Access to Justice for Local Communities in Investor-state Arbitration

By:

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November 6, 2019

Generally, Investor-state Arbitration as a dispute resolution mechanism has been a subject of scholarly debates. Scholars attack the ISA regime on various grounds, which include the impropriety of delegating adjudicatory powers to private individuals on disputes relating host states' policy decisions, the marginal role of human rights and environmental considerations in investment disputes, the ISA tribunal's bias towards investors, inconsistent arbitral decisions, the lack of an appeal system, and non-transparent proceedings.

Recently, the International Center for Settlement of Investment Disputes (ICSID) and United Nations Commission on International Trade Law (UNCITRAL) are working on reform proposals to improve the legitimacy of Investor-state dispute settlement (ISDS). The ICSID and UNCITRAL secretariats' working paper on the ISDS reform include issues relating to appointment of arbitrators, cost of arbitration, and confidentiality in ISA proceedings. However, proposals relating

to joinder of affected third parties (local communities) in ISA proceedings are conspicuously missing. This means human and environmental rights considerations may remain at a marginal level in ISA proceedings because local communities who bear the negative impacts of investments do not have access to the ISA to and seek remedy against corporate abuse.

The omission of local communities' participation in ISA proceedings in the ongoing reform undermines the legitimacy of these reform efforts for two reasons. First, the working groups deny that local communities are rights holders in international investment law. Second, they overlook the fact that local communities directly or indirectly trigger investment disputes. Local communities trigger investment claims in situation where, for example, local community mobilization prompts state action or in situations where host states fail to protect foreign investment in the face of local communities' physical security risk to investors' properties. Either way, local communities are at the center investment disputes.

Amidst continued neglect of local community participation in ISA proceedings, a private group of international practicing lawyers and academics are proposing a special international arbitration where local communities can claim compensatory damages for environmental and human rights abuse arising from business activities in host states— Business and Human Rights Arbitration. This proposal aims to contribute to the implementation of the third pillar of the United Nations Guiding Principles which focuses on access to remedy. The new face of international arbitration is to be regulated by a procedural framework called "Business and Human Rights Arbitration Rules" [BHR Arbitration Rules], which are based on the 2013 UNCITRAL Arbitral Rules. The Draft Rules was released in June 2019. Generally, the Draft Rules focus on the special requirements of human rights issues in business disputes. They are drafted in a way which ensures that the BHR arbitral structure meets the *Guiding Principles'* requirements of legitimacy, equitability, procedural transparency, accessibility, predictability, and rights-compatibility of outcomes.

The BHR Arbitration proposal prompts a pertinent question of whether a new arbitration regime is necessary, considering the potential to reform ISDS to include local community participation in ISA proceedings. This Note contends

that the introduction of BHR arbitration Rules may be an unnecessary in international dispute resolution. First, the BHR Arbitration is fraught with procedural uncertainties and complexities. Second, it may contribute to international law fragmentation and duplication of governance efforts. Third, it may create parallel proceedings between domestic courts, ISA tribunals and BHR Arbitration tribunals. This is because of the blurred distinction between investment and commercial disputes. Indeed, the definition of “investment” in most BITs is typically broad and includes everything of economic value, virtually without limitation.

Realistically, rather than give victims/local communities access to justice through a specialized arbitration, the BHR Arbitration proposal may only benefit a few white educated men—arbitrators. The proposal will increase arbitrators’ incidents of double hatting across tribunals because international arbitration comprises of a closed network of professionals. Also, multiple arbitral forums that touch on investment issue will contribute to governance/procedural gaps that multinational corporations may continue to exploit. MNCs, who are aware of local communities’ weak financial plight, may file claims in different arbitral tribunals to weaken local community’ resistance.

An ISA reform regarding local community participation will go a long way to enhance the legitimacy of the ISDS. It obviates the need for parallel arbitral proceedings because investment disputes garbed in commercial cloaks are resolved in a one-stop shop. The hybrid nature of the ISA also ensures that private (investors rights) and public (human and environmental rights) issues are resolved in a single forum. Also, the history of the ICSID Convention and its acceptance over time prevents (or reduces) a legitimacy attack that a new arbitral structure would ordinarily be subjected to. Generally, elements of BHR Arbitration proposal ought to be channelled into an ISA reform in order to create a better ISDS regime.

However, the political and procedural challenges to ISDS reform may make an ISA reform in this regard difficult. It is doubtful whether developed countries who benefit from Multinational corporations’ activities operating abroad, for example, through equity ownership, will support an ICSID reform in this regard. Also, the procedural and technical considerations involved in amending both

the ICSID Convention and the ICSID rules requires more than lip service for a better ISDS regime. For example, the doctrine of privity of contract poses a challenge to an inclusive ISA proceeding. If technically, states and investors are parties to the investment treaty, it is arguable that Local communities do not have locus standi to make claims in ISA proceedings. My response to this objection is two-fold. First, if we cease to view states as an abstract entity and construe them as a representation of Local communities, then, this objection is less convincing. In this view, states play an agency or trusteeship role in relation to Local communities. A clause in the preamble which provides that the state signs the BIT for itself and on behalf of its citizens may clarify the relationship between states and Local communities as agents and principals respectively.

Second, depending on the jurisdiction, it is possible for contracts to confer rights or benefits on third parties, in which case, third parties have a right to claim such benefits. Since states enter into treaty arrangements for the benefit of their citizens, Local communities should be able to directly access ISA tribunals in cases where the benefit has not materialized. This is more so where investors' activities, through environmental pollution and human rights abuse, have left Local communities worse than they were before the investment. Local communities' cause of action, and the tribunal's jurisdiction arise from BITs that are made for their benefit. Indeed, some arbitral institutions recognize opportunities for third party/beneficiary joinder to arbitration proceedings.

However, it may be difficult to obtain investors' advance consent to local community claim for human rights and environmental abuse. This is because consent to such agreement may open investors to a barrage of claims, which may jeopardize their business activities and stability in host states. Although a commentator suggests ways to establish investors' consent, their feasibility remains doubtful because they involve legal and political considerations. However, if investors, who are reluctant to consent to local community participation in ISA, are now considering the prospect of consenting to BHR arbitration, it is an indication that obtaining investors' consent may be a difficult task, but it is not impossible one. In sum, the extent of ISA reform as regards local community participation in ISA proceedings will depend on the political and legal will of stakeholders in international investment law.

Overall, considering the problematic nature of the BHR Arbitration proposal and challenges to ISA reform, there is no easy solution to the problem of access to justice for local communities. However, the choice of ISA reform is as good as choosing the lesser of two evils. Access to justice for victims of business and human rights in the ISA will be an strong index to measure the realization of the sustainable development goal on access to justice. Goal 16 specifically provides that states should promote the rule of law at the national and international levels and ensure equal access to justice for all. Reforming the ISA to ensure equal access between states, investors, and local communities will be an important step in this direction.

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