# Investment Disputes and Affected Third Parties

## Connections, Issues, and Options for Reform

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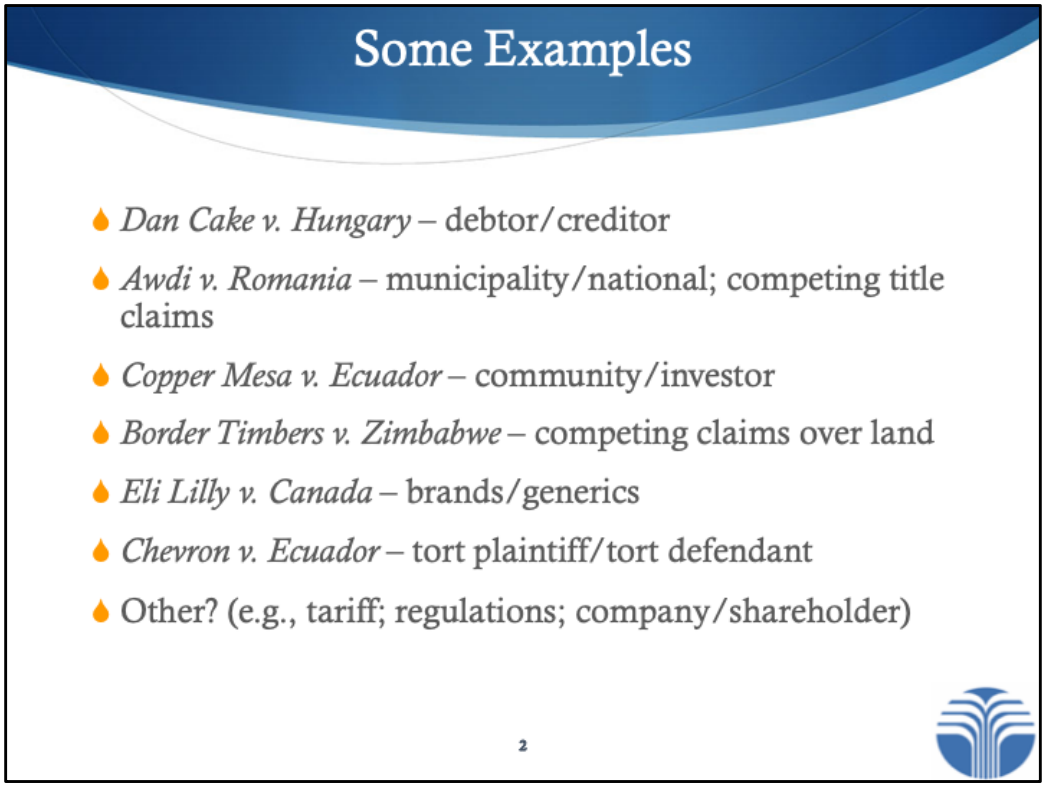



**Dan Cake v Hungary**: Debtor missed court deadlines relevant to presenting plan; ultimately presented a plan court deemed not serious, proceeded with liquidation; debtor objected – but what about creditors interested in the timely process? ***Creditor not a party.***

**Awdi v. Romania**: Different types of disputes. One was when national entity gave a concession that allegedly purported to grant the concessionaire long-term rights to use municipal lands. Municipalities brought constitutional claims; ultimately succeeded; investor sued – and tribunal declared that government failure to undo the effects of that constitutional decision violated the treaty. ***Municipalities not a party.***

**Copper Mesa v. Ecuador**: From mid-1990s through to events triggering dispute, communities expressed concern re development of project. Some concern about the project itself, and some about the lack of information/consultation. Pursued relief before World Bank Inspection Panel; constitutional reforms; domestic legal proceedings; action against investors and board member in the home state; stock exchange in the home country of the investor (Canada); National Contact Point (NCP) process. For various reasons, including rules on corporate form that protected the investor against suit, nothing was successful. Only had voices heard once they protested and physically blocked access. Government took action to halt the project; investor sued in a forum, ISDS, where the local communities could not be party. Tribunal found the government liable for, *inter alia*, not doing enough to support the investor vis-à-vis communities. ***Affected communities not a party.***

**Border Timbers v Zimbabwe**: Claim concerned a land dispute that arise in the context of a land reform program that originally sought to address historical injustices. Investor claimants

held a number of properties, including agricultural plantations, which they lost during implementation of land reform. Sought restitution and full legal title and exclusive control, to the exclusion of third party use, including pastoralists with ancestral claims over the lands. Application made by a civil society organization and four chiefs of communities affected by the underlying investments noted that the properties were located on ancestral lands, and the tribunal must therefore take into account (in considering a request for restitution, full title, and exclusive control) the land rights of indigenous communities under international human rights law. Despite acknowledging that the determinations made by the tribunal could well "have an impact on the interests of the indigenous communities," the tribunal considered that the issues they raised were beyond the scope of the dispute, and also fundamentally conflicted with the claims made by the investor, implying that the petitioners were not sufficiently neutral to be considered "friends of the court". Denied participation as *amicus curiae*. The tribunal ordered restitution of the seized property, including water rights associated with the properties. Ordered Zimbabwe to reinstate "full (unencumbered) legal title to, and exclusive control" over lands also claimed by third parties. The tribunal also required payment of damages for damages to the lands/ assets and lost productivity to the tune of US$ 65 million (plus interest) to the shareholder claimants and US$ 30 million (plus interest) to the corporate claimants . Moreover, if Zimbabwe failed to restitute the lands within 90 days, the claimants would receive an additional US$ 321 million. ***Affected communities excluded.***

Update**:** According to one of our interviews, at the domestic level, the communities sought to usufruct rights protected under domestic law. Both the investor and the state sought to interfere with the claim at the domestic level on the basis of the ICSID tribunal's award. Their efforts are apparently still ongoing. It is not clear whether Zimbabwe has returned the lands, but a challenge to the award failed in November 2018 (annulment committee ruled in favor of the investor).

**Eli Lilly v. Canada**: Case arose out of the courts' decision in local litigation between a generics firm and Eli Lilly. The generics firm – whose award (and relevant doctrine), was being challenged – could not be a party to the ISDS dispute. ***Affected third party firm excluded.***

**Chevron v. Ecuador**: Well known case where affected Lago Agrio plaintiffs excluded from investor-state claim. Case involves a challenge to an award held by non-parties. At core of issue was legality/validity of settlement agreement by the government purporting to waive non-parties' rights. That issue was determined by the tribunal without the non-parties being able to participate. Tribunal ordered Ecuador to take all steps necessary, both within and outside Ecuador, to prevent affected groups from enforcing a domestic judgment obtained against the investor claimant. ***Affected communities excluded.***

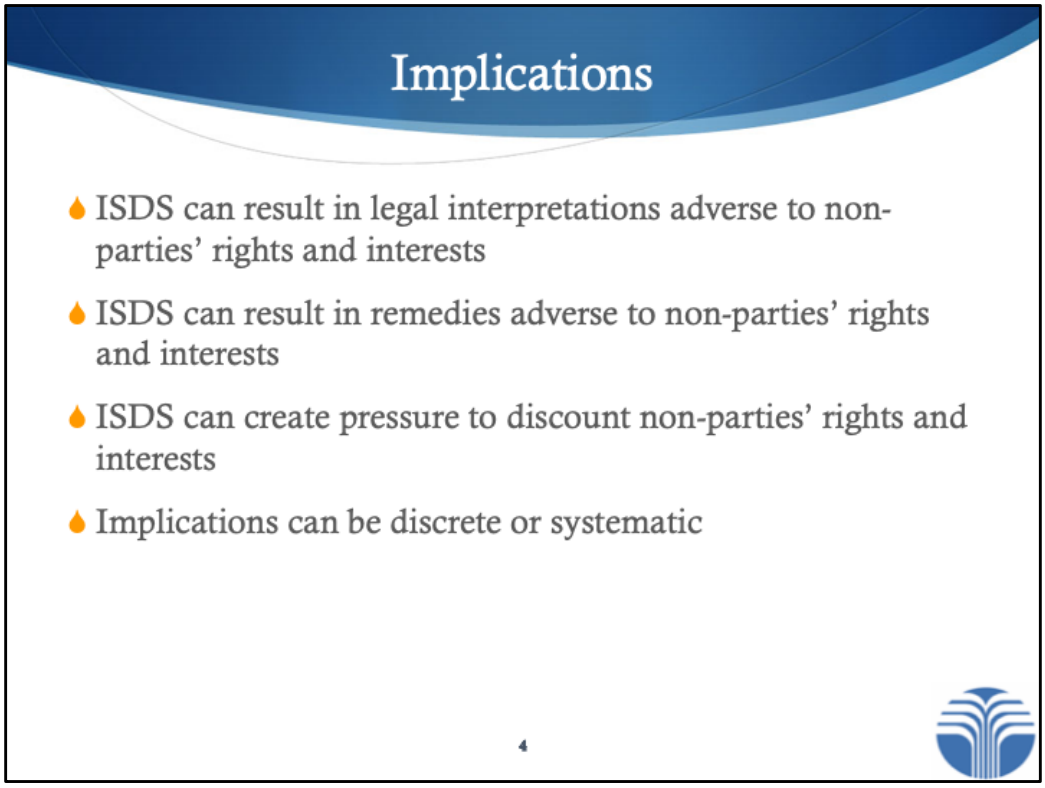
**South American Silver Mining v. Bolivia**: In another recently concluded case against Bolivia, a mining company sought restitution of a project and compensation or, alternatively, close to US$ 400 million in compensation. The project is located in an area in which 46 indigenous communities live. The investor succeeded in its claim but obtained sunk costs (US$ 18.7 million) rather than restitution, despite allegations of egregious misconduct by the investor in

its interactions with affected communities (including attempts to divide and criminalize local leaders). ***Affected indigenous communities excluded.***

# Non-Exclusive Circumstances Triggering Third-Party Rights and Interests

- Dispute arises out of discrete competing claims in different fora, e.g.:
  - *TransCanada v. United States*
  - *Copper Mesa v. Ecuador*
- Dispute arises out of discrete competing claims in the same forum – collateral attacks on underlying judgment, e.g.:
  - *Eli Lilly v. Canada*
  - *Infinito v. Costa Rica*
  - *Chevron v. Ecuador*
- Dispute involves competing rights and interests
  - Particularly acute relating to property rights – which are often zero-sum
  - In policy argument (and settlement decisions) the state doesn't necessarily represent the interest of the non-parties (actual or potential conflicts; or potential non-alignment)
- Dispute seeks relief (incl. injunctive or declaratory relief) impacting non-parties, e.g.,
  - *Border Timbers v. Zimbabwe*
  - *Chevron v. Ecuador*






Investor-state claims can result in:

- Legal interpretations that are adverse to non-parties' rights and interests (e.g. *Awdi v. Romania*)
- Remedies that are adverse to non-parties' rights and interests (e.g. *Border Timbers v. Zimbabwe; Chevron v. Ecuador*)
- Pressure to discount non-parties rights and interests (e.g. broader chilling or provoking of host state action to prioritize investor interests/ rights over interests/ rights of non-parties – e.g. chilling adoption of legislation to prohibit metal mining in El Salvador due to ongoing claim and threat of other claims; legislation had been advocated for by coalition of civil society groups, affected communities, academia, etc.)

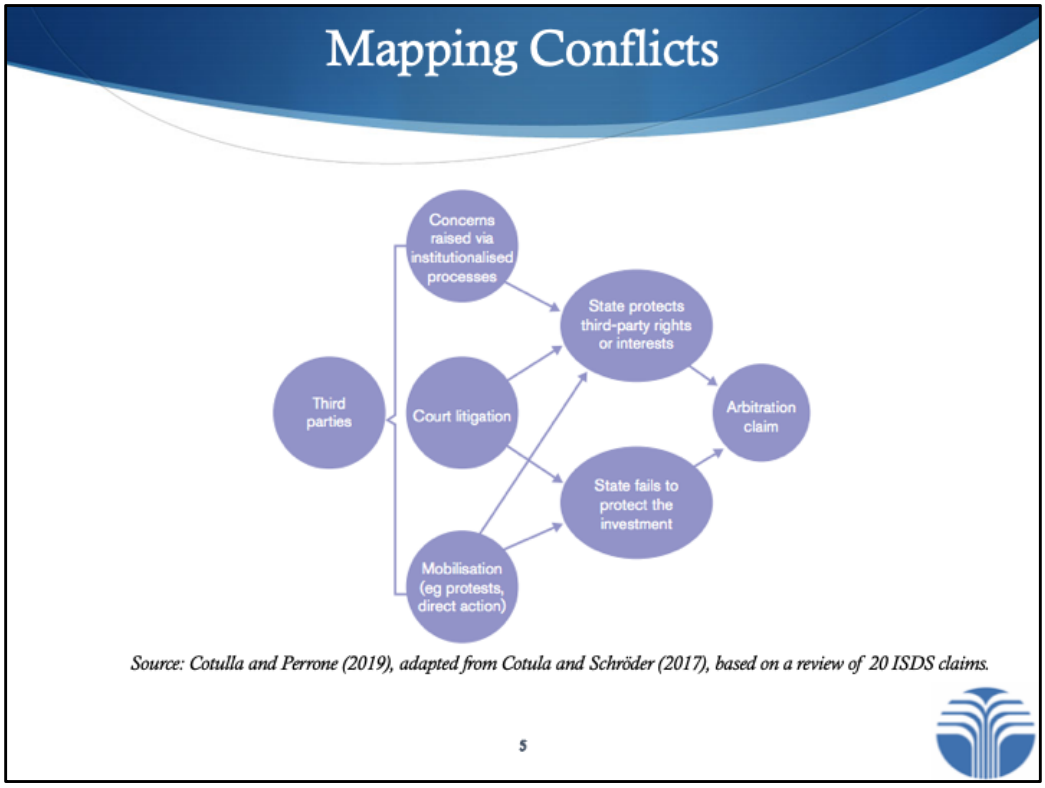
These implications can also be discrete or systematic:

- *Chevron v. Ecuador* provides an example of a more discrete implication, where the relief ordered targeted a domestic judgment obtained by non-parties to the investor-state dispute.
- Where a tribunal makes a general determination/ pronouncement regarding what a state should/ could have done vis-à-vis its treatment of investors in the face of community protest, for example, that can send signals to host states and create systemic implications for host state treatment of affected groups, civil society, etc. For example, in *Copper Mesa v. Ecuador*, the tribunal stated:

*"It is of course difficult to say now what it should have done to resolve all the Claimant'*

*difficulties and, still more so, whether what anything it could have done would have changed the Claimant's position for the better.* ***Plainly, the Government in Quito could hardly have declared war on its own people. Yet, in the Tribunal's view, it could not do nothing****."* [Award, para. 6.83]

This statement regarding host state conduct could send a potentially systemic signal. Could also exacerbate systemic power asymmetries that often naturally exist at the domestic level between investors (economic interests) and affected groups with other interests.

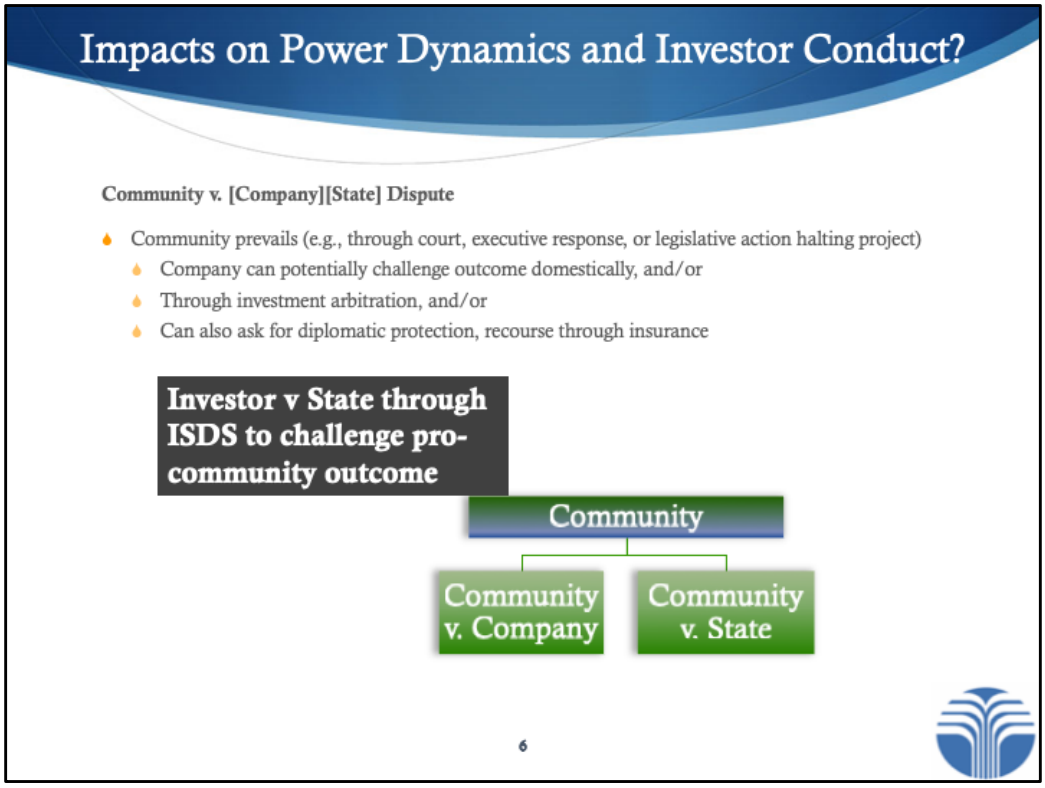



Source: Lorenzo Cotula and Nicolás M Perrone, "Reforming investor-state dispute settlement: what about third-party rights?" (IIED, 2019) <https://pubs.iied.org/17638IIED/?c=law>

This visual depicts **how third party rights can be affected by/ arise in the factual fabric of investor-state claims**, as noted by Cotula and Perrone (2019), and Cotula and Schröder (2017). As noted by Cotula, Perrone, and Schröder, several investor-state claims have arisen due to the following fact patterns:

- Government offers incentives and facilitates establishment of the project
- Affected groups may not have been consulted or have had an opportunity to voice concerns and/ or assert rights
- They seek to do so by mobilizing, protesting, or litigating against the investor and/ or state entities to either enforce their rights or resist the project
- Investor-state claims have been triggered where the state, in response to actions taken by affected groups, review their initial position and take measures to respond to community concerns
- These measures may affect the investor/ investment
- Foreign investors respond by initiating an investor-state (bilateral) claim, even though the fact pattern reflects a trilateral relationship relevant to the project
- The interests of the affected groups may be at stake in the investor-state claim, in addition to their legal rights under domestic and/ or international human rights law
- Yet due to the bilateral nature of investor-state claims, they cannot meaningfully participate

See also Lorenzo Cotula and Mika Schröder, “Community perspectives in investor-state arbitration” (IIED, 2017) <https://pubs.iied.org/12603IIED/>

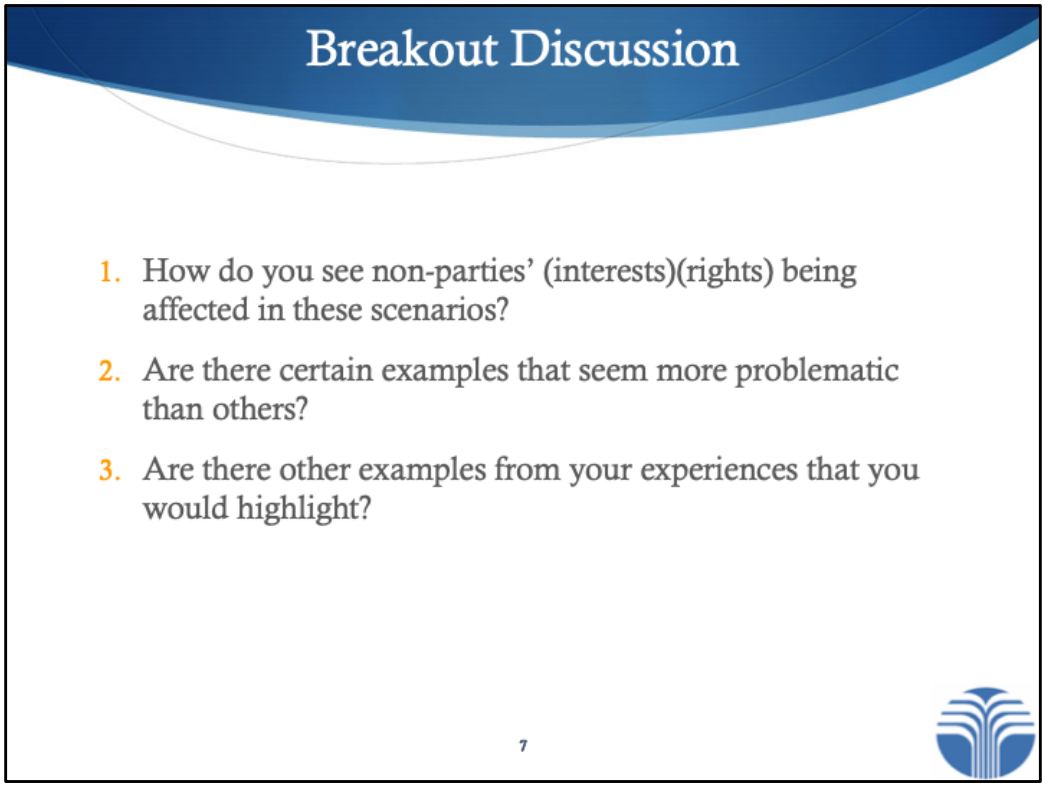



ISDS can also affect power dynamics and send signals regarding investor conduct:

- It enables investors to challenge favorable outcomes obtained by, for example, affected communities at any point.
- If a community prevails through domestic courts, executive response, or legislative action halting a project, the investor can:
    - Potentially challenge the outcome domestically
    - Challenge through investor-state arbitration
    - Seek diplomatic protection
    - And seek recourse through insurance

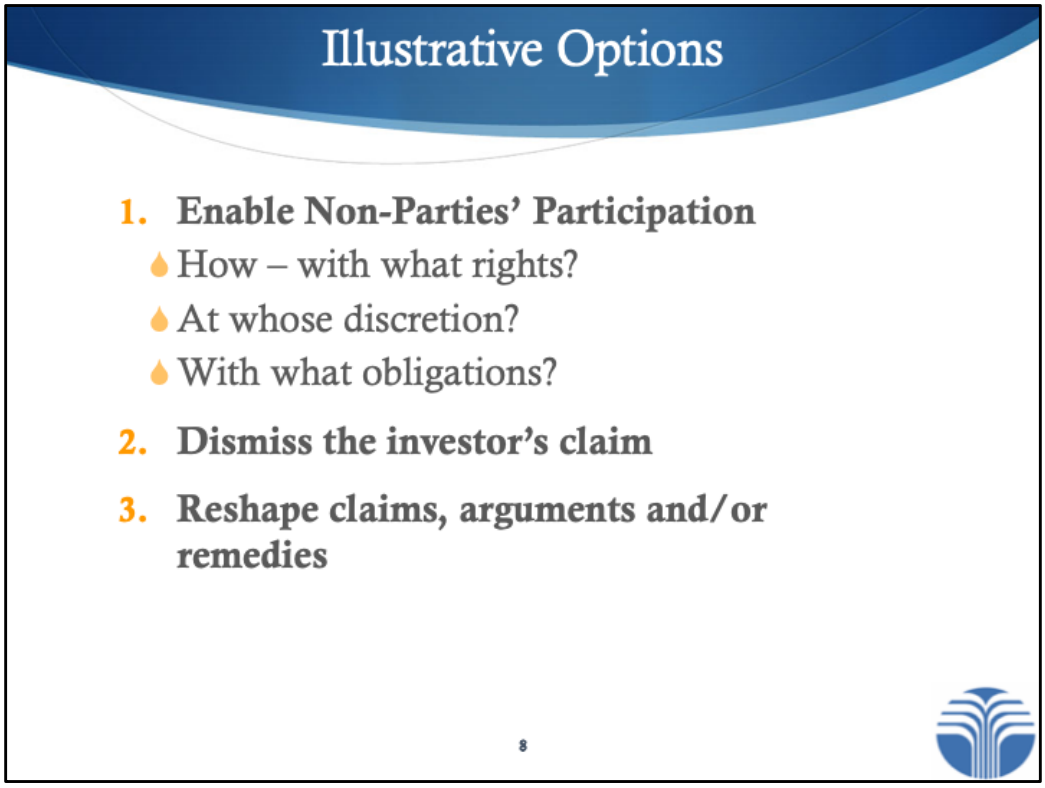
With respect to investor conduct:

- Tribunals have compensated investors despite recognizing that they failed to undertake adequate due diligence or otherwise engaged in misconduct (e.g. *Copper Mesa v. Ecuador; Silver Mining v. Bolivia*).
- What types of signals does this send to investors? What types of investments does the regime protect and encourage?




Breakout session:

- In small groups, discuss the questions on the slide.




How could the rights and interests of third parties be addressed?

**Option #1: Enable third parties to participate in investment disputes.**

Some questions that arise:

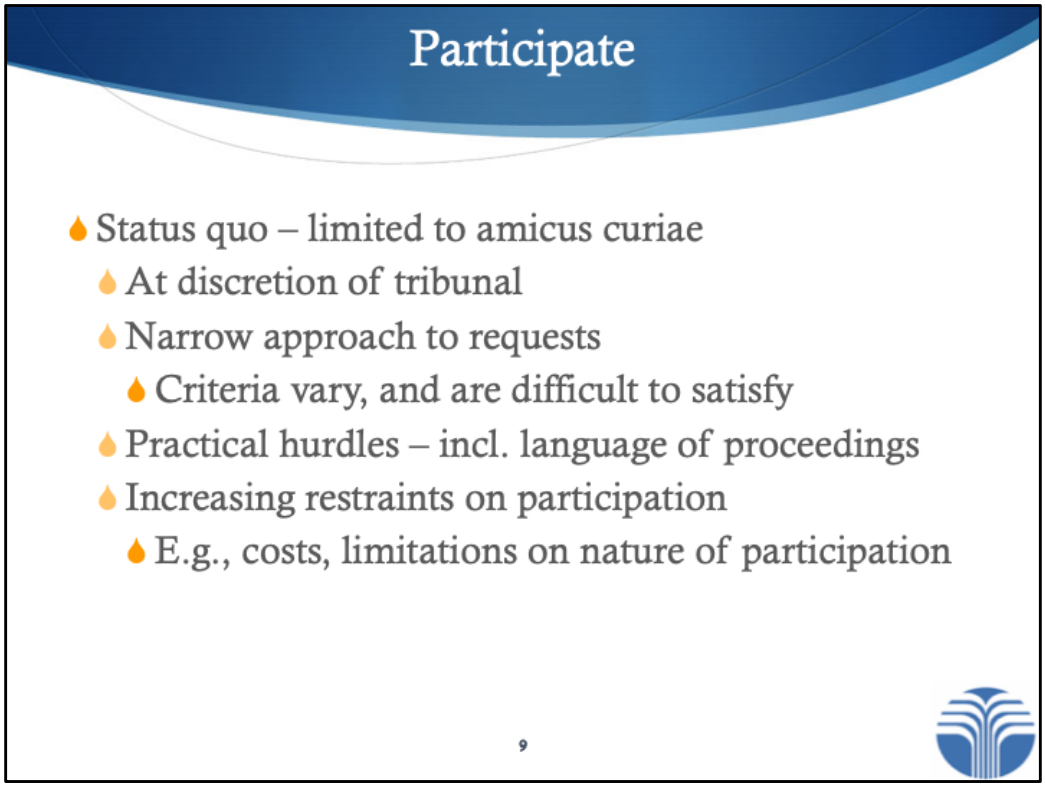
- How? With what rights? (e.g., as an amicus curiae or as a full party)
- At whose discretion? Who decides whether they participate? What test is applied?
- With what obligations? (e.g., to pay costs)

**Option #2: Dismiss the claim**

- Determine that it's not the forum for the investor's claim due to impacts on non-parties, and require determination in another forum (e.g. domestic courts)

**Option #3: Reshape claims, arguments, and/ or remedies**

- E.g. Carve out specific legal claims or requests for relief that affect rights/ interests of third parties? (e.g., tribunal's rejection of Ecuador's cross-claim in *Chevron v. Ecuador* on the ground that it raised non-parties' rights)

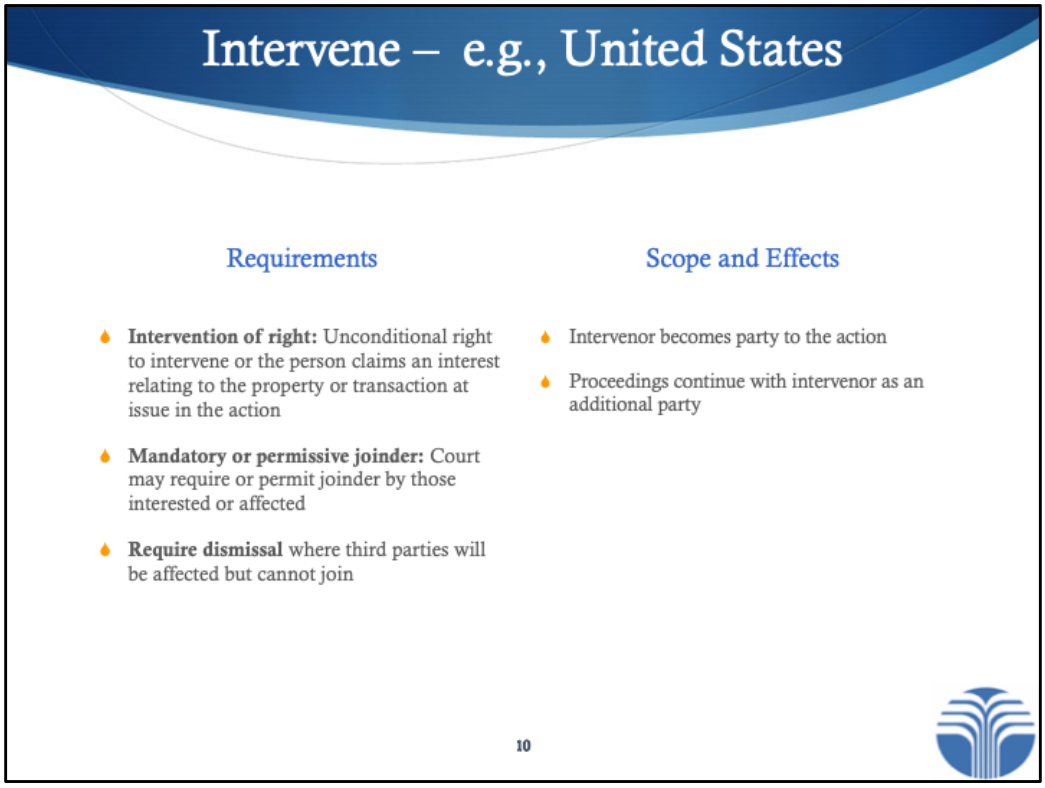



What is the status quo in ISDS?

- Participation as *amicus curiae*, or friends of the court/ tribunal
    - Participation is granted at discretion of tribunal
    - Presently, the approach to amicus participation raises concerns – the standard is vague and difficult to satisfy; when participation is granted, it may also be narrow and with obligations that deter engagement:
        - Amici need a sufficient interest, but one that is not too close (e.g., *Border Timbers v. Zimbabwe*)
        - Often required to remain neutral so as not to biased against a party, even if requirement is implicit
        - Need to add something new, but law firms representing disputing parties are often deemed to adequately raise/ address (legal) issues (*Bear Creek v. Peru*)
        - Need to add something new, but likely unable to identify what is new if pleadings, witness statements and exhibits are not available
        - Practical hurdles relevant to, e.g. affected communities include (i) language barriers (hearings/ documents – when available – often not translated into local or indigenous language; (ii) resource constraints; lack of legal and technical support; lack of financial support)
        - Potentially increasing restraints on participation
            - Possibility of cost award imposed against amicus curiae by tribunal (e.g., as considered, but then seemingly rejected after country input, by ICSID)

        - Limitation by tribunals of nature of *amicus* submissions – e.g. decision by one tribunal to limit submission to matters of fact, not law (e.g., *Gabriel Resources v. Romania*)

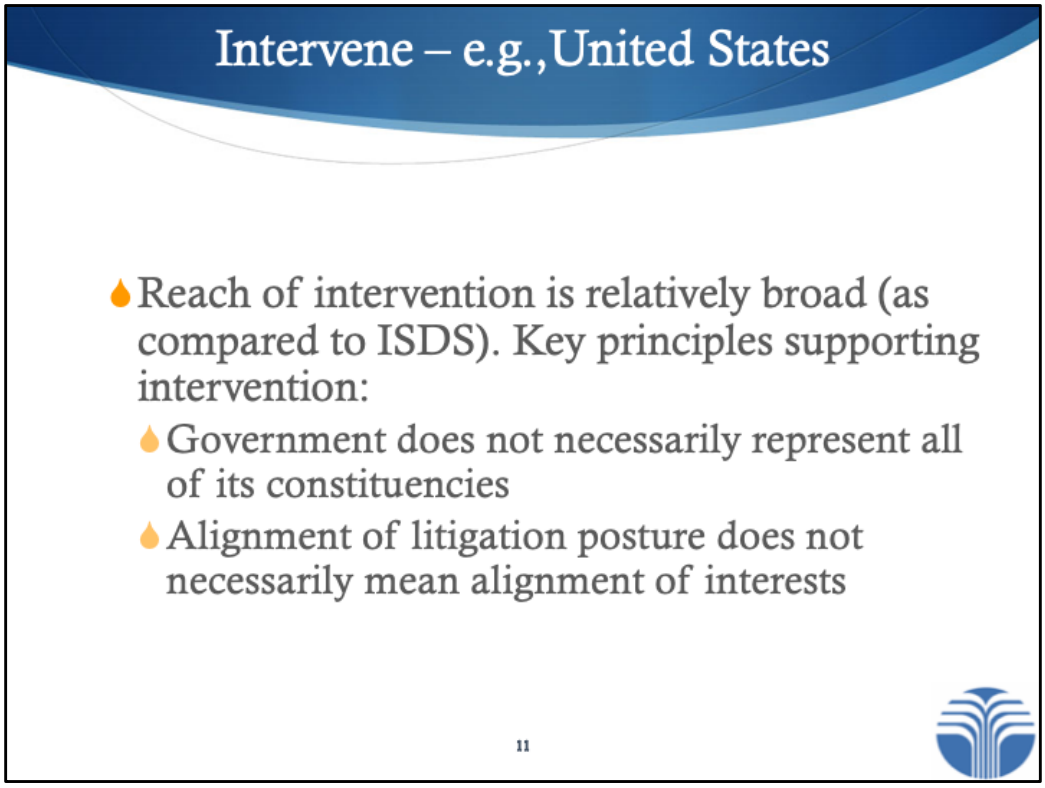
- Broader rights of intervention are not available, even when non-parties rights are at issue and/or stand to be affected




Beyond amicus participation, there is intervention/joinder.

In considering how third parties could intervene, we can look to domestic systems for examples of how intervention is facilitated and operates in practice. Many (or indeed most) domestic systems allow for intervention in a variety of circumstances.

The US courts apply a broad standard for intervention by third parties (next slide).




In terms of the **reach of intervention**, the US courts have clearly extended intervention to cover public interest organizations. Under the current ISDS system, such non-parties cannot obtain full standing in the adjudication, although their rights or interests are affected (or the rights/ interests of the groups they represent are affected), and they have a distinctive perspective relative to the claimant and respondent.

The US courts have said that:

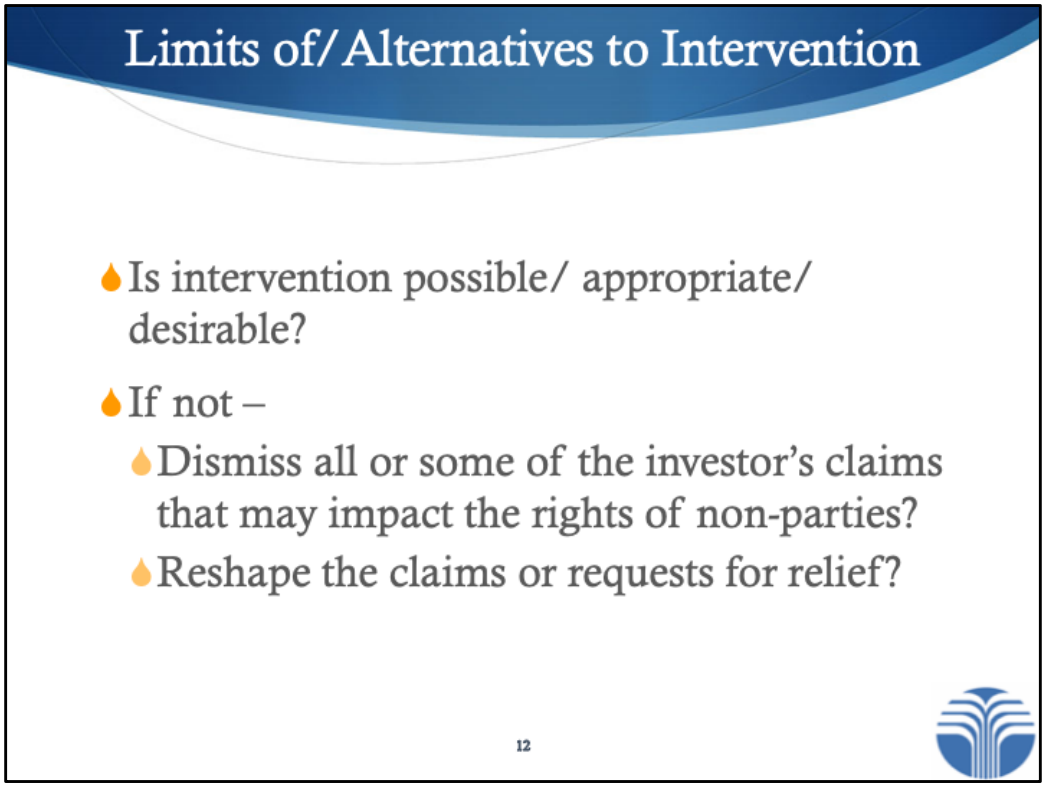
- **"[A] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported."** *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (1995).
- So a group – for example a public interest group – involved in supporting a particular measure can intervene in an action that seeks to challenge the legality of that particular measure.

Similarly, the US courts have said that:

- **Environmental groups that had "participated in the administrative process by submitting comments and by appealing [the challenged plan]" "easily" demonstrated an interest in later litigation supporting a right of intervention**.
- *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)

Also relevant, the US courts have said that the perspectives brought by third parties and the state do not necessarily align, and that the latter does not necessarily represent the former:

- **The state is not assumed to represent all its constituents' interests; same litigation posture does not mean same interest**.
    - "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.' Mausolf, 85 F.3d at 1303. 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.
- **Alignment of interests at one point does not mean alignment forever. Government policies may shift, leaving non-parties vulnerable.**
    - "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." Kleissler v. 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.




In considering the impacts on non-parties, it is important to also consider the practical hurdles many non-parties face (particularly in light of the broader context in which international investment projects take place) and whether third party intervention would actually be accessible for all affected third parties.

- In some cases, it would be unfair and impractical to **require** those who may be affected by an ISDS dispute to intervene in those proceedings in order to protect their rights or interests. Indeed, it may create further barriers to justice for those who already experience legal, financial, and technical hurdles in seeking justice for business-related harms.
- The proceedings are infamously costly and complex; 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 (and could be less favorable than) those otherwise governing the non-parties' claims; and the arbitration may be conducted in a language other than the language of the host country or relevant affected individuals or communities.
- Thus, instead of just focusing on rights of intervention, which may be feasible for well-resourced individuals or entities to exercise, **there is a need to consider rules and mechanisms requiring dismissal of cases, claims, and/or requests for relief that would impact the rights or interests of non-parties unable or unwilling to join the ISDS proceeding** – drawing on a Monetary Gold principle; or a doctrine that when there are necessary and indispensable parties that cannot be joined, the case must be dismissed.

There is some precedent for this approach in ISDS cases, but decisions to date send unclear and conflicting signals, and are inadequate to safeguard non-parties.

- In *Chevron v. Ecuador*, for instance, the tribunal rejected **Ecuador's cross-claims** on the ground that the government did not have standing to assert the relevant claims: those claims that the government was raising about environmental harm, the tribunal said, belonged to Ecuador's citizens individually, not the government. **This is an important recognition by an ISDS tribunal that that claims of a government (or its arguments, settlement decisions, and defenses) do not necessarily represent the claims or protect the interests of its citizens.**
- Similar reasoning has been used in the domestic context to allow private parties rights to intervene in and become party to processes involving their governments as litigants when those non-parties rights or interests may not adequately represented by a government. No such rights of intervention, however, are permitted in ISDS.
- In contrast to its concern about the rights and interests of non-parties in its dismissal of Ecuador's counterclaim, however, the tribunal showed a marked lack of concern about issuing relief that aimed to directly interfere with the rights of non-parties.
- A key issue in that case was whether Chevron could use ISDS proceedings – proceedings to which only it, its corporate affiliates, and Ecuador were party – to effectively nullify an award that private plaintiffs (the "Lago Agrio" plaintiffs) had secured against Chevron after decades of litigation. Ecuador, the Lago Agrio plaintiffs, and others raised concerns that it was wholly inconsistent with the rights of the Lago Agrio plaintiffs (and constitutional doctrines of separation of powers) for the ISDS tribunal to strip the Lago Agrio plaintiffs of the legal remedy they had obtained against Chevron, and to do so in an arbitration forum that the Lago Agrio plaintiffs had no right or ability (or potentially desire) to join.
- But, in brief treatment, the tribunal dismissed those arguments and granted Chevron's requests for declaratory and injunctive relief seeking to prevent the Lago Agrio plaintiffs from being able to enforce their award anywhere in the world.
- In awarding Chevron's requests for relief, the tribunal mentioned but failed to engage with the impact of its award on the rights and interests of non-parties, and has sent a loud and troubling signal to other foreign investors that if they do not like tort pending claims or awards secured against them by private plaintiffs in domestic court proceedings, they can use the privileged and closed mechanism of ISDS to seek to shut pending proceedings down or challenge awards granted.

(See, e.g., Chevron v. Ecuador, UNCITRAL, PCA Case No. 2009-23, Second Partial Award on Track II, August 30, 2018, paras. 9.20-9.97, Part X. See also Chevron v. Ecuador, Interim Award, January 15, 2012, at pp. 11 & 16; Chevron v. Ecuador, Second Interim Award, February 16, 2012, para. 3; Third Interim Award on Jurisdiction and Admissibility, February 27, 2012, paras. 4.59-4.71).

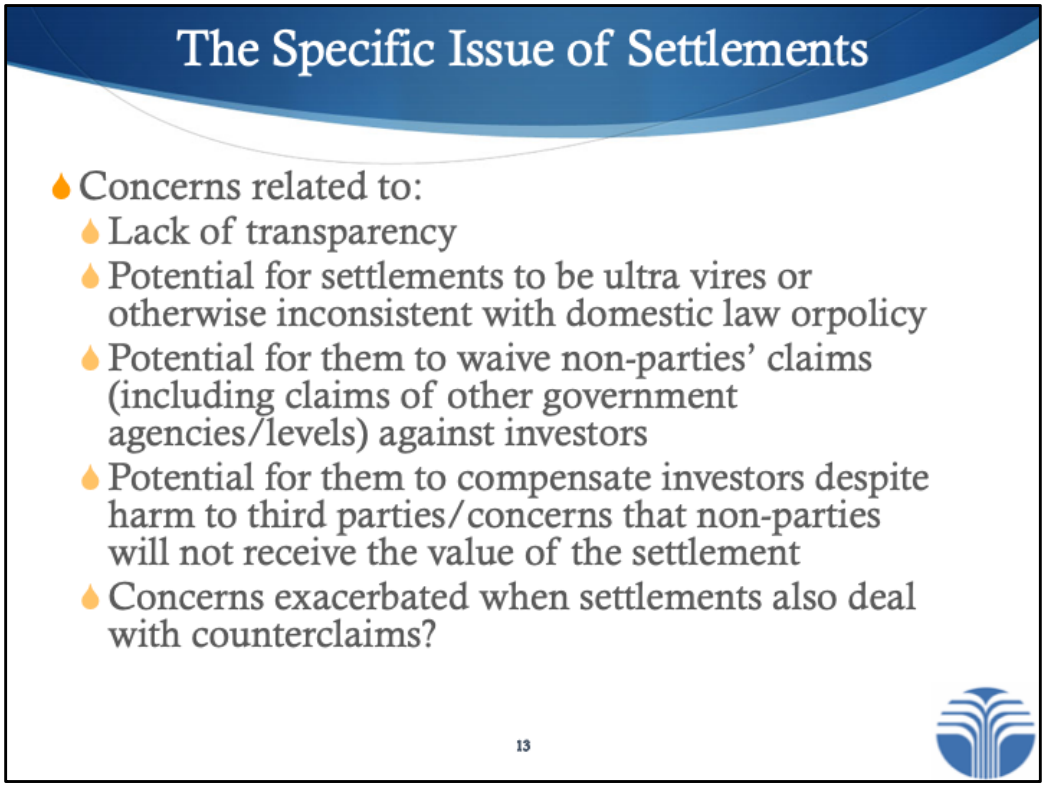
(In the Third Interim Award, the tribunal devoted 4 out of 121 pages of text to these issues. In the Second Partial Award on Track II, the tribunal devoted roughly 6 pages of 500 pages of text to these issues).

In the Second Partial Award on Track II, the tribunal determined that settlement agreements

between Chevron's predecessors and certain Ecuadorian entities waived all "diffuse" claims against Chevron, and that the Lago Agrio plaintiffs' claims were based on those "diffuse" claims. The Lago Agrio plaintiffs had no standing before the ISDS tribunal, however, to raise arguments about the validity of those settlement agreements or the nature of those agreements' impacts on their claims.

(See Chevron v. Ecuador, Second Partial Award on Track II, paras. 7.35 (repeating the tribunal's statement that its ISDS decisions would "not decide the question of the effect of the 2995 Settlement Agreement as between the Lago Agrio Plaintiffs and Chevron").

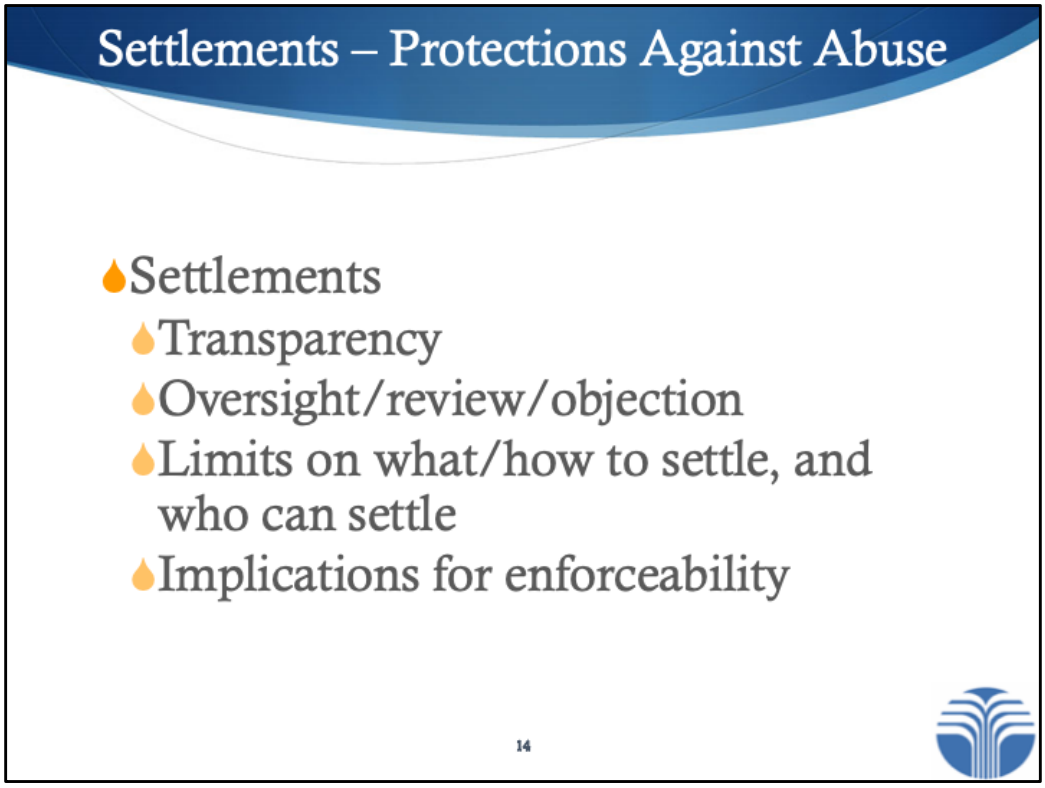
The tribunal also purportedly sought to minimize the effect its judgment would have on the Lago Agrio plaintiffs, saying that such plaintiffs remained free to initiate new litigation based on individual (not diffuse) claims. The respondent, however, had argued such claims would now be time-barred. The tribunal did not decide the matter. See id. paras. 7.34-7.39.




Settlement of investor-state claims can also implicate the rights and interests of third parties. ISDS/ IIAs do not provide for rules requiring that settlements will be disclosed; indeed, they are often not disclosed. Similarly, there are no checks to ensure that settlements reached by a state party are adequate in light of harm suffered by third parties that is attributable to the investor, consistent with underlying domestic law, or consistent with international law. This is particularly problematic when settlements are entered as awards, and when settlements involve counterclaims.

<u>See</u>

- Lise Johnson and Brooke Guven, "The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest" (Investment Treaty News, 13 March 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/>
- CCSI and UN Working Group on Business and Human Rights, Roundtable Outcome Document: Impacts of the International Investment Regime on Access to Justice (September 2018) <http://ccsi.columbia.edu/2018/09/27/ccsi-and-unwgbhr-international-investment-regime-and-access-to-justice/>).




How to address these issues?

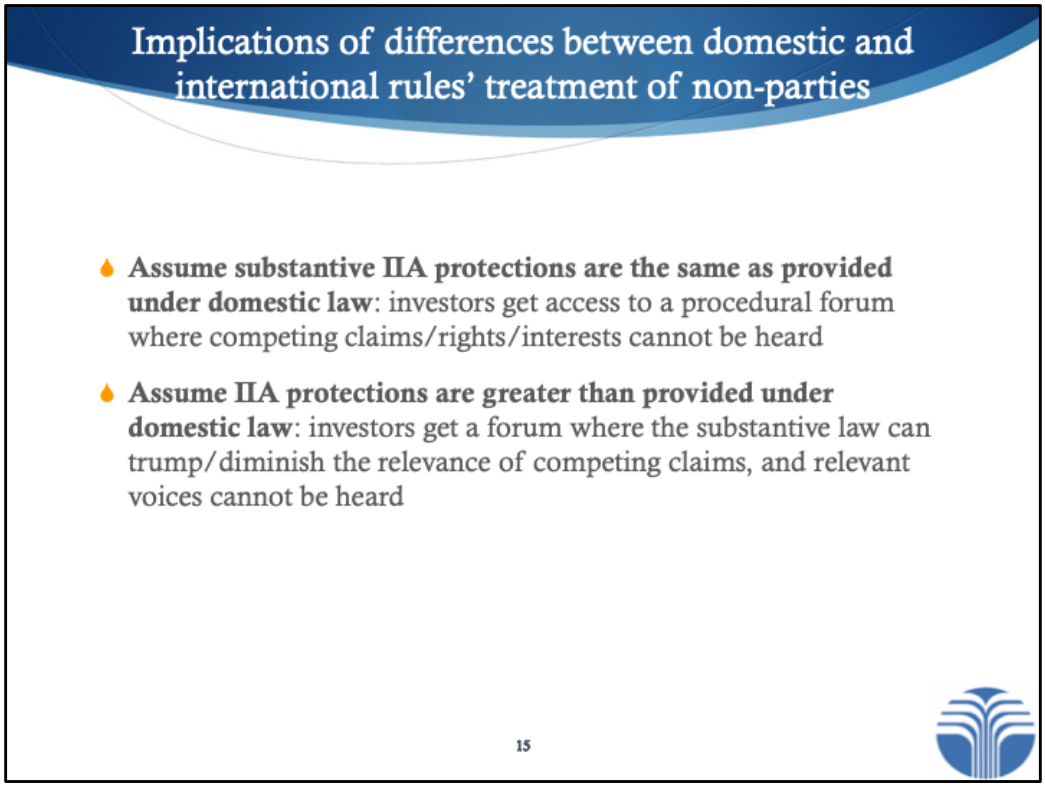
At a minimum, rules could be adopted to require disclosure of settlements. On February 13, 2019, the US House of Representatives unanimously (418-0) passed the Settlement Agreement Information Database Act, which, according to GovTrack.us, "would create a single website where all federal government settlements would be posted publicly and searchable. In cases where a settlement is confidential, the bill would mandate the government also issue a public a statement explaining the nondisclosure. It was introduced on February 6 as bill number H.R. 995 by Rep. Gary Palmer (R-AL6)." As of April 1, 2019, the bill was going to the Senate. Its supporters cite the ways that the bill would enhance openness, and standardize the process of settlement publication which currently is done mostly by press release and "frequently leaves the public and elected officials in the dark about costs and outcomes."

Another useful example is the EPA's Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements (published on October 16, 2017). This was reportedly driven by concerns businesses had raised relating to "sue and settle" conduct of the EPA – patterns in which environmental organizations would sue the government for failure to take regulatory action, and the government would settle the claim by, inter alia, committing to take certain action. According to businesses/industry associations such as the US Chamber of Commerce, this led to regulation outside of the normal processes dictated by the Administrative Procedures Act. The new EPA directive provides, e.g.:

- EPA will make the following available online (or in the case of a proposed consent decree or draft settlement agreement, in the Federal Register as well):
    - Notice of intent to sue EPA within fifteen days. (¶ 1)
    - Complaint or petition for review regarding an issue in which EPA is a defendant or respondent in federal court within fifteen days. (¶ 2.)
    - A list of consent decrees and settlement agreements that continue to govern EPA's actions, to be updated with any new consent decrees or settlement agreements within fifteen days of their execution. (¶ 4).
    - Any proposed consent decree or draft settlement agreement (¶ 8.)
    - Will provide opportunity for public comment and review/ modification.

- In some contexts, there are statutory requirements for government disclosure of settlements and opportunities for the public to intervene and object, e.g., under CERCLA, the Comprehensive Environmental Response, Compensation, and Liability Act (also known as the Superfund Act); judges also play a role in reviewing government settlements.

- These mechanisms for transparency, intervention, and oversight, and are lacking in ISDS; nevertheless, and especially when entered as awards, even ISDS settlements that are ultra vires and entered into in the shadow of the law may nevertheless attain heightened/strengthened legal status, especially when entered as awards.




Even assuming that substantive treaty protections are the same as provided for under domestic law, the difference in procedural rules between domestic and international systems can have implications for the rights and interests of non-parties.

Will concerns raised by this increase if the cost/duration of ISDS claims drops and ISDS becomes more of a substitute than a complement for administrative and constitutional law cases?

# Other examples of intervention - Argentina

## Requirements

- **Principal intervention:** Some provincial codes also allow interventions to enable claims against both existing parties; E.g. third party alleging ownership over an object that is the subject-matter of the main proceedings
- **Accessory intervention:** Third parties can intervene if they prove *prima facie* that the decision may affect their own interests

## Scope and Effect

- **Principal:** Joins as a litigant to assert its own right; Has all the powers that are granted to the parties at any stage of the proceedings; May sustain positions that are in contrast with those of the principal parties
- **Accessory:** Intervention is subordinate to party whose position it supports, but it has power to present its own position

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Slides that follow provide short statements of other jurisdictions' approaches to intervention. What can we learn from those?

# Germany

## Requirements

- **Principal intervention:** Third party asserts a claim on the object or right that is subject of the main proceedings or will be affected by them; Can intervene in the main proceedings by initiating claims against both parties
- **Accessory intervention:** Third party has a legitimate legal interest to intervene in the main proceedings in support of one of the parties

## Scope and Effect

- **Principal:** Third party does not become a party in the main proceedings but initiates a separate set of proceedings (filing a claim against both parties in the main proceedings; these can be joined into the main proceedings)
- **Accessory:** Third party is not a party or representative, but can be involved at times by joinder with the party in support of which it is intervening



# Russia

## Requirements

- **Principal intervention <u>with independent claims</u>:** Third party with its own claims has the same rights as the claimant in the same proceedings; Intervention is initiated by a claim against both parties; claims of the third party that joins can partially or fully exclude a claimant's claims
- **Principal intervention <u>without independent claims</u>:** Third parties may join on the side of the claimant or respondent

## Scope and Effect

- **Principal <u>with</u>:** Same rights and obligations as claimant
- **Principal <u>without</u>:** Same procedural rights and obligations as claimant; Does not have the ability to adjust certain aspects of claim or conclude a settlement
- **In both cases**, the case is reviewed from the beginning



# Senegal

## Requirements

- **Principal:** Must prove that they have a right to bring a legal action.
- **Accessory:** Must prove an interest in supporting one of the parties.
  - Notion of "interest" is widely construed. Influenced by French jurisprudence. E.g. an NGO has an interest in intervening if it can show that (i) it has a collective interest that is distinct from that of its members; and (ii) this collective interest was recognize as such by law/ in the organization's statutes

## Scope and Effect

- **Principal:** Becomes a party and stands on its own; Decision is binding and enforceable against third party
- **Accessory:** Not regarded as a party; Its fate depends on that of main party it supports; It does have the right to make arguments/ pleadings; Party bears its costs of the intervention



# IACtHR

## Requirements

- Rules of Procedure
- Any "person or institution" "who is unrelated to the case and to the proceeding" may submit observations as *amicus curiae*
- 500 *amicus* submissions received in first 35 years

## Scope and Effect

- Intervener is not a party to the proceedings
- Intervention does not stay the proceedings



# Commercial Arbitration

## Requirements

- **Intervenors:** Third party intervenes on their own right/ initiative
- **Joinder:** Disputing party must allow the third party to be joined in the ongoing claim

## Scope and Effects

- In both cases, third party becomes a party to the dispute that stands on its own
- Disputing parties generally consent to intervention/ joinder (given private/ consensual nature of commercial arbitration)
- See e.g. LCIA Arbitration Rules (art. 22); SIAC Arbitration Rules (Rule 24); Swiss Rules (art. 4)
- UNCITRAL Arbitration Rules 2010 (art 17) (if party to underlying arbitration agreement)



# For more on these issues…

## Access to Justice

- CCSI's work on the investment regime, third parties, and access to justice:
  - http://ccsi.columbia.edu/work/projects/access-to-justice/
  - Report forthcoming in 2019 (accessible once published at link above)

## Settlements

- CCSI's note on settlement of investment disputes:
  - http://ccsi.columbia.edu/2017/04/21/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest/



Thank you!

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