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Justice for All? Protecting the Public Interest in Investment Treaties

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JUSTICE FOR ALL? PROTECTING THE PUBLIC INTEREST IN INVESTMENT TREATIES

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Abstract: Investment arbitration has come increasingly under fire because of its design flaws. There is an emerging consensus that investment treaty arbitration not only falls short of ensuring a sufficient degree of transparency of arbitral proceedings and impartiality of arbitrators, but also that its institutional architecture is unjustifiably asymmetric, entrusting foreign investors with significant rights while no protection is afforded to the host states' constituencies. In response to these criticisms, several states have attempted in recent years to reform the rules governing investor-state arbitration. A perusal of recently concluded international investment agreements, however, reveals that the reform efforts so far have focused on the first two shortcomings. Very little, instead, has been done with regard to the asymmetric character of the system. This Essay seeks to specifically address this flaw, by placing the rights of investment-affected people on par with those of investors. To do this, we seek to display the viable alternatives to the currently predominant—and flawed—model of investment dispute settlement. We start by outlining the features of the investor-state dispute settlement system that lie at the root of the system's legitimacy crisis. In particular, relying on a burgeoning body of scholarship, we expose the inadequacy of private order dispute settlement mechanisms in dealing with mainly public law disputes. Bearing this in mind, we contend that future reform efforts should reckon with the rights and interests of the individuals

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and groups of individuals who are likely to be affected by the investment operations. In other words, States can only remove the asymmetric character of the system by endowing this category of individuals with substantive and procedural rights. We also argue that international investment agreements should go beyond their traditional protective function by aiming to keep investors' conduct in check. We opine that such agreements should also clearly establish investors' obligations to safeguard the wide range of non-investment interests implicated in investment operations. This Essay envisages three innovative models for the solution of investment disputes and presents a comparative analysis of alternative scenarios. The first suggests the abandonment of investment arbitration in favor of soft-law grievance mechanisms. The second envisages arbitration for both investors and investment-affected parties. The third proposal is a networked system where arbitration is coupled with grievance mechanisms for investment-affected individuals. In short, we submit that future treaties should either completely ditch the ISDS system or undertake a major overhaul of the system. Each proposal has its limits and promises. We conclude that, in spite of their limits, any of these proposals would offer a superior alternative to the dramatic deficiencies of the current system and future research should be directed to further articulate the contours of our proposals.

INTRODUCTION

Few areas of international law are more controversial than international investment law. Debate traditionally rages over international rules—both customary and conventional—on foreign investment. Opponents of such rules often level criticisms against investment treaty arbitration for its lack of impartiality, transparency, and coherence.[1] More crucially, the international investment regime is often regarded as an unbalanced system that favors corporate interests.[2]

Not surprisingly, international investment reform proposals have proliferated among scholars and practitioners. Recent treaty practice has also been the subject of reform efforts.[3] The most significant of these efforts

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[1] *See* M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 32–33 (2015); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 152–67 (2008); Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 785–89 (2008).

[2] *See* Frank J. Garcia et al., *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. INT'L ECON. L. 861, 869–70 (2015).

[3] *See, e.g.*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTE (ICSID), CONVENTION ARBITRATION RULES ON TRANSPARENCY (2017); UNITED NATIONS COMMISSION ON INT'L TRADE LAW (UNCITRAL), RULES ON TRANSPARENCY (Apr. 1, 2014); *North American Free Trade Agreement: Notes of Interpretation of Certain Chapter 11 Provisions*, ¶ A(1), FOREIGN TRADE INFO. SYS. (July

concern the dispute settlement mechanism provided by international in-investment treaties. Recent international investment agreements ("IIAs") and arbitration rules put greater emphasis on the transparency of arbitral proceedings, arbitrators' independence, and arbitral decisions' consistency.[4] Additionally, new IIAs feature less vague investment protection standards and seek to reconcile investment protection with a wide range of non-investment interests, such as environmental protection, human rights, and labor rights.[5]

Notwithstanding these developments, such treaties still fail to fully address their central flaw: their asymmetric structure, which allows investors to hold both substantive and procedural rights, but the communities affected by such investments to have neither.[6] In this Essay, we set out to identify models for reforms that can address this major pitfall. Given the limited scope of this Essay, these three models are only sketched and serve the purpose of identifying new directions for reforms. Future research is necessary to further study the fine points and legal design of each alternative.

Part I of this Essay discusses the features of the investor-state dispute settlement ("ISDS") system that lie at the root of the system's legitimacy crisis.[7] Part II explains possible substantive reforms, which require formal obligations for investors and rights to the civil society likely to be affected by the investment operations.[8] Part III examines the emergence of Public Alternative Complaint Mechanisms ("PACoMs"), such as Ombudsbodies and National Contact Points as existing practices aimed at ensuring the accountability of international institutions and of the corporation operating

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31, 2001), http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp [https://perma.cc/MYB3-9SP4] [hereinafter *NAFTA Notes of Interpretation*].

[4] *See, e.g.*, *NAFTA Notes of Interpretation*, *supra* note 3, ¶ A(1).

[5] *See, e.g.*, Reciprocal Investment Promotion and Protection Agreement, Morocco-Nigeria, art. 24 (Dec. 3, 2016), http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409 [https://perma.cc/3V3S-U7RN] [hereinafter Morocco-Nigeria BIT] (requiring investors and host states to assess the potential impact of an investment on the local community). *See generally* Eric De Brabandere, *Host States' Due Diligence Obligations in International Investment Law*, 42 SYRACUSE J. INT'L L. & COM. 319, 320 (2015) (discussing specific obligations that IIAs sometimes impose on host states); Tarcisio Gazzini, *The 2016 Morocco-Nigeria BIT: An Important Contribution to the Reform of Investment Treaties*, INV. TREATY NEWS (Sept. 26, 2017), https://www.iisd.org/itn/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini/ [https://perma.cc/NTB7-A3ZV] (discussing the likely impact of the Morocco-Nigeria BIT reforms in detail).

[6] *See* Mattias Kumm, *An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege*, 4 ESIL REFLECTION 1, 5 (2015).

[7] *See infra* notes 11–76 and accompanying text.

[8] *See infra* notes 78–110 and accompanying text.

transnationally, as well as the protection of rights of affected parties.[9] Final-Finally, Part IV provides possible methods to ensure investment-affected people's access to remedies in the investment regime, which include three alternatives: PACoMs as an alternative of investment treaty arbitration; access to investment treaty arbitration for all; and a networked system that combines existing arbitration tools with other grievance mechanisms.[10] Overall, this Essay submits that the future treaties should either completely eliminate the ISDS system or undertake a major overhaul of the system. Despite the limits of each alternative, this Essay concludes that any of these proposals would offer a superior alternative to the dramatic deficiencies of the current system.

I. THE LEGITIMACY CRISIS OF INTERNATIONAL ARBITRATION

The ISDS system is one of the distinctive features of the investment treaty-based protection regime.[11] IIAs generally contain investment dispute

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[9] *See infra* notes 111–145 and accompanying text.

[10] *See infra* notes 146–167 and accompanying text.

[11] *See generally* DIRECTORATE FOR FIN. & ENTER. AFFAIRS, OECD, DISPUTE SETTLEMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS: A LARGE SAMPLE SURVEY (2012), http://www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf [https://perma.cc/Q6D3-3S79]. Only few investment agreements do not grant access to such a dispute settlement mechanism. These include either agreements concluded in the early days of the "Bilateral Investment Treaty ("BIT") revolution" or very recent treaties, particularly Australia and Brazil's investment agreements. *Id.* at 8 n.2; *see, e.g.*, Acuerdo de Cooperación y Facilitación de Inversiones [Investment Cooperation and Facilitation Agreement], Braz.-Chile, Nov. 24, 2015, http://investmentpolicyhub.unctad.org/Download/TreatyFile/4712 [https://perma.cc/8SJZ-7MBZ] (containing no ISDS mechanism); Acordo de Cooperação e Facilitação de Investimentos [Agreement for Cooperation and Facilitation of Investments], Angl.-Braz., Apr. 1, 2015, http://investmentpolicyhub.unctad.org/Download/TreatyFile/4720 [https://perma.cc/V48D-8WPU] (same); Acordo de Cooperação e Facilitação de Investimentos [Agreement for Cooperation and Facilitation of Investments], Braz.-Mozam., Mar. 30, 2015, http://investmentpolicyhub.unctad.org/Download/TreatyFile/4717 [https://perma.cc/D8P7-V6KG] [hereinafter Brazil-Mozambique ACFI] (same); Malaysia-Australia Free Trade Agreement, Austl.-Malay. (May 22, 2012), http://fta.miti.gov.my/miti-fta/resources/Malaysia-Australia/MAFTA.pdf [https://perma.cc/23EL-4SGN] (same); Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Indon., Nov. 8 1968, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3334 [https://perma.cc/4NCS-M6CS] (same); Agreement Concerning the Encouragement and the Reciprocal Protection of Investments (with Protocol), Den.-Indon., Jan. 30, 1968, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2977 [https://perma.cc/PUQ9-FA8S] (same); Treaty Concerning the Promotion and Reciprocal Promotion of Investments, Ger.-Iran, Nov. 11, 1965, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3502 [https://perma.cc/3GJ2-96ER] (same); Accord de Commerce, de Protection des Investissemenets et de Coopération Technique [Trade, Investment Protection and Technical Cooperation Agreement], Congo-Switz., Oct. 18, 1962, http://investmentpolicyhub.unctad.org/Download/TreatyFile/817 [https://perma.cc/8LY4-XZEF] (same).

clauses, whereby the contracting states give their prospective consent[12] to submit to arbitration any future disputes stemming from an alleged violation of substantive provisions of the IIAs.[13] As the number of IIAs containing ISDS clauses increased over time, investment arbitration gained an unprecedented importance in the resolution of investment disputes.[14] Nevertheless, investment arbitration soon became a victim of its own success.[15] The increasing number of investment disputes exposed the main shortcomings of the most popular arbitration rules.[16]

This Part illustrates the main criticisms raised against the investment arbitration system. Section A discusses the current regime's procedural deficiencies, including the adjudicating body's lack of independence and impartiality, the system's overall incoherence, and its lack of transparency.[17] Section B describes the asymmetry in-build in the investment treaty arbitration system, whereby investors are entrusted with significant rights and investment-affected individuals and communities with almost none.[18] Section C examines current reform efforts and developments emerged in recent investment treaty practice.[19] Finally, Section D exposes the inadequacy of private order dispute settlement mechanisms in dealing with mainly public law disputes.[20]

A. Procedural Deficiencies

1. Lack of Independence and Impartiality of the Adjudicatory Body

Investment arbitration is often considered as being too prone to the interests of foreign investors. This is primarily because under the most

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[12] ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW 6 (2014).

[13] This way of establishing arbitral tribunals' jurisdiction has been famously dubbed "arbitration without privity." *See* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 232, 234 (1995).

[14] *See* Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed*, 29 ICSID REV. 372, 396 (2014).

[15] *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1539 (2005).

[16] *See* UNCTAD, *Investor-State Dispute Settlement: An Information Note on the United States and the European Union*, IIA ISSUES NOTE, June 2014, at 9–10, https://unctad.org/en/PublicationsLibrary/webdiaepcb2014d4_en.pdf [https://perma.cc/FS4H-RZBV]. *See generally* Giorgio Sacerdoti, *Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards*, 19 ICSID REV. 1 (2004) (providing a comparative analysis of selected aspects of these bodies of rules).

[17] *See infra* notes 21–39 and accompanying text.

[18] *See infra* notes 40–47 and accompanying text.

[19] *See infra* notes 48–70 and accompanying text.

[20] *See infra* notes 71–76 and accompanying text.

commonly used arbitration rules, namely the United Nations Commission on Internal Trade Law (UNCTRIAL) and the International Centre for Settlement of Investment Disputes (ICSID) rules, parties to a dispute play an important—although not exclusive—role in selecting arbitrators. This has been cuttingly defined as "the ultimate form of forum shopping"[21] because party-appointed arbitrators are inherently more likely to uphold the claims put forward by the party who selected them. More generally, this system could induce arbitrators to uphold the views of those who have the power to trigger the ISDS system—i.e., the investors—in order to obtain future appointments.[22] Besides, some commentators have noted that arbitrators belong to a racially and culturally homogenous circle. In fact, in the overwhelming majority of cases, parties appoint arbitrators from North America and Western Europe.[23] A recent survey showed that a small circle of fifteen Western arbitrators decided fifty-five percent of all investment arbitrations.[24] Arbitrators can thus be viewed as an epistemic community whose members share a similar pro-market attitude and trust in international arbitration,[25] which affects the interpretation of the vague standards set out in IIAs.[26]

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[21] *See* Catherine A. Rogers, *The International Arbitrator Information Project: An Idea Whose Time Has Come*, KLUWER ARBITRATION BLOG (Aug. 9, 2012), http://kluwerarbitrationblog.com/blog/2012/08/09/the-international-arbitrator-information-project-an-idea-whose-time-has-come/ [https://perma.cc/HD2V-H752].

[22] *See* Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT'L L. 431, 455 (2013); Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L.J. 211, 221 (2012).

[23] *See* ICSID, THE ICSID CASELOAD STATISTICS (ISSUE 2016-2), at 18 (2016), https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202016-2%20(English)%20Sept%2020%20-%20corrected.pdf [https://perma.cc/WEM9-E5MA].

[24] PIA EBERHARDT & CECILIA OLIVET, CORP. EUR. OBSERVATORY & THE TRANSNAT'L INST., *Profiting from Injustice—How Law Firms, Arbitrators and Financiers Are Fueling an Investment Arbitration Boom* (2012), https://www.tni.org/en/briefing/profiting-injustice [https://perma.cc/S22A-VBG3]; *see also* Emmanuel Gaillard, *Sociology of International Arbitration*, *in* PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 188, 201 (David Caron et al. eds., 2015) (examining lack of impartiality in the ISDS system).

[25] YVES DEZELAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 16 (1996); B. Audit et al., *Table Ronde: Le Système Actuel est-il Déséquilibré en Faveur de L'investisseur Privé Étranger et au Détriment de L'état D'accueil?*, *in* LE CONTENTIEUX ARBITRAL TRANSNATIONAL RELATIF À L'INVESTISSEMENT: NOUVEAUX DÉVELOPPEMENTS 185, 187–90 (Charles Leben & Joe Verhoeven eds., 2006).

[26] M. SORNARAJAH, *supra* note 1, at 27.

2. Incoherence

The tendency of investor arbitration to deliver inconsistent decisions often results in unsustainable legal uncertainty.[27] Arbitral tribunals often interpret similar or even the same provisions of IIAs but somehow decide cases with almost identical fact patterns in different manners.[28] The uncertainty shrouding the meaning of the main investment standards might induce host states not to exercise their regulatory power in order to preempt possible investment claims, creating a so-called "regulatory chill".[29]

This tendency to inconsistency is brought about by the very features of investment arbitration.[30] First, arbitral decisions do not have the value of creating binding precedent, but only produce persuasive effects on subsequent tribunals.[31] Second, investment tribunals apply a myriad of investment agreements.[32] Third, the insufficient application of consolidation techniques, the oft-artificial separation between treaty and investment claims,

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[27] Christoph Schreuer, *Coherence and Consistency in International Investment Law*, *in* PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 391, 398 (Robert Echandi & Pierre Sauvé eds., 2013) [hereinafter PROSPECTS IN INTERNATIONAL INVESTMENT LAW]; Louis T. Wells, *Backlash to Investment Arbitration: Three Causes*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 341, 342 (Michael Waibel et al. eds., 2010) [hereinafter INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY].

[28] *See* Anders Nilsson & Oscar Englesson, *Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?*, 30 J. INT'L ARB. 561, 563–69 (2013); Frank Spoorenberg & Jorge Viñuales, *Conflicting Decisions in International Arbitration*, 8 LAW & PRAC. INT'L CTS. & TRIBUNALS 91, 94 (2009).

[29] Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037, 1040 (2010).

[30] *See* Yas Banitafemi, *Consistency in the Interpretation of Substantive Investment Rules: Is It Achievable?*, *in* PROSPECTS IN INTERNATIONAL INVESTMENT LAW, *supra* note 27, at 200, 203–204 ("Thus, each arbitral tribunal engages in a one-off interpretation with no precedential value other than for the parties.").

[31] *See* El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 39 (Apr. 27, 2006), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C17/DC511_En.pdf [https://perma.cc/3GFC-345W] (stating that "ICSID arbitral tribunals are established ad hoc, from case to case . . . and the present Tribunal knows of no provision, either in that Convention or in the BIT, establishing an obligation of *stare decisis* . . ."); Catherine Kessedjian, *To Give or Not to Give Precedential Value to Investment Arbitration Awards*, *in* THE FUTURE OF INVESTMENT ARBITRATION 43, 67 (Catherine Rogers & Roger Alford eds., 2009); *see also* Giorgio Sacerdoti, *Precedent in the Settlement of International Economic Disputes: The WTO and Investment Arbitration Models*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 225 (Arthur Rovine ed., 2010) (discussing the benefits and consequences of the lack of consistency in decision making by arbitral tribunals); Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 5, 5 (2011) (discussing how, despite the lack of a stare decisis rule in international law, permanent jurisdictions continue to reference their own past decisions).

[32] *See* STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 15–16 (2009); Spoorenberg & Viñuales, *supra* note 28, at 96.

and the narrow interpretation of the res judicata principle further exacerbate the vexed problem of parallel proceedings.[33] Fourth, there is no general obligation to publish arbitral proceedings.[34] Finally investor-state arbitration does not provide for any type of appellate mechanism;[35] the only, very limited exception to this is the ad hoc annulment procedure under Article 52 of the ICSID Convention.[36]

3. Lack of Transparency

Investment arbitration has also been lambasted for its lack of transparency. Originally emerging as a brainchild of international commercial arbitration, investment arbitration traditionally places more emphasis on confidentiality than on transparency.[37] Although confidentiality does not raise particular issues for purely private disputes, it may be problematic in the context of investment arbitration, in which disputes often have a more "public dimension."[38] The procedural rules governing investment arbitration have thus long been considered deficient in terms of access to relevant information and participation of third-parties.[39]

B. Institutional Imbalance: The Great Asymmetry

The other most serious deficiency of the ISDS system is its imbalance. On the one hand, the system protects foreign investors, on the other hand, citizens, domestic investors, and host states are entitled to extremely thin rights. States, for instance, have limited ability to raise counterclaims[40] and

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[33] Spoorenberg & Viñuales, *supra* note 28, at 98–100.

[34] *See id.* at 97.

[35] *Id.* at 95.

[36] *Id.*; *see* Nilsson & Englesson, *supra* note 28, at 572; Christina Knahr, *Annulment and Its Role in the Context of Conflicting Awards*, *in* INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY, *supra* note 27, at 151, 162.

[37] Decision of the Appointing Authority, Sir Robert Jennings, on the Challenge of Judge Bengt Broms (May 7, 2001), *quoted in* DAVID D. CARON & LEE F. CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 5 (2013).

[38] *See* Loretta Malintoppi & Natalie Limbasan, *Living in Glass Houses? The Debate on Transparency in International Investment Arbitration*, 2 BCDR INT'L ARB. REV. 32, 33–34, 36–37 (2015).

[39] *See id.* at 33–34, 47–48; *see also* Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 INT'L & COMP. L.Q. 373, 375, 382, 406–12 (2010) (providing examples in which courts' inability to grant access to information had negative consequences, possibly preventing justice, for the non-investor parties in investment treaty arbitration proceedings).

[40] S*ee* August Reinisch, *The Rule of Law in International Investment Arbitration*, *in* RECONCEPTUALISING THE RULE OF LAW IN GLOBAL GOVERNANCE, RESOURCES, INVESTMENT AND TRADE 301 (Photini Pazartzis et al. eds., 2016); *see also* Christian Tietje & Kevin Crow, The Reform of Investment Protection Rules in CETA, TTIP and Other Recent EU-FTAs: Convincing? 9,

citizens have limited participatory rights (e.g., via submission of Amicus Briefs). Scholars and world leaders heavily debate the existence and problematic nature of this asymmetry.[41] Some argue that the asymmetry is necessary to remedy the lack of political rights of foreign corporations in domestic policy.[42] Nevertheless, this argument, beyond its naïveté, is rebutted by empirical studies, suggesting that foreign corporations generally have sufficient political capital in national politics.[43] It is worth emphasizing that the problem is not only that the host state has limited rights, but also that the local communities and people affected by such investments have few, if any, rights. According to one study, community interests are often marginalized in the system of investment law.[44] This is highly problematic given that investments have effects, both positive and negative, on domestic populations. The lack of access to justice for local constituencies that are affected by such investments is thus unjustifiable. In this way, the asymmetry underpinning the system creates a fundamental clash between ISDS and the rule

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16 (Dec. 13, 2016) (unpublished manuscript), https://ssrn.com/abstract=2885279 (discussing the process to raise counterclaims). Nevertheless, in some cases counterclaims have been admitted. *Cf.* Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016) (*Urbaser*), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C255/DC9852_En.pdf [https://perma.cc/56D2-F9RZ]; Saluka Inv. B.V. v. Czech Republic, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim (May 7, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0739.pdf [https://perma.cc/DKS8-GYBQ].

[41] *See, e.g.*, Alessandra Arcuri, *The Great Asymmetry and the Rule of Law in International Investment Arbitration*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2018 (Lisa Sachs et al. eds., forthcoming 2019), https://ssrn.com/abstract=3152808 [https://perma.cc/4R39-4F9B]; Garcia et al., *supra* note 2, at 869–70 (2015); Kumm, *supra* note 6, at 5; Tietje & Crow, *supra* note 40, at 26–27.

[42] For example, in an obiter the arbitral tribunal in *Tecmed* stated that "[o]n the basis of a number of legal and practical factors, it should be also considered that the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitle [sic] to exercise political rights reserved to the nationals of the State, such as voting for the authorities that will issue the decisions that affect such investors." Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 122 (May 29, 2003), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3785/DC4872_En.pdf [https://perma.cc/8NP7-EVBL]; *see* Stephan W. Schill, *Reforming Investor-State Dispute Settlement*, 20 J. INT'L ECON. L. 649, 662 (2017) (providing a recent iteration of this argument).

[43] Wendy L. Hansen & Neil J. Mitchell, *Disaggregating and Explaining Corporate Political Activity: Domestic and Foreign Corporations in National Politics*, 94 AM. POL. SCI. REV. 891, 893, 894 (2000); David Schneiderman, *Investing in Democracy? Political Process and International Investment Law*, 60 U. TORONTO L.J. 909, 937 (2010). *See generally* Emma Aisbett & Lauge Poulsen, *Relative Treatment of Aliens: Firm Level Evidence from Developing Countries*, (Glob. Econ. Governance Program, Working Paper No. 122, 2016), https://www.geg.ox.ac.uk/publication/geg-wp-2016122-relative-treatment-aliens-firm-level-evidence-developing-countries [https://perma.cc/T5C3-6BL5] (providing a recent empirical study that demonstrates that foreign investors are generally not being discriminated).

[44] LORENZO COTULA & MIKA SCHRÖDER, COMMUNITY PERSPECTIVES IN INVESTOR-STATE ARBITRATION 20 (2017).

of law.[45] Given the strong commitment to the rule of law by the international law system,[46] as well as by some of its major players,[47] it is imperative to address this fundamental flaw of the investment law regime.

C. Current Reforms and Developments

Developments and reforms in the field show that some of the deficiencies of the current system are currently being addressed. For example, recent treaty practice has attempted to address the drawbacks related to the lack of transparency. The first step to increase the transparency of arbitral proceedings was taken in the context of the North American Free Trade Agreement (NAFTA). In 2001, the NAFTA Free Trade Commission ("FTC") issued a note of interpretation stating that:

> Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.[48]

This note overturns the traditional approach to investment arbitration by stating that NAFTA arbitral proceedings are public unless expressly provided otherwise. It thus follows that all documents, such as the written pleadings of the parties, the orders of the tribunal, and the final awards, can be made public without the consent of the parties.[49] Additionally, in 2003, the FTC issued another note to clarify the conditions under which non-disputing party submission should be admitted.[50]

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[45] Arcuri, *supra* note 41, at 10–16.

[46] *See* G.A. Res. 67/1, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels (Nov. 30, 2012).

[47] *See, e.g.*, Consolidated Version of the Treaty on European Union art. 21, 2008 O.J. (C115) 28–29. Article 21 states the following:

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Id.

[48] *NAFTA Notes of Interpretation*, *supra* note 3, ¶ A(1).

[49] Malintoppi & Limbasan, *supra* note 38, at 41.

[50] HOWARD MANN, INT'L INST. FOR SUSTAINABLE DEV., THE FREE TRADE COMMISSION STATEMENTS OF OCTOBER 7, 2003, ON NAFTA'S CHAPTER 11: NEVER-NEVER LAND OR REAL PROGRESS? (2003), https://www.iisd.org/sites/default/files/publications/trade_ftc_comment_oct03.

Two other important recent developments were the 2006 amendments to the ICSID Rules and the adoption of UNCITRAL's Rules on Transparency in 2014.[51] These bodies of rules introduced an obligation to publish the excerpts of the arbitration decisions, regardless of the consent of the parties,[52] as well as an obligation to publish the documents submitted by the parties during the arbitral proceedings, except for those containing confidential or protected information or information that could affect the respondent's essential security interests.[53] Second, the rules explicitly provide for an opportunity to admit non-disputing parties to oral hearings,[54] as well as their written pleadings.[55] Moreover, IIAs also placed more emphasis on transparency[56] by imposing the obligation on arbitral tribunals to make documents of the proceedings available[57] and the oral hearings publicly accessible, as well as by conferring on arbitral tribunals the power to admit third-party submissions.[58]

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pdf [https://perma.cc/L7F8-3H69]. Under this test, arbitral tribunals shall admit such submissions insofar as (i) they help them clarify the facts of case or the interpretation of the applicable rules, (ii) they concern issues falling within the scope of the dispute, (iii) they had a significant interest in arbitration, and (iv) the decision of the case involves public interest considerations. *See* Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?*, *in* INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY, *supra* note 27, at 253, 261.

[51] *See* UNICTRAL, RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (2014), http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf [https://perma.cc/Q692-HP87] [herinafter UNICTRAL, RULES ON TRANSPARENCY]; ICSID, CONVENTION ARBITRATION RULES ON TRANSPARENCY, *supra* note 3. These transparency rules apply to disputes under IIAs entered into force after April 1, 2014, unless otherwise provided by the parties. It follows that UNCITRAL rules on transparency applies automatically if a given IIA, which came into force after this date, refers to UNCITRAL arbitration rules. *See* Lise Johnson et al., *International Investment Agreements: A Review of Trends and New Approaches*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2013–2014, at 25, 61 (Andrea K. Bjorklund ed., 2014). *See generally* Shotaro Hamamoto, *Le Règlement de la CNUDCI sur la Transparence dans L'arbitrage Entre Investisseurs et États Fondé sur des Traités et la Convention de Maurice sur la Transparence—Commentaire Article par Article*, 1 J. DROIT INT'L 5 (2016).

[52] ICSID, RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS, RULE 48(4), at 122 (2006), https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf [https://perma.cc/G2W2-Z6KJ].

[53] UNICTRAL, RULES ON TRANSPARENCY, *supra* note 51, art. 7.

[54] *Id.* art. 5; ICSID, RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS, *supra* note 52, art. 27(2).

[55] *See* UNICTRAL, RULES ON TRANSPARENCY, *supra* note 51, art. 5; ICSID, RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS, *supra* note 52, art. 37(2).

[56] *See* N. Jansen Calamita, *Dispute Settlement Transparency in Europe's Evolving Investment Treaty Practice*, 15 J. WORLD INV. & TRADE 645, 659–61 (2014).

[57] *See, e.g.*, Free Trade Agreement art. 9.17, Austl.-China, June 17, 2015, https://dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Documents/chafta-agreement-text.pdf [https://perma.cc/9SDR-4GWS]; Explanatory Materials for the Agreement on Economic Cooperation art. 27, N.Z.-Taiwan, July 10, 2013, https://www.mofa.gov.tw/en/Upload/WebArchive/1266/%E5%8D%94%E5%AE%9A%E5%90%84%E7%AB%A0%E7%AF%80%E4%BB%8B%E7%B4%B9-%E8%8B%B1%E6%96%87-20130710.pdf [https://perma.cc/8BR3-6K2Y]; Agreement for the Promotion and Protection of Investments annex B, Can.-Czech, May 6, 2009, http://investment

Although attempts to reform the ISDS system focused largely on its transparency issues, such reform efforts devoted far less attention to the system's other shortcomings.[59] Notably, the questionable procedures for arbitrator selection remain unchanged and proposals to introduce an appellate review mechanism remain dead letter in most IIAs.[60] Nevertheless, two relevant exceptions to these otherwise lasting issues are the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA) and the free trade agreement between the European Union and Vietnam. These two agreements adopt an investment dispute settlement mechanism, the Investment Court System ("ICS"), which attempts to remove the causes of pro-investor bias and of the overall inconsistency of arbitral decisions.[61] To this end, the agreements confer the power to nominate the adjudicators upon the Joint Committee, which is a body composed of representatives of the contracting states. Further, the ICS envisages the establishment of an Appellate Tribunal, which may improve the coherence of the system.[62]

These recent developments, although notable and commendable, are not extensive enough to have an impact on the investment protection regime as a whole. For instance, the ICS still maintains several features of the traditional investor-state arbitration, especially because the ICSID and UNCITRAL rules and facilities would still play an important role in the proceedings

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policyhub.unctad.org/Download/TreatyFile/606 [https://perma.cc/GD6S-RTXW]; Acuerdo sobre Promoción y Protección Cecíproca de Inversiones [Agreement on Reciprocal Investment Promotion and Protection] art. 26, Peru-Colomb., Dec. 11, 2007, http://investmentpolicyhub.unctad.org/Download/TreatyFile/798 [https://perma.cc/B5RG-DQEH]; Agreement on the Promotion and Reciprocal Protection of Investments art. 20, Mex.-Slovk., Oct. 26, 2007, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2002 [https://perma.cc/FD9V-ZTHT]; Agreement for the Promotion and Reciprocal Protection of Investments art. 18, Mex.-U.K., May 12, 2007, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2009 [https://perma.cc/KTW6-FMM9].

[58] *See, e.g.*, Agreement for the Promotion and Protection of Investments art. 31, Cameroon-Can., Mar. 3, 2014, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3163 [https://perma.cc/K92H-GU95].

[59] Laurence Boisson de Chazournes & Rukia Baruti, *Transparency in Investor-State Arbitration: An Incremental Approach*, 2 BCDR INT'L ARB. REV. 59, 75 (2015).

[60] U.S. DEP'T OF STATE, 2004 MODEL BIT art. 28, annex D (2004), http://www.state.gov/documents/organization/117601.pdf [https://perma.cc/9FKX-XZZJ] (model treaty); ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration, 15, 17 (Oct. 22, 2004) (discussion paper), https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf [https://perma.cc/VR69-2Z4V]. This provision was introduced on the basis of the provisions of the Bipartisan Trade Promotion Authority Act, which included the establishment of an appellate authority among the objectives of US trade policy. *Id.*

[61] E.U.-Vietnam Free Trade Agreement arts. 15.1, 15.4, E.U.-Viet., June 25, 2018, http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157375.pdf [https://perma.cc/M3LQ-T428]; Comprehensive Economic and Trade Agreement art 8.27, Can.-E.U., Sept. 21, 2017, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [https://perma.cc/Z8AP-V4LU].

[62] ICSID Secretariat, *supra* note 60, at 17.

conducted under these new rules.[63] Moreover, for all their improvements, IIAs have maintained the lamented asymmetry. Only a limited number of model IIAs provide for investors' obligations. The India Model Bilateral Investment Treat ("BIT") of 2015, for example, stipulates that investors are subject to "internationally recognized standards of corporate social responsibility."[64] Similarly, the Southern African Development Community Model BIT Template[65] imposes on investors the duty to respect human rights in the workplace, in the community, and in the host state where the investment is made. The same provision expands upon this obligation by referencing the International Labor Organization Declaration on Fundamental Principles and Rights of Work and underlining that foreign investment must be made and managed in accordance with international environmental and human rights obligations.[66]

Several IIAs between developing and emerging countries also include innovative features that partly address the asymmetrical nature of such agreements. For instance, the Morocco-Nigeria[67] BIT of 2016 establishes that, in addition to carrying out a social and environmental impact assessment on the basis of the relevant domestic legislation, the foreign investors shall conduct their businesses with a mindset of pursuing sustainable development and fostering the well-being of local communities.[68] Further, under the BIT, investors must act in accordance with the International Labour Organization's Tripartite Declaration on Multinational Investment and Social Policy as well as with highest possible adherence to Corporate Social Responsibility standards.[69] While these types of integration of obligations for investors in investment treaties is commendable, these reform efforts have

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[63] *See id.* at 23–24; Philip Hainbach, *The EU's Approach to Investor-State Arbitration in the Comprehensive Economic and Trade Agreement (CETA*), 13 TRANSNAT'L DISP. MGMT. 1, 33–34, (2016), https://www.transnational-dispute-management.com/article.asp?key=2315 [https://perma.cc/QF2S-L9JS]; Gus Van Harten, *Key Flaws in the European Commission's Proposals for Foreign Investor Protection in TTIP* 2 (Osgoode Legal Studies, Research Paper No. 16/2016, Nov. 24, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692122 [https://perma.cc/4R7Z-USW6] [hereinafter Van Harten, *Key Flaws*].

[64] *See* MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY art. 12 (2015), http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560 [https://perma.cc/6YJ8-49Y3].

[65] S. AFRICAN DEV. CMTY., MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY art. 15 (2012), https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf [https://perma.cc/5L7X-JTW2].

[66] *See id.*

[67] Morocco-Nigeria BIT, *supra* note 5, art. 24. *See generally* Gazzini, *supra* note 5 (providing a brief overview and assessment of the BIT).

[68] *See* Morocco-Nigeria BIT, *supra* note 5, art. 24. It is also worth recalling that several other recent IIAs provide for similar clauses. *See, e.g.*, Brazil-Mozambique ACFI, *supra* note 11, art. 14.

[69] Morocco-Nigeria BIT, *supra* note 5, art. 24.

yet to establish effective enforcement mechanisms for investors' obligations, leaving the problem of asymmetry partly unsolved.[70]

D. Looking for the Public Soul of the International Investment Regime

> *[T]he res publica is the property of the people. But a people is not any collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good.*
>
> —*De Re Publica*, 1, XXV, § 39, Cicero[71]

Many of the flaws discussed above could be ascribed to the hybrid nature of the ISDS system. This dispute settlement mechanism conflates a private and a public dimension. The former is epitomized by the rules and procedures governing arbitral proceedings and the inherently private nature of the claimants. As is well known, investment arbitration is based on the commercial arbitration model.[72] Interestingly, though, virtually all investment disputes directly or indirectly pertain to the exercise of public power and affect the public interest. The current system appears to grant investors the right to challenge the "regulatory fabric" of the host state[73] and to arbitrators the "authority to make what are in essence governmental decisions."[74]

In light of the asymmetrical nature of investment disputes, we echo an increasing body of literature, that advocates for reorienting investment dispute towards the protection of public interests. A private mechanism to solve

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[70] Under the previous unapproved draft of the India-Model BIT, it would have been possible to submit civil claims in the investor's home state for liability regarding "acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State" and the non-compliance with the investors' obligation would have given rise to the "denial of treaty benefits." *See* Jesse Coleman & Kanika Gupta, *India's Revised Model BIT: Two Steps Forward, One Step Back?*, INV. CLAIMS (Oct. 4, 2017), http://oxia.ouplaw.com/page/India-BIT [https://perma.cc/37V4-TQTX].

[71] The original Latin sentence reads as follows: "*Res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus*, *sed coetus multitudinis iuris consensu et utilitatis communione sociatus*." Cicero, *De Re Publica*, 1, XXV, § 39 (Clinton Walker Keyes trans., Harvard Univ. Press ed. 2006) (c. 54 B.C.E.). The literal translation of *res publica* is "public thing," but it is often translated in English as "commonwealth." *Res publica*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/res%20publica [https://perma.cc/7B98-KWPZ].

[72] Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 125–27 (2006).

[73] Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 PA. J. INT'L L. 1, 10 (2014).

[74] Van Harten & Loughlin, *supra* note 72, at 126.

disputes of eminently public nature is a dissonance. Although it is increasingly more difficult to draw a clear line between private and public law, both at the domestic and international levels,[75] we believe that this dichotomy retains an explanatory potential in this context. Private and public law adjudication each presuppose different approaches, languages, and objectives.[76]

Therefore, while acknowledging that the boundaries between public and private realms may be thin and somewhat elusive, we employ this dichotomy to emphasize the symbolic and normative value of the *public* dimension of (quasi-)legal institutions. Our use of the term public is thus meant in a socio-legal perspective, not a purely legal one. We conceive a public institution as one particularly aimed at protecting and promoting the public interest, as opposed to providing for a special privilege for a private or vested interest. It is from this vantage point that we advocate for a radical transformation of the international investment regimes, whereby they become genuinely public.

II. SUBSTANTIVE REFORMS: OBLIGATIONS FOR INVESTORS AND RIGHTS TO THE CIVIL SOCIETY

To correct the asymmetry of the investment regime and make the core of investment law more genuinely public, countries should place the rights of investment-affected communities on par with those of investors. To do that, they must implement a two-fold set of reforms. The first prong of our proposal concerns the substantive rules governing investment disputes. This Part argues that future treaties should further the incipient tendency to impose obligations on foreign investors and recognize civil society's rights in such agreements. Section A argues that international investment treaties should impose more formal obligations for investors to consider human rights in their operations, such as by moving from the lax "clean hands doctrine" to stricter human rights provisions.[77] Section B suggests that treaties should incorporate the UN Guiding Principles on Business and Human Rights to a greater extent.[78]

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[75] Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUR. J. INT'L L. 387, 390 (1999).

[76] *See* Alex Mills, *The Public-Private Dualities of International Investment Law and Arbitration*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 97, 98 (Chester Brown & Kate Miles eds., 2011) [hereinafter EVOLUTION IN INVESTMENT TREATY LAW].

[77] *See infra* notes 79–88 and accompanying text.

[78] *See infra* notes 89–110 and accompanying text.

A. From Clean Hands to Human Rights

Admittedly, many treaties provide for the obligation to abide by the host state's laws. Building on this provision, some arbitral tribunals have even concocted the so-called "clean hands doctrine."[79] Nevertheless, the contours and the effects of such treaty clauses remain quite nebulous.[80] States should clarify the status of this obligation, by including in new treaty texts specific provisions that list among investors' other obligations their full respect of relevant domestic law requirements. Similar provisions could in turn allow investment-affected individuals or groups of individuals to invoke an investor's alleged violation of domestic legislation, particularly human rights, labor, and environmental laws as part of their claims.

Of course, such provisions would likely hold little or no significance where the host state's laws do not set sufficiently high human rights, labor, or environmental standards.[81] Therefore, foreign investors, in the conduct of their business, should also be subject to international human rights, labor, and environmental obligations. As observed above, recent treaty practice is beginning to move towards the inclusion of such obligations in IIAs.[82] Still, some of these provisions adopt a hortative language, which states that foreign investors merely "should," rather than "shall," comply with a wide range of international obligations.[83]

Similarly, contemporary arbitral jurisprudence appears to embrace a more balanced view of international investment law.[84] Based on its interpre-

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[79] *See* Patrick Dumberry, *State of Confusion: The Doctrine of "Clean Hands" in Investment Arbitration After the* Yukos *Award*, 17 J. WORLD INV. & TRADE 229, 229–230 (2016) (explaining that the "clean hands doctrine" states that "he who comes into equity must come with clean hands").

[80] It is debated whether illegal conduct by the foreign investor amounts to a jurisdictional issue, a question of admissibility, or a question of merit. *See* Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29 ICSID REV. 155, 155, 167 (2014); Andrew Newcombe, *Investor Misconduct: Jurisdiction, Admissibility, or Merits?*, *in* EVOLUTION IN INVESTMENT TREATY LAW, *supra* note 76, at 187. *See generally* Dumberry, *supra* note 79.

[81] Ursula Kriebaum, *Human Rights of the Population of the Host State in International Investment Arbitration*, 10 J. WORLD INV. & TRADE 661, 667–71 (2009).

[82] *See supra* notes 48–70 and accompanying text.

[83] *See, e.g.*, Morocco-Nigeria BIT, *supra* note 5, art. 24(1) (stating only that investors "should strive to make the maximum feasible contributions to the sustainable development of the host State and local community").

[84] *See* Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Award: Partial Dissenting Opinion of Philippe Sands QC, at 2, 6 (Nov. 30, 2017), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808_En.pdf [https://perma.cc/TBB6-ZPRH]; *Urbaser*, ¶ 1193; Joshua Paine, Bear Creek Mining Corporation v Republic of Peru*: Judging the Social License of Foreign Investments and Applying New Style Investment Treaties*, ICSID REV., 1–9 (forthcoming 2018); Markus Krajewski, Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice (Apr. 15, 2018) (unpublished manuscript),

tation of the Argentina-Spain BIT, the ICSID tribunal in *Urbaser v. Argentina* first observed that the BIT should not be read in isolation from other sources of international law, including human rights obligations.[85] With this in mind, the tribunal took a further momentous step by affirming that such obligations do not apply exclusively to states, but also apply to bind private parties. Notably, the ICSID tribunal stated that "it is therefore to be admitted that the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights."[86] Although the *Urbaser* tribunal eventually rejected the respondent's counterclaim alleging the violation of human rights obligations, the ruling clearly demonstrated that times are ripe for a paradigm shift in investment treaty making.

The inclusion of a bundle of investors' international obligations is likely to usher in a new era in the settlement of investment disputes. Building on the experience of these recent model treaties, future investment treaties should incorporate the most authoritative legal sources on business and human rights.

B. Incorporating the UN Guiding Principles into Investment Treaty Law

The main legal instruments in the realm of business and human rights are the United Nations Guiding Principles ("UNGPs"),[87] the United Nations Global Compact[88] and the OECD Guidelines on Multinational Enterprises.[89] These international instruments articulate the contours of corporate responsibility to respect human rights.

The UNGPs are the set of principles that arguably best reflects the current agreement at the international and transnational level of the role of human rights in relation to the conduct of business.[90] Parts I and II of the

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https://ssrn.com/abstract=3133529 [https://perma.cc/YJW9-K69C] (examining such jurisprudence in detail).

[85] *Urbaser,* ¶¶ 1186–1192.

[86] *Id.* ¶ 1199.

[87] *See generally* UN OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, GUIDING PRINCIPLES OF BUSINESS AND HUMAN RIGHTS (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [https://perma.cc/52PT-H78L] [hereinafter UN GUIDING PRINCIPLES].

[88] *See generally* UN GLOBAL COMPACT, https://www.unglobalcompact.org/ [https://perma.cc/2RTL-ETFU].

[89] *See generally* OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf [https://perma.cc/G4WP-SHMZ] [hereinafter 2011 OECD GUIDELINES].

[90] Professor John G. Ruggie, Harvard University, has drawn attention to the fact that the UNGPs have been informed by "thick stakeholder consensus." *See* John G. Ruggie, Life in the

UNGP, addressing "the State duty to protect human rights" and "the corporate responsibility to respect human rights" respectively, enunciate a sufficiently clear body of substantive law to frame the responsibilities of states and corporations vis-à-vis the civil society in the context of investment relations.[91] There seem to be no legitimate reasons why states, who generally advocate for more rule of law, should take issue with endorsing these principles in their future investment treaties.[92] In addition, several third-world countries are very supportive of the UNGPs to the extent that it has helped launch the establishment of an inter-governmental working group with the mandate to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[93] Another important initiative to strengthen the protection of human rights in the context of business operations is the recent launch of a platform to create arbitration for disputes involving business and human rights.[94]

Against this background, our proposal may appear as part of a broader trend aspiring at the establishment of more inclusive legal institutions regulating transnational business transactions. Embedding Parts I and II of the UNGPs in future investment treaties could bridge the gap between the business and human rights regime and the investment treaties regime.[95] Nevertheless, there are some concerns about turning the UNGPs into binding law.

Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights (Jan. 23, 2015) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726.

[91] *See generally* UN GUIDING PRINCIPLES, *supra* note 87.

[92] The promotion of the rule of law is one of the often-discussed justifications for international investment law. *See* Benjamin K. Guthrie, *Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law*, 45 N.Y.U. J. INT'L L. & POL. 1151, 1166, 1167 (2013); Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2 TRADE L. & DEV. 19 (2010).

[93] UN Human Rights Council Res. 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, at 2 (June 26, 2014), https://digitallibrary.un.org/record/776246/files/A_HRC_26_L.22_Rev.1-EN.pdf [https://perma.cc/2RKE-RTLR].

[94] *See* Catherine Dunmore, *International Arbitration of Business and Human Rights Disputes: Part 1 and Part 2*, ASSER INST.: DOING BUS. RIGHT BLOG (Dec. 7, 2017), http://www.asser.nl/DoingBusinessRight/Blog/post/international-arbitration-of-business-and-human-rights-disputes-part-1-introducing-the-proposal [https://perma.cc/A3Q9-3FH8] (providing an overview of the proposal).

[95] Past proposals by both scholars and non-governmental organizations have explicitly referenced international instruments on business and human rights. *See, e.g.*, INT'L INSTITUTIONAL SUSTAINABLE DEV., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT 11 (Apr. 2005), www.iisd.org/pdf/2005/investment_model_int_agreement.pdf [https://perma.cc/WZN3-ZLMN]. Our proposal includes Part I of the UNGPs because we also envision the inclusion of obligations for the host state.

This Essay addresses those concerns below, particularly by discussing the alternative grievance mechanisms that may ensure access to remedies. For now, it suffices to emphasize that one of the advantages of our proposal is that the dispute resolution mechanism—whatever form it may take—would be open to both investors and civil society. The same regime would combine investors' standards of protection, as currently articulated in investment treaties, with a range of guarantees for the individuals or group of individuals affected by the investment. In this way, the UNGPs would operate in a context in which each separate interest has a distinct voice and comparable rights as the others.

On a substantive level, there are several potential criticisms of the UNGPs. For example, the UNGPs often contain somewhat vague and overbroad concepts, such as the requirement of "due diligence" by corporations.[96] In response to this criticism, general clauses and other vaguely defined concepts are quite common in international investment law. Suffice it to mention in this regard the fair and equitable treatment clause.[97] In passing, it is also worth noting that due diligence is no stranger to the regime of investment treaties.[98] Several investment arbitration tribunals have implicitly or explicitly referred to due diligence of investors.[99]

In the context of business and human rights, the 2012 Joint Interpretative Note of the Global Compact and the Office of the High Commissioner for Human Rights provided some guidance on this issue.[100] Similarly, the

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[96] *See* ILA STUDY GRP. ON DUE DILIGENCE IN INT'L LAW, SECOND REPORT (July 2016), http://ww.ila-hq.org/index.php/study-groups [https://perma.cc/7UHU-379E] (providing a general discussion of due diligence in international law as well as a discussion of "due diligence and business activities").

[97] For example, investment treaties often include a "fair and equitable treatment clause." *See generally* Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, INT'L LAW., Spring 2005, at 87; OECD, *Fair and Equitable Treatment Standard in International Investment Law* (OECD Working Papers on International Investment, Working Paper No. 2004/3, 2004) http://www.oecd.org/investment/investment-policy/WP-2004_3.pdf [https://perma.cc/93EN-L97G] [hereinafter OECD, *Fair and Equitable Treatment*]. Additionally, "due diligence" requirements are often used in international investment treaties. In adjudicating disputes, several investment arbitration tribunals have also implicitly or explicitly referred to due diligence obligations of investors. *See* OECD, *Fair and Equitable Treatment, supra.*

[98] *See* De Brabandere, *supra* note 5, at 320.

[99] *See, e.g.*, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶¶ 374–391 (July 24, 2008), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C67/DC1589_En.pdf [https://perma.cc/C8WH-UL6S]; Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Final Award (Oct. 17, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0565.pdf [https://perma.cc/W6Y4-Z9VX].

[100] *See generally* UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE (2012) https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf [https://perma.cc/783Z-8GHD] [hereinafter UN INTERPRETIVE GUIDE 2012].

practice of OECD National Contact Points ("NCP") sought to clarify this concern.[101] For example, in the United Kingdom NCP case of *RAID v. DAS Air* in 2004, an airline company was accused of transporting coltan from the Democratic Republic of Congo. The company defended itself by denying knowledge about the sources of the material transported.[102] In this case the due diligence that the UK NCP found DAS should have exercised is a norm coming for the UN's "Protect, Respect and Remedy" Framework.[103] It is also through ambiguities that important legal concepts develop and the scholarly work on due diligence for corporations may bear witness to such fruitful development.[104] Finally, future international investment arbitration case law is likely to further elucidate a due diligence requirement. Moreover, such a requirement in international investment treaties can be viewed as a key balancing mechanism, attenuating the problems that may arise in situations where corporations have very reduced space to realize human rights. One argument against holding corporations responsible for human rights violations is that they often would lack the powers or rights needed for that purpose.[105] Due diligence requirements can thus lift the corporations from unreasonable and unjustified expectations vis-à-vis their responsibilities. Guiding Principle 17(b) explicitly provides that human rights due diligence "[w]ill vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations."[106] Reference to "the nature and the context of the operation" could

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[101] *See infra* notes 133–145 and accompanying text (providing a brief discussion of National Contact Points).

[102] The United Kingdom NCP held that the airline company "undertook insufficient due diligence on the supply chain," particularly by not trying to establish "the source of the minerals they were transporting." *Cf.* RAID v. Das Air, Statement by the UK NCP for the OECD Guidelines for Multinational Enterprises: Das Air, ¶¶ 44, 49 (July 17, 2008), http://www.oecd.org/daf/inv/mne/44479531.pdf [https://perma.cc/HG9X-2QCL].

[103] *See generally* UN GUIDING PRINCIPLES, *supra* note 87 (explaining how to implement the UN's "Protect, Respect and Remedy" Framework).

[104] *See generally* Jonathan Bonnitcha & Robert McCorquodale, *The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights*, 28 EUR. J. INT'L L. 899 (2017) [hereinafter Bonnitcha & McCorquodale, *Due Diligence*] (highlighting perceived ambiguities in the UNGP); John Gerard Ruggie & John F. Sherman, III, *The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, 28 EUR. J. INT'L L. 921 (2017) [hereinafter Ruggie & Sherman, *Reply*] (responding to the observations in Bonnitcha & McCorquodale, *Due Diligence*, *supra*); *see also* Jonathan Bonnitcha & Robert McCorquodale, *The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerard Ruggie and John F. Sherman, III*, 28 EUR. J. INT'L L. 929 (2017) (responding to the analysis in Ruggie & Sherman, *Reply*, *supra*).

[105] *See generally* John Douglas Bishop, *The Limits of Corporate Human Rights Obligations and the Rights of For-Profit Corporations*, 22 BUS. ETHICS Q. 119, 122 (2012).

[106] UN GUIDING PRINCIPLES, *supra* note 87, art. 17(b).

be read in the future as a placeholder for a norm that enables balancing the concrete possibilities that a corporation has to respect human rights as one of their responsibilities.[107]

The UNGPs are also subject to criticism for being both under- and over-comprehensive. On the one hand, the UNGPs do not explicitly refer to all the areas covered by the UN Global Compact Ten Principles and by the OECD Guidelines.[108] For example, the UNGPs have no specific rules relating to corruption or taxation. Although it may factually be accurate to say that they cover a narrower set of issues than the Global Compact and the OECD Guidelines, this is not necessarily a problem. It may, in fact, be more politically feasible to embed a somewhat less ambitious, but more widely agreed upon instrument for this purpose. Certainly, OECD Members could be more ambitious and try harder to integrate the OECD Guidelines in new investment treaties. What this Essay argues is that the UNGPs could function as the common denominator for redrafting the substantive applicable law in new investment treaties.

At the same time, the UNGPs may be considered overambitious because they refer to all human rights, without setting distinct boundaries as to which human rights should be respected by corporations. The latter criticism could be extended to all the other international instruments on business and human rights because they all take this broad approach.[109] The main reason for these instruments' addressing all internationally recognized human rights is that "business enterprises can have an impact—directly or indirectly—on virtually the entire spectrum of these rights."[110] By singling out one set of rights, the new treaties might miss out on important dimensions of the business-human rights linkage. In this sense, a broad reference to human rights should not be considered problematic, but instead a desirable aspect of investment treaties.

III. REALIZING RIGHTS: PUBLIC ALTERNATIVE COMPLAINT MECHANISMS AS THE NEW GAME IN TOWN

The second pillar of this Essay's proposed reform project concerns the dispute settlement mechanism. In our view, a rethinking of the architecture of dispute settlement is necessary to obliterate the asymmetric nature of the in-

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[107] *See id.*

[108] *See generally* OECD GUIDELINES, *supra* note 89; *The Ten Principles of the UN Global Compact*, UN GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles [https://perma.cc/T2QC-X3SZ].

[109] *Cf.* UN GLOBAL COMPACT, *supra* note 108 (specifically Principles 1 and 2); OECD GUIDELINES, *supra* note 89, at 31–34.

[110] *See* UN INTERPRETIVE GUIDE 2012, *supra* note 100, at 12–13.

ternational investment regime. Going beyond the *current* investor-state arbitration system, however, requires some imaginative effort. A survey of the current international treaty practice offers some fecund hints. For example, a growing number of conventional instruments opt for non-judicial dispute settlement mechanisms, administered by public or quasi-public bodies. Although these mechanisms differ in many respects, they share a common objective: securing the accountability of non-state actors, particularly international institutions and corporations.[111] For the sake of conciseness, these instruments can be christened Public Alternative Complaint Mechanisms ("PACoMs").

Before looking into the possible application of the alternative dispute settlements in the context of international investment treaties, it is worth pausing to examine the main features and functions of PACoMs in international and transnational law. This Part offers a brief overview of two representative examples of PACoMs: ombudsbodies and the OECD NCPs. Section A focuses on ombudsbodies,[112] which could be considered as the forerunners of all PACoMs.[113] Ombudsbodies are proliferating in the international field and offer protection to individuals, which otherwise would have little to no voice vis-à-vis international organizations. Section B of this Part discusses the OECD NCPs, which have been launched on the premise that multinational corporations play a key role in the global economy and should accordingly bear responsibility for their actions.[114] Above all, these grievance mechanisms constitute key institutional innovations to afford protection to the public interest, particularly when such interest is under-represented.[115]

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[111] *See, e.g.*, UN DEV. PROGRAM, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD (2002).

[112] The term "ombusbody" is our own. The office is generally referred to as "Ombudsman." Beside its clear gender bias, the word fails to capture the idea that it is more than one person enabling the office to work. When we refer to specific institutions, we use the official name, which indeed is often Ombudsman. Nevertheless, we will adhere to our nomenclature whenever the term is used in the abstract.

[113] *See infra* notes 116–132 and accompanying text.

[114] *See infra* notes 133–145 and accompanying text.

[115] A full overview of these institutions is beyond the scope of this Essay. It is worth mentioning, however, that PACoMs have also proliferated in the context of International Financial Institutions. The most notable example is the World Bank Inspection Panel ("Panel"). Established in 1993, the Panel is a grievance mechanism to the avail of the project-affected people. In its short life, the Panel has heard more than 100 cases. While the Panel opinions are non-binding, they have often led to a change in the policy of the Bank. Ole Kristian Fauchald, *Hardening the Legal Softness of the World Bank Through an Inspection Panel?*, 58 SCANDINAVIAN STUD. IN L. 101, 102, 107 (2013).

A. Ombudsbodies

The origins of ombudsbodies date back to the eighteenth century. The first ombudsman-fashioned institution was established in Sweden with the aim of overseeing other state officials and ensuring the observance of laws and statutes.[116] These bodies gradually became completely independent from the king and executive branch because independence was both a source of legitimacy and a prerequisite for the appropriate and complete discharge of the duties of the ombudsman. The notion of Ombudsman eventually became protean over time and now encompasses a rather diverse array of bodies—including non-governmental ones—that both deal with individual complaints and carry out a wide variety of control functions.[117]

An example of the type of functions that human rights ombudsbodies now perform include their particularly important role in advancing the human rights and rule of law culture of newly democratic states. In some instances, the ombudsman-like institutions have even acted as the only democratic body and human rights agency in states with semi-authoritarian governments.[118] More widely, the ombudsman is regarded as an instrument to ensure good governance and the respect of the rule of law.[119] The growing importance of such mechanisms at the international level has much to do with the transformation of the international legal order. The classic conception of international law, according to which international law is the body of rules applicable to states ("Law of Nations"),[120] became outdated in the mid-1900s. In the second half of the twentieth century, the number and importance of international organizations grew at an exponential rate.[121] Such organizations continue to operate in a vast array of fields and are generally endowed with penetrating powers. Owing to their ever-increasing scope, international organizations and international treaties tend to impact not only

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[116] *See* Sten Rudholm, *Existing Ombudsman Systems: Sweden's Guardians of the Law: The Chancellor of Justice*, *in* THE OMBUDSMAN: CITIZEN'S DEFENDER 17, 17–22 (Donald C. Rowat ed., 1968); Bertil Wennergren, *The Rise and Growth of Swedish Institutions for Defending the Citizen Against Official Wrongs*, 377 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 2 (1968).

[117] *See* LINDA C. Reif, THE OMBUDSMAN, GOOD GOVERNANCE, AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM 59–62 (2004).

[118] *See, e.g.*, Thomas Pegram, *Accountability in Hostile Times: The Case of the Peruvian Human Rights Ombudsman 1996–2001*, 40 J. LATIN AM. STUD. 51, 60 (2008) (explaining how in Peru, the Defensoría Civil controlled and restrained the Fujimori government regarding human rights requirements to some extent).

[119] John McMillan, The Ombudsman and the Rule of Law 1–16 (Jan. 2005) (unpublished manuscript), http://classic.austlii.edu.au/au/journals/AIAdminLawF/2005/1.pdf [https://perma.cc/T5D9-5CPL].

[120] *See generally* EMER DE VATTEL, LE DROIT DES GENS 47 (1758).

[121] CHITTARANJAN FELIX AMERASINGHE, PRINCIPLES OF INSTITUTIONAL LAW OF THE INTERNATIONAL ORGANIZATIONS 6 (2005).

on the conduct of inter-state relations, but also the day-to-day life of individuals within those countries. In light of these transformations, the protection of individual rights has become one of the main areas of development of international law.[122] As Hersch Lauterpach famously put it, the post-World War II international legal system has turned the individual from an "object of international compassion into a subject of international rights."[123] Although the international legal personality of individuals still remains an unsettled question,[124] much of the world accepts that individuals possess some degree of international subjectivity.[125] Against this backdrop, the rise of complaint mechanisms is easily explained as an attempt to strengthen the legitimacy of international organizations and international regimes more generally by striving for more effective accountability and, ultimately, for good governance.[126]

A look at the international practice shows that ombudsbodies have been used to secure the transition to peace and stability in post-conflict contexts. The Kosovo ombudsbody is a case in point. The establishment of such an institution was part of the broader mission by the Organization for Security and Co-operation in Europe ("OSCE") to restore democratic institution in the country and promote human rights.[127] Notably, it was entrusted with the duty to review alleged abuses of authority of executive, legislative, and judicial bodies in Kosovo and to ensure the observance of the civil and political rights contained in the main human rights treaties. The competence of the ombudsbody encompasses cases of both illegality and maladministration that originated from the conduct of executive, legislative, and judicial bodies.[128] The powers of this ombudsbody include, amongst others, tendering good offices, conducting investigations, making recommendations, and

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[122] FRANCISCO ORREGO VICUÑA, INTERNATIONAL DISPUTE SETTLEMENT IN AN EVOLVING GLOBAL SOCIETY: CONSTITUTIONALIZATION, ACCESSIBILITY, PRIVATIZATION 51–53 (2012).

[123] HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 4 (1950).

[124] *See generally* ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW (2016) (discussing the emerging concept of international rights of individual persons, as opposed to the older concept of international law protecting persons); Andrew Clapham, *The Role of the Individual in International Law*, 21 EUR. J. INT'L L. 25 (2010) (discussing the possibility of international civil, and not only criminal, law obligations of individuals).

[125] ORREGO VICUÑA, *supra* note 122, at 52.

[126] Henk Addink, *Good Governance: A Principle of International Law*, *in* WHAT'S WRONG WITH INTERNATIONAL LAW? LIBER AMICORUM A.H.A. SOONS 288, 301–03 (Cedric Ryngaert et al. eds., 2015); REIF, *supra* note 117, at 62, 66. *See generally* Edith Brown Weiss, *Good Governance*, *in* 4 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 516 (Rudiger Wolfrum ed., 2015) (discussing the concept of good governance).

[127] REIF, *supra* note 117, at 275.

[128] *Id.* at 277.

issuing opinions on the compatibility of domestic legislation with international human rights standards.

In contrast, some international ombudsbodies only have "internal competence." The UN and the World Health Organization (WHO) introduced ombudsbodies to deal with employment disputes. For instance, the WHO ombudsman may deploy a wide range of soft instruments, such as providing advice or mediation, to settle and avoid complaints concerning employment conditions and the relations between employees.[129]

The UN also established a complaint mechanism to address the criticism drawn by its targeted sanctions regimes. Following the 9/11 terroristic attacks, the UN Security Council used the basis of the powers set out in Chapter VII of the UN Charter to impose individual sanctions on physical and legal persons affiliated or linked to al-Qaida or other Islamic terroristic organizations. To address these concerns and avoid jeopardizing its repressive action, the UN created the Office of the Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee,[130] which was entrusted with the power to handle delisting claims from affected individuals and entities. To be sure, the power to allow the delisting lies with the Sanction Committee. Nevertheless, the Ombudsperson's recommendation may certainly influence the final decision of the Committee.

More recently, ombudsbodies have also featured in IIAs. The 2015 Brazil Cooperation and Facilitation Investment Agreements provide for the establishment of an ombudsman (also called 'National Focal Point'), which can receive complaints from investors or the other party.[131] Such a body is meant to facilitate the solution of controversies, and its main responsibility is to provide "support for the investor of the other party."[132] We thus cannot help but recognize this newly conceived institution as an indication that the times are ripe for the kind of institutional innovation we advocate for in this Essay.

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[129] *Id.* at 342.

[130] *The Office of the Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee*, UN OFFICE OF THE OMBUDSPERSON OF THE SEC. COUNCIL'S 1267 COMM., https://www.un.org/sc/suborg/en/ombudsperson [https://perma.cc/JR68-533W].

[131] *See* José Henrique Vieira Martins, *Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments*, INV. TREATY NEWS (June 12, 2017), https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/#_edn5 [https://perma.cc/HTA7-ZNMN] (providing a commentary on the 2015 Brazil Cooperation and Facilitation Investment Agreements).

[132] *Cf.* COOPERATION AND FACILITATION INVESTMENT AGREEMENT, art. 18 (2015), http://investmentpolicyhub.unctad.org/Download/TreatyFile/4786 [https://perma.cc/L5H7-TFU8] [hereinafter BRAZIL MODEL CFIA] (model agreement).

B. National Contact Points and the OECD Guidelines for Multinational Enterprises

The 1976 OECD Ministerial Declaration on International Investment and Multinational Enterprises included an Annex with a set of recommendations for multinational enterprises ("MNEs") (i.e., the original OECD Guidelines for Multinational Enterprises).[133] This original setup, recognizing contextually the rights and responsibilities of investors, shows how the nexus between the protection of investments and protection of those affected by investment activities was recognized early on in the international investment regime. Since then, the investment regime has evolved on two parallel tracks: on the one hand, the hard-law BITs, and on the other hand, the soft-law regimes for responsible investments. Today, the OECD Guidelines have become one of the cornerstones of this soft-law regime.[134] In 1984, in order to promote the Guidelines as well as to solve conflicts that may arise regarding their implementation, OECD Members agreed to establish NCPs.[135] NCPs are institutions set up at the domestic level that can take different institutional forms, including panels of experts, bodies composed of representatives of competent ministries, and bodies including business and NGO representatives.[136]

The caseload of the NCPs has increased exponentially, reaching almost four hundred specific cases in 2017.[137] Although only OECD Members can establish NCPs, the outreach of these bodies extends beyond OECD membership because an instance can be brought against an OECD-MNE operating in non-OECD countries.[138] Although not all cases successfully solved

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[133] *See generally* John Gerard Ruggie & Tamaryn Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges* (Harvard Kennedy Sch. Working Paper, No. 15-045, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2601922 [https://perma.cc/3BTH-KYEC] (providing a brief history of the Guidelines).

[134] *Cf.* 2011 OECD GUIDELINES, *supra* note 89.

[135] *See* OECD, SECOND REVISED DECISION OF THE COUNCIL ON THE GUIDELINES FOR MULTINATIONAL ENTERPRISES 28 (1984), http://www.oecd.org/daf/inv/mne/50024913.pdf [https://perma.cc/D5LJ-XNTA]; *see also* 2011 OECD GUIDELINES, *supra* note 89, at 68.

[136] *See* 2011 OECD GUIDELINES, *supra* note 89, at 71 (discussing procedural guidance for NCPs).

[137] In 2017, the case load included more than 200 concluded, 122 rejected, and 26 pending cases. *See Database of Specific Instances*, OECD, http://mneguidelines.oecd.org/database/ [https://perma.cc/KD54-G5YU] [hereinafter *OECD Database*] (providing statistics of NCP specific instances).

[138] See, for example, the many cases brought against corporations operating in the Democratic Republic of Congo. Cases can be consulted at the *OECD Database*, *supra* note 137.

the respective problem,[139] NCPs' decisions have yielded significant results overall.[140] The bulk of cases relate to employment and industrial relations (44%), the environment (20%), and few cases have addressed issues relating to taxation (2%).[141]

The distribution of cases among NCPs has been uneven: in some countries, NCPs investigations were never initiated, while in others, the mechanisms are frequently invoked, with the UK NCP being one of the most active.[142] The fact that in fourteen member countries the NCP has never been activated—and that in some members only one or two NCPs instances have been initiated—has been read as sign of weakness of the highly decentralized system of NCPs.[143] Arguably, in some countries NCPs are ineffective because they lack minimum standards of independence and impartiality. Additionally, the lack of enforceability of the NCPs' reports remain problematic:

> [W]ith one single exception, no government has publicly stated that non-cooperation by a company with an NCP or a negative finding against a company will have any material consequences imposed by a government. Forty years of pure voluntarism should be a long enough period of time to conclude that it cannot be counted on to do the job by itself.[144]

Despite these deficiencies, NCPs have significantly contributed to clarify the scope of investors' obligations in the context of the OECD Guidelines. As is the case for most grievance systems, NCPs can be seen as both co-producing standards for MNEs and strengthening their legal normativity.[145]

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[139] *See, e.g.*, *Amnesty International and Friends of the Earth vs Shell*, OECD WATCH, https://www.oecdwatch.org/cases/Case_244 [https://perma.cc/6KN7-FHNS] (discussing the specific instance involving Royal Dutch Shell Company and its pollution in the Niger Delta).

[140] *See generally* Ruggie & Nelson, *supra* note 104 (providing data and assessments on the effectiveness of NCPs).

[141] *See OECD Database*, *supra* note 137 (providing data on specific instances of NCPs).

[142] *See* SHELLEY MARSHALL, CORP. ACCOUNTABILITY RES., OECD NATIONAL CONTACT POINTS: BETTER NAVIGATING CONFLICT TO PROVIDE REMEDY TO VULNERABLE COMMUNITIES, (2016), https://static1.squarespace.com/static/57e140116a4963b5a1ad9780/t/580d7b7bb3db2b51a441a6e8/1477278601503/NJM16_OECD.pdf [https://perma.cc/6367-U62J]. *See generally* OECD Database, *supra* note 137.

[143] Ruggie & Nelson, *supra* note 133, at 20.

[144] *Id.* at 21; *see also* CAITLIN DANIEL ET AL., OECD WATCH SECRETARIAT, REMEDY REMAINS RARE: AN ANALYSIS OF 15 YEARS OF NCP CASES AND THEIR CONTRIBUTION TO IMPROVE ACCESS TO REMEDY FOR VICTIMS OF CORPORATE MISCONDUCT (2015), https://www.oecdwatch.org/publications-en/Publication_4201/@@download/fullfile/Remedy%20Remains%20Rare.pdf [https://perma.cc/D2UV-NL53].

[145] *See* Ruggie & Nelson, *supra* note 133, at 20.

IV. ACCESS TO REMEDIES: ENFORCING INVESTMENT-AFFECTED PEOPLE'S RIGHTS IN THE INVESTMENT REGIME

The ongoing attempts to enhance the transparency, coherence, and integrity of the investment-treaty arbitration are commendable and should continue. We contend, however, that the most daunting challenge for correcting the asymmetry of the international investment regime remains ensuring proper enforcement of the human rights of the investment-affected individuals. Most of the reforms proposed—as well as those partly realized—have eluded this fundamental question. The previous section briefly demonstrated how the international law system has started to respond to the need to protect people's rights by establishing new grievance mechanisms. This trend should be inspirational in the field of international investment law, especially if the field wants to be faithful to the aspiration of further development and rule of law for all.

This Part briefly sketches three model solutions to fix this fundamental flaw of the investment regime. Section A of this Part discusses the first model, which implies the disposal of investment arbitration in favor of soft-law grievance mechanisms.[146] Section B explains the second model, which retains investment arbitration, but enables investment-affected individuals to claim the violation of human rights, labor, and environmental standards in the context of investment arbitration.[147] Under both models, the grievance mechanism (be it a PACoM or arbitration) would be equally available to investors and investment-affected people. Section C discusses the realm between these two proposals, in which several hybrid or multi-layered systems could be imagined, and which we cluster under the label of "networked grievance systems."[148]

A. PACoMs as an Alternative to Investment-Treaty Arbitration

PACoMs could replace investment arbitration as an instrument to solve investment disputes. Ombudsperson-fashioned mechanisms could hear claims of investors, states, and investment-affected individuals. Under this system, it would be of critical importance to establish a truly independent body. As discussed in earlier sections,[149] PACoMs are not always independent. The experience with the NCPs shows that they can be dysfunctional at times.[150] This is why the rules governing the selection and the appointment

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[146] *See infra* notes 149–155 and accompanying text.
[147] *See infra* notes 156–165 and accompanying text.
[148] *See infra* notes 166–167 and accompanying text.
[149] *See supra* notes 21–26 and accompanying text.
[150] *See* Ruggie & Nelson, *supra* note 133, at 20.

of the ombudsperson should ensure his or her impartiality, independence, and professionalism. Unlike arbitral tribunals, these bodies would not render a binding award, but would seek to lead parties to find a mutually satisfactory solution. Although the report issued by an ombudsbody would be barren of binding effects, it could support a legal action before the host state's courts.

This proposed solution is similar to the one endorsed in the 2015 Brazil Cooperation and Facilitation Investment Agreement, whereby two bodies—a Joint Committee or an ombudsman/National Focal Point—are entrusted with the responsibility to manage and solve disputes.[151] Under this model investment treaty, however, the ombudsman only addresses the complaints of the investors or the other party. What we advocate would also broaden the competence of such bodies and entitle them to hear complaints from the investment-affected communities as well. This proposal may be difficult to realize, but it has several likely benefits. First, it would save on the gigantic costs of the arbitration mechanisms, which in themselves could be seen as a threat to democracy. Second, such procedures tend to be easier, faster, and more accessible to a broader public.[152] Finally, the type of mediation conducted by these bodies is also likely to facilitate cooperation at early stages, free exchange of information, and possibly the achievement of mutually acceptable solutions.

Nevertheless, the non-binding nature of these procedures remains highly controversial.[153] A non-binding report would be toothless in contexts where the rule of law is poor (insufficient or ineffective), and this may sound particularly worrying to investors. At the same time, and in contrast with what academics often argue, exposing investors to a poor rule of law

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[151] *Cf.* BRAZIL MODEL CFIA, *supra* note 132, arts. 17(4)(e), 18. Such a body is also provided for in the MERCOSUR Protocol. *See* Facundo Pérez-Aznar & Henrique Choer Moraes, *The MERCOSUR Protocol on Investment Cooperation and Facilitation: Regionalizing an Innovative Approach to Investment Agreements*, EJIL:TALK! (Sept. 12, 2017), https://www.ejiltalk.org/the-mercosur-protocol-on-investment-cooperation-and-facilitation-regionalizing-an-innovative-approach-to-investment-agreements/ [https://perma.cc/YHP6-B3R3].

[152] NCPs, for example, tend to offer "simpler and relatively quicker alternative" to judicial dispute resolution. *See* Ruggie & Nelson, *supra* note 133, at 20.

[153] *See*, *e.g.*, Alfred de Zayas, *quoted in UN Expert Urges World Bank to Amend Its Constitution to Effectively Advance Human Rights*, UN OFFICE OF THE HIGH COMM'R ON HUMAN RIGHTS (Sept. 14, 2017), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22064&LangID=E [https://perma.cc/S8Q9-YKSV] (discussing an interview with expert Alfred de Zayas, and noting that "Mr. de Zayas said the World Bank's existing accountability mechanisms—the Inspection Panel and the Compliance Advisor Ombudsman—did very valuable work, but he regretted that their recommendations were not binding"); *see also* Ruggie & Nelson, *supra* note 133, at 21. A similar problem has been noted in the context of systems of private certification and corporate social responsibility. *See generally* TIM BARTLEY, RULES WITHOUT RIGHTS: LAND, LABOR AND PRIVATE AUTHORITY IN THE GLOBAL ECONOMY (2018).

system may be beneficial for the rule of law of the host country. Research has shown how international arbitration "also has the potential to sideline the domestic construction of the rule of law and the work of human rights promoters."[154] From this vantage point, a system in which the negative effects of poor rule of law are equally felt by the civil society and investors could arguably put more pressure on governments to improve their judiciaries, as well as other branches or agencies of their government.

More importantly, a non-binding but well-functioning grievance mechanism could help gather awareness around the existence and violation of certain rights and may lead to their future clarification and realization. As argued by Stefano Rodotà:

> To proclaim a right . . . does not mean to ensure respect, application, effectiveness . . . It is an uphill road, a slow process. . . . But, let us not cede to the temptation, masked by realism, to assert that that until a right is not *fully* enforceable, it is as if it does not exist. How many times, by just being written down in an instrument, it has been possible to denounce the non-application of a right, to name the scandal of its violation, to let the bad conscience of those who deny that right to surface, creating in this way the political condition to forcefully ask for its effective protection?[155]

B. Investment Treaty Arbitration for All

If investment treaty arbitration is to be retained, it should be reformed to ensure that investment-affected people also have a voice in the system.[156] Next to investors' claims, arbitral tribunals would be thus able to hear complaints of private individuals, communities of individuals, and possibly NGOs on such persons' behalf regarding alleged breaches of domestic law and human rights related to foreign investments. This proposal resounds with the proposal for the International Business and Human Rights Arbitration ("IBHRA").[157] It differs from the IBHRA proposal, however, in that we

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[154] Mark Fathi Massoud, *International Arbitration and Judicial Politics in Authoritarian States*, 39 LAW & SOC. INQUIRY 1, 25 (2014).

[155] Stefano Rodotà, *Nuovi Diritti. L'età dei Diritti. Lezioni Norberto Bobbio* (Oct. 25, 2004) (unpublished manuscript) (translation by the author), http://old.cgil.it/archivio/nuovidiritti/documenti/bioetica_00013.pdf [https://perma.cc/64VB-ZA8L].

[156] *See generally* JOSÉ DANIEL AMADO ET AL., ARBITRATING THE CONDUCT OF INTERNATIONAL INVESTORS (2018) (providing a recent reflection on alternative modes to include host state population in the arbitration process).

[157] For a description of first ideas on the IBHR Arbitration Rules, see CLAES CRONSTEDT ET AL., INTERNATIONAL BUSINESS AND HUMAN RIGHTS ARBITRATION (2017), http://www.l4bb.org/

propose that arbitration be extended to investment-affected people under the same legal regime that affords protection to investors. Crafting new rules to empower the civil society means addressing the thorny issue of jurisdiction. Treaty text would need to be reformed so that investment arbitration tribunals would be competent both *ratione materiae* and *ratione personae* to adjudicate the disputes brought by investment-affected people against investors or states.[158] The inclusion of reference to the UNGP, as proposed above, would establish jurisdiction *ratione materiae*.[159] New treaties should further specify that arbitration tribunals have jurisdiction to hear claims against investors. Arguably the most difficult issue is to establish jurisdiction *ratione personae*. Research has already started to indicate ways to overcome such hurdles,[160] but future research is necessary to further identify viable legal techniques and mechanisms in this realm.

The binding nature of awards and their enforceability across jurisdictions are clear advantages of retaining arbitration as the main dispute settlement mechanism.[161] Nevertheless, our proposal is likely to attract several criticisms. First, investment arbitration tribunals may lack the necessary competences to deal with human rights issue. Although many arbitrators are already highly qualified in the field of human rights, the epistemic community of investment arbitrators could be further enlarged so as to ensure that in any dispute where human rights are invoked, there are always professionals who are well-versed in them. As a practical matter, this reform may require the obligatory consideration of specific qualifications in the selection of arbitrators in each dispute at hand. For example, this reform would likely require that all arbitrators in a dispute concerning human rights have the mandated human rights competences.

There are several possible criticisms against extending treaty arbitration to the avail of the civil society. Most importantly, opening arbitration to individuals and groups affected by investment may be critiqued for stripping domestic adjudicatory institutions of many of their competences. Arguably, resorting to the customary rule on the exhaustion of domestic legal remedies could mitigate the risks of hollowing out core competencies of

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news/TribunalV6.pdf [https://perma.cc/RG2T-HD3S]; *see also supra* note 94 and accompanying text.

[158] *Ratione materiae* is subject-matter jurisdiction. *Subject-matter jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014) [hereinafter *Ratione materiae*]. *Ratione personae*, on the other hand, is personal jurisdiction. *Personal jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[159] *See Ratione materiae*, *supra* note 158.

[160] *See generally* JOSÉ DANIEL AMADO ET AL., *supra* note 156.

[161] *See generally* August Reinisch, *Enforcement of Investment Awards*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 671 (Kate Yannaca-Small ed., 2010).

domestic courts. It follows that a clear rule on the exhaustion of domestic legal remedies for investors and investment-affected people will have to be reintroduced under this new system. A more prosaic, although far from trivial, issue relates to the high costs of the arbitration system.[162] Such costs may yet be a de facto barrier to entry for citizens. Nevertheless, special funds, such as the Financial Assistance Fund established by the Permanent Court of Arbitration,[163] or legal aids are all instruments that may provide ways to make arbitration affordable to the civil society.[164]

One edge of our approach is that the claims of investors and of investment-affected people concerning the same set of facts could be contextually addressed in one proceeding.[165] Moreover, the epistemic community of arbitrators would grow accustomed to both sets of rights as equally worthy of protection. Working with different types of claims can mitigate the risks of bias in favor of one group of actors and may facilitate appreciation of complex issues related to investment relations. Finally, our proposal best reflects the principle of upholding the equality before the law of investment-affected people and investors.

C. A Networked System

The third model we consider is a networked system. Under this system, existing arbitration to the avail of investors could be complemented by a grievance mechanism (such as an NCP) for investment-affected people. In this case, a new treaty like CETA would necessitate minimum modification.[166] For example, it could endorse the OECD Guidelines and add that

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[162] The costs of investment arbitration are notoriously high. *See generally* DIANA ROSERT, INT'L INST. FOR SUSTAINABLE DEV., THE STAKES ARE HIGH: A REVIEW OF THE FINANCIAL COSTS OF INVESTMENT TREATY ARBITRATION (2014), https://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf [https://perma.cc/N7Q6-ZLCL]; Gareth Hutchens & Christopher Knaus, *Revealed: $39m Cost of Defending Australia's Tobacco Plain Packaging Laws*, THE GUARDIAN (July 1, 2018), https://www.theguardian.com/business/2018/jul/02/revealed-39m-cost-of-defending-australias-tobacco-plain-packaging-laws [https://perma.cc/VX5G-PC4F] (providing a recent example of a costly dispute).

[163] This Fund has been established for developing countries. *See Financial Assistance Fund*, PERMANENT COURT OF ARB., https://pca-cpa.org/en/about/structure/faf/ [https://perma.cc/CX3H-QRH6].

[164] *See id.*

[165] In several ISDS cases, local communities contended that their rights were being violated by claimants in investor-state disputes. *See, e.g.*, Chevron Corp. (USA) v. Republic of Ecuador, PCA Case No. 2007-2, Final Award, ¶ 10 (Aug. 31, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0154.pdf [https://perma.cc/93S6-3WYA] (arguing that the claimants were attempting to undermine the enforceability of a class action brought by the local residents against the claimants for pollution).

[166] *See supra* note 62 and accompanying text.

parties to the treaty should establish the NCP, as provided by the OECD Guidelines. Moreover, whenever a question on business and human rights is raised by one party, arbitration tribunals should consider past reports of NCPs and consult with them. The lack of consideration of NCP reports or the lack of consultation when such issue has been raised by a party could also be considered a justification to set the claims aside. There are many possible variations of such a system. For example, reports by NCPs suggesting violations of the Guidelines by corporations could constitute the basis for counterclaims by states.

The advantage of a networked system is that it would entail an incremental reform and it could capitalize on the accrued experience of already existing institutions. As of today, forty-eight NCPs have been established[167] and, as previously discussed, more than four hundred specific instances have been initiated. Additionally, by not making the business and human rights instrument formally binding, this reform may be politically viable. The downside of such a regime is that it would not fully correct the asymmetry between the investors and the investment-affected communities. Investors would retain the strong rights under investment treaty arbitration, whereas the civil society would be afforded a "reinforced" soft-law mechanism, which could only indirectly influence investment arbitration. Yet, this networked system could be considered as merely the beginning of reforms in the path to correct the unsustainable imbalance of the current system of international investment treaties.

CONCLUSION

This Essay advocates for a change of paradigm in investment treaty law. Under this new paradigm the rights of investment-affected people, together with obligations of investors, are recognized as part and parcel of the investment regime. In sum, the proposed shift is from a system centered on protecting the *res privata* (e.g., investors' interests) to one protecting the *res publica* (including the interests of the people and community where the investment is located, as well as those of investors). We have suggested three different models to accomplish that objective. The three models presented in this Essay, along with their advantages and disadvantages, share the common feature of empowering the individuals and the communities affected by the investment operations. We contend that this is the way forward. Still, more research is necessary to further delineate the contours of the models identified and to indicate which model may be more viable and apt

[167] Jernej Cernic Letnar, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises*, 3 HANSE L. REV. 71, 83–84 (2008).

in different contexts. What is clear is that a system, especially one that is allegedly aimed at contributing to the development of the host state, cannot so blatantly exclude the interests of the communities that are likely to be affected by those investments. By starting to recognize the relevant rights that must be regulated and by referring to environmental protection and human rights, the current investment-treaty regime is progressing overall. Nevertheless, if these rights remain without enforcement mechanisms, they are likely to remain subaltern to the rights of investors. Grievance mechanisms are important, not only to enforce these rights, but also to give a voice to the right-holders. It is through this voice that these rights can be better understood and gradually realized. Decades of investment treaty arbitration have contributed to the silencing of these voices. It is now time to reform this state of affairs, especially if the investment regime intends to be faithful to some of its alleged ambitions.