

Third-Party Rights in Investor–State Dispute Settlement: Options for Reform¹

15 July 2019

¹ This document was submitted to UNCITRAL Working Group III on ISDS Reform in accordance with paragraph 83 of document A/CN.9/970 (Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its 37th session (New York, 1–5 April 2019)). That paragraph, and the discussion it reflects, invited submissions by states and other stakeholders on reform options so as to inform UNCITRAL’s efforts identifying and prioritizing particular solutions UNCITRAL will develop in the next phase of its work. This text was drafted by Jesse Coleman, Lise Johnson and Brooke Güven (CCSI); Lorenzo Cotula and Thierry Berger (IIED).

Introduction

At its 37th session (New York, 1–5 April 2019), Working Group III on Investor–State Dispute Settlement Reform (WGIII) identified participation by third parties in investor–state dispute settlement (ISDS) as an issue warranting consideration when WGIII discusses possible reform options.² 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.³ A number of points related to this issue were raised during the discussion, including:⁴

- 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.

During the 37th 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.⁵ 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.⁶ 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 are insufficient, and not intended, to address these issues.⁷ Additionally, it was noted that participation of third parties—going beyond *amicus curiae* submissions—is relevant for the legitimacy of the ISDS system.⁸

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 WGIII 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 the costs and duration of ISDS cases.⁹ For example, 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

² United Nations Commission on International Trade Law (UNCITRAL), ‘Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 37th Session (New York, 1–5 April 2019) (hereafter UNCITRAL, ‘37th 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) (hereafter IIED, CCSI and IISD, ‘Shaping the Reform Agenda’).

³ UNCITRAL, ‘37th Session Report’ (n 2) para. 31.

⁴ UNCITRAL, ‘37th Session Report’ (n 2) para. 31.

⁵ UNCITRAL, ‘37th Session Report’ (n 2) para. 32.

⁶ UNCITRAL, ‘37th Session Report’ (n 2) para. 32.

⁷ See audio recordings of the 37th Session, covering the afternoon of 1 April 2019 and the morning of 5 April 2019. On 5 April, relevant comments were made, for instance, by Ecuador, IIED and IISD, beginning around 90 minutes into the English language version. Recordings are available at: <<http://www.uncitral.org/uncitral/audio/meetings.jsp>>.

⁸ UNCITRAL, ‘37th Session Report’ (n 2) para. 31.

⁹ 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 UNCITRAL, ‘36th Session Report’).

separate submission illustrates in greater detail some of the ways in which the cross-cutting issues discussed by WGIII, including third-party participation, are relevant to the concerns identified for reform, and can help shape the contours of reform options.¹⁰

Ultimately, WGIII 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.¹¹ In light of that decision, this submission seeks to aid WGIII 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 WGIII’s work.

This submission and the options discussed complement other submissions and solutions,¹² 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.¹³ 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.

¹⁰ IIED, CCSI and IISD, ‘Shaping the Reform Agenda’ (n 2).

¹¹ WGIII 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 15 July via these submissions to the Secretariat. See UNCITRAL, ‘37th Session Report’ (n 2).

¹² IIED, CCSI, and IISD, ‘Shaping the Reform Agenda’ (n 2); 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 and 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).

¹³ Lise Johnson, Jesse Coleman, Brooke Güven, and Lisa Sachs, ‘Alternatives to Investor-State Dispute Settlement’ Working Paper (CCSI April 2019) <<http://ccsi.columbia.edu/2019/04/15/alternatives-to-investor-state-dispute-settlement/>> accessed 20 August 2019.

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 types of actors involved. For illustrative purposes and based on existing investor–state arbitrations, affected third parties may include:

- Creditors of ISDS claimants;¹⁴
- Local government bodies or indigenous authorities with rights and powers over land, contracts or regulatory spheres that are at issue in the ISDS case;¹⁵
- 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;¹⁶
- Users of utilities and other public services who are affected by measures concerning those services or by investment claims challenging those measures;¹⁷
- Individuals or groups that have competing claims to property at stake in the dispute;¹⁸ and
- Adverse parties in underlying or parallel domestic litigation.¹⁹

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

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

¹⁵ 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).

¹⁶ 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 full protection and security (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 Cotula and Mika Schröder, ‘Community Perspectives in Investor-State Arbitration,’ (IIED 2017) < <https://pubs.iied.org/pdfs/12603IIED.pdf> > accessed 20 August 2019.

¹⁷ 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.

¹⁸ 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*).

¹⁹ 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*).

- Disputes arise out of discrete competing claims advanced in different fora between non-governmental actors, states and investors.²⁰ 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.²¹ 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.²² 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

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.²³ 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 is, 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.

²⁰ 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.

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

²² 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).

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

In addition, states may be unable to raise claims regarding relevant issues such as investor misconduct and violations of third-party rights.²⁴

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 a 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.²⁵

Since the landmark decision in *Methanex v. United States* that first allowed *amicus curiae* submissions in an ISDS context,²⁶ 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.”²⁷ Tribunals also clarified that acceptance of *amicus* submissions was “a matter of its power rather than of third party right.”²⁸ 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 in making its determination²⁹ 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 WGIII’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”).³⁰ As alluded to in WGIII’s discussion, there are ongoing debates regarding whether current rules and jurisprudential approaches to *amicus* arrangements are appropriate to ensure adequate participation of

²⁴ 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).

²⁵ 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> > accessed 20 August 2019.

²⁶ *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*).

²⁷ *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.

²⁸ *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].

²⁹ 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* (Oxford UP 2009), 405-406. 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.

³⁰ UNCITRAL, ‘37th Session Report’ (n 2) para. 31.

even interested third parties.³¹ But, as was also stated during the 37th session, it is clear that the *amicus curiae* mechanism is not intended or suited to cater to 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.

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.

³¹ 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 the International Centre for Settlement of Investment Disputes’ [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> > accessed 20 August 2019.

1. Enable participation

Most jurisdictions provide for mandatory and/or permissive intervention by third parties. Examples of jurisdictions that provide for intervention include Angola,³² Argentina,³³ France,³⁴ Germany,³⁵ India,³⁶ Russia,³⁷ Senegal,³⁸ Switzerland³⁹ and the United States.⁴⁰ Some international dispute settlement mechanisms also provide for intervention in certain circumstances.⁴¹ For illustrative purposes only, Box 1 discusses in greater detail arrangements applicable in the United States.⁴² The table included in the Annex highlights some of the rules applicable in a number of domestic, regional and international legal systems.⁴³

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 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;⁴⁴
- Mandatory or permissive **joinder** by interested or affected third parties;⁴⁵
- 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 the purpose of determining the third party's rights with respect to property at issue in the claim;⁴⁶ and
- **Dismissal** of cases where a non-party's rights will be affected by the proceedings but they cannot be joined.⁴⁷

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.⁴⁸ US law and jurisprudence

³² Angola, Code of Civil Procedure.

³³ See e.g., Argentina, Code of Civil and Commercial Proceedings.

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

³⁵ See e.g., Germany, Code of Civil Procedure.

³⁶ India, India's Code of Civil Procedure, First Schedule, Order I.

³⁷ See e.g., Russia, Code of Civil Procedure.

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

³⁹ See e.g., Switzerland, Code of Civil Procedure.

⁴⁰ US Federal Rules Civil Procedure, Rules 18-24.

⁴¹ 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.

⁴² This jurisdiction was chosen because several authors are U.S. lawyers and thus particularly familiar with U.S. law.

⁴³ The table included in the Annex is a draft. The authors welcome comments, corrections and additions to the Annex. Please submit all proposed edits via [this form](#).

⁴⁴ US Federal Rules Civil Procedure, Rule 24.

⁴⁵ US Federal Rules Civil Procedure, Rules 19, 20.

⁴⁶ See e.g., US Federal Rules Civil Procedure, Rule 22; Federal Statute 28 USC § 1335.

⁴⁷ See e.g., US Federal Rules Civil Procedure, Rules 19(a) and (b).

⁴⁸ US Federal Rules of Civil Procedure, Rules 18-24.

also outline the circumstances under which such intervention is permissible or required and include mechanisms for dismissing claims when necessary parties cannot be joined.⁴⁹

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.”⁵⁰ 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.⁵¹

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;⁵² 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.⁵³ Thus, intervention may be appropriate or even necessary to ensure that all relevant rights and interests are protected, even with the state.

As WGIII 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

⁴⁹ *ibid.*

⁵⁰ *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (1995).

⁵¹ *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)

⁵² “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), public interest groups 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).

⁵³ “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.’ *Kleisserv. 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.

provides WGIII 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 WGIII 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.⁵⁴

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 they make provision in these cases for the dismissal or reframing of claims that could otherwise affect third parties.⁵⁵ 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”).⁵⁶ The *Monetary Gold* principle has been invoked by a number of states before international and regional courts and tribunals.⁵⁷

National and international legal systems also outline the factors that courts and tribunals must consider in making their dismissal determination. Relevant considerations include:⁵⁸

- 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; and
- Whether the claimant would have an adequate remedy if the claim were dismissed due to non-joinder of the third party.

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:

⁵⁴ 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/>> accessed 20 August 2019.

⁵⁵ See e.g., US Federal Rules of Civil Procedure, Rule 19(b).

⁵⁶ *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).

⁵⁷ For commentary, see e.g., Ori Pomson, ‘Does the Monetary Gold Principle Apply to International Courts and Tribunals Generally?’ [2019] 10 Journal of International Dispute Settlement, 88.

⁵⁸ This example comes from the US context, and is set forth in US Federal Rules of Civil Procedure, Rule 19(b).

- 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 or are less known to (and could be less favourable 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.⁵⁹

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.⁶⁰ 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.⁶¹ 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).

⁵⁹ 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).

⁶⁰ See e.g., US Federal Rules of Civil Procedure, Rule 19(b)(2).

⁶¹ 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 WGIII 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 state 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 if the investor and state agree to modify the applicable arbitration rules. And a Mauritius Convention-type treaty might involve relatively long time frames if ratifications are slow.

In the short term, WGIII 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 WGIII for putting these issues formally on the agenda and look forward to further discussion and engagement on these issues.

Annex

Note: The table below is a draft. We welcome comments, corrections and additions to this draft. Please submit all comments via this [form](#).

Please do not rely on the information included in the table as we are continuing to develop and finalize the annex.

Table 1: Third-Party Intervention in Common and Civil Law Jurisdictions

Jurisdiction	Requirements for intervention	Role of intervener	Implications for proceedings
<i>Angola</i> ⁶²	Nominated and called intervention: May be called by the respondent to participate as parties; requires existence of a legal relationship between the third party and the respondent (e.g., where the respondent possesses assets on behalf of the third party). Assisting intervention: May intervene in support of one of the parties if the third party is party to a legal transaction where the substance of that transaction depends on relief sought by the party it seeks to assist through its intervention. Opponent intervention: The third party has a right of its own that is incompatible with the claimant's claims; it may participate upon its request or request of the respondent. Principal: The third party may intervene on its own request or the request of one of the original parties. A principal intervener has its own rights in the proceedings, which must either be equal to those of the claimant or the respondent. It may also be admitted if it would fulfill the requirements to be joined in the proceedings from the outset.	Nominated: Becomes a respondent (with the original either removing itself or remaining as a party). Assisting: Does not become a claimant or respondent but can invoke the same rights as the party that it seeks to assist. However, its position is subordinate to the party being assisted. Opponent: Becomes a party to proceedings (either as a claimant or respondent). Principal: Becomes a party to the proceedings and has the same rights as the original parties.	Third parties will in most cases be bound by the effects of any judgments rendered by the proceedings.

⁶² Angola, Code of Civil Procedure.

<i>Argentina</i> ⁶³	Voluntary accessory intervention: Third parties may intervene if they prove <i>prima facie</i> that the decision may affect their own interests. Voluntary autonomous intervention: Third parties may intervene if, according to substantive law, they would have been legitimized to act as one of the disputing parties. Other: Some provincial codes provide for voluntary principal intervention, which allows third parties to bring their own claims against both parties to existing proceedings.	Intervener's participation is subordinate to the party whose position it supports. Intervener is admitted as a joint litigant to assert its own right and has all powers that are granted to disputing parties.	Interveners may intervene at any time. The intervention does not suspend or restart proceedings. Participation is limited to the matters arising at the stage at which intervention occurs.
<i>France</i> ⁶⁴	Third-party intervention can be voluntary (upon the party's own motion) or compulsory (the third party is summoned by an existing disputing party). A voluntary intervention can be made for the third party's own benefit or in support of an existing party. Third-party interventions must bear sufficient links with the claims of the initial parties. Voluntary accessory interveners must also show an interest in order to preserve their rights. This "interest" includes indirect interests.⁶⁵ Voluntary principal interveners must show that they have a right to bring an action with regard to their claim. Courts may summon "all interested persons whose presence seems necessary for the resolution of the dispute."⁶⁶	Interveners become party to proceedings.	Determinations are binding on interveners. Interveners must be allowed to make observations on procedural steps already taken. Voluntary accessory interveners cannot be found liable but will bear the costs of their intervention. Voluntary principal interveners can raise claims on their own and can therefore be found liable. Courts must examine and decide on the issues put forward by interveners; they can first decide the main claims and then turn to third party claims if joining the two would cause undue delay. Voluntary principal interventions will continue even if the main proceedings are discontinued, i.e. they are not subordinate to the main/original proceedings.
<i>Germany</i> ⁶⁷	Third-party intervention can be initiated by a motion of the third party itself, upon request of an existing party or by summons of the court.	Third party does not become a party in the main proceedings but initiates a separate set of proceedings that can be joined into the main proceedings.	As intervention can run in parallel to main proceedings, the outcomes may not be consistent.

⁶³ See e.g., Argentina, Code of Civil and Commercial Proceedings.

⁶⁴ See e.g., France, Code of Civil Procedure; Code Dalloz Civil Procedure; Dalloz Repertoire – Intervention; Dalloz Action – Intervention; Dalloz Repertoire – Amicus; Judicial Organisation Code.

⁶⁵ An organization, including civil society organizations, can have an interest in intervening if they show that (i) the organization has a collective interest distinct from its members' individual interests; and (ii) this collective interest is recognized as such by law or in the organization's statutes.

⁶⁶ France, Code of Civil Procedure art 332.

⁶⁷ See e.g., Germany, Code of Civil Procedure.

	Principal: Intervener asserts a claim on the object or right at issue. It initiates proceedings against both parties to the main/original proceedings. Accessory: Intervener has a legitimate interest to intervene in support of one of the parties. Court summons: Based on the constitutional provision that everyone has the right to be heard, the court may summon a third party if its decision would affect a third party's rights.	Intervener has the same powers as the original parties. In the context of accessory intervention, the third party is not a party or representative, but can in some circumstances be involved in the main proceedings through joinder.	In the context of accessory intervention, the third party is more limited in the challenges it can raise.
<i>Russia</i> ⁶⁸	Third-party intervention can be initiated by a motion of the third party itself or upon request of an existing party.	A third party with its own claims has the same rights and bears the same obligations as existing parties. A third party without its own claims may join the proceedings in support of one of the existing parties or be summoned by one of the parties to participate. Such a party bears the same procedural (but not substantive) rights and obligations as the party they join.	When a third party intervenes, the case is reviewed from the beginning.
<i>Senegal</i> ⁶⁹	Third-party intervention must be initiated by the third party, and they must show a substantial link with the claim of the existing parties. In the case of voluntary accessory intervention, the intervener must prove an interest in supporting one of the parties to preserve its rights. The notion of interest has been broadly construed by the courts. In the case of voluntary principal intervention, the third party must prove a right to bring a legal action. In some cases, the courts may request that the existing parties bring into the proceedings all interested parties that can assist in the resolution of the dispute.	Voluntary accessory interveners are not party to the proceedings. Voluntary principal interveners become party to the proceedings.	Voluntary accessory interveners depend on the fate of the main parties. They cannot be held liable but bear the costs of their intervention. Voluntary principal interveners can bring their own claims. Determinations will be binding on voluntary principal interveners. They can submit arguments/pleadings. All interveners (accessor and principal, voluntary and non-voluntary) enjoy the right of due process. The courts may decide on the main proceedings and voluntary intervention jointly. In the case of all voluntary intervention, if the main proceedings are dismissed, the voluntary intervention is also dismissed. This is not the case for compulsory intervention (e.g., intervention required by the courts).

⁶⁸ See e.g., Russia, Code of Civil Procedure.

⁶⁹ See e.g., Senegal, Code of Civil Procedure. Compulsory/non-voluntary intervention developed on the basis of judicial practice.

<i>Switzerland</i> ⁷⁰	Third-party intervention can be initiated by a motion of the third party itself or upon request of an existing party. Principal intervention is admissible when the third party demonstrates that it has a preferable right that wholly or partially excludes the right of existing parties. Accessory intervention can be made in support of one of the existing parties when a sufficient legal interest in having the dispute decided in favour of one of the parties is proven.	Principal intervention gives rise to independent proceedings, wherein the intervener is entitled to all of the procedural rights of the existing parties. Accessory intervention is limited to supporting the party it is admitted to support.	In the case of principal intervention, the courts may join the claims and make a single determination or stay proceedings until third-party issues are decided.
<i>United States</i> ⁷¹	“Intervention of right” and “permissive intervention” are provided for. The courts must allow for intervention where federal statute gives the intervener the unconditional right to intervene or where the intervener claims an interest relating to the property or transaction at issue. “Permissive intervention” enables the courts to permit intervention where federal statute grants a conditional right to intervene or where an intervener has a claim or defence that shares “a common question of law or fact” with the main proceedings.	The intervener becomes a party to the proceedings. They may join an existing party or take a position adverse to both parties.	Interveners are generally considered to have the same rights as the main/original disputing parties. Proceedings continue with the intervener as an additional party.

⁷⁰ See e.g., Switzerland, Code of Civil Procedure.

⁷¹ US Federal Rules Civil Procedure, Rules 18-24.

Table 2: Third-Party Intervention in International and Regional Dispute Settlement⁷²

Jurisdiction	Requirements for intervention	Role of intervener	Implications for proceedings
<i>International Court of Justice (ICJ)</i> ⁷³	State parties may intervene in contentious matters and advisory cases. ICJ decides upon requests for intervention in these matters. Where interpretation of a treaty is at issue, a state has the right to intervene (and the ICJ's determination will be binding on it). International organizations can participate in advisory proceedings as a requesting body or as bodies likely to furnish relevant information.	The intervener is not considered a party.	In contentious proceedings and where the state intervenes regarding the interpretation of a treaty, the intervener will be supplied with copies of pleadings and documents and will be entitled to submit a written statement and/or written observations. In advisory proceedings, international organizations may submit observations on particular matters and in a manner determined by the ICJ.
<i>International Tribunal for the Law of the Sea (ITLOS)</i> ⁷⁴	State parties may intervene in contentious matters and advisory cases concerning interpretation or application of relevant treaties. State parties seeking to intervene in contentious matters must seek permission from ITLOS and, in doing so, must set out the legal interest they consider may be affected by the decision in the case. State parties seeking to intervene in advisory matters must also request permission to do so from ITLOS.	The intervener does not become a party to proceedings.	In both contentious and advisory proceedings, the intervener is provided with pleadings and documents and may submit written statements (to which disputing state parties may respond). Interveners may also participate in oral hearings and make observations regarding the subject matter of their intervention.

⁷² In some international contexts in which third parties cannot intervene and become full-fledged parties to the proceedings, there may be critical procedural distinctions between the proceedings. For example, regional human rights and other mechanisms generally require exhaustion of domestic remedies as a prerequisite to accessing the relevant forum. While third-party participation may not be available in the forum, rules requiring exhaustion may have thus provided an opportunity for legal and factual analysis of the third party's circumstances at the domestic level that could form part of the factual basis of the international dispute, and potentially resolve and narrow the issues for consideration at the international level in ways that raise fewer concerns about negative impacts on third-party rights or the exclusionary nature of the international forum. WGIII, when considering other international examples, might therefore wish to consider how such procedural issues could impact the analysis of affected third parties.

⁷³ See ICJ Statute arts 62-63 (contentious matters) and art 66 (advisory cases). See also ICJ Statute arts 34 and 50 and ICJ Rules of the Court arts 43 and 69.

⁷⁴ See e.g., ITLOS Statute arts 21, 22, 31, 32. See also ITLOS Rules arts 99–104.

<i>Court of Justice of the European Union (CJEU)</i> ⁷⁵	Member States of the European Union (EU); institutions of the EU; bodies, offices and agencies of the EU; and “any other person.” With the exception of EU institutions, all others listed in art 40 of the CJEU Statute may be granted leave to intervene if they establish an interest in the result of the case. Intervention is granted by decision of the President.	The intervener becomes an ancillary party. They must accept the case as they find it and support the form of order sought by one of the existing parties to the proceeding.	The intervener receives procedural documents served on disputing parties (excluding items deemed confidential) and may make statements outlining the form of order it is seeking to support, pleas relied upon and evidence produced or offered by the intervention.
<i>African Court on Human and Peoples’ Rights (ACtHPR)</i> ⁷⁶	State parties must file a request with the ACtHPR to intervene and, in doing so, must show their interest in the case. The ACtHPR determines whether to accept the request.	The intervener is not party to the proceedings.	The intervening state is entitled to present submissions regarding the subject of its intervention.
<i>Inter-American Court of Human Rights (IACtHR)</i> ⁷⁷	Any person or institution unrelated to the case and proceeding may submit observations as <i>amicus curiae</i> regarding ongoing proceedings.	The intervener is not party to the proceedings.	<i>Amicus curiae</i> briefs do not stay the proceedings. The IACtHR has cited and incorporated evidence from <i>amicus</i> submissions and their supporting documentation in several judgments.

⁷⁵ CJEU Statute art 40 (requirements for intervention) and CJEU Rules of Procedure arts 129–132 (procedural steps).

⁷⁶ See e.g., ACtHPR Protocol art 5, and ACtHPR Rules of the Court arts 33 and 53.

⁷⁷ See e.g., IACtHR Rules of Procedure arts 2, 28, 44.

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).

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 Güven 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)