Assessing the Viability of Investor Liability Provisions in the Reform Agenda of International Investment Law

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Abstract:

To address the shortcomings that have been identified with the international investment law system, treaty reforms have been proposed that attempt to make provision for the liability of investors for their conduct which has negative impacts on the host state. These include the use of home state courts and the use of counterclaims in investor state arbitration. The question is whether these provisions provide adequate protection to the citizens of host states who face the brunt of negative investor conduct. The paper finds that these measures are not sufficient to provide adequate redress. The paper recommends the incorporation of national courts in the resolution of investment disputes, the increased enforceability of national court decisions across borders as well as providing affected communities access to an adequate and equivalent remedy at the international level. This will give local communities the means through which their rights can be adequately vindicated in the context of international investment law disputes.

Introduction

FDI plays a major role in the development of national economies.[1] The nature of cross border investment is such that there are several interested parties involved in making, regulating, and sustaining investment. The investor, whose primary objective is to receive returns on their investments and protect their property interests while operating in a foreign land; the host state whose interests entail job creation, human and environmental protection, and sustainable development; the home state that seeks to ensure that its nationals are adequately protected abroad and the local communities and citizens of host state where investment activity takes place who want to enjoy the benefits of investment activity and be protected from negative investment

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1 GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 411 (3rd ed. 2012).

activity. In some cases, the interests of these parties may conflict with each other resulting in disputes arising between them.[2]

Despite the existence of all these stakeholders, the international investment law system only makes provision to govern the relationship between the foreign investor and the host state. The international investment law system makes use of a myriad of bilateral investment treaties (BITs) that contain substantive protections for investors and provide for a unique dispute settlement mechanism known as investor-state arbitration. Through investor state arbitration, foreign investors are given special authority to initiate claims against host states, seeking to challenge state regulatory conduct that they allege has infringed on their investments and their rights as contained in BITs.

One of the concerns that has been levelled against the international investment law system is its one-sided nature, in that BITs were intended purely for the protection of investors.[3] BITs have been criticised as creating justice bubbles for foreign investors by creating a system of special rights and special dispute settlement mechanisms that are not accessible by other stakeholders in the international investment law system.[4] To this end, most BITs tend to make provision for investor protections with no corresponding obligations for the investor and host state obligations with no corresponding rights for the host state. In addition to this, most BITs are silent on the rights and interests of stakeholders outside of foreign investors and host states, such as local communities. Local communities as used in this article refers to the term in its broadest sense as a group of people connected to a particular locality who do not exercise governmental authority. It includes indigenous peoples and local residents by geographic proximity. As a result of these concerns,[5] the international investment law system has been facing significant backlash from stakeholders which has led to a 'legitimacy crisis' and in turn led to calls and actions for the reform of international investment law.[6]

2 Jose E. Alvarez & Karl P. Sauvant, *The Evolving International Investment Regime: Expectations, Realities, Options* (2011)

3 Howard Mann, Reconceptualizing International Investment Law: Its Role in Sustainable Development, 17 LEWIS & CLARK L. REV. 521, 522–3 (2013).

4 Anil Yilmaz Vastardis, *Justice bubbles for the privileged: a critique of the investor-state dispute settlement proposals for the EU's investment agreements',* 6 LONDON REV. INT'L L. 279 (2018); Surya Deva & Tara Van Ho, Addressing (In)Equality in Redress: Human Rights-Led Reform of the Investor-State Dispute Settlement Mechanism, 24 J. WORLD INV. & TRADE 398 (2023).

5 These concerns have been focused on by UNCITRAL Working Group III and relate to the procedural issues of correctness, consistency and coherence of decisions, independence and impartiality of arbitrators and reducing time and costs of proceedings.

6 Susan D. Franck, T*he Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

Discussions on the reform of international investment law are taking place at various fora. UNCITRAL Working Group III has been mandated to identify concerns regarding the investor state dispute settlement system (ISDS) and develop potential solutions for reform. Working Group III is focused on reforming the procedural aspects of international investment law. It has identified a number of procedural concerns including lack of consistency, coherence, predictability, and correctness of arbitral decisions by tribunals; the perceived or alleged lack of guarantees for independence and impartiality amongst arbitrators and the lack of diversity in the appointment of arbitrators and the increasing costs and duration of arbitral proceedings.[7] In seeking to resolve these concerns, Working Group III is focusing mainly on exploring proposals on reforming the current system of investor state arbitration or introducing a permanent multilateral investment court with or without an appellate mechanism.[8]

This narrow focus on procedural aspects has been criticised as seeking to entrench and legitimize the current system that prioritises the protection of foreign investors to the exclusion of other, equally important parties.[9] Gathii and Mbori note that the focus of Working Group III is aimed at improving ISDS, and will result in the carrying forward of some of the unequal, unfair and unjust rules of international investment law thereby entrenching some of the fundamental challenges that are facing the system that have received little to no attention.[10] The reform effort undertaken by Working Group III has put into the backseat important issues that arise from the potential negative impacts of investments that affect local and indigenous communities.[11] Van Harten et al note that the concerns identified and focused on by Working Group III while also important, are far from the diligent catalogue of necessary reforms that have been proposed by various stakeholders.[12] They further note that the reforms that are presently under discussion would not alleviate the most serious challenges facing the international investment law system and underscore the need for reforms that go beyond just the procedural aspects identified by Working Group III.[13] Sachs et al note

7 *See generally* U.N. COMMISSION ON INTERNATIONAL TRADE LAW: WORKING GROUP III: INVESTOR STATE DISPUTE SETTLEMENT REFORM, https://uncitral.un.org/en/working_groups/3/investor-state.

8 *Id.* (Under the auspices of UNCITRAL Working Group III).

9 James T. Gathii & Harrison O. Mbori, *Reform and Retrenchment in International Investment Law: Introduction to a Special Issue,* 24 J. WORLD INV. & TRADE 535, 536 (2023).

10 *Id.*

11 *Caroline Lichuma, International Investment Law Reforms and the Draft Business and Human Rights Treaty: The More Things Change, the More They Remain the Same?*, 24 J. WORLD INV. & TRADE 718 (2023).

12 Gus Van Harten, Jane Kelsey, et al., *Phase 2 of the UNCITRAL ISDS Review: Why "Other Matters" Really Matter* 1-15 (Osgoode Legal Stud. Rsch., 2019).

13 *Id.* at 14.

that the approach undertaken for reform undermines the legitimacy, support for and uptake of Working Group IIIs reform process.[14] They further find that,

> [D]espite the stakes, which continue to mount, the work plan casts serious doubt that Working Group III after all its time, effort and expense, will produce serious or impactful outcomes. The work plan reveals an unwillingness to seriously and fully deal with concerns about how ISDS may negatively impact domestic law and institutions, chill or unduly raise or shift the cost of a public interest regulation or undermine the rights of non-parties. It is, at best, a missed opportunity and at worst, a process that is all but set to lock in a system of dispute settlement that is fundamentally at odds with inclusive sustainable development. A number of stakeholders and states have consequently been disengaging from the process.[15]

The approach to reform by Working Group III to a larger extent remains silent on how other stakeholders that are affected by foreign investment can effectively participate in and make use of the system. Foreign investment disputes particularly in the natural resource extraction sector show that local communities have a lot at stake but have remained almost invisible in the international investment law system with the limited ability to participate in the dispute settlement procedures.[16] In this regard, Cotula notes that 'international law – is not only the story of judges and diplomats and lawyers in tailored suits handling complex litigation. It is also the story of women and men who feel the impacts of rules and proceedings in their lives yet are often excluded from decision making...'[17]

The exclusion of local communities from the international investment law system and their inability to access justice has left many local communities that have been affected by investment activity with no means to vindicate their rights.[18] In these situations local communities (often unsuccessfully) resort to alternative mechanisms in attempts to have their rights vindicated. For example, in *Kiobel v. Royal Dutch Petroleum Co,* a group of Nigerians, after failing to obtain redress in their national courts for harm

14 Lisa Sachs, et al., *The UNCITRAL Working Group III Work Plan: Locking in a Broken System?,* COLUM. CTR. SUSTAINABLE INV. (May 4, 2021), https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system.

15 *Id.*

16 Nicolás M. Perrone, *The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, And The International Investment Regime,* 113 AJIL UNBOUND 16 (2019).

17 Lorenzo Cotula, *Investment disputes from below: whose rights matter?*, INT'L INST. FOR ENV'T & DEV. (July 23, 2020) https://www.iied.org/investment-disputes-below-whose-rights-matter.

18 Emmanuel T. Laryea, *Making Investment Arbitration Work for All: Addressing the Deficits in Access to Remedy for Wronged Host State Citizens Through Investment Arbitration,* 59 B.C. L. REV. 2845 (2018).

caused by the conduct of Shell in Nigeria, unsuccessfully attempted to sue Shell in the courts of the United States under the Alien Tort Statute.[19] The court held that there was a presumption within the Alien Tort Statute against the extra-territorial application of the statute and that in the absence of evidence of a sufficiently strong link between the matter and the territory of the United States, the Alien Tort Statute would be inapplicable to the matter.[20] Since the statute was presumed to be inapplicable the court did not proceed to deal with the merits of the matter. This illustrates that insufficient provision has been made for the participation of and the protection of the rights of local communities who are affected by foreign investment activity.

This is not to say that foreign investment only has negative impacts on local communities. When harnessed properly foreign investment can have several benefits for local communities. However, the inability of the existing domestic and international legal frameworks to appropriately balance the threats and opportunities that come with foreign investment has left local communities more susceptible to suffering the threats.[21]

It is therefore necessary to achieve the reform of the substantive and procedural aspects of the international investment law in a manner that takes into account the needs of other stakeholders, such as local communities, in a manner that focuses on the protection of human, labour and environmental rights and promotes the achievement of sustainable development.

Outside of the auspices of Working Group III, states, interest groups and academics have focused on the need to address this imbalance.[22] Of particular importance to the re-balancing exercise are local communities who often bear the brunt of negative investor conduct, with no equivalent means at the international level to seek redress.[23] The rebalancing of the international investment law system is necessary to ensure that the reform efforts do not merely entrench the existing system but can lead to more positive and fundamental reform that addresses a broad range of issues and accommodates a wide range of stakeholders.[24]

19 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

20 *Id*. at 117–25.

21 George K. Foster, *Foreign Investment and Indigenous Peoples: Options For Promoting Equilibrium Between Economic Development And Indigenous Rights,* 33 MICH. J. INT'L L. 627, 632 (2012).

22 Caroline Lichuma, *International Investment Law Reforms and the Draft Business and Human Rights Treaty: The More Things Change, the More They Remain the Same?*, 24 J. WORLD INV. & TRADE 718 (2023).

23 Ibironke T. Odumosu-Ayanu, *Local Communities, Indigenous Peoples, and Reform/Redefinition of International Investment Law*, 24 J. WORLD INV. & TRADE 792 (2023); Nicolás M. Perrone *Investment Treaty Law and Matters of Recognition: Locating the Concerns of Local Communities*, 24 J. WORLD INV. & TRADE 436 (2023); *see* Perrone, *supra* note 16.

There have been steps taken by academics, think tanks, states and regional economic communities to rebalance the international investment law system, and make provision for local communities and states to have a mechanism through which investors can be held liable for their negative conduct that may cause harm to host states and local communities.[25] The attempts at various levels to incorporate mechanisms by which investors can be held liable in the context of international investment law are what this paper refers to as investor liability provisions.

This paper seeks to undertake an assessment of investor liability provisions that have been proposed in the reform of international investment law, in particular the use of home state laws and home state courts and counterclaims for holding investors liable for their conduct that amounts to a breach of the applicable BIT. These provisions have been incorporated into IIAs such as the African Continental Free Trade Agreement (AfCFTA) Investment Protocol and have been proposed as a viable means through which meaningful reform can be achieved.[26] This paper will explore the effectiveness and practicality of these provisions and ascertain whether these provisions can be used to achieve the desired result of investor liability. The paper will further go on to explore other methods of ensuring investor liability that can be adopted by states at both treaty and national level which could possibly provide more effective redress to the affected parties, including incorporating the exhaustion of local remedies rule and providing access to affected third parties to a remedy at the international level.

This paper seeks to make recommendations on how provisions for holding investors liable for their negative conduct can be strengthened and incorporated into international investment agreements (IIAs) to give greater effect to the re-balancing exercise and ensure that the investors are held to account for their negative conduct. To achieve this, section I will provide an overview of the investor liability provisions under discussion using the Protocol to the Agreement Establishing the African Continental Free Trade Area On Investment (AfCFTA Investment Protocol) as an example and provide an assessment of the effectiveness and practicality of these provisions. Section II will proceed to explore alternative methods of holding investors liable for violations of their investment treaty obligations and section III will conclude.

24 Gathii & Mbori, *supra* note 9.

25 *See* for example the work of the International Institute for Sustainable Development and Open-ended Intergovernmental Working Group (OEIGWG) on transnational corporations and other business entities.

26 Investor liability provisions have been contained in a number of reformed IIAs, however, this paper will draw examples from the AfCFTA Investment Protocol.

I. Overview And Assessment Of Investor Liability Provisions

In the traditional investment law regime, investors enjoyed a wide range of rights and investment protections,[27] which led to a boom in investment arbitration cases, in which investors claimed large sums of money arising out of state regulatory conduct which allegedly violated investors rights and enjoyment of their investment as contained in IIAs. While providing investors a myriad of rights, most IIAs were silent as to the corresponding obligations owed by the investor to the host state and its citizens. As such, even where the investor engaged in conduct that was harmful to the host state, its citizens or its environment, there has been no equal remedy under international investment law through which investors could be held accountable.[28] Further, where states took measures for the protection of human rights, they ran the risk of being held liable for the same, even where these measures were necessary for the protection of human rights.[29] For example, *Aguas del Tunari v Bolivia* where a coalition of farmers, factory workers, environmentalists, labour groups, and others vocally resisted the terms of a water concession granted to an investor leading to the government cancelling the concession.[30] In response, the investor initiated investment arbitration proceedings.

As a result of this, states, although at varying levels have begun to re-assess their investment treaties to bring about more accountability for foreign investors. African states seem to be at the forefront of this re-assessment exercise, by incorporating investor obligations in the investment agreements. For example, the Nigeria Morocco BIT, in article 18(2) provides that '[i]nvestors and investments shall uphold human rights in the host state.[31] Articles 18(3) and 18(4) further make provision for the obligation of investors to act in accordance with core labour standards, and the obligation not to circumvent international environmental, labour and human rights obligations of the host and home state.[32] The AfCFTA Investment Protocol[33] provides for express

27 For example, fair and equitable treatment, full protection and security, most favoured nation, national treatment, transfer of funds, and compensation for expropriation.

28 *See* Emmanuel T. Laryea, *supra* note 18 (An exposition of instances where local communities were unable to or found difficulty in getting redress for harm occasion to them by investment activity).

29 *See* Odumosu-Ayanu, supra note 23, at 820 (For an overview of cases).

30 Aguas del Tunari, SA v The Republic of Bolivia, ICSID Case No. ARB/02/03, Decision on Respondent's Objections to Jurisdiction (21 October 2005).

31 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and The Government of the Federal Republic of Nigeria, Morocco – Nigeria, Dec. 3, 2016, https://edit.wti.org/wti-filesystem/20220107/01520fd8-42b6-4e80-9566-bc9b64f4ec5f/download%20(1).pdf [hereinafter Morocco-Nigeria BIT]

protection of the states right to regulate and the incorporation of investor obligations with a focus on human rights, labour, the environment, indigenous peoples and local communities and socio-political rights.[34] Other organisations have also contributed to the calls for reform of international investment law, with the International Institute for Sustainable Development (IISD) coming up with a model investment agreement, the IISD Model International Agreement on Investment for Sustainable Development, that incorporates investor obligations.[35]

In order to give effect to these substantive protections provided to local communities, there has also been the incorporation of measures that can be used to hold investors liable. These will be discussed below.

A. Home State Courts

A common provision that has arisen in the above -mentioned initiatives is the use of home state courts as a means to hold investors liable. For example, Article 47 of the AfCFTA Investment Protocol provides as follows:

1. Investors and their investments shall, where applicable and in accordance with domestic laws and regulations be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Host State in relation to the investment where such acts, decisions or omissions lead to damage, personal injuries or loss of life in the Host State.

2. State parties shall develop rules and procedures that allow for or do not prevent or unduly restrict, the bringing of court actions relating to the civil liability of investors in the territory of their Home States, taking into account rules governing conflict of laws and the recognition and enforcement of foreign judgements.

The import of these provisions is to provide an avenue through which investors can be held liable in the host state for their negative conduct that can cause harm and damage to a host state and its citizens. Despite the evident purpose of these provisions, there are some issues that affect their practicality and their effectiveness in providing the

32 *Id*. at art. 18(3), 18(4).

33 Protocol To the Agreement Establishing the African Continental Free Trade Area on Investment, Jan. 21, 2023, https://edit.wti.org/document/show/e5d51824-c467-4e24-922b-3fb376d89550 [hereinafter AfCFTA Investment Protocol].

34 *See id*. at Chapters 4–5.

35 The IISD model is formulated to 'promote foreign investment in pursuit of sustainable development, in particular in developing and least-developed countries,' and refers to international human rights obligations.

protection that they desire. In the first instance, it is usually the local communities where the investment takes place that usually suffer the negative impacts of investor conduct, ranging from environmental degradation to violations of labour, cultural and other human rights.[36] As such, it is these local communities that would often seek redress for the damage they have suffered arising from investor conduct. The pertinent question therefore is whether, local communities would be able to effectively make use of home state courts to seek redress. It is the viewpoint of the author that there are several obstacles that would stand in the way of local communities making use of home state courts.

The main obstacle that would be experienced is that of accessibility. One of the fundamental principles of the rule of law is the right of access to justice. The right of access to justice encompasses the provision of an effective remedy that is capable of providing redress. In the context of the use of home state courts, even where there is the removal of impediments such as forum non conveniens, the use of home state courts still falls short of the requirements for an effective dispute settlement process and ensuring access to justice. A practical example of this is where a local community in a rural developing country with limited access to resources would seek to hold a foreign investor, usually a large multi-national company liable in the courts of the foreign investor. Similar difficulties arise even in the context of regional agreements, for example a local community in rural Zimbabwe, seeking to hold a Nigerian investor liable in the Nigerian courts. These examples illustrate that there are several difficulties that can be involved including costs that are associated with litigating in another country the most significant being costs of travel to the court of the home state. In addition to this the difficulty and costs associated in finding legal representation in the home state country, differences in procedure and legal background and language barriers all act as prohibiting factors that bar access to the home state court. As such, while clauses allowing the use of home state courts are set to achieve a noble purpose and assist in holding investors liable, their effectiveness is, to a larger extent limited by practical considerations regarding access to the court. There is therefore a need for additional mechanisms to be put in place to ensure the effectiveness of investor liability provisions.

36 Akinwumi Oguranti, *Access to Justice for Local Communities in Investor-State Arbitration*, AFRONOMICSLAW (Nov. 6, 2019), https://www.afronomicslaw.org/2019/12/06/access-to-justice-for-local-communities-in-investor-state-arbitration

B. Counter claims

Where investor obligations are contained in an IIA, it has been noted that it is important for the host state to have a mechanism that can be used to enforce invest obligations where there has been non-compliance and gain redress for the same. In the present international investment arbitration framework, host states are not able to bring direct claims against the investor for their conduct which may have negatively impacted the citizens of the host state.[37] This because the agreement to arbitrate is made perfecta by the investor initiating arbitral proceedings, however, where the investor has not expressly consented to the arbitration, the host state would not be able to initiate arbitral proceedings. To address these concerns, some arbitration rules allow host states to bring counterclaims against investors.[38] Despite the rules of most arbitral institutions making provision for the use of counterclaims, there are two key obstacles that have been identified by arbitral tribunals in accepting counterclaims made by host states.[39] These two obstacles are whether or not the agreement to arbitrate provides the tribunal with jurisdiction over the determination of counterclaims and the question as to what obligations are owed by the investor to the host state.[40]

In the case of *AMTO v Ukraine*[41], Ukraine sought to bring a counterclaim in accordance with the arbitral rules of the Stockholm Chamber of Commerce. The applicable IIA was the Energy Charter Treaty and its dispute resolution clause provided for the resolution of disputes which alleged a breach of an obligation of the host state. The tribunal held that its jurisdiction to hear a counterclaim was dependent on the contents of the dispute resolution clause in the applicable treaty. In this instance, the dispute resolution clause only extended jurisdiction to the tribunal to determine matters arising from an alleged breach of an obligation of the host state and as such, the tribunal found that it was limited by the subject matter jurisdiction defined in the dispute resolution clause and could not determine the counterclaim raised by the host state.[42] The same reasoning was also applied in the case of *Roussalis v Romania*[43] where the tribunal found that the applicable dispute resolution clause limited the jurisdiction of the tribunal to determining claims brought by the investor alleging a breach of the host states obligations

37 Tomoko Ishikawa, *Counterclaims and the Rule of Law in Investment Arbitration*, 113 AM. J. INT'L L. 33, 35 (2019).

38 *See, e.g.,* ICSID Arbitration Rules, Rule 48 (2022).

39 Yaraslau Kryvoi, *Counterclaims in Investor-State Arbitration,* 21 MINN. J. INT'L L. 216, 216 (2012).

40 *Id.*

41 *Limited Liability Company AMTO v. Ukraine,* SCC Case No. 080/2005, Final Award (Mar. 26, 2008).

42 *Id*. at 118.

43 *Spyridon Roussaliss v. Romania,* ICSID Case No. Arb/06/1, Award (Dec. 7, 2011).

In order to address this, the relevant dispute resolution clause in the applicable IIA would be determinative as to the question of whether the arbitral tribunal will have the jurisdiction to determine a counterclaim by the host state. For the tribunal to have jurisdiction to hear counterclaims by the host state, the dispute resolution provisions in the relevant IIA will have to specifically provide for this. As opposed to granting the tribunal jurisdiction to decide disputes arising from the host state's breach of its obligations,[44] the dispute resolution provision will have to grant the tribunal the general jurisdiction to hear disputes arising out of a violation of any of the obligations that are contained in the treaty. As such, the parties will have provided consent for the adjudication of disputes arising out of the host states violation of its obligations as well as the investor's violation of its obligations. An example of how this has been effectively incorporated is evident in s9 and 10 of the AfCFTA Investment Protocol Zero Draft that provide as follows:

9. Consent to Arbitration

Consent to arbitration shall be provided as follows:

a. each State Party consents to the submission of a claim to arbitration under this Article in accordance with this Annex; and
b. by submitting a claim to arbitration, the investor also consents to counterclaims by the Host State for an alleged breach of the Protocol.

10. Counterclaims

a. Host State may initiate a counterclaim against the investor before any competent body dealing with a dispute under this Protocol for damages or other relief resulting from an alleged breach of the Protocol.

However, this provision did not make it into the final draft of the AfCFTA Investment Protocol and it remains to be seen whether a similar provision will be provided in the Dispute Settlement Annex that is to be negotiated in accordance with article 46(3) of the AfCFTA Investment Protocol which is still under negotiation.

By making it possible for the host state to institute counterclaims, the host state may be able to represent the interests of its citizens who may be negatively affected by investment activity. This would give local communities an opportunity to heard and ensure that they have an effective remedy against the negative impacts of investment activities. This obligation on the state to raise counterclaims for the protection of its citizens where investors have violated their obligations in terms of the applicable IIA, is in line with the state's duty to protect. The duty to protect requires that the state take

44 As is the case with most dispute resolution clauses in existing IIAs.

active measures to protect its citizens from human rights abuses perpetrated by third parties through the implementation of regulations and policies and providing effective remedies when violations occur.[45] This duty on the state to take active measures has been recognized in the jurisprudence of other international courts and tribunals. In the case of *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,*[46] the African Commission on Human and People's Rights held that the government of Nigeria had a duty to protect its citizens from the negative impacts caused by foreign oil mining companies. The Inter-American Court on Human Rights in the case of *Velásquez-Rodríguez v. Honduras* held that '[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.'[47] The European Court of Human Rights has further affirmed the position that the state has a positive duty to protect its citizens from human rights violations committed by third parties and to take all reasonable measures to ensure the protection of its citizens.[48]

Within the context presently under discussion, the state's duty to protect its citizens from the negative conduct of foreign investors will have been fulfilled by ensuring provision for investor obligations and by providing an effective remedy through which the host state can seek redress in instances where the investor violates any of its obligations.

In addition to making provision for the host state to bring counterclaims, the state must also make sure that they are able to receive timely information regarding investor non-compliance with their obligations. As the reformed IIAs envisage obligations for investors in relation to the developmental needs of local communities, the activities that are related to the achievement of those obligations can be determined and undergone in conjunction with the investors and the local authorities. Local authorities are in the best position to monitor the actions of investors in relation to the fulfilment or non-fulfilment of their binding obligations and issue progress reports to the national level for the implementation of any remedies that might be available or in assisting the local

45 Juan Pablo Bohoslavsky, Líber Martín & Juan Justo, *The State Duty to Protect from Business-Related Human Rights Violations in Water and Sanitation Services: Regulatory and Bits Implications),* 26 INT'L L.: REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 63, 72 (2015) (Colom.); Markus Krajewski, *The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities,* 23 DEAKIN L. REV. 13, 19 (2018).

46 *Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria,* Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Oct. 27, 2001), https://achpr.au.int/en/decisions-communications/social-and-economic-rights-action-center-serac-and-center-economic-15596.

communities to access remedies as will be provided for in the IIA. The oversight of the local authority is of particular importance when it comes to preserving cultural and indigenous aspects of the community as they are well versed in this respect. The state has to ensure that local authorities are well equipped to monitor the conduct of foreign investors and that there exist mechanisms for which grievances can be brought to the national level for the purposes of seeking redress.

While counterclaims appear to be a useful tool in attempting to effectively rebalance investment agreements, they are not, on their own, able to fully provide for effective investor liability. This is because, due to their nature, counterclaims can only be instituted after an investor has already initiated a claim. As such, where an investor does not initiate a claim, host states would not be able to make use of the counterclaim mechanism, and this would render the counterclaim provisions less effective for ensuring investor liability. Further, while the state has the duty to protect its citizens, as a party to investment disputes, it should not be taken for granted that the host states will always have the same interests as their citizens. As such, there are some instances where the interests of the host state would be contrary to the interests of the local investors thereby limiting the likelihood of the host state providing adequate representation on behalf of its citizens.[49] In any event, the use of counterclaims does not provide direct redress and remedies to the local communities. They would still be unable to participate in the proceedings, make meaningful representations and have access to information and hearings. This undermines the protection that the re-balancing exercise seeks to achieve.

From the above discussion, despite the efforts to reform the system in order to achieve adequate protection of affected stakeholders, the reform methods adopted are inadequate to meet this goal. According to Sornarajah many reform efforts address the peripheries of the system in the hopes that by fixing them, the challenges of the system will be muted.[50] As such there is a need for additional mechanisms to be put in place to ensure investor liability.

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47 *Velásquez-Rodríguez v. Honduras,* Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988).

48 *See generally* Daniel Augenstein, *State Responsibilities to Regulate and Adjudicate Corporate Activities Under the European Convention on Human Rights*, Submission to the Special Representative of the United Nations Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and Other Business Enterprises (April 2011) https://media.business-humanrights.org/media/documents/9b7d88557de08aa2aad4d2b2428d4abcd0f1b35c.pdf.

49 George K. Foster, *Foreign Investment and Indigenous Peoples: Options For Promoting Equilibrium Between Economic Development And Indigenous Rights,* 33 MICH. J. INT'L L. 627 (2012).

50 Muthucumaraswamy Sornarajah, *Disintegration and Change in the International Law on Foreign Investment,* 23 J. INT'L ECON. L. 413, 418 (2020).

II. Measures To Be Incorporated Into International Investment Treaties To Achieve Effective Investor Liability.

A. National Courts Of The Host State

The UN Guiding Principles on Business and Human (UN Guiding Principles) have not yet culminated into a binding international treaty on human rights but they are widely used and accepted as the standard for business and human rights.[51] According to De Schutter, the UN Guiding Principles are regarded as 'the most authoritative statement of the human rights duties or responsibilities of states and corporations adopted at the UN level.'[52] On this basis they can be used to assist in ensuring investor liability within international investment law.

According to the UN Guiding Principles, the state has an active role to play in ensuring effective redress for victims of violations of rights that are occasioned by business in the course and scope of their business activity. To this end, Guiding Principle 25 provides as follows:

> As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

The Guiding Principles further provide that the steps can be in the form of state judicial mechanisms i.e., national courts,[53] non-judicial mechanisms,[54] and non-state-based mechanisms.[55] From this we see that the state has the primary duty to

51 René Wolfsteller & Yingru Li, *Business and Human Rights Regulation After the UN Guiding Principles: Accountability, Governance, Effectiveness*, 23 HUMAN RIGHTS REV. 1, 2 (2022).

52 Olivier De Schutter, *Foreword: Beyond the Guiding Principles, in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? (Suryva Deva & David Bilchitz, eds., 2013).

53 *See* U.N. Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* 28, U.N. Doc. HR/PUB/11/04 (2011) (Principle 26 provides that '[s]tates should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.').

54 *See id*. at 30 (Principle 27 provides that, '[s]tates should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.').

55 *See id*. at 31 (Principle 28 provides that, 'States should consider ways to facilitate access to effective non-State based grievance mechanisms dealing with business-related human rights harms.').

ensure that its citizens are able to receive adequate redress arising from human rights violations occasioned by investors. Ensuring strong judicial mechanisms is beneficial in that, where these mechanisms are in the host state, they are more accessible to the victims of rights violations, they ensure ease of participation of all affected parties in the dispute, are much cheaper than cross border or international litigation and there is the possibility of appeal where any party may not be satisfied with the outcome of the decision.

To give effect to these principles, the UN Human Rights Council adopted a draft resolution to establish an open-ended intergovernmental working group to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. The Working group has released a third revised draft text for a binding treaty on business and human rights. The text of the treaty deals with inter alia provisions for ensuring investor liability. These provisions illustrate how the domestic courts of the host state can be an effective forum for ensuring liability of investors and set out the steps that states ought to take in giving effect to the same. For example, article 7 makes provision for access to a remedy and sets out the steps that states ought to take to ensure that victims are able to receive effective redress. These steps include ensuring that there are effective, adequate and timely remedies that overcome the specific obstacles that women, vulnerable and marginalised people face,[56] facilitating access to information,[57] providing adequate legal assistance,[58] removing barriers and obstacles to access to courts such as high costs of filing cases[59] and ensuring enforcement of judgements rendered.[60]

In addition to this, Article 8 provides for the legal liability of business entities and enjoins states to ensure that their domestic laws make provision for domestic liability for business entities carrying our operations within the state for human rights abuses.[61] To this end, these are concrete steps that can be taken by states and incorporated into their investment agreements to ensure that investors can be held liable within the courts of the host state that are closest and most accessible to the victims.

56 Human Rights Council, U.N. Doc. A/HRC/49/65/Add.1, at 25 (Feb. 28, 2002).
57 *Id.*
58 *Id.*
59 *Id.* at 26.
60 *Id.*
61 *Id.* at 27.

Within the international investment law regime, there is no general rule for the exhaustion of local remedies. As such, encouraging local communities to hold investors liable through domestic courts while foreign investors can directly approach international tribunals may increase the likelihood of parallel proceedings and perpetuate the creation of a separate system of justice for investors.

In order to address this, it is proposed that the exhaustion of local remedies rule be incorporated into international investment law as a pre-requisite for the initiation of proceedings before the international mechanism. The exhaustion of the local remedies rule has been considered one of the longest-standing and most basic principles in international law.[62] The CIL rule of exhaustion of local remedies aims at safeguarding state sovereignty by requiring individuals to seek redress for any harm allegedly caused by a state within its domestic legal system before pursuing international remedies. This principle was confirmed in the *ICJ Interhandel* case, where the court held that the exhaustion of local remedies rule is a well-established principle of CIL that gives the State where the violation occurred an opportunity to redress the violation by its own means within the framework of its domestic legal system.[63] The exhaustion of local remedies rule acknowledges that recourse to international dispute settlement mechanisms should complement national mechanisms and should only be pursued where national mechanisms fail to provide effective protection.[64] Where the exhaustion of local remedies rule applies, the claim before the international tribunal will not be admissible until local remedies have been pursued, save for where the remedies are not available or are ineffective.

By incorporating the exhaustion of local remedies rule into the international investment law regime, we not only address the question of parallel proceedings. Mandating the use of the exhaustion of local remedies rule could provide impetus for host states to improve their national legislation, build the capacity of their national courts and strengthen their judicial systems.[65] This is because foreign investors would not be bound by the exhaustion of local remedies rule where the remedies are ineffective or unavailable, and this would act as a means by which states are encouraged to improve

62 Douglas Wong, *From Redundancy to Resurgency: Revisiting the Local Remedies Rule in International Investment Arbitration*, 35 SING. L. REV. 114, 114 (2017).

63 Interhandel (Switzerland v. United States of America), Judgment, 1959 I.C.J. Reports 6 (Mar. 21).

64 Amos O. Enabulele, *Sailing Against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice*, 56 J. AFR. L. 268, 269 (2012).

65 Richard C. Chen, *Bilateral Investment Treaties And Domestic Institutional Reform,* 55 COLUM. J. TRANSNATIONAL L. 547, 586 (2017).

66 George K. Foster, *Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 COLUM. J. TRANSNATIONAL L. 201, 249 (2010).

the state of their domestic courts where these are found to fall short of providing an adequate remedy. This would not only be beneficial for investors (both foreign and domestic) but improve overall access to justice and strengthen local judicial systems.

The inclusion of exhaustion of local remedies rule also allows for the settlement of disputes through domestic courts that are created in line with national constitutions that are subject to control mechanisms and are therefore viewed as being more determinate, more accountable and more legitimate[66] in comparison to tribunals that are created on an ad hoc basis with no oversight authority. As opposed to trying to create an entirely new legitimate system at the international level, it would be much easier to make use of the already existing domestic court system, whose existence, structure and use are already accepted as having perceived legitimacy.[67] It would address the concern that investor-state dispute settlement (ISDS) functions as a form of international judicial review without the backing of any constitutional system.[68] By grounding ISDS within the framework of the national court system, it will be seen as a part of the national system for the settlement of disputes and can, by extension, be conferred with legitimacy and acceptance that is already enjoyed by national courts. The national courts and international mechanisms will not be seen as competitors working against each other but as one whole unit aimed at ensuring the effective resolution of investment disputes.

National courts also serve as 'sites for endogenous' change in that they can redefine participating actors and shape critical norms.[69] This would be beneficial for international investment law as there have been calls for greater participation of other stakeholders in the investment dispute settlement process and most domestic courts allow for the participation of all interested parties in a matter. Further, its ability to shape norms within the constitutional framework of the state would provide a basis for more acceptable interpretations of the protections that can be offered to investors.[70]

The use of domestic remedies would also inadvertently address other procedural concerns that have arisen in international investment law such as that of multiple proceedings. This is because a majority of national laws already have mechanisms in

67 Filiz Kahraman, Nikhil Kalyanpur, & Abraham L. Newman, *Domestic courts, transnational law, and international order,* 26 EUROPEAN J. INT'L RELATIONS 184, 189 (2020).

68 Daniel Kaldermis, *Back To The Future: Contemplating A Return To The Exhaustion Rule, in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 310, 334 (Jean E. Kalicki & Anna Joubin-Bret ed., 2015).

69 Kahraman, Kalyanpur, et al., *supra* note 67, at 185.

70 This would be in response to criticisms regarding the interpretation of treaty provisions by arbitral tribunals who are far removed from the local realities of the host state and its citizens.

place to address and prevent the occurrence of multiple proceedings. Many systems of domestic law generally apply a no reflective loss principle to shareholder claims. In domestic law systems, shareholders can only claim for the direct injury to their rights as shareholders but cannot claim for any injury that has bene occasioned on the company. In the English Supreme Court in the case of *Prudential Assurance v Newman Industries*[72] the court stated that:

> [W]hat [the shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a three per cent shareholding.[73]

The court in *Sevilleja Garcia v Marex Financial Ltd,* upheld the rule of no reflective loss claims and stated that the basis of this rule was to prevent double recovery, that there was no causation between the actions of the wrongdoer and the harm to shareholder, noting that the shareholders harm would have been caused by the failure of the company to seek redress, to avoid conflict of interest and preserve company autonomy.[74]

In South Africa, the Supreme Court in *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) held that the underlying principles that find application with regard to the rule preventing reflective loss are, first, that a company has a distinct legal personality, secondly, that holding shares in a company merely gives shareholders the right to participate in the company on the terms of the memorandum of incorporation, which right remains unaffected by a wrong done to the company and, in the light thereof, a personal claim by a shareholder against a wrongdoer who caused loss to the company is misconceived.[75]

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71 David Gaukrodger, *Investment Treaties and Shareholder Claims: Analysis of Treaty Practice* 8 (Org. Econ. Coop. Dev., Working Paper No. 2014/03, 2014); Julia Richter, *The two problem pillars of multiple proceedings in investment arbitration: why the abuse of process doctrine is a necessary remedy and requires focus in UNCITRAL'S ISDS reform,* 14 J. INT'L DISP. SETTLEMENT 407, 410 (2023).

72 Prudential Assurance Co. Ltd. V. Newman Industries Ltd. (No. 2), [1982] 1 Ch 204 (Eng.).

73 *Id.*

74 Sevilleja Garcia v. Marex Financial Ltd. [2018] EWCA Civ 1468 (U.K.).

75 Itzikowitz v. Absa Bank Ltd. (20729/2014) [2016] ZASCA 43, ¶ 9 (S. Afr.).

This viewpoint was also followed in the matter of *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* held that,

> Where a wrong is done to a company, only the company may sue for damage caused to it. This does not mean that the shareholders of a company do not consequently suffer any loss, for any negative impact the wrongdoing may have on the company is likely also to affect its net asset value and thus the value of its shares. The shareholders, however, do not have a direct cause of action against the wrongdoer. The company alone has a right of action.[76]

Further, the principles of *res judicata and lis pendens* have a clear and direct application in a large number of jurisdictions and can effectively be used to dispose of or deal with multiple proceedings. These rules, while forming part of international law, have been difficult to apply in the context of investment arbitrations and have not provided sufficient redress regarding multiple proceedings.[77]

From the above we see that the domestic courts have already developed rules and mechanisms that can effectively deal with the procedural concerns that have arisen against ISDS. As such, placing the responsibility for the liability of investors within the national court system and incorporating the exhaustion of local remedies would provide an effective means of redress that also considers the needs of local communities and vulnerable and marginalised communities, without fully depriving investors of international remedies.

B. Enforcement Of Judgements Of The National Level

As local communities will largely make use of domestic courts to hold foreign investors liable for any harm that has been occasioned by their operations, there needs to be a mechanism to ensure the enforceability of the judgements rendered by the courts of the host state in the home state, where the foreign investor would have its main operation should the need arise. This is where the home state would have a large role to play in ensuring that investors can be held liable for their conduct. IIAs would have to incorporate provisions that allow the home state to recognise and enforce the judgements of the host state to the extent that they provide for liability of their investors for human rights abuses in the host state. To this end, the home state can be

76 Hlumisa Investment Holdings (RF) Ltd. and Another v. Kirkinis and Others (1423/2018) [2020] ZASCA 83, ¶ 21 (S. Afr.).

77 Jose Magnaye & August Reinisch, *Revisiting Res Judicata and Lis Pendens in Investor-State Arbitration,* 15 L. & PRAC. INT'L CTS. & TRIBUNALS 264 (2016); Aman Prasad, *Res Judicata- A Boon or A Bane for International Investment Tribunals?* (Apr. 26, 2020) (unpublished manuscript) (Uppsala University).

enjoined to remove barriers and difficulties that may be associated with the recognition and enforcement of foreign judgements.[78]

While provisions in IIAs would only apply on a bilateral basis to the extent agreed on by the parties, the Convention on the Recognition and Enforcement of Foreign Judgements (the Foreign Judgements Convention) would be of importance in ensuring large scale recognition of foreign judgements,[79] thereby facilitating the cross border enforcement of host state judgements where they have held foreign investors liable for human rights abuses. Although the Foreign Judgements Convention has not yet come into force and has only been signed by 28 states, the increased use of domestic courts in the resolution of investment disputes may provide the impetus required to see it being utilised to its full potential.

C. Access to an international remedy

While the incorporation of the exhaustion of local remedies rule will rebalance the system by requiring all parties to make use of the same dispute settlement process and ensure that local communities are able to effectively participate, there is still a need to rebalance the circumstances at the international level of governance. As investors are able to have a remedy at the international level, it is equally important that local communities and other affected stakeholders have the same remedy within the confines of the international investment law system. This is necessary because while there are a significant number of benefits to the incorporation of exhaustion of local remedies, this does not answer all the issues that have arisen and may arise in the context of international investment. As noted by Laryea, there may be instances where local remedies are inadequate requiring recourse to international mechanisms.[80] This is inherently noted in the design of the exhaustion of local remedies rule which takes into account that sometimes-local remedies may not be available or effective, however, this does not detract from the implementation of the rule discussed above.

In this regard it is therefore necessary to ensure that local communities are also able to access the international mechanism in designing the reformed international dispute settlement system.

78 This removal of barriers will be based on reciprocal and mutual recognition of judgements between the host state and the home state.

79 Like the New York Convention has done with arbitral awards.

80 Laryea, *supra* note 18, at 2852.

Due to the nature of consent required in arbitration, the retention of arbitration would not be a viable option for the mode of settlement of international investment disputes where the effective participation of third parties needs to be considered. In order for an arbitral tribunal to have jurisdiction to hear a matter, there ought to be a valid agreement between the arbitrating parties. In international investment law the host state agrees to arbitration in advance in the dispute resolution clause of the applicable IIA and the foreign investor consents to the use of arbitration through the initiation of an arbitral claim. As a result, there can only be two parties to an arbitration, the host state and the foreign investor, and only one party, the foreign investor, can initiate arbitration proceedings. As a result of this, there can be no meaningful participation of third parties in the dispute resolution process based on arbitration save for in the limited context of amicus curiae submissions. This means that third parties, usually local communities and vulnerable or marginalised groups will not be able to have their rights and interests adequately protected in the course of an arbitral dispute.

Further, this means that the investor obligations that are being incorporated into newer generation IIAs are ineffective as there would be no equivalent mechanism within the international investment law framework that can be used by third parties to directly enforce the obligations of the foreign investor and seek protection from negative investor conduct. Vastardis notes that, 'a permanent court of investment arbitration is a short-sighted solution to deficiencies in local access to justice which is likely to undermine domestic legal developments.'[81]

In response to this, a permanent judicial mechanism i.e., a multilateral investment court that is modelled on domestic judicial systems for the settlement of disputes arising in the context of international investment law can be utilised.

As noted above, states are beginning to incorporate investor obligations into their treaties, thereby creating obligations for the foreign investor to ensure that their investment activities do not cause harm to the local communities, the host state or the environment. In this regard the rights holders are no longer just foreign investors but also the host states and the local communities. All these actors therefore ought to be given an opportunity to enforce their rights through an equal and accessible dispute settlement process. When a dispute or the outcome of a dispute impacts the rights and

81 Anil Yilmaz Vastardis, *Investment Treaty Arbitration: A justice bubble for the privileged', in* THE OXFORD HANDBOOK OF ARBITRATION (Thomas Schultz & Federico Ortino eds., 2020).

82 Frank J. Garcia & Brooke S. Guven, *Designing a Multilateral Investment Court for Procedural Justice,* 24 J. WORLD INV. & TRADE 461, 471 (2023).

interests of others, procedures must be in place to determine those interests and how the process can accommodate and adjudicate them.[82] The general rule, especially in most domestic legal systems, is that the law should require meaningful participation in the dispute resolution process for any person that has been affected by that process.[83] This viewpoint has also been adopted in international courts and tribunals. For example, the WTO allows for states to intervene in a dispute where they can demonstrate a substantial interest in the matter and the interests of the intervening party can be fully considered when rendering a decision.[84]

To ensure effective participation of all affected parties, the rules of procedure will have to provide for a more court-like mode of dispute settlement that can be accessed by a wider range of parties. The rules of procedure should allow for various parties to have standing before the court and offer flexibility to state parties to opt in and opt out of various mechanisms thereby widening its scope of application and increasing its chances of acceptance.

As signatories to the instrument establishing the MIC as well as signatories to IIAs, state parties should be able to make use of the MIC through the incorporation of state-to-state dispute settlement. Therefore, where states such as Brazil, seek to retain the use of state-to-state mechanisms, they will not have to approach another forum but can also make use of the MIC.[85]

Secondly, the rules of procedure should make provision for individuals- both natural and juristic persons, to have access to the court. This will not only allow foreign investors to be able to approach the court as in traditional investor state dispute settlement but also provide a mechanism through which local communities and other affected stakeholders can directly approach the court and have access to an international mechanism for the settlement of disputes. By extending the right of access to local communities and other affected stakeholders, the MIC ensures that the dispute settlement mechanism works for a wide range of stakeholders. To give effect to this, the court would have jurisdiction to hear all matters arising from a violation of any of the obligations in the BIT. As the jurisdiction of an international court is conditioned on state consent, the consent by states to the jurisdiction of the MIC would, much like in the International Criminal Court, provide the state with jurisdiction over individuals as well.

83 *Id.*

84 Dispute Settlement Understanding, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1867 U.N.T.S. 425.

85 The use of state-to-state mechanisms has not produced many difficulties in practice and so will not be elaborated on further herein.

By ensuring equal access to the court, there is a shift from international investment law being a system which protects the rights of a select group of people to realising that many stakeholders can be affected by investment activity and providing all affected parties with equal remedies before the law.

III. Conclusion

Access to justice is one of the sustainable development goals and has been identified as the third pillar of the UN Guiding Principles on Business and Human Rights which enshrine the duty of the state to ensure access to a remedy for the adjudication and enforcement of business and human rights claims. Access to justice has also been recognised by the former Special Rapporteur on Extreme Poverty and Human Rights who has urged states to include the elimination of inequality in access to justice viewing this as a vital feature of human centred social and economic development. Access to justice entails the right to an effective remedy. Target 16.3 of the SDGs refers to the promotion of the rule of law at the national and international level and ensuring equal access to justice for all.

By incorporating domestic remedies and providing access to local communities to dispute settlement provisions at the international level, not only do we address the concerns that have arisen in the context of international investment law, but we also create a that the international investment law system plays its part in contributing to the achievement of sustainable development. Ensuring liability for foreign investors is an important aspect of the reform of international investment law and will go a long way in rebalancing investment treaties to benefit all stakeholders.

In the premises, we see that the tools and resources for ensuring investor liability are already existent within national and international law. What is required is to bring these out and utilise them in a manner that is compatible with the goals of the international investment law reform agenda.

86 Magdalena Sepulveda (Special Rapporteur on extreme poverty and human rights), *Equality and access to justice in the post 2015 development agenda,* https://www.ohchr.org/sites/default/files/Documents/Issues/Poverty/LivingPoverty/AccessJusticePost2015.pdf.