Article

Inclusivity in the Settlement of Investment Disputes: Making a Case for Local Communities

Diversity is being invited to the party. Inclusion is being asked to dance

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Abstract

This contribution examines the extent to which the Investor-State Dispute Settlement (ISDS) system takes into consideration the rights and interests of local African communities affected by investment disputes but are not parties to them. It argues that these communities receive unsatisfactory treatment, which often leads to their exclusion (or non-inclusion) from ISDS. The contribution goes further by exploring reforms likely to better protect these communities, increase their inclusion in ISDS as well as the legitimacy of the investment regime. The first part examines the *raison d'être* for inclusivity in investment arbitration and why it is important to talk about the inclusion of communities in investment adjudication. Zooming in on the case of African communities, the second part analyses the current participation of these communities in the settlement of investment disputes and attempts to demonstrate that this participation is limited and could lead to a partial or total denial of justice for affected communities, in other words, exclusion. The final part looks at some of the reforms and ideas that are currently being considered for better protection and inclusion of these communities.

Keywords: local communities; investment disputes; *amicus curiae*; human rights; Multilateral Investment Court

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Introduction

The quest for inclusivity is a never-ending search in international law, which oscillates between promoting diversity and inclusion, on the one hand, and inequality and exclusion, on the other. This 'fight for inclusion'[1] concerns all aspects of international law, from its subjects to the institutions, territories, ideas, and ideologies.[2]

In the context of international adjudication, inclusivity is often associated with legal standing before international courts and tribunals,[3] diversity of international benches,[4] democratic participation or representation,[5] international judicial profession,[6] etcetera.

In the current legitimacy crisis of international economic institutions, (the lack of) inclusiveness has been mentioned, both at the level of the World Trade Organisation[7] and in the context of the investment regime with its Investor-State Dispute Settlement (ISDS) mechanisms. In this latter domain, for example, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III underscored 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' [emphasis

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1 Andrea Bianchi, 'The Fight for Inclusion: Non-State Actors and International Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford 2011) 39–57.

2 For an overview of inclusivity in international law, see the 2022 Annual Conference of the European Society of International Law with the theme of 'In/Ex-clusiveness of International Law' <https://esil-sedi.eu/2022-esil-annual-conference-utrecht-1-3-september-2022/> accessed 8 December 2023; see also Rüdiger Wolfrum and Volker Röben (eds*) Legitimacy in International Law* (Springer 2008).

3 Edvard I Hambro and Edgar Turlington, 'Individuals Before International Tribunals' (American Society of International Law Annual Meeting 1941) 22–29; W Paul Gormley, *The Procedural Status of the Individual before International and Supranational Tribunals* (Dordrecht, Martinus Nijhoff 1966); Francisco Orrego Vicuna, 'Individuals and Non-state Entities before International Courts and Tribunals' (2001) Max Planck Yearbook of United Nations Law 53–66; Brian McGarry & Yusra Suedi, 'Judicial Reasoning and Non-State Participation before Inter-State Courts and Tribunals' (2022) 21 The Law and Practice of International Courts and Tribunals 123–148.

4 Freya Baetens (ed), *Identity and Diversity on the International Bench, Who is the Judge?* (OUP 2020); Lucy Greenwood, 'Tipping the balance – diversity and inclusion in international arbitration' (2017) 33 Arbitration International 99–108.

5 Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2014); Volker Röben, 'What About Hobbes? Legitimacy as a Matter of Inclusion in the Functional and Rational Exercise of International Public Power' in Wolfrum and Röben (n 2) 353–367.

6 Rimdolmsom Jonathan Kabré, *Le Rôle des Juristes Privés (Avocats et Conseils) dans le Règlement des Différends Impliquant les États* (Helbing Lichtenhahn Verlag 2021); Tommaso Soave, *The Everyday Makers of International Law: From Great Halls to Back Rooms* (Cambridge University Press 2022).

7 Manfred Elsig underlined the exclusion of some stakeholders and ideas, see Manfred Elsig, 'The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?' (2007) Journal of World Trade 82.

added].[8] This observation echoes the views expressed by some authors according to whom, communities are not often associated, or tend to be insufficiently taken into consideration in the settlement of investment disputes,[9] even though many investment activities take place on territories occupied by communities and indigenous peoples (for example oil, gas, mining, agriculture, fishing and forestry).[10]

Against this background, the article examines the treatment that these communities have received in the settlement of investment disputes with a view to demonstrating their problematic exclusion and exploring reforms that could improve such treatment. To achieve that, the first part examines the *raison d'être* of inclusivity in investment arbitration. The second part analyses the current participation of these communities in the settlement of investment disputes and attempts to demonstrate that this participation is limited and that this limited participation could lead to a partial or total denial of justice for these affected communities, in other words, to their exclusion. The final part

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8 UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform)' 37th Session' (New York 1–5 April 2019)' A/CN 9/970 7 para 31. It is worth mentioning that the Working Group III is concerned with inclusiveness in its own process and has put in place strategies to ensure broad and inclusive participation of all countries through the hosting of inter-sessional meetings by different governments and financial support to developing states to enable their participation in the deliberations of the working group, see UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform)' 36th Session (Vienna, 29 October to 2 November 2018) A/CN 9/964 20.

9 For an author, these communities are 'invisible' in the international investment regime, See Nicolás M Perrone, 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' (2019) 113 AJIL 16–21; see also Lorenzo Cotula and Mika Schröder, *Community Perspectives in Investor-state Arbitration* (IIED 2017); Nicolás M Perrone, 'The International Investment Regime and Local Populations: are the Weakest Voices Unheard?' 2016 7 Transnat'l Legal Theory 383; James Anaya, 'Extractive Industries and Indigenous Peoples', Report of the Special Rapporteur on the Rights of Indigenous Peoples to the Human Rights Council, A/HRC/24/41 (2013); Nicolás M Perrone, 'Local Communities, Extractivism and International Investment Law: The Case of Five Colombian Communities' (2022) 19(6) Globalizations 837–853.

10 'Dispossession of land and natural resources is a major human rights problem for indigenous peoples. They have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and large-scale development initiatives that tend to destroy their lives and cultures rather than improve their situation … Large-scale extraction of natural resources such as logging, mining, dam construction, oil drilling and pipe-line construction have had very negative impacts on the livelihoods of indigenous pastoralist and hunter-gatherer communities in Africa', Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa, adopted by The African Commission on Human and Peoples' Rights (28th Ordinary Session (2005) <https://www.iwgia.org/images/publications/African_Commission_book.pdf> accessed 14 February 2023; see also Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya on Extractive industries and indigenous peoples, A/HRC/24/41 (1 July 2013) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/152/49/PDF/G1315249.pdf?OpenElement> accessed 14 February 2023.

looks at some of the reforms and ideas that are currently being considered for better protection and inclusion of these communities.

Inclusivity in the Settlement of Investment Disputes: *Un Faux Problème*?

The issue of inclusivity in the settlement of investment disputes has been addressed mainly from the perspective of arbitrators and the need to increase diversity among them.[11] Generally speaking, the investment regime can be summed up as involving two main actors consisting of foreign investors and a host state.[12] The former want strong protection for their properties in the host countries while the latter wants to keep their regulatory powers with as little infringement as possible. However, this regime involves more than 'a foreign investor who wants to extract gold and a state that needs to decide whether this is environmentally acceptable.'[13] This regime also affects other actors, in particular local communities, which seem to be 'invisible' in investment arbitration. This claim of invisibility (or exclusion) was recalled by South Africa in its submission to the UNCITRAL Working Group III where it was said that:

> ISDS allows foreign investors to bring claims against host governments to an international arbitral tribunal and gives private parties access to the supranational level. This discriminates against companies operating locally and comes with systemic issues. Yet, people and communities harmed by foreign investments do not have clear mechanisms to claim justice and reparation. Their rights are subject to a system driven by purely private commercial reasoning prompted to award cases exclusively focused towards serving the private economic interest of investors.[14]

Is this verified? Are local communities not represented in ISDS?

Theoretically, local populations' rights are absorbed and represented by their states.[15] This Westphalian assumption is, however, not always confirmed in practice:

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11 See inter alia Kabir Duggal and Amanda Lee, 'A 360-Degree Kaleidoscopic View of Diversity and Inclusion (or Lack Thereof)' (2022) 33(1) International Arbitration; Andrea K Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration' (2020) 21(2/3) The Journal of World Investment & Trade 410–440; Ksenia Polonskaya, 'Diversity in the Investor-State Arbitration: Intersectionality Must Be Part of the Conversation' (2018) 19(1) Melbourne Journal of International Law 259–298.

12 Admittedly, the home state signs the investment treaties but for the benefit of its nationals (the investors. See Rodrigo Polanco, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection* (Cambridge University Press 2019).

13 Nicolás M Perrone, 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' (2019) 113 AJIL Unbound 16.

14 UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS)' Submission from the Government of South Africa A/CN 9/WG III/WP176 (17 July 2019) para 8.

15 Silvia Steininger, 'The Role of Human Rights in Investment Law and Arbitration: State Obligations, Corporate Responsibility, and Community Empowerment' in Ilias Bantekas and Michael Ashley

> although a government would be expected to represent the interests of communities in arbitral proceedings in principle, this cannot be assumed in practice, because a case may have involved tensions and even litigation between authorities and communities.[16]

The very fact that investors have been granted *locus standi* in investment adjudication can be seen as a sign that states are not always able or willing to protect the rights of their nationals, be it investors or local communities. In *Von Abo v President of the Republic of South Africa*, a South African national took his government to court on the ground that his request for diplomatic protection was not granted, after his investments were expropriated in Zimbabwe. But the South African Constitutional Court found that no right to diplomatic protection under South African law exists:

> the provision of diplomatic protection at the request of a citizen whose rights are violated in and by a foreign state is a matter which forms part of the executive function of government. Thus, *it is up to the government to decide whether protection should be given, and if so, what form the diplomatic intervention should take* [emphasis added].[17]

In addition, some states have acknowledged this lack of representation on behalf of their communities. In *Chevron v Ecuador*,[18] for example, the Ecuadorian government stated that it was not acting in 'any representational capacity exercising "diffuse" or "collective rights" on behalf of Ecuadorian individuals but acting only in its capacity as a co-contractual party to the 1973 Concession Agreement.'[19] It added that 'it had no power to represent the Ecuadorian people in regard to their individual rights and that individuals could bring personal claims and recover damages under Article 19-2 of the Ecuadorian Constitution.'[20]

Stein (eds), *The Cambridge Companion to Business and Human Rights* (Cambridge University Press 2021) 418.

16 Cotula and Schröder (n 9) 12.

17 See *Von Abo v President of the Republic of South Africa* (CCT 67/08) [2009] ZACC 15; 2009 (10) BCLR 1052 (CC); 2009 (5) SA 345 (CC) (5 June 2009) 26 para 45; see also Von Abo v Government of the Republic of South Africa and Others (3106/07) [2010] ZAGPPHC 4; 2010 (3) SA 269 (GNP) ; 2010 (7) BCLR 712 (GNP) (5 February 2010) and Government of the Republic of South Africa and Others v Von Abo (2011 (5) SA 262 (SCA); [2011] 3 All SA 261 (SCA)) [2011] ZASCA 65; 283/10 (4 April 2011). See also Engela C. Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31(1) ICSID Review 183-184. The same considerations have led to the drafting of Article 292 UNCLOS which allows a non-state actor to act 'on behalf of' a State, see Tulio Treves, 'Article 292' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea, A Commentary* (Beck/Hart/Nomos 2017) 1882.

18 *Chevron v Ecuador*, UNCITRAL, PCA Case No 2009–23.

19 *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador*, First Partial Award on Track I, 17 September 2013, PCA Case No 2009-23, 25 para 57.

20 ibid 25 para 58. However, the arbitral tribunal disagreed with such a view and contended that only the state 'could bring a diffuse claim under art 19(2) to safeguard the right of citizens to live in an environment free from contamination. At that time, no other person could bring such a claim,' ibid 43 para 106.

Furthermore, some states did not include the rights of their local communities when they have used the public interest defence in investment arbitration, for issues affecting their communities: In the *Bernhard von Pezold and Others v Zimbabwe* and *Border Timbers Ltd and Others v Zimbabwe,* the Zimbabwean government claimed that the expropriations were carried out for a public purpose[21] but did not mention its obligation vis-à-vis the indigenous people, who were living on the disputed land, as part of this public purpose defence. The tribunal rejected the public interest defence and criticised such omission, noting that the Zimbabwean government 'has neither raised as a defence in these proceedings that it has obligations towards the indigenous communities under international law.'[22]

Communities have also pointed to this lack of representation and relied on it to seek direct participation in investment arbitration. In *Glamis Gold, Ltd v The United States of America,* the Quechan Indian nation declared that the United States government cannot 'adequately represent' its interests and that 'no party can speak with expertise or authority to the cultural, social or religious value of the Indian Pass area to the Tribe or the severity of impacts to the area and the Tribe, except for qualified members of the Tribe.'[23] Therefore, this community was 'uniquely positioned to comment on the impact of the proposed mine to cultural resources, cultural landscape or context.'[24] The same argument was made by some communities in *Chevron v Ecuador*.[25]

This absence of representation has been phrased as a charge of the illegitimacy of investment regime which is seen as

> illegitimate because the party at interest is not present in the arbitration and is not represented. In essence, this is a critique of the State because the State is present as a respondent, yet the argument is that the State in fact does not represent the interests of the affected community, a portion of the state respondent.[26]

21 *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15 Award 28 July 2015 164–67 paras 481–487.

22 *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development C. (Private) Limited v Republic of Zimbabwe* (ICSID Case No ARB/10/25) Procedural Order No 2 19 para 59.

23 *Glamis Gold, Ltd v The United States of America*: UNCITRAL, 'Quechan Indian Nation Application for Leave to File a Non-party Submission' (19 August 2005) 4.

24 ibid.

25 Some NGOs filed an application for *amicus curiae* in which they asserted that those local communities 'are not and cannot be parties to the investment arbitration. Since [these communities] are not represented—legally or otherwise—by Ecuador, it would be improper for the tribunal to hear Chevron's claims involving the allegations of one party in the underlying and centrally figured domestic litigation in the absence of the other party to it' <https://www.iisd.org/project/chevron-v-ecuador> accessed 14 February 2023.

26 David D Caron, 'Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy' (2009) 32 Suffolk Transnat'l LR 520. He goes further by suggesting a case-by-case approach and suggesting not to grant those communities a locus standi that will elevate them past the respondent

The Participation of African Communities in the Settlement of Investment Disputes

This rubric looks at how African local communities have participated in investment arbitration with a view to discuss whether this forum allows appropriate consideration for the rights and interests of these communities. In investment arbitration, communities are allowed to file non-disputing parties' submissions. The legal framework for non-disputing parties' submissions is examined before discussing cases where African communities have filled non-disputing parties' submissions.

The ICSID Arbitration Rule 37(2)

Contrary to some branches of international law such as international trade law[27] or the law of the sea,[28] the investment regime did not originally envisage a third-party intervention. The first investment tribunal to authorise *amicus curiae* was the ad hoc tribunal in the *Methanex* case, under the UNCITRAL Rules.[29] ICSID tribunals were refusing such submissions[30] and finally accepted third parties' submissions in the *Vivendi* case.[31] In 2006, ICSID Rules were amended to enable third parties' submissions, with the introduction of ICSID Arbitration Rule 37(2).[32]

ICSID Arbitration Rule 37(2) reads as follows:

> After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non- disputing party") to file a written

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state: 'Thus, the question of whether the state adequately represents the investor-impacted community in a particular proceeding is ultimately a contextual question and depends on the state and community in question. Elevating the community past the state respondent creates a number of obvious political tensions.' See also Won Kidane, 'The China-Africa Factor in the Contemporary ICSID Legitimacy Debate' (2014) 35(3) University of Pennsylvania Journal of International Law 571.

27 See art 10 WTO Dispute Settlement Understanding.

28 Articles. 31 and 32 Statute of the International Tribunal for the Law of the Sea.

29 *Methanex Corporation v USA* (2001), Decision of the Tribunal on Petitions from Third Parties to Intervene as 'Amici Curiae'.

30 See, for example, *Aguas del Tunari v Republic of Bolivia* (2002) (ICSID Case No ARB/02/3). In this case, the president of the tribunal stated that 'It is manifestly clear to the tribunal that it does not, absent the agreement of the Parties, have the power to join a non-party to the proceedings; to provide access to hearings to non-'parties and, a fortiori, to the public generally; or to make the documents of the proceedings public.' See Letter by NGO to Petition to Participate as Amici Curiae, 29 January 2003.

31 *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic* ICSID Case No ARB/03/19.

32 ICSID, 'A Brief History of Amendment to the ICSID Rules and Regulations' <https://icsid.worldbank.org/news-and-events/speeches-articles/brief-history-amendment-icsid-rules-and-regulations> accessed 14 February 2023. See also UNCITRAL 'Rules on Transparency in Treaty-based Investor-State Arbitration'(2014) art 4 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf> accessed 14 February 2023.

submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.
The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

This provision calls for some remarks: First, non-disputing parties do not have a 'right' to file the written submission. It is rather a 'possibility' or an 'option.' Secondly, litigant parties must be consulted but the tribunal can override the opposition of a party and grant third-party submission. Thirdly, such participation is only limited to filing a written submission without the possibility to participate in the other stages of the proceedings. However, there seems to be an inherent conflict with this rule because, on the one hand, the non-disputing party is expected to bring a different perspective or knowledge than the disputing parties while, on the other hand, that party does not have access (or very limited access) to the files of the litigants.[33] Last but not least, the last paragraph of the provision is unclear as it calls the tribunal to ensure that 'the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.' What does it mean? How can the unfair prejudice be assessed? Given the competing interests that local communities (indigenous peoples, more specifically) and investors could have, notably in the context of extractive industries, is it is utopian to think that such a provision can ultimately lead to prioritising investors over local communities?

ICSID Regulations and Rules were recently amended[34] and non-disputing parties' submissions are mentioned at Rule 67 of ICSID Arbitration Rules. This new provision incorporates the main elements of ICSID Arbitration Rule 37(2) and has new features such as the obligation to disclose third-party funding that the non-disputing party may

33 See also Frank Emmert and Begaiym Esenkulova. 'Balancing Investor Protection and Sustainable Development in Investment Arbitration – Trying to Square the Circle?' (September 15, 2018) <https://ssrn.com/abstract=3260265> accessed 14 February 2023.

34 <https://icsid.worldbank.org> accessed 14 February 2023.

obtain. So far, this new provision has not been applied in a dispute involving African communities.

African Communities as *Amici Curiae* in Investment Arbitration

An *Amicus curiae* submission has been requested in more than 100 ICSID cases,[35] by a wide range of persons and entities, from non-governmental organisations to indigenous communities, going through individuals and research centres.[36] Local African communities have requested *amicus curiae* submissions in a few cases which are analysed below.[37]

Bernhard von Pezold and Others v Zimbabwe and Border Timbers Ltd and Others v Zimbabwe

The two cases were heard together, and the parties presented joint conclusions and evidence, although these cases were not formally consolidated. In these two cases, indigenous people, in collaboration with an NGO, asked permission to submit observations as non-disputing parties.[38] This permission was refused but it is interesting to analyse the reasoning of the tribunal and the arguments of the parties as they shed light on the perception that important actors of ISDS (arbitrators and litigant parties) have vis-à-vis indigenous peoples' rights.

The indigenous communities, the Chikukwa, Ngorima, Chinyai and Nyaruwa peoples, claimed to have a 'distinct cultural identity and social history which is inextricably linked to their ancestral lands,' which are also at the heart of this dispute.[39] While recognising that some parts of their expropriated properties are of 'particular cultural significance' to those peoples, claimants were opposed to such participation.[40]

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35 <https://icsid.worldbank.org/cases/content/tables-of-decisions/ndp> accessed 14 February 2023.

36 See Pablo Jaroslavsky and Juan Pablo Blasco, 'Amici Curiae in Investment Arbitration' Jus Mundi, Wiki Notes on Investment Law and Arbitration (9 November 2021) paras 13–14 <https://jusmundi.com/en/document/wiki/en-amici-curiae-in-investment-arbitration> accessed 14 February 2023.

37 Non-disputing party submission was asked in *ABCI Investments Limited v Republic of Tunisia* ICSID Case No ARB/04/12 Decision Concerning the Non-disputing Party's Application (2 December 2019) but will not be analysed because the text of the decision has not yet been made public, see <https://jusmundi.com/en/document/decision/en-abci-investments-limited-v-republic-of-tunisia-decision-concerning-the-non-disputing-partys-application-monday-2nd-december-2019#decision_6630> accessed 14 February 2023.

38 Indigenous people have also requested to participate as *amicus curiae* in *Glamis Gold Ltd v The United States of America*.

39 *Bernhard Von Pezold and Others (Claimants) v Republic of Zimbabwe (Respondent)* (ICSID Case No Arb/10/15) *Border Timbers Limited, Border Timbers International (Private) Limited, And Hangani Development Co. (Private) Limited* (Claimants) *v Republic of Zimbabwe* (Respondent) (ICSID Case No Arb/10/25), Procedural Order No 2 26 June 2012 6 para 21.

40 ibid 10 para 32; see also 20–21 para 62.

Claimants also invoked the lack of independence of indigenous communities vis-à-vis of the host State as a ground of refusal.

The respondent state, first, agreed to refuse any third submission and justified this position saying that it 'had not anticipated that there could be any person or organisation with an interest in the matter apart from the parties.'[41] However, after the petition of the local communities, the state did not raise any specific argument to support such participation. As underscored by the tribunal and by the claimants, the respondent never made and issue of the rights of these communities in the present dispute. Coming from the litigant party, expected to defend and protect these community rights, it is worrisome[42] and this lack will be used by the tribunal as a justification for the refusal of participation. The tribunal also affirmed that it cannot override the objection that one litigant party may have to the participation of third parties.[43] The approach of the tribunal is restrictive since the ICSID Arbitration Rule 37(2) only mentions the need to consult parties before deciding whether to allow a third party to intervene. In addition, by limiting the scope of the dispute to the arguments raised by the parties, the tribunal adopted a very restrictive approach.

Biwater Gauff Limited v Tanzania

The revision of ICSID Arbitration Rules, in 2006, occurred during the proceedings of the *Biwater Gauff Limited v Tanzania* case. Just after the revision, five NGOs seized this opportunity to submit their petition for *amicus curiae* status on 27 November 2006.[44] The petition was not submitted by the local communities themselves but rather, by local and international NGOs with proven expertise in issues relevant to local communities. These organisations requested *amicus curiae* submissions because the case raised several 'issues of vital concern to the local community in Tanzania.'[45] They also added that 'the arbitration process goes far beyond merely resolving commercial or private conflicts, but rather has a substantial influence on the population's ability to enjoy basic human rights. This aspect of the case means that the process should be transparent and permit citizens' participation.[46]

The claimant was opposed to this petition on the grounds that the concerns it raises are 'legally and factually irrelevant' to this case.[47] In addition, the claimant added that 'no environmental issues arise for determination in this case and that the arbitration raises no issues of sustainable development.'[48] The tribunal accepted the participation of these

41 ibid 2 para 5.
42 ibid 18 para 57.
43 ibid 21 para 63.
44 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No ARB/05/22 Petition for Amicus Curiae Status 27 November 2006.
45 ibid 7.
46 ibid 8.
47 ibid Award 24 July 2008 100 para 357.
48 ibid

petitioners by underscoring the public interest dimension of this case which exceeds the sole interest of the litigant parties,[49] but rejected its request to access documents produced by parties,[50] according to the Procedural Order No 3.

It is worth reflecting upon the third-parties' submission as it stresses the claimants' responsibility in the situation and the effects on local community rights. In particular, the *amici* claimed that the BGT's conduct was either part of a renegotiation strategy[51] or constituted a lack of due diligence coupled with poor business management.[52] But whatever the case, this conduct has consequences within the ambit of BITs protection and what claimants are able to claim for. Additionally, the *amici* proposed to analyse the nature and the extent of investors' responsibility through the lens of sustainable development and human rights. By doing so, this submission put local populations' rights at the centre of the case.[53] The submission teems with words such as 'community,'[54] 'citizens,'[55] 'population'[56] and 'people.'[57] This is not surprising, coming from NGOs with significant expertise in the field of human rights. The *amici* concluded by saying that: 'Using the investor-State process to seek compensation for

49 ibid 100–101 para 358. The tribunal adds that 'In this case, given the particular qualifications of the petitioners, and the basis for their intervention as articulated in the petition, it was envisaged that the petitioners would address broad policy issues concerning sustainable development, environment, human rights and governmental policy' ibid 103 para 366.

50 ibid 103–104 para 368.

51 ibid 110–111 paras 385–386.

52 ibid 112 para 390.

53 The submission contains many references to local populations' rights.

54 'With respect to (b) (*pacta sunt servanda*) it is said that an investor's failure to meet obligations undertaken in a contract with a host State, especially in an infrastructure project, can uproot the entire foundation of the contract, jeopardise its *basic goals for the community involved*, and create significant risks to human health, the operation of businesses, and the achievement of development and other societal objectives … When private sector investors fail to meet their obligations, it is not simply the commercial bargain that is put at risk, but the very *welfare of the citizens* that the privatisation was mandated to enhance' [emphasis added]. *Biwater Gauff* (n 47) para 377.

55 ibid para 387 111. 'By not fulfilling the promises contained in its bid, BGT had created a situation of urgency requiring governmental action. In fact, the Government, carrying the duty to provide access to *water to its citizens*, had to take action under its obligations under human rights law to ensure *access to water for its citizens*. In this light, terminating the agreement cannot be found to be a breach of a contract whose very purpose was to promote and enhance the achievement of human rights' [emphasis added].

56 ibid para 380 108. 'They conclude that foreign corporations engaged in projects intimately related to human rights and the capacity to achieve sustainable development (such as the project here), have the highest level of responsibility to meet their duties and obligations as foreign investors, before seeking the protection of international law. This is precisely because such investments necessarily carry with them very *serious risks to the population* at large' [emphasis added].

57 ' ibid para 383, 109. BGT's poor performance affected not only its income, but also *the people of Dar es Salaam* who were dependent on BGT for water delivery during the contract period and in the future' [emphasis added].

the failure of a renegotiation strategy should be discouraged'[58] and that an award for costs should be issued against the claimants.

The arbitral tribunal found that these submissions were 'useful,'[59] 'have informed the analysis of claims'[60] and 'have provided a useful contribution to these proceedings,'[61] but had little impact on the award since the tribunal found that the respondent had violated the fair and equitable treatment, displayed discriminatory and unreasonable conduct, and expropriated the claimant of their investment.[62] The final decision dismissed the claims for damages and ordered each party to bear their costs. However, in parallel proceedings, another tribunal rejected BGT's claims and awarded USD 3 million to the respondent as damages.[63] The tribunal's reasoning shows that it can override the refusal of one party and grant a non-party the right to submit observations.[64] It also demonstrated the limitations of *amicus curiae*.[65]

Piero Foresti and Others v South Africa

The *amicus curiae* participation was also requested in *Piero Foresti and Others v South Africa* by five local and international NGOs, some of them with prior experience in filing non-disputing parties' submissions before investment tribunals. The participation was granted, with access to documents necessary for the preparation of their submissions.[66] With the discontinuance of the case, these independent public interest organisations could not use such opportunities to defend the numerous issues that are of 'direct concern to South African citizens.'[67]

All in all, local communities' participation through third party submissions could lead to unsatisfactory results. The efficiency of this form of participation should be questioned because it cannot be seen as an effective remedial mechanism.[68] In fact, arbitral tribunals have not developed a coherent and transparent methodology for

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58 ibid 112 para 391.
59 ibid 112 para 392.
60 ibid.
61 ibid 101 para 359.
62 ibid 242 para 814.
63 This tribunal was administrated under UNCITRAL 'Arbitration Rules' <https://www.theguardian.com/business/2008/jan/11/worldbank.tanzania> accessed 14 February 2023.
64 The tribunal used this possibility for the written submission but followed the request of the claimants who did not want *amici* to attend the hearings.
65 *Biwater Gauff* (n 47) para 361.
66 *Piero Foresti, Laura de Carli & Others v The Republic of South Africa*, ICSID Case No ARB(AF)/07/01, Letter regarding non-disputing parties, 5 October 2009.
67 'Petition for Limited Participation as Non-Disputing Parties in Terms of Articles 41(3) 27, 39, and 35 of the Additional Facility Rules' ARB(AF) 07/01, 17 July 2009 para 4.1 8.
68 Jesse Coleman and others, 'Third-Party Rights in Investor–State Dispute Settlement: Options for Reform' 2019 Columbia Center on Sustainable Investment<https://ccsi.columbia.edu/sites/default/files/content/docs/our%20focus/uncitral-submission-third-party-participation-en.pdf> accessed 14 November 2023.

assessing *amicus curiae* applications and these submissions tend to have little impact on tribunals' final outcomes.[69] The question, therefore, is how can ISDS reforms promote better inclusion of local communities?

Reforming Investor-state Dispute Settlement for a Better Inclusivity

In the ongoing discussions within UNCITRAL WG III, some participants stressed the need for these reforms to promote 'the development of an inclusive investment-related dispute settlement alternative.'[70] In this regard, issues related to communities are taken into consideration with, notably, discussions on how to better protect their rights and interests in ISDS.[71] This section focuses on two proposals that could improve the participation of these communities in ISDS: the reforms of the practice of *amicus curiae* and the establishment of a Multilateral Investment Court (MIC).

Reforming the Practice of *Amicus Curiae*

The current practice of *amicus curiae* could yield unsatisfactory results.[72] In this regard, the UNCITRAL Working Group III noted 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. (…) During the discussion, it was noted that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") as well as the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency") addressed submissions by a third person (article 4 of the Rules on Transparency) and by a non-disputing Party to the treaty (article 5 of the Rules on Transparency). Therefore, the question was raised whether those provisions were insufficient and required the development of guidance to tribunals

69 Nicolette Butler, 'Non-Disputing Party Participation in ICSID Disputes: Faux Amici?' (2019) 66 Netherlands International Law Review 143–178.

70 UNCITRAL (n 14) para 32.

71 To ensure that the multilateral investment court (MIC) meets the best practices of an open and transparent process, there must be more clarity on third-party interventions. There is a need to ensure that intervention is done in the public interest and must not affect the parties to the investment dispute unfairly. There must be rules that provide a guarantee that the MIC's acceptance of an intervener would assist the Investment Court in determining the issues by providing new or independent views, UNCITRAL (n 14) para 54; Coleman and others (n 68); UNCITRAL (n 8).

72 See, inter alia, Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20(3) The European Journal of International Law 740–747; Eugenie Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-party Participation' (2011) 29(1) Berkley Journal of International Law 200–224; Jesse Coleman, Kaitlin Y Cordes, and Lise Johnson, 'Human Rights Law and the Investment Treaty Regime' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing Ltd 2020) 301–302.

> on how to apply the requirements for third-party submissions and to ensure that such submissions would be duly considered when rendering their decisions.[73]

A first option would be to automatically grant *amicus curiae* applications to local communities when a dispute is linked to investment activities taking place on territories occupied by these communities. It should be recalled that the link to the territory is an aspect of the identification of local communities.[74] A second option would be to allow them to participate in other stages of the proceedings. The UNCITRAL Working Group III underscored 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*' [emphasis added].[75]

What kind of participation did it envision? Maybe the participation in oral proceedings and/or access to all the documents of the case as some communities and NGOs requested. The USA-Rwanda BIT authorises non-disputing parties to participate in oral proceedings.[76] Last but not least, in their submission to the Working Group III, three NGOs discussed some options for the protection of third-party rights in ISDS.[77] One of these options aims at enabling third-party participation and draws from the examples of domestic jurisdictions, most of which provide for different involvement of third parties in the settlement of disputes.[78] These parties can participate through intervention, joinder, or interpleader. These procedural mechanisms could

> ensure the effectiveness, fairness and quality of the outcome between the disputing parties, which could otherwise be undermined if, for instance, individuals or entities are

73 UNCITRAL (n 8) paras 31–32.

74 'The court deduces that for the identification and understanding of the concept of indigenous populations, the relevant factors to consider are the presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions' [emphasis added]. *African Court on Human and Peoples' Rights, African Commission on Human and Peoples' Rights v Republic of Kenya*, Application No 006/2012 Judgment (26 May 2017) 31 para 107.

75 UNCITRAL (n 8) para 31.

76 According to Art 28(2) of the Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda concerning the Encouragement and Reciprocal Protection of Investment, 'The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.'

77 Coleman and others (n 68).

78 ibid 7–10.

crucial to complete resolution of the case or determination of relief but are not parties to the dispute.[79]

The Establishment of a Multilateral Investment Court

The proposal for the creation of a Multilateral Investment Court began, in 2018, with the EU Commission being given the mandate for negotiating the creation of a new multilateral court for investment disputes.[80] Currently, the negotiations for the setting up of a MIC are taking place within the UNCITRAL WGIII.[81] Such a court can be beneficial to local communities because, among its features, it will have permanent members and an assistance mechanism.

Permanent Members of the MIC

One of the main features of the MIC is the appointment of permanent members, by states and before disputes arise. This contrasts with the current ad hoc system where arbitrators are appointed on a case-by-case basis, by the litigant parties once the dispute has arisen.[82]

The appointment of permanent members seems to be best suited to settle matters involving national public policy issues.[83] In *Eco Oro v Colombia*, Philippe Sands QC was criticising the lack of sensitivity of arbitrators to the difficulties of governmental

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79 ibid 8.

80 <https://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> accessed 14 February 2023.

81 <https://uncitral.un.org/en/standing> accessed 14 February 2023.

82 'When states appoint adjudicators *ex ante* (before particular disputes arise), they act in their capacity as treaty parties and have an incentive to balance their interests, ensuring the selection of fair and balanced adjudicators that they would be happy to live with whether a future case is brought by their investors or against them as respondents. In arbitration, however, the choice of arbitrator is made not in advance but *ex post* (i.e. at the time a dispute has arisen), which means that investors and state respondents make decisions about arbitrators with a view to best serving their interests in that particular case … in addition to encouraging the appointment of predisposed (i.e. perceived as investor or state friendly) arbitrators and a small number of repeat players, one of the problems with this approach is that it leads to a continued high concentration of persons who have gained their experience as arbitrators primarily in the field of commercial arbitration involving disputes of "private law" rather than public international law disputes. Such persons often are professionally less familiar with public international law (investment treaties are of course a field of public international law) and public law (which is important because the cases concern the actions of states in their sovereign capacity)' UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS).' Submission from the European Union, A/CN 9/WG III/WP 145 (12 December 2017) paras 31–32.

83 'Given the rise in investor-state claims over breach of treaty commitments due to enactment of public laws and regulations, and not only on commercial matters pertaining to private or State contracts, it makes sense to promote a public dispute settlement mechanism over a private commercial system. The RIC proposal aims to achieve this without denying the right to individual or private action for foreign investors.' Charles Nyombi, 'A Case for a Regional Investment Court for Africa' (2018) 43(3) North Carolina Journal of International Law 104.

decision-making.[84] This could be explained by the fact that many of the current arbitrators in ISDS come from 'commercial arbitration involving dispute of private law' and are less familiar with the public (international) law features of the investment treaty regime.[85] This lack of sensitivity to public policy issues is further evidenced by the cautious attitude that some arbitral tribunals have adopted vis-à-vis human rights-based arguments: Replying to the respondent's argument according to which it should be given a margin of appreciation in the determination of its public interest, the Tribunal, in *Bernhard von Pezold and Others v Republic of Zimbabwe* noted that

> due caution should be exercised in importing concepts from other legal regimes (in this case European human rights law) without a solid basis for doing so. Balancing competing (and non-absolute) human rights and the need to grant States a margin of appreciation when making those balancing decisions is well established in human rights law, but the Tribunal is not aware that the concept has found much support in international investment law. The Respondent has only referred the Tribunal to European human rights cases in its arguments. This is a very different situation from that in which margin of appreciation is usually used. Here, the Government has agreed to specific international obligations and there is no "margin of appreciation" qualification within the BITs at issue. Moreover, the margin of appreciation doctrine has not achieved customary status. Therefore, the Tribunal declines to apply this doctrine.[86].

Such a cautious attitude could be detrimental to communities' rights which are not 'lesser rights.'[87]Additionally, some previous studies have pointed out the fact that

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84 'In determining whether measures taken by a state is arbitrary to the point of being shocking, tribunals must be sensitive to the difficulties of government decision-making in the face of legitimate objectives that pull in different directions. In the search for balance, and in the face of competing pressures, different arms of the same government may inevitably give expression to different and potentially conflicting priorities. As noted above, this is particularly the case when the protection of the environment or human health is at stake (one need only think of the current challenges faced by so many governments around the world as they confront the emerging reality of global warming/climate change and biodiversity losses and their consequences, or the reality of Covid-19, as governments struggle to find a way through the difficulties of protecting human health whilst also securing economic wellbeing)' *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No ARB/16/41 Partial Dissent of Professor Philippe Sands QC 12.

85 UNCITRAL (n 82).

86 *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15 Award (28 July 2015) 156 paras 465–466; 'Arbitrators and judges, as well as other adjudicators, must take care to remain within the arbitral or judicial function: they must not legislate, and they must take care not to trespass into a forbidden domain by imposing their own policy preferences where the legislative branch—and perhaps also a divided executive arm—oscillates over time between competing social objectives and policy goals' *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No ARB/16/41, Partial Dissent of Professor Philippe Sands QC 12–13 paras 28, 30; see also Johannes Fahner and Matthew Happold, 'The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration' (2019) 68(3) International and Comparative Law Quarterly 741–759.

87 'As an international investor the claimant has legitimate interests and rights under international law; local communities of indigenous and tribal peoples have also rights under international law, and these

arbitrators have allegedly an ‘apparent interest to interpret the treaties in ways that create favourable conditions for foreign investors to bring claims’[88] and that can favour their multiple reappointments. They can also play multiple roles in the proceedings as arbitrators, counsel, experts, etcetera. This situation increases the risk of conflicts of interests, given the financial implications of these different roles.[89] The proposal for the establishment of an investment court tries to mitigate or nullify the influence of these factors with full-time employment, ethical requirements and a robust and transparent appointment process.[90] This court will therefore promote and lead to more correctness and consistency, which can ultimately be beneficial to communities, given that most of the recent investment agreements contain provisions for the protection of these communities.[91] Unfortunately, these recent agreements are not always interpreted, by arbitrators, in accordance with the intention of the treaty parties and the current ISDS system has limited options for the review of arbitral decisions (revision and annulment of the award but no appeal).[92]

Investment Advisory Centre (IAC)

In its submission to the UNCITRAL Working Group III, the European Union included an assistance mechanism in its proposal for the establishment of a standing mechanism for the settlement of international investment disputes.[93] Such an assistance mechanism

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are not lesser rights’ *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award, partial dissenting opinion of Professor Philippe Sands (30 November 2017) 19 para 38.

88 Gus Van Harten, ‘Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010’ (2018) 29(2) The European Journal of International Law 540.

89 Wolfgang Alschner, *Investment Arbitration and State-Driven Reform, New Treaties, Old Outcomes* (OUP 2022) 3.

90 ‘To hear each particular case, adjudicators would be appointed to divisions of the standing mechanism on a randomised basis to ensure that the disputing parties would not be in a position to know in advance who will hear their case.’ UNCITRAL, Submission from the European Union and its Member States A/CN 9/WG.III/WP 159/Add 1 (24 January 2019) 6 para 24.

91 According to art 23 of the Pan-African Investment Code, for example, ‘investors shall not exploit or use local natural resources to the detriment of the rights and interests of the host State. Investors shall respect rights of local populations, and avoid land grabbing practices vis-à-vis local communities.’ ‘Local communities in member states have rights of ownership over their innovations, practices, knowledge and technologies acquired through generations and have a right to collectively benefit from the utilization of such resources. These community rights are to be protected in accordance with norms, practices and customary law found in, and recognised by the local communities in Member States whether such law is written or not. Access by an investor to biological resources and knowledge or technologies of local communities in a Member State is conditioned on the prior informed consent of the local community with rights over the resources. Access carried out without such local consent is invalid.’ Art 49 al 2 b ECOWAS Common Investment Code.

92 ICISID Convention arts 51 and 52.

93 ‘A mechanism should be devised to ensure that all disputing parties can operate effectively in the investment dispute settlement regime. This could aid least developed and developing countries in litigation in international investment disputes and possibly in other aspects of the application of international investment law. Such an initiative may form part of the process of establishing a

is currently discussed at UNCITRAL Working Group III.[94] The main beneficiaries envisaged for such a mechanism are states,[95] although communities were included in initial discussions on potential beneficiaries.[96]

This mechanism can be of particular importance for these communities since, even participating as *amicus curiae* requires legal expertise that they may not possess.[97] So far, they have mainly been assisted by NGOs, on a pro bono basis, in the drafting of their third-party submissions[98] but such assistance is not always guaranteed. And the England Supreme Court underscored the difficulty, if not the impossibility, for these African communities to have access to 'sufficiently substantial and suitably experienced legal teams' to enable their participation in litigation.[99] This need for legal assistance is especially important as some participants in the UNCITRAL Working Group III

standing mechanism. A scoping and feasibility study, involving input from developing countries and experts, on ways to ensure an adequate form of legal defence in proceedings under international investment agreements, is currently being prepared' UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union and its Member States A/CN 9/WG III/WP 159/Add 1 para 38.

94 <https://uncitral.un.org/en/multilateraladvisorycentre> accessed 14 February 2023.

95 UNCITRAL, 'Possible Reform of Investor-State dispute Settlement' ISDS Advisory Centre, Note by the Secretariat A/CN 9/WG.III/WP 168 para 25.

96 UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform)' thirty-eighth session A/CN 9/1004 (October 2019) para 30 UNCITRAL, 'Possible Reform of Investor-State dispute Settlement (ISDS) Advisory Centre, Note by the Secretariat, A/CN 9/WG.III/WP 212 para 56; Lise Johnson and Brooke Guven, 'Securing Adequate Legal Defense in Proceedings under International Investment Agreements, a Scoping Study' CCSI (November 2019) 99.

97 For a general discussion about the importance of an advisory centre for African actors, see Rimdolmsom Jonathan Kabré, 'Establishing an Advisory Centre on Investment Law: What Significance for African Countries?' in Lisa E Sachs, Lise J Johnson, and Jesse Coleman (eds), *Yearbook on International Investment Law & Policy 2020* (Oxford University Press 2020); it should be added that some of them do have access to NGOs that provide legal services such as the International Institute for Sustainable Development, the International Institute for Environment and Development, the Accountability Counsel, CIEL, etcetera.

98 For example, indigenous people were assisted by the European Centre for Constitutional and Human Rights in *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co (Private) Limited v Zimbabwe (ICSID Case ARB/10/ 25)*, see Procedural Order 2 1. In Biwater, these communities were assisted by The Lawyers' Environmental Action Team (LEAT), The Legal and Human Rights Centre (LHRC), The Tanzania Gender Networking Programme (TGNP), The Center for International Environmental Law (CIEL) and The International Institute for Sustainable Development (IISD), see Petition for Amicus Curiae Status in Case No Arb/05/22 before the International Centre for Settlement of Investment Disputes between Biwater Gauff (Tanzania) Limited and United Republic of Tanzania, 27 November 2006.

99 See *Vedanta Resources PLC and Another (Appellants) v Lungowe and Others* (Respondents) [2019] UKSC 20, 33 para 89 <https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf> accessed 14 February 2023; Rimdolmsom Jonathan Kabré, 'La Participation des Communautés Locales Africaines Dans la "'Justice Délocalisée": Une Chimère?' (2021) 6 AfronomicsLaw <https://www.afronomicslaw.org/category/analysis/la-participation-pour-les-communautes-locales-africaines-dans-la-justice> accessed 14 February 2023.

discussions are advocating for granting local communities' locus standi in ISDS.[100] If states, with all their resources, need a legal assistance mechanism, there is even more reason to legally assist communities in this regard, given that they have fewer resources and are more vulnerable.

Conclusion

This contribution discussed the treatment that African communities have received during the settlement of investment disputes. They are allowed to file non-disputing parties' submissions.

However, this form of participation cannot be considered an effective mechanism given that these communities do not have the 'right' to be granted *amicus curiae* participation and that non-disputing parties' submissions tend to have little or no impact on the decisions of arbitral tribunals.

As ISDS mechanisms are being redesigned and reformed, the author also examined proposals and reforms that could improve the participation of these communities in ISDS. In this regard, different options for reforming the practice of *amicus curiae* were explored and it was argued in favor of a 'right' to file *amicus curiae* briefs for these communities, notably when the dispute is linked to investment activities taking place on territories occupied by them. The article also examined the extent to which the establishment of a Multilateral Investment Court can increase the inclusion of communities in the settlement of investment disputes.

References

Alschner W, Investment Arbitration and State-Driven Reform, New Treaties, Old Outcomes (Oxford University Press 2022).

Baetens F (ed), *Identity and Diversity on the International Bench, Who is the Judge?* (Oxford University Press 2020) <https://doi.org/10.1093/oso/9780197644386.001.0001>

Bianchi A, 'The Fight for Inclusion: Non-State Actors and International Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford 2011) <https://doi.org/10.1093/acprof:oso/9780199588817.003.0006>

100 Allowing claims by investors against states, but also other affected individuals or communities to bring claims against investors means allowing natural or legal persons with a direct and present interest to intervene in the proceedings. This is a necessary part of making the process fairer and by creating a forum that protects the rights of all people—not just those of multinationals; UNCITRAL, Submission from South Africa, 9 para 52. This has happened more in the environment/climate area.

Bjorklund AK and others, 'The Diversity Deficit in International Investment Arbitration' (2020) The Journal of World Investment & Trade <https://doi.org/10.1163/22119000-12340177>

Bogdandy AV and Venzke I, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press 2014).

Caron DD, 'Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy' (2009) 32 Suffolk Transnational Law Review.

Coleman J, Cordes KY and Johnson L, 'Human Rights Law and the Investment Treaty Regime' in *Surya Deva and David Birchall* (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing Ltd 2020) <https://doi.org/10.4337/9781786436405.00022>

Cotula L and Schröder M, *Community Perspectives in Investor-State Arbitration* (IIED 2017).

Duggal K and Lee A, 'A 360-Degree Kaleidoscopic View of Diversity and Inclusion (or Lack Thereof)' (2022) 33(1) International Arbitration.

Elsig M, 'The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?' (2007) Journal of World Trade <https://doi.org/10.54648/TRAD2007003>

Francioni F, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20(3) The European Journal of International Law <https://doi.org/10.1093/ejil/chp057>

Gormley WP, *The Procedural Status of the Individual before International and Supranational Tribunals* (Martinus Nijhoff 1966) <https://doi.org/10.1007/978-94-011-9530-0>

Greenwood L, 'Tipping the Balance – Diversity and Inclusion in International Arbitration' (2017) 33 Arbitration International <https://doi.org/10.1093/arbint/aix001>

Hambro EI and Turlington E, 'Individuals Before International Tribunals' (1941) American Society of International Law Annual Meeting <https://doi.org/10.1017/S0272503700059036>

Johnson L and Guven B, 'Securing Adequate Legal Defense in Proceedings under International Investment Agreements, a Scoping Study' *CCSI* (November 2019) <https://doi.org/10.2139/ssrn.3678394>

Kabré RJ, 'Establishing an Advisory Centre on Investment Law: What Significance for African Countries?' in Lisa E Sachs, Lise J Johnson and Jesse Coleman (eds), *Yearbook on International Investment Law & Policy 2020* (Oxford University Press 2020).

Kabré RJ, *Le Rôle des Juristes Privés (Avocats et Conseils) dans le Règlement des Différends Impliquant les États* (Helbing Lichtenhahn Verlag 2021) <https://doi.org/10.46455/Helbing_Lichtenhahn/978-3-7190-4414-5>

Kidane W, 'The China-Africa Factor in the Contemporary ICSID Legitimacy Debate' (2014) 35(3) University of Pennsylvania Journal of International Law.

Levine E, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-party Participation' (2011) 29(1) Berkley Journal of International Law.

McGarry B and Suedi Y, 'Judicial Reasoning and Non-State Participation before Inter-State Courts and Tribunals' (2022) 21 The Law and Practice of International Courts and Tribunals <https://doi.org/10.1163/15718034-12341467>

Nyombi C, 'A Ccase for Regional Investment Court for Africa' (2018) 43(3) North Carolina Journal of International Law.

Perrone NM, 'Local Communities, Extractivism and International Investment Law: The Case of Five Colombian Communities' (2022) 19(6) Globalizations <https://doi.org/10.1080/14747731.2022.2035494>

Perrone NM, 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' (2019) 113 AJIL Unbound <https://doi.org/10.1017/aju.2018.92>

Perrone NM, 'The International Investment Regime and Local Populations: are the Weakest Voices Unheard?' (2016) 7 Transnational Legal Theory <https://doi.org/10.1080/20414005.2016.1242249>

Polanco R, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection* (Cambridge University Press 2019).

Polonskaya K, 'Diversity in the Investor-State Arbitration: Intersectionality Must Be Part of the Conversation' (2018) 19(1) Melbourne Journal of International Law.

Röben V, 'What About Hobbes? Legitimacy as a Matter of Inclusion in the Functional and Rational Exercise of International Public Power' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008).

Schlemmer C, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31(1) ICSID Review <https://doi.org/10.1093/icsidreview/siv040>

Soave T, *The Everyday Makers of International Law: From Great Halls to Back Rooms* (Cambridge University Press 2022) <https://doi.org/10.1017/9781009248013>

Steininger S, 'The Role of Human Rights in Investment Law and Arbitration: State Obligations, Corporate Responsibility, and Community Empowerment' in Ilias Bantekas and Michael Ashley Stein (eds), *The Cambridge Companion to Business and Human Rights* (Cambridge University Press 2021) <https://doi.org/10.1017/9781108907293.019>

Treves T, 'Article 292' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea, A Commentary* (Beck/Hart/Nomos 2017).

Van Harten G, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29(2) The European Journal of International Law <https://doi.org/10.1093/ejil/chy024>

Vicuna FO, 'Individuals and Non-state Entities before International Courts and Tribunals' (2001) Max Planck Yearbook of United Nations Law.

Cases

ABCI Investments Limited v Republic of Tunisia ICSID Case No ARB/04/12.

African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v Republic of Kenya*, Application No 006/2012.

Aguas del Tunari v Republic of Bolivia (ICSID Case No ARB/02/3.

Bear Creek Mining Corporation v Republic of Peru ICSID Case No ARB/14/21.

Bernhard von Pezold and Others v Republic of Zimbabwe, ICSID Case No. ARB/10/15.

Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co (Private) Limited v Republic of Zimbabwe (ICSID Case No ARB/10/25).

Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania, ICSID Case No ARB/05/22.

Chevron Corporation and Texaco Petroleum Company. The Republic of Ecuador, PCA Case No. 2009–23.

Piero Foresti, Laura de Carli & Others v The Republic of South Africa, ICSID Case No ARB(AF)/07/01.

Eco Oro Minerals Corp v Republic of Colombia ICSID Case No ARB/16/41.

Government of the Republic of South Africa and Others v Von Abo (2011 (5) SA 262 (SCA); [2011] 3 All SA 261 (SCA)) [2011] ZASCA 65; 283/10 (4 April 2011).

Methanex Corporation v United States of America, UNCITRAL.

Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic ICSID Case No ARB/03/19.

Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents) [2019] UKSC 20.

Von Abo v President of the Republic of South Africa (CCT 67/08) [2009] ZACC 15; 2009 (10) BCLR 1052 (CC); 2009 (5) SA 345 (CC) (5 June 2009).

Von Abo v Government of the Republic of South Africa and Others (3106/07) [2010] ZAGPPHC 4; 2010 (3) SA 269 (GNP); 2010 (7) BCLR 712 (GNP) (5 February 2010).

Reports

African Commission on Human and Peoples Rights ‘Report of the Working Group of Experts on Indigenous Populations/Communities’ Res on the Rights of Indigenous Populations/Communities in Africa 28th ordinary session (2005).

Anaya J, ‘Extractive Industries and Indigenous Peoples’, Report of the Special Rapporteur on the Rights of Indigenous Peoples to the Human Rights Council, A/HRC/24/41 (2013).

UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the European Union and its Member States A/CN 9/WG III/WP 159/Add 1.

UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of South Africa A/CN 9/WG.III/WP 176 (2019).

UNCITRAL, ‘Report of Working Group III (Investor-State Dispute Settlement Reform) 37th Session (New York, 1–5 April 2019) A/CN 9/970 (2019).