

Development at Whose Cost? Indigenous Peoples, International Investment Law, and Land Rights in Africa and Asia

Irene Wanjiru Kariuki

University of Nairobi, Nairobi, Kenya

The relationship between Investor State Dispute Settlement (“ISDS”) and the indigenous peoples’ rights has been turning abstruse over the years, raising critical questions about the adequacy of ISDS mechanisms in safeguarding those rights. Foreign investment development projects have frequently been reported to infringe upon indigenous peoples’ land rights and other fundamental freedoms with the ISDS mechanism functioning as a catalyst for such violations. This is seen through the treatment accorded to the indigenous peoples in the settlement of investment disputes, who, even though not parties to the underlying dispute between the investors and the states, become victims of it. The crux of this paper is to examine the extent to which the decisions of ISDS tribunals impact indigenous peoples’ land rights in Asian and Africa countries. It critically questions whether, how, and to what extent the voices and perspectives of indigenous peoples are incorporated into the resolution of international investment disputes. This paper examines the legal frameworks governing international investment disputes in Africa and Asia and the specific challenges faced by indigenous peoples in accessing and participating in ISDS proceedings, drawing on case studies and precedents from both regions. The analysis aims to assess the broader implications of these practices on indigenous land rights and sustainable development. The paper concludes with proposed pathways for reform, including reconsideration of ISDS mechanisms altogether. The research methodology applied is a combination of doctrinal and qualitative methodologies. Doctrinal research is applied to analyse the existing texts and legal instruments on international investment disputes in Asia and Africa. The qualitative research approach explores the real-world examples on various relevant ISDS decisions made in Asian and African countries. The paper will then seek to thematically analyse the findings to unearth the common practices, challenges, and consequences of each practice on indigenous land rights and sustainable development.

Keywords: indigenous land rights, sustainable development, international investment law, ISDS

Introduction

Investor State Dispute Settlement (“ISDS”) is a dispute resolution mechanism available in free trade agreements and investment bilateral treaties, that presents an avenue for foreign investors to access an international tribunal to resolve investment disputes against Host States (Australian Government Department of Foreign Affairs and Trade, n.d.). The mechanism applies arbitration to resolve the disputes, thereby excluding the domestic courts system. In ISDS proceedings, the parties appoint their respective arbitrators of choice, and both parties then agree

Irene Wanjiru Kariuki, advocate of the High Court of Kenya, LL.M., University of Nairobi, Nairobi, Kenya.

on a third arbitrator to form the arbitral tribunal, which conducts the proceedings as specified in the relevant treaty. The proceedings and their outcome are kept confidential, except in rare cases where the parties permit the publication of the outcomes. Most of the ISDS proceedings take place under the governance of the rules of the United Nations Centre for International Trade Related Arbitration Law (UNCITRAL) or at the International Court for the Settlement of Investment Disputes (ICSID) at the World Bank.

ISDS is an old dispute resolution system that is traced back to the 1960s where it was used to protect former colonizers' assets from expropriation in the newly independent states. It is now applied by investors and some States on the argument that domestic court systems lack impartiality, and foreign investors' interest would not be protected by a biased system.

ISDS is therefore put in place to create an "independent" forum to adjudicate over the interests of the foreign investors (Abbott, Erixon, & Ferracane, 2014). Independent they may be, but in practice, these tribunals often fail to uphold fundamental principles of justice and human rights, by prioritizing investor interests over the core human rights of indigenous peoples. This raises serious concerns about their legitimacy and fairness. It also calls into question the true purpose of such development projects, which in many cases end up harming the very communities they claim to benefit. These scenarios are particularly prevalent in Africa and Asia, due to the large-scale foreign investments in the various development projects including projects in the extractive industries and infrastructure which frequently intersect with indigenous and local communities.

The discussions around the interaction between the foreign investment projects, the ISDS system, and the indigenous peoples have been going on over time, and this is majorly triggered by the grave effects that ISDS has on the rights of the indigenous peoples. This friction arises from the fact that ISDS is founded on arbitration as the dispute resolution mechanism, which is contractual, and the indigenous peoples are strangers to these contracts, thereby lacking capacity to claim under the law of contracts. This innate nature of the ISDS proceedings however directly contradicts International Human Rights Law such as the provisions of Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which provides for the indigenous peoples' right to participation in decision-making of matters that would affect their rights. Article 2(3) (a) of the International Covenant on Civil and Political Rights requires the States "to ensure that any person whose rights or freedoms ... are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity".

Given the limiting nature of the ISDS proceedings, the indigenous peoples are left with no defined routes to seek remedies for violations committed against them by foreign investors, who in most cases, have the support of the States through permits to conduct their investment projects. Additionally, Article 21 of the African Charter on Human and Peoples' Rights guarantees all peoples' right to natural resources. This provision provides for the right to freely dispose of natural resources and prohibits deprivation of this right. From the various jurisprudential decisions such as that of the African Court on Human and Peoples' Rights in the case of *African Commission of Human and Peoples' Rights vs. Republic of Kenya* (Application No. 006/2012) [2017] AfCHPR 2 (the Ogiek Case),¹ Article 21 has been interpreted to protect indigenous peoples' customary rights to land and natural resources.

¹ *African Commission of Human and Peoples' Rights vs. Kenya* (the "Ogiek Case").

Furthermore, many of the bilateral investment treaties (BITs) currently in force in most countries are outdated and grant States broad discretion with minimal protection for third-party rights. While some countries are currently reviewing their BITs, most were drafted without consideration for indigenous peoples' rights or general international human rights.

This paper recognises that foreign investment projects and the ISDS have widespread impact on not only the indigenous peoples, but also on the local people in Asia and Africa. However, the paper's focus is specifically on the indigenous peoples. It is therefore essential to provide a clear definition of who indigenous peoples are, particularly in contrast to local communities, in order to contextualize the specific vulnerabilities and rights at stake.

The Indigenous and Tribal Peoples Convention, 1989 (ILO Convention No. 169 of 1989) under Article 1(1) (b) describes indigenous peoples as:

Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.²

From this definition, several key points emerge: First, that indigenous peoples are identified as groups living within independent or sovereign state, which implies that colonization and state formation did not erase pre-existing populations. Second, recognition of indigenous peoples can come through self-identification or recognition and acknowledgement by other parties such as the State or the rest of the society. Importantly, this recognition is not contingent upon formal legal acknowledgment by the state. Another significant element is the emphasis on descent: Indigenous peoples are understood to be the original inhabitants of a territory before colonization or state formation. Lastly, for a group to be considered indigenous, it must have preserved, fully or partially, unique systems of organisation, customs, and governance.

This paper adopts the above definition, recognising indigenous peoples as

indigenous populations that live within, or attached to, geographically distinct traditional habitats or ancestral territories, and who identify themselves as being part of a distinct cultural group, descended from groups present in the area before modern states were created and current borders defined, (Wang, Ning, & Zhang, 2021)

distinguishing them from local communities who would be groups that have recently settled or occupied the geographical area or country in question.

The following section will provide a brief overview of the international and domestic legal framework concerning indigenous peoples and international investment dispute resolution, with a particular focus on the two regions central to this paper: Africa and Asia.

Analysis of the Legal Framework

Protection of indigenous peoples' land rights and resolution of international investment disputes in Africa and Asia are governed by distinct legal regimes. As this section will demonstrate, placing these frameworks side by side reveals a fundamental "conflict of concepts". ISDS is inherently transactional, grounded in contractual

² ILO Convention No. 169 of 1989 under Article 1(1) (b).

obligations and individual rights between states and investors. In contrast, indigenous legal systems are rooted in customary law, emphasizing communal land ownership and the collective protection of associated rights. This conceptual disconnect generates significant friction when disputes arise from foreign investment projects that affect indigenous peoples and their lands.

Protection of Indigenous Peoples' Land Rights

International law recognises the various rights, including the land rights, of the indigenous peoples. The UNDRIP specifically recognises the indigenous peoples' right to "the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired" under Article 26(1). Article 10 of the UNDRIP stipulates that

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11(1) places an obligation on States to

provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Furthermore, Article 18 recognises the indigenous peoples' right to "participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures..." To further buttress the indigenous peoples' right to participate in proceedings relating to matters affecting their rights, Article 27 of the UNDRIP obligates the States to:

establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

This provision underpins the central hypothesis of this paper: that the protection of indigenous peoples' rights in international investment projects disputes across Africa and Asia requires their meaningful participation throughout the entire lifecycle of the ISDS proceedings.

In addition, Article 7 of the ILO Convention No. 169 of 1989 provides for the indigenous peoples' right to have control over the development projects that affect their way of living. The Convention states that:

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development ...³

Further, the Convention specifically recognises the right of the indigenous peoples to the ownership and possession of the lands which they traditionally occupy, while Article 16 protects them from removal from those lands.

³ Article 7 ILO.

Regarding participation in dispute resolution processes, Article 12 of the Convention provides that:

the peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

This provision clearly anticipates and affirms the right of the peoples concerned to participate in legal proceedings related to the protection or enforcement of their rights. However, in practice, this is rarely upheld in ISDS proceedings, which frequently exclude the affected communities from participating in the process. Moreover, these mechanisms often preclude indigenous peoples from seeking redress through domestic courts or holding their governments accountable, thereby undermining their access to justice.

At the domestic levels, the rights of indigenous peoples are recognised and protected through national legislation. Different countries in Africa and Asia accord different levels of protection to indigenous peoples. Kenya is one of the countries in Africa with robust legal framework for protection of indigenous peoples. The supreme law of the land, the Constitution of Kenya 2010, recognises community land. The Constitution defines community land as (among others) land that is ancestral land and land traditionally occupied by hunter-gatherer communities. Additionally, the 2010 Constitution establishes the National Land Commission under Article 67, mandating it to encourage the application of traditional dispute resolution mechanisms in land conflicts. The Democratic Republic of Congo also enacted a law, Law No. 22/030 of July 15, 2022, on the protection and promotion of the rights of indigenous Pygmy peoples.

Across Asian countries, a variety of terms are used to refer to the indigenous peoples. For example, in Taiwan, aboriginal tribes, aborigines in peninsular Malaysia, cultural minorities in the Philippines, hill tribes in Thailand, etcetera (Roy, 2005). Similarly, the countries in Asia have different levels of legal protections for indigenous peoples. For example, countries such as India offer strong protective measures and high constitutional status for the Nagas and Mizos communities, while Philippines offers constitutional recognition and moderately strong protection measures (Roy, 2005). In Japan, the protection of the Ainu as indigenous peoples has been criticised for focusing on cultural promotion without indigenous rights such as land rights (Gayman, 2024).

International Investment Disputes Resolution

Africa. The 1900s saw a huge proliferation of BITs across the Globe, which was due to among other reasons, the belief that the BITs would promote the flow of foreign investment among countries (Sornarajah, 2010). This is still one of the driving forces for the continued growth in the BITs across Africa, despite the fact that recent literature has critically questioned whether BITs do in fact promote foreign investment flows. This question, however, falls outside of this paper's scope.

A common characteristic among most BITs signed by African countries is that they were lux and friendly (in most cases a little too friendly) to the interests of the foreign investors, against the Host States. This came to be as most tried to change the general attitude held by foreign investors, that African countries were a "risky" foreign investment destination, in the hope of luring and giving the foreign investors some comfort and desire to pump their resources into these "risky" destinations (United Nations, 2016).

BITs typically have provisions of the settlement of investment disputes. Unlike some of the first-generation BITs which only provided for state-to-state dispute settlement, more recent BITs address investor-to-state dispute settlement, through the ISDS mechanism. According to a report by the United Nations Economic Commission for Africa, between 1972 and 2014, 111 investment dispute cases, which constituted approximately one-fifth of all documented cases, involved African countries (United Nations, 2016).

The investment landscape in Africa has seen tremendous changes in the recent years, more so following the adoption of the African Continental Free Trade Area (AfCFTA) Protocol on Investment (“Protocol”) in February 2023. The Protocol seeks to promote cooperation on investment matters in Africa by eliminating the fragmentation of investment regulations in Africa, among other specific objectives. The Protocol is a paradigm shift in the regional investment legal landscape in Africa, with multiple benefits expected to be derived from it by the State Parties.

Before the AfCFTA, the investment legal regime in Africa was convoluted, primarily due to the varied investment laws and policies in place across the African countries, together with the regional instruments among the members of the various regional trading blocs across the Continent, such as the Common Market for Eastern and Southern Africa, the Economic Community of West African States, the East African Community, and the South African Development Community (International Trade Administration, 2024).

Article 46 of the Protocol provides that in the resolution of a dispute between an investor and a State, the parties shall first seek to resolve the dispute amicably through consultations, negotiations, conciliation, mediation, or other amicable dispute resolution mechanisms available in the Host State. If such amicable resolution fails, the Protocol refers the parties to the dispute resolution mechanisms provided for under the Annex to the Protocol, which is to be finalised within 12 months at the latest from the date of adoption of the Protocol.⁴ To date, the Annex is still under negotiation and its provisions, including whether it will adopt the traditional ISDS or introduce a novel continental tribunal, remain to be seen.

In addition to the regional legal framework on international investment disputes in Africa, there has been development at the National levels, with some countries enacting or amending their domestic laws governing international investment, to live up to the standards of international human rights and protection of the citizens, running away from the ISDS model whose main focus is the protection of investors. An example is South Africa’s Protection of Investment Act, 2015, which does away with ISDS.

Asia. Similar to Africa, many Asian countries are parties to BITs that incorporate ISDS as the main dispute resolution mechanism. The number of ISDS cases in the region has been steadily increasing, particularly in sectors such as extractives, renewable energy, and construction (Paffey & Suhadolnik, 2025). The Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement (ACIA) of 2009 explicitly provides for the resolution of investment disputes through ISDS and grants extensive protections to investors. However, the ACIA has faced criticism for potentially undermining the rights of indigenous peoples by facilitating large-scale investment projects on ancestral lands without adequate safeguards.

Asia has also been part of the growing global unease surrounding the ISDS system, with the region increasingly described as one of the “focal points in rulemaking” in international investment law (Schill, 2016).

⁴ Article 46(3) of the Protocol.

The concerns around the ISDS among Asian countries started rising from the 2000s, when a significant number of ISDS claims were brought against various States under their existing treaties. This caused some of the countries to terminate their ISDS-backed treaties. For example, following the first public investment treaty award against India in the *White Industries Australia Limited v. The Republic of India* (UNCITRAL),⁵ India issued about 57 termination notices under its international investment agreements. Similarly, Indonesia, following its encounter in the *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40 concluded in 2014,⁶ took steps to terminate some of its international investment agreements, and renegotiated others with less exposure to claims from foreign investors (Bland, 2014).

Fast forward to date, there is a pattern to move away from broad investor protection treaties in Asia's treaty practice, with the adoption of limited investor protection provisions. For example, India's 2015 Model BIT retains ISDS but with a narrow window and reduced substantive protections. While the BIT does not specifically speak to the protection of indigenous peoples, the BIT presents an indirect opportunity for the protection of indigenous peoples through regulation by the State in the public interest. The BIT also requires investors to first exhaust local remedies for a specific period before filing an arbitration case under the treaty. A good example is the recently concluded BIT between India and the United Arab Emirates.

Case Study Analysis

Africa

***Bernhard Von Pezold and Others v. Zimbabwe* (ICSID Case No. ARB/10/25).** The European Center for Constitutional and Human Rights (ECCHR) and four indigenous communities (Chikukwa, Ngorima, Chinyai, and Nyaruwa peoples) applied for leave to participate in the proceedings in the capacity of *amici curiae*. Specifically, they petitioned for: (i) permission to file a written submission as joint amici curiae; (ii) access to the key arbitration documents; and (iii) permission to attend the oral hearings and to reply to any specific questions of the Tribunal on the written submissions. In their application, the indigenous communities described their interest in the case by indicating that

their distinct cultural identity and social history was inextricably linked to their ancestral lands and the outcome of the arbitral proceedings would determine not only the future rights and obligations of the disputing parties with regard to those lands, but may also potentially impact on the indigenous communities' collective and individual rights.⁷

The Claimants vehemently objected to the non-disputing parties' application, arguing among other things, that the non-disputing parties were not independent, and that their claim of being "indigenous" would require the Tribunal to delve into matters of international law, which fell outside of its jurisdiction.

On the other hand, the Respondent did not file any observations in response to the non-disputing parties' application, except that it had no objection provided the application did not challenge the sovereignty of the Republic of Zimbabwe.⁸ This response (or lack of it thereof) is significant as it demonstrates the failure by the

⁵ *White Industries Australia Ltd v. India* (Final Award) (United Nations Commission on International Trade Law Arbitral Tribunal, 30 November 2011).

⁶ *Churchill Mining and Planet Mining v. Republic of Indonesia* (ICSID Arbitral Tribunal Cases No. ARB/12/40 and ARB/12/14; Decision on Jurisdiction (24 February 2014)).

⁷ *Bernhard Von Pezold and Others v. Zimbabwe* (ICSID Case No. ARB/10/25).

⁸ *Ibid.*

State, to speak up and defend the rights of its own peoples. Choosing silence spoke volumes on the role of the State in undermining the rights of the indigenous peoples in the ISDS proceedings.

In dismissing the application, the Tribunal found that the non-disputing parties did not have a “significant interest in the proceeding”, and that their intended submissions would not “address a matter within the scope of the dispute”, as it was based on a claim as “indigenous peoples” under international human rights law, a matter which the Tribunal considered to be outside of the scope of the dispute.⁹

It is imperative to internalize the reasoning of the Tribunal, vis-à-vis the arguments raised by the indigenous communities and the ECCHR. The indigenous communities and the ECCHR raised significant issues touching on the violation of human rights and the land rights of the indigenous communities, which formed the basis of their application for leave to participate in the proceedings. On the flip side, these very issues were used as the basis for denial by the Tribunal, of leave to be enjoined as *amici curiae*. The precedent set by this Tribunal’s decision is an overt contributor to the exclusion of the indigenous peoples from ISDS proceedings.

Biwater Gauff (Tanzania) Limited Versus the Republic of Tanzania (Case No. Arb/05/22 before the International Centre for Settlement of Investment Disputes). In this case, though not directly touching on indigenous land rights, involved a water services agreement, and the question of sustainable development. Three Tanzanian-based legal non-governmental organizations (NGOs) and two international NGOs collectively applied to be granted the status of *amicus curiae*, to access the key arbitration document, and to attend the oral hearings when they take place, and to reply to any specific questions of the Tribunal on the written submissions.¹⁰ In the end, the Tribunal allowed the applicants to file their submissions, but denied their access to documents and to attend the hearings. However, from the final award, the Tribunal in specific instances relied on the *amicus curiae*’s submissions, noting that they had informed the analysis of the issues raised in the dispute (Butler, 2019). This case is important to this paper as it demonstrates the impact of allowing *amicus curiae* submissions.

Piero Foresti, Laura de Carli and Others v. The Republic of South Africa (ICSID Case No. ARB(AF)/07/1). In this case, which involved a dispute on mining rights, investors instituted the proceedings against South Africa claiming that it had withdrawn their mining rights without adequate compensation in return (Butler, 2019). Four NGOs applied for limited participation in the proceedings as non-disputing parties, and their applications were granted (Butler, 2019). In addition to being granted the status of *amicus curiae*, the non-disputing parties were also allowed access to some documents filed by the parties, in a bid to allow them to substantively and informatively respond to the issues raised by the parties.¹¹

Asia

Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan (ICSID Case No. ARB/12/1). Popularly known as the “Reko Diq Case”, this case presents a slightly different issue compared to the other cases discussed above. Decided in 2019, the dispute was founded on the agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments (1998). The dispute concerned a claim against the Respondent for denial of a mining lease to Claimant’s wholly-owned subsidiary, Tethyan Copper

⁹ Ibid.

¹⁰ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/05/22.

¹¹ https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C90/DC2391_En.pdf.

Company Pakistan (Private) Limited, in order to allow the Government of Balochistan to implement its own project instead. The Tribunal ruled in favor of the Claimant, finding the Respondent liable for breach of its obligation to accord Claimant fair and equitable treatment under Article 3(2) of the Treaty.

The mining project had faced significant opposition from local communities such as the Balch community, with concerns around the potential impacts on water resources, threats to the region's environment, and a lack of local consent.

Churchill Mining and Planet Mining v. Republic of Indonesia (ICSID Arbitral Tribunal Cases No. ARB/12/40 and ARB/12/14). The dispute was based on the UK-Indonesia Bilateral Treaty, where the UK-based Churchill Mining initiated ISDS proceedings against the Republic of Indonesia following a unilateral revocation of the mining company's coal mining license.¹² While the case was dismissed in favor of Indonesia, the interests of the Indigenous Dayak communities whose lives and culture are were tied to the land in question, were not addressed. The case was dismissed on purely legal grounds of forgery of documents, and nothing on the impact of the project on the Indigenous peoples' lives. There was also no participation on behalf of the Indigenous Dayak communities during the arbitration proceedings. This case, like the above listed cases, demonstrates how the ISDS framework is innately designed to exclude the rights of Indigenous peoples.

Tension Between ISDS and Indigenous Rights

An analysis of the above cases reveals several recurring challenges. Chief among them are procedural barriers and the lack of legal standing for indigenous peoples to participate as primary parties in ISDS proceedings. The tension between the ISDS framework and indigenous peoples' rights is evident in several ways: the consistent exclusion of indigenous communities from meaningful participation; the prioritization of investor rights and interests over the land and related rights of indigenous peoples; the frequent absence of Free, Prior, and Informed Consent; and the resulting regulatory chill. This section examines the core tensions between ISDS and the rights of indigenous peoples, considering both the legal principles involved and how these conflicts manifest in practice.

Conceptual Conflict: Private Contracts vs. Collective Communalism

As discussed in earlier sections of this paper, ISDS is transactional and contractual in nature, governed by the doctrine of privity of contracts. Therefore, only the parties directly involved in the contract have the right to enforce its terms or be held liable under it (Divine Bright, 2024), in which case that would be the States and the investors. This locks out the indigenous peoples' right to enforce against the investors or the States, when their activities affect their rights.

On the other hand, the indigenous peoples' rights are backed by legal systems that are rooted in customary law, which emphasise on communal ownership of property and collective rights. This discrepancy results into conceptual friction whereby ISDS treats land and natural resources as commercial assets, while the indigenous communities treat these resources as a form of identity, culture, and livelihood, inseparable from them. The ISDS tribunals, called to resolve disputes of a commercial nature between parties whose interests are commercial,

¹² *Churchill Mining and Planet Mining v. Republic of Indonesia* [2016] ICSID Arbitral Tribunal Cases No. ARB/12/40 and ARB/12/14.

rarely have the mandate, or a supporting framework, to incorporate these non-commercial values into their decision making.

Procedural Exclusion and Lack of Locus Standi

By their very nature, ISDS proceedings are generally blurred, private, and exclusive compared to other domestic dispute resolution mechanisms such as litigation before domestic courts of law, which take into consideration the interests of non-parties but interested parties to the dispute. It is left to the discretion of the ISDS tribunals to decide whether to accept third parties' participation and contribution to the cases before them, and they often reject inclusion of such third parties. It is also common to find the parties to the dispute, that is the investors and the State, objecting to the inclusion of third parties' submissions as *amici curiae*, since such submissions would be aimed at raising fundamental human rights questions to expose the failed obligation of the State and the responsibility of the investor with regard to the effect of their activities on the rights of the affected indigenous peoples.

This therefore significantly limits the indigenous peoples' opportunities to effectively intervene in ISDS proceedings. It does not help that there are no rules to compel ISDS tribunals to dismiss the cases before them when those cases threaten third party rights. Further, the powers of the tribunals are very much limited to the will of the parties to the dispute, which causes the tribunals to decline the non-disputing parties' applications to participate in the proceedings on the grounds that either of the disputing parties are opposed to the application.

In the Permanent Court of Arbitration case of *Chevron Corporation and Texaco Petroleum Company v. the Republic of Ecuador* PCA Case No. 2009-23, the EarthRights International, Fundación Pachamama, and the International Institute for Sustainable Development submitted petitions to be allowed to make non-disputing party submissions in the proceedings, but the tribunal declined their participation as *amici curiae*.¹³

Confidentiality Versus Lack of Transparency

ISDS proceedings, just like other arbitration proceedings, are characterised by high confidentiality, which when looked from the lens of human rights law, is seen as lack of transparency. In particular, Article 27 of the UNDRIP requires States to

establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources...

The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) empowers people with the rights to access information, participate in decision-making in environmental matters, and to seek justice (UNECE, n.d.). This opaqueness in ISDS proceedings is (mis)used by investors and States in violating the indigenous peoples' rights, as the decisions of the ISDS tribunals can be made without their input or knowledge.

Regulatory Chill

As highlighted in the previous section, the issue is not the absence of legal recognition of indigenous peoples' rights. Rather, the persistent violation of these rights, despite existing legal protections, can often be attributed to

¹³ <https://www.italaw.com/sites/default/files/case-documents/ita0170.pdf>.

a phenomenon known as regulatory chill. Regulatory chill refers to the restraint by States to enact or enforce certain regulatory or policy measures as a result of fear of potential negative impact on foreign investment, or the threat of legal claims by investors under ISDS (Shekhar, 2016). An example is seen in Indonesia, where the Government has continued to expand the production of palm oil and extractive industries despite national laws mandating it to protect human rights, take measures to control climate change, and exercise oversight over domestic companies, partly due to fears of claims from investors under older BITs (Nnoko, 2021).

The tensions discussed in this section are not exhaustive, but what is evident is that they are both systemic and structural. Reform efforts are underway across different countries globally, including revision and termination of investment treaties and calls for the development of alternative dispute resolution mechanisms that acknowledge, respect, and include indigenous peoples' views. However, as it is currently, the ISDS model is fundamentally unfit for the protection of indigenous rights in Africa and Asia. South Africa and India have been on the forefront of these reforms, but it is necessary that the rest of the countries take steps to ensure procedural fairness and uphold the substantive rights of the indigenous communities.

Consequences of ISDS on Sustainable Development

The format and conduct of ISDS tribunals have far reaching impact, not only on directly affected indigenous communities but also on the broader pursuit of long-term sustainable development. Contrary to the often-promoted narrative that ISDS benefits all stakeholders, the mechanism primarily serves the interests of foreign investors and, in some cases, host governments that use it to deflect responsibility for failing to protect their populations.

Sustainable Development Goals (SDG) 10 (Reduced Inequality), 15 (Life on Land), and 16 (Peace, Justice, and Strong Institutions) are directly and adversely affected. ISDS perpetrates inequality by prioritizing the rights and interests of foreign investors over those of Indigenous communities.

When ISDS creates a “regulatory chill” discouraging states from enacting environmental protections for fear of litigation, it undermines efforts and ability to preserve natural resources, terrestrial ecosystems, and land rights, hence undermining the objectives of SDG 15.

On the other hand, SDG 16 aims to promote peaceful and inclusive societies, provide access to justice for all, and build effective, accountable, and inclusive institutions (Martin, n.d.). The secretive, unaccountable, and exclusionary nature of ISDS proceedings directly contradicts this goal.

Ultimately, it is Indigenous peoples, Host States, and the environment that bear the brunt of ISDS decisions, while foreign investors, and often their home states, walk away with favourable outcomes and minimal accountability.

Consequences of ISDS on a State's Fiscal Legitimacy

There is no agreed definition of fiscal legitimacy yet, but it involves ensuring that any fiscal system follows the seven major principles of “accountability”, “transparency”, “responsibility”, “effectiveness”, “efficiency”, “fairness”, and “justice” (Waris & Latif, 2015). Waris has defined fiscal legitimacy using three different contexts, namely (1) the fiscal context; (2) fiscal State; and (3) the contemporary States contexts. In the fiscal context, the fiscal legitimacy determines what constitutes sound; rational and logical decision-making is regarding State

funding, resource allocation, and management of expenditure. In the fiscal State context, fiscal legitimacy reflects the societal acceptance of State decisions regarding the collection of resources from society and the spending of those resources. On the other hand, in the contemporary States context, fiscal legitimacy should be rooted in the fulfilment of mutual and reciprocal obligations by persons and their collective institutions, and an agreement that these institutions will leverage their authority, including their fiscal authority, to realise the needs and aspirations of the citizenry (Waris, 2024). The theory of fiscal legitimacy is premised on the fact that a financial system should be responsive to good governance principles, namely: “transparency”, “accountability”, and “responsibility” (Irianto, Rosdiana, Sardjono, & Tambunan, 2018).

ISDS Tribunal decisions often result in significant and unpredictable financial liability, with awards against governments sometimes reaching into the billions of dollars. For example, in *Hulley Enterprises Ltd. v. Russian Federation* (PCA Case No. 2005-03/AA226), Russia was ordered to pay damages in the amount of USD 39,971,834,360 in addition to other incidental costs (Investment Policy Hub, 2005). Similarly, in the above referenced case of *Tethyan Copper v. Pakistan*, Pakistan was ordered to pay USD 4,087 million as principal amount of compensation for the breaches, in addition to other related costs and interest.

These enormous financial burdens divert public funds away from essential services such as healthcare, education, and infrastructure, undermining a country’s national development priorities. The burdens also heavily strain taxpayers, which can contribute to taxpayers’ dissatisfaction, leading to economic and political instability. For developing countries, especially those in Africa and Asia, such financial liabilities are not only disproportionate but fundamentally unsustainable (Sundaram, 2025).

Participation of Indigenous Peoples in ISDS Proceedings: A Process or an Event?

The earlier sections of this paper have highlighted the significant flaws in the ISDS proceedings particularly with respect to the participation and inclusion of Indigenous communities. The paper has also demonstrated the adverse impacts of these shortcomings on sustainable development goals and on fiscal legitimacy of States. This section turns to a critical question: What would constitute meaningful inclusion and effective participation of Indigenous peoples in ISDS proceedings?

The participation of third party rightsholders (including Indigenous peoples) in ISDS proceedings was given particular attention and discussed during the 37th session of the United Nations Commission on International Trade Law (UNCITRAL) the Working Group in 2019 in New York. During this session, it was noted that third-party participation “would better enable pertinent interests to be represented and considered in the context of the dispute”; and that such participation “would support consideration of other matters, including environmental protection, protection of human rights, and the obligations of investors”.¹⁴

The ISDS rules do not provide for meaningful or substantive participation of third parties generally in ISDS proceedings. While the applicable rules vary depending on the institution responsible for each arbitral proceeding, the common practice is that third parties are allowed to seek permission of the tribunal to submit as *amici curiae* (loosely translated as “friends of the court”), and even then, the discretion is left on the tribunal to either accept or reject such requests. In determining the decision on whether to accept or reject these requests, the tribunal is

¹⁴ “Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session”, United Nations Commission on International Trade Law, 2019.

expected to rely on the comments of the parties to the dispute, and may not accept the request, when the parties decline the proposed admission of non-parties. Case in point is the case discussed above, *Bernhard Von Pezold and Others v. Zimbabwe* (ICSID Case No. ARB/10/25), where the tribunal dismissed the request of the non-parties to make submissions as *amici curiae* for among other reasons, that the claimant had expressly objected the non-parties' request.

In the limited instances where the non-parties are admitted to ISDS proceedings as *amici curiae*, their submissions are limited to points of law or facts, and not to address or speak for the persons whose rights are affected by the dispute, and for purposes of this paper, not to speak on behalf of the indigenous peoples (Perrone & Cotula, 2019). Effectively, and following the decision in the *Methanex Corporation v. United States of America* case which emphasized that accepting third party requests conferred “no rights, procedural or substantive, on such persons” and that acceptance of *amicus* submissions was “a matter of its (the tribunal's) power rather than of third party right”,¹⁵ the *amicus* mechanism only gives authority to, but does not make it mandatory for the tribunals to accept third-party submissions, and only grants third parties a limited and conditional role in the proceedings.¹⁶

It would therefore be correct to conclude that as it stands now, the participation of third parties, and in this case the Indigenous peoples, in ISDS proceedings barely exists, and in the few instances when they are allowed to submit before the tribunals, it is treated as an event and not a process, making it inconsequential.

Real Participation of Indigenous Peoples in ISDS: What Should It Look Like?

The overall objective of meaningful participation is to promote fairness and access to justice for the Indigenous peoples. In determining what real impactful participation should look like, the first place to check would be to compare the ISDS proceedings to other dispute settlement mechanisms including litigation before the traditional domestic and international courts of law.

It is common in litigation before the courts of law for third parties to be enjoined in different capacities, depending on the applicable national and international laws. For example, in Kenya, a third party can apply and be enjoined as an interested party or an *amicus curiae* and each of these parties has designated roles to play in the proceedings. The *amicus curiae* provide the courts with important information to aid in decision-making and should therefore be impartial. On the other hand, the interested party is a person that has an identifiable stake or legal interest or duty in the proceedings before the court. In determining whether to allow joinder of an interested party, courts must answer two questions: (1) “What is the intended party's state and relevance in the proceedings?” and (2) “Will the intended interested party suffer any prejudice if denied joinder?”¹⁷

If joinder of non-disputing parties in ISDS proceedings is similarly treated, and the arbitral tribunals called upon to answer the question: “Will the intended interested party suffer any prejudice if denied joinder?” in admitting the Indigenous peoples as non-disputing parties to the disputes, then their meaningful inclusion, and consequently, the protection of their interests, would be significantly strengthened.

¹⁵ *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions From Third Parties to Intervene as “Amici Curiae”, UNCITRAL, 15 January 2001.

¹⁶ “Third Party Rights in Investor-State Dispute Settlement: Options for Reform”, Columbia Center on Sustainable Investment, International Institute for Environment and Development and International Institute for Sustainable Development.

¹⁷ *Meme Versus the Republic* [2004] 1 EA 124.

Furthermore, in determining what substantive participation should look like, it is the author's view that the same should be juxtaposed with the principle of public participation, which is a foundational principle of democracy and equality. This is because both entail hearing and considering the views and concerns of the targeted participants. Public participation refers to the ways in which non-state actors interact directly in public discussion and deliberation with state entities (Global Initiative for Fiscal Transparency, n.d.). Principles of public participation demand that in order to achieve effective participation, particular factors must be present. These include: (i) an enabling policy and legal environment; (ii) equality and non-discrimination; (iii) effective remedies for all; (iv) access to information; (v) openness and transparency; and (vi) empowerment and education of the participants.¹⁸

The Supreme Court of Kenya in a 2019 case between the *British American Tobacco Kenya PLC v. Cabinet Secretary for the Ministry of Health & 2 Others* (Petition 5 of 2017) [2019] KESC 15 (KLR)¹⁹ set out the ingredients for meaningful public participation as follows:

1) clarity of the subject matter for the public to understand; 2) structures and processes (medium of engagement) of participation that are clear and simple; 3) opportunity for balanced influence from the public in general; 4) commitment to the process; 5) inclusive and effective representation; 6) integrity and transparency of the process; and 7) capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

The Environmental Protection Agency (EPA) in the United States of America has adopted the “*Spectrum of Public Involvement*”, which is a model with five key processes for successful public participation, namely: (1) outreach; (2) information exchange; (3) recommendations; (4) agreements; and (5) stakeholder action. Each process involves a methodology to achieve the intended outcomes. The EPA further emphasizes that public participation is a process and not a single event, as it entails a series of activities and actions by the responsible agency throughout the full lifespan of a project, to both inform the public and obtain input from them (OITA US EPA, n.d.).

The participation of the Indigenous peoples in the ISDS arbitration proceedings should not be any different from the public participation. For it to be impactful, their participation should be guided as much as possible by the principles of public participation. That way, their participation will not be an “event” but a “process”. Limiting their participation to *amici curiae* submissions while denying them full participation in the proceedings, reduces their role to a symbolic gesture, an event rather than a meaningful process, and ultimately undermines the legitimacy of their purported inclusion.

Way Forward for Asia and Africa

ISDS is a mechanism that has its roots in colonialism, which helps explain its disregard for the rights and interests of third parties, and only prioritises the interests of the foreign investors. It is therefore not surprising that it has been characterized as a neo-colonial system that developing countries should approach with caution (Sundaram, 2025).

¹⁸ “Public Participation: Principles and Best Practice”, International Centre for Non-profit Law LLC.

¹⁹ *British American Tobacco Kenya, PLC Formerly British American Tobacco Kenya Limited v. Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party)* (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment).

It is therefore impractical to expect a mechanism conceived in a vastly different historical and political context to remain effective and appropriate in today's world. Undoubtedly, there is need for reforms or altogether rejection of ISDS in investment treaties. This can be achieved through the concerted and individual efforts of the States, investors, and the affected Indigenous communities.

First, the reforms should start at the local and international investment legal regimes. At the domestic level, African and Asian countries should ensure that their investment laws allow for material public participation and consultation with the Indigenous communities (and the affected third parties generally), in the foreign investment approval processes.

At the international level, and in support of the local laws, the affected third parties should be encouraged to seek recourse at the international human rights law arena to pursue redress. While this recourse is currently available, it is constrained by the fact that parties are required to first exhaust the local remedies before lodging claims before the regional and international courts. This places the complainants at a disadvantage, given that the investors are able to access the ISDS tribunals without having to first exhaust the local avenues of dispute resolution.

Review of the BITs at the States' individual levels, to amend the dispute resolution mechanisms and ultimately reduce or eliminate exposure to future ISDS claims. Despite the transparency of the language of the BITs regarding the protection of the local communities' rights and the obligations of the investors, it is beyond doubt that foreign investors would be turned away by BITs that propose to rely on domestic courts as the dispute resolution mechanism. Bearing in mind the importance attached to foreign investment especially in developing countries, it would be necessary to develop BITs that balance the two interests. This can be achieved by proposing dispute resolution mechanisms that allow parties to engage in meaningful negotiations prior to engaging in the arbitration proceedings and allowing parties the opportunity to choose between options of mechanisms to resolve their disputes, including the option to rely on domestic courts. That way, the exposure to ISDS can be significantly reduced. Notably, South Africa has adopted this approach by replacing ISDS mechanisms in its investment treaties with reliance on domestic judicial processes for dispute resolution.

Embracing new-generation investment treaties that enable States to take actions to meet their environment and human rights obligations in investment treaties, as well as the ability for the Host States to seek recourse before the domestic courts against the investors who violate the treaty obligations. For example, the Morocco-Nigeria BIT signed in 2016 (but yet to get in force) introduced a liability clause which subjects investors

to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the Host State. (Gazzini, 2017)

The Netherlands also developed a model investment agreement which is intended to be used as the basis for negotiating future investment agreements. While the agreement still retains arbitration as the mode of dispute resolution, the agreement includes provisions on sustainable development and protection of human rights, which were not present before, and certainly not common in the older generation agreements.

In 2022, the African Arbitration Academy (“AAA”) launched the Draft Model BIT for African States (“Model BIT”), which adopts *Ubuntu*²⁰ as its overarching philosophy, to reflect the intention that its interpretation, performance, and enforcement must comply with human dignity and quality (Ojok, 2023). The Model BIT provides for mediation and arbitration as the mechanisms for dispute resolution between disputing parties. Regarding submissions by non-disputing parties, the Model BIT gives discretion to the tribunal to accept and consider *amicus curiae* submissions from non-disputing parties in accordance with the rules set out under Annex 3 of the Model BIT. The rules refer to “matters within the scope of the dispute” and provide that “the submissions shall be directly relevant to the factual or legal issues under consideration”. The rules further provide that in inviting or determining whether to allow the filing of *amicus*, the Tribunal shall consider among other things, the extent to which “the non-disputing party has a significant interest in the outcome of the proceedings”. While the Model BIT is not a legally binding document, it serves as a model and resource for African states to use when drafting their own investment treaties.

States can also contribute and pledge to support the development of new agreements that protect human rights and the environment such as the proposed international treaty on transnational corporations and human rights and business and human rights instruments that place mandatory obligations on multinational corporations’ investors.

Conclusion

Should ISDS be reformed to enable participation of the indigenous peoples, or should the mechanism be abolished altogether and replaced with an alternative dispute resolution framework? While a complete discontinuation of ISDS by all countries may not be feasible in the immediate term given the large number of existing bilateral investment treaties still in force, some States have already taken steps in that direction. For example, South Africa’s Protection of Investment Act entirely modifies dispute resolution by prioritizing exhaustion of domestic remedies.

Should ISDS be discontinued, there would be a clear need for a replacement mechanism that strikes a balance between two competing priorities: attracting foreign investment and promoting sustainable development, including the protection of the rights of indigenous peoples who are directly or indirectly impacted by investment projects.

One promising alternative could be the establishment of regional multilateral investment courts, which would offer a more transparent, inclusive, and balanced approach. The European Union has already advanced efforts toward such a court, which if successfully implemented, could serve as a model for other regions. Similarly, the option of a multilateral investment court is under consideration within the AfCFTA framework, particularly in the context of its Investment Protocol and related dispute settlement mechanisms.

References

Abbott, R., Erixon, F., & Ferracane, M. F. (2014). Demystifying Investor-State Dispute Settlement (ISDS). ECIPE Occasional Paper No. 5. Australian Government Department of Foreign Affairs and Trade. (n.d.). Investor-State Dispute Settlement (ISDS). Retrieved from <https://www.dfat.gov.au/trade/investment/investor-state-dispute-settlement> (accessed on October 18, 2024)

²⁰ Translated to mean: “a person is a person because of what other community members have done for them”.

- Bland, B. (2014). Indonesia to terminate more than 60 bilateral investment treaties. Retrieved from <https://www.ft.com/content/3755c1b2-b4e2-11e3-af92-00144feabdc0> (accessed on July 29, 2025)
- Butler, N. (2019). Non-disputing party participation in ICSID disputes: Faux Amici? *Netherlands International Law Review*, 66, 143-178.
- Divine Bright, F. (6 October 2024). The doctrine of privity of contract: Legal foundations and modern exceptions. *Social Science Research Network*. Retrieved from <https://papers.ssrn.com/abstract=4977295> (accessed on 4 August 2025)
- Gayman, J. (May 21 2024). Culture-centered indigenous policies in Japan. *GJIA (Georgetown Journal of International Affairs)*. Retrieved from <https://gjia.georgetown.edu/2024/05/21/culture-centered-indigenous-policies-in-japan/> (accessed on October 22, 2025)
- Gazzini, T. (May 8, 2017). Nigeria and morocco move towards a “New Generation” of bilateral investment treaties. *EJIL: Talk!* Retrieved from <https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/> (accessed on October 31, 2024)
- Global Initiative for Fiscal Transparency. (n.d.). *Public participation principles and guide—GIFT*. Retrieved from <https://fiscaltransparency.net/public-participation-principles-and-guide/> (accessed on December 5, 2024)
- Gqada, I. (2011). Setting the boundaries of a social licence for mining in South Africa: The Xolobeni mineral sands project. Retrieved from <https://saiaa.org.za/research/setting-the-boundaries-of-a-social-licence-for-mining-in-south-africa-the-xolobeni-mineral-sands-project/>
- International Trade Administration. (July 9, 2024). *AfCFTA investment landscape*. Retrieved from <https://www.trade.gov/market-intelligence/afcfta-investment-landscape> (accessed on December 31, 2024)
- Investment Policy Hub. (2005). *Hulley Enterprises v. Russia*. Retrieved from <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/212/hulley-enterprises-v-russia> (accessed on October 21, 2025)
- Irianto, E. S., Rosdiana, H., Sardjono, L. F., & Tambunan, M. R. U. D. (2018). Fiscal legitimacy of environmental taxation: Challenges for green growth policy. *E3S Web of Conferences*, 52, 00012.
- Kabre, R. J. (2024). Making the multilateral investment court beneficial for African local communities. Retrieved from <https://www.afronomicslaw.org/category/analysis/making-multilateral-investment-court-beneficial-african-local-communities#:~:text=More%20specifically%2C%20it%20examines%20the%20extent%20to%20which,and%20interests%2C%20with%20an%20emphasis%20on%20African%20communities>
- Martin. (n.d.). Goal 16: Peace, justice and strong institutions. *United Nations Sustainable Development*. Retrieved from <https://www.un.org/sustainabledevelopment/peace-justice/> (accessed on October 21, 2025)
- Nnoko, J. (2021). Why our land? *Human Rights Watch*. Retrieved from <https://www.hrw.org/report/2021/06/03/why-our-land/oil-palm-expansion-indonesia-risks-peatlands-and-livelihoods> (accessed on August 4, 2025)
- OITA US EPA. (n.d.). Public participation guide: Introduction to public participation. Retrieved from <https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation> (accessed on October 27, 2024)
- Ojok, F. (January 26, 2023). The African arbitration academy’s model bilateral investment treaty for African states. *Kluwer Arbitration Blog*. Retrieved from <https://arbitrationblog.kluwerarbitration.com/2023/01/26/the-african-arbitration-academys-model-bilateral-investment-treaty-for-african-states/> (accessed on December 5, 2024)
- Paffey, J., & Suhadolnik, N. (2025). *Running a marathon: The evolution of investment disputes in the APAC region and anticipated trends*. Retrieved from <https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2026/article/running-marathon-the-evolution-of-investment-disputes-in-the-apac-region-and-anticipated-trends> (accessed on July 29, 2025)
- Perrone, N. M., & Cotula, L. (2019). Reforming Investor-State Dispute Settlement: What about third-party rights? International Institute for Environment and Development. Retrieved from <https://www.iied.org/17638iied> (accessed on October 18, 2024)
- Roy, R. D. (2005). *Traditional customary laws and indigenous peoples in Asia*. London: Minority Rights Group Internat.
- Schill, S. (July 27, 2016). Can Asia transform international investment law? *East Asia Forum*. Retrieved from <https://eastasiaforum.org/2016/07/27/can-asia-transform-international-investment-law/> (accessed on July 29, 2025)
- Shekhar, S. (May 21, 2024). “Regulatory Chill”: Taking right to regulate for a spin. Culture-Centered Indigenous Policies in Japan/GJIA (Georgetown Journal of International Affairs). Retrieved from <https://gjia.georgetown.edu/2024/05/21/culture-centered-indigenous-policies-in-japan/> (accessed on October 22, 2025)
- Sornarajah, M. (2010). *International law on foreign investment* (3rd ed.). Cambridge: Cambridge University Press.
- Sundaram, J. K. (October 21, 2025). Neocolonial ISDS, abused, biased, costly, and grossly unfair. *Centre Tricontinental*. Retrieved from <https://www.cetri.be/Neocolonial-ISDS-Abused-Biased> (accessed on October 21 2025)

- UNECE. (n.d.). Public participation. Retrieved from <https://unece.org/environmental-policy-1/public-participation> (accessed on 4 August 2025)
- United Nations. (Ed.). (2016). *Investment policies and bilateral investment treaties in Africa: Implications for regional integration*. Economic Commission for Africa.
- Wang, C., Ning, J., & Zhang, X. H. (2021). International investment and indigenous peoples' environment: A survey of ISDS cases from 2000 to 2020. *International Journal of Environmental Research and Public Health*, 18, 7798.
- Waris, A. (2024). *Report of the independent expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights*. United Nations General Assembly Human Rights Council 2024 A/HRC/55/54. Retrieved from <https://documents.un.org/doc/undoc/gen/g23/262/58/pdf/g2326258.pdf?token=KzsXn6zqhiF6LgpvUK&fe=true>
- Waris, A., & Latif, L. A. (2015). Towards establishing fiscal legitimacy through settled fiscal principles in global health financing. *Health Care Analysis*, 23, 376-390.