King's Student Law Review

Title: 'The Good, The Bad and The Ugly 'of ISDS Reforms: Rebalancing the System?

Author: Stephanie Papazoglou

Published by: **King's College London on behalf of The King's Student Law Review**

'The Good, The Bad and The Ugly of ISDS Reforms': Rebalancing the System?

Stephanie Papazoglou

> Where Francis Bacon observed that Revenge is a kind of wild justice, we suggest that Backlash is a kind of wild reform.
>
> *David Caron and Esmé Shirlow*, 2018

Abstract

Recent decades have seen a tremendous need for scrutiny of the international investment arbitration system. Commentators increasingly see signs of backlash against the foreign investment regime and ask whether the current regime of investment arbitration is in crisis. This question can no longer be ignored or be dismissed. A wide array of concerns has been identified by the Working Groups, including a fourth category, namely 'other concerns'. These additional concerns mainly cover third-party participation in so-called investor-state dispute settlement (ISDS), the obligations of investors in relation to human rights as well as the possibility of allowing counterclaims by states and claims by third parties against foreign investors. In its broadest terms, these concerns arise from the asymmetric structure of the ISDS regime. Evidently, there is a presumption that procedural rights provided through multiple tools (bilateral investment treaties [BITs], international contracts, domestic laws) to foreign investors do not correspond with the rights on the side of the states or third parties. The asymmetry of the system is significant. For a comprehensive and real reform agenda, the Working Group III concluded that these aspects would be addressed as part of the existing concerns or as guiding principles for the on-going proposals for reforms.

Nevertheless, backlash is not only about ISDS. Backlash against ISDS is a manifestation of broader concerns about globalisation, and the concerns raised about the perceived negative effects of globalisation are very frequently articulated through critiques of investor-state arbitration. At the heart of this matter, the million-dollar question to be addressed is why ISDS is now in the spotlight and repeatedly being flagged and how states can regulate and prevent this kind of concern. This article aims to provide an overview of the perceived on-going efforts for reform, focusing on the asymmetry concern raised at various levels of the ISDS system. Further, the author engages in a critical perspective of these proposals for reforms by assessing their future implications within the international investment community.

Introduction

Recent decades have seen a tremendous need for scrutiny within the international investment system. Investment experts increasingly see signs of backlash[1] and are not afraid to declare that the current ISDS regime is in crisis[2]. Accordingly, the legitimacy of the ISDS mechanism is a matter of heated debate among civil society, political and institutional actors, as well as academics, and there has been an urgent call for reforms. Since at least 2015, multiple arbitration fora - such as the UNCITRAL and ICSID Working Groups - have been engaged in multilateral reform of the current ISDS system. A wide array of concerns has been identified by the Working Groups and can be neatly divided into three categories set out by the UNCITRAL Working Group: (i) concerns pertaining to consistency, correctness, coherence, and transparency of arbitral decisions by ISDS tribunals; (ii) concerns pertaining to costs and duration of the arbitral proceedings; and (iii) concerns pertaining to arbitrators, including independence, impartiality, conflicts of interest, and diversity.[3]

During its 37th session, in early April 2019, the UNCITRAL Working Group III addressed a fourth category of 'other concerns' as part of its mandate[4] that mainly covers third-party participation in ISDS, obligations of investors in relation to human rights, and the possibility of allowing counterclaims or claims by states against foreign investors.[5] In their broadest terms, these concerns arise from the asymmetric structure of the ISDS. Indeed, when the ISDS system was established, its asymmetrical structure was not a concern but rather a way to counterbalance the asymmetry in the legal relationship of a company investing abroad and a state that has, in theory, close to unlimited regulatory and executive resources to unilaterally reshape the rights and obligations of the company. The asymmetry explains why investors, through multiple tools (BIT, international contracts, domestic laws), are the exclusive holders of the right to initiate claims before an ISDS tribunal against a host state. However, there are currently strong critics against this alleged original asymmetry. Specifically, critics argue that

---

1 The author of this paper refers to 'a large range of acts [that] are cited under the banner of 'backlash' - these acts include decisions of states to review, not renew, terminate, or withdraw from existing treaties, refusals by states to negotiate or sign investment treaties and changes in the approaches of States to the negotiation of new treaties. There are also other forms of backlash, which are not manifested in the actions of States, but arise instead from civil society, non-governmental organizations, and academia. For these groups, backlash often manifests in the form of protests, comments in public consultation processes, and increased reporting and academic discussion of the crisis said to face the regime. The acts and criticisms directed at those treaties are often described as a backlash against investment arbitration generally. See David Caron and Esme Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and its Unintended Consequences' in A Follesdal and G Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (OUP 2018) 161-162.

2 LT Wells, 'Backlash to Investment Arbitration: Three Causes' 341.

3 UNCITRAL Working Group Papers No 150-153.

4 UNCITRAL Report of Working Group III April 2019, 8.

5 'Other concerns' covering third party funding, regulatory chill, and calculation of damages will not be examined in this article.

foreign corporations are benefiting from this structural asymmetry and using ISDS to challenge government policies, actions, or decisions that they allege reduce the value of their investment[6] - which thus has a negative impact not only against states but also against investment-affected communities (eg non-disputing third parties), which will be further explored below.

In light of the ISDS asymmetrical claims structure concern, which does not provide equal and efficient rights to all actors, there is a presumption that the legitimacy and fairness of the system has been injured.[7] In other words, investment treaties and investment treaty arbitration unilaterally favours the interest of investors over the host state's competing interests, which institutionalises a pro-investor bias that casts the legitimacy of the entire system of international investment law and arbitration into doubt.[8] These concerns can no longer be ignored or be dismissed. Given the extent of the regime's evolution, this is not the place to consider each reform in detail. Instead, this paper traces the major components of the on-going developments and discusses how the diverse proposals for reforms - and in particular the permanent, multilateral investment court proposal - are dealing with the issue of asymmetry.

These perceived legitimacy and fairness issues raise questions as to whether the ISDS proposals for reform can cure the shortcomings of the existing asymmetric system and whether their implementation may potentially create new concerns. Section 1 examines the rationale behind the major on-going ISDS developments in different academic and institutional fora as well as in international investment treaties practice and assesses their implications in respect of the asymmetry issue. Section 2 engages in a prospective and critical evaluation by focusing on the current reform proposal for a permanent, multilateral investment court as a response to the asymmetric structure of ISDS and also presents other relevant solutions capable to address the asymmetrical structure concern. Finally, the author draws concluding remarks and future perspectives.

1. ISDS Reforms: A Response to the Asymmetry Concern by Mapping the Way Forward

The present section analyses the rationale for pursuing ISDS reform on a multilateral basis, focusing on the issue of asymmetry. The section will then describe the major on-going developments within various arbitration fora and assess their implications regarding this asymmetry issue. For the sake of clarity, the author of this paper will separately analyse the permanent, multilateral investment court proposal and how it may deal with the asymmetrical structure concern.

1.1. The Rationale of Reforms: Criticisms of the Asymmetric Structure of the ISDS Regime

[6] See Alliance for Justice Letter, Eberhardt and Olivets.

[7] Charles Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law' (2009) 9 (2) Chicago JIL 471-475; ibid Caron and Esme (n 1) 164.

[8] ibid 474.

The current ISDS framework is characterised by the use of arbitral tribunals established ad hoc to resolve disputes between foreign investors and the host states. The original reason for establishing the system was to counterbalance the asymmetry in the legal relationship of a company investing abroad and the state, which, in theory, has close to unlimited regulatory and executive resources. In attempting to eliminate that asymmetry, the ISDS system has since been characterised as a '*one-way street*',[9] as the host state is, in principle, the respondent.[10] Generally speaking, the presumption is that the investor is the 'weaker' party, but the system still works in its favour. This original asymmetrical structure is not necessarily problematic. However, circumstances have changed over time. Currently, strong criticisms are raised against the alleged asymmetry between the investor and host state. For example, in cases involving multi-billion-dollar multinational companies as investor and small developing or least developed countries as host state, critics claim the original asymmetry has not been effectively addressed by the current ISDS regime.[11] The lack of an appropriate solution is due to the current regime giving states limited procedural rights compared to the claimant. In other words, the unfairness of the system derives from the fact that states cannot sue foreign investors for causing, eg social or environmental harm. Moreover, their right to bring counterclaims against the investors has been constantly criticised as ineffective.[12] These unsuccessful efforts to assert counterclaims[13] result from current international institutional rules and various international treaties, which fail to provide efficient tools. Therefore, the asymmetry concern remains unresolved and calls for urgent reform.

Furthermore, procedural asymmetry creates some negative impacts that go beyond the disputing parties and affect non-party stakeholders. Among these non-party stakeholders are local communities, labour unions, environmental protection entities, and civil society organizations. Under the current regime, these non-parties cannot intervene to present a substantive point of law or facts during proceedings; existing arrangements in ISDS are not designed to protect these non-party stakeholders whose rights and interests may nonetheless be directly at stake.[14]

Agreeing with these criticisms, several countries have denounced or withdrawn from the International Centre for Investment Disputes (ICSID) Convention[15] and others have reduced

---

9 Lorenzo Cotula, 'Investor-State Arbitration: an opportunity for real reform?', IIED blog.

10 T Schultz and C Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors?' 1153.

11 Brower and Schill (n 7) 471-75.

12 Harshad Pathak 'Consenting to Counterclaims Under the ICSID Convention' (2019) 19 (1) Pepp Disp Resol LJ 104.

13 ibid 119-22.

14 See, eg *Chevron v Ecuador* PCA Arbitral Award 2018. During the 37th session of the UNCITRAL Working Group III, it was confirmed that, currently, few opportunities are available for interested third parties to take part in ISDS proceedings.

15 Bolivia, Ecuador, and Venezuela became the first countries to withdraw from ICSID since its establishment in 1966. See Joost Pauwelyn and Rebecca J Hamilton, 'Exit from International Tribunals' (2018) Journal of International Dispute Settlement 682.

or terminated their exposure to ISDS mechanisms.[16]

In the author's view, these states' reactions may also be part of a reform - or voice - strategy. In a legal sense, the term 'reform' is defined as 'an improvement or set of improvements made to a legal system in order to make it more modern or effective'.[17] The current system is indeed facing an imminent push towards major reforms aiming to promote and protect different values, including greater transparency, correctness of arbitral decisions, symmetric access to justice, and state sovereignty. These reform proposals are divided broadly into two sides: the first group advocating for a structural reform, including an investment court and appellate body; the second group preferring a more functional reform by maintaining the current system and making adjustments in a step-by-step process.[18] For the purposes of this paper, what is important is not which reform is more desirable, but that states should focus on the establishment of a 'real reform' that addresses asymmetric access and contributes to making the system fairer and more legitimate.

1.2. The On-going Developments: A Step Forward in Rebalancing the ISDS System

This subsection examines current developments, which are called by the UNCITRAL Working Group III, 'functional reform' and aim to reconfigure the asymmetric structure of the ISDS and to turn the one-way street into a multi-directional one.

1.2.1 Effective Counterclaims as a Response to the Asymmetry Concern

Allowing states to file counterclaims may contribute to resolving multiple concerns with ISDS, particularly the asymmetry in parties' obligations as well as democratic accountability of the system and legitimacy in the fields of human rights and sustainable development. The need for accountability and legitimacy is the reason why the practice of allowing counterclaims has been enhanced by recent developments in state treaty practice. In various 'new generation' investment treaties, diverse obligations have been imposed on foreign investors. Indeed, some treaties' provisions require investors to comply with international instruments, particularly those on labour, environmental, and human rights. States could invoke such clauses in ISDS by initiating human rights, environmental, or labour counterclaims.[19] However, none of these treaties is yet in force. Article 7(1) of the Netherlands Model Bilateral Investment Treaty 2018 also appears to allow host states to initiate counterclaims in case foreign investors do not comply 'with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labour laws.' This practice strengthens the

[16] South Africa has followed by terminating its investment treaties since 2012. Further, the India Model BIT has significantly limited access to ISDS. See Anthea Roberts, 'A turning of the Tide against ISDS?' (EJITALK, 19 May 2017) 3.

[17] Cambridge Dictionary (2018).

[18] Report of Working Group III (ISDS Reform) on the work of its 37th session (April 2019), A/CN.9/970, paras 63 et seq.

[19] Numerous examples confirm this new trend, including the Belarus-India BIT 2018 (Chapter III, Article 11(i) and Article 12), the Intra-MERCOSUR Investment Facilitation Protocol 2017 (Article 13), and the Morocco-Nigeria BIT 2016 (Article 18).

case for redressing asymmetries and ensuring that investments advance sustainable development.[20] Accordingly, the UNCITRAL Working Group III has included in its mandate an examination of the scope of counterclaims that may be filed by states.[21]

Moreover, in March 2019, to keep ICSID's procedural rules 'fit-for-purpose', an ICSID Working Paper proposed a range of amendments to the ICSID Arbitration Rules, including a minor amendment to Rule 40(1) on counterclaims.[22] Under the ICSID Arbitration Rules and Convention, for a respondent state to bring, for instance, a human rights counterclaim against an investor, three requirements must be met: (1) the parties must consent to submit counterclaims to ICSID arbitration; (2) the counterclaim must arise directly out of the subject matter of the dispute; and (3) the counterclaim must be within the jurisdiction of ICSID.[23] The same criteria are also required under the UNCITRAL Arbitration rules, revised in 2010 (Article 21(3)). The UNCITRAL requirements, in practice, have been difficult or even impossible to meet, due to a lack of substantive obligations on the investors. Taking into consideration the recent developments in international investment agreements (IIAs) that impose obligations on investors, a few recent ICSID tribunals have considered a host state's counterclaim - e.g. based on the right to water - in accordance with the ICSID Arbitration Rules and declared it admissible.[24] This is a step forward to symmetric access, but there is a long way to go before consistency of arbitral tribunal decisions on counterclaims is achieved. Some commentators have argued that the Working Group made adjustments only to the temporal requirement of counterclaims without reflecting the recent developments and, thus, failed to make a comprehensive reform in rebalancing the system.[25]

1.2.1. The Rise of Third-Party Participation as a Response to the Asymmetry Concern

Currently, third parties – including local residents and indigenous peoples – affected by foreign investments have no right to participate in ISDS disputes. Existing arrangements for third parties to participate in ISDS are not designed to protect third parties even if their rights and interest are directly at stake.[26] Meanwhile, it is true that counterclaims may be linked to the rights or interests of those third parties, but there is no guarantee that the state is able or willing to espouse these claims, raising the question as to whether third parties should be permitted to have a more active role in the proceedings. To respond to these concerns, the UNCITRAL Working Group III concluded that the participation of third parties or non-

[20] Lorenzo Cotula and Brooke Guven, 'Investor-State Arbitration: an opportunity for real reform?' IIED blog.
[21] Report of Working Group III (ISDS Reform) on the work of its 37th session (April 2019), A/CN.9/970, paras 34-35.
[22] ICSID Working Paper II (2019) Volume I AR 45, 216.
[23] Article 43 and Article 25 of the ICSID Convention.
[24] See *Urbaser v Argentina* ICSID No. ARB/07/26 ICSID award, 18 October 2018 and *Burlington Resources v Republic of Ecuador* No. ARB/08/5 ICSID award, 7 February 2017.
[25] Summary Comments to the Proposals for Amendment of the ICSID Arbitration Rules IISD blog, 9.
[26] Lorenzo Cotula, 'Reforming investor-state dispute settlement: what about third-party rights?' (2019) IIED Blog.

disputing parties in ISDS proceedings, warranted consideration.[27] Furthermore, as part of wider ISDS reforms, the UNCITRAL Rules on Transparency and the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration have provided for amici curiae submissions by a third person[28] along with, or by a non-disputing Party to the treaty.[29] In other words, these amici curiae ('friends of the court') briefs are defined as a procedural mechanism by which third parties may be allowed to intervene during the arbitral proceedings and provide their input in respect of the dispute. This procedural tool aims to ensure and promote symmetric access as well as enhance the transparency and correctness of the arbitral awards by helping arbitral tribunals to consider all relevant facts and laws that might be at stake. A recent and influential example is the *Philip Morris* case, where the tribunal accepted and even relied upon the amicus curiae submissions.[30]

Nevertheless, even if these briefs assist the tribunals in resolving the dispute, their admissibility is still at the mercy of the tribunal's discretion and parties' willingness to accept them. Recent practice shows that arbitral tribunals consistently reject such briefs (the *Phillip Morris* case is one of the few *a contrario* examples).[31] Moreover, arbitration rules do not always ensure third parties' access to hearings or diverse types of documents submitted by the parties. Amicus curiae submissions are thus not always able to grant effective voice or protection to actors whose rights or interests are at stake in a dispute.[32] As recognised during the UNCITRAL Working Group III session, the question was raised as to

> whether those provisions were insufficient and required the development of guidance to tribunals on how to apply the requirements for third-party submissions and to ensure that such submissions would be duly considered when rendering their decisions.[33]

Lastly, the ICSID Secretariat, with regard to the current rule amendment process, has not moved beyond the existing approach to amicus curiae submissions.[34] Even when the submission is permitted, the tribunal is entitled - not obligated - to 'provide the non-disputing party with access to relevant documents filed in the proceeding', but is forbidden from doing so if either party objects. This provision imposes significant limitations on the ability of amici curiae to make meaningful submissions. Therefore, the multilateral reform agenda should, in a more proactive way, enhance public access and third-party intervention by other tools, eg through the procedural tool of joinder, which will be examined further in this article, non-disputing parties may become real parties to the dispute.

---

27 ibid 7.

28 UNCITRAL Rules, art 4.

29 ibid art 5.

30 *Phillip Morris v Uruguay* ICSID case No ARB/10/7, 2016 award.

31 *Eco Oro v Columbia* ICSID case No ARB/16/41, 2016; *Von Pezold and Border Timbers v Zimbabwe* ICSID case No ARB/10/15, 18 February 2019.

32 See *Chevron v Ecuador* (n 14).

33 Report of Working Group III (n 18) para 31-33 p 7.

34 Proposed Arbitration Rule 65 on amici curiae submission of non-disputing parties.

In light of the above, these '*functional*' on-going developments currently fail to effectively and uniformly establish counterclaims for states and third-party intervention for non-disputing parties. This failure leads to the second part of this paper, which addresses whether the EU proposal for a multilateral investment court, a more structural or radical reform than others, may be a more efficient and potentially effective way of dealing with the asymmetrical nature of the ISDS system.

2. A Critical Analysis of the ISDS Reform: Redressing the System?

The present section engages in a critical evaluation of one of the major ISDS reforms, the establishment of an investment court system (ICS), and examines whether this system will effectively address the asymmetric concern generated by ISDS. It also analyses alternative solutions for addressing these concerns. For the sake of clarity, regarding the ICS, the author of this paper refers to the EU's proposal for a multilateral investment court system and thus, will not discuss any of the other reforms that are part of the broader ICS package.

2.1. The Permanent Investment Court System: The Good, The Bad, and The Ugly Aspects

The complexity of current investment disputes requires more sophisticated procedural tools so that all affected parties can assert effectively their rights. The European Commissioner for Trade expressed the EU's view that the multilateral investment court (MIC) is the logical way to effectively address the above-discussed concerns.[35] Accordingly, the UNCITRAL Working Group III has considered the EU's proposal during its debates about ISDS reform.

In the author's view, a permanent body may indeed contribute to the establishment of a symmetric access to justice system - ie by permitting the filing of effective claims or counterclaims by states - that also allows third-party intervention - ie by permitting joinder). It is true that ISDS currently lacks comparable arrangements.

Moreover, investment experts have expressed the need to create a multilateral convention, which would grant access to the MIC to all actors - direct or indirect - and provide them with the aforementioned procedural tools.[36] One may imagine that this treaty would reflect the meaningful IIA developments on counterclaims and third-party intervention. Evidently, its provisions may also explicitly impose substantive obligations on investors related particularly to human rights, environmental, and labour protection. The permanent arbitrators may thus

---

[35] European Commission Archives (2018) <trade.ec.europa.eu>; see also Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' CIDS Supplemental Report p 3; Rosa Luxembourg Stiftung 'A World Court for Corporation how the EU plans to entrench and institutionalize investor-state dispute settlement' (2017) Brussels Office.

[36] Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?' (2016) 1st CIDS Report, Analysis and Roadmap; ibid Kaufmann-Kohler and Potestà (2017); UNCITRAL July 2017 Report, para 29 p 8; Anthea Roberts, 'A Turning of the Tide against ISDS?,' (2017) EJILTALK 3.

allow affected non-parties to intervene during the proceedings when their legal rights have been affected and arise directly out of the subject matter of the dispute.[37] Another solution, inspired by other national and international dispute settlement contexts, is to give arbitral tribunals the discretionary power to dismiss the case when they consider that a dispute between two parties may affect a non-party's rights.[38] These tools are designed to provide an effective voice to non-parties and permit the court to consider different perspectives on the facts and all relevant, applicable norms, including norms outside of investment law. The tools may also protect the quality and correctness of ISDS decisions as well as enhance an investor's accountability. In the author's view, the drafters of the MIC convention, on the issue of investors' obligations, should be inspired by principles and guidance on multinational corporations and human rights.[39] Further, with regard to counterclaims and joinder mechanisms, a model could be the International Court of Justice system or other national and international court systems that include such mechanisms.[40]

Therefore, some of the good aspects of the establishment of an MIC are greater access to justice, public scrutiny, consistency, and transparency. Respondent states as well as affected non-parties may initiate effective claims and counterclaims, and the latter will act as real parties with equal procedural rights as the original parties. The author believes that counterclaims and third-party joinder could mitigate existing concerns, including lack of transparency, democratic accountability, and legitimacy.

Nevertheless, some risks may arise from an MIC. For instance, the proceedings may be more costly, lengthy, and complex - not only for local communities, but also for the foreign investor and state. The judges will also need to have more than just public international law and arbitration qualifications, potentially including expertise in human rights and environmental law. Local communities may thus find themselves in an unfavourable dispute settlement forum far from their locality.[41] Moreover, for the admissibility of claims or counterclaims, the investor's consent must be proven. To respond to this issue, the author proposes that consent could be given by two ways: either ex ante via an open offer to consent instrument, with the investors also sending an acceptance letter to the MIC, or ex post consent when the investors file the notice of arbitration, which signifies that arbitrating a claim shall also be deemed to include consent to arbitrate any counterclaims brought by the state. So, the MIC convention would be considered a source of consent to the filing of counterclaims. This idea was first developed by Professor Michael Riesman in his dissent in the *Roussalis* case.[42] Another negative aspect of this proposal is related to doubts about whether a multilateral convention will be ever signed and ratified by all states. The future of the unknown may thus create

[37] Lise Johnson, 'Investment Disputes and Affected Third Parties, Connections, Issues and Options for Reform' (2019) 8.

[38] ibid eg inspired by the Rule 81 of the ICJ Rules.

[39] UNGPs and SDGs on Business and Human Rights.

[40] Johnson (n 37).

[41] ibid.

[42] *Roussalis v Romania* ICSID Case No ARB/06/1, Declaration of W Michael Reisman (28 Nov 2011).

anxiety within the international community.

Finally, the ugly part of this proposal for reform is uncertainty as to whether the establishment of an MIC is really 'worth it' or whether it is more prudent for the UNCITRAL Working Group to start by implementing and improving the relevant procedural tools within the current system. This latter view has been supported by some academics and experts, who believe that although entering into a single multilateral convention would be easier than entering into side agreements for every FTA, one would still expect that the European Union would start out with the side agreements given that no one knows whether, or when, an agreement might be reached on a Multilateral Investment Court.[43] Currently, new developments on different levels are trying to respond to the asymmetry issue and are going to be examined in the following subsection.

2.2. Alternative Wings: Future or Fiasco?

Along with various proposals for ISDS reform, a fairer system may still require ISDS arbitration to coexist with other alternative tools.[44] The list of complementary tools mainly addresses the exhaustion of local remedies. For instance, South Africa passed the Protection of Investment Act 22 of 2015, which gives primacy to domestic courts. This alternative tool may respond to the public access concern. Directly affected civil society actors may intervene or bring a claim against foreign investors before national tribunals to protect their human, environmental, or labour rights. Another recent example is the enactment of a French law on the 'duty of vigilance of the parent company and main contractor companies'.[45] Indeed, this French law provides recourse before the French courts in cases of non-compliance in the investor's obligations. This tool may also resolve the problem of ISDS tribunals lacking appropriate expertise. Under these laws, local communities may find themselves in a more favourable and less costly dispute settlement forum.

Furthermore, alternative dispute resolution (ADR) mechanisms, such as investment mediation, may also constitute an effective means of achieving fairness and symmetry among disputing parties. The attractiveness of mediation is closely related to the issue of equality of arms. This form of ADR could strengthen the procedural rights of those affected - states or local communities - because it can establish a framework for investors, public authorities, and affected people to discuss and cooperate before or after investment decisions and thus prevent the need to file formal international disputes.[46] As China stated during the UNCITRAL Working Group sessions, 'investment mediation could operate to prevent the escalation of disputes to arbitration'.[47] For example, efforts have recently established the Convention on

---

[43] Roberts (n 36).

[44] Report of Working Group III (n 18); see Indonesia Proposal (2019); the Belarus-India BIT Model; Johnson (n 37).

[45] French Corporate Duty of Vigilance Law No 2017-399, 27 March 2017

[46] NM Perrone, 'Making Local Communities Visible: A way to prevent the potentially tragic consequences of foreign investment?' (2019).

[47] Hong Kong ISDS Reform Conference: Investment Mediation, 17 April 2019.

International Settlement Agreement resulting from Mediation adopted by the UN General Assembly (Mediation Convention).[48] Similarly, Brazil has started signing Cooperation and Facilitation Investment Agreements that encourage the use of ADR. Indeed, so-called focal points - or Ombudsmen, which are domestic governmental institutions mainly operating at investment level - offer support to foreign investors, answer requests, and seek solutions to inquiries related to their investments.[49] In other words, if there is a doubt, problem or complaint, the investor could consult the Ombudsman in the host state to try to mitigate the risks by managing the controversy. These public bodies promote dialogue and consultation among the contracting parties on various issues, including social, environmental, and corporate responsibility regulations. However, this institution under the CFIAs model was only recently established and has not been fully tested in practice, so the unclarity and uncertainty of its viability remain, which may give rise to some concerns. For instance, while Brazilian CFIAs include provisions on corporate social responsibility, the local community cannot yet make complaints to the Ombudsman. In relation to this point, one criticism of the Ombudsman's structure is that only governments and investors can make complaints to it.[50]

The recent drafting project on the Hague Rules of the Business and Human Rights Arbitration (BHR)[51] could also be another reform option to address the asymmetrical access to justice concern. The project addresses a number of concerns arising in arbitration, including rights-compatibility between business corporations and civil society. The drafting team discussed the possibility for communities that are negatively affected by an investment activity to initiate a claim against corporations before an arbitral tribunal. However, BHR arbitration is distinct from investor-state arbitration. Nevertheless, it is in the author's view that these draft rules, the United Nations Guiding Principles (UNGPs) on Business and Human Rights - which ensure access by third parties to a private adjudicative remedy mechanism[52] - should be taken into account by the Working Group III, since UNCITRAL is part of the United Nations. In light of this, an open question remains as to whether or not all these on-going alternative proposals will have a successful impact in the ISDS system.

Conclusion

[48] United Nations Convention on International Settlement Agreements resulting from Mediation (New York 2018); (The 'Singapore Convention on Mediation') open for signatures on 7th August 2019.

[49] Article 20 of the CFIA.

[50] Nathalie Bernasconi-Osterwalder and others, 'Comparative Commentary to Brazil's Cooperation and Investment Facilitation Agreements (CFIAs) with Mozambique, Angola, Mexico and Malawi' (2015) IISD 6-7.

[51] The Hague Rules of the Business and Human Rights Arbitration initiated by the Business and Human Rights Arbitration Working Group, who released in November 2018 as Elements paper on Business and Human Rights Arbitration and in June 2019, Draft Arbitration Rules on Business and Human Rights.

[52] Business and Human Rights Arbitration Project Report 2018 (CILC) 5.

International investment dispute settlement plays an important role in attracting investments and strengthening confidence in the investment environment. It is, therefore, essential to ensure that the resolution of investment disputes is carried out effectively, and that those involved in, or affected by, such disputes have confidence in the system, especially states and third parties, who possess, as it has already been examined, less rights under the current ISDS regime. Effectively addressing the problems, including the asymmetry concern, already identified by the UNCITRAL and ICSID Working Groups could improve the current system. This improvement can be done either by a step-by-step process, which means through functional reforms, or through a more radical way, which may include structural reforms like the permanent, multilateral investment court. As explained above, both type of reforms have their own positive and negative implications. However, it is important to keep in mind that a narrow focus would miss the opportunity for real and comprehensive reform and would risk locking states into a system that remains fundamentally flawed. Consequently, while states are legitimately in the driver's seat of ISDS reform, discussions between lawmakers and experts and others not affiliated with the state must continue to strengthen the fairness, legitimacy, and justice of the system.