Columbia Center on Sustainable Investment

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The Impacts of ISDS on Non-Parties and Options for Reform: Comments by Lise Johnson on Day 2 of UNCITRAL Working Group III's Fourth Intersessional Meeting

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Thank you very much to the government of Korea, and to the Secretariat, for this invitation, and to colleagues of Working Group III for your time. The Working Group's commitment to these cross-cutting issues, and the recent reiteration of the importance of these topics at the Commission session, is crucial. These cross-cutting issues have featured particularly prominently in the backlash against ISDS, as governments and others have raised concerns about ISDS's impacts on regulatory space and on power imbalances among investors, states, and other stakeholders. These issues are crucial to whether and how investment governance contributes to or undermines sustainable development, and as comments by a number of delegations reflect, they warrant a central place in the WG agenda.

I will be speaking about the impacts of ISDS on the rights and interests of non-parties and ways of addressing those impacts; these comments are further detailed in a submission that we have made to the Working Group with the International Institute for Sustainable Development and the International Institute for Environment and Development.[1]

I want to elaborate on two main points:

First, I will highlight ways in which ISDS can negatively affect the rights and interests of non-parties; second, I will outline some of the reform options that can potentially be used to help avoid those harms.

Investor–state arbitrations often affect the rights and interests of other actors that are not formally party to the dispute. An obvious example is where the investor is using the ISDS proceeding to claim rights over property that are subject to competing claims by non-parties. To the extent that the investor's claim over property is accepted by an ISDS tribunal, the competing claim is rejected. This factual scenario can be seen in ***Border Timbers and von Pezold v Zimbabwe***,[2] as an example.

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[1] I thank Lorenzo Cotula and Lisa Sachs for their comments on these remarks.

[2] ICSID Case No. ARB/10/15, Award, 28 July 2015 (subsequently upheld on annulment). For a discussion of this case, see "Undermining the Right to Land and Perpetuating Colonial Wrongs: *Border Timbers and Von Pezold v. Zimbabwe* (CEO, TNI & FOEE, 2019).

But there are other examples. In ***Dan Cake v Hungary***,[3] the debtor missed court deadlines relevant to presenting its insolvency plan; ultimately, it presented a plan that the domestic court deemed not serious, and so proceeded with liquidation; the debtor objected via ISDS, and the tribunal agreed the domestic court had erred; but the ISDS process, which only heard the complaints of the covered debtor, did not enable consideration of the rights of the claimant's creditors.

Awdi v. Romania[4] is also relevant. One aspect of the dispute arose out of the fact that a national entity gave a concession purporting to grant the concessionaire long-term rights to use municipal lands. Affected municipalities brought constitutional claims challenging the interference with their rights, and ultimately succeeded. The investor then sued in ISDS, and the tribunal declared that the government's failure to undo the effects of that constitutional decision violated the investment treaty. The municipalities that had prevailed at the domestic level were not a party to the ISDS case.

My final example is ***Chevron v. Ecuador***.[5] This is the well-known case where affected Lago Agrio plaintiffs were both targeted by, and excluded from, the investor-state claim. The claimants used the ISDS process to challenge an award for environmental harm suffered by non-parties to the ISDS dispute. A core issue was the legality and validity of a settlement agreement purporting to waive the Lago Agrio plaintiffs' and others' rights against the oil companies. The validity of the settlement agreement was determined by the tribunal without the non-parties being able to participate. The ISDS tribunal also ordered Ecuador to take all steps necessary, both within and outside Ecuador, to prevent the Lago Agrio plaintiffs from enforcing the domestic judgment they obtained against the investor claimants after years of litigation. The affected communities were, and continue to be, excluded from the ISDS process.

There are many such cases.

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 non-party rights do not arise. But there are many circumstances where the interests and objectives of a respondent state and of affected non-parties with discrete rights at stake may diverge, making the state unwilling or unable to present arguments to advance the rights or interests of non-parties.[6]

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[3] ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (subsequently upheld on annulment).

[4] ICSID Case No. ARB/10/13, Award, 2 March 2015.

[5] PCA Case No. 2009-23. For a brief discussion of this aspect of the case, see, e.g., Lise Johnson & Lisa E. Sachs, *Investment Treaties, Investor-State Dispute Settlement, and Inequality: How International Investment Treaties Exacerbate Domestic Disparities*, International Rules and Inequality: Implications for Global Economic Governance, José Antonio Ocampo, Ed., Columbia University Press, 2019 (2019) 11-12 https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/106/>.

[6] Indeed, there are often contexts when it is impossible for a state to represent *all* of the interests of *all* of its stakeholders, which then requires empowering stakeholders to exercise their own voice and take independent action to protect their rights and interests. U.S. cases grappling and addressing this issue include Utah

Current ISDS rules do not provide for effective or meaningful participation of non-parties in investment disputes. Third parties can request permission to make a submission as an amicus curiae, or "friend of the court," and an arbitral tribunal may, at its discretion, accept such a request. But amicus curiae submissions are not designed to grant effective voice or protection for actors whose rights are directly at stake in a dispute.

So this brings me to part two, the issue of possible reform. Some might be preventive and relate to reforms already discussed in this intersessional. For instance, if exhaustion were required, ensuring that more cases first went to, and were potentially resolved before, domestic courts, this might better ensure that all relevant rights holders are party to the proceedings.[7] Additionally, clearer standards on dismissal of cases without legal merit could bring an early halt to certain types of cases, such as claims that are effectively appeals by investors against adverse domestic court decisions in disputes between the investors and other private parties. And of course, as we've addressed in a separate submission, there is the opportunity to use this UNCITRAL process to facilitate an orderly shift from ISDS to state-to-state dispute settlement for all or some claims, which can help limit the circumstances in which these issues arise.

Other potential approaches include:
• Enabling participation by interested or affected third parties through intervention, or joinder;
• Requiring dismissal of claims where such parties are unwilling or unable to intervene or be joined; and
•Reframing of claims, arguments, and remedies, for instance to bar claims for relief that seek to order the government to take property from a non-party and give it to the investor-claimant.

Various domestic and international jurisdictions can provide insights and guidance as the Working Group further explores these issues. We also discuss them more in our submission to UNCITRAL.[8]

Each option has advantages and disadvantages. The costs of intervention in ISDS, for instance, may effectively bar participation by those without the necessary legal, technical, or financial resources. As national legal systems recognize, it may be impossible or impractical

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Association of Counties v. Clinton, 255 F.3d 1246, 1255 (10th Cir. 2001); Kleissler v. United States Forest Service, 157 F.3d 964, 973-974 (3rd Cir. Ct. App. 1998); Am. Farm Bureau Fedn v. United States EPA, 278 F.R.D. 98 (M.D. Pa. 2011). For a discussion of issues this rases in the context of governments' efforts to settle claims against them, see Michael T. Morley, Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases, 16 U. Pa. J. Const. L. 637 (2014).

[7] However, to the extent that investors are able to use ISDS to effectively appeal against domestic court judgments, these risks of interested and affected parties being unfairly excluded from the ISDS proceedings can arise even when exhaustion is required.

[8] We encourage and invite feedback on this proposal. Should you have any comments, please provide them here.

for a third party to intervene in a proceeding. The appropriate response in such cases may be to dismiss the case, a particular claim, or request for relief.

It is crucial to use the opportunity presented by this United Nations initiative to ensure that governance of investment, including the dispute resolution phase of governance, is consistent with human rights, good governance, and principles of equality before the law. As you have recognized, and as was reiterated through support for the cross-cutting issues at the recent Commission session, addressing the issue of impacts on non-parties is essential to that exercise.

Thank you.