Reform Options for ISDS

The work of the UNCITRAL Working Group III provides a unique opportunity to tackle the manifold problems of Investor State Dispute Settlement (ISDS). The mandate of the working group is broad, and allows for a wide range of possible solutions.[1]

As the UN Conference on Trade and Development (UNCTAD) has identified, there are a variety of ways to address the problems caused by existing investment agreements.[2] And, as the Organization for Economic Co-operation and Development (OECD) has recently explained, there is no clear evidence that international investment agreements lead to increased FDI nor that any such investments that are influenced by the treaties is positive for either party.[3] In addition, a recent empirical study concludes that there is no evidence for the assertion that ISDS serves to de-politicize disputes.[4] In contrast, many states have demonstrated that there are better alternatives for promoting foreign investment.[5]

The options presented below are intended to support a broad discussion on potential solutions within the Working Group and highlight the diverse ways in which widely-acknowledged problems of ISDS could be addressed.

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[1] For the UNCITRAL working group mandate, see: http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-34th-session/930_for_the_website.pdf, para. 6.
[2] For a list of options presented by UNCTAD, see: http://unctad.org/meetings/en/SessionalDocuments/ciimem4d14_en.pdf.
[3] Joachim Pohl, "Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence", OECD Working Papers on International Investment, 2018/01, OECD Publishing, Paris, available at, http://dx.doi.org/10.1787/e5f85c3d-en, pp. 14-36, 37-39; Johnson et al., Costs and Benefits of Investment Treaties: Practical considerations for States (CCSI 2018).
[4] Gertz, Geoffrey, et al. "Legalization, diplomacy, and development: Do investment treaties de-politicize investment disputes?." 107 World Development 239 (2018).
[5] See, e.g., The EU-Indonesia CEPA negotiations, Responding to calls for an investment policy reset: are the EU and Indonesia on the same page?, pp. 20-23, SOMO, 15 February 2018, https://www.somo.nl/eu-indonesia-cepa-negotiations/.

A multilateral approach to terminating existing BITs[6]

The UNCITRAL process provides a unique opportunity to lay the basis for states to agree, multilaterally, to terminate investment treaties and/or withdraw consent to arbitrate.[7] Working Group III could recommend that states negotiate a multilateral instrument that specifies the treaties they seek to terminate, indicates their intent not to challenge state parties' effort to terminate, and affirms their commitment to provide aliens treatment required by customary international law. This approach would allow governments to terminate in a coordinated way that reaffirms that termination is not directed against investors but against ISDS.

Alternatively, the working group could recommend that states negotiate a multilateral instrument to withdraw consent to ISDS, leaving states bound by the obligations under investment agreements but allowing disputes to be settled only through state-state dispute settlement mechanisms or other forms of dispute resolution, such as mediation or the use of an ombudsman.[8]

Explanation:

ISDS reform through the renegotiation of individual investment treaties would involve significant time, effort, and be challenging given the power dynamic and political considerations inherent in treaty negotiations. Instead, countries could terminate multiple treaties at once, lessening the pressure on terminating governments.[9] Obligations of fair and just treatment to foreign investors would remain under customary international law, as well as various human rights treaties and free trade agreements.[10]

Treaty termination is not uncommon or egregious: "denunciations and withdrawals are a regularized component of modern treaty practice."[11] In fact, a growing number of countries have terminated (or threatened to terminate) their BITs in the past decade,

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[6] See Lise Johnson et al., "Addressing the Existing Treaty Challenge: Termination and Withdrawal of Consent," Columbia Center on Sustainable Investment (forthcoming 2018).

[7] Matthew C. Porterfield, "Aron Broches and the Withdrawal of Unilateral Consent in Investor-State Arbitration," Investment Treaty News (11 Aug. 2014), https://www.iisd.org/itn/2014/08/11/aron-broches-and-the-withdrawal-of-unilateral-offers-of-consent-to-investor-state-arbitration/ (discussing legal basis for and implications of withdrawals of consent); Rob Howse, "A Short Cut to Pulling out of Investor-State Arbitration under Treaties: Just Say No," International Economic Law and Policy Blog (9 Mar. 2017), http://worldtradelaw.typepad.com/ielpblog/2017/03/a-short-cut-to-pulling-out-of-investor-state-arbitration-under-treatiesjust-say-no.html.

[8] Some investment treaties, such as the China-Australia Free Trade Agreement (ChAFTA), include a state-to-state 'filtering' provision that requires a period of diplomatic consultation between states before an investor may request arbitration. Free Trade Agreement, China-Australia, 17 June 2015, Art. 9.11,.

[9] This process could also include an agreement to invalidate survival clauses.

[10] For a deeper examination of the investor rights that would survive BIT termination, see Tania Voon et al., "Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights," 29 ICSID Rev. 451 (2014); Clint Peinhardt & Rachel L. Wellhausen, "Withdrawing from Investment Treaties but Protecting Investment" (20 Apr. 2016), http://www.rwellhausen.com/uploads/6/9/0/0/6900193/peinhardt_wellhausen_bitwithdrawal.pdf.

[11] Laurence R. Helfer, "Exiting Treaties," 91 Virginia L. Rev. 1579, 1602-05 (2005).

including India, South Africa, the Philippines, Ecuador, Bolivia, Venezuela, Poland, Romania, and others.[12]

Alternatively, a country could indicate its withdrawal of consent to ISDS in particular, while remaining party to its investment treaties. As with termination, withdrawal of consent to ISDS could be done via a multilateral instrument. Some international law professors have suggested that this approach would be legal under the Vienna Convention on the Law of Treaties.[13]

Example:
India has sent notices to terminate BITs with 58 countries, including 22 EU countries.[14] Indonesia, Bolivia, Venezuela, and South Africa have also announced their intent to terminate investment agreements.[15]

The recent Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, which imposes changes to over one thousand bilateral tax treaties, provides an example of how a multilateral effort can successfully address problems in existing bilateral agreements.[16]

As a result of the European Court of Justice ruling that BITs between EU member states are illegal under European law, these agreements must now be terminated.[17] The termination may be achieved through an international treaty in which the EU member states agree to immediately terminate all BITs between them without the application of a survival clause.

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[12] Peinhardt & Wellhausen, *supra* note 5, at 4–8; Colin Trehearne, "Will 2018 Mark a Tipping Point for Binding Investor-State Arbitration?," Kluwer Arbitration Blog (31 Oct. 2017), http://arbitrationblog.kluwerarbitration.com/2017/10/31/will-2018-mark-tipping-point-binding-investor-state-arbitration/?print=pdf.

[13] Howse, *supra* note 2, at 2; Johnson, *supra* note 1.

[14] Nicholas Peacock & Nihal Joseph, "Mixed Messages to Investors as India Quietly Terminates Bilateral Investment Treaties with 58 Countries," Herbert Smith Freehills Arbitration Notes (16 Mar. 2017), https://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/. Although re-negotiated agreements could still include ISDS, the substantive investment protections would be aligned with customary international law, rather than create additional substantive rights. See Issuing Joint Interpretive Statements for Indian Bilateral Investment Treaties, F. No. 26/07/2013-IC, India Ministry of Finance (8 Feb. 2016), http://indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf.

[15] Ryan Matthews, Nandakumar Ponniya & Jo Delaney, "Withdrawal from Investment Treaties: An Omen for Waning Investor Protection in AP?," Baker McKenzie (12 May 2017), http://www.bakermckenzie.com/en/insight/publications/2017/05/withdrawal-from-investment-treaties/.

[16] Pascal Saint-Amans, "Ground-breaking Multilateral BEPS Convention Signed at OECD will Close Loopholes in Thousands of Tax Treaties Worldwide," OECD (7 June 2017), http://www.oecd.org/tax/ground-breaking-multilateral-beps-convention-will-close-tax-treaty-loopholes.htm.

[17] *Achmea B.V. v. The Slovak Republic*, Case C-284/16, Judgment of the Court (Grand Chamber) (6 Mar. 2018), http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=445274.

Allow Counterclaims

The UNCITRAL working group could recommend that, to the extent states continue to allow ISDS, counter-claims be permitted as long as there is a factual connection between the originating claim and the counterclaim. Additionally, international human rights and environmental obligations could be considered within the investment dispute resolution panel's jurisdiction for purposes of hearing a counterclaim.[18]

Explanation:

ISDS arbitration panels have historically excluded state-respondent counterclaims against investor-claimants. Although counterclaims are permitted in principle under the ICSID Convention[19] and UNCITRAL Arbitration Rules,[20] states' attempts to assert counterclaims rarely, if ever, succeed. This procedural pattern has led to an asymmetrical system of investment arbitration in which foreign investors are granted rights without accompanying obligations. On the other side of the equation, "a state cannot win; the most it can hope to do is not lose."[21]

Allowing counterclaims in ISDS would have a number of benefits for investors as well as state respondents:

- Efficiency: permitting counterclaims would establish ISDS as a one-stop shop for all claims relating to a particular cluster of events, and would encourage efficient decision-making.[22]
- Consistency: permitting counterclaims would avoid the risk of different fora reaching different conclusions regarding the same legal questions, as well as mitigate the fragmentation of international law.[23]
- Fairness and legitimacy: permitting counterclaims would enhance the perceived legitimacy of the ISDS system by addressing concerns over its current asymmetrical nature.[24]
- Enhanced rule of law: permitting counterclaims would make it far more likely that foreign investors are called to account for their actions.[25]

Adequate public participation, access to information, and access to justice in ISDS disputes are crucial in order to realize the benefits of allowing state counterclaims.[26]

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[18] The viability of this approach, however, would depend on ensuring that experts in human rights and environmental law were appointed to the arbitral tribunals.

[19] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Art. 46, https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf.

[20] UNCITRAL Arbitration Rules (2010), Arts. 21-23, https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

[21] Andrea Bjorkland, "The Role of Counterclaims in Rebalancing Investment Law,"17 Lewis & Clark L. Rev. 461, 464 (2013).

[22] *Id.* at 475.

[23] Kelsey Brooke Farmer, "The Best Defence is a Good Offense: State Counterclaims in Investment Treaty Arbitration" (2016), at 6, http://researcharchive.vuw.ac.nz/handle/10063/5004.

[24] Bjorklund, *supra* note 16, at 475-77.

[25] *Id.*

In discussions during the first meeting, members of Working Group III seemed to agree that investor-state dispute resolution should not reject counterclaims outright. Some indicated that the underlying treaty should determine whether counterclaims are permissible. However, reliance on the underlying investment agreement alone is insufficient to support counterclaims because arbitration tribunals have provided contradictory approaches to this issue, even when the same treaty language is involved.[27]

Example:
The Spain-Argentina BIT allows for dispute resolution upon request of either party.[28] This provision thus allows for counterclaims: the arbitral tribunal in *Urbaser v. Argentina* took jurisdiction over Argentina's human rights-based counterclaim against the Spanish investor.[29] Although ultimately ruling in favor of Urbaser, the judgment created a precedent for host state human rights counterclaims in ICSID arbitration.[30]

The duty to regulate/a public interest carve out
Working Group III could recommend that ISDS be reformed to protect the states' right, and duty, to regulate in the public interest. This can only be achieved by ensuring that investment protections cannot be used as a basis to challenge public interest decisions. The members of Working Group III have discussed a mechanism to enable the early dismissal of frivolous claims.[31] The same mechanism could be used to deny jurisdiction over claims against legitimate, non-discriminatory, and lawful decisions to protect the public interest.[32]

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[26] Otherwise, there is a risk that states could settle ISDS claims by disposing of potential counterclaims on behalf of their constituents, thereby precluding affected citizens from holding foreign investors accountable in other fora for environmental or human rights violations. See Lise Johnson & Brooke Skartvedt Guven, "The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest," Int'l Inst. for Sustainable Development (13 Mar. 2017), https://www.iisd.org/itn/2017/03/13/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest-lise-johnson-and-brooke-skartvedt-guven/.
[27] Farmer, *supra* note 18, at 25.
[28] Agreement Between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, 28 Sept. 1992, Art X(3), https://www.investorstatelawguide.com/documents/documents/BIT-0008%20-%20Argentina-Spain%20(1991)%20[english%20translation]%20UNTS.pdf.
[29] *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Final Award, 8 Dec. 2016, https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.
[30] *Id*; see Edward Guntrip, "Urbaser v. Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?," European Journal of International Law - Talk! (10 Feb. 2017), https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/.
[31] United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session (19 Dec. 2017), paras. 51-52.
[32] For an explanation by ClientEarth about how this could work, see Towards a More Diligent and Sustainable System of Investment Protection, ClientEarth (15 Mar. 2017), Sec. 4.2, https://www.documents.clientearth.org/wp-content/uploads/2017-03-15-towards-a-more-diligent-and-sustainable-system-of-investment-protection-ce-en.pdf.

Explanation:
Investors have invoked ISDS provisions to challenge domestic public interest measures relating to a broad range of topics, including tobacco packaging laws, environmental health regulations, and affirmative action programs. These actions threaten sovereign states' "right to regulate" by raising the price tag on public interest legislation and pressuring states not to adopt such rules.

For example, when Australia passed plain packaging tobacco laws in 2011, Philip Morris challenged the rule under the ISDS provision of the Australia-Hong Kong BIT. Although the investor's claim was ultimately unsuccessful, the Australian government was embroiled in years of costly arbitration over a measure squarely intended to promote public health. While arbitration was ongoing, New Zealand delayed implementing its own tobacco packaging laws until the Australia claim was settled.[33]

Example:
In response to Australia's experience, the country insisted on including a 'tobacco carve-out' in its next trade agreement, the Trans-Pacific Partnership (TPP). Article 29.5 reads: "A Party may elect to deny the benefits of Section B of Chapter 9 [ISDS] with respect to claims challenging a tobacco control measure of the Party." This provision will protect TPP parties from defending plain packaging laws and other tobacco regulations before ISDS tribunals.[34]

A public interest carve-out could be modeled after the TPP's tobacco carve-out, but broadened to include other forms of public interest legislation.[35]

As another example, the Nigeria-Morocco BIT provides, "For greater certainty, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement."[36]

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[33] Alexandre Gauthier, "Investor–State Dispute Settlement Mechanisms: What Is Their History and Where Are They Going," Canada Library of Parliament (4 May 2016), at 4, https://lop.parl.ca/Content/LOP/ResearchPublications/2015-115-e.pdf.
[34] Similarly, Professor Gus Van Harten has suggested a 'climate carve-out' provision in BITs that protects domestic climate change regulations from ISDS challenges. Gus Van Harten, "An ISDS Carve-Out to Support Action on Climate Change," Osgoode Legal Studies Research Paper No. 38 (2015), http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1112&context=olsrps.
[35] For example, the provision could provide that *"No claims can be brought in investor-state dispute resolution challenging public interest measures contributing to or aiming at inter alia environmental, social, human rights, or consumer protection."* See ClientEarth, *supra* note 27, Sec. 4.2.
[36] Reciprocal Investment Promotion and Protection Agreement, Morocco-Nigeria, 3 Dec. 2016, Art 23.3, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409.

Clean hands clause for investors

Working Group III could also recommend that any investor that has violated domestic or international obligations should not be granted access to ISDS.[37]

Explanation:

ISDS panels typically allow investors to bring claims even when they have plainly violated domestic and international law. For example, in 2010, Copper Mesa Mining Corporation brought an ISDS claim against Ecuador for terminating certain mining concessions. Ecuador pointed out, and the tribunal acknowledged, a pattern of unlawful and violent behavior on behalf of the investor: in the tribunal's own words, Copper Mesa "resort[ed] to recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands." Despite these findings and despite Ecuador's impressive amount of expert testimony and materials relating to the legal doctrine of unclean hands under international law, the tribunal allowed the claim to proceed and ultimately awarded Copper Mesa $24 million.[38]

A separate and unrelated ISDS panel similarly found that "'unclean hands' does not exist as a general principle of international law which would bar a claim by an investor, such as Claimants in this case."[39]

As a result, investors have unrestricted access to ISDS tribunals regardless of their conduct. This ignores the rationale behind the clean hands doctrine, which has appeared in jurisdictions as diverse as ancient Roman law, modern American law, and the International Court of Justice.[40] There is no reason why investment arbitration should not observe the same equitable doctrine. Any ISDS system should refuse to enforce investor rights if they have not abided by national and international law.[41]

Examples:

India's model BIT provides, "(i) Investors and their investments shall comply with all laws, regulations, administrative guidelines and policies of a Party concerning the establishment, acquisition, management, operation and disposition of investments."[42]

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[37] See ClientEarth, *supra* note 27, Sec. 4.1.

[38] *Copper Mesa Mining Co. v. Republic of Ecuador*, PCA Case No. 2012-2, Final Award (15 Mar. 2016), para 6.99, https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf.

[39] *Yukos Universal Limited v. Russian Federation*, PCA Case No. AA 227, Final Award (18 July 2014), para. 1363, https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf.

[40] Stephen M. Schwebel, "Clean Hands, Principle," Oxford Public International Law (Mar. 2013), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e18; T. Leigh Anenson, "Limiting Legal Remedies: An Analysis of Unclean Hands," 99 Kentucky L.J. 63 (2010).

[41] For example the provision could state, "*An investor may not submit a claim if the investment has been made through fraudulent misrepresentation, concealment, corruption, conduct amounting to an abuse of process, fraud, human rights abuses, or not in accordance with the applicable environmental, social, and consumer law, including international law.*" ClientEarth, *supra* note 27, Sec. 4.1. The language is based on based on Articles 8.1 and 8.18 (3) of the Canada-Europe Trade Agreement ("CETA").

[42] Model Text for the Indian Bilateral Investment Treaty, Art. 11, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

As another example, the Morocco-Nigeria Reciprocal Investment Promotion and Protection Agreement provides, "1) Each Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations. . . 4) A breach of this article by an investor or an investment is deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment."[43]

Finally, CETA provides, "For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process."[44]

These provisions could be expanded to include human rights and environmental obligations.[45]

Exhaustion of local remedies

Working Group III could recommend that investors be required to exhaust local remedies. The ability of investors to challenge a state directly in an ISDS tribunal, without resorting to domestic courts first, is an anomaly in international law and contrary to international human rights law and customary international law.

Additionally, Working Group III could recommend that if a domestic court finds that a law, rule, regulation, or guideline is non-discriminatory, and/or was issued in compliance with ILO conventions, multilateral environmental agreements, sustainable development goals, or other international obligations, that this finding is conclusive and should bar the filing of an ISDS case before any international tribunal.

Explanation:

Under both customary international law and international human rights law, individuals are required to seek redress before domestic courts before bringing international proceedings against the state for wrongful acts.[46] This rule, known as 'exhaustion of local remedies,' is intended to ensure respect for sovereign state authority over matters occurring within the state's jurisdiction. Only after proceeding through the domestic court system may a party bring a claim before an international law tribunal.

Exhaustion of local remedies is nearly ubiquitous in international human rights

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[43] Reciprocal Investment Promotion and Protection Agreement, Morocco-Nigeria, 3 Dec. 2016, Art 14, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409.

[44] Comprehensive and Economic Trade Agreement (CETA), EU-Canada, Art. 8.18.3, http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/.

[45] More generally, a country could refuse to enter into BITs at all with countries that do not respect international human rights or environmental standards. French President Emmanuel Macron recently adopted this view in response to the United States' withdrawal from the Paris Agreement. See Arthur Neslen, "Macron: EU 'Mad' to do Trade Deal with US after Paris Climate Withdrawal," Climate Home News (22 Mar. 2018), http://www.climatechangenews.com/2018/03/22/macron-eu-mad-trade-deals-us-paris-withdrawal/.

[46] ClientEarth, *supra* note 27, Sec. 2.1.

instruments. The International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights all contain some form of exhaustion of local remedies requirement.[47] International human rights case law upholds this requirement subject to narrow exceptions.[48]

The failure to require the exhaustion of local remedies in ISDS cases enables investors to side-step domestic courts and remedies, thereby undermining the domestic legal system.[49] The European Court of Justice (ECJ) recently expressed concerns about this aspect of ISDS and determined that ISDS between EU Member States incompatible with EU law, because it removes disputes from domestic legal systems.[50]

Example:
States and regional economic communities including Argentina, India, Romania, Turkey, the United Arab Emirates, Uruguay, the Southern African Development Community, and the East African Community have required investors to pursue or exhaust local remedies before resorting to ISDS.[51]

Third party access
Because the outcome of ISDS can directly affect the livelihood and well-being of local communities,[52] Working Group III could recommend that third parties be allowed to join a case with full rights as a party. This is a common feature of procedural codes around the world and is based on the premise that access to adjudication that directly affects one's vested interests is a fundamental principle of law.

Explanation:
ISDS decisions often have significant impacts on the rights of local communities, businesses, and other actors not directly party to the dispute. In *Ecuador v. Chevron*, for example, an ISDS tribunal ordered the Ecuadorian government to overturn a $9.5 billion judgment against Chevron by the domestic court that would have gone toward environmental remediation and health care costs for communities impacted by the oil conglomerate's decades of pollution.[53] The innumerable individuals affected by Chevron's pollution were stripped of almost $10 billion to which they were legally

[47] *Id.* at Sec. 2.3.1.
[48] *Id.* at Sec. 2.3.2.
[49] Also this requirement has been dispensed with in ISDS in part because of a concern that domestic courts are not efficient or unbiased, the solution to these problems is to strengthen the domestic judiciary and domestic legislation.
[50] *See Achmea*, *supra* note 12.
[51] Martin Dietrich Brauch, "IISD Best Practices Series: Exhaustion of Local Remedies in International Investment Law," Int'l Inst. for Sustainable Development (Jan. 2017), https://www.iisd.org/library/iisd-best-practices-series-exhaustion-local-remedies-international-investment-law.
[52] See, e.g., Nicolás M. Perrone, "The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?," Transnational Legal Theory 7.3 (2016), at 383-405 (noting that "the notion of investment also serves to occlude other purposes for local resources").
[53] "Ecuador's Highest Court vs. a Foreign Tribunal: Who Will Have the Final Say on Whether Chevron Must Pay a $9.5 Billion Judgment for Amazon Devastation?,", Public Citizen (Dec. 2013), at 1, https://www.citizen.org/sites/default/files/chevron-decision-2013.pdf.

entitled under Ecuadorian law. Nevertheless, those individuals and communities had no representation in the ISDS proceeding that decided their fate.

Very limited third-party participation in ISDS disputes is allowed in the form of *amicus curiae*. However, *amicus curiae* is a shallow and narrow substitute for legal standing. Amici lack substantial procedural and substantive rights in ISDS proceedings. For example, they cannot receive direct compensation for legal injuries, cannot view much or all of the evidentiary record, cannot participate in oral arguments, and cannot participate in settlement negotiations. As one scholar puts it, ISDS panels have "systematically denied *amici* any involvement beyond the submission of briefs."[54]

Third-party intervention is a common feature of domestic procedural codes around the world. For example, in the United States and France, third parties may intervene as a matter of right when their interests directly relate to the subject matter of the litigation.[55] Many other countries including Canada, the United Kingdom, Italy, India, and Brazil, allow intervention at the discretion of the court.[56] The rationale behind third-party intervention in these and other countries is multifold. Intervention increases judicial efficiency[57]; ensures access to justice[58]; improves judicial decision-making[59]; and promotes synchronization among different jurisdictions.[60]

Third party intervention is also a feature of international law. For example, the International Court of Justice allows third parties with "an interest of a legal nature which may be affected by the decision in the case" to intervene at the Court's discretion.[61]In fact, since 1943, the ICJ has declined to exercise its jurisdiction where the legal interests of a third state "would form the very subject-matter of the decision."[62]

Finally, third party intervention is already a feature of some international commercial

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[54] Bernali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?," 41 Vanderbilt J. of Transnat'l L. 775, 817 (2008).
[55] Federal Rules of Civil Procedure 24(a) (United States); Code of Civil Procedure Title IX (France).
[56] Rules of the Supreme Court of Canada 56–59; Civil Procedure Rules 54.17 (United Kingdom); Code of Civil Procedure 105 (Italy); Supreme Court Rules, Rule 3 of Order XVII (India); Civil Procedure Code 51 *et seq*. (Brazil).
[57] Raising all claims related to a particular set of events before one tribunal avoids duplicative judicial processes and avoid the accompanying waste of judicial resources.
[58] Intervention allows all parties with legal interests in the outcome of a given dispute to access a remedy.
[59] Hearing all sides of a dispute allows the judicial body to have a fuller understanding of the factual and legal issues at play.
[60] Intervention reduces the risk of two separate judicial bodies arriving at different conclusions over the same set of facts and legal questions.
[61] Statute of the International Court of Justice, Art. 62, http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.
[62] This is known as the "Monetary Gold principle." See Tobias Theinel, "Third States and the Jurisdiction of the International Court of Justice: The Monetary Gold Principle," 57 German Yearbook of Int'l L. 321 (2014).

arbitration procedural rules.[63] For example, the Netherlands Arbitration Institute Rules allow a third party to request the arbitral tribunal for permission to join the proceedings.[64]

Example:
The United States has the most robust system of third-party intervention, which allows full participation for "*anyone . . . who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.*"[65]

The Netherlands Arbitration Institute Rules provide that "*A third party who has an interest in the outcome of arbitral proceedings to which these Rules apply may request the arbitral tribunal for permission to join the proceedings or to intervene therein.*"[66]

[63] See Rules of the London Court of International Arbitration (2014), Art. 22.1(viii), http://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx; UNCITRAL Arbitration Rules, *supra* note 15, Art. 17.5.
[64] Netherlands Arbitration Institute Rules (2015), Art. 41.1, http://www.nai-nl.org/downloads/NAI%20Arbitration%20Rules%20and%20Explanation.pdf.
[65] Federal Rules of Civil Procedure 24(a) (United States).
[66] Netherlands Arbitration Institute Rules, *supra* note 58, Art. 41.1.