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Investment treaty arbitration: A justice bubble for the privileged*

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> 'There is the old idea, which has withstood the passage of time, that dominant social forces in society maintain their domination not through the use of force but through having their worldview accepted as natural by those over whom domination is exercised.'[1]

Historically, the use of international arbitration to resolve foreign investment disputes was advocated to prevent discrimination against foreign investors on the basis of their nationality and avoid violation of their due process rights by so-called abusive governments with weak judiciaries. For this reason, the use of international investment arbitration, particularly investment treaty arbitration (ITA), which arguably has the strongest rights enforcement mechanism existing in international law,[2] has been perceived as facilitating access to justice for foreign investors at the international level. Despite ITA's popularity with investors, this system of dispute settlement has been criticised by state actors, legal scholars, and civil society activists alike for flaws such as lack of consistency, transparency, excessive costs, impartiality and independence of arbitrators. Ironically, ITA has been promoted to uphold rule of law in host state relationships with foreign investors, but it has been diagnosed with a rule of law deficit itself. In response, several formal initiatives have been launched to reform the existing model of investment arbitration to inject rule of law into ITA.[3] The most

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[1] BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3, 15.

[2] BA Simmons, 'Bargaining over BITS, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' (2014) 66 World Politics 12, 17.

[3] International Centre for Settlement of Investment Disputes ('ICSID), 'Backgrounder on Proposals for the Amendment of the ICSID Rules' <https://icsid.worldbank.org/en/Documents/Amendment_Backgrounder.pdf> accessed 29 August 2019; UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session (Vienna, 27 November – 1 December 2017)* UN Doc No A/CN.9/930 (19 December 2017); Council of the European Union, 'Negotiating directive giving the European Commission a mandate to negotiate a treaty establishing a multilateral court for the settlement of investment

ambitious model is promoted by the European Union (EU) which establishes a permanent investment court system (ICS) to replace the current investment treaty arbitration model in EU's new investment treaties.[4] Other key reform initiatives, progressing under the auspices of UNCITRAL and ICSID, are taking a more incremental approach to remedy the flaws in the existing model of arbitration.[5]

While many of ITA's flaws may be remedied by robust reforms responding to critiques, in this essay I challenge investment treaty arbitration at its core by questioning the validity of insistence on special routes for access to justice reserved to remediate the grievances of a class of privileged investors, which I refer to in this essay as 'justice bubbles'. Despite the potential of the ongoing reform initiatives to genuinely improve the existing investment treaty arbitration model, salvaging and strengthening these justice bubbles that serve the needs of the privileged few sustains and even makes permanent the prioritisation of institutions of justice for foreign investors over the improvement of local institutions that could provide justice for members across society, including foreign investors. I recognise that no institutional process used or proposed for settling international investment law (IIL) disputes is perfect, and each process is "imperfect in different ways given the dynamics of participation within them."[6] The challenge in this essay is directed towards the singling out of high value investment disputes as deserving special treatment above and beyond any institutional options available to any other private party aggrieved by governmental abuse.

Two caveats are in order. First, reforming ITA and improvements to local institutions of justice are not necessarily competing agendas amounting to a zero sum game. Some states could properly resource both the improvement of local institutions and special modes of

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disputes', 12981/17 ADD 1 <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> accessed 29 August 2019.

[4] Council of the European Union, 'Negotiating directive giving the European Commission a mandate to negotiate a treaty establishing a multilateral court for the settlement of investment disputes'; China also supports an international court system model to settle investment disputes with foreign investors: N Chandran, 'China's Plans for Creating New International Courts are Raising Fears of Bias', *CNBC*, 1 February 2018, <https://www.cnbc.com/2018/02/01/china-to-create-international-courts-for-belt-and-road-disputes.html> accessed 29 August 2019; A Roberts and T St John 'UNCITRAL and ISDS Reform: China's Proposal', (EJIL:*Talk!* 5 August 2019), <https://www.ejiltalk.org/uncitral-and-isds-reform-chinas-proposal/> accessed 29 August 2019.

[5] There is a possibility that the UNCITRAL Working Group III may become the forum for negotiating a multilateral investment court, but it is yet in the exploratory phase of identifying main areas of concern and reform.

[6] S Puig and G Shaffer 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112(3) American Journal of International Law 361, 362

dispute settlement for foreign investors. That said, if local institutions of justice are strong, the question arises as to why states would need to promote special modes of dispute settlement serving only foreign investors. After all, substantial financial and human resources are needed to set up, maintain and adjudicate disputes before these special modes of dispute settlement on an ongoing or permanent basis in parallel to the existing local justice mechanisms.[7] Where states prioritise allocating resources into the creation and maintenance of justice bubbles for the privileged, they are inevitably taking away valuable resources and attention which could have been used, had the political will existed, to improve the effectiveness of local judicial and non-judicial protection mechanisms that serve all members of society. This kind of internationalisation also shields qualifying investors from the challenging realities in the host state, at least as far as dispute settlement is concerned, and these challenges have to be shouldered by the rest of the society while the investor pursues its claim entirely outside the host state and obtains a remedy that the host state must compensate as a matter of priority to any other harm suffered within the host state in connection to the investment.

The second caveat is to make it clear that the objection raised in this essay is not to the *ad hoc* use of international arbitration in settling investor-state disputes based on mutual consent of the investor and the host state given in an investment contract. Rather, it is to the efforts to validate the idea that investment treaty 'arbitration without privity'[8] should be the default and most appropriate mode of resolving investor-state disputes. While the critique presented here is relevant beyond the EU's ICS model, the latter deserve particular attention since its adoption would in all likelihood entrench ever greater prioritisation—on a global scale—of the commercial interests of the wealthiest few over wider societal interests by, amongst other

[7] International courts of similar standing have the following budgets: 2019 budget for the Court of the Justice of the European Union is €429,5 million, Court of Justice of the European Union, *The Court in Figures* <https://curia.europa.eu/jcms/jcms/P_80908/en/> accessed 29 August 2019; The European Court of Human Rights budget for 2019 amounts to €69,997,500. This covers Judges' remuneration, staff salaries and operational expenditure (information technology, official journeys, translation, interpretation, publications, representational expenditure, legal aid, fact-finding missions etc.). It does not include expenditure on the building and infrastructure (telephone, cabling etc.) European Court of Human Rights, *ECHR Budget* <https://www.echr.coe.int/Documents/Budget_ENG.pdf> accessed 29 August 2019; The Budget for the International Court of Justice for 2017-2018 was $ 47,792,500, United Nations, *Report of the International Court of Justice 1 August 2017-31 July 2018*, Seventy-third Session Supplement No. 4 UN Doc No A/73/4* (28 September 2018) <https://www.icj-cij.org/files/annual-reports/2017-2018-en.pdf> accessed 29 August 2019.

[8] J Paulsson, *'Arbitration Without Privity'* (1995) 10 ICSID Review – Foreign Investment Law Journal 232, 232 (The "new world of arbitration is one where the claimant need not have a contractual relationship with the defendant and where the tables could not be turned: the defendant could not have initiated the arbitration, nor is it certain of being able to even bring a counter-claim.")

things, making justice bubbles for investors more permanent. Introducing a standing court system is likely to lock a relatively large number of states into this mode of dispute settlement for decades, and potentially define the new ISDS system as a template of good governance.

I begin by critically analysing the imposition of ITA as the most appropriate method for resolving investor-state disputes. A brief overview of the recent and increasing backlash against ITA and the responses this attracted in the form of proposals for a permanent court of investment arbitration are then examined. The final section argues that the establishment of a permanent investment court is a short-sighted solution to shortcomings in local access to justice which is likely to undermine domestic legal developments. What is needed is a rejection of the outsourcing of the settlement of investment disputes on a permanent basis. If this were achieved, it would constitute a paradigmatic shift in approaches to access to justice.

I. THE IMPOSITION OF ITA AS THE MOST APPROPRIATE ISDS METHOD

Investor-state disputes can be resolved in various fora. ISDS can encompass judicial proceedings, conciliation, mediation, negotiation and arbitration.[9] Arbitration has been and continues to be advocated as the most appropriate way of settling disputes between international investors and host states.[10] Investment treaty arbitration, particularly, is the most frequently invoked international dispute settlement method to resolve foreign investment disputes for well-resourced investors.[11] An investment treaty is not the only place where arbitration is used. International and local commercial disputes, investment contract disputes, as well as inter-state disputes, are also frequently resolved through arbitration. This can be a

[9] Investment disputes may also be brought before the courts of the regional human rights systems. See *Velikovi v Bulgaria*, ECHR App No 43278/98 (2007) 48 EHRR 27.

[10] See T St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (OUP 2018), 184, 198-209 (Traces the promotion of investment arbitration as the most appropriate method of ISDS back to the role played by the legal officials in the World Bank who were drafters of the ICSID Convention and who "disseminated [ICSID arbitration clauses] widely and brokered ISDS clauses into existence in hundreds of contracts and treaties".); See also, The World Bank Group, 'Legal Framework for the Treatment of Foreign Investment (Vol.2): Guidelines, Report No. 11415', paras 50-52 <http://documents.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf> accessed 29 August 2019; The reform initiatives led by UNCITRAL and the EU start from the presumption that ITA is the most appropriate method but it needs to be improved by significant reforms, UNCITRAL, 'Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS)', Note by the Secretariat, Fiftieth Session, Vienna, 3-21 July 2017, A/CN.9/917 paras 9-11.

[11] ICSID, *ICSID Caseload – Statistics* (Issue 2019-1), 10: shows that in 75 per cent of the cases registered with ICSID, the basis of consent invoked by the investor was a treaty.

legitimate method for resolving disputes, founded on the principles of consent and party autonomy.[12]

In most cases, private parties mutually agree, in a contract, to submit their disputes to arbitration, rather than resorting to national courts. They do so for a variety of reasons, for example, concerns over confidentiality or greater trust in arbitrators' expertise. In these instances, the decision to submit to arbitration is made *ad hoc*; the parties do not submit all future disputes between themselves to arbitration, but only those that relate to the specific legal relationship referred to in the arbitration agreement. With the reach and impact of the agreement strictly limited to the contract and its signatories, arbitration on an *ad hoc* basis normally does not constitute a large-scale transfer of judicial authority.

In contrast, due to an extensive web of investment treaties containing direct consent to arbitration, investment treaty arbitration's personal and material reach is so wide that it does entail such a large-scale transfer. The source of most contemporary investment arbitration, investment treaties negotiated between states, see a state making a standing offer to arbitrate to an indeterminate number of investors from the other state party.[13] This offer can be accepted by any qualifying investor through the initiation of arbitral proceedings. The host state may not even be aware of the existence of a dispute until it receives the notice of arbitration. The investor which resorts to this mechanism does not need to have negotiated an arbitration agreement for a defined legal relationship. Instead, it can just claim the 'right to arbitrate' which its state has negotiated for its benefit and that of other qualifying investors. Additionally, investment treaty consent can survive a decade or longer after termination of an investment treaty.

I argue in this paper that a move towards a multilateral investment court system would further entrench the large-scale transfer of judicial authority effectuated by the existing model of investment treaty arbitration. This is not to say that contract based investor-state arbitration does not give rise to the same concerns raised by treaty-based arbitration, in terms of costs, transparency, legal certainty, arbitrator ethics, etc. However, due to its *ad hoc* nature

[12] N Blackaby, C Partasides, A Redfern and M Hunter, *Redfern and Hunter on International Arbitration*, (6th ed. OUP 2015) 71.
[13] Paulsson, 'Arbitration Without Privity' (n.8).

explained above, it does not amount to a large-scale transfer of judicial authority and it gives host states more room to change course in their future investment contracts as well as giving host states a full opportunity to negotiate an arbitration clause with individual investors directly and more conscientiously.[14] In the following section, I explore the main arguments justifying ITA as the most appropriate method for settling foreign investment disputes.

Justifications of promoting ITA

Two main arguments are often advanced to justify the use of ITA as the most appropriate method of ISDS as opposed to resolving disputes through the usual route of national courts of the host state.[15] The first is that it improves access to justice for foreign investors,[16] the second that it contributes to the development of the rule of law through the application of agreed minimal standards in host states[17] as well as internationally.[18] These two arguments are clearly related given that access to justice is a vital component of the rule of law. While the first justification is narrower in scope, the second one is a broader and bolder assumption. The end goal of both of these justifications is that procedural guarantees offered by ITA enhances investor trust and therefore increases investment contributing to the economic development of the receiving state and overall wellbeing of its citizens.[19] I will explore the access to justice and rule of law justifications in turn.

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[14] For a detailed analysis of how far the scale and gravity of investment treaty arbitration claims were anticipated by states when signing investment treaties see, L N Skovgaard Poulsen, *Bounded rationality and economic diplomacy: The politics of investment treaties in developing countries* (CUP 2015); See also, J Bonnitcha, L N Skovgaard Poulsen and M Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017) 70-71.

[15] As an alternative to diplomatic protection, investment arbitration is viewed as a means to depoliticise investment disputes; See I F I Shihata, *Towards a greater depoliticization of investment disputes : the roles of ICSID and MIGA (English)*. Washington, DC 1992 World Bank. http://documents.worldbank.org/curated/en/335931468315286974/Towards-a-greater-depoliticization-of-investment-disputes-the-roles-of-ICSID-and-MIGA accessed 29 August 2019.

[16] F Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 *European Journal of International Law* 729.

[17] S Franck, 'Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law' (2007) 19 McGeorge Global Business and Development Law Journal 337; BK Guthrie, 'Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law' (2013) 45 NYU Journal of International Law and Politics 1151; J Paulsson, 'Enclaves of Justice' University of Miami Legal Studies Research Paper No 2010-29, < http://ssrn.com/abstract=1707504> accessed 29 August 2019.

[18] B Kingsbury and S Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law', (2009) New York University Public Law and Legal Theory Working Papers 146, <https://lsr.nellco.org/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1146&context=nyu_plltwp;> accessed 29 August 2019.

[19] The impact of foreign investment on host state development and the impact of investment treaty commitments on the flows of inward investment are empirically contested questions. For an overview and analysis of the

The use of arbitration to resolve foreign investment disputes was advocated in the postcolonial era to prevent discrimination against foreign investors and avoid denial of justice, leading to a diminution of investment value,[20] by governments which it was feared would be abusive and/or would only have weak judiciaries.[21] Distrust of the local judiciary as corrupt or biased against foreign investors was perceived as a factor which could have deterred investors from entering the host state market.[22] The solution found was to internationalise the resolution of foreign investment disputes. Amid worries that protectionist policies of host states would harm the liberalisation of global investment, it was argued that international rules and dispute settlement would help to depoliticise disputes.[23] With its declared aim of empowering foreign investors to access justice, ITA soon became presented as a necessity for any state wishing to attract foreign investment.[24] The idea was accepted that the substantive rights of investors anywhere in the world need to be backed up by procedural means capable of enforcing those rights.

Mainstream thinking on investment arbitration accepts that releasing foreign investors from the necessity of exhausting domestic remedies prior to initiating international arbitration is needed in order to prevent discrimination against, and give voice to, foreign investors who are unrepresented in the host state's political process.[25] This has the effect of prioritising international solutions which, in turn, reinforces the common perception that domestic institutions, actors, and cultures undermine democracy and human rights, whilst international law promotes them.[26] The view of investment arbitration as the impartial guardian of foreign

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literature on these impacts see Bonnitcha, Skovgaard Poulsen and Waibel, *The Political Economy of the Investment Treaty Regime* (n.14), 155-180.

[20] D Schneiderman, 'Investing in Democracy? Political Process and International Investment Law' (2010) 60 *University of Toronto Law Journal* 909, 911.

[21] M-B Dembour and N Stammers, 'Free Trade, Protectionism, Neoliberalism: Tensions and Continuities' (2018) 6(2) London Review of International Law 169; G Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2 *Trade, Law and Development* 19, 33; J Alvarez, *The Public International Law Regime Governing International Investment* (Martinus Nijhoff, 2011) 113.

[22] Bonnitcha, Skovgaard Poulsen and Waibel, (n.14) 86.

[23] N Tzouvala, 'The Ordo-Liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale', in A Rasulov and JD Haskell (eds), *European Yearbook of International Economic Law* (Springer,forthcoming).

[24] Bonnitcha, Skovgaard Poulsen and Waibel (n.14), 209-210

[25] Hence the link made between access to justice and the 'minimum standard of treatment of aliens': see Francioni (2009) 731. See also *Técnicas Medioambientales Tecmed SA v United Mexican States* (Award) ICSID Case No ARB (AF)/00/2, 29 May 2003, [122] (*Tecmed v Mexico Award*).

[26] M Koskenniemi, 'It's Not the Cases, It's the System' (2017) 18 Journal of World Investment and Trade

investors' rights epitomises the sanctity of the international and the distrust of the local. Interestingly, it also serves to underpin the argument that arbitration stands to improve host states' poor records in terms of the rule of law.[27] What the rule of law means is admittedly elusive.[28] However, in IIL debates, it tends to encompass democratic governance, limitation of government authority by law, legal certainty, protection of basic rights and, most importantly in the context of this essay, access to justice.

An argument often made by proponents of investment liberalisation is that compelling host states to comply with international investment standards through recourse to an external enforcement mechanism has a positive effect on the local rule of law in the host state.[29] It is argued that this happens in two ways. First, decisions of ITA tribunals act as checks on arbitrary government behaviour contrary to rule of law principles and compel host states to comply with an external and a more just standard of treatment *vis-à-vis* foreign investors.[30] Second, by leaving the final word to impartial and independent arbitration tribunals, an increase in the levels of investment protection and legal certainty is achieved, in turn leading to economic and social development in the host state funded by the resources generated from the investment trickling down to improving local judicial and executive capacities. Thus, for ardent proponents of the rule of law function of ITA such as Benedict Kingsbury and Stephan Schill, ITA is a tool capable of fostering 'democratic accountability and participation … good and orderly state administration and the protection of rights and other deserving interests.'[31] In a similar vein, Susan Franck presents investment treaty arbitration as a contributing factor to the development of the rule of law in host states with a weak rule of law. She argues that

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343, 352-353; A Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 Harvard International Law Journal 444, 484. See also, M-B Dembour & T Kelly, 'Introduction: The Social Lives of International Justice', in M-B Dembour & T Kelly (eds), *Paths to International Justice: Social and Legal Perspectives* (OUP, 2007) 1, 13.

[27] S W Schill, 'International Investment Law and the Rule of Law' in J Lowell, JC Thomas and J van Zyl Smit (eds.), *Rule of Law Symposium 2014: The Importance of the Rule of Law in Promoting Development* (Singapore: Academy Publishing, 2015) 81-102; Amsterdam Law School Research Paper No. 2017-18; Amsterdam Center for International Law No. 2017-15 <https://ssrn.com/abstract=2932153> accessed 29 August 2019; Franck, (n.16).

[28] As Brian Tamanaha has observed, the rule of law 'stands in the peculiar state of being *the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means'. BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP, 2004) 4 (emphasis in original).

[29] Schill, 'International Investment Law and the Rule of Law' (n.26); Franck, (n.16).

[30] Franck, (n.16) 367.

[31] Kingsbury and Schill (n.18) 8.

'investment treaty arbitration may create incentives for foreign investment by fostering the development of the rule of law'.[32]

Studies which have attempted to measure the impact of IIL commitments on the volume of inward investment are inconclusive.[33] On rule of law effects, a recent socio-legal study by Mavluda Sattorova demonstrates that "host states do not necessarily respond to their encounter with investment treaty law by becoming more risk-averse and compliant with good governance norms."[34] Interviews with relevant government officials, judges and civil servants have shown that there was limited internalisation of the good governance standards found in investment treaties and investment treaty claims have not generally led to noteworthy changes in the standards followed by officials in future dealings with foreign investors.[35] Her study has further found that in some instances, host states "[r]ather than embarking on comprehensive and systemic reforms of governance institutions and practices, some host governments – in particular in developing countries – appear to opt for short-term and localised solutions aimed solely at safeguarding the special treatment of foreign investors and optimising the defence of state interests in investment arbitration disputes."[36] She concludes that some host states may follow good governance standards in dealings with foreign investors while failing to achieve 'good governance for all.'[37] It is increasingly acknowledged that IIL commitments are not a panacea for remedying rule of law deficiencies in host states.[38]

Neither is there sufficient empirical support for the idea that procedural guarantees contained in IIL make a positive contribution to improving deficiencies in the domestic rule of law.[39] A

[32] Franck, (n.16) 340.
[33] Skovgaard Poulsen, (n.14) 7-8.
[34] M Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart Publishing 2018) 196.
[35] ibid 65-75.
[36] ibid 85.
[37] ibid 196.
[38] Bonnitcha, Skovgaard Poulsen and Waibel (n.14), 170-171; See also, R Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2005) 37 *NYU Journal of International Law and Politics* (2005) 952; T Ginsburg, 'International Substitutes for domestic institutions: bilateral investment treaties and govenrance' (2005) International Review of Law and Economics 25, 107-123.
[39] T Schultz and C Dupont, 'Investment Arbitration: Promoting the Rule of Law of Over-Empowering Investors? A Quantitative Empirical Study' (2015) 25 *European Journal of International Law* 1147; Even in states with more robust rule of law, increased use of arbitration might hamper the consistent development of the law by courts. The Lord Chief Justice of England and Wales has argued that the development of the common law by courts in England and Wales was hampered in areas of law where arbitration is increasingly used. Lord

recent empirical study on the functions of investment arbitration which explores its relationship with the rule of law found that it 'creates at best a weak rule of law effect in countries with a poor record of respect for the rule of law'.[40] On the contrary, it is argued in this essay that the large scale outsourcing of judicial authority under investment treaty law can undermine the evolution of local institutions of justice. In this respect, David Schneiderman warns against the creation of legal enclaves for foreign investors on the grounds that this might deprive 'the investor voice from the enterprise of creating good and generalised rule of law institutions in the host country.'[41] These findings and arguments should prompt us to seriously question the proposition that ITA produces positive rule of law effects in host states.

II. THE BACKLASH AGAINST ITA AND THE MOVE TOWARDS A PERMANENT COURT OF INVESTMENT ARBITRATION

There has been an intense backlash against ITA from various actors, including states, civil society and scholars. Critiques of the current system vary from arguing for outright rejection[42] to offering suggestions for remedying its flawed features.[43] Critics particularly refer to a rule of law deficit in the current ITA model: the proceedings' lack of transparency and inclusiveness; the high costs associated with the arbitral procedure and legal representation; the absence of an appeals process; and the inconsistency of decisions on issues involving public interest. They also question the impartiality of arbitrators by pointing

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Thomas of Cwmgiedd, 'Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration', 9 March 2016, <https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf> accessed 29 August 2019.

[40] Schultz and Dupont (n.38), 1163.

[41] Schneiderman, 'Investing in Democracy? Political Process and International Investment Law' (n.19) 937; See also Ginsburg (n.37); S Mazumder, 'Can I stay a BIT longer? The effect of bilateral investment treaties on political survival' (2016) 11 The Review of International Organizations, 477- 521.

[42] Schneiderman, 'Investing in Democracy? Political Process and International Investment Law' (n.19); OHCHR, 'Investor–State Dispute Settlement Undermines Rule of Law and Democracy, UN Expert Tells Council of Europe', 19 April 2016, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19839&LangID=E> accessed 29 August 2019; D Davitti, K Greenman and N Tzouvala, 'Crowd-Drafting: Designing a Human Rights-Compatible International Investment Agreement' (2018) <https://portal.research.lu.se/portal/files/55021365/Crowd_Drafting.pdf> accessed 29 August 2019.

[43] See, e.g., G Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (OUP, 2013); S Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 Vanderbilt Journal of International Law 57.

to concerns over general conflicts of interest, elitism, and specific vested financial interests in certain outcomes.[44] At a more substantive level, the way ITA serves to advance neoliberal policies around the globe, in particular imposing such policies on developing states, has been criticised.[45]

The potentially detrimental effect of ITA on democratic governance merits particular consideration. It has been convincingly argued that broad and inconsistent interpretations by arbitral tribunals of the substantive rights afforded to investors under the IIL regime have a shrinking effect on the policy space of elected governments.[46] Indeed, host states have not always been successful in defending their actions even when explaining they had to interfere with investments in order to fulfil their human rights obligations under international law and domestic constitutions.[47] In response to this unforeseen encroachmnent of investment treaty awards into the regulatory initiatives in the public interest, investment treaty practice is evolving to explicitly reserve public policy space for governments to limit the interpretative discretion of arbitral tribunals regarding the impact of social and environmental regulations on foreign investments.[48] The interpretation of such treaty clauses in arbitral practice is yet to be seen. Particular features of investment treaty arbitration also prompt suspicions of a built-in bias in favour of investors, for example the facts that the process can only be initiated by

[44] P Sands, 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel', in A Rovine (ed.), *Contemporary Issues in International Arbitration and Meditation: The Fordham Papers* (Brill 2012), 28-49; J Linarelli, M E Salomon and M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018) 163; For empirical studies unpacking these claims see, Sergio Puig, 'Social Capital in the Arbitration Market', (2014) 25 European Journal of International Law 387; M Langford, D Behn, and R Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 Journal of International Economic Law 301.

[45] M Sornarajah, 'Toward Normlessness: The Ravage and Retreat of Neo-Liberalism in International Investment Law' (2010) 2 *Yearbook of International Investment Law and Policy* 595. See also, D Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Palgrave Macmillan, 2013); N Tzouvala, (n.22).

[46] Schneiderman, 'Investing in Democracy? Political Process and International Investment Law' (n.19); G Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (n.42).

[47] *Tecmed v Mexico Award* (2003); *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal SA v Argentine Republic*, (Decision on Liability) ICSID Case No ARB/03/19, 30 July 2010; *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic* (Award) ICSID Case No ARB/07/26, 8 December 2016.

[48] See for instance Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part Article 8.9; Netherlands Model Investment Agreement (22 March 2019) Article 2(2) <https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden> accessed 29 August 2019; Agreement between The Slovak Republic and The Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, Signed 19.01.2016 and entered into force 30.08.2017, Article 10.

investors under BITs and that investors are endowed with substantive rights, but without incurring reciprocal obligations.

Solutions offered to rectify these defects have included: enhancing transparency of proceedings and arbitral decisions; increasing third party participation in the procedure via *amicus curiae* interventions; setting up an appeals mechanism; introducing codes of conduct for arbitrators; and limiting the interpretive radius of substantive protections in treaty provisions by listing legitimate policy grounds that can be invoked by host states. Most importantly, in September 2015, the EU proposed the creation of an Investment Court System 'to replace the old ISDS model in all [EU]'s ongoing and future trade negotiations'.[49] This was in response to the negative reactions from around Europe to the initial plans to incorporate ITA into Trans-atlantic Trade and Investment Partnership. The proposal immediately became the flagship innovation of the EU's infant investment policy. ICS has been incorporated into CETA, and it is also now found in the EU-Vietnam free trade agreement as the investment tribunal system.[50] The EU's Trade Commissioner has presented the proposal as revolutionary, claiming that it expresses the EU's aspiration to lead the way globally in reforming the current ITA model.[51] The ultimate objective of the EU is to create a multilateral permanent court of investment arbitration modelled around ICS. With China recently expressing its preference for a permanent appellate body to reform the current model of ITA, it has been observed by Anthea Roberts and Taylor St John that "two of the world's three biggest economies have now signalled support for significant reform of ISDS, including the possible creation of a permanent appellate body."[52]

The ICS model is the most advanced and complete proposal made so far and it offers a reformed version of the current ITA system, attempting to address the concerns raised. In the words of the CETA negotiators, the proposed rules aim to institutionalise a fairer and more

[49] C Malmström, 'Proposing an Investment Court System', 16 September 2015, https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en accessed 29 August 2019.
[50] Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam, ch. II, Art. 12, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 29 August 2019. (The text of the agreement was published on 1 February 2016, though it has not yet entered into force.)
[51] Malmström (n.48).
[52] Roberts and St John (n.4).

transparent version of ITA.[53] The key innovation of the ICS is the establishment of a permanent arbitration mechanism consisting of a first instance tribunal and an appeals tribunal operating under full transparency.[54] With this, the EU aims to achieve consistency and transparency in decision-making; overcome the ethical challenges to arbitrator appointments and conduct;[55] and increase third party participation in the proceedings.[56] Other notable provisions of the proposal include sections on interpretation,[57] on restricting parallel claims and claims by investors who acquired the investment for purposes of submitting a dispute against the host state,[58] and on limiting mass claims by an unidentified number of claimants.[59]

To justify maintaining an international dispute settlement mechanism in its investment treaties, the Commission refers to the potential lack of impartiality of domestic courts in claims against host states, state immunity from suit, the unavailability of certain remedies in domestic courts, and—most unconvincingly—the existence of 'different applicable rules which cannot be invoked before domestic courts'.[60] None of these justifications are substantiated. States do not have full immunity from suit in any of the EU jurisdictions or in Canada. They routinely act as defendants in judicial review claims by private parties. Courts can effectively grant a more diverse set of remedies than arbitral tribunals which typically grant monetary compensation. Lack of impartiality can be a problem in both arbitration and litigation. The document does not clarify what exactly the obstacle would be for domestic courts to apply international treaty protections to cases before them, where these rules govern the substance of the dispute.[61] There is ample evidence showing application of a wide variety

[53] 'Joint Statement: Canada–EU Comprehensive Economic and Trade Agreement (CETA)', 29 February 2016, <http://europa.eu/rapid/press-release_STATEMENT-16-446_en.htm> accessed 29 August 2019.
[54] See the ICS draft proposal text for TTIP, 'Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce, Chapter II—Investment', Arts 9, 10 and 18 http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf accessed 29 August 2019.
[55] ibid Art. 11.
[56] ibid Arts 22, 23.
[57] ibid Art. 13(5).
[58] ibid Arts 14, 15.
[59] ibid Art. 6(5).
[60] 'Public Consultation on Modalities for Investment Protection and ISDS in TTIP', <http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf> accessed 29 August 2019.
[61] The direct applicability of such rules will depend on the constitutional tradition of each contracting state. Even in states that follow a dualist model, treaty protections can be transposed into the domestic legal order via legislation.

of international law norms by domestic courts ranging from treaties on human rights to environmental protection.[62]

The Commission's proposal received mixed reactions from critical commentators. These can be divided into five main groups.[63] The first group are arbitration loyalists that object to the court model as an alternative to the current model of ITA on the grounds that the model proposed would politicise and undermine investor protection, primarily due to states appointing the ICS judges.[64] This group argues for the maintenance of the status quo only with the addition of minor reforms to improve the efficiency of the system, such as increased transparency and increased diversity of arbitrators. The second group consists of those objecting to the adoption of international dispute settlement for investment disputes between liberal constitutional democracies on grounds that the negotiating parties have some of the most developed legal systems.[65] For this group, ITA or ICS only makes sense for agreements with countries that do not provide adequate domestic legal protection. Joseph Weiler has labelled this double standard approach 'European hypocrisy' (in comments that predate the Commission's ICS proposal).[66] In an approach representative of the third group, Weiler wants to see ITA's most egregious defects corrected so that the system can be transformed into a more permanent mechanism for all international investment disputes. In this respect, the ICS is a positive development with the recognition within this group that there is still some way to go to achieve a good model of ISDS.[67] Schill argues that as long as the ICS is

[62] D Shelton, 'Normative Evolution in Corporate Liability for Violations of Human Rights and Humanitarian Law' (2010) 15 Austrian Review of International and European Law 45, 48-51.

[63] Anthea Roberts maps the positions and reactions of states in relation to the reforms being proposed in various avenues in A Roberts 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 (3) American Journal of International Law 410.

[64] C N Brower and S Blanchard 'What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States' (2014) 52 Columbia Journal of Transnational Law 689; Judge Stephen Schwebel, Remarks at Sidley Austin (May 17, 2016) <http://isdsblog.com/wp-content/uploads/sites/2/2016/05/THEPROPOSALSOFTHEEUROPEANCOMMISSION.pdf> accessed 29 August 2019; EFILA TASK FORCE PAPER Regarding the proposed International Court System, 1 February 2016 <https://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf > accessed 29 August 2019.

[65] See, e.g., E-U Petersmann, 'Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?' (2015) 18 Journal of International Economic Law 579, 600; M Kumm, 'An Empire of Capital? Transatlantic Investment Protection as the Institutionalisation of Unjustified Privilege', 25 May 2015, 4(3) *ESIL Reflections*, <http://www.esil-sedi.eu/node/944> accessed 29 August 2019.

[66] J Weiler, 'European Hypocrisy: TTIP and ISDS', *EJIL*: *Talk!*, 21 January 2015, <http://www.ejiltalk.org/european-hypocrisy-ttip-and-isds/> accessed 29 August 2019.

[67] See, e.g., R Quick, 'Why TTIP Should Have an Investment Chapter Including ISDS'(2015) 49 *Journal of World Trade* 199; B Choudhury, '2015: The Year of Reorienting International Investment Law' 20(3) *ASIL Insights* (2016), https://www.asil.org/insights/volume/20/issue/3/2015-year-reorienting-international-investment-law accessed 29 August 2019; SW Schill, 'The European Commission's Proposal of an "Investment

used on a bilateral basis, the inconsistent interpretations problem in the investment treaty regime as a whole will continue to persist. Second, he argues that the proposal treats national courts and ICS as mutually exclusive options and therefore undermines the role of "domestic courts in settling investor-state disputes and ensure government compliance with international law."[68] The fourth group of reactions views the proposal as making only limited improvements to ITA, with ICS 'mainly a re-branding exercise for ISDS'.[69] This group identifies the following main flaws: the ICS claims can only be initiated by the foreign investors, other relevant rights holders such as community members do not have standing, adjudicators will continue to receive lucrative remunarations when acting as members of the ICS tribunals, and the lack of a requirement to exhaust local remedies undermines domestic institutions.[70] For the final group, whatever improvements the ICS proposal brings to the existing model, foreign investors will still be unjustifiably advantaged compared to other members of society. These critics argue that ICS should be abandoned.[71] This essay aligns primarily with the final group, but also appreciates, as the fourth group does, the value of an international mechanism being available as a last resort to remediate denials of justice.

III. MIND THE JUSTICE BUBBLES

What justifies treating certain investors as a category of claimants who should be automatically insulated from the access to justice mechanisms which exist at local, including

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Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?' 20(9) *ASIL Insights* (2016) https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping accessed 29 August 2019; C Titi, 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead' (2017) 1 Transnational Dispute Management, < https://www.transnational-dispute-management.com/article.asp?key=2427> accessed 29 August 2019; See also, R Howse, 'Counting the Critics of Investor-State Dispute Settlement: the EU Proposal for a Judicial System for Investment Disputes', <https://cdn-media.web-view.net/i/fjj3t288ah/Courting_the_Criticsdraft1.pdf> accessed 29 August 2019.

[68] SW Schill, 'The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?' (n.66).

[69] G Van Harten, 'Key Flaws in the European Commission's Proposals for Foreign Investor Protection in TTIP', Osgoode Legal Studies Research Paper No 16/2016 (2016), 12 <http://digitalcommons.osgoode.yorku.ca/olsrps/139/> accessed 29 August 2019.

[70] See, e.g.,G Van Harten, 'ISDS in the Revised CETA: Positive Steps, But Is It the "Gold Standard"?' (20 May 2016) Centre for International and Governance Innovation Investor-State Arbitration Commentary Series No. 6 <https://www.cigionline.org/publications/isds-revised-ceta-positive-steps-it-gold-standard> accessed 29 August 2019.

[71] Schneiderman, 'Investing in Democracy? Political Process and International Investment Law' (n.19); OHCHR, 'Investor–State Dispute Settlement Undermines Rule of Law and Democracy, UN Expert Tells Council of Europe', 19 April 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19839&LangID=E> accessed 29 August 2019.

national, level? Why should they be entitled to a purportedly more robust method of dispute settlement than any other member of society? I argue there is no good reason for this. The special treatment international investment disputes receives is unwarranted, and introduction of a permanent court of investment arbitration is a move in the wrong direction as it would entrench the special treatment afforded to certain investors deeper. A permanent court of investment arbitration is a short-sighted solution to the purported rule of law defects within domestic legal systems which can undermine access to justice not only for foreign investors but any other groups in the society.

Thousands of investment treaties which contain substantive and procedural provisions constitute an unprecedented international legal protection regime with private beneficiaries. The most precious aspect of this regime is its procedural component. The procedural empowerment of investors via ITA has been described as the 'most effective means of resolving investor-state disputes'[72]—a 'real innovation'[73] in the investment treaty regime. What makes the ITA system a justice bubble is not whether the outcomes of these cases overall tend to favour investors, although such an empirical finding would certainly be another indicator of the privileging nature of ITA.[74] Rather, the main problem is the design and operation of this special system of dispute settlement *de facto* available only to wealthier investors to secure investment interests above and beyond the fora and remedies available to the other members of society in domestic legal systems. I will discuss in two steps below the particularly privileging features of investment treaty arbitration leading me to describe it as a 'justice bubble'.

The first step involves identifying the relevant features of investment treaty arbitration's design and consider the impact of this design on the operationalisation of substantive IIL obligations. Investment treaty arbitration operates in an international legal vacuum in the absence of appropriate checks and balances that would be present in judiciaries compliant

[72] C Reiner and C Schreuer, 'Human Rights and International Investment Arbitration', in PM Dupuy, E-U Petersmann & F Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP, 2009) 82.
[73] Franck, (n.16), 343; D Collins, *An Introduction to International Investment Law* (CUP 2017) 214.
[74] The data available on outcomes has been interpreted in different ways by scholars: See, e.g., Schultz and Dupont (n.38) 15-17; S Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 Harvard International Law Journal 435; G Van Harten, 'The Use of Quantitative Methods to Examine Possible Bias in Investment Arbitration' [2010-2011] *Yearbook on International Investment Law and Policy* 859.

with rule of law principles.[75] Investment arbitration was described by one leading arbitration practitioner as the 'wild, wild west of international practice'.[76] This is particularly problematic in ITA as most investment treaties neither require exhaustion of local remedies nor provide grounds for meaningfully reviewing ITA awards. Within this institutional design, arbitral tribunals institute a monopoly over the interpretation of the bilateral investment treaty ('BIT') provisions, which are typically 'relatively brief and [written] at a fairly high level of generality'.[77] Because of this, ITA rulings cannot but impact the practice of states regarding their IIL obligations[78] and draw shifting and uncertain boundaries to the regulatory space of host states. This is most problematic when these interpretations made in a legal vacuum impact States' non-investment obligations,[79] such as those under international human rights law or environmental law.[80] In addition to the uncertainty created by the wide interpretive radius within which ITA tribunals operate, tribunals have typically treated their mandate to be limited strictly to the investment claim at hand in isolation from any non-investment obligations of the host states that are intrinsically linked to the investment dispute. This way, an investor claim does not get tangled with any other the legal rights and interests affected by the investment or by the host state's action or inaction vis-à-vis the investment. Third parties whose rights are affected cannot join as parties and in most cases not even as interveners to claim their rights or voice their position. In some cases, third parties may never even find out whether an investment claim exists or has been resolved via ITA. Inevitably, the succint and abstract formulation of substantive protections, coupled with the absence of a rule of binding precedent, the lack of an appeals mechanism, and the lack of interested third party input gives ITA tribunals considerable interpretative discretion that can seriously undermine social and environmental protections which stand in the way of investors' rights and interests.

[75] Such as having binding standards of conduct for members of the judiciary and legal counsel, legal standards for taking evidence, having various levels within the court system with possibilities of appeals at more than one level.
[76] G Kahale III, 'The Inaugural Brooklyn Lecture on International Business Law: 'ISDS: The Wild, Wild West of International Law and Arbitration' (2018) 44 Brooklyn Journal of International Law 1.
[77] S Ratner, *The Thin Justice of International Law* (OUP 2015) 350, 371.
[78] ibid 371.
[79] See for instance, *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic* , ICSID Case No. ARB/03/23, Award, 11 June 2012, [192]; *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/2, Award (30 November 2017); *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12; *Clayton and Bilcon of Delaware et al v Government of Canada*, PCA Case No 2009-04 Award on Damages (10 January 2019).
[80] C Titi, *The Right to Regulate in International Investment Law* (Nomos/Hart, 2014).

Approaching the investor-state relationship and the disputes from a privity lens, one observes that IIL tends to take a narrow view of the nature and impact of the dispute. However, the way a dispute—concerning, for example, a water concession or the construction of a pipeline—is resolved can have serious effects beyond the immediate parties to the dispute, the more so since an ITA tribunal might hesitate to take public impacts into consideration given its mandate is limited by the investment treaty to deal only with investment interests.[81] Since the objective of investment treaties is to promote and protect investments, tribunals generally interpret the abstract rules in a manner compatible with those objectives. Such a narrow and asymmetrical mandate would be unthinkable for a national court. A national court does not have a mandate limited to an investment treaty and as such does not have legal grounds to refuse to take into consideration the relevant non-investment obligations of the host state. Furthermore, third party joinder, intervention as amicus and transparency are all possible in domestic court alternatives of ITA (administrative courts and judicial review). The features described in the preceding paragraphs show that as the ITA system stands, it provides a level of legal protection for investors unseen elsewhere. A permanent court of international arbitration is promising to dial down on some of these special features, but as Van Harten points out,[82] does not really address issues of third party standing, asymmetrical protection provided only to investors (unlike in the case of contract based arbitration where both parties can initiate arbitration), and provides no clear jurisdictional basis for the serious consideration of non-investment obligations by the ICS tribunals.

The second step to demonstrating the privileging nature of ITA relates to the costs associated with it. Investors able to mount claims against host states through this mechanism are typically wealthy enough the cover the huge costs of ITA or have a large enough investment claim that can attract third party funding.[83] Small businesses are less likely to have access to the necessary funds to be able to resort to this mechanism. An OECD survey showed that 'costs for the parties in recent ISDS cases have averaged over USD 8 million with costs

[81] WM Reisman, '"Case Specific Mandates" versus "Systemic Implications": How Should Investment Tribunals Decide? The Freshfields Arbitration Lecture' (2013) 29 *Arbitration International* 131.
[82] Van Harten, ISDS in the Revised CETA: Positive Steps, But Is It the "Gold Standard"? (n.69).
[83] B Guven and L Johnson, 'Policy Implications of Third-Party Funding in Investor-State Dispute Settlement' May 2019, CCSI Working Paper 2019, 6 <http://ccsi.columbia.edu/files/2017/11/The-Policy-Implications-of-Third-Party-Funding-in-Investor-State-Disptue-Settlement-FINAL.pdf > accessed 29 August 2019 ("On average, financing a claim costs US$ 5 million per side. The economics of the investment require a potential award somewhere around a 5x-6x multiplier of costs, meaning the minimum value of a claim that would be attractive to a funder would be somewhere around US$ 30 million.")

exceeding USD 30 million in some cases'.[84] Costs of legal counsel constitute the largest proportion of ITA costs, with claimants and respondents being often represented by large law firms within the same circle.[85] Although costs of litigating large scale commercial disputes before domestic courts can also climb as high as ITA costs, particularly, in North America and Western Europe due to expensive legal representation often provided by large law firms at similar representation fees charged for ITA claims. As highlighted in a recent report submitted to the UNCITRAL Working Group III, for many of the investment disputes submitted to investment arbitration, the average costs for the parties would have been significantly less if the disputes were litigated before national courts of the host state.[86] In the latter scenario, court fees are significantly lower than tribunal costs, and legal representation options are not limited to the world's most expensive law firms. Defendants and claimants in ITA may often find themselves compelled to seek legal representation from the 'experienced' large law firms who are central players in the arbitration industry to increase their chances of success. The magnitude of ITA costs are also obvious even when compared with disputes heard by other international courts. The permanent court model of the EU proposes for the contracting state parties to finance the court, and this could mean a reduction from the arbitrator costs.[87] But it is unlikely that there will be a reduction in the costs of legal representation, which is the largest cost item involved in ITA claims. In fact, CETA Article 8.39 (5) requires the unsuccessful party to bear the costs of the proceedings, including the winning party's legal counsel fees, unless the tribunal finds such apportionment unreasonable. This can place additional burden on losing host states who will likely pay for the high fees charged by leading arbitration law firms representing the investors.

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[84] OECD, 'Investor–State Dispute Settlement Public Consultation: 16 May–9 July 2012', <http://www.oecd.org/daf/inv/internationalinvestmentagreements/50291642.pdf> accessed 29 August 2019; See for a more recent study has shown that the average investment treaty arbitration cost is just short of USD 10 million: M Hodgson, 'Costs in Investment Treaty Arbitration: The Case for Reform' in J E Kalicki and A Joubin-Bret (eds) *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015) 749.

[85] M Hodgson, 'Costs in Investment Treaty Arbitration: The Case for Reform' in J E Kalicki and A Joubin-Bret (eds) *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015) 749; See also D Rosert, 'The Stakes Are High: A review of the financial costs of investment treaty arbitration' (IISD 2014) <https://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf> accessed 29 August 2019; Academic Forum on ISDS Working Group 1, 'Excessive Costs and Insufficient Recoverability of Cost Awards' (15 March 2019) <https://www.cids.ch/images/Documents/Academic-Forum/1_Costs_-_WG1.pdf > accessed 29 August 2019.

[86] Academic Forum on ISDS Working Group 1, 'Excessive Costs and Insufficient Recoverability of Cost Awards' (n.84).

[87] European Commission 'Factsheet on the Multilateral Ibvestment Court' <https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf> accessed 29 August 2019.

The *Yukos* dispute, which involved a series of claims against Russia by Yukos investors seeking compensation for the violation of their property and due process rights, can serve to illustrate the extent of protections under the current ITA model compared to protection under a regional human rights protection framework. One set of proceedings took place before the European Court of Human Rights (ECtHR),[88] a second set before an ITA tribunal. Both disputes essentially arose from the damage suffered by the energy company Yukos and its shareholders resulting from the same series of host state abuse. A significant difference between these claims was that the first claim was based on the rights guaranteed under human rights law, particularly based on the right to a fair trial and the right to property as interpreted and applied pursuant to the ECtHR jurisprudence. The ITA claim was based on broad investment treaty standards (in this instance the Energy Charter Treaty) of expropriation, and fair and equitable treatment. Although both sets of rights broadly cover the same ground and protect the same interests, there is a stark difference between the two dispute resolution processes in terms of their valuation of damages. The ECtHR ordered Russia to pay the claimants €1.87 billion in just satisfaction under the European Convention on Human Rights. This was the largest compensation this court had ever awarded. Still, it was dwarfed by the $50billion awarded by the ITA tribunal for essentially the same dispute under the Energy Charter Treaty.[89] While both claims resulted in findings of host state violations, the massive difference between the awarded compensation for essentially the same violations speaks to the privileging nature of ITA.

From the perspective of investors, the only obvious disadvantage of ITA as opposed to using domestic courts and international human rights mechanisms after exhausting local remedies is the costs of using ITA. In the *Yukos* case, the costs awarded to the claimant in the ITA proceedings reached up to $60 million, while the ECtHR awarded €300,000 in costs—again an unprecedented amount for the ECtHR. Nonetheless, the high costs of using and

[88] *OAO Neftyanaya Kompaniya Yukos v Russia*, ECtHR, Application No 14902/04), 20 September 2011, <http://hudoc.echr.coe.int/eng?i=001-106308> accessed 29 August 2019.

[89] *Yukos Universal Limited (Isle of Man) v Russian Federation*, UNCITRAL, PCA Case No AA 227. Later, the ITA award was set aside by domestic courts at the seat of arbitration (The Hague) on the grounds that the ITA tribunal did not have jurisdiction. An English translation of the judgment is available at http://www.italaw.com/sites/default/files/case-documents/italaw7258.pdf accessed 29 August 2019. The Yukos claimants may still be able to enforce the ITA award, despite The Hague court's decision. See B Knowles, K Moyee & N Lamprou, 'The US$50 billion Yukos award overturned Enforcement becomes a game of Russian roulette' *Kluwer Arbitration Blog*, 13 May 2016, http://kluwerarbitrationblog.com/2016/05/13/the-us50-billion-yukos-award-overturned-enforcement-becomes-a-game-of-russian-roulette/ accessed 29 August 2019.

maintaining ITA actually adds to its privileged nature since they limit its use to the few privileged investors who can afford it.

When the underlying assumption is that investor-state disputes are most effectively settled internationally, then moving towards an international court of investment arbitration is a genuine attempt to respond to some of the weakenesses identified by the backlash against ITA. If, however, domestic judiciaries respecting the rule of law are the gold standard for access to justice, why move away further from that goal by establishing a permanent arbitration court? If international dispute settlement for foreign investment disputes is a response to a genuine concern about defects in domestic access to justice and rule of law, would it not be ideal to channel efforts to improve the local remedy systems? Admittedly, both of these options are 'imperfect choices' and the international option provides a quicker solution for governments and international organizations to offer investment protection than attempting to improve local justice mechanisms around the globe within host states presenting all sorts of complex challenges. With the two of the world's biggest economies pushing for further internationalisation of ISDS and moving away from local solutions, the justice bubble for the few is likely to become more normalised and institutionalised.

No valid justification for prioritising investor interests

The premise of the argument for transferring settlement of investor-state disputes to international tribunals or courts is that international dispute settlement promises more effective legal protection for foreign investors. It is claimed that foreign investors could be at a disadvantage if they have to challenge host state acts in host state courts due to possible bias and discrimination against them on the basis of their nationality.[90] In response to this alleged problem, policy-makers have taken the necessary steps to secure due process rights of investors as a matter of priority, in order to help investment flow without undue burden. However, even if it could be assumed that domestic courts and judges may in particular circumstances be biased against foreign investors, the observation has to be made that investors do not form the only group against which domestic courts might carry perceived biases. So, the question arises, what makes IIL disputes more important than other kinds of disputes, such that the creation of such a special and powerful dispute settlement mechanism

[90] Francioni (n.15).

is warranted for them alone? Would all disputes not deserve to be settled by impartial and efficient courts?

The adoption of the ICS model in CETA exposes that ITA is no longer merely an access to justice solution. Rather, ITA and its institutionalisation by a permanent arbitration court is a symptom of the prioritization of capital interests over broader societal interests. It is clear that the EU, its member states, and Canada do not fail to grant effective judicial protection to investors. In the EU, access to effective judicial protection is guaranteed for everyone, regardless of the nationality of the parties, in member state constitutions, under the ECHR to which all EU member states have acceded, and in the EU Charter of Fundamental Rights. In Canada due process rights are guaranteed by the constitution of the country. In both jurisdictions, the abstract rights guaranteed in these core documents are brought to life by relatively strong national judiciaries. In the EU, a further level of protection is provided at the regional level also through the ECtHR and the Court of Justice of the European Union. The right to a fair trial and access to remedy are among the few human rights granted to corporations, including corporate investors, on a par with individuals (as the *Yukos* case illustrates). Given this, attempts to institutionalise ITA by reference to access to justice and rule of law arguments ring hollow. With this observation, I do not intend to join the 'European hypocrisy' observed by Weiler. Rather, what I wish to stress is the double standard promoted by policy-makers who prioritise safeguarding investor interests, while neglecting the effects of potential domestic rule of law flaws on the rest of the society.

If we look at the issue from a legal and procedural empowerment perspective, concerns about access to effective remedies within developed and developing jurisdictions are not unjustified. Focusing on the CETA countries, there is no evidence to suggest that EU member states and the EU legal system and Canada fail to provide effective remedies to foreign investors. Rather, flaws in access to justice primarily affect members of low-income and vulnerable groups in these jurisdictions,[91] and these 'groups most in need of legal assistance have the least access to political leverage that could secure it'.[92] Proponents of ITA often consider foreign investors legally and politically vulnerable against the state apparatus,

[91] The term 'vulnerable groups' is used to include, but is not limited to, indigenous peoples, minority groups, single parents, homeless people, children, migrants and refugees, the disabled.
[92] DL Rhode, *Access to Justice* (OUP, 2004) 3.

including its judiciary, because of their nationality and the fact that they do not have the right to vote to elect representatives who will determine the policies affecting their investment.[93] Yet the type of investor likely to use the ITA or ICS mechanisms has far more political leverage to secure its interests within the domestic legal system than many other portions of the society, particularly the poorest and most vulnerable.[94] It is, at best, questionable to reduce democratic representation and political leverage to the act of voting and then to conclude that the ability to vote guarantees that the laws enacted by the legislature will equally guard the interests of all voters. Moreover, not having the ability to vote does not mean that one's interests will not be protected by legislation. Legal persons such as companies cannot participate in the democratic process through voting, but they can exercise very strong influence, via lobbying, to promote legislation and reforms to judiciary that safeguards their interests.[95] At domestic and international governance levels, large corporate actors and business interests (i.e. international investors) have the leverage to push their agenda forward much more forcefully than other actors including the disadvantaged communities and civil society organisations that represent their interests.[96]

There is no evidence to show that foreign investors are more vulnerable to negative bias in domestic courts than any other group. Even relative to the treatment of domestic investors, foreign investors are not necessarily more vulnerable to political risk than their domestic counterparts.[97] Indeed, they might receive better treatment before local courts than some domestic investors due to the economic power they have to secure better business outcomes.[98] In addition, regardless of whether a corporation would commonly be classifed as domestic, with sufficient resources it will easily side-step national law by careful corporate

[93] *Tecmed v Mexico* Award (2003); C Schreuer, 'Do We Need Investment Arbitration?', in JE Kalicki & A Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff, 2015) 879.
[94] Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (n.44) 131.
[95] ibid, 937; E Aisbett and C McAusland, 'Firm Characteristics and Influence on Government Rule-Making: Theory and Evidence' (2013) 29 *European Journal of Political Economy* 214.
[96] Chimni (n.1) 13; E Aisbett and L Skovgaard Poulsen, 'Relative Treatment of Aliens: Firm-Level Evidence from Developing Countries', GEG Working Paper No 2016/122, December 2016, 5, <https://www.geg.ox.ac.uk/publication/geg-wp-2016122-relative-treatment-aliens-firm-level-evidence-developing-countries> accessed 29 August 2019.
[97] Aisbett and Poulsen (n.95).
[98] Ibid.

planning which allows them to pose as 'foreign', thus benefitting from favourable investment treaty provisions that national courts are bound to uphold.[99]

Wealthy investors are more likely to possess the expertise and resources to safeguard their rights, even in times of political crises that may adversely affect their investment. This is not to say that they will not suffer from time to time from the whims of capricious governments and biased judiciaries, but it is to say that they remain better placed and equipped to both enforce and defend their rights. Flaws in access to justice are a much more acute problem for the weakest segments of society. The UN Commission on the Legal Empowerment of the Poor has estimated that 'at least four billion people are excluded from the rule of law'.[100] In its work, the UN Commission documented the systemic inequalities for access to justice for the poor and vulnerable.[101] Even in the most developed countries, access to courts and legal representation remains a challenge for low-income and vulnerable individuals due to lack of financial resources, inaccessibility of the law, excessive formalism, geographical distance, and lack of faith in the judiciary.[102] Increasingly limited access to legal aid only serves to excacerbate this challenge.[103]

The inequalities prevalent in all societies disproportionately affect access to justice for the poor and vulnerable, making them suffer more than any other group from flaws in access to justice.[104] All this shows is that the weakest segments of the society are in greater need of

[99] See, e.g., *Yukos Universal Limited (Isle of Man) v Russian Federation*, UNCITRAL, PCA Case No AA 227 and *Libananco Holdings Co Ltd v Republic of Turkey*, ICSID Case No ARB/06/8. Both saw the applicants arguing that they were foreign investors because they had used corporate entities incorporated in off-shore jurisdictions to roundtrip their investments.

[100] UN Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone. Volume I: Report of the Commission on Legal Empowerment of the Poor* (2008) 3, <https://www.un.org/ruleoflaw/files/Making_the_Law_Work_for_Everyone.pdf> accessed 29 August 2019; *Report of the Secretary-General on Legal Empowerment of the Poor and Eradication of Poverty*, 13 July 2009, UN Doc A/64/133, <https://www.un.org/ruleoflaw/files/N0940207.pdf> accessed 29 August 2019.

[101] UN Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone. Volume II: Working Group Reports* (2008), <https://www.un.org/ruleoflaw/files/making_the_law_work_II.pdf> accessed 29 August 2019.

[102] JT Johnsen, *Vulnerable Groups at the Legal Services Market, in Access to Justice and the Judiciary: Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication* (Intersentia, 2009); A Currie, 'A National Survey of the Civil Justice Problems of Low- and Moderate-Income Canadians: Incidence and Patterns' (2006) 13 International Journal of the Legal Profession 217 (presenting examples from Norway and Canada).

[103] Johnsen (n.101) 33.

[104] MR Anderson, 'Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs', IDS Working Paper No 178, February 2003, 3, <https://www.ids.ac.uk/publication/access-to-justice-and-legal-process-making-legal-institutions-responsive-to-poor-people-in-ldcs> accessed 29 August 2019.

legal empowerment than international investors. Yet, states continue to prioritise better and more advanced solutions for remediating investor grievances that operate outside of the local justice mechanisms, instead of prioritising the needs of the groups that need empowerment more urgently. The legal empowerment rationale behind granting investors direct access to international dispute resolution simply cannot be explained as anything other than being a justice bubble for the privileged.

Justice bubbles undermine development goals

A slightly different but equally powerful argument against the entrenchment of a justice bubble for privileged investors in the direction of a permanent court of investment arbitration is that it is likely to have a fragmenting effect on local legal development[105] and thus on the development process as a whole. This is not to say that investment arbitration must bear all the blame for the complex process of development. But ITA has often been championed as a tool for economic and social development due to its encouragement of more inward investment into host states. I have already stated above that studies show little to no correlation between signing up to ITA and increased levels of investment.[106] On the contrary, the contribution of having direct recourse to an international tribunal or court for resolving investor-state disputes towards development goals is debatable for at least two reasons. Firstly, outsourcing IIL disputes to international tribunals without the pre-requisite of exhausting local remedies could be expected to have a chilling effect on the development of local capacity and expertise in important areas of law.[107] Additionally, Mavluda Sattorova explains in her book that imposition of external standards on host states via IIL and ITA can constrain successful internalisation of reforms.[108] States may introduce speedy reforms in the aftermath of large monetary awards granted for breach of their IIL obligations, but this type of "legal transformation does not facilitate the emergence of 'nationally felt' legal rules but instead tends to result a widespread criticism and at times suspicion over the desirability of the proposed reforms for the host country."[109]

[105] Ginsburg, (n.37), 119-22.
[106] Bonnitcha, Skovgaard Poulsen and Waibel, *The Political Economy of the Investment Treaty Regime* (n.14) 155-180.
[107] Ginsburg, (n.37), 121.
[108] Sattorova (n.33) 111-112, 124.
[109] Sattorova (n.33), 111.

Secondly, there is the very high cost of international ISDS; the hugely expensive process cannot but absorb funds from the public purse that many would prefer to see allocated to improving local means for access to justice or to the progressive realisation of economic, social and cultural rights. In other words, the cost of ITA can give rise to the 'gains of economic liberalisation … to be lost to its beneficiaries.'[110] For example, resources to be allocated to the creation and maintainance of the ICS within the EU and its investment treaty partner states could instead be allocated to improvement of legal aid schemes or the improvement of judicial capacities. The channelling of funds to international dispute settlement with investors is particularly detrimental in times of crises: under the current design of ISDS, compensation of international investors that suffered harms in Argentina, Egypt and Venezuela during or in the aftermath of financial, political and security crises as a result of host state conduct falling below investment treaty standards happens as a matter of priority,[111] even if the countries are struggling or failing to provide most basic needs of their citizens during the same periods.

The former Special Rapporteur on Extreme Poverty and Human Rights has urged states to include the elimination of inequality in access to justice within their post-2015 development goals, viewing it as 'a vital feature of human-centred social and economic development'. [112] Public resources and the attention of policy-makers should not be dedicated to maintaining expensive paths to justice for a privileged few but to remedying the flaws and inequalities that exist at the local level. Amartya Sen has demonstrated that legal development is an integral part of the process of development, contributing economically, politically and socially.[113] Improving local access to justice, even from a utilitarian point of view, would

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[110] C Tan, 'The New Disciplinary Framework: Conditionality, New Aid Architecture and Global Economic Governance' in C Tan and J Faundez (eds) *International Economic Law, Globalization and Developing Countries* (Cheltenham, Edward Elgar 2010) 122.

[111] See for instance the huge claims in *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11 (Decision on Liability and Heads of Loss) 21 February 2017; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (Award) 20 August 2007; ConocoPhillips Petrozuata B.V., *ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. and ConocoPhillips Company v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30 (Award) 8 March 2019.

[112] M Sepúlveda, 'Equality and Access to Justice in the Post-2015 Development Agenda', http://www.ohchr.org/Documents/Issues/Poverty/LivingPoverty/AccessJusticePost2015.pdf accessed 29 August 2019.

[113] A Sen, 'What is the Role of Legal and Judicial Reform in the Development Process?', Paper presented at the World Bank Legal Conference on the Role of Legal and Judicial Reform in Development, 5 June 2000, 13-14, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf> accessed 29 August 2019.

have broader positive effects on the investment climate beyond legal protection, including the political, economic and social climate in the host states. Investor-state disputes are only one of the many types of disputes that an investor would have whilst operating in the host state. A well-functioning local legal system would benefit the investor in all its relationships with other parties, including other businesses and its employees.

Improving the local rule of law as a constituent element of, and a catalyst for, development has been on the agenda of inter-governmental organisations, national development agencies, and development banks for decades, particularly with regard to developing countries and countries in transition. The point here is not to re-state that desideratum. The message is instead that, regardless of the development level of a country, improving access to justice for all segments of society would lead to more meaningful development outcomes than providing special justice paths to a privileged few.

IV. CONCLUSION

The EU's inclusion of an adapted form of investment treaty arbitration in its investment relationship with Canada, despite lack of evidence to suggest that these countries fail to grant effective legal protection to investors, shows that the prioritisation of interests is not necessarily between developing and developed states, but rather—in all states—a division between the economically powerful and the disadvantaged. Within both developing and developed states, the interests of powerful business interests, local or foreign, take priority and are granted 'the highest possible protection'.[114] While investment treaty arbitration may empower investors from developed countries to challenge certain developing state policies, in the same way they empower investors to challenge the policies of developed states that constrain economic gains.

In this essay, I aimed to shift the focus of discussion from concentrating on how to reform ITA to paying closer attention to whether there are valid justifications for further normalising and entrenching special justice mechanisms for a group of wealthy investors. I drew attention to how, within states at all levels of development, disadvantaged groups in society are much

[114] D Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (CUP, 2008) 4.

more seriously and disproportionately affected by weak rule of law compared to international investors. While investors may suffer from arbitrary government interference with their investments, they are better placed to fight back than disadvantaged groups. Outsourcing the resolution of investment disputes to specialised tribunals outside the domestic systems creates a justice bubble for powerful actors who already have significant capacity to effect change in host states. The aim here is not to propose a complete rejection of international paths, arbitration or otherwise, for resolving investment disputes. As with all other types of voluntary alternative dispute settlement, investment arbitration should be available if the parties agree to submit disputes to arbitration in their investment contract. Mandatory recourse to international dispute settlement could also be introduced subject to the exhaustion of local remedies. However, having investment treaty arbitration as the default, permanent and direct method of dispute settlement is objectionable. The proposals for permanent courts of investment arbitration take the *ad hoc* justice bubbles created by a large web of investment treaties one step further by attempting to make ISDS outsourcing permanent. It is a short-sighted plan that is likely to have detrimental effects on access to justice for all.