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Beyond *Amicus Curiae*: Rethinking the Role of Third-Party Participation in Investment Arbitration and Environmental Governance

Paulina Kuehme, Lakshmi Swathi Ganti,
Brian Kelly Nyaga, Mattia Semenza

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By
Paulina Kuehme
Lakshmi Swathi Ganti
Brian Kelly Nyaga
Mattia Semenza

Supervisor
Prof. Elena Cima

Prepared for the South Centre as part of the Geneva Graduate Institute's LL.M. Legal Clinic Programme, International Environmental Law and Governance Stream

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EXECUTIVE SUMMARY

This document examines third-party participation in Investor-State Dispute Settlement (ISDS), with a particular emphasis on environmental considerations. It investigates how to ensure procedural fairness and enable meaningful involvement of affected communities in cases concerning environmental protection. The study assesses the scope and challenges of such participation, including the ability to present evidence and legal arguments related to environmental impacts. It also explores the potential role of third-party involvement in shaping counterclaims against investors for environmental damage, and its possible influence in mitigating compensation by introducing arguments and evidence related to environmental costs. Through this analysis, the project aims to support a more balanced and sustainable ISDS framework - one that protects both investors and the environment - while fostering community empowerment and strengthening accountability for environmental harm.

While Part I focuses on the current ISDS rules, highlighting the challenges faced by affected individuals and communities, Part II suggests possible reforms to strengthen third-party participation as summarized below.

A) **Issue: the need to go beyond third parties' submissions.** The United Nations Commission on International Trade Law (UNCITRAL) Working Group III emphasized: i) the need of guidance to tribunals on how to apply the requirements for third-party submissions; ii) the importance of third-party participation "beyond making submissions as third parties"; iii) how to ensure that third-party submissions would be duly considered by investment tribunals.

Proposed actions:

- ***Significant interest***. There is a need to define precisely the notion of "significant interest", distinguishing between a broad interest coinciding with the public interest, from a legal interest of the third party that aligns with the interest of one of the disputing parties, to which greater procedural rights could be granted.
- ***Beyond submissions as third parties***. Procedural rights may include the right to access documents of the proceedings; the right to submit evidence and technical reports prepared by environmental experts; the right to attend hearings, and the right to request participation in the assessment of the damage suffered by one of parties (*i.e.* the State).
- ***Due consideration provision.*** Introducing a requirement for arbitral tribunals to state in the final award the reasons for rejecting a submission and compel them to either meaningfully consider the third party's position or explicitly justify its exclusion.

B) **Issue: the need to broaden access to information and transparency.** Effective third party participation in ISDS requires comprehensive information disclosure, including case registration, and access to documents and hearings.

Proposed actions:

- ***Unilateral means to enhance transparency.*** Strengthening domestic legislation, such as freedom of information laws, may provide access to documents overcoming the requirement of consent of parties, as seen in the Methanex Case.
- ***Bilateral Agreements (BITs).*** BITs can institutionalise transparency by mandating public hearings and document disclosure in case of environmental issues.
- ***Multilateral means.*** Use frameworks like the Aarhus Convention and the Escazú Agreement which aim to enhance public participation, access to information, and environmental justice as a normative foundation for reforming ISDS. Encourage States to include Escazú/Aarhus-inspired provisions in new-generation BITs, embedding transparency and environmental considerations into treaty texts.

C) **Issue: addressing shortcomings of International Centre for Settlement of Investment Disputes (ICSID) arbitration rules.** The existing ICSID arbitration rules provide third parties the rights to make *amicus curiae* submissions, subject to discretion of the tribunal. Moreover, access to documents and participation to hearings are subject to consent of both parties to the dispute.

Proposed actions:

- ***Public policy objective criteria***. Inclusion of explicit criteria requiring the tribunal to consider *amicus curiae* submissions when they address relevant public policy objectives, such as environmental protection.
- ***Environmental concern should prevail over consent***. When environmental concerns are raised in amicus submissions, tribunals should ensure third parties' access to all relevant documents and hearings, even without prior consent of the parties.
- ***Reducing the parties' time to object to award publication***. The 60-day period granted to the disputing parties to reject the third parties' request of publication of awards should be shortened to 30 days to improve legal certainty.

D) **Issue: strengthening States' right to bring counterclaims.** Lack of provisions in BITs makes it difficult to file counterclaims, which could allow third parties to play a role in environmental disputes. Challenges include a) explicit consent to counterclaims, b) limited jurisdiction of tribunal due to narrow dispute settlement clauses and c) lack of investor obligations for environmental protection.

Proposed actions:

- ***Third parties benefit from States' counterclaims.*** Strengthening the rights of States to bring counterclaims, particularly in disputes concerning environmental protection, would allow third parties to play a role in these cases, including to offset compensation claims made by investors.
- ***Expanding BITs provisions.*** Including clauses in BITs allowing counterclaims based on environmental harm, broader dispute settlement clauses for tribunals to have jurisdiction, and provisions seeking to impose environmental due diligence obligations on the investor, would be useful to support environmental counterclaims. Examples include the Morocco-Nigeria BIT and the South African Development Community (SADC) Model BIT.

E) Issue: addressing shortcomings of UNCITRAL rules on transparency. The requirement of prior consultation of the parties before accepting *amicus curiae* submissions may unfairly impede third parties' participation.

Proposed actions:

- ***Tribunals exclusive authority over amicus acceptance.*** Granting tribunals exclusive authority over the acceptance of *amicus curiae* submissions (without the duty of prior consultation of the parties) would strengthen third party participation and would be in line with ICSID arbitration rules.

F) Issue: addressing shortcomings of UNCITRAL arbitration rules. Article 17 of the UNCITRAL Arbitration Rules authorizes tribunals to hold hearings for witnesses and expert witness testimony, yet it does not extend this platform to affected third parties.

Proposed actions:

- ***Early involvement of third parties***. Third-party participation should be allowed at an earlier stage of arbitration, such as during evidence-taking, which could allow affected communities to present evidence, thereby strengthening the evidentiary record in cases with significant environmental implications.

G) Issue: extending reform efforts beyond the arbitration rules. Efforts to reform the ISDS system to incorporate more comprehensive third-party participation should go beyond reforming the existing rules and draw inspiration from other adjudicatory forums that have achieved this integration. To this end, the ISDS reform process should draw inspiration from forums such as the World Bank Accountability Mechanism, regional human rights courts and the proposal for the establishment of a Multilateral Investment Court as relevant examples.

Proposed actions:

- ***Introducing dedicated procedural steps for third party submissions***. The ISDS system should have dedicated evidence taking procedures that are focused on collecting evidence and insights from third parties as these grievances relate to the dispute. Such a system can draw inspiration from the decentralized and citizen-driven accountability safeguards that are ingrained in the World Bank Accountability Mechanism.
- ***Empowering the tribunals to proactively solicit third party perspectives***. The arbitral tribunals should be empowered to solicit third party submissions in cases where there is an apparent connection between the dispute and parties submitting such *amicus*. This proactive approach, as is adopted in the African Court on Human and People's Rights, empowers the tribunal to go beyond the submissions made by parties on its own mandate.
- ***The European Union (EU) Multilateral Investment Court (MIC).*** Adopting a centralised reform process through the EU approach of establishing the MIC would fast-track the incorporation of more robust third-party participation by streamlining a host of ISDS dispute settlement frameworks into a centralised adjudication forum that frontlines third-party participation.

H) Issue: addressing structural barriers to third-party participation.

Proposed actions:

Geographic Barriers

- ***Making the use of video-conference technology compulsory***. This would make ISDS proceedings more accessible.
- ***Prioritizing the location of the affected third parties.*** The tribunal should exercise its discretion when determining the location of UNCITRAL proceedings in favour of affected communities.

Linguistic Barriers:

- ***Creating an obligation to guarantee translation services to admitted third parties***. ISDS tribunals should be obliged to offer translation services for proceedings, potentially supported by small language models, once a third-party's participation is affirmed.

Financial Barriers:

- ***Third-party funding should be restricted or carefully regulated*****:** since these actors provide funding primarily to secure a portion of the award, the practice risks prioritising investor returns over the interests of the third parties, as they do not have a direct financial stake in the claim.

Excessive Length of Proceedings:

- ***Tribunals must ensure that proceedings remain time-effective*** despite an increased role of third parties.

INTRODUCTION

Investor-State Dispute Settlement (ISDS) arbitration has increasingly garnered calls for reform towards balancing the protection of investor rights with global demands for stronger environment governance for States. ISDS enables foreign investors to bring claims against host States for alleged violations of obligations under International Investment Agreements (IIAs), such as Bilateral Investment Treaties (BITs).

Over time, ISDS has attracted significant criticism, particularly for restricting States' regulatory space to adopt measures in areas of public interest like environmental protection.[1] Environmental considerations are increasingly important in the context of ISDS due to the growing awareness of the environmental impacts of foreign investments, such as natural resource extraction, and infrastructure projects.[2] Hence, there have been calls[3] for the inclusion of third-party participation, such as Non-Governmental Organizations (NGOs), local communities, and environmental organizations, which could help ensure that environmental issues are properly addressed in ISDS arbitration proceedings thereby ensuring the legitimacy of the system.

The governing legal framework includes mechanisms established by the United Nations Commission on International Trade Law (UNCITRAL) and the International Centre for the Settlement of Investment Disputes (ICSID). Most IIAs make explicit reference to these rules in their arbitration clauses. Under the current legal framework, third parties can participate in ISDS proceedings primarily through the submission of *amicus curiae* (friends of the court) briefs. However, the acceptance of such briefs is often at the discretion of the arbitral tribunal, which has led to inconsistent practices and uncertainties, raising concerns over lack of transparency. Several key arbitral awards have addressed the issue of third-party participation, such as *Methanex v USA,* shaping the evolving nature of ISDS proceedings. Despite these developments, affected communities and environmental groups face considerable challenges in effectively participating in the ISDS process.

Third parties often have firsthand knowledge, independent research, and scientific data pertaining to the environmental impacts of an investment. Their participation in the ISDS process can strengthen and enhance the legitimacy of arbitral proceedings by bringing in diverse perspectives and evidence. Additionally, third-party participation can promote broader investor accountability by supporting counterclaims that address environmental concerns.

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[1] Eugenia Levine, "Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation", *Berkeley Journal of International Law,* Vol. 29, Issue 1 (2011); United Nations General Assembly, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment on the catastrophic consequences of Investor-State dispute settlement for climate and environment action and human rights, A/78/168, 13 July 2023 (accessed 7 March 2025).

[2] Organisation for Economic Co-operation and Development (OECD), *Foreign Direct Investment and the Environment* (1999). Available from https://doi.org/10.1787/9789264266315-en.

[3] United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019*),* 9 April 2019, UN Doc A/CN.9/970 (accessed 7 March 2025).

This report explores pathways for promoting third-party participation in ISDS arbitration to better balance investor protection with environmental considerations. In this report 'third party participants' refer to non-State actors, individuals or local communities, who are directly influenced by the investment or investment-related dispute.[4]

Part I focuses on the current ISDS rules, highlighting the challenges faced by affected individuals and communities. Specifically, Section 1 addresses the applicable legal framework and the current status of the ISDS reform process. Section 2 discusses the current procedural rules for third party participation and their possible shortcomings. Section 3 considers the relevant case law, and possible developments through treaty-making. Section 4 addresses some technical barriers to third-party participation.

Part II suggests possible reforms to strengthen third-party participation. Specifically, Section 5 addresses reform proposals from the ongoing discussions at the UNCITRAL Working Group III. Section 6 sets out ways to increase access to information and transparency. Section 7 refers to potential amendments to the existing ICSID and UNCITRAL rules. Section 8 refers to potential amendments inspired by different supranational courts and accountability mechanisms. Finally, Section 9 addresses the mechanisms and possible solutions that could overcome the technical barriers described in Section 4. A brief conclusion to the study is provided.

[4] UNCITRAL (n 3).

PART I

1. Applicable Framework and Status of the Reform Process

This section introduces the applicable legal frameworks under the ICSID and UNCITRAL rules and gives a brief overview of the current status of the ISDS reform.

1.1. Introducing the Applicable Legal Framework

ICSID is the most prominent forum for ISDS.[5] The rules applicable to third-party participation in ICSID tribunals are the ICSID Arbitration Rules, a set of procedural obligations last amended and adopted by the ICSID Administrative Council in 2022.[6] In contrast, the UNCITRAL Rules of Arbitration, first created in 1976 as a set of arbitration rules in the context of international commercial arbitration[7] and revised in 2020, do not create a mechanism to administer proceedings in specific cases[8] but rather form the basis of provisions of IIAs or are directly referred to in such treaties.[9] UNCITRAL Rules of Arbitration can be administered by an institution, such as ICSID or the Permanent Court of Arbitration, or in an ad hoc manner.[10] The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Rules on Transparency) delineate the current possibilities of third party participation.[11] Originally, these rules only applied to treaties concluded on or after 1st April 2014.[12] However, the time frame of their application was extended to include all ISDS arbitration, independent of applicable arbitration rules and an agreement's date of conclusion, between contracting States of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration of 2014 (Mauritius Convention).[13]

Consent is the basis for jurisdiction under both the ICSID Arbitration Rules and the UNCITRAL Rules.[14] Parties can choose to refer their disputes in respect of a specific legal relationship to

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[5] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd edition (Oxford University Press, 2022), p. 342.
[6] International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules (July 2022); Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer (n 5), p. 399.
[7] Nigel Blackaby and Caroline Richard, "Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?", in *The Backlash against Investment Arbitration,* Michael Waibel, Asha Kaushal, *et al.,* eds. (Kluwer Law International, 2010), p. 254.
[8] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer (n 5), p. 347.
[9] *Ibid.*, p. 424.
[10] ICSID, "Services Provided by ICSID in Cases under the UNCITRAL Rules". Available from https://icsid.worldbank.org/services/arbitration/uncitral/services-overview (accessed 19 March 2025); Permanent Court of Arbitration, "UNCITRAL Arbitration Rules". Available from https://pca-cpa.org/en/services/arbitration-services/uncitral-arbitration-rules/ (accessed 19.03.2025).
[11] *Cf. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (New York, United Nations: United Nations Commission on International Trade Law, 2014). ('UNCITRAL Rules on Transparency').
[12] *Cf. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, art 1 (1).
[13] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, entered into force 18 October 2017) ('Mauritius Convention'), art 1 (1); Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer (n 5), p. 414.
[14] Stephen Jagusch and Jeffrey Sullivan, "A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern", in *The Backlash against Investment Arbitration,* Michael Waibel, Asha Kaushal, *et al.,* eds. (Kluwer Law International, 2010), p. 88.

arbitration under the UNCITRAL Rules of Arbitration, which will then settle such disputes "in accordance with these Rules subject to such modifications as the parties may agree".[15] In comparison, arbitrations can only be conducted under ICSID if jurisdictional threshold requirements under Article 25 (1) of the ICSID Convention are met. Under Article 25 (1) ICSID Convention jurisdiction of ICSID arises with regards to any legal dispute "*arising directly out of an investment, between a Contracting State… and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre*".[16] A unilateral withdrawal of consent is not permissible once given.[17] The requirement of the written form of consent of a State to ICSID jurisdiction is met when it is delineated in an investment treaty, contract, or a local law.[18] Parties can link their consent to the fulfilment of conditions.[19] Thus, if one of the jurisdictional requirements of Article 25 (1) ICSID Convention is not satisfied, parties will choose to initiate ad hoc arbitration under the UNCITRAL Rules of Arbitration. For example, the definition of investment under the ICSID Convention as developed through the ruling of tribunals is narrower compared to definitions found in the relevant BITs, which are usually applied by UNCITRAL tribunals.

While several differences between ICSID and UNCITRAL systems and the nature of the specific claim influence the choice of forum, the possibility of judicial review of UNCITRAL awards is often the decisive factor.[20] Awards by UNCITRAL tribunals can be overruled by domestic State courts at the seat of arbitration. The ICSID regime, established through an international treaty with the intention to create a system independent from national law, is not subject to any seat or *locus arbitri*. Under Article 26 ICSID Convention consent to ICSID arbitration excludes any other remedy and Article 53 (1) ICSID Convention explicitly prohibits the judicial review of ICSID awards in domestic courts.[21] The only option for gaining annulment of an award is through the internal procedure outlined in Article 52 of the ICSID Convention. Arbitration tribunals applying UNCITRAL Rules have a legal seat. Many States have introduced domestic legislation that regulates the conduct of international arbitrations occurring in their territory with the intent to give effect to arbitration agreements made between parties.[22] Such national legislation delineates the competencies of domestic courts with regards to arbitration tribunals and can include the possibility of a judicial review.

A focus on the current possibilities of third-party participation necessitates an in-depth analysis of Article 67 of the ICSID Arbitration Rules and Article 1 to 8 of the UNCITRAL Rules on Transparency (see section 2).

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[15] UNCITRAL Rules art. 1(1).

[16] Convention on The Settlement of Investment Disputes Between States and Nationals of Other States (adopted March 1965, entered into force October 1966) ('ICSID Convention'), art 25 (1).

[17] *Ibid.*

[18] Stephen Jagusch, Jeffrey Sullivan (n 14), p. 86.

[19] *Autopista Concesionada de Venezuela, C.A. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction (27 September 2001), 6 ICSID Rep 419 (2004); Stephen Jagusch, Jeffrey Sullivan (n 14), p. 86.

[20] Stephen Jagusch, Jeffrey Sullivan (n 14), p. 109.

[21] Stephen Jagusch, Jeffrey Sullivan (n 14), p. 97.

[22] *Ibid.*, p. 98.

1.2. Current Status of the ISDS Reform Process

At its fiftieth session in 2017, the UNCITRAL entrusted its Working Group III with a broad mandate to work on the possible reform of ISDS. The UNCITRAL agreed that the Working Group would ensure that the deliberations - while benefiting from the widest possible breadth of available expertise from all stakeholders - would be Government-led with high-level input from all Governments, consensus-based and fully transparent.

The report of Working Group III on the progress of its thirty-seventh session held in New York from 1 to 5 April 2019 stressed that third-party participation in ISDS could allow for relevant interests to be presented and considered by the investment tribunal.[23] With reference to the subjects, the Working Group III advocates for the participation of the "general public", "public interest organizations", and "local communities" or "individuals" affected by the investment or the dispute at hand. With reference to the subject matter, the Working Group III advocates for more consideration for the "protection of human rights," "obligation of investors" and, interestingly for the purposes of the present report, "**issues relating to the environment**."

Finally, with reference to the instruments and ways of participation in ISDS proceedings, the report of Working Group III highlighted the importance that the above-mentioned subjects were able to participate "**beyond making submissions as third parties**," without further clarifying the nature of the wider participation sought. The same report highlighted that, during the discussion, it was noted that the UNCITRAL Rules on Transparency as well as the Mauritius Convention addressed submissions by a third person and by a non-disputing Party to the treaty.

Therefore, the question was raised whether those provisions were insufficient and required the development of guidance to tribunals on how to apply the requirements for third-party submissions and to ensure that such submissions would be duly considered when rendering their decisions. However, since 2019, the Working Group III has not taken any concrete steps to implement third-party rights, nor has it clarified the nature of the wider participation sought "beyond making submissions".

[23] "*Another aspect that was raised as warranting consideration by the Working Group was the need to ensure the participation of third parties in ISDS, including the participation of the general public and local communities affected by the investment or the dispute at hand. It was said that, currently, there was very little opportunity for interested third parties to take part in ISDS proceedings. It was stressed that third-party participation in ISDS could allow for relevant interests to be presented and considered by the investment tribunal, for example on issues relating to environment, protection of human rights, as well as obligation of investors. It was further said that, as a matter of legitimacy of the ISDS system, it would be important that affected communities and individuals as well as public interest organizations be able to participate in ISDS proceedings beyond making submissions as third parties"* (UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), para. 31).

2. Current Procedural Rules

This section outlines the procedural rules for third-party participation under the ICSID Arbitration Rules and the UNCITRAL Rules on Transparency.

2.1. ICSID Arbitration Rules

Since its inception in 1966 the ICSID Arbitration rules have undergone several significant amendments in 1978, 1984, 2003, 2006, 2014, 2018 and, more recently, in 2022. Prior to the 2006 amendment, the Secretariat Discussion paper[24] invited stakeholder inputs on possible areas where the rules could be changed, which included questions on: "*a) whether the ICSID secretariat 'should be required' and 'not just authorized' to publish excerpts of all awards; b) should the rules give tribunals authority to accept submissions from third parties"*. During the consultations, some States were in favor of requiring the consent of both parties for the tribunal to allow third-party submissions.[25] However, in the 2006 amendment, Rule 37(2) was incorporated, as per which, the tribunal has the authority to accept submissions from third parties, requiring only prior consultation with the parties. Further, Rule 48(4) required the publication of legal excerpts of awards as soon as possible.

These rules were restated in the 2022 Amendment through Rule 67 and Rule 62(4) respectively. Rule 67 of 2022 Arbitration Rules allows any non-disputing party such as a person or entity that is not party to the dispute to apply for permission to file a written submission (*amicus curiae*). However, the acceptance of such submissions is subject to the discretion of the tribunal.[26] The *amicus curiae* submissions *must* be made within the timeline set by the tribunal and must not unduly disrupt or delay the arbitration process. When considering whether to grant the request, the tribunal takes into account factors such as (a) whether the submission would address a matter within the scope of the dispute; (b) whether the submission would assist the Tribunal by bringing a perspective different from that of the parties; (c) whether the non-disputing party has a significant interest in the proceeding in line with Rule 67(2).

Rule 62 regulates the publication of awards and decisions on annulment. In Rule 62 (1) it is determined that their publication is conditioned on the consent of the parties. As per Rule 62 (3) the consent of parties to the publishing of the documents is assumed if no objection is submitted in written form 60 days after the dispatch of the documents. Rule 62 (4) outlines the procedure if one party does not consent to their publication, which leads to the publication of excerpts of the awards and decisions as suggested by the Secretary-General after parties had the ability to comment on the documents.

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[24] *Possible Improvements of the Framework of ICSID Arbitration* (ICSID, 22 October 2004). Available from https://icsid.worldbank.org/resources/publications/background-papers; *Suggested Changes to the ICSID Rules and Regulations* (ICSID, 12 May 2005). Available from https://icsid.worldbank.org/resources/publications/background-papers.

[25] Antonio Antonietti, "The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules", *ICSID Review - Foreign Investment Law Journal*, Volume 21, Issue 2 (2006).

[26] *Ibid*.; Eloïse Obadia, "Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration", *ICSID Review - Foreign Investment Law Journal*, Vol. 22, Issue 2 (2007), Pages 349–379. Available from https://doi.org/10.1093/icsidreview/22.2.349.

Furthermore, Rule 63 (1) states the *lex generalis* of orders and decisions published within 60 days after the order or decision is issued with any redactions as agreed on by the parties, while Rule 63 (2) and (3) outlines the procedure on disagreements to any proposed redactions.

The core requirement of "consent of both parties" for the publication of the award in its entirety is embedded in Rule 64. Further, Rule 65, provides that unless either disputing party objects, the tribunal may allow non-disputing parties to attend or observe all or part of the hearing. Rule 66 provides for protection of confidential and sensitive information in arbitration proceedings, allowing parties to determine documents, evidence, and submissions as protected information, thereby limiting their disclosure to ensure confidentiality, national security, or business interests.

2.1.1. Shortcomings and Criticism of ICSID Arbitration Rules

The discretion of the tribunal in accepting *amicus* briefs may create unpredictability regarding acceptance of submissions, as the requests are considered on a case-by-case basis, giving regard to the satisfaction of the criteria. This may also provide the tribunal the flexibility to determine what criteria should be taken into account. Moreover, these rules do not provide for broader rights of intervention to the affected third parties.

Furthermore, Rule 62, 63, and 64 aim to increase transparency and public access to information, while simultaneously pursuing the objective of preserving the control of the parties over the proceedings, and the confidentiality of ICSID arbitration. However, access to documents, awards and hearings contingent on parties' consent or objection, may legitimize concerns of third parties. Rule 62 is centered on the consent of the parties, which allows parties to effectively block the full publication of awards and decisions. While excerpts are still published, the current Rules bar affected third parties and the public from having the information needed to effectively participate in ISDS proceedings under ICSID and scrutinize all elements of an award or decision on annulment. Limited access to these essential documents decreases the predictability and clarity of decisions.

Considering that these Rules place the decision on the publication of the documents on either the Secretary-General or the Tribunal, the objectivity of this publication procedure is limited. ICSID arbitrators might shy away from enabling more comprehensive access to documents to avoid tarnishing their reputation in the eyes of investors, by prioritizing public access to information over the confidentiality of the proceedings. Nonetheless, Rule 62 and Rule 63 oblige ICSID tribunals to publish information on the outcomes and decisions of the proceedings even if certain redactions are accepted. Thus, to a certain extent they guarantee access to information and accountability, as these Rules do not allow for complete confidentiality of the documents in favour of the parties.

2.2. UNCITRAL Rules on Transparency

The UNCITRAL Rules on Transparency address submissions by third parties and by non-disputing parties to the subject matter treaty. These provisions are critical to the present research as they provide direct reference to third-party participation thus formalizing third-party considerations in ISDS. Article 4 is particularly important as it explicitly addresses third party participation.

Article 4 of the UNCITRAL Rules on Transparency creates a basis for third-party participation in arbitral proceedings through making written submissions. The third person is defined as a party that is not a disputing party and not a non-disputing party, within the meaning of Article 5. The tribunal is vested with the discretion to determine whether to accept third-person submissions after conducting consultations with the disputing parties. This discretion of the UNCITRAL arbitral tribunal supersedes the primacy of the rules as indicated in Article 1 (5) where tribunals are vested with the discretion to conduct proceedings in a manner that promotes transparency notwithstanding any effect the Rules may have.

The submission by the third party should be concise and set out the interest the party has in the dispute. The submissions should also provide a financial disclosure on the financial assistance received to support the preparation of the submission as well as any substantial financial assistance received within the preceding two years. Based on an analysis of Article 4, the tribunal shall take a host of factors into consideration when determining whether to admit the submissions of third persons. These are:

1. Whether the third person has a significant interest in the arbitral proceedings.[27]
2. The extent to which the submissions would enable the tribunal to determine factual or legal issues related to the proceedings by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties.[28]
3. The outcome of consultations between the arbitral tribunal and the disputing parties.[29]
4. The impact of the submission on the proceedings. The tribunal shall ensure that such submissions do not 'disrupt' or 'unduly burden' the arbitral proceedings and that such submissions shall not 'unfairly prejudice' any disputing party.[30]

Hearings, where evidence is presented, and oral arguments are made, are open to the public. However, if certain parts of the hearing involve confidential information or could affect the fairness of the arbitration process, the tribunal shall take the necessary steps to keep those portions private.[31] In this respect, the information considered confidential or protected includes business-related confidential data, information shielded by the treaty, information protected under the respondent State's laws, and information whose disclosure could interfere with law enforcement.

To ensure this protection, the arbitral tribunal, after consulting with the disputing parties, shall implement measures to prevent the release of such information. These measures may include setting deadlines for parties to request confidentiality, establishing procedures for identifying and redacting sensitive content in documents, and, when necessary, conducting private hearings as outlined in Article 6.

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[27] UNCITRAL Rules on Transparency, art 4(3)(a).
[28] *Ibid.*, art 4(3)(b).
[29] *Ibid.*, art 4(1).
[30] *Ibid.*, art 4(5).
[31] *Ibid.*, art 6(1&2).

Finally, the repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations or an institution named by UNCITRAL for the purposes of publication of information at the commencement of arbitral proceedings under art. 2 or publication of documents under art. 3 of the Rules on Transparency.

2.2.1. Shortcomings of UNCITRAL Rules on Transparency

In its 37th session, the UNCITRAL Working Group III questioned the adequacy and completeness of these provisions in facilitating third-party participation through submissions in ISDS and ensuring that such submissions were duly considered in the decisions of the tribunals.[32] This challenge is well founded given the potential barriers to third-party submissions that the provisions implicitly construct.

The tribunal shall only admit third-party submissions upon consulting with the disputing parties. This provision implies that disputing parties may have a right to unilaterally veto third party submissions thus binding the tribunal to this decision. Furthermore, the third party is required to have a 'significant interest' in the arbitral proceedings. Currently, there is no bright line test to determine whether this threshold has been satisfied, and tribunals are left to determine it on a case-by-case basis. The lack of specific guidance ultimately rests the determination of these interests on the discretion of the tribunal.

Finally, the tribunal is required to ensure that such submissions do not 'disrupt' or 'unduly burden' the arbitral proceedings and that the submissions shall not 'unfairly prejudice' any disputing party.[33] This docile approach to third-party submissions limits the value of third-party contributions to the contours of *amicus curiae* submissions which focus on points of law or fact.

In this way, the third-party participation envisioned in the UNCITRAL Rules on Transparency is limited to that of submissions made by *amicus curiae*. The analysis above illustrates the limited scope of *amicus* submissions which are perceived as failing to provide third-party actors with an effective voice and, therefore, failing to cater to the rights of third parties that are affected by the outcome of the proceedings.[34]

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[32] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session (Vienna, 5–9 April 2021), UN Doc A/CN.9/970, para. 32.
[33] UNCITRAL Rules on Transparency, art 4(5).
[34]Jesse Coleman, Lise Johnson, Brooke Güven, Lorenzo Cotula and Thierry Berger, "Third Party Rights in Investor-State Dispute Settlement: Options for Reform" (Columbia Law School, 15 July 2019), pp. 6–7. Available from https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1149&context=sustainable_investment_staffpubs.

3. Progress on Third-party Participation and Environmental Governance in ISDS through Case Law and Treaty-Making

3.1. Developments through Case Law

The section below outlines the evolution of third-party participation through the decisions of arbitral tribunals in ISDS cases.

3.1. a) Methanex Corporation v. United States of America

Canadian investor *Methanex Corporation* initiated arbitration against the United States of America under Chapter 11 of the North American Free Trade Agreement (NAFTA) and the UNCITRAL Arbitration Rules on 3 December 1999.[35] Its claim concerned the prohibition of a gasoline additive known as methyl tert-butyl ether by the state of California,[36] which the state argued caused water pollution.[37] In 2000, the International Institute for Sustainable Development (IISD) issued the first *amicus curiae* request in the history of ISDS.[38] Simultaneously, IISD petitioned to access the pleadings and oral hearings of the parties.[39] American NGO Earthjustice filed a second *amicus curiae* petition.[40] The Tribunal decided in favour of the state.

Key outcomes. The *Methanex* case led to significant progress for third-party participation.[41] In January 2001 the Tribunal confirmed its jurisdiction to consider *amicus curiae* submissions and voiced its intent to accept the submissions in the merits phase.[42] The case set a precedent for various ISDS proceedings for the acceptance of *amicus curiae* submissions.[43] The decision is crucial due to the environmental protection objective of California's opposed regulation. Thus, it illustrates that third-party participation can be effective in supporting environmental protection regulation against investor claims. While Methanex was successful in its opposition to open hearings and to third-party access to documents[44], third parties accessed information per U.S. domestic law.[45] Nonetheless, the NGO's petitions show the significance of access to information for third-party participation and the role of NGOs in advocating for transparency in ISDS.

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[35] *Methanex Corporation v. United States*, Final Award on Jurisdiction and Merits, (2005) 44 ILM 1345, Preface, para. 1.

[36] *Ibid*., Preface, para. 1, Part II Chapter D, para. 7; Howard Mann, "Methanex v. United States", *IISD Investment Treaty News,* 18 October 2018. Available from https://www.iisd.org/itn/2018/10/18/methanex-v-united-states (accessed 20 March 2025).

[37] *Methanex Corporation v. United States* (n 35), Part II Chapter D, para. 15.

[38] Howard Mann (n 36).

[39] Howard Mann (n 36); "Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures" (OECD, 2005), p. 7. Available from https://doi.org/10.1787/524613550768.

[40] *Ibid.*

[41] *Ibid.*

[42] *Methanex Corporation v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (15 January 2001), para. 53.

[43] Howard Mann (n 36).

[44] *Ibid.*

[45] *Ibid.*

3.1. b) Glamis Gold Ltd. v. United States of America

Glamis Gold Limited (*Glamis*), a mining company incorporated in Canada, filed a dispute against the United States of America under NAFTA's Chapter 11 and the 1976 UNCITRAL Arbitration Rules.[46] The corporation saw a violation of its investor rights by the state of California, due to its adoption of more restrictive regulations on mining addressing the permit procedure, the operation of open pit mines and the protection of Native American heritage sites.[47]

Key outcomes. This case expanded the practice of arbitration tribunals regarding *amicus curiae* submissions and transparency.[48] In *Glamis*, the tribunal accepted and considered written submissions by three distinct groups - civil society organizations, a business association and the affected indigenous Quechan Indian Tribe.[49] Thus, *Glamis* showed that an *amicus curiae* submission process with multiple third parties is feasible in ISDS without hindering the tribunals functioning.[50] The Tribunal enabled access to materials and the ISDS process.[51] While the tribunal states in its final award that it should address the content of *amicus curiae* submissions in its award to the extent that they influence necessary decisions, it concludes that it does not reach the specific issues raised by the submissions.[52] The tribunal used its discretion to not explicitly address the concerns and arguments by third-party participants. While the submissions may have provided context and influenced the final award, intransparency remains as to how thoroughly the tribunal considered the arguments of third parties.

3.1. c) Perenco v. Ecuador

The case *Perenco v. Ecuador*[53] initiated in 2008 under the France–Ecuador BIT and concession contracts, involved Perenco, a French-owned oil and gas company, and Ecuador. Perenco had invested in two hydrocarbon blocks but faced increasing windfall taxes of 50% and 99% after a political transition. Following the second tax, Petroecuador took control of the blocks. In April 2008, Perenco filed for arbitration with ICSID. In its 2011 counter-memorial, Ecuador alleged Perenco caused severe environmental damage (environmental counterclaim) and had failed to properly maintain the infrastructure. In 2015, the tribunal issued an Interim Decision on Ecuador's environmental counterclaim, confirming some contamination for which Perenco would be held liable and appointing an independent expert to assess remediation costs. The tribunal made extensive reference to the independent expert report and, in its final decision, the tribunal ordered Perenco to pay Ecuador slightly more than USD 54 million under the environmental counterclaim.

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[46] *Glamis Gold, Ltd. v. United States of America*, Award (2009) IIC 380, Ad Hoc Tribunal UNCITRAL, para. 1.
[47] *Ibid.*, para. 252; Howard Mann, "Glamis v. United States", *IISD Investment Treaty News,* 18 October 2018. Available from https://www.iisd.org/itn/2018/10/18/glamis-v-united-states/ (accessed 21 March 2025).
[48] Howard Mann (n 47)
[49] *Glamis Gold, Ltd. v. United States of America*, Decision on Application and Submission by Quechan Indian Nation (16 September 2005), para. 13. Available from https://www.italaw.com/sites/default/files/case-documents/ita0366.pdf ; *C.f. Glamis Gold, Ltd. v. United States of America*, Non-disputing Party Submission of the National Mining Association (13 October 2006); *C.f. Glamis Gold, Ltd. v. United States of America*, Non-disputing Party Submission Sierra Club and Earthworks (16 October 2006); Howard Mann (n 47).
[50] Howard Mann (n 47).
[51] *Ibid*.
[52] *Glamis Gold, Ltd. v. United States of America* (n 49), para. 8.
[53] *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6.

Key outcomes. The case does not expressly deal with third-party participation rights. However, it is an important precedent for the consideration given in an arbitration proceeding to environmental damages and to the role of technical advisors in quantifying the damage. The case invites reflection on the possibility for parties affected by environmental damage, to submit environmental reports prepared by third-party consultants, with certain guarantees regarding their independence and transparency on the source of funding.

3.1. d) Urbaser v. Argentina

The case *Urbaser v. Argentina*[54] arose from Argentina's financial crisis, impacting a concessionaire providing water and sewerage services in Buenos Aires, in which Urbaser was a shareholder. Argentina's emergency measures led to the concessionaire's insolvency, prompting Urbaser to initiate ISDS proceedings. Argentina counterclaimed, arguing that the concessionaire's failure to invest in water and sanitation violated the human right to water. The tribunal accepted jurisdiction over the counterclaim and affirmed the "right to water" as a human right under international law.

Key outcomes. While the case does not address third-party participation rights, it is the first arbitral award to analyze a state's counterclaim against an investor for alleged human rights violations, offering insights relevant to strengthening third-party participation, focusing on:

i) Human rights corporate responsibility: the tribunal distinguishes between corporations' negative responsibilities (not to harm), which are directly attributable under international law, and positive responsibilities (to grant rights), which are not. In the present case, the obligation to ensure water and sanitation stems from the concession contract, making the state primarily responsible for exercising its authority over the concessionaire to ensure and preserve the population's basic right to water and sanitation.

ii) BITs counterclaims clauses: the case highlights the challenges and opportunities of state counterclaims in arbitration, stressing the need for clear counterclaim clauses in BITs, given that international human rights obligations generally bind states unless explicitly extended to investors.

The case demonstrates how a more decisive consideration of human (and environmental) rights in BITs would significantly contribute to enhancing these rights. To ensure that multinational corporations respect environmental rights and that affected third parties have a voice in the arbitral process, efforts could be made during BIT negotiations. Clear clauses in BITs outlining corporate responsibilities regarding human and environmental rights, coupled with procedural guarantees for third parties in ISDS proceedings, would significantly contribute to enhancing environmental rights.

3.1. e) Apotex Inc. v. United States of America

Canadian pharmaceutical company Apotex filed a dispute against the United States of America under NAFTA's Chapter 11 and ICSID Arbitration Rules.[55] The corporation saw a violation of its investor

[54] *Urbaser v. Argentina* (Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic), ICSID Case No. ARB/07/26).
[55] *Apotex Inc. v. United States of America,* ICSID Case No. UNCT/10/2.

rights by the U.S. Food and Drug Administration, alleging a lack of due process in its prevention of the claimant exporting drugs produced in two Canadian facilities to its U.S. American subsidiaries. In this case, third parties had to ensure meeting the participation requirements for *amicus curiae* under both ICSID Arbitration and the NAFTA FTC Statement.[56]

Key outcomes. *Apotex v. United States* significantly contributed to further delineating the conditions for third parties to qualify as *amici curiae.* A management consultancy requested to participate as *amicus curiae*, arguing it aimed to contribute its special expertise on whether the claimant's venture capital raised could be considered an 'investment' under NAFTA.[57] Its objective was to support the claimant through arguing for a broader definition of 'investment'.[58] The tribunal denied the consultancy participation, citing that *amicus curiae* need to provide 'knowledge, experience or expertise' to bring to the arbitration that disputing parties could not contribute, display 'significant interest in the arbitration' and needed to express 'the particular public interest it would be seeking to address'.[59] Moreover, an investment lawyer, Mr. Barry Appleton, requested to gain *amicus curiae status.* The tribunal refused his request citing a lack of significant interest in the case and ability to assist the tribunal.[60] Appleton's argument that he represented clients who faced similar disputes was deemed insufficient.[61] The tribunal added that allowing his submission would create unnecessary work and costs for the disputing parties.[62] While third party participation was rejected in the case, it helped to clarify the requirements for *amicus curiae* submissions - to assist the tribunal, a significant interest in the dispute and to contribute to issues within the scope of the case.[63] Clear criteria adds credibility to the instrument, decreases the risk of unduly burdening parties and enables more meaningful participation.

The first ICSID tribunal to accept *amicus curiae* submission was in *Vivendi v. Argentina.*[64] Even though the *amicus curiae* submissions were accepted, they did not have a significant impact on the outcome of the dispute. However, the tribunal relying on *Methanex and Article 44 of the ICSID Convention* emphasized that it had the procedural autonomy to decide on accepting *amicus curiae* submissions. This case played a key role towards the amendment to the 2006 ICSID rules leading the way to formalized procedural acceptance of *amicus curiae* submissions.

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[56] Luke Bastin, "Amici Curiae in Investor-State Arbitrations: Two Recent Decisions", *Australian International Law Journal*, Vol. 20 (2013).
[57] Luke Bastin, "Amici Curiae in Investor-State Arbitration: Eight Recent Trends" *Arbitration International,* Vol. 30 (2014).
[58] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB (AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, 4 March 2013, para. 25; *Ibid*.
[59] *Apotex Inc. v. United States of America*, UNCITRAL (NAFTA), Procedural Order No. 2 on the participation of a non-disputing party, 11 October 2011, paras. 23, 28-29; *C.f. Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB (AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, 4 March 2013.
[60] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB (AF)/12/1, Procedural Order on the Participation of the Applicant Mr. Barry Appleton, as a Non-Disputing Party, 4 March 2013.
[61] Luke Bastin (n 57), p. 100.
[62] *Ibid.*
[63] Luke Bastin (n 56), p. 104.
[64] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic,* ICSID Case No. ARB/03/19.

3.1. f) Biwater Gauff v. Tanzania

Biwater Gauff v. Tanzania[65] marked the first case in which the tribunal allowed an *amicus curiae* submission under the amended 2006 ICSID rules, despite opposition from the claimant. In this case, the investor entered into a contract with the Tanzanian government to provide water and sewerage services in Dar es Salaam for ten years. The project faced significant difficulties, leading to the termination of the contract and seizure of the investor's assets. The arbitration took place under the United Kingdom-Tanzania BIT and the ICSID Arbitration Rules. The tribunal received *amicus curiae* submissions from five NGOs.

Key outcomes. The *amici* requested access to case documents and participation in oral hearings. However, the tribunal declined the request for access to documents, reasoning that the dispute had already received significant public attention, but left open the possibility of reconsideration later. It is noteworthy that the tribunal provided detailed reasons for refusal. On the request for access to oral hearings, ICSID Rule 32(2) required consent from both disputing parties. Since Biwater Gauff objected, the tribunal denied direct participation. Although the *amici* were denied access to case documents and hearings, their submissions were instrumental in shaping the tribunal's reasoning. The *amici* argued that the investor's failures contributed to the project's collapse and highlighted the investor's heightened responsibility in the water sector, given its impact on the fundamental right to clean water. The tribunal extensively referenced these arguments, emphasizing investors' due diligence obligations and the significance of sustainable development goals. This case marked a pivotal moment in recognizing the role of *amicus* submissions under ICSID Rule 37, demonstrating that third-party perspectives could enhance understanding of environmental and human rights concerns in investment disputes.

3.1. g) Philip Morris International v. Republic of Uruguay

In 2010, *Philip Morris v. Uruguay*[66] initiated an international suit challenging Uruguay's tobacco control laws claiming a violation of the BIT between Uruguay and Switzerland. Uruguay adopted two anti-smoking measures taking into consideration the implications of tobacco consumption for its population. The measures at issue required firstly, 80% graphic health warnings on cigarette packs, and secondly, limited tobacco brands to a single brand variant (known as Single presentation requirement, "SPR"). Investors claimed that the SPR requirement affected the company's value, and the 80% regulation limited its rights to use its legally protected trademark thereby infringing on its intellectual property rights. Uruguay's measures were based on the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC). The tribunal accepted two applications of *amicus curiae* submissions: a) WHO and the WHO FCTC Secretariat, and b) the Pan American Health Organization (PAHO). The WHO and FCTC report discussed the evidence-based approach taken by Uruguay and emphasized the effectiveness of large graphic health warnings on tobacco consumption choices. It further discussed relevant international instruments. The PAHO submissions examined tobacco control measures in America. The submissions provided evidentiary support for the tribunal's assessment of the effectiveness and reasonableness of measures.

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[65] *Biwater Gauf Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.

[66] *Philip Morris Brands SARL and others v. Republic of Uruguay*, ICSID Case No. ARB/10/7.

Key outcomes. The tribunal dismissed all the claims and upheld the legality of the measures for the purpose of protecting public health. The tribunal relied on the *amicus curiae* submissions in reaching its decision in favour of States' rights to regulate cigarette packaging over the investors' proprietary trademark rights. The award extensively references the *amicus* submissions. This case plays a key role in the discussion on the role *of amicus curiae* submissions in the interplay of public policy measures and investor rights.

3.1. h) Bernhard von Pezold & Border Timbers Limited v. Republic of Zimbabwe

In the joined arbitrations *Bernhard von Pezold v Zimbabwe*[67] and *Border Timbers v Zimbabwe*[68], claimants challenged Zimbabwe's land reform program, alleging expropriation of their large agricultural estates. An NGO and several Zimbabwean indigenous communities jointly sought permission to participate as *amici curiae* in the arbitrations. Their requests included filing a joint written submission, accessing key case documents, attending hearings, and potentially responding to tribunal questions.

Key outcomes. The tribunal rejected the request to participate as *amici curiae* based on two grounds. First, their submission would not assist the tribunal, did not address matters within the scope of the dispute, and did not arise from a significant interest in the proceedings. Second, lack of 'apparent independence' requirement i.e., that the *amici curiae* were not 'independent' from the respondent State and thus did not satisfy Rule 37(2). It inferred that Rule 37(2) implicitly requires amici to be independent of the disputing parties, a criterion not expressly stated in the rule. This novel interpretation contradicts the explicit requirement of "a significant interest", and could severely limit future *amicus curiae* participation, imposing a burdensome standard.[69]

3.2. Developments through Treaty-making

3.2.1. Third-party Participation in ISDS Arbitration in the Scope of the U.S.-Colombia Trade Promotion Agreement, 2012

The U.S.-Colombia Trade Promotion Agreement (TPA), which went into effect 15 May 2012,[70] explicitly gives authority to the ISDS arbitration tribunal to accept and consider *amicus curiae* submissions and is exceptional in its inclusion of provisions promoting public access to relevant documents and hearings. In addition, the Agreement includes commitments to protect the environment, allowing for environmental considerations to be a key element in potential treaty interpretation and decreasing the chance that investors bring claims that could target environmental protection legislation.

[67] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15.
[68] *Border Timbers Limited and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25.
[69] Luke Bastin (n 56).
[70] United States - Colombia Trade Promotion Agreement (signed 22 November 2006, entered into force 15 May 2012).

3.2.1. a) Third Party Participation under the ISDS Chapter of the TPA

Chapter Ten of the TPA covers Investment and its Section B addresses ISDS.[71] As per Article 10.16 (3) a claimant may submit a claim under ICSID or UNCITRAL Arbitration Rules or another set of agreed-on Arbitration Rules. Article 10.20 (3) empowers the tribunal to have the authority to "*accept and consider amicus curiae submissions from a person or entity that is not a disputing party*". Such a submission must display the author, any person or entity that has contributed in a financial or another manner to the submission. The wording of Article 10.20 (3) suggests that the tribunal can exercise a measure of discretion in allowing petitions of third parties. However, the inclusion of the *amicus curiae* provision points to a general openness of the dispute settlement process to third-party submissions.

3.2.1. b) Increased Transparency under the ISDS Chapter of the TPA

The TPA allows for improved transparency of proceedings, enabling more efficient public participation. Article 10.21 (1) delineates that written documents relevant to the ISDS proceedings are made available to the public. This includes the notices of intent and arbitrations, pleadings, memorials, briefs, *amicus curiae* and non-disputing party submissions, minutes of the hearings, as well as orders, awards, and decisions of the tribunal. Additionally, Article 10.21 (2) sentence 1 designates oral hearings to be open to the public as a general rule. As an exception, Article 10.21 (4) sets out the procedure of limiting the release of documents because they contain protected information. As per Article 10.21 (2) sentences 2 and 3, arrangements to ensure a tribunal's hearing does not entail the release of protected information forms the exception and needs to be specifically advocated for by parties. This degree of enabling access to information regarding ISDS to the public through a bilateral treaty is novel and allows for increased accountability. NGOs and affected people are empowered to follow ISDS proceedings and get involved effectively.

3.2.1. c) The Significance of the Chapter on the Environment of the TPA

Chapter 18 of the TPA is dedicated to the environment and outlines clear commitments to ensure trade and environmental policies are "*mutually supportive*" and support sustainable development.[72] The inclusion of a separate chapter on the environment indicates its special status in the Agreement. All obligations in the environment chapter are accorded the same dispute settlement procedures and enforcement mechanisms as TPA's commercial obligations.

Article 18.1 recognizes the sovereignty of both States to determine their respective domestic environmental laws but with the objective of ensuring a high standard of environmental protection and further raising such standards. The Article could prevent investors from filing claims against more ambitious domestic environmental protection legislative instruments based on the TPA. Additionally, the provision could avoid a potential "chilling effect" of the prospect of ISDS on pursuing advanced environmental protection policies.

Article 18.2 in combination with Annex 18.2 delineates the obligation for parties to "*adopt, maintain, and implement laws, regulations, and all other measures to fulfil their obligations*" under selected multilateral environmental agreements (MEAs) such as the Montreal Protocol. Thus, the article

[71] United States - Colombia Trade Promotion Agreement, Chapter 10.
[72] *Ibid.*, Chapter 18.

strengthens the status of these agreements and would bar investors' claims incompatible with the State party's obligations under the select MEAs.

Article 18.3 (2) explicitly states that "*it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws*". The overall status the environment is accorded in the Agreement would support an interpretation of arbitration rules in a manner that is as environmentally friendly as possible.

3.2.2. Third-party Participation in the AfCFTA Investment Protocol

The Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (AfCFTA Investment Protocol) creates a governing framework to facilitate and encourage intra-African investment flows. The Protocol seeks to provide a comprehensive legal and institutional framework for investment at the Continental level. The investor-State dispute resolution pursuant to the AfCFTA Investment Protocol is currently under negotiation by the AfCFTA State parties and shall be included as an Annex to the Protocol.[73] Therefore, the scope of third-party submissions has not yet been determined.

However, past rhetoric on the balance between public interests and investor rights from the Continent may be indicative of the direction taken by the negotiators. South Africa's submission to the UNCITRAL Working Group III in preparation for the 38th session highlights continental critics of the ISDS system in relation to third-party participation. The submission criticized the lack of recourse for affected parties in ISDS including governments and local communities which created an ecosystem that prioritizes investment protection over public interest objectives such as environmental protection.[74] The preambular language of the AfCFTA Investment Protocol thus reaffirms the inherent right of State Parties to regulate in their territories to promote sustainable development objectives and protect legitimate public welfare objectives such as the conservation of living and non-living exhaustible natural resources.[75]

Against this background, the ISDS mechanism is likely to give due regard to third party interests by allowing for participation that ensures the balance of rights between investors and the public welfare of affected parties.

[73] Agreement Establishing the African Continental Free Trade Area (opened for signature 21 March 2018, entered into force 30 May 2019), Investment Protocol (adopted 18 February 2023) ('AfCFTA Investment Protocol'), art 46 (3).
[74] Talkmore Chidede, "South Africa's Submission on UNCITRAL ISDS Reforms: Comments and Implications", tralac, 16 October 2019. Available from https://www.tralac.org/blog/article/14276-south-africa-s-submission-on-uncitral-isds-reforms-comments-and-implications.html (accessed 29 March 2025).
[75] AfCFTA Investment Protocol, Preamble.

4. Additional Barriers to Third-party Participation

Third parties face numerous structural barriers in effectively participating in ISDS.

4.1. Geographic Barriers

Hearings are often conducted in a location geographically distant to the affected third parties.[76] The place of UNCITRAL arbitration is agreed on by the parties.[77] If no explicit choice was made, the tribunal determines the location based on the circumstances of the case such as the suitability of the domestic arbitration law, location of the evidence, or subject matter and convenience for the parties, counsel, and arbitrators.[78] Previously, UNCITRAL tribunals were held in cities of the Global North such as London, New York, and Paris.[79] ICSID proceedings frequently occur in big cities worldwide like Washington D.C. and Beijing.[80] In recent years the capacity for conducting sessions and hearings by phone or video conference has increased. Nearly 60% of ICSID sessions and hearings were conducted in a remote manner in 2019.[81] Witnesses and other participants have the option to participate in in-person hearings through virtual communication in multiple languages.[82]

4.2. Financial Barriers

Intervening in an ISDS process requires significant financial resources, as the complexity of ISDS proceedings may necessitate third parties to hire legal counsel.[83] Increasing third-party participation through the active participation of affected parties in oral hearings, additional submissions, and access to all parts of the proceedings, will increase the costs of ISDS. In the period from June 2017 until May 2020 the mean cost of ISDS for investors was 7.2 million USD, while the mean cost for ISDS respondent States was 4.4 million USD.[84] ICSID arbitrator fees are 500 USD per hour of work related to the proceeding in addition to travel and lodging costs,[85] while UNCITRAL arbitrator fees are to be "reasonable" in relation to the amount in dispute under Article 41 UNCITRAL Arbitration Rules.[86] Additional work hours of arbitrators through third-party participation will further increase the costs

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[76] Jesse Coleman *et al.* (n 34), p. 11.
[77] International Centre for Settlement of Investment Disputes, "Place of Arbitration - UNCITRAL Arbitration". Available from https://icsid.worldbank.org/procedures/arbitration/uncitral/place-of-arbitration (accessed 19 March 2025).
[78] *Ibid.*
[79] *Ibid.*
[80] International Centre for Settlement of Investment Disputes, "A Guide to ICSID's Global Facilities" (10 March 2020). Available from https://icsid.worldbank.org/news-and-events/speeches-articles/guide-icsids-global-facilities#:~:text=ICSID's%20new%20hearing%20centre%20in,rooms%20for%20parties%20and%20tribunals (accessed 19 March 2025).
[81] *Ibid.*
[82] *Ibid.*
[83] Jesse Coleman *et al.* (n 34), p. 11.
[84] Mathew Hodgson, Yarik Kryvoi and Daniel Hrcka, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration* (June 2021). Available from https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf 13 (accessed 30 May 2025).
[85] International Centre for Settlement of Investment Disputes, "Cost of Proceedings". Available from https://icsid.worldbank.org/services/cost-of-proceedings (accessed 20 March 2025).
[86] UNCITRAL Arbitration Rules, art. 41.

of ISDS for both investors and States. The costs added to ISDS proceedings could discourage respondent States from advocating for meaningful third-party participation. Instead, high costs could motivate States to purposefully exclude third parties and limit their participation in ISDS.

4.3. Time Commitment

Efficient third-party participation requires affected people to be able to invest the time to follow often lengthy proceedings.[87] The mean length of proceedings has increased by more than one and a half years since 2017 to five years and six months in total.[88] The length of proceedings increases the burden on third-party participants to remain up-to-date and continuously involved in the case.

4.4. Linguistic Barriers

Translation of the arbitral proceedings might be necessary, as they could be held in a language not spoken by the affected third parties.[89] The official languages of ICSID are English, French, and Spanish. Per ICSID Arbitration Rule 7(1) parties in each dispute can agree on one or two official languages to conduct the proceedings and submissions. ICSID also allows proceedings to be conducted in a non-official language if the Tribunal, after consulting ICSID's Secretary-General, gives its approval.[90] Considering 838 arbitrators are currently listed in ICSID,[91] it is unlikely that an entire tribunal will be able to understand and consider oral and written statements in indigenous languages. In UNCITRAL proceedings, the parties may choose the language in which the arbitral proceedings are conducted.[92] While interpretation of witness statements by third parties may be possible,[93] third parties need to be able to follow the proceedings and understand the written documents in the language chosen by the parties. This may add considerable translation costs.

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[87] *Cf.* Jesse Coleman *et al.* (n 34), p. 10.
[88] Mathew Hodgson, Yarik Kryvoi and Daniel Hrcka (no 84), p. 13.
[89] *Cf.* Jesse Coleman *et al.* (n 34), p. 11.
[90] Benjamin Miller, Jennifer Liu, Ramin Wright, Jenny Yoo, *Guide for Potential Amici in International Investment Arbitration* (Center for International Environmental Law and University of Toronto, January 2014), p. 16. Available from https://ciel.org/Publications/Guide_PotentialAmici_Full_Jan2014.pdf.
[91] International Centre for Settlement of Investment Disputes, "Arbitrators, Conciliators and Ad Hoc Committee Members". Available from https://icsid.worldbank.org/resources/databases/arbitrators-conciliators-ad-hoc-committee-members (accessed 19 March 2025).
[92] United Nations Commission on International Trade Law, *UNCITRAL Notes on Organizing Arbitral Proceedings* (New York, United Nations, 2016), p. 9.
[93] *Ibid.*, p. 10.

PART II

5. The Case for Reforming the Current System based on Inputs from UNCITRAL Working Group III

UNCITRAL Working group III in its 37th Session highlighted three aspects: **i)** the need of guidance to tribunals on how to apply the requirements for third-party submissions (in this respect attention will be focused on the absence of a notion of "significant interest"); **ii)** the importance of third party participation "beyond making submissions as third parties"; **iii)** how to ensure that third-party submissions would be duly considered by investment tribunals.

5.1. The Need for Guidance on the Application of the Requirements for Third-party Submissions

Of the three factors[94] that the tribunal should take into account to grant the request of third party submission, the most controversial is the "significant interest" requirement, especially when referred to the environmental concern. As there is no bright-line test to determine whether the significant interest threshold has been satisfied, and tribunals are left to determine it on a case-by-case basis, this is an aspect on which arbitral tribunals might need "guidance" as envisaged by Working Group III.

5.2. The Absence of a Notion of "Significant Interest" of the Third Party

In arbitral case law, the interest of the third party is not precisely defined; rather, it is characterized as a de-facto interest that mostly coincides with the public interest (*e.g.* in environmental, health or fundamental rights protection).

Examples include *Methanex Corporation v. United States of America*, where, in paragraph 49 of the *Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae* of January 15, 2001, it is stated that: "*there is an undoubtedly public interest in this arbitration*." Similarly, in *Aguas Argentinas S.A. [...] v. Argentina* the tribunal concluded "*this case does involve matters of public interest of such a nature that have traditionally led courts and other tribunals to receive amicus submissions from suitable non-parties*".[95]

If the third party's interest coincides with the interest of the broader public, its procedural rights are necessarily limited and may conflict with the confidentiality interests of the formal parties to the arbitration, both in terms of access to documentation and participation in hearings - being subject to

[94] (a) whether the submission would address a matter within the scope of the dispute; (b) whether the submission would assist the Tribunal by bringing a perspective different from that of the parties; (c) whether the non-disputing party has a significant interest in the proceeding.
[95] Order in Response to a Petition for Transparency and Participation as *Amicus Curiae,* May 19,2005, para. 19

the consent of the disputing parties (which is not always granted, as demonstrated by the *Biwater v. Tanzania* case).

5.3. Procedural Rights: "beyond making submissions as third parties"

From the perspective of reforming the arbitration system, in order to strengthen third-party participatory rights, a distinction could be drawn between a *de facto* interest that coincides with the public interest - currently represented by *amici curiae* - and a legal interest of the third party that aligns with the interest of one of the disputing parties, to which greater procedural rights could be granted.

In the context of a State counterclaim concerning environmental damage caused by the investor (as in the *Perenco v. Ecuador* case), local communities (*e.g.* indigenous groups) suffering harm from the pollution perpetrated by the investor - or NGOs representing their interests - may have a legal interest that aligns with that of the State. Accordingly, they could be granted standing to "participate" in the proceedings beyond the mere submission of *amicus curiae* briefs, similarly to NGOs intervening as third parties[96] in environmental proceedings before certain regional supranational courts, such as the Court of Justice of the European Union[97] or the European Court of Human Rights.[98] These third-party rights of intervention could include and enhance:

i. the right to access all documents of the proceedings (bearing in mind that the parties would still be able to redact sensitive information);
ii. the right to submit evidence and technical reports prepared by external and independent environmental experts (aimed, among other things, at demonstrating the harm suffered);
iii. the right to attend hearings (with or without the prior consent of the disputing parties - *i.e.*, the investor);
iv. the right to request participation in the assessment of the damage suffered by the State and the determination of appropriate remedies.

Such "enhanced" procedural rights go beyond the mere submission of *amicus curiae* briefs, whose purpose is to offer (to the tribunal, rather than to the parties) information, arguments, or perspectives that may assist in the resolution of the case, and whose admissibility is subject to the tribunal's discretion. Therefore, such rights could not be granted where the third party's interest diverges from or even conflicts with that of the State (*e.g.*, in cases where a community claims that the State allowed the investor's polluting activity to continue for years without adequate regulation, thereby becoming jointly responsible for the harm caused).

[96] Jasper Krommendijk and Kris van der Pas, "To intervene or not to intervene: intervention before the court of justice of the European Union in environmental and migration law", *The International Journal of Human Rights*, vol. 26, no. 8 (2022), pp. 1394–1417.
[97] *Deza, a.s. v European Chemicals Agency* (Case T-189/14). See also Title IV, Chapter 4 "Intervention", Article 129 – 131 of the Rules of Procedure of the Court of Justice.
[98] *Hatton and Others v United Kingdo*m, App no 36022/97 (ECtHR, 8 July 2003).

To summarize, allowing a third party to support the case of a disputing party whose interest aligns with its own (likely, though not necessarily, the State's counterclaim) would enable it to benefit from many of the procedural rights typically afforded to parties, such as access to documentation or participation in hearings. This could made be possible either without the third party acquiring formal party status, or even by granting such status, thereby promoting a more institutionalized model with uniform procedural rules (see, for example, the initiative for a multilateral investment court referred to in section 8.3 below).

5.4. Means to Ensure that Third-party Submissions would be Duly Considered by Investment Tribunals

In arbitral practice it is common for *amicus curiae* submissions to be considered and for tribunals to provide reasons both for accepting and for rejecting such submissions. However, there is no specific provision requiring the arbitral tribunal to state the reasons for which a submission is rejected, or for which access to certain documentation or a hearing is denied. Introducing such a requirement would "force" tribunals to take the third party's position into account - or, at the very least, to take responsibility for not doing so.

6. Means to Increase Access to Information and Transparency as a Precondition of Third-party Participation

6.1. Access to Information as a Precondition for Third-party Participation

Information disclosure is an essential precondition for effective third-party participation. First, third parties need to be informed about the registration of a case to enable informed decision-making regarding whether and at what stage participation would be productive.[99] The facilitation of meaningful third party participation necessitates the disclosure of relevant documents such as "notices of intent and arbitration, pleadings, memorials and briefs"[100] and access to the hearings.[101] Lastly, the publication of awards is crucial for improved transparency and forms the foundation of potential future action by third parties.[102]

6.2. Unilateral Means to Strengthen Access to Information and Transparency

Drafting and strengthening domestic legislation on freedom of information can be an effective option of improving transparency and third-party access to necessary information. For example, in *Methanex* the tribunal rejected open hearings and open access to documents for third-parties based on the opposition of the investor.[103] The State, the United States of America, nonetheless published all the pleadings in line with its domestic Freedom of Information Act.[104] Thus, new or improved existing legislation that gives affected third parties the right to demand of the State to access information on the actions of the government can strengthen the ability for affected parties to participate in ISDS.

6.3. Bilateral Means to Strengthen Access to Information and Transparency

The Columbia-U.S. Trade Promotion Agreement illustrates how bilateral agreements on ISDS can increase the transparency of proceedings. It delineates a *lex generalis*, which requires oral hearings to be public and that relevant written documents are to be made publicly available.[105] This significantly improves the position of third parties in gaining access to the information necessary to effectively participate in ISDS. Bilateral agreements regulating ISDS proceedings between parties are thus an effective means to create a legal framework for improved rights to access information. While it is a lengthier process to amend or create bilateral treaties than negotiating a Memorandum of Understanding, the binding nature of treaties is crucial to create changes to formal procedural rules. A treaty text that prioritizes transparency of proceedings increases the pressure on tribunals to

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[99] *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures* (n 39), p. 3.
[100] *Ibid.,* p. 12.
[101] Nigel Blackaby and Caroline Richard (n 7), p. 254.
[102] *Ibid.*, p. 255.
[103] Cf. *Methanex Corporation v. United States*, Definition of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae"' (15 January 2001), para. 46; Howard Mann (n 36).
[104] Howard Mann (n 36).
[105] United States - Colombia Trade Promotion Agreement (n 70), Article 10.21.

interpret IIAs in a manner that guarantees the release of documents and public nature of oral hearings. Tribunals are compelled to justify the denial of access rights.

6.4. Multilateral Means to Strengthen Access to Information and Transparency

The regulatory approaches in the Aarhus[106] and the Escazu[107] agreements can be considered as milestones in enhancing public participation, access to information, and environmental justice. The Aarhus convention is an international agreement[108] that gives the public a number of rights in regard to the environment such as the right to information and the right to participate in environmental decision making. Similarly, the Escazu agreement is a regional treaty for Latin America and the Caribbean that emphasizes access to information, public participation in environmental matters and the protection of environmental defenders. Both the agreements seek to enhance transparency and accountability in environment decision making, reinforcing the role of public engagement in shaping policies towards better environment protection.

These agreements could serve as a normative foundation for reforming ISDS by ensuring that affected communities are given a more substantive role in disputes involving environmental concerns. However, the applicability of these agreements to ISDS is limited to those investment treaties that include provisions on environmental protection obligations and public participation mechanisms.

Therefore, three key considerations should be included in ISDS reforms. First, case filings, procedural orders, relevant environmental impact assessments and studies should be published in a centralized, accessible repository. Second, public access to hearings (virtually or in person) should be allowed unless confidentiality is justified under strict and narrow conditions. Third, States should negotiate ISDS clauses that reflect Escazu and Aarhus obligations when entering new investment treaties. Moreover, States should consider including public policy objectives such as environmental considerations and transparency requirements in the provisions as can be seen in many new generation BITs such as the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA). [109]

[106] United Nations Economic Commission for Europe (UNECE), Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998. Available from https://unece.org/environment-policy/public-participation/aarhus-convention/text.
[107] United Nations Economic Commission for Latin America and the Caribbean (ECLAC), Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), Escazú, Costa Rica, 2018. Available from https://www.cepal.org/en/escazuagreement.
[108] As of 1 April 2025, the Aarhus Convention has 48 Parties, including the European Union and its member states. These Parties are primarily from Europe and Central Asia.
[109] Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA), chapter 8. Available from https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/08.aspx?lang=eng.

7. Potential Amendments of Existing Rules concerning Third-party Participation

7.1. ICSID Arbitration Rules

A key reform to Rule 67 could be the inclusion of explicit criteria requiring tribunals to consider whether an *amicus curiae* submission addresses relevant public policy objectives, such as environmental protection or sustainable development. In this context, tribunals should be directed to give particular weight to submissions from communities directly impacted by the investment or the dispute, including Indigenous peoples and environmental groups. Embedding such a criterion would align ISDS practice with broader principles of legitimacy, transparency, and public interest.

While the consent principle remains a foundational principle of ISDS, it could be advisable to limit its all-encompassing nature to allow for improved third party participation. For example, if a non-disputing party is accepted to issue a submission as per Rule 67, parties should be required to accept that these *amicus curiae* participants gain access to the publication of awards and decisions on annulment as per Rule 62, orders and decisions as per an amended Rule 63, documents filed in the proceedings as per amended Rule 64 and be allowed to observe the hearings according to an amended Rule 65. Rule 66 is sufficient in guaranteeing the confidentiality of information and proceedings for the investors. Removing discretion in the decision in a dispute regarding the publication of information through amended arbitration rules would allow individual arbitrators to not face scrutiny for being perceived as unfriendly towards investors. In addition, the current 60 day period given to parties to reject the publication of awards and decisions on annulment as per Rule 62 (3) and Rule 63 (1) could be shortened to 30 days to allow for improved legal certainty for non-disputing parties with regards to the material that will be available to them.

7.1.1. Strengthening States' Rights for Bringing Counterclaims and Role of Third Parties

There are only two reported cases of successful environmental counterclaims in ICSID arbitration.[110] Rule 48 of the ICSID Arbitration rules[111] allows bringing counterclaims as a response to the request by an investor. Further, the rules require the counter claim to arise directly from the dispute's subject matter and must fall within the parties' consent and ICSID's jurisdiction. Some challenges in bringing counterclaims include: a) divergence in views on the scope of the parties' consent b) narrow approach towards determining jurisdiction claims c) strengthening public policy objectives and transparency in new BITs. Addressing these issues would enable third parties to effectively participate in counterclaims concerning environmental issues.

Firstly, there are divergences in views amongst tribunals and commentators whether the element of consent to counterclaims might limit environmental counterclaims in the future. However, this risk may diminish with time as recent investment treaties and new BITs have started including language

[110] Mees Brenninkmeijer, Fabien Gélinas, "Counterclaims in Investment Arbitration: Towards an Integrated Approach", *ICSID Review - Foreign Investment Law Journal*, Volume 38, Issue 3 (Fall 2023), Pages 567–594. Available from https://doi.org/10.1093/icsidreview/siad014.
[111] 2022 ICSID Arbitration Rules, Rule 48.

expressly permitting counterclaims.[112] Secondly, the requirement of consent by parties in investment arbitration often excludes counterclaims unless explicitly permitted by the IIA. In investment treaty arbitration, counterclaims are restricted by the tribunal's jurisdictional limits, which are often narrowly defined by treaties emphasizing State obligations rather than investor duties. Since treaties usually do not impose obligations on investors, States struggle to bring counterclaims under treaty-based jurisdiction. Currently, tribunals interpret their jurisdiction strictly, relying on treaty wording. Hence, treaties with broad dispute settlement clauses allow counterclaims, while narrower clauses exclude them. Thirdly, it may be considered to incorporate in IIAs provisions that seek to impose environmental due diligence or sustainable development obligations on the investor. The investor's failure to comply with these substantive environmental obligations may support an environmental counterclaim. The 2016 Morocco-Nigeria BIT[113] and the Southern African Developmental Community (SADC) Model BIT are examples of a new generation of environmentally conscious investment treaties. [114]

This shift in the approach to negotiating BITs is necessary to ensure third party participation in counterclaims. By strengthening the States' right to bring counterclaims, third parties can contribute to offset the compensation demands of the investors. In this scenario, States could then take necessary steps to compensate third parties or take actions to remedy the harm. For instance, Indigenous communities harmed by extractive industries could be eligible for remedies either through State-based compensation mechanisms or special funds tied to the investment framework.

7.2. UNCITRAL Rules on Transparency

The UNCITRAL Rules on Transparency designate *amicus* briefs as the primary mechanism for third-party participation in arbitration. Under Article 4, tribunals are empowered to consider submissions from third parties based on strict criteria, including consultations with disputing parties, a demonstrated significant interest in the case, and assurances that submissions will not disrupt proceedings. However, the requirement for a prior consultation of the parties may restrict broader participation, especially where the third-party perspectives contradict the interests of the parties. To enhance third-party involvement, the rules should be amended to grant tribunals exclusive authority over the acceptance of *amicus* submissions, ensuring that decisions are guided solely by procedural fairness rather than litigants' interests. This reform aligns with the principle of *nemo iudex in causa sua* which in effect will prevent parties from excluding perspectives that may challenge their legal positions.

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[112] Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the United Arab Emirates (signed 12 November 2017), art 13(3) (the investor's consent to arbitrate is conditional upon the investor's acceptance of the possibility of counterclaims). See also Southern African Developmental Community, SADC Model Bilateral Investment Treaty Template with Commentary (July 2012) ('SADC Model BIT'), art 19.2.

[113] Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria ('Morocco– Nigeria BIT') (signed 3 December 2016), preamble.

[114] SADC Model BIT, Part 3 'Rights and Obligations of Investors and State Parties',' Article 14.1, Article 15.3.

Furthermore, third-party participation should be integrated earlier on in the lifecycle of arbitration proceedings at the evidence-taking stage. Article 17 of the UNCITRAL Arbitration Rules authorizes tribunals to hold hearings for witnesses and expert witness testimony, yet it does not extend this platform to affected third parties, such as alleged victims of environmental degradation. Expanding these provisions under the Rules on Transparency would allow tribunals to receive direct evidence from impacted communities, strengthening the evidentiary record in disputes with broad societal implications. This approach mirrors the Inter-American Court of Human Rights, where Article 58(a) of the Rules of Procedure enables the court to obtain evidence from third parties, including witnesses and victims, through both written statements and oral testimony. By adopting similar measures, the UNCITRAL Rules on Transparency could advance a more inclusive and comprehensive dispute resolution process that factors in third party perspectives that go beyond the commercial interests of the disputing parties.

8. New Ideas for Reforming the ISDS System Beyond the Existing Rules

8.1. Potential ISDS Third-party Participation Reforms Inspired by the Accountability Mechanism of the World Bank Group

The World Bank's Accountability Mechanism is an independent administrative process that aims to provide people and communities, who consider themselves adversely affected by the multilateral development bank's operations and projects, an access to recourse and redress.[115] In the scope of the work of the Inspection Panel, Compliance Advisor Ombudsman and the Dispute Resolution Service, communities and NGO representatives without a contractual relationship with the World Bank can hold it directly accountable on the basis of material harm.[116] Complainants are involved in the investigation, fact-finding and in creating recommendations for policy changes, as the procedure of the quasi-judicial mechanism includes field visits, interviews and consultations with the affected population and NGOs.[117] The mechanism's aim is to create more responsive systems through the application of the principles of "decentralized, citizen-driven accountability".[118]Yet, its impact is limited, as solely the adherence of the Bank to its own operational policies, procedures, as well as safeguard policies is evaluated.[119]

Integrating elements of independent grievance mechanisms into ISDS proceedings could elevate the position of affected third parties. The means of participation of third parties could be strengthened by granting those admitted to the dispute the right to submit *amicus curiae* briefs and partake in oral hearings without a prior decision of the tribunal on the issue. Thus, standardizing and formalizing written and oral third-party submissions of affected third parties. Alternatively, a separate procedural hearing phase could be introduced, which is focused on the impact of the ISDS case on third parties. During this hearing, affected third parties could voice how investment adversely impacted them and present their perspectives on arguments brought by the investor and State during the dispute with a direct material impact on them. To ensure that arbitrators actively engage with the presented arguments, they would be required to briefly respond to the information and arguments by the affected third parties in the final award. It should no longer be in the tribunal's discretion to actively engage

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[115] Benjamin K. Sovacool, Andria Naudé Fourie and May Tan-Mullins, "Disequilibrium in Development Finance: The Contested Politics of Institutional Accountability and Transparency at the World Bank Inspection Panel", *Development and Change,* vol. 50, no. 4 (2019).

[116] *Ibid.*, p. 868; *Compliance Advisor Ombudsman: Operational Guidelines* (World Bank, 2016). Available from https://documents1.worldbank.org/curated/en/261961478069759569/pdf/108840-WP-ENGLISH-CAO-Operational-Guidelines-2004-PUBLIC.pdf; Imbrahim F. I. Shihata, *The World Bank Inspection Panel: In Practice* (Oxford University Press, 2000), p. xx; Inspection Panel, "About the Inspection Panel". Available from https://www.inspectionpanel.org/about-us/about-inspection-panel (accessed 02.05.2025).

[117] C.f. The Inspection Panel, *Investigation Report - India: Mumbai Urban Transport Project* (IBRD Loan No. 4665-IN; IDA Credit No. 3662-IN) (World Bank, 21 December 2005); World Bank, "World Bank Accountability Mechanism - Mandate and Governance". Available from https://accountability.worldbank.org/en/mandate-and-governance (accessed 02.05.2025).

[118] Benjamin K. Sovacool, Andria Naudé Fourie and May Tan-Mullins (n 115), p. 869.

[119] *Ibid.*, p. 871.

with *amicus curiae* submissions[120] or to omit any analysis of the arguments of third parties in the final award.[121]

8.2. Potential ISDS Third-party Participation Reforms Inspired by Human Rights Bodies

Third party participation in legal proceedings features significantly in the adjudication of human rights questions at international human rights courts and tribunals. The mechanisms enacted in these fora provide a template for the integration of third-party participation into international investment adjudicatory bodies. Benchmarking the third-party participation against human rights bodies is particularly important given the nexus between the commercial considerations brought to the fore in investment disputes and the social justice and environmental conservation issues that also arise. Here both participatory mechanisms in the African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights are relevant examples.

The African Court on Human and Peoples' Rights (ACtHPR) is the premier regional judicial body for handling human rights violations in Africa. The ACtHPR derives its mandate from the African Charter on Human and Peoples' Rights.[122] The Court has made significant progress in incorporating third party participation into the legal proceedings including through the inclusion of *amicus curae* briefs as well as through a recent amendment to the Rules of the Court that facilitates non-State actor interventions. Initially, the Rules of the Court permitted interventions of States not party to the dispute. The revision of Rule 61 under the Rules of the Court 2020 now empowers the Court to solicit interventions from non-State actors in the interest of justice. The interventions take the form of oral and written submissions. The Inter-American Court of Human Rights (IACtHR) also facilitates third-party participation in legal proceedings through both *amicus* briefs and submissions during evidence taking. The Court is empowered through Article 58 (a) of the Rules of Procedure of the Court to obtain evidence from third parties including alleged victims and witnesses. The evidence may be collected through both written statements and oral testimonies.[123]

Notably, both courts have pathways for non-State actors to initiate legal proceedings, further highlighting the extent of entrenchment of third-party participation in these bodies. In the case of the ACtHPR, State parties that have ratified the special declaration under Article 34 (6) of the Protocol to the African Charter on Human and Peoples' Rights effectively accept the Court's jurisdiction in cases brought by non-State actors. Therefore, actors such as individuals and NGOs have direct access to the forum. The process is more complex in the case of the IACtHR. Non-State actors in this Court cannot directly initiate cases. The claims of human rights violations must first be submitted to the

[120] C.f. *Philip Morris Brands SARL and others v. Republic of Uruguay*, ICSID Case No. ARB/10/7.
[121] C.f. *Glamis Gold, Ltd. v. United States of America*, Award (2009) IIC 380, Ad Hoc Tribunal UNCITRAL.
[122] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 25 January 2004) ('African Court Protocol'), Article 1.
[123] Rules of Procedure of the Inter-American Court of Human Rights (adopted 16 November 2009, entered into force 28 November 2009) ('Inter-American Court Rules'), Article 58 (a).

Inter-American Commission on Human Rights for evaluation.[124] Upon a finding of admissibility, the Commission will investigate the claim and submit a report with recommendations to bring the offending State into conformity.[125] The Commission will then submit a case to the Court where the State fails to implement the recommendations.[126]

Human rights courts have made significant progress in integrating third party participation into the framework of their legal proceedings. This progress provides an important reference point for the ISDS reform process by illustrating the channels for enhancing third party participation beyond the level of a*micus curae* briefs. By adopting the approach of the ACtHPR which empowers this court to solicit interventions from non-State actors in the interest of justice, the ISDS forums can take a more proactive approach in gathering information and evidence relevant to the dispute that may not be provided by the parties to the dispute. Additionally, broadening the evidence-taking process to include both witnesses and victims is particularly important when we consider the issue of effectively incorporating third-party participation to ensure the consideration of environmental issues in ISDS. The experiences of human rights courts should be factored into the ISDS reform process with the caveat that these two systems of adjudication are predicated on different systems of international law and a nuanced integration should be favored over a wholesale replication of the avenues for third party participation.

8.3. The Creation of a Multilateral Investment Court

Since 2015, the European Commission has been working to establish a Multilateral Investment Court ("MIC") as part of a comprehensive reform of the Investor-State Dispute Settlement (ISDS) system. A Multilateral Investment Court would follow the EU's approach as reflected in its Free Trade Agreements (FTAs) and would bring key features of both domestic and international courts into the field of investment adjudication. The idea is that the MIC would: i) offer two levels of adjudication; ii) consist of a permanent body of qualified judges; iii) rule on disputes arising under both future and existing investment treaties.

For the EU, the MIC would replace the bilateral investment court systems included in its trade and investment agreements. It is in the EU's interest to ensure that investment dispute resolution operates effectively at the international level. The EU is pursuing a modern and reformed approach to ISDS. However, most of the more than 3,200 existing investment agreements – including the over 1,400 concluded by EU Member States – do not contain the innovations and improvements developed by the EU in its recent investment negotiations. The MIC would have the potential to replace the dispute settlement provisions included in those older agreements.

The EU's MIC proposal favoured the initiative of UNCITRAL Working Group IIII, which is currently working on a draft statute of a Multilateral Investment Court (MIC) (see the Report of the

[124] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) ('American Convention'), Article 44.
[125] American Convention, Article 48 and 50.
[126] American Convention, Article 51.

Forty-ninth session held in Vienna, on 23–27 September 2024).[127] The draft partially incorporates elements of a proposal by the European Commission for a MIC in 2015, including a permanent body of standing judges, an appellate mechanism, and transparency rules. The UNCITRAL MIC represents a multilateral and negotiated version of the model first introduced by the EU, which includes compromises to secure broader international consensus. The EU has chosen to focus its efforts within the UNCITRAL process.

[127] UNCITRAL (n 3).

9. Potential Issues Concerning Increased Participation of Third Parties in ISDS

9.1. Overcoming Geographic Barriers

The capacity for remote participation should be further expanded, as the necessary technology already exists. Making the use of video-conferencing technology compulsory for all ISDS hearings and sessions could be a cost-effective option to better include remote communities. Nonetheless, stable internet access is necessary to allow for remote participation. State parties and NGOs could be mobilized to ensure that affected third parties have the necessary internet connection or gain access to a community space or municipal office with internet access.

In the case that the tribunal determines the location of UNCITRAL proceedings, the geographic location of the affected third parties could be prioritized. To strengthen the position of affected third parties, the respondent State should be the first option of potential proceedings. Domestic travel is more feasible for affected third parties than international travel. Moreover, affected parties would be less burdened by bureaucratic processes such as getting a passport or a visa. Locating the arbitration in the respondent State could increase travel and accommodation costs for the parties, counsel and arbitrators. However, considering that previous tribunals were held in expensive cities like New York, the difference in costs might be negligible.

9.2. Addressing Linguistic Barriers

Providing translation services to affected third parties should be a priority, as they need to be able to follow the proceedings and understand the written documents to participate effectively. If the interests of the affected third party aligns with the interest of the defendant State, it would be in the interest of governments to provide translation services. Alternatively, an affirmative decision on the admission of an affected third-party submission in line with ICSID Arbitration Rule 67 and Article 4 UNCITRAL Rules on Transparency could trigger an obligation for the tribunals to guarantee comprehensive translation of the subsequent proceedings and submissions. This could decrease the financial burden on States.

Translation costs in ISDS could be addressed through the use of artificial intelligence powered translation services. Artificial intelligence small language models are increasingly adapted to indigenous languages and require less resources for their operation and can be displayed on devices with little computational power and low-bandwidth connectivity compared to large language models.[128] They could thus serve communities in areas with limited technological infrastructure.[129] As a subset of all language models, indigenous language models are specifically designed, trained

[128] Brooke Tanner and Cameron F. Kerry, "Can small language models revitalize Indigenous languages?", *Brookings* (19 March 2025). Available from https://www.brookings.edu/articles/can-small-language-models-revitalize-indigenous-languages/ (accessed 01.05.2025).
[129] *Ibid.*

and optimized with input from the target community.[130] For example, AfriBERTa is a multilingual language model trained on 11 Indigenous African languages.[131] However, concerns regarding the exposure of Indigenous culture and language online, exploitation and misrepresentation persist.[132] Thus, the use of artificial intelligence powered small language models in ISDS has to be evaluated on a case-by-case basis to ensure its use is aligned with community values.

9.3. Addressing the Financial Barriers to Third-party Participation in ISDS

The financial barriers to third-party participation in ISDS remain significant and discourage NGOs and individuals from intervening through the existing channels. The financial barrier may also frustrate the practicality of the proposed reforms, as third parties may still struggle to cover the costs arising from more comprehensive channels of participation such as oral and written submissions.

Third party funding could serve as a potential solution for overcoming the financial barrier to ISDS by allowing external actors to finance legal claims in exchange for a portion of the award. However, this solution is more tailored to investor claims as the ISDS framework currently stands since non-disputing parties do not have a monetary stake in the outcome of the proceedings. Furthermore, third party funding evokes concerns about conflicts of interest and transparency as funders may influence case strategy or settlement decisions. Some jurisdictions have introduced regulatory frameworks to balance this channel of financial accessibility with ethical considerations; however, third party funding remains unregulated at the treaty level.[133]

9.4. Addressing the Increased Length of Proceedings

The impact of expanded third-party participation in ISDS remains a key concern, particularly regarding the length of proceedings. Tribunals will be called to account the inclusion of third-party perspectives which is likely to extend deliberations and procedural delays. Nonetheless, empirical data on the duration of ISDS proceedings indicates that duration of proceedings for arbitration cases and ICSID annulments stands at 3.73 and 1.91 years respectively, which is shorter than the duration in many other international adjudicative proceedings.[134]

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[130] *Ibid.*
[131] Kelechi Ogueji, Yuxin Zhu and Jimmy Lin, "Small Data? No Problem! Exploring the Viability of Pretrained Multilingual Language Models for Low-Resource Languages", *Proceedings of the 1st Workshop on Multilingual Representation Learning* (11 November 2021), p. 116. Available from https://aclanthology.org/2021.mrl-1.11.pdf.
[132] Zeynolabedin Jafari, "The Role of AI in Supporting Indigenous Languages", *AI and Tech in Behavioural and Social Sciences,* Vol. 1, No. 2 (2023).
[133] Brooke Guven and Lise Johnson, *The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement* (Columbia Centre on Sustainable Investment, 2019), p. 1.
[134] Malcom Langford, Daniel Behn and Laura Letourneau-Tremblay, "Investment Arbitration and its Discontents: An Empirical Assessment", EJIL: Talk!, 05 April 2019.

CONCLUSION

While significant progress for third party participation has been achieved, shortcomings persist. The objective of the proposed reforms is to allow third parties to play an active part in ISDS beyond passive submission rights. Amendments of procedural norms in both ICSID and UNCITRAL frameworks would formalize the role of third parties and ultimately strengthen the position of the public interest and environmental concerns in ISDS. This report suggests that clarifying the notion of “significant interest”, improving access to information and imposing obligations on tribunals to consider third-party input could allow for more meaningful third-party participation. In sum, while the effectiveness of the ISDS system has primarily been based on the outcomes for parties to a dispute, the long-standing concerns regarding the system’s limitations with regards to environmental considerations, accountability and transparency are increasingly being centred. This report provides practical recommendations on how to address these pain points by enhancing third party participation in the ISDS reform efforts.

South Centre
International Environment House 2
Chemin de Balexert 7-9
1219 Geneva
Switzerland
Tel.: +41 22 791 8050
south@southcentre.int
www.southcentre.int

SouthCentre

South Centre, Geneva

SouthCentre GVA

southcentre_gva

South_Centre

SouthCentre