

## Third Party Rights in Investor-State Dispute Settlement: Options for Reform

Submission to UNCITRAL Working Group III on ISDS Reform, contributed by Columbia Center on Sustainable Investment (CCSI), International Institute for Environment and Development (IIED), and International Institute for Sustainable Development (IISD)<sup>1</sup>

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### Introduction

At its 37<sup>th</sup> session (New York, 1-5 April 2019), the Working Group identified participation by third parties in investor-state dispute settlement (ISDS) as an issue warranting consideration when the Working Group discusses possible reform options.<sup>2</sup> This includes participation of the general public and of local communities that are specifically affected by the investment or the dispute at hand, though the rationale for and scope of such participation may vary.<sup>3</sup> A number of points related to this issue were raised during the discussion, including:<sup>4</sup>

- That third-party participation would better enable pertinent interests to be represented and considered in the context of the dispute; and
- That such participation would support consideration of other matters, including environmental protection, protection of human rights, and the obligations of investors.

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<sup>1</sup> This text was drafted by: Jesse Coleman, Lise Johnson, and Brooke Güven (CCSI); Lorenzo Cotula and Thierry Berger (IIED).

<sup>2</sup> United Nations Commission on International Trade Law (UNCITRAL), Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session (New York, 1-5 April 2019) (hereafter ‘37<sup>th</sup> Session Report’) paras. 31 and 39. See also IIED, CCSI and IISD, ‘Shaping the Reform Agenda: Concerns Identified and Cross-Cutting Aspects’ (Submission to UNCITRAL Working Group III on Investor-State Dispute Settlement Reform, 15 July 2019).

<sup>3</sup> 37<sup>th</sup> Session Report (n 2) para. 31.

<sup>4</sup> 37<sup>th</sup> Session Report (n 2) para. 31.

During the 37<sup>th</sup> session, it was also noted that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Transparency Rules”) address *amicus curiae* submissions by non-disputing third parties and non-disputing state parties.<sup>5</sup> However, it was questioned whether the provisions contained in the Transparency Rules are sufficient to provide for adequate consideration and protection of third party rights.<sup>6</sup> In discussions during the session, several states and observers made specific comments relevant to this topic, focusing, for instance, on concerns that ISDS proceedings can impact the rights of third parties, and indicating that the role and intent of *amicus curiae* submissions is insufficient, and not intended, to address these issues.<sup>7</sup> Additionally, it was noted that participation of third parties – going beyond *amicus curiae* submissions – is relevant for the legitimacy of the ISDS system.<sup>8</sup>

These discussions highlight the impact that ISDS may have on the rights and interests of third parties. But they also raise issues that are integral or relevant to concerns the Working Group has already identified for reform, including: concerns relating to the lack of consistency, coherence, predictability and “correctness” of arbitral decisions; concerns relating to arbitrators and decision makers; and concerns relating to costs and duration of ISDS cases.<sup>9</sup> For example, the participation in a dispute, beyond the *amicus curiae* context, by third parties whose rights or interests are at stake in the dispute can promote the correct interpretation and application of all relevant legal norms and lead to more “correct” (and legitimate) outcomes. It can also help avoid multiple and potentially conflicting decisions on relevant rights, interests, and relief. A separate submission illustrates in greater detail some of the ways in which the cross-cutting issues discussed by the Working Group, including third-party participation, are relevant to the concerns identified for reform, and can help shape the contours of reform options.<sup>10</sup>

Ultimately, the Working Group decided that it was “important to take into account” these issues relating to third parties as it proceeded in the next phase of its work, concerning the development of concrete reform options.<sup>11</sup> In light of that decision, this submission seeks to aid the Working Group in its task. It first briefly highlights the ways in which ISDS can affect the rights and interests of third parties, and how the *amicus curiae* mechanism does not adequately address those issues. It then outlines potential reform options for ISDS to better consider the range of rights and interests at stake in investment disputes. The submission provides examples of how other legal jurisdictions address these issues. In highlighting these examples, the submission seeks to raise questions for states to consider when thinking about how they address analogous issues in their domestic contexts, and whether such domestic rules and principles could helpfully inform considerations and options for ISDS reform. Finally, the submission considers what these insights and options mean for the Working Group’s work.

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<sup>5</sup> 37<sup>th</sup> Session Report (n 2) para. 32.

<sup>6</sup> 37<sup>th</sup> Session Report (n 2) para. 32.

<sup>7</sup> See audio recordings of the 37<sup>th</sup> Session, covering the afternoon on April 1, 2019, and the morning of April 5, 2019. On April 5, relevant comments were made, for instance, by Ecuador, IIED, and IISD, beginning at around 90 minutes of the English language version.

<sup>8</sup> 37<sup>th</sup> Session Report (n 2) para. 31.

<sup>9</sup> United Nations Commission on International Trade Law (UNCITRAL), Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Sixth Session (Vienna, 29 October–2 November 2018) (hereinafter “36<sup>th</sup> Session Report”).

<sup>10</sup> IIED, CCSI, and IISD, ‘Shaping the Reform Agenda: Concerns Identified and Cross-Cutting Aspects’ (Submission to UNCITRAL Working Group III on Investor-State Dispute Settlement Reform, 15 July 2019).

<sup>11</sup> The Working Group agreed that, prior to developing project schedules, it is important for governments to first identify all potential solutions for reform. With respect to such potential solutions, “it was recalled that some were listed in document A/CN.9/WG.III/WP.149 and its annex. However, the Working Group agreed that other solutions could also be proposed,” ideally by July 15 via these submissions to the Secretariat. See 37<sup>th</sup> Session Report (n 2).

This submission and the options discussed complement other submissions and solutions,<sup>12</sup> as the options contained herein should not be interpreted as comprehensive solutions for addressing the rights of third parties affected by investor-state disputes. It is crucial to use the opportunity presented by this United Nations initiative to consider what means of dispute settlement is consistent with and helps advance human rights-compliant sustainable investment and governance thereof. This may mean, for instance, deciding that the procedural features and substantive outcomes produced by ISDS (whether through ad-hoc arbitration or a court or roster-based system) are not fit for purpose, and that the focus of reform should be instead be on increasing support for domestic institutions, state-to-state cooperation and dispute settlement, market mechanisms such as risk insurance, and strengthened international human rights systems that can support access to justice for all.<sup>13</sup> However, to the extent that reforms are more discrete, and focus on changes to ISDS models themselves, the options outlined below present some procedural tools that could be used to better protect third parties' rights in those proceedings. Without attention to these issues in conjunction with other reform solutions, concerns related to such third parties will likely remain and may in fact be exacerbated should reforms entrench the ISDS system.

### How the rights or interests of third parties may be at stake in ISDS

Investor-state disputes often affect the rights and interests of other actors that are not formally party to the dispute. This reflects the wide range of relationships that typically arise in the context of international investment. The factual configurations are very diverse, as are the type of actors involved. For illustrative purposes and based on existing investor-state arbitrations, affected third parties may include:

- Creditors of ISDS claimants;<sup>14</sup>
- Local government bodies or indigenous authorities with rights and powers over land, contracts, or regulatory spheres that are at issue in the ISDS case;<sup>15</sup>
- Local communities that are specifically affected by the investment in dispute – for example, where the investment is a natural resource or infrastructure project that impacts those communities, and/or where the investment is being contested by affected groups via domestic or other processes;<sup>16</sup>

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<sup>12</sup> IIED, CCSI, and IISD, 'Shaping the Reform Agenda: Concerns Identified and Cross-Cutting Aspects' (Submission to UNCITRAL Working Group III on Investor-State Dispute Settlement Reform, 15 July 2019); CCSI, IIED, and IISD, 'Draft Treaty Language: Withdrawal of Consent to Arbitrate and Termination of International Investment Agreements' (Submission to UNCITRAL Working Group III on Investor-State Dispute Settlement Reform, 15 July 2019); CCSI, IISD, IIED 'Draft Text Providing for Transparency and Prohibiting Certain Forms of Third-Party Funding in Investor-State Dispute Settlement' (Submission to UNCITRAL Working Group III on Investor-State Dispute Settlement Reform, 15 July 2019).

<sup>13</sup> Lise Johnson, Jesse Coleman, Brooke Güven, and Lisa Sachs, "Alternatives to Investor-State Dispute Settlement" (CCSI Working Paper, April 2019) <<http://ccsi.columbia.edu/2019/04/15/alternatives-to-investor-state-dispute-settlement/>>

<sup>14</sup> See e.g., *Dan Cake S.A. v. Hungary*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/12/9, 24 August 2015.

<sup>15</sup> See e.g., *Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, Award, ICSID Case No. ARB/10/13, 2 March 2015 (hereafter *Awdi v. Romania*) (involving a case in which the rights of municipalities over their land was at the heart of the dispute).

<sup>16</sup> Examples of such cases include (i) ISDS claims challenging state action taken in response to community mobilization concerning an investment, and (ii) ISDS claims challenging alleged failure of the state to act when required to, e.g., comply with FPS obligations. See e.g., *Copper Mesa Mining Corporation v. Republic of Ecuador*, Award and Joint Motion for Stay of the Pending Action Pending Completion of Settlement Agreement, PCA No. 2012-2, 15 March 2016 and 25 July 2018 (hereafter *Copper Mesa v. Ecuador*). For further examples, see Lorenzo

- Users of utilities and other public services, who are affected by measures concerning those services, or by investment claims challenging those measures;<sup>17</sup>
- Individuals or groups that have competing claims to property at stake in the dispute;<sup>18</sup> and
- Adverse parties in underlying or parallel domestic litigation.<sup>19</sup>

Third-party rights or interests can be triggered or affected by ISDS disputes in a range of circumstances, including where:

- Disputes arise out of discrete competing claims advanced in different fora between non-governmental actors, states, and investors.<sup>20</sup> For example, when an environmental organization challenges before national courts a government agency's issuance of an environmental permit to an investor, and the investor brings an ISDS claim to challenge the permit's revocation;

*NGO v Govt Agency ⇒ Investor v State (NGO not present)*

- Disputes in which ISDS is used to challenge aspects of the legal proceedings and/or outcomes of a dispute between the investor and other private litigants.<sup>21</sup> For example, when individual plaintiffs secure a tort judgment against the investment, and the investor brings an ISDS claim to challenge the tort judgment as being arbitrary and disproportionate; or when a generics firm successfully challenges a pharmaceutical company's patent, and an investor in that pharmaceutical company challenges the court decision in ISDS;

*Tort Plaintiff v Investment ⇒ Investor v State (Tort Plaintiff not present)*

*Generics Firm v Pharmaceutical Co ⇒ Investor v State (Generics Firm not present)*

- Disputes before ISDS tribunals involve competing rights and interests.<sup>22</sup> For example, where affected communities challenge before national courts a government agency's granting of a concession, arguing that consultation processes were inadequate, and the investor brings an ISDS claim to challenge a court injunction that stopped continuation of the project until consultation was complemented); and

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Cotula and Mika Schröder, 'Community Perspectives in Investor-State Arbitration,' (IIED, 2017) <<https://pubs.iied.org/pdfs/12603IIED.pdf>>.

<sup>17</sup> See e.g., *Teco v. Guatemala*, Award, ICSID Case No. ARB/10/23, 19 December 2013; *Suez et al. v. The Argentine Republic*, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010; *Azurix Corp v. The Argentine Republic*, Award, ICSID Case No ARB/01/12; 14 July 2005; *SAUR International SA v. Republic of Argentina*, Award, ICSID Case No ARB/04/4, 22 May 2014.

<sup>18</sup> See e.g., *Bernhard von Pezold and Others v. Republic of Zimbabwe*, Award and Decision on Annulment, ICSID Case No. ARB/10/15, 28 July 2015 and 21 November 2018 (hereafter *von Pezold v. Zimbabwe*).

<sup>19</sup> See e.g., *Eli Lilly and Company v. The Government of Canada*, Final Award, UNCITRAL, ICSID Case No. UNCT/14/2, 16 March 2017 (hereafter *Eli Lilly v. Canada*); *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23 (hereafter *Chevron v. Ecuador*).

<sup>20</sup> See e.g., *TransCanada Corporation and TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/16/21; *Copper Mesa v. Ecuador* (n 16); and *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5.

<sup>21</sup> See e.g., *Eli Lilly v. Canada* (n 19) and *Chevron v. Ecuador* (n 19).

<sup>22</sup> See e.g., *Daniel Kappes and Kappes Cassidy & Associates v. Guatemala*; *South American Silver Limited v. Bolivia*, Award, PCA Case No. 2013-15, 22 November 2018; and *von Pezold v. Zimbabwe* (n 18).

*Affected Communities v Ministry of Mines and Investor ⇒ Investor v State (Affected Communities not present)*

- Disputes in which the claimant seeks requests for relief (e.g. injunctive or declaratory) that affect non-disputing third parties.<sup>23</sup> For example, an indigenous community and investor have competing claims over rights to a piece of land, and the investor sues in ISDS to secure an award ordering the state to provide it clear title to the disputed property.

*Indigenous Community v Investor ⇒ Investor v State (Indigenous Community not present)*

It may be argued that, in ISDS disputes, the state represents the rights and interests of its citizens, and that, therefore, concerns regarding effects on third-party rights do not arise. There are, however, a range of circumstances applicable to the international investment context where the interests and objectives of a respondent state and of affected third parties with discrete rights at stake may diverge, making the state unwilling or unable to make arguments to advance the rights or interests of third parties. States may, for instance, be unwilling to make concessions or advance arguments in ISDS that third parties could use against them in parallel or subsequent legal proceedings concerning harms suffered by those third parties. In addition, states may be unable to raise claims regarding relevant issues such as investor misconduct and violations of third-party rights.<sup>24</sup>

#### Nature and limitations of the *amicus curiae* mechanism

Current ISDS rules tend not to provide for effective or meaningful participation of third parties in investment disputes. Depending on applicable rules, third parties can request permission to make a submission as *amici curiae*, or “friends of the court,” and an arbitral tribunal may, at its discretion, accept such request should certain conditions be met. However, *amicus curiae* submissions mainly provide the tribunal with relevant information on points of fact or law; they are not designed to grant effective voice or protection for actors whose rights are directly at stake in a dispute.<sup>25</sup>

Since the landmark decision in *Methanex v. United States* that first allowed *amicus curiae* submissions in an ISDS context,<sup>26</sup> tribunals have emphasized the limited scope of *amicus curiae* participation – noting that, while the tribunal could accept written submissions from third parties, this practice conferred “no rights, procedural or substantive, on such persons.”<sup>27</sup> Tribunals also clarified that acceptance of *amicus* submissions was “a matter of its power rather than of third party right.”<sup>28</sup> In effect, the *amicus* mechanism authorizes but does not require tribunals to accept submissions from third-parties, and grants third parties only a limited and conditional role in the proceedings. At most, *amicus* is a mechanism to assist the tribunal

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<sup>23</sup> See e.g., *von Pezold v. Zimbabwe* (n 18); and *Chevron v. Ecuador* (n 19).

<sup>24</sup> See, e.g., *Chevron v Ecuador* (n 19), Second Partial Award on Track II (30 August 2018), Part VII, 11-12 (holding that the state did not have standing to raise arguments regarding claims of individual harms to Ecuadorians).

<sup>25</sup> Lorenzo Cotula and Nicolás M Perrone, “Reforming Investor-State Dispute Settlement: What About Third Party Rights?” (IIED, 2019) < <https://pubs.iied.org/pdfs/17638IIED.pdf> >.

<sup>26</sup> *Methanex Corporation v. United States of America*, Decision of the tribunal on Petitions from Third Parties to Intervene as “Amici Curiae”, UNCITRAL, 15 January 2001 (hereafter *Methanex v. United States*).

<sup>27</sup> *Methanex v. United States* (n 26), Decision of the tribunal on Petitions from Third Parties to Intervene as “Amici Curiae” [33]. For further discussion, see Farouk El-Hosseny, *Civil Society in Investment Treaty Arbitration: Status and Prospects* (Brill Nijhoff 2018) 103, 105, 252.

<sup>28</sup> *United Parcel Service of America Inc. v. Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, ICSID Case No. UNCT/02/1, 17 October 2001 [61].

in making its determination,<sup>29</sup> and does not enable affected third parties to meaningfully intervene in order to protect their rights. In fact, the criteria for *amicus* participation – which some tribunals have interpreted as requiring the *amicus* applicant to be neutral – would likely be difficult if not impossible to satisfy for third parties whose rights are potentially affected in and by ISDS cases.

In the context of this submission, it may be useful to recall the Working Group’s own clarification that “third parties” include both the “general public,” i.e. individuals and groups who may have an interest but not a direct stake in the dispute (hereinafter referred to, for sake of clarity, as “interested third parties”), and “local communities affected by the investment or the dispute at hand” (hereinafter “affected third parties”).<sup>30</sup> As alluded to in the Working Group’s discussion, there are ongoing debates regarding whether current rules and jurisprudential approaches to *amicus* arrangements are appropriate to ensure adequate participation of even interested third parties.<sup>31</sup> But, as was also stated during the 37<sup>th</sup> session, it is clear that the *amicus curiae* mechanism is not intended or suited to cater for affected third parties whose interests and legal rights may be at stake in the dispute.

The remainder of this submission explores options to develop procedural tools that may better protect the rights and interests of affected third parties, and that may also better serve the interests of the disputing parties and the dispute settlement procedure itself. These include tools: (i) enabling affected third parties to become party to the proceedings in order to ensure fair, efficient and effective resolution of the dispute, and (ii) providing for dismissal or other reframing of the case.

### Options for consideration

Many (or indeed most) domestic legal systems, and some systems of international dispute settlement, recognize that disputes between parties to a proceeding often affect the rights and interests of others who are not formally party to that proceeding at the outset. In recognition of this reality, procedural rules prevalent in many legal systems provide for:

- **Participation** by interested or affected third parties through intervention, joinder, or interpleader;
- **Dismissal** of claims where such parties are unwilling or unable to intervene or be joined; and
- **Reframing** of claims, arguments and remedies where circumstances require.

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<sup>29</sup> James Harrison, “Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?” in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds) *Human Rights in International Investment Law and Arbitration* (2009), 405-6. See also Vivian Kube and Ernst-Ulrich Petersmann, “Human Rights Law in International Investment Arbitration” (2016) 11 (1) *AJWH* 65, 88-89; Lorenzo Cotula, “Democracy and International Investment Law” (2017) 30 *Leiden Journal of International Law* 351, 377-380; El-Hosseny (n 27) 253.

<sup>30</sup> 37<sup>th</sup> Session Report (n 2) para. 31.

<sup>31</sup> For insights regarding some of the concerns regarding current *amicus* practice, see, e.g., Nicolette Butler, “Non-Disputing Party Participation in ICSID Disputes: *Faux Amici*?” (2019) 66 *Netherlands International Law Review* 143 (arguing that aspects of ICSID’s rules and/or application thereof limited the potential effectiveness of *amicus* participation and suggesting some reforms); Damien Charlotin, “ICSID Annulment Committee Allows European Commission to Intervene in an ECT Case, But Limits Intervention to EC’s Complaint about Earlier Tribunal’s Decision to Oblige Amicus Curiae to Make Costs Undertakings,” *IA Reporter* (26 March 2019) (outlining the European Commission’s arguments that the cost undertaking that the tribunal had ordered the *amicus* applicant to pay amounted to a fundamental breach of procedure); Letter by Lise Johnson, Kaitlin Cordes, and Jesse Coleman to the tribunal in *Bear Creek Mining Corp v. Peru*, ICSID Case No. ARB/14/21 (3 August 2016) (raising concerns regarding the tribunal’s reasoning in its decision to reject the *amicus* brief submitted by CCSI) <<http://ccsi.columbia.edu/files/2016/08/CCSI-Response-to-Procedural-Order-No.-6.pdf>>.

Looking to these approaches and systems can provide insights and guidance as to the rationale for each solution, how it operates in practice, and whether and how those solutions can be considered in the context of international investment dispute resolution. This section elaborates further on each of these options, which could be integrated in ISDS under an arbitration or court-based system, and could also potentially be relevant for other types of proceedings such as state-to-state dispute settlement.

## 1. Enable participation

Most jurisdictions provide for mandatory and/or permissive intervention by third parties. Examples of jurisdictions that provide for intervention include Angola,<sup>32</sup> Argentina,<sup>33</sup> France,<sup>34</sup> Germany,<sup>35</sup> India,<sup>36</sup> Russia,<sup>37</sup> Senegal,<sup>38</sup> Switzerland,<sup>39</sup> and the United States.<sup>40</sup> Some international dispute settlement mechanisms also provide for intervention in certain circumstances.<sup>41</sup> For illustrative purposes only, Box 1 discusses in greater detail arrangements applicable in the United States.<sup>42</sup>

### *Box 1: Third-party participation in the United States*

US federal laws provide a range of procedural mechanisms to protect the rights of third parties potentially affected by disputes. The rules also aim that to ensure the effectiveness, fairness, and quality of the outcome between the disputing parties, which could otherwise be undermined if, for instance, individuals or entities are crucial to complete resolution of the case or determination of relief but are not parties to the dispute. Relevant rules include those addressing:

- **Intervention** by interested or affected third parties;<sup>43</sup>
- Mandatory or permissive **joinder** by interested or affected third parties;<sup>44</sup>
- Where there is a dispute or ongoing litigation amongst several parties, **interpleader** rules enable a claimant or respondent to seek the participation of a third party for purpose of determining the third party's rights with respect to property at issue in the claim;<sup>45</sup> and
- **Dismissal** of cases where a non-party's rights will be affected by the proceedings but they cannot be joined.<sup>46</sup>

<sup>32</sup> Angola, Code of Civil Procedure.

<sup>33</sup> See e.g., Argentina, Code of Civil and Commercial Proceedings.

<sup>34</sup> See e.g., France, Code of Civil Procedure; Code Dalloz Civil Procedure; Dalloz Repertoire – Intervention; Dalloz Action – Intervention; Dalloz Repertoire – Amicus; Judicial Organisation Code.

<sup>35</sup> See e.g., Germany, Code of Civil Procedure.

<sup>36</sup> India, India's Code of Civil Procedure, First Schedule, Order I.

<sup>37</sup> See e.g., Russia, Code of Civil Procedure.

<sup>38</sup> See e.g., Senegal, Code of Civil Procedure. Compulsory/ non-voluntary intervention developed on the basis of judicial practice.

<sup>39</sup> See e.g., Switzerland, Code of Civil Procedure.

<sup>40</sup> US Federal Rules Civil Procedure, Rules 18-24.

<sup>41</sup> See e.g., Article 62 of the Statute of the International Court of Justice; Article 31 of the Statute of the International Tribunal for the Law of the Sea; and Article 10 of the World Trade Organization's Dispute Settlement Understanding.

<sup>42</sup> This jurisdiction was chosen because several authors are US lawyers and thus particularly familiar with US law.

<sup>43</sup> US Federal Rules Civil Procedure, Rule 24.

<sup>44</sup> US Federal Rules Civil Procedure, Rules 19, 20.

<sup>45</sup> See e.g., US Federal Rules Civil Procedure, Rule 22; Federal Statute 28 USC § 1335.

<sup>46</sup> See e.g., US Federal Rules Civil Procedure, Rules 19(a) and (b).

US federal and state laws include standards and mechanisms to evaluate the level at which a third party's interest in a claim is sufficiently significant to warrant intervention in a dispute.<sup>47</sup> US law and jurisprudence also outline the circumstances under which such intervention is permissible or required, and include mechanisms for dismissing claims when necessary parties cannot be joined.<sup>48</sup>

US courts have extended intervention to cover public interest organizations, stating that “[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported.”<sup>49</sup> In other words, a public interest group involved in supporting a particular measure can intervene in an action that seeks to challenge the legality of that particular measure. Similarly, the US courts have stated that environmental groups who have “participated in the administrative process by submitting comments and by appealing” a challenged measure had “easily” demonstrated an interest in litigation that supported their right to intervention.<sup>50</sup>

US courts have also addressed the issue of whether/when the government litigant is deemed to adequately represent or defend the rights of its nationals, and when intervention by those nationals is permissible or required to adequately protect their rights and interests in the relevant proceeding. US courts have concluded that: (i) the state is not assumed to represent all of its constituents' interests, and that the same litigation posture does not imply the same interest;<sup>51</sup> and (ii) alignment of interests at one point in time does not imply alignment at all stages: government policies may shift, leaving non-parties vulnerable.<sup>52</sup> Thus, intervention may be appropriate or even necessary to ensure that all relevant rights and interests are protected even with the state.

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<sup>47</sup> US Federal Rules of Civil Procedure, Rules 18-24.

<sup>48</sup> *ibid.*

<sup>49</sup> *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (1995).

<sup>50</sup> *Coalition of Ariz./N.M Counties for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 841 (10th Cir. 1996). See also *N.M. Off-Highway Vehicle All. v. U.S. Forest Serv.*, 540 F. App'x 877, 880 (10th Cir. 2013)

<sup>51</sup> “The government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation. In litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor. ‘Even the government cannot always adequately represent conflicting interests at the same time.’ [internal citations omitted]. This potential conflict exists even when the government is called upon to defend against a claim which the would-be intervenor also wishes to contest.” *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255-1256. In a separate case, a US District Court found that, in circumstances “[w]here a utility company's case could substantially affect electrical rates charged to consumers and small business owners” and the latter group was not adequately represented by the disputing parties (in this case the claimant utility company, and the defendant public utility commissioners), that public interest group and the public utility commissioners “did not have coextensive interests and served different, if overlapping, constituencies, so public interest group was allowed to intervene as of right.” *PG&E v. Lynch*, 216 F. Supp. 2d 1016, 53 Fed. R. Serv. 3d (Callaghan) 1376 (N.D. Cal. 2002).

<sup>52</sup> “Plaintiffs also maintain that, given the government's past conduct in this litigation, there is nothing to indicate it will not continue to vigorously represent the interest of the intervenors in defending the creation of the monument. However, ‘it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts.’ *Kleisslerv. United States Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998). The government has taken no position on the motion to intervene in this case. Its ‘silence on any intent to defend the [intervenors] special interests is deafening.’ *Conservation Law Found.*, 966 F.2d at 44.” *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255-1256, 2001 U.S. App. LEXIS 15533, \*26-27, 31 ELR 20796, 50 Fed. R. Serv. 3d (Callaghan) 757, 2001 Colo. J. C.A.R. 3619.



As the Working Group fulfils its resolve to take into account third-party participation in the next phase of its work, and while recognizing the specificities of each national and international legal system, the existence of legal arrangements for third-party intervention or joinder in a large number of national and international contexts provides the Working Group with empirical elements to reflect on what comparable arrangements might look like in an ISDS context.

In some jurisdictions where third parties can intervene in full and become a full-fledged party to the proceedings, they must also bear the costs of their intervention. For some affected third parties, such as indigenous and other communities affected by natural resource projects that give rise to ISDS disputes, assuming the costs of intervention in ISDS may effectively bar participation, as these groups often lack the necessary legal, technical, and financial resources. This means that, if the Working Group explores possible arrangements to enable meaningful participation of affected third parties in ISDS, it should also consider rules on allocation of costs and legal and other support facilities. Ongoing initiatives are exploring options and mechanisms to address legal support gaps for rights holders affected by international investment.<sup>53</sup>

## 2. Dismiss claims

Many national legal systems recognize that it may be impossible or impractical for a third party to intervene in a proceeding, and consequently make provision in these cases for the dismissal or reframing of claims that could otherwise affect third parties.<sup>54</sup> In international law, rules regarding dismissal are grounded in the approach the International Court of Justice (ICJ) took in the *Monetary Gold* case (“*Monetary Gold* principle”).<sup>55</sup> The *Monetary Gold* principle has been invoked by a number of states before international and regional courts and tribunals.<sup>56</sup>

National and international legal systems also outline the factors that courts and tribunals must consider in making their dismissal determination. Relevant considerations include:<sup>57</sup>

- The extent to which the court’s determination might prejudice the third party, or the disputing parties in the third party’s absence;
- The extent to which such prejudice could be reduced or avoided by reframing the claims, arguments, or remedies;
- Whether a determination rendered in the third party’s absence would be adequate;
- Whether the claimant would have an adequate remedy if the claim were dismissed due to non-joinder of the third party.

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<sup>53</sup> See e.g., Sam Szoke-Burke and Kaitlin Y. Cordes, ‘Innovative Financing Solutions for Community Support in the Context of Land Investments’ (CCSI, 2019) <<http://ccsi.columbia.edu/2019/03/22/innovative-financing-solutions-for-community-support-in-the-context-of-land-investments/>>.

<sup>54</sup> See e.g., US Federal Rules of Civil Procedure, Rule 19(b).

<sup>55</sup> *Monetary Gold Removed from Rome in 1943* (Italy v France, UK and US) (Preliminary Question) [1954] ICJ Rep 19, 32. In *Monetary Gold*, the ICJ stated that it could not exercise its jurisdiction over matters when a third state’s “legal interests would not only be affected by a decision, but would form the very subject-matter of the decision” (*Monetary Gold*, 32). In reaching this conclusion, it relied on the principle of state consent to jurisdiction (see pp. 32-33).

<sup>56</sup> For commentary, see e.g., Ori Pomson, “Does the Monetary Gold Principle Apply to International Courts and Tribunals Generally?” *Journal of International Dispute Settlement*, Vol. 10(1) (2019).

<sup>57</sup> This example comes from the US context, and is set forth in US Federal Rules of Civil Procedure, Rule 19(b).

In an ISDS context, impossibility or impracticality for a third party to intervene in the proceedings may result from or be exacerbated by, for example:

- The costly and complex nature of proceedings;
- Arbitration is often held in a location far from the site of the relevant investment project;
- The proceedings are likely governed by substantive and procedural rules that differ from, are less known to (and could be less favorable than), those otherwise governing the non-parties' claims;
- The arbitration may be conducted in a language other than the language of the host country or affected third parties;
- The disputing parties may not have consented to joinder by the third party; and
- The instrument governing the powers of the tribunal proscribes joinder of third parties or restricts the tribunal's ability to take jurisdiction over arguments made by third parties.<sup>58</sup>

Thus, while intervention may serve important aims, it may not always be the right solution for relevant disputing parties and/or third parties. Mechanical reliance on intervention, whether of a permissive or mandatory nature, may generate concerns, including that it could force third parties to join potentially costly and physically remote proceedings in order to protect their rights and interests, and that it could create further barriers for those who already experience legal, financial, and technical hurdles in seeking justice for business-related harms. Rules requiring dismissal of cases would therefore be relevant to situations where a dispute affects the rights of third parties and these parties are unable or unwilling to join the ISDS proceedings.

### 3. Reframe claims, arguments, and/or remedies

Where the rights of third parties may be affected but such parties cannot or will not intervene or be joined, and the claims cannot or should not be dismissed, another approach envisaged by legal systems is for the claims and/or requests for relief to be reframed in ways that avoid or minimize impacts on third parties.<sup>59</sup> In an ISDS context, while investment treaties often affirm that the awards are binding on the parties only, awards can in practice undermine proceedings and/or the outcomes of separate legal disputes between the investor and investment-affected rights holders, or the state and those rights-holders.<sup>60</sup> Possible arrangements for reframing the contours of an investor-state dispute may involve, for example, requiring claimants to reformulate the claim or the legal arguments underpinning it, and/or to reshape the remedies sought (including with regards to injunctive and declaratory remedies).

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<sup>58</sup> See, e.g., EU-Mexico Global Agreement in Principle, Resolution of Investment Disputes, art 2 (Scope) (stating that the dispute settlement applies to disputes between a treaty Party and claimant of the other Party, arising from certain Party obligations set forth in the treaty, and indicating that the “Tribunal constituted under this Section shall not decide claims that fall outside the scope of this Article”); EU-Vietnam Investment Protection Agreement, ch 3 (Dispute Settlement), art 3.27(1) and (3) (similarly cabining the types of claims that tribunals under the ISDS section can review).

<sup>59</sup> See e.g., US Federal Rules of Civil Procedure, Rule 19(b)(2).

<sup>60</sup> See e.g., *von Pezold v. Zimbabwe* (n 18). *Chevron v. Ecuador* (n 19), Second Partial Award on Track II, 30 August 2018 [7.36] (dismissing concerns regarding the implications of the tribunal's award for non-parties by saying that its decisions could not be “legally binding upon any” of those non-parties); cf 4 Moore's Federal Practice – Civil § 19.02 (when discussing whether a non-party is “necessary” under US rules of procedure, noting that although a non-party may not “be bound as a legal matter by [the] judgment, as a practical matter it will probably have to sue to vindicate its interest”).

## Ways forward

The examples discussed in this submission provide guidance for possible reform options the Working Group may wish to consider in Phase 3 of its mandate. Options include enabling participation, and/or requiring dismissal or reframing of claims. At stake is not only a concern about ensuring that the rights of third parties are protected in comparable ways to the approaches used in many national and international legal systems – but also a concern about ensuring that ISDS dispute resolution produces fair, efficient, coherent, and consistent solutions.

Reforms could be adopted in procedural rules and treaties, including a multilateral instrument modelled on the Mauritius Convention, which would amend existing bilateral and multilateral treaties. Procedural tools for addressing issues of third parties' rights could be designed to be incorporated within traditional ISDS, as well as in the context of more encompassing multilateral reforms of the system. Some approaches, such as clarification of the role of a *Monetary Gold*-type principle, could potentially be advanced through interpretive statements or agreements clarifying existing investment treaties or aspects of treaties governing enforcement, such as the “public policy” ground for resisting enforcement under the New York Convention.

These and other possible approaches have advantages and disadvantages, and may involve tradeoffs between ease of adoption and effectiveness of the solution. While an interpretive clarification, for instance, might be relatively easy for a state to issue, its ability to shape outcomes in particular cases is not certain. Additionally, even agreement by states parties to an investment treaty on such a clarification of that agreement will not necessarily provide a binding outcome or a comprehensive solution to the relevant issues. Reforming arbitral rules to provide clearer dictates to tribunals could have limited effect under existing treaties, if states or disputing parties opt to apply a different set of arbitration rules, or the investor and state agree to modify the applicable arbitration rules. And a Mauritius Convention-type treaty might involve relatively long timeframes if ratifications are slow.

In the short term, Working Group member and observer states may wish to consider, based on their experiences, the experiences of other states, and the experiences and insights of other stakeholders, how ISDS intersects with the rights and interests of affected and interested third parties, and what reforms to ISDS (which may include shifting towards other alternatives) are necessary and appropriate to ensure dispute settlement is advancing its objectives and meeting national and international governance criteria. In this context, states may also wish to reflect on how third-party participation issues are addressed by the legal systems applicable in their own jurisdiction, asking such questions as: Which relevant rules apply, and how are they working in practice? Do the issues those rules seek to address also arise in ISDS? Do the rules provide insights for possible approaches in ISDS?

We commend the Working Group for putting these issues formally on the agenda and look forward to further discussion and engagement on these issues.

## Additional resources

Jesse Coleman, Kaitlin Y. Cordes, and Lise Johnson, [“Human Rights Law and the Investment Treaty Regime.”](#) in Surya Deva and David Birchall (eds) *Research Handbook on Human Rights and Business* (Edward Elgar Publishing Ltd., forthcoming 2019).

CCSI, [Investment Disputes and Affected Third Parties: Issues and Options for Reform](#) (Slides, April 2019)

Lisa Sachs and Lise Johnson, [“Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities.”](#) in José Antonio Ocampo (ed) *International Rules and Inequality: Implications for Global Economic Governance* (Columbia University Press), 2019-01.

CCSI and the UN Working Group on Business and Human Rights, [Impacts of the International Investment Regime on Access to Justice](#) (Roundtable Outcome Document, September 2018)

Brooke Guven and Lise Johnson, [“The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest”](#) (Investment Treaty News, March 2017)

Lorenzo Cotula and Terrence Neal, [“UNCITRAL Working Group III: Can Reforming Procedures Rebalance Investor Rights and Obligations?”](#) (South Centre, 2019)

Lorenzo Cotula and Nicolás M Perrone, [“Reforming Investor-State Dispute Settlement: What About Third Party Rights?”](#) (IIED, 2019)

Lorenzo Cotula and Mika Schröder, [“Community Perspectives in Investor-State Arbitration”](#) (IIED, 2017)