BHR arbitration award that recognizes states' and MNCs' breach of human rights can be used as a defence—or justification for a state's breach of its contractual or treaty obligation—in an ISA proceeding involving MNCs and states only. Assuming that the BHR award cannot be used as an outright defence, it raises the question of whether one award can be set off against another, especially in cases where awards granted in both arbitral tribunals are almost the same. The scenario described here, with its peculiar procedural challenges, could be avoided if local communities are granted standing in ISA proceedings and can counterclaim against MNCs for their human rights and environmental violations. Although it is important, in some ways, to developed specialized regimes, it is more prudent to establish an investment system where disputes are solved in a one-stop shop.

Apart from the fact that fragmentation of international law that exacerbates the potential for parallel proceedings will result in increased cost of prosecution, delay in proceedings, and inconsistent awards,[178] it will also have direct implications for corporate accountability and access to justice for victims of business and human rights abuse. This is because multiple arbitral forums that touch on investment disputes will contribute to governance and procedural gaps that MNCs may continue to exploit.[179] MNCs that are aware of local communities' financial plight may file claims in different arbitral tribunals and national courts to weaken victim and local community resistance.[180] Issues regarding enforcement of awards and appropriate jurisdiction to hear claims between local communities and MNCs are further procedural issues that may increase the financial burden of local communities. Therefore, the financial burden of accessing various arbitral tribunals and courts for enforcement and the potential for corporate procedural abuse may weaken or discourage victims and local communities from making even the most viable claim.[181]

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why the Bophal community is without legal remedy since 1984. See Apoorva Mandavilli, "The World's Worst Industrial Disaster is Still Unfolding," *The Atlantic* (10 July 2018), online: <https://www.theatlantic.com/science/archive/2018/07/the-worlds-worst-industrial-disaster-is-still-unfolding/560726/> [https://perma.cc/KPH9-FZUQ].

[177] *Contra* Debadatta Bose, "*David R Aven v Costa Rica*: The Confluence of Corporations, Public International Law and International Investment Law," Case Comment, (2020) 35 ICSID Rev 20.

[178] See Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Martinus Nijhoff, 2011) at 281. See generally Gilles Cuniberti, "Parallel Litigation and Foreign Investment Dispute Settlement" (2006) 21 ICSID Rev 381; Vaughan Lowe, "Res Judicata and the Rule of Law in International Arbitration" (1996) 8 African J Intl & Comp L 38; Jamie Shookman, "Too Many Forums for Investment Disputes? ICSID Illustrations of Parallel Proceedings and Analysis" (2010) 27 J Intl Arbitration 361.

[179] See Jose Antonio Puppim De Oliveira et al, "Corporations and the 'Governance Gaps' for Sustainable Development: An Exploratory Analysis" (2018) 1 Academy of Management Annual Meeting Proceedings 17291.

[180] See Emmanuel Gaillard, "Abuse of Process in International Arbitration" (2017) 32 ICSID Rev 17.

[181] See generally Diana Rosert, The Stakes are High: A Review of the Financial Costs of Investment Treaty Arbitration (International Institute for Sustainable Development, 2014).

It could be argued that the Hague Rules, when adopted by parties in ISA proceedings, may serve the same purpose as they would in BHR arbitration proceedings. This is because parties can adopt the Hague Rules in BHR arbitration or ISA. Indeed, a commentator notes that "BHR Arbitration Rules [Hague Rules] could be treaty compatible but they are not treaty dependent."[182] This statement needs qualification. The Hague Rules are not treaty compatible with the *ICSID Convention*. This is because parties can only choose Hague Rules in ISA proceedings if the *ICSID Convention* supports features of the Hague Rules. For example, it is doubtful whether the *ICSID Convention* supports local communities' rights to directly participate in ISA proceedings.[183]Also, Article 1(2) of the Hague Rules limits the scope of BHR arbitration to commercial relationships only. These characteristics of the Hague Rules make it difficult to argue that the Hague Rules and the *ICSID Convention* are compatible. Even if we accept that Hague Rules could be used in ISA proceedings,[184] it raises the question of why this reform effort is not pursued in the ongoing ISDS reform.

It could also be argued that the Hague Rules may support rights flowing from the Draft Treaty on Business and Human Rights, as promoted by some developing countries, including Ecuador and South Africa.[185] However, Choudhury questions the introduction of a new business and human treaty, when IIAs could be reconfigured to include human rights obligations of MNCs.[186] According to her, a reconfiguration of IIAs to include BHR issues would address some of the challenges of signing a new Business and Human Rights Treaty.[187] Particularly, and persuasively too, Choudhury argues that ISA provides a robust structure that has the potential to facilitate easy access to remedy for both MNCs and victims of business and human rights.[188] Therefore, although the Hague Rules can support the proposed business and human rights treaty, the ripple effect is that the treaty will create an unnecessary fragmentation of international dispute resolution mechanisms.

Realistically, rather than give victims and local communities access to justice through a specialized arbitration, the BHR arbitration proposal may benefit only a few white, educated men—arbitrators. The proposal may increase the incidence of arbitrators double hatting across tribunals because international arbitration comprises a closed network of professionals.[189] It may

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[182] Cismas & Macrory, *supra* note 151 at 237.

[183] The *ICSID Convention* expressly states that arbitration proceedings shall be conducted in accordance with the provisions of the Convention (*supra* note 49 art 44).

[184] Article 1(1) of the Hague Rules states "[t]he characterization of the dispute as relating to business and human rights is not necessary for jurisdiction where all the parties to the arbitration have agreed to settle a dispute under these Rules." Hague Rules, *supra* note 21, art 1(1).

[185] See *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (17 August 2021), online: United Nations Human Rights Council <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> [https://perma.cc/6GCJ-RNQJ].

[186] Choudhury, *supra* note 122 at 463.

[187] *Ibid*.

[188] *Ibid*.

[189] Double-hatting is a situation where arbitrators play multiple roles as counsel, arbitrators, expert witness in ad-hoc arbitral proceedings. See *e.g.* Malcolm Langford, Daniel Behn & Runar Hilleren Lie, "The Revolving Door in International Investment Arbitration" (2017) 20 J Intl Econ L 301; Yves Dezalay & Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996) at 20; Sergio Puig, "Social Capital in the Arbitration Market" (2014) 25 Eur J Intl L 387; Tom Ginsburg,

also exacerbate the risk of conflict of interest among arbitrators. In effect, without achieving its intended effect of providing an effective remedy to victims of business and human rights, BHR arbitration may create opportunities for small groups of individuals from developed countries to generate additional income.[190] Shihata notes that "[i]t is no secret that developing countries often see international arbitration as a process administered, to a large extent, by nationals of the developed countries."[191]

Therefore, it is important to inquire about the possible underlying rationale for the BHR arbitration proposal: Is it to give justice to victims and local communities who suffer from human rights abuse and socio-economic impoverishment arising from business activities or to benefit arbitrators and investors? Victim and local community interest may be marginal in the BHR arbitration framework. Roberts agrees that this sort of proposal may be motivated by investors' and arbitrators' interests alike. In her words:

> First, to the extent that investors do not like the movement from a more private law approach to a more public law orientation, we can expect them to use their power to counter it by, for instance, moving their emphasis from treaties to contracts and by choosing commercial arbitral rules (*e.g.*, ICC or UNCITRAL) rather than specialized investment ones (*e.g.*, ICSID). Second, advocates and arbitrators who can happily inhabit the world of investment treaty and commercial arbitration will continue to emphasize the similarities between these fields, but may also be happy to see some investment treaty cases repackaged as commercial ones, as this plays to their comparative advantage.[192]

A. Towards an ISDS Reform

In 2018, the UNCITRAL Working Group III (UWGIII) invited states to submit proposals to reform the procedural framework of ISDS.[193] In response, states submitted reform proposals that primarily address the ISDS legitimacy crisis I discussed in Part I of this article, above. The proposals include issues relating to the independence and neutrality of arbitrators, consistent and coherent arbitral decisions, an efficient appeal system, exhaustion of local remedies, third-party funding, and

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"The Culture of Arbitration" (2003) 36 Vand J Transnat'l L 1335. See also Amr A Shalakany, "Arbitration and the Third World: Bias under the Scepter of Neo-Liberalism" (2000) 41 Harv Intl LJ 419 at 430. Shalakany argues that arbitration may be another form of imperialism.

[190] Dezalay & Garth, *supra* note 189 at 10. See also Catherine A Rogers, "The Vocation of the International Arbitrator" (2005) 20 Am U Intl L Rev 957. Rogers describes the market for international arbitration as a closed system that is difficult for newcomers to penetrate.

[191] Ibrahim FI Shihata, "Obstacles Facing International Arbitration" (1986) 4 Intl Tax & Bus Lawyer 209 at 209. See also Guillaume Aréou, "Expected Challenges and Opportunities of Investment Arbitration in Africa" (7 February 2019), online (blog): Kluwer Arbitration <http://arbitrationblog.kluwerarbitration.com/2019/02/07/expected-challenges-and-opportunities-of-investment-arbitration-in-africa/> [https://perma.cc/5VVT-8PD3].

[192] Anthea Roberts, "DIVERGENCE BETWEEN INVESTMENT AND COMMERCIAL ARBITRATION" (2012) 106 Am Soc'y Intl L Proc 297 at 300.

[193] The UWGIII was entrusted with a three-pronged mandate: "(i) to identify and consider concerns regarding ISDS; (ii) to consider whether reform was desirable in light of any identified concerns; and (iii) if the Working Group were to conclude that reform was desirable, to develop any relevant solutions to be recommended to the Commission." See *Report of the United Nations Commission on International Trade Law*, UN, 50th Sess, UN Doc A/72/17 (2017) at para 264. See also Lorenzo Cotula & Brooke Guven, "Investor-state arbitration: an opportunity for real reform?" (7 December 2018) online (blog): *International Institute for Environment and Development* <www.iied.org/investor-state-arbitration-opportunity-for-real-reform> [perma.cc/53ZN-GAEE].

transparency of arbitral proceedings.[194] Also, some states proposed local community participation in ISA proceedings. For example, Indonesia proposed that relevant stakeholders, private and public, representing business and non-business interests alike, should be included in ISA proceedings.[195] Indonesia argued that allowing local communities to participate in ISA proceedings will balance the rights and obligations of all stakeholders. Similarly, the European Union and its member states proposed that third parties, for example, representatives of communities affected by investment disputes, should be permitted to participate in ISA proceedings.[196] Also, Ecuador proposed that local communities should participate in ISA proceedings.[197] However, Ecuador noted that local community participation should be subject to the parties' and tribunals' consent.[198] The proposals on accommodating third-party interests in ISA proceedings show that some states are willing to support local community participation.[199]

The UWGIII considered the proposals in its 37th Session in April 2019 and admitted that third-party participation in ISA proceedings will allow ISA tribunals to consider and hear relevant issues relating to the environment and protection of human rights.[200] In its deliberations, the working group considered the UNCITRAL Rules and the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* ("*Mauritius Convention on Transparency*").[201] The UWGIII noted that these instruments provide an insufficient framework to allow local community participation in ISA proceedings.[202] This conclusion may not be unconnected with the fact that the instruments only allow third parties to file written submissions without an opportunity for oral evidence.[203] Although the reform options for third-party participation in ISA proceedings are still being considered by the UWGIII,[204] the ongoing deliberation shows the possibility of giving local communities access to ISA proceedings through an ISDS reform.

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194 "Working Group III: Investor-State Dispute Settlement Reform" online: *United Nations Commission on International Trade Law* <uncitral.un.org/en/working_groups/3/investor-state> [perma.cc/U789-DSJX].

195 *Possible reform of Investor-State dispute settlement (ISDS): Comments by the Government of Indonesia*, UNCITRAL WGIII, 37th Sess, UN Doc A/CN.9/WG.III/WP.156 (2018) at para 7.

196 See *Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States*, UNCITRAL WGIII, 37th Sess, UN Doc A/CN.9/WG.III/WP.159/Add.1 (2019) at paras 28-29.

197 See UNCITRAL Working Group III, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Ecuador*, UN Doc A/CN.9/WG.III/WP.175 (17 July 2019), at para 24, online: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/072/09/PDF/V1907209.pdf?OpenElement>.

198 *Ibid* at para 25.

199 *Ibid* at para 26.

200 UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session (1–5 April 2019)*, UN Doc A/CN.9/970, online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V19/024/04/PDF/V1902404.pdf?OpenElement> at para 18 [UNCITRAL, *Working Group III*].

201 See *UNCITRAL Rules*, *supra* note 98. Article 4 provides that "[a]fter consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute." See also United Nations Convention on Transparency in Treaty-based Investor State Arbitration, online: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf> [https://perma.cc/2H7A-9HPX].

202 UNCITRAL, *Working Group III*, *supra* note 200.

203 *Ibid*.

204 The 43rd UWGIII session is slated to hold in Vienna on 5-16 September 2022. See Working Group III: Investor - State Dispute Settlement Reform, online: < https://uncitral.un.org/en/working_groups/3/investor-state>.

This article does not answer the question of how local communities can participate in ISA proceedings. However, the Columbia Center on Sustainable Investment (CCSI), International Institute for Environment and Development (IIED), and International Institute for Sustainable Development (IISD), in their submission to the UWGIII, examine the reform options for third-party participation.[205] Similarly, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises also reiterated the need for local communities to access justice in ISA proceedings.[206] Although the UN working group proposed a systemic reform that allows parties to incorporate provisions of the UNGPs into IIAs, they note that "[i]f the ISDS system is to maintain its legitimacy, it is imperative that affected communities and individuals as well as public interest organizations are able to effectively participate in the ISDS proceedings and present their evidence, views and perspectives in full."[207]

Considering the possibility of reforming ISDS to include local community participation in ISA proceedings, it is important to ask whether there is a need for BHR arbitration. This question is important in light of a possible fragmentation of international law described above and some commentators' conclusion that "the BHR Arbitration Rules Project is not clearly and consistently focused on the access-to-remedy problem it is attempting to solve,"[208] and that "[t]he BHR Arbitration Rules are not drafted from a rights holder-claimant's perspective, and indeed leave potential claimants unduly exposed to a system that can undermine their rights."[209] Indeed, the BHR arbitration framework is fraught with practical procedural difficulties. Issues relating to preliminary proceedings, hearings, and enforcement of awards reflect these difficulties. For example, as a preliminary issue, it may be difficult to establish consent to arbitrate between MNCs and local communities, especially in instances where parties did not submit to arbitration in advance. Therefore, the tribunal's jurisdiction may be challenged on the ground that there was no consent to arbitrate between victims, local communities, and MNCs.

The procedural challenges are exacerbated by the overlapping issues of private and public law in BHR arbitration.[210] For example, during a hearing, the tribunal's jurisdiction to hear a claim may be challenged because BHR disputes may be intertwined with tortious and criminal issues that may not be settled by way of accord and compromise. It is even more complex when governments are complicit in the tortious and criminal wrongs of MNCs; it raises the question of whether states can or should be added to international arbitration proceedings in such mixed (criminal and tortious) claims. These practical difficulties defy a straitjacket answer. Indeed, it has

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[205] See Columbia Center on Sustainable Investment, International Institute for Environment and Development, and International Institute for Sustainable Development, Third Party Rights in Investor-State Dispute Settlement: Options for Reform, (15 July 2019), online: UNCITRAL <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_reformoptions_0.pdf> [https://perma.cc/AZ7C-WJZR].

[206] See Letter from independent human rights experts appointed by the UN Human Rights Council, REF OL ARM 1/2019 (7 March 2019), online: <https://uncitral.un.org/sites/uncitral.un.org/files/public_-_ol_arm_07.03.19_1.2019_0.pdf> [https://perma.cc/C8Y3-CSC5] ["Letter REF OL ARM 1/2019"].

[207] *Ibid* at 6.

[208] Gustavo Becker, "Business and Human Rights Arbitration: A Potential Procedural Remedy for Transnational Human Rights Litigation Involving European and Latin Parties" (8 March 2021), online (blog): <https://eurolatinstudies.com/index.php/laces/announcement/view/19>.

[209] Lisa E Sachs, et al, "The Business and Human Rights Arbitration Rule Project: Falling Short of its Access to Justice Objectives" (September 2019), online: Columbia Center on Sustainable Investment <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1151&context=sustainable_investment_staffpubs> [https://perma.cc/5R7K-KNWX] at 7.

[210] See generally Youseph Farah, "Improving Accountability through the Contractualisation of Human Rights" (2013) 2 Business and Human Rights Review 11.

been noted that "areas of conflict between fundamental rights and arbitration…has been recognized by, and is worrisome to, arbitrators, arbitration practitioners, constitutional lawyers and foreign investors."[211]

The overlapping public and private law issues become more evident at the enforcement stage with the application of the *New York Convention*. Since one-third of countries who are signatories to the *New York Convention* limit its application to only commercial matters, business and human rights claims may be outside the scope of most national arbitral statutes.[212] Therefore, it may be difficult to enforce awards that are not classified as commercial awards under the *New York Convention*.[213] Also, an award touching on states' public regulatory powers (such as human rights) may be unenforceable on the ground that such disputes are not arbitrable, or are contrary to the public policy of the seat of arbitration.[214] Although, Crockett and Sousa note that there are no reported cases where an award was refused because it touches on human rights, the potential difficulty of arbitrability of such disputes exists, especially in arbitration proceedings where the seat is in developing countries.[215] Most developing countries, especially in Africa, continue to restrict the scope of arbitral matters due to public policy and sovereignty concerns.[216]

However, ISA is more suitable for local community claims because it is a hybrid system that offers an opportunity to achieve both private and public interests in a single forum.[217] The combination of public and private law issues that cause procedural challenges for BHR arbitration can be accommodated in ISA proceedings. For example, public law issues, including public policy and states' policies on health, human rights, and the environment can be heard together with private law issues involving the proprietary and contractual rights of investors. Julie Maupin notes that "[i]nternational investment law deals with both public and private concerns, impacts upon both public and private actors, and crosses over traditional divides separating public law from private law and public international law from private international law."[218] Therefore, allowing third-party participation in a platform that is already designed as a hybrid system will prevent some of the procedural challenges that BHR arbitration will face as a forum that focuses only on commercial disputes.[219]

Furthermore, due to its reliance on the *New York Convention*, the Hague Rules leave the enforcement of awards at the mercy of states. Abhisar Vidyarthi agrees that "for awards rendered

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[211] Andrew I Chukwuemerie, "Arbitration and Human Rights in Africa" (2007) 7 Afr Hum Rts LJ 103 at 104.
[212] See Crockett & de Sousa, *supra* note 151 at 110.
[213] This is notwithstanding Article 1(2) of the *Draft Rules* provision that "[t]he parties agree that any dispute that is submitted to arbitration under these Rules shall be considered to have arisen out of a commercial relationship or transaction for the purposes of Article I of *the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*." It is submitted that parties cannot contract out of mandatory national statutes relating to arbitrability—a fact acknowledged by Article 1(4) which provides that "[t]hese Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."
[214] See Muthucumaraswamy Sornarajah, "The UNCITRAL Model Law: A Third World Viewpoint" (1989) 6 J Intl Arb 7 at 15.
[215] See *e.g.* Loukas A Mistelis and Stavros L Brekoulakis, eds, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) at 6.
[216] See generally Akinwumi Ogunranti, "Separating the Wheat from the Chaff: Delimiting Public Policy Influence on the Arbitrability of Disputes in Africa" (2019) 10 J Sustainable Dev L and Pol'y 105.
[217] See José E Alvarez, "Is Investor-State Arbitration 'Public'?" (2016) 7 J Intl Dispute Settlement 534.
[218] Julie A Maupin, "Public and Private in International Investment Law: An Integrated Systems Approach" (2014) 54 Va J Int L 367 at 367.
[219] See Zachary Douglas, *supra* note 69. See also Farah, *supra* note 210 at 13.

under the Hague Rules to hold any credibility, the enforcement states must be readily willing to enforce them."[220] Therefore, states' legislation and policies on arbitrability of human rights and justiciability of human rights claims against corporations will determine whether a BHR arbitration award will be enforced. Apart from the fact that this situation breeds unpredictability and inconsistencies in the enforcement of awards, it may also create a situation where states frustrate the enforcement of awards that are unfavourable to them.

On the other hand, enforcement of ISA awards does not depend on individual states' enforcement policies. Sections 53 and 54 of the *ICSID Convention* provide that an ISA award is final and can be enforced in the court of any ICSID Member State as though it were a final judgment of that state's courts. In effect, an ISA award is equivalent to a judgement of a state court that cannot be set aside by another court except on limited grounds. Although enforcement of awards under the *ICSID Convention* is not perfect,[221] it is less complex than the *New York Convention*. This is because ICSID awards can only be refused on limited grounds,[222] and are not subject to national courts' discretion.[223] Therefore, apart from confirming the signature of the Secretary-General, national courts play a limited role in the enforcement of an ICSID award.[224] It has been noted that "[i]n terms of enforcing an award, ICSID arbitration is probably preferable for investors."[225] So, if the ICSID enforcement mechanism is preferable for investors, victims of business and human rights abuse should also be able to enjoy the same robust enforcement mechanism.

In terms of remedies, an ISA tribunal can provide similar remedies to the ones provided by BHR arbitration. Indeed, this is one of the recommendations of the UN Working Group on Business and Human Rights in its report to the UWGIII.[226] The UN Working Group noted that ISDS reform should take an "all roads lead to remedy" approach which will enable local communities to seek remedies in ISA proceedings through a reconfigured IIA or treaty that recognizes the human rights obligations of investors.[227] This recommendation may not be unconnected with the fact that ISA tribunals can order both pecuniary and non-pecuniary remedies

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[220] Abhisar Vidyarthi, "Hague Rules on Business and Human Rights: What Lies Ahead?" (September 2020), online (blog): Columbia Law School <http://aria.law.columbia.edu/hague-rules-on-business-and-human-rights-arbitration-what-lies-ahead/>.

[221] See Christopher Smith, "The Appeal of ICSID Awards: How the AMINZ Appellate Mechanism Can Guide Reform of ICSID Procedure" (2013) 41 Ga J Intl & Comp L 567. See also Matthew H Kirtland, Katie Connolly & Jacob Smit, "A Comparison of the Enforcement Regimes under the New York and Washington Conventions" (2018) online: Norton Rose Fulbright <https://www.nortonrosefulbright.com/en/knowledge/publications/04f14b2a/a-comparison-of-the-enforcement-regimes-under-the-new-york-and-washington-conventions-mdashbra-tale-of-two-cities> [https://perma.cc/L957-6S6M] at 4.

[222] By way of revision or interpretation of an award. However, either party can also request an annulment of an award through an independent ad-hoc panel. See International Centre for Settlement of Investment Disputes, "ICSID Convention, Regulations and Rules" (Washington, 2006) at arts 50-52.

[223] They are enforced in contracting states as final judgments. See *ibid* at art 54(1).

[224] See Amazu A Asouzu, "African States and the Enforcement of Arbitral Awards: Some Key Issues" (1999) 15 Arb Intl 1 at 28.

[225] Wick, *supra* note 80 at 279.

[226] See Letter REF OL ARM 1/2019, *supra* note 206.

[227] *Ibid*. See also Nicholas J Diamond & Kabir AN Duggal, "Adding New Ingredients to an Old Recipe: Do ISDS Reforms and New Investment Treaties Support Human Rights?" (2021) 53 Case W Res J Intl L 117.

as recommended in Principle 25 of the *Guiding Principles*.[228] For example, like BHR arbitral tribunals, ISA tribunals can order remedies, including apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions, as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.[229] In sum, if local communities are granted access to ISA proceedings, they can get remedies similar to those provided by a BHR arbitration tribunal.

If history is anything to go by, the Hague Rules may suffer from low reception from parties and MNCs.[230] The Hague Rules may follow the path of the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment ("PCA Rules").[231] Like the Hague Rules, the PCA Rules were drafted by a working group and committee of experts in environmental law and arbitration to address the principal gaps in environmental dispute resolution. Also, like the Hague Rules, the PCA Rules are based on the UNCITRAL Rules, and they allow arbitration between any combination of states, intergovernmental organizations, and non-governmental organizations, MNCs, and individuals. However, the PCA Rules had a lukewarm reception in 2001 and were scarcely adopted by parties.[232] As of 2016, only six cases were commenced under the PCA Rules.[233] Considering the similarities in the making of the two Rules, the Hague Rules may suffer the same challenges as the PCA Rules because, as of July 2021, the Hague Rules have not been used by any party.[234]

Conversely, notwithstanding its critics, ISA has existed since the nineteenth century and has enjoyed remarkable and steady growth from a few infrequent cases to more than forty new

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[228] Commentary to Principle 25 of the Guiding Principles provides that "[r]emedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition." On the power of ISA tribunals to make nonpecuniary orders, see generally Christoph Schereuer, "Non-Pecuniary Remedies in ICSID Arbitration" (2004) 20 Arb Intl 325; Patrick J Rodriguez, "International Contractualism Revisited: Non-Pecuniary Remedies under the Fair and Equitable Treatment Standard" (2018) 18 Chicago J Intl L 673. See also *Antoine Goetz and others v Republic of Burundi I*, ICSID Case No ARB/95/3 (where, in an interim award, the tribunal gave the sovereign a choice of non-pecuniary relief or pecuniary obligation, holding that Burundi can either "give an adequate and effective indemnity to the claimants" or "return the benefits of the free zone to them"). See also Steven K Davidson & Michael J Baratz, "Enforcing Non-pecuniary Obligations in an ICSID Award" (3 August 2021), online (blog): <https://www.steptoe.com/en/news-publications/enforcing-non-pecuniary-obligations-in-an-icsid-award.html> [https://perma.cc/QTC4-ZYXA].

[229] See Tomoko Ishikawa, "Restitution as a 'Second Chance' for Investor-State Relations: Restitution and Monetary Damages as Sequential Options" (2016) 3 McGill J Disp Resol 154.

[230] See Iris Ng Li Shan, "On the Path to Justice: Exploring the Promise and Pitfalls Of the Hague Rules on Business and Human Rights Arbitration" (2020) 2 ITA in Rev 54 at 58.

[231] Permanent Court of Arbitration, online: <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf> [https://perma.cc/9AXX-53Y9].

[232] See Li Shan, *supra* note 230 at 58.

[233] In half the cases, both parties were private entities, while the other three cases involved a public limited company, a public-owned private company, or a government agency as respondent. See Tamar Meshel, "Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment: Permanent Court of Arbitration (PCA)" in *Max Planck Encyclopedias of International Law* (Oxford University Press, 2016), online: <https://pure.mpg.de/rest/items/item_3196242_1/component/file_3196243/content> [https://perma.cc/KT3D-MYKV].

[234] See Florencia Villaggi & Benjamin Guthrie, "Arbitration, Business, and Human Rights" (14 July 2021), online: *Corporate Counsel Business Journal* <ccbjournal.com/articles/arbitration-business-and-human-rights> [perma.cc/A562-F5K9].

cases each year.[235] Indeed, it has been noted that "[n]otwithstanding the criticism…ISA remains the most common dispute resolution mechanism adopted in BITs."[236] Admittedly, ISA presently suffers from a legitimacy crisis as I described in Part I of this article, but the current ISDS reform process offers an opportunity to solve some of the procedural challenges. In effect, the history of the *ICSID Convention* and its acceptance over time prevents (or mitigates) a legitimacy attack that a new arbitral rule would ordinarily be subjected to.[237]

Apart from the comparative advantages of ISA over BHR arbitration, an ISDS reform that allows local community participation in ISA proceedings has its advantages. First, it will ameliorate, if not eliminate, access to justice problems associated with ISA proceedings as discussed in Parts I and II of this article.[238] Second, recognizing local communities' standing in ISA proceedings will promote ISA as a just, fair, and equitable system for both investors and host states.[239] This is because the reform will balance the interests of both investors and host states, which are presently lopsided in favour of investors.[240] Third, reforming ISDS to include local community participation will allow them to enjoy benefits from new-generation BITs and IIAs that reference corporate responsibility and business and human rights guidance tools.[241] This is because local communities can claim a breach of MNCs' human rights obligations in BITs or IIAs in ISA proceedings. In effect, investors will be held accountable for their human rights and environmental abuse in the same forum that protects them.[242] MNCs will no longer be untouchable in ISA proceedings because local communities and host states will be able to claim and counterclaim against them.[243]

Furthermore, allowing local communities to participate in ISA proceedings may be one of the solutions to the social conflict that comes with some of the investment projects discussed in Parts I and II, above.[244] Recognizing the rights of local communities in ISA proceedings means that local communities have access to an independent forum where they can file claims about human rights and environmental abuse. Since host states may sometimes be complicit in human rights abuses, local communities that may be reluctant to approach domestic courts may access ISA. Therefore, instead of resorting to self-help that may lead to social conflict and violence, the

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[235] See William W Burke-White & Andreas von Staden, "Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations" (2010) 35 Yale J Intl L 283 at 284.
[236] Blythe, *supra* note 59 at 277.
[237] Although Ecuador and Bolivia have exited the IIA completely, with South Africa also exiting, a vast majority of countries still sign bilateral treaties. Therefore, a reform may be a way to reduce the ICSID legitimacy crisis. See Choudhury, *supra* note 122 at 477.
[238] See Laryea, *supra* note 8 at 2866.
[239] *Ibid*.
[240] *Ibid*. See also Lorenzo Cotula & Terrence Neal, "UNCITRAL Working Group III: Can Reforming Procedures Rebalance Investors Rights and Obligations?" (March 2019) online (pdf): *The South Center* <www.southcentre.int/wp-content/uploads/2019/03/IPB15_UNCITRAL-Working-Group-III-Can-Reforming-Procedures-Rebalance-Investor-Rights-and-Obligations_EN-1.pdf> [perma.cc/E2YG-B5PJ].
[241] See Lorenzo Cotula, "Business and human rights in investment treaties: What progress? (11 November 2011), online (pdf): <eprints.lse.ac.uk/82107/1/UN%20FORUM%20SERIES%20-%20Business%20and%20human%20rights%20in%20investment%20treaties_%20What%20progress_.pdf> [perma.cc/WCG2-4R9A].
[242] *Ibid*.
[243] See Lorenzo Cotula & Nicolas M Perrone, "Reforming Investor-state Dispute Settlement: What about Third-party Rights" (February 2019), online (pdf): *International Institute for Environment and Development* <pubs.iied.org/sites/default/files/pdfs/migrate/17638IIED.pdf> [perma.cc/E9JS-PCN8].
[244] See Laryea, *supra* note 8 at 2866.

intervention of local communities before an ISA tribunal may be a catalyst for a full-blown ISA proceeding where the investment-related issues of investors, host states, and local communities are heard together.

In sum, it is more efficient to reform the ISDS regime than to create a new BHR arbitration system that is untested and fraught with procedural challenges of its own.[245] Experts, scholars, and stakeholders must not relent on efforts to review the investment law structure to create an inclusive ISA that reflects the relational interaction between investment, human rights, environment, and sustainability. Central to this proposed ISA framework is equal access to justice for investors, host states, and victims and local communities harmed by investment activities.[246] However, as attractive as this proposal may seem, it would be naïve to suggest that it is without its own challenges. Indeed, Odumosu notes that ISDS reform in this regard is a "Herculean" and "arduous" task.[247] The next section examines some of these challenges.

V. Possible Objections and Challenges to ISDS Reform

It may be difficult to implement an inclusive ISDS reform partly because of ISA's traditional role as an interpretative and dispute settlement mechanism, and because of the politico-economic considerations involved in BIT negotiations. I classify these challenges as procedural and politico-economic challenges, respectively. It is important to acknowledge that the extent of ISDS reform will depend on the political and legal will of stakeholders in international investment law. Therefore, the analysis in this section reflects a politico-economic dimension to law reform. This section argues that although the investment regime is driven by political and economic concerns, there may be a legal response to it. I respond to some of these objections, but this discussion is by no means exhaustsive due to the limited space in this article.

A. Procedural Challenges

Arguably, an ISDS reform is too remote a solution to problems arising from BITs that are unevenly negotiated.[248] ISA is an interpretative institution that determines parties' treaty obligations, which were agreed upon by states and investors. Since (developing) states, most of whom may be ill-advised to sign BITs, enter BITs freely, any proposed reform must focus on the

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[245] For further challenges of BHR arbitration, see Cismas & Macrory, *supra* note 151 at 224; Yiannibas, *supra* note 151 at 214; Crockett & de Sousa, *supra* note 151 at 104; Center for International Legal Cooperation, *supra* note 132. See also International Law Association Study Group on Business and Human Rights (Draft Final Report, 23 July 2019) at 8-9.

[246] See Odumosu, "Locating Third World Resistance," *supra* note 14 at 436. Odumosu notes:

> [O]f course, the point is not that regulatory measures adopted in response to domestic pressure should automatically trump investment protection, rather, the suggestion is that in view of the increased incidence of cases where domestic pressure is pleaded as (one of) the factor(s) that triggered the adoption of legal rules, there is a dire need for the development of an international investment regime that engages Third World resistance and acknowledges that just as it (investment dispute settlement) shapes peoples' lives, domestic resistance also shapes and informs its realm.

[247] *Ibid* at 437.

[248] See Hisham Ababneh, *A MODEL BIT FOR DEVELOPMENT: The Example of Jordan* (SJD Thesis, University of Pittsburg School of Law, 2017) [unpublished] at 311 ("[t]he solution to the current state-of-affairs is not one related to the ISDS process itself, but rather is related to the broad and unqualified provisions of BITs"); Indeed, it has been noted that "…developing countries generally have less bargaining power and might be subject to unfavorable liability provisions in bilateral or multilateral investment treaties designed by the capital and technology exporting states." See Hanson Hosein, "UNSETTLING: Bhopal and the Resolution of International Disputes Involving an Environmental Disaster" (1993) 16 Boston College Intl & Comp L Rev 285 at 309.

treaty-signing stage instead of ISDS's procedural reform.[249] This is because ISA derives its jurisdiction from BITs that may not permit the inclusive dispute resolution structure that this article proposes.[250] For example, it will be difficult to argue for inclusive participation where the scope of a BIT excludes investors' human rights, environmental obligations, and community participation. Indeed, Trakman notes that "[ISA] is not an end in itself, nor should it be so construed."[251]

This argument is valid and legitimate. However, as stated in the previous section, the tides in investment treaty signing are changing; there is an increasing reference to CSR and business and human rights guidance tools in investment treaties.[252] For example, the 2018 Dutch model BIT incorporates the *Guiding Principles* and *OECD Guidelines for Multinational Enterprises*.[253] It urges tribunals to consider investors' non-compliance with their commitments under these guidance tools. Similar model treaties, which include the 2012 South-African Development Community (SADC) Model BIT**,** 2015 Norway Model BIT,[254] 2016 Nigerian-Morocco BIT,[255] ECOWAS Common Investment Code,[256] and the Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS,[257] suggest that there is a growing new generation of investment treaties that support a human rights approach.[258] Therefore, there is a need to reform ISDS to support rights and obligations flowing

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[249] See *e.g.*, Howard Mann, "RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW: ITS ROLE IN SUSTAINABLE DEVELOPMENT" (2013) 17 Lewis & Clark L Rev 521.

[250] However, the case of *Urbasersa v Argentina* suggests that the Tribunal could rely on "external" sources of law, which include international human rights instruments to enforce human rights obligations in BITs. See Patrick Abe, "Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration: Fallacies and Potentials of the 2016 ICSID Urbaser v. Argentina Award" (2018) 1 Brill Open L 61.

[251] Trakman, *supra* note 27 at 605.

[252] See Lorenzo Cotula, "Business and Human Rights in Investment Treaties: What Progress?" (11 November 2015), online (blog): London School of Economics: UN Forum Series <https://blogs.lse.ac.uk/businesshumanrights/2015/11/11/un-forum-series-business-and-human-rights-in-investment-treaties-what-progress/> [https://perma.cc/753V-DFF3].

[253] Article 23 of the Model BIT specifically provides that "[w]ithout prejudice to national administrative or criminal law procedures, a Tribunal may, in deciding on the amount of compensation [to award to an investor following a breach of the BIT by the host State], take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Businesses and Human Rights, and the OECD Guidelines for Multinational Enterprises." Antony Crockett, "Going Dutch—A Model for Rebalancing Investment Treaties to Address Human Rights Concerns?" (24 May 2018), online (blog): Herbert Smith Freehills <https://www.herbertsmithfreehills.com/latest-thinking/going-dutch-%E2%80%93-a-model-for-rebalancing-investment-treaties-to-address-human-rights> [https://perma.cc/SS4C-L7F4].

[254] Article 31 provides that "[t]he Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and to participate in the United Nations Global Compact." Draft Version 130515, online: <https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf>.

[255] See Tarcisio Gazzini, "The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties" (2017) 3 Investment Treaty News Q 3.

[256] *(ECOWIC)* (July 2018), online: West Africa Competitiveness Programme <https://wacomp.projects.ecowas.int/wp-content/uploads/2020/03/ECOWAS-COMMON-INVESTMENT-CODEENGLISH.pdf> [https://perma.cc/535D-58UQ].

[257] UNCTAD, (19 December 2008), online: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3266/download> [https://perma.cc/KLD9-XQ9P].

[258] Article 15(1) of the SADC Model BIT states:

from this new generation of BITs. Human rights obligations arising from BITs should be supported by local community access to ISA proceedings. This way, local communities can directly claim rights included in BITs for their benefit.

On contractual grounds, the doctrine of privity of contract may pose a challenge to an inclusive ISA proceeding. If, technically, states are parties to investment treaties, and states and investors are parties to investment contracts, it is arguable that local communities do not have *locus standi* to make claims in ISA proceedings. However, this challenge can be overcome if we cease to view states as abstract entities and construe them as representatives of local communities. In this view, states play an agency or trusteeship role in relation to local communities.[259] A clause in the contract or treaty that provides that a state signs the BIT for itself and on behalf of its citizens may clarify the relationship between states and local communities as trustees and beneficiaries, respectively.[260] Laryea proposes that one way to incorporate third-party benefits on local communities is to include a clause in the IIA or treaty stating that the host state is acting on behalf of its citizens.[261] I agree with this proposal. The Hague Rules provide a model clause that reflects the proposal in this article as follows:

> The parties irrevocably consent that any dispute, controversy or claim arising out of or in relation to: [insert defined subject matter, which may include:
>
> > (a) selected national laws;
> > (b) selected international instruments;
> > (c) other industry or supply chain codes of conduct, statutory commitments or regulations from sports governing bodies, or any other relevant business and human rights norms or instruments] may be submitted by any third party beneficiary of such [law(s)] [instrument(s)] to arbitration in accordance with the Hague Rules on Business and Human Rights Arbitration.[262]

It has been noted that the above model clause "provides an elegant and relatively fuss-free way of opening the door to arbitration for alleged victims."[263] A BIT or IIA clause that incorporates the above model clause will allow local communities to participate in ISA proceedings and, consequently, overcome the privity challenge.[264]

However, it may be difficult to obtain investors' advance consent to local community claims of human rights and environmental protection abuse. This is because consent to such an agreement may open investors to a barrage of claims, which may jeopardize their business

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> Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the [sic] human rights by others in the Host State, including by public authorities or during civil strife." Also, Article 18(2) of the Morocco-Nigeria BIT similarly provides that "[i]nvestors and investments shall uphold human rights in the host state.

Naomi Briercliffe & Olga Owczarek, "Human-Rights-Based Claims by States and 'New Generation' International Investment Agreements" (1 August 2018), online (blog): Kluwer Arbitration <http://arbitrationblog.kluwerarbitration.com/2018/08/01/human-rights-based-claims-by-states-and-new-generation-international-investment-agreements/> [https://perma.cc/A5BN-GC2L].

[259] See Eyal Benvenisti, "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders" (2013) 107 Am J Intl L 295 at 296.

[260] See Laryea, *supra* note 8 at 2872.

[261] *Ibid* at 2871-2872.

[262] Simma, "Hague Rules," *supra* note 134 at 106-107.

[263] Li Shan, *supra* note 230 at 62.

[264] See Choudhury, *supra* note 122 at 463-75. Choudhury notes that there are a number of avenues through which human rights obligations can be incorporated into IIAs. They include use of preambles or objectives, substantive obligations, human rights chapters, and alternative remedies (negotiation and consultation).

activities and stability in host states. Although Laryea suggests ways to establish investors' consent,[265] their feasibility remains doubtful because they involve legal and political considerations. However, if investors, who are reluctant to consent to local community participation in ISA, are now considering the prospect of consenting to BHR arbitration,[266] it is an indication that obtaining investors' consent may be a difficult task—but not an impossible one.[267]

In sum, procedural challenges to an inclusive ISDS reform may arise from the nature of BITs as contracts between two consenting parties and the ISA as an interpretative tool of these established rights.[268] Therefore, ISDS reform involves recalibrating parties' rights in BITs and ISA proceedings to recognize local communities' formal participatory rights. These are some of the issues that the UNCITRAL Working Group will (hopefully) address in the ongoing ISDS reform.

B. Politico-economic Challenges

The term "politico-economy" is used broadly in this article. This term refers to the political and economic interests of widely acclaimed stakeholders in the investment regime—investors, home states, and arbitrators.[269] One of the reasons for establishing an investment regime is to depoliticize and transfer investment disputes from the realm of diplomacy and politics to the realm of law.[270] It has been noted that "[t]he essence of each of these arrangements [the *ICSID Convention*, BITs] is that controversies between foreign investors and host states are insulated from political and diplomatic relations between states."[271] In essence, the purpose of the depoliticization theory in investment law is to resolve investment disputes without creating a state-state conflict.

However, regardless of the depoliticization theory, international investment law is a tool to advance modern global capitalism.[272] This is because developed countries enter into treaty

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[265] Laryea, *supra* note 8 at 2869. Laryea notes:

> There are several ways by which an investor's consent to arbitrate may be obtained. These include: (1) ad hoc, case by case, consent (i.e., giving consent when requested by an HSC after a dispute has arisen); (2) voluntarily making a standing offer of consent to all HSCs, which may be accepted by the act of initiating arbitral proceedings; (3) making a standing offer of consent to all HSCs in an investment contract between the investor and the host state, if there was such a contract; (4) a declaration in the host state's law that all foreign investors are deemed to have consented to arbitration initiated by HSCs; and (5) a declaration in a mandatory domestic licensing or authorization regime for foreign investors and investments stating that they have consented to arbitration proceedings initiated by HSCs.

[266] See Cismas & Macrory, *supra* note 151 at 224; Yiannibas, *supra* note 151 at 214; Crockett & Sousa, *supra* note 151 at 104.

[267] It may be argued that investors who are truly committed to corporate social responsibility may be open to consent to an investment arbitration as a form of corporate accountability. However, this approach may not be appealing to some MNCs that exploit most developing countries' weak domestic legal systems and wide unaccountability.

[268] It is acknowledged that ISA also performs substantive roles in the shaping of the ICSID regime because these proceedings determine whether states are liable and assess damages, sometimes in the billions of dollars. These decisions have contributed substantially to the legitimacy concerns regarding IIAs.

[269] Kidane refers to investors and arbitrators as the two most important players. See Kidane *supra* note 52 at 579. This section focuses on these two.

[270] See Aron Broches, "Settlement of Investment Disputes" in Aron Broches, *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law* (Martinus Nijhoff Publishers, 1995) 161 at 163. The depoliticization theory is grounded in Article 27(1) and (2) of the *ICSID Convention* which provides that a state shall not give diplomatic protection to its nationals in cases where parties agree to submit the dispute to an arbitration panel.

[271] Andreas F Lowenfeld, Separate Opinion on the Award in Corn Products International, Inc. v United Mexican States, (18 August 2009) ICSID Case no ARB(AF)/04/1, at para 1.

[272] See generally St John, *supra* note 42.

negotiations to protect their economic and political interests through MNCs.[273] For example, it has been noted that "American investment treaties were used primarily for the protection of American capital and cementing diplomatic relations with politically important countries."[274] The investment regime is an opportunity for MNCs and developed home countries to execute a neoliberal global agenda that reduces (developing) states' intervention in the economy and promotes global laissez-faire capitalism.[275] Therefore, although international investment law may have been purposively created to reduce the influence of state diplomacy and politics, it has created an avenue for some states to secure their economic interests in developing countries.

Owing to the developed nations and MNCs' powerful and joint politico-economic interests in the investment regime, it may be difficult to change the regime's liberal economic approach to an inclusive structure that equally distributes rights and obligations between host states, investors, and local communities. In effect, incorporating BHR arbitration elements that are focused on corporate accountability and remedy may be antithetical to the founding political and economic interests of international investment law.[276] Therefore, the proposed ISDS reform is incongruous with the history of BITs and ISA, which are meant only to protect investors' business in host states.[277]

However, the changing global political economy of the investment regime suggests that advocates of investment protection may be open to a reform that reflects investors' obligations in BITs and an inclusive ISA.[278] With the rise of emerging markets as capital exporters, the power dynamics are changing in the global economic order.[279] Developed countries are now capital importers and are increasingly subjected to investment claims from investors in emerging markets.[280] Therefore, the surge in investment claims arising from the North American Free Trade

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[273] See generally Milan Babic, Jan Fichtner & Eelke M Heemskerk, "States Versus Corporations: Rethinking the Power of Business in International Politics" (2017) 52 Intl Spectator 20.

[274] Lauge N Skovgaard Poulsen, "The Politics of Investment Treaty Arbitration" in Thomas Schultz & Federico Ortino, *The Oxford Handbook of International Arbitration* (Oxford University Press, 2020) 740 at 747.

[275] See David Kotz, "Globalization and Neoliberalism" (2002) 12 Rethinking Marxism 64.

[276] See Muthucumaraswamy Sornarajah, The International Law on Foreign Investment, 2nd (Cambridge University Press, 2004) at 5. Sornarajah notes that "[t]he interplay of various economic, political and historical factors shaped and continues to shape and continues to shape the development of international law on foreign investment.".

[277] See Perrone, "Invisible Local Communities," *supra* note 16 at 21. See also Jorge Daniel Taillant & Jonathan Bonnitcha, "International Investment Law and Human Rights" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Paul Newcombe, eds, *Sustainable Development in World Investment Law* (Kluwer Law International, 2011) 53 at 59. Taillant and Bonnitcha note that "[t]he public interest in terms of the social, environmental, or economic negative externalities of large foreign investments, was simply not part of the objectives pursued in the evolution of...[the] investment legal framework".

[278] See Bonnitcha, Poulsen & Waibel, *supra* note 7 at 233.

[279] *Ibid* at 202-205. China is an example of countries that is increasingly becoming a capital exporter. See *e.g.* Trakman, *supra* note 27 at 624. Similarly, developing countries continue to enter into BITs with one another. This means that the narrative between developing and developed countries are changing.

[280] See UNCTAD, *World Investment Report 2004: The Shift Towards Services* (2004) at 19. UNCTAD noted that "outward FDI from developing countries is becoming important." See also Rainer Geiger, "Multilateral Approaches to Investment: The Way Forward" in José E Alvarez, Karl P Sauvant et al, eds, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press, 2011) 153 at 155.

Agreement (NAFTA) and other multilateral trade agreements may lead traditional advocates for investment protection to consider an inclusive policy.[281]

Indeed, the rise of emerging economies, including Brazil, Russia, India, and China (BRICS), changes the nature of global investment flows and ultimately challenges the existing investment law's political and institutional structure.[282] It has been noted that, "as outward foreign investment from 'developing' countries such as China expands, the reciprocity of the investment regime is no longer a legal fiction, and the traditional developed/developing country is becoming less useful in explaining attitudes and policies towards investment in different states."[283] This statement requires little clarification to show the extent of ongoing global developments. The emerging economies are not only sources of outward FDI; they are also recipients of foreign investments—they act as home states and host states simultaneously.[284] In sum, emerging economies are no longer "rule-takers"; they are now "rule-makers."[285] Therefore, developed countries' reduced hegemony or monopoly over foreign investment presents an opportunity to reframe the international investment law framework.[286]

Even if developed states accept an inclusive structure as I argue in this article, it is doubtful whether arbitrators will welcome ISA's inclusive approach that focuses on investors' obligations. This is because investment arbitrators are often criticized for systematically valuing investors' interests above the host state or local community interests.[287] Although this criticism may be anecdotal, this does not foreclose the possibility of systemic bias.[288] Some arbitrators may be biased towards investors due to their policy preference and background as commercial lawyers.[289]

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[281] See Wenhua Shan, "From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law" (2007) 27 Nw J Intl L & Bus 631 at 650 (noting that "[m]ounting cases against the U.S. government before…[NAFTA] tribunals, has put the United States, a long-time unreserved advocate of investment liberalism, on defense, and forced it to re-examine investment treaties and treaty-based arbitration for the first time in history from a defendant's position").

[282] See Anthea Roberts, "Investment Treaties: The Reform Matrix" (2018) 112 AJIL 191; Karl P Sauvant, Geraldine McAllister with Wolfgang Maschek, eds, *Foreign Direct Investment from Emerging Markets: The Challenges Ahead* (Palgrave Macmillan, 2010) at 3; Stephan W Schill, "Tearing down the Great Wall - The New Generation Investment Treaties of the People's Republic of China" (2007) 15 Cardozo J Intl & Comp L 73.

[283] Bonnitcha, Poulsen & Waibel, *supra* note 7 at 230.

[284] See Fabio Bertoni, Stefano Elia & Larissa Rabbiosi, "Outward FDI from the BRICs: Trends and Patterns of Acquisitions in Advanced Countries" in Marin Marinov & Svetla Marinova, eds, *Emerging Economies and Firms in the Global Crisis* (Palgrave Macmillan, 2013) 47; John Matthews, "Dragon Multinationals: New Players in 21st Century Globalization" (2006) 23 Asia Pacific J Management 5.

[285] Karl Sauvant, "Emerging Markets and the International Investment Law and Policy Regime" in Robert Grosse & Klaus E Meyer, eds, *The Oxford Handbook of Management in Emerging Markets* (Oxford University Press, 2019) 127 at 151.

[286] Indeed, it has been noted that "[t]he United States and Europe can no longer assume that they have the political and economic power to set the rules of the game." Sonia E Rolland, "The BRICS' Contributions to the Architecture and Norms of International Economic Law" (2013) 107 Am Soc'y Intl L Proc 164 at 169.

[287] See *e.g.* Catherine A Rogers, "The Politics of International Investment Arbitrators" (2013) 12 Santa Clara J Intl L 223.

[288] See Gus Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration" (2012) 50 Osgoode Hall LJ 211 at 215. Van Harten notes that "there is not, and probably never will be, conclusive empirical evidence of the presence or absence of systemic bias in investment arbitration." See also Peter Nunnenkamp, "Investor-State Dispute Settlement: Are Arbitrators Biased in Favor of Claimants?" (February 2017), Kiel Policy Brief 105 online: Kiel Institute for the World Economy <https://d-nb.info/112978939X/34> [https://perma.cc/YLH3-BJZ8].

[289] See Muthucumaraswamy Sornarajah, *supra* note 27 at 42; Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States" (2010) 104 Am J Intl L 179 at 207, n 134.

They may also favour investors' interests to increase their business opportunities (as counsel or arbitrator) for future investment disputes because MNCs are repeat players.[290] In fact, "[m]any arbitrators vocally rejected a proposal by International Court of Justice Judge, Bruno Simma, to give greater consideration to international environmental and human rights law in investment arbitration."[291] This statement is an indication that investment arbitrators may not support an inclusive ISDS reform just yet.

However, UWGIII's work on the ongoing ISDS reform includes a code of conduct for arbitrators that guides against systemic bias, impartiality, and conflict of interest.[292] The code contains "strict" principles that are geared towards solving the legitimacy crisis in the ISDS regime.[293] Since arbitrators' perceived bias may have contributed to the ISDS legitimacy crisis,[294] it is expected that the proposed ethical rules will guide arbitrators' approach towards local community participation and issues of human rights and the environment.[295] Also, the appointment of arbitrators with knowledge of human rights and the environment may help to overcome the systemic bias against human rights issues because these arbitrators can balance the commercial and human rights issues arising from ISA cases. For example, the Hague Rules provide that "[t]he presiding or sole arbitrator shall have demonstrated expertise in international dispute resolution and in areas to the dispute, which may include, depending on the circumstances of the case, business and human rights law and practice, relevant national and international law and knowledge of the relevant field and industry."[296] Therefore, the appointment of an arbitrator who has expertise in areas of law other than commercial law may help to balance arbitrators' commercial interests with human rights and the environment.

VI. Conclusion

Although "debates about investment arbitration as a dispute settlement mechanism are as heated as they are complex,"[297] this article provokes yet another thought by comparing the possibility of reforming ISDS to adopting the BHR arbitration proposal. It discusses the nature and justification for ISA and distinguishes it from international commercial arbitration. Although international commercial arbitration recognizes reciprocal rights and obligations, ISA does not reflect these characteristics because it downplays investors' obligations to host states and local communities, especially concerning human rights and the environment. This article links the marginal role of

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[290] See generally Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice; How Law firms, Arbitrators and Financiers are Fueling an Investment Arbitration Boom*, Helen Burley, ed, (Corporate Europe Observatory and the Transnational Institute, 2012).
[291] *Ibid* at 8.
[292] See UNCITRAL Working Group III, *Possible Reform of Investor-State Dispute Settlement (ISDS) — Draft Code of Conduct: Note by the Secretariat* (9 November 2020) UN Doc A/CN.9/WG.III/WP.201, online: <https://undocs.org/en/A/CN.9/WG.III/WP.201>.
[293] See Katia Fach Gómez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (Springer, 2019) at 18.
[294] See Silvia Steininger, "What's Human Rights Got to Do With It, An Empirical Analysis of Human Rights References in Investment Arbitration" (2018) 31 LJIL 33 at 51.
[295] See Martin Dietrich Brauch, "Toward a Code of Conduct for Investment Adjudicators: Can Ethical Standards Salvage ISDS" (19 September 2019), online (blog): International Institute for Sustainable Development <https://www.iisd.org/itn/en/2019/09/19/toward-a-code-of-conduct-for-investment-adjudicators-can-ethical-standards-salvage-isds-martin-dietrich-brauch/> [https://perma.cc/HQJ3-ZLWX].
[296] Hague Rules, *supra* note 21, art 11(c).
[297] Bonnitcha, Poulsen & Waibel, *supra* note 7 at 259.

investors' obligations in ISA proceedings to limited local community representation in ISA proceedings. It notes that notwithstanding the role of local communities in international investment discourse, they have limited access to justice in ISA proceedings. Through another proposed arbitration model (BHR arbitration), this article considers the possibility of giving local communities direct access to justice in a non-judicial forum. It draws parallels between ISA and BHR arbitration and argues that, although it is important in some ways to develop new specialized regimes like BHR arbitration, the BHR arbitration proposal is an unnecessary effort to secure access to justice for local communities. The prospect of creating parallel arbitral systems and peculiar procedural challenges make the BHR arbitration proposal problematic. Instead of a new "specialized" arbitration that is untested and prone to new legitimacy attacks, I advocate for an inclusive ISDS reform that resolves investment disputes in a single forum. This article acknowledges that ISDS reform will not be a walk in the park either—it demands procedural and politico-economic recalibration that will be dependent on stakeholders' commitment to creating an inclusive system. It remains to be seen whether recent global developments, which include increased investment claims against developed countries and the rise of emerging economies, are enough to motivate states and MNCs to reconstruct formal participatory rights in ISA and create access to justice for all.

Overall, considering the problematic nature of the BHR arbitration proposal and challenges to ISA reform, there is no easy solution to the problem of access to justice for local communities. However, the choice of ISDS reform is as good as choosing the lesser of two evils.