

Community perspectives in investor-state arbitration

Lorenzo Cotula and Mika Schröder



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Cover: A dump truck operator stands gesturing in front of the vehicle he operates at a gold mine in Tanzania.

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Acronyms

CBD	Convention on Biological Diversity
EU	European Union
FPIC	free, prior and informed consent
ICS	investment court system
ICSID	International Centre for Settlement of Investment Disputes
IIED	International Institute for Environment and Development
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
JRP	Joint Review Panel
NGO	non-governmental organisation
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

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Executive summary

The governance of the global economy has been at the centre of extensive and often polarised debates. International arbitrations to settle investment disputes between businesses and states – a system commonly referred to as ‘investor-state arbitration’ – have come to crystallise wider concerns about the balance of public and corporate interests in economic governance.

One of the major questions is whether investor-state arbitration enables proper consideration of the rights, interests and perspectives of others who are affected by, but not party to, the dispute. Although these proceedings pit an investor against a state, the underlying dispute often also involves third parties.

Indeed, large-scale investments – for example, in mining, petroleum and agriculture – can have far-reaching implications for the rights and interests of local communities, and have sometimes triggered difficult disputes – for example, over whether communities were duly consulted, or the local impacts of the investment. These aspects – and community action to address them – may be among the root causes of the investor-state dispute.

On several occasions, such issues have surfaced in investor-state arbitrations, with proceedings featuring concerns about communities’ enjoyment of human rights, their access to land and natural resources, exposure to environmental harm and public authorities’ responsiveness to community demands. The remit of legal proceedings in such cases is typically confined to the investor-state dispute. But arbitral tribunals also need to consider community perspectives if they are to develop a good understanding of the multiple actors and rights at stake.

This report examines whether and how investor-state arbitral tribunals consider community perspectives, interests and rights in their settlement of investment disputes. Based on information from online global databases, the report identifies 20 arbitrations where some form of community action was part of the facts of the case and was reflected – even if partially and cursorily – in publicly available case documents. The analysis covers concluded and ongoing arbitrations from the mining, petroleum, agriculture, waste management and water and sanitation sectors.

The notion of communities

The report uses the term ‘community’ in its broadest sense, as a group of people connected to a particular locality who do not exercise governmental authority. This can cover widely diverse situations. In some of the arbitrations reviewed, the term refers to an indigenous people, a number of indigenous peoples or communities within an indigenous people. In others, it refers to local residents who, while united

by geographic proximity and the impact of an investment, may not necessarily see the group as a stable source of social identity.

This diversity of situations has legal implications, because different groups have different rights. For example, international instruments establish distinct collective rights for indigenous peoples, including their right to self-determination and the related duty of states to consult them in good faith in order to obtain free, prior and informed consent (FPIC).

Communities include diverse interests, and there is often important social differentiation within and between communities – for example, on the basis of social status, wealth, income, gender, age or ethnicity. Some groups may live closer to the project and be more concerned about any adverse effects, while others may be more sheltered from it and find its promised benefits attractive. These factors can result in differentiated project impacts and divisions over proposed investments within communities.

Community perspectives in the arbitrations reviewed

In many of the arbitrations reviewed, the community dimension was central to the factual fabric of the case. Broadly speaking, several of the cases reviewed fall into two main types.

The first includes cases where communities raised concerns in investment approval processes, initiated legal proceedings and/or organised public protests. Community mobilisation prompted state action, which the investor argued adversely affected the investment and which ultimately triggered the investor's arbitration claim.

In the second group of cases, the investor claimed that the government failed to take measures it was legally obliged to take in response to community action. For example, investors claimed that the public authorities had failed to guarantee the physical security of their investment after local groups occupied farms in the context of agrarian reform programmes.

Some arbitrations involved allegations that investors or their representatives intimidated the communities. Claims that the state failed to adequately protect the rights of local communities also underlay some arbitrations.

The presence of community action in the facts of the disputes reflected the communities' efforts to advance their rights, interests or perspectives in the investment process – for example, addressing environmental issues, preserving important cultural sites, or securing continued access to natural resources. In some cases, it also reflected wider advocacy efforts to align investment processes with respect for human rights.

How the tribunals considered community perspectives

In the arbitrations reviewed, tribunals considered community perspectives to different extents and in different ways. Some explicitly mentioned community concerns in their analyses, including in relation to environmental and public health concerns. Others investigated the nature and extent of community protests against the investment.

But the investor-state framing of the arbitrations meant that community perspectives tended to remain marginal in the structure and outcomes of most cases. The focus was on the relationship between the investor(s) and the state. In some cases, community relations were considered to be part of the problem – a factor that pushed the authorities to take the measures that adversely affected the investment.

This is partly because tribunals typically decide cases based on the facts presented and the arguments developed by the parties – in other words, by the investor and the government. If the state is not willing or able to argue community issues in effective ways, the tribunal has limited opportunities to consider those issues.

Although the state has the mandate to represent the interests of its population, its failure to consider the rights of communities can be among the root causes of a dispute. For example, official approval of an investment without prior consultation could trigger community protests, state action to address community concerns, and ultimately the investor-state dispute. In cases involving tensions between authorities and local communities, it cannot be assumed that the government will effectively articulate community perspectives in the arbitral proceedings.

Amicus curiae submissions by grassroots and non-governmental organisations (NGOs) provide a vehicle for neglected issues to become part of the proceedings. But tribunals enjoy considerable discretion in deciding whether to accept these submissions. Making a written submission does not amount to full-fledged participation in the arbitral proceedings, and petitioners face significant restrictions. None of the tribunals in the awards reviewed fully engaged with *amicus curiae* arguments.

There are also tensions between the mindsets and approaches of lawyers on arbitral tribunals and the real world of community relations. In the latter, the politics are often complex and solutions can require interventions to address technical issues and promote public participation in contested terrains. Capacity constraints may be at play, and the officials delivering these interventions may not be familiar with legal concepts and language. This could increase the risk that public action to address community issues may expose states to successful arbitration claims.

Taken together, these different factors tend to undermine the effectiveness of investor-state arbitration in considering community perspectives. This problem is particularly pressing where community rights and investment protection come into direct contest. Commentators, *amicus curiae* petitioners and one sitting arbitrator

have raised concerns that prevailing approaches might make it more difficult for communities to obtain what they seek from the public authorities that represent them.

Community wins and ‘chilling effect’

Several of the cases reviewed represented community wins, in that the public authorities acted on community concerns and investors responded by filing the arbitration claim. The arbitral proceedings typically centred on whether the state should compensate the investor and how much it should pay. This influences how the costs of public action are shared between governments and businesses, and as such it raises important issues of public policy.

But even more significant would be cases where public authorities refuse to meet the communities’ demands out of fear of arbitration claims. In these situations, the prospect of costly legal proceedings and potentially large compensation bills would create a ‘chilling effect’ on public action to address community concerns.

These cases are harder to document – it is easier to identify the instances where authorities did act, resulting in publicly known arbitrations. More socio-legal research is needed to shed light on these issues, but available evidence suggests that the concern should be taken seriously.

Examples from the cases reviewed include reports of governments seeking to assuage community opposition and avoid arbitration claims, and of arbitrations affecting activists’ efforts to escalate advocacy from one business venture to national law reform. Seen in this light, the stakes in arbitral proceedings go well beyond the compensation due to individual investors: they could affect the contours of public authority and the balance of commercial and public interests in society.

Possible ways forward

These findings indicate a need for systemic reform to ensure the rights, interests and perspectives of communities receive fuller consideration in investment processes. While this report focuses on dispute settlement, solutions require looking beyond arbitration. By the time a dispute reaches an arbitral tribunal, a web of treaties, laws and contracts has already delineated the legal framework the tribunal must consider.

Where problems are rooted in shortcomings of the domestic legal system, national law reform to strengthen the substantive and procedural rights of communities in investment approval processes, including through FPIC where relevant, could help to prevent disputes from escalating after decisions have been made.

International law also offers arenas for thinking through the substantive rules upstream of any arbitration. This would include properly considering the costs

and benefits of signing international investment treaties as well as recalibrating investment protection standards and rebalancing investor rights and obligations when drafting international investment treaties. It would also involve improving the interface between such treaties and international human rights law, for example through investment treaty clauses explicitly excluding investments that violate human rights norms from legal protection.

In terms of remedies and dispute settlement, international human rights law will likely provide the main arena for communities to obtain international law redress in investment processes. Human rights law contains relevant norms, and human rights recourse institutions have specialist expertise to handle human rights issues. But insofar as community dimensions exist in investor-state dispute settlement, questions arise as to how community perspectives can be properly considered.

Incremental reforms to investor-state dispute settlement could involve ensuring that legal counsel and arbitrators have the expertise to consider these issues where required. Arguably, there is a need and opportunity for a more ambitious rethink of international arrangements to settle investment-related disputes. In recent years, a backlash against investor-state arbitration saw extensive public mobilisation, particularly in high-income countries. Discussions are now underway about reforms to the ways investment disputes are settled.

This evolving context provides space for considering new mechanisms to safeguard community rights in the settlement of investment-related disputes. There are proposals for recognising a community's right to put forward their perspective. While diverse, these proposals go beyond the narrow confines of *amicus curiae* submissions, by giving communities a legal right to intervene in proceedings and possibly advance their own grievances.

Implementing these proposals would require tackling significant conceptual and practical issues. Examples include how communities are represented, how to shelter communities from the risks associated with legal proceedings and how the system would intersect with international human rights law and institutions. There is little sign of the political support needed for such proposals.

But this report shows that these issues do require urgent policy action. If effective mechanisms are not developed, community perspectives are unlikely to receive the attention they deserve. In the longer term, the perceived legitimacy of international systems for settling investment-related disputes will partly depend on their ability to take community perspectives seriously and to accord the appropriate weight to community rights and interests.

1. Introduction

1.1 The issue

Governance of the global economy has been at the centre of extensive and often polarised debates. International arbitrations to settle investment disputes between businesses and states – a system commonly referred to as ‘investor-state arbitration’ – have come to crystallise wider concerns about the balance of public, corporate and third-party interests in economic governance (IISD 2004, Peterson 2009, Johnson and Bernasconi-Osterwalder 2013, Robinson 2015, Public Citizen 2015 and BHRRC *et al.* 2016).

One such arbitration – *Pac Rim Cayman LLC v. Republic of El Salvador*¹ – recently attracted extensive public and media attention (Westerveld 2015, Taylor and Paul 2016, Provost and Kennard 2016). Although the case pitted a mining company against government authorities, the underlying dispute also involved grassroots groups affected by or campaigning against the mining project (Orellana *et al.* 2015, Daniels 2015 and Phillips Williams 2016). This community dimension catalysed public interest in the dispute and more generally in investor-state arbitration.

The presence of community dimensions is not unique to this particular case. Community relations feature prominently in several completed and ongoing arbitrations, in the mining, petroleum, agriculture, waste management and water and sanitation sectors. This partly reflects that commercial investments can have far-reaching local impacts and often trigger grassroots action to advance the rights of affected communities. This is increasingly recognised in the literature on investment law and arbitration (Leader 2006, Odumosu 2007a and 2007b, De Schutter 2008, Harrison 2009, Cotula 2012, 2015 and 2016, Thrasher and Wise 2015, Cordes *et al.* 2016, Perrone 2016, Phillips Williams 2016 and Viñuales 2016).

Several investor-state arbitrations involved concerns about communities’ human rights, access to land and natural resources, exposure to environmental harm and public authority responsiveness to their demands. While the remit of legal proceedings is typically confined to the investor-state disputes, arbitral tribunals also need to consider community perspectives if they are to develop a good understanding of the multiple actors and rights at stake.

This raises questions about the extent to which arbitral tribunals can meaningfully consider the perspectives, interests and rights of those who are affected by, but not party to, the dispute. More fundamentally, it raises questions about the institutional

¹ The cases reviewed for this report, along with relevant case documents, have been numbered for ease of reference. See Table 2, Appendix 1 for the list of cases and case documents cited, with the corresponding reference numbers used in this report. The *Pac Rim* arbitration is Case 11.

arrangements needed to handle today's often complex and multi-faceted investment disputes.

Box 1. An outline of investor-state arbitration

International investor-state arbitration refers to the settlement of a dispute between an investor and a state by an international arbitral tribunal.

By taking a dispute to arbitration, the investor will seek to enforce a commitment that the government has entered into through a treaty, law or contract. The investor will typically allege that the government took (or failed to take) action in violation of that commitment.

The final decision of an arbitral tribunal is an arbitral award. If the tribunal decides in favour of the investor, the award usually orders the state to pay the investor compensation. Some awards have ordered states to return expropriated assets and pay compensation in case of non-compliance.

Arbitral tribunals are not bound by previous awards, but they and the parties often refer to these to support their reasoning. There is no centralised system for appeals against awards (though some recent treaties provide for appeals mechanisms), and different tribunals can follow different approaches.

Investor-state arbitration may be based on national laws, investor-state contracts or international investment treaties. The legal basis for an arbitration determines applicable law – for example, the contract and relevant law, or the standards set by an investment treaty.

This ability for private actors to directly access international redress is unusual in international law and constitutes an important difference compared to international trade law, for example, where only states can bring disputes about alleged treaty violations. International human rights law allows individuals to access international remedies, but usually only after individuals have unsuccessfully pursued remedies available under national law.

1.2 Research focus, methods and limitations

This report examines whether and how investor-state arbitral tribunals consider the perspectives, interests and rights of communities when they settle investment disputes. The report focuses on arbitrations where some form of community action i) was part of the facts of the underlying dispute and ii) was discussed in publicly available case documents relating to the arbitral proceedings, even if partially and cursorily.

Community action involves diverse measures communities take to articulate their perspectives, advance their interests or realise their rights. It can include anything from raising concerns in the context of investment approval processes to making formal complaints or organising public protests in the implementation phase or even initiating litigation against the investor or the state.

A review of the literature helped identify relevant arbitrations, but the analysis primarily draws on the case documents themselves and looks at how community perspectives were presented and addressed in the arbitral proceedings. The resulting pool of 20 arbitrations includes cases brought under international investment treaties, national laws and/or investor-state contracts. It includes disputes from the mining, petroleum, agriculture, waste management and water and sanitation sectors.

Case documents were accessed through publicly available repositories, particularly:

- Investment Treaty Arbitration (www.italaw.com);
- United Nations Conference on Trade and Development (UNCTAD)'s Investor State Dispute Settlement Navigator (<http://investmentpolicyhub.unctad.org/ISDS>); and
- Investment Arbitration Reporter (www.iareporter.com).

Appendix 1 lists the arbitrations and case documents cited in the report. Arbitral awards were reviewed where these were available. When relevant and possible, other case documents were also reviewed, including statements of claims, memorials and counter-memorials, third-party submissions and procedural orders.

It is recognised that, by their very nature, party submissions reflect partial perspectives of often highly contested facts, and legal documents in general can only provide a very limited understanding of multifaceted community relations. Also, time constraints made it impossible for the study to cover all case documents for all the arbitrations reviewed. In examining documents other than the tribunals' final decisions, pending arbitrations were prioritised, though some cases were then decided while the research was underway.

Some additional caveats are in order. The notion of communities raises complex issues, which are discussed further in Section 2. Boundaries are also blurred between community dimensions and a wider range of issues involving public mobilisation beyond the groups directly affected by the investment.

For example, in some publicly known arbitrations localised disputes escalated into policy advocacy at national level. In others, national and international NGOs, rather than communities themselves, led the advocacy. To facilitate a tighter analysis, this report focuses on arbitrations involving at least some local-level action on the part of geographically identifiable communities that could have in principle been a party to a legal proceeding.

Only arbitral proceedings that explicitly mention community perspectives were included. For example, among the cases reviewed, only one arbitration stems from the privatisation of water and sanitation services. Although several other arbitrations in this sector raise broadly comparable issues, the analysis excluded them because community action did not feature in publicly available case documents.

This failure to mention community issues altogether provides important insight into how effectively investor-state arbitration can address them. But the present analysis focuses instead on how tribunals dealt with the issues that did arise in the proceedings, to provide pointers for possible reforms.

Although efforts were made to identify all relevant arbitrations, the resulting list of cases is best seen as a subset of the wider universe of arbitrations involving community dimensions. Limited publicly available information constrained both case identification and analysis. There could be other potentially relevant arbitrations whose documents are not publicly available,² or that are at a very early stage.³ Also, community issues are not always framed as such in arbitral proceedings, hindering the search for relevant cases.

Several of the arbitrations reviewed are extremely complex, owing to the intricate factual circumstances that sometimes span decades, the difficult technical issues involved and in some cases the existence of parallel legal proceedings in multiple jurisdictions. This report focuses on the community dimensions, and on the overall trend and its policy implications, rather than the specifics of individual cases. Several cases are still pending, and the decisions tribunals make in those cases could alter the report findings.

1.3 Report outline

Section 2 discusses the nature of community perspectives in investor-state arbitration and explores the channels through which these perspectives were advanced in arbitral proceedings. Section 3 examines how arbitral tribunals consider community perspectives, identifying gaps and advances in terms of both process and substance. The conclusion summarises key findings and provides pointers for policy and practice.

² See, for example, Peterson (2008) for a discussion of an arbitration that partly hinged on authorities failing to protect an estate from incursions by local residents in the context of land reform in South Africa.

³ See, for example, IARporter (2016b) and Simson (2016), discussing an arbitration reportedly stemming, at least in part, from the government's alleged failure to tackle incursions by smallscale miners on a shuttered mine in Ghana.

2. Community perspectives: towards a typology

This section discusses the diverse configurations of community perspectives that surfaced in the review of investor-state arbitrations. It also explores the channels through which these perspectives were advanced in the arbitral proceedings.

2.1 Investors, governments and communities

Historically, the investor-state relationship was at the centre of initiatives to establish international arrangements for settling investment disputes (for example, Shihata 1986). That relationship is very important in investment processes.

The state is responsible for aligning investments with the country's best interest – for example, by setting and enforcing tax or environmental requirements. At the same time, the investor may expect the state to uphold the rule of law. The structure of investor-state arbitration reflects this emphasis on the relationship between businesses and public authorities.

In practice, large-scale investments can involve or affect other actors. Badly thought-out investments have dispossessed people of their rights to land and natural resources, undermined their traditional governance structures and degraded their environment and cultural sites. Well-designed investments can help people gain new livelihood opportunities through new jobs or businesses, and additional taxes can help sustain local public services. These costs and benefits are often not evenly distributed.

The notion of communities

In this report, the generic term 'community' is used in its broadest sense to mean a group of people who are connected to a particular locality and do not have the power to exercise governmental authority.

Some lawyers may be unaccustomed to the notion of communities. But several arbitral tribunals have used that notion in their decisions.⁴ Some international instruments also refer to communities. For example, the 1992 Convention on Biological Diversity (CBD) (Article 8(j)) refers to 'indigenous and local communities' and the 1992 Rio Declaration on Environment and Development refers to 'indigenous people and their communities, and other local communities' (Principle 22).

In some countries, national law defines the notion of community, giving it particular legal significance. For example, Mexico's constitution refers to 'indigenous peoples

⁴ See, for example, case documents 7A (paras 1.93–4 and 1.103–4) and 11D (paras 3.12 and 6.77). For a pending case, see case documents 3G (paras 14–17) and 3H (paras 16 and 22).

and communities' (Article 2); Mozambique's Land Law No. 19/97 of 1997 refers to 'local community' (Article 1(1)); and the Philippines' Indigenous Peoples Rights Act No. 8371 of 1997 refers to 'indigenous cultural communities' (Article 3(h)).

The term 'communities' can apply to diverse situations. In several of the arbitrations reviewed, it refers to an indigenous people, a number of indigenous peoples or communities within an indigenous people. In others, it refers to local residents united by geographic proximity and the impact of an investment who do not necessarily see the group as a stable source of social identity.

This diversity of situations has legal implications, because different groups have different rights. For example, international instruments establish distinct collective rights for indigenous peoples, including the right to self-determination and the related duty of states to consult them in good faith to obtain free, prior and informed consent (ILO 1989 and UN 2007; see also Anaya 2004, Doyle 2015a and Gilbert 2016).

At the same time, communities often include diverse interests. Important social differentiation often exists within and between communities – for example, on the basis of social status, wealth, income, gender, age or ethnicity. Some groups may live closer to the project and so be more concerned about any adverse effects; others that are more sheltered may find its promised benefits attractive.

These factors can result in differentiated project impacts, sometimes dividing communities over proposed investments. Conflicts can arise within and between communities, including over the distribution of compensation payments or development funds.⁵

Community-government relations

International human rights law affirms fundamental rights for all human beings and has important implications for relations between communities and public authorities in investment processes. For example, FPIC requires authorities to consult indigenous peoples before approving investments (Anaya 2013), and human rights courts have interpreted the right to property as requiring states to consult communities, conduct impact assessments and ensure benefit sharing in development projects (IACtHR 2007, AComHPR 2009).

Where authorities violate human rights norms – for example, by issuing natural resource concessions without consultation – disputes can arise between communities and the government, and can ultimately affect the investor. Community mobilisation can escalate into protest, road blocks, sabotage and occupations, it can trigger national and international litigation, and it can ultimately push the government to meet the communities' demands and the investor to bring an arbitration.

⁵ See, for example, case document 7A (para 4.45).

In at least two of the arbitrations reviewed, communities initiated parallel proceedings against the government before regional human rights institutions (IACoMHR 2009 and 2016, presenting connections to the arbitration *Renco Group Inc v. Republic of Peru*; and IACtHR 2012, presenting points of contact with *Burlington Resources, Inc v. Republic of Ecuador*⁶).

As a result, 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.

Community-investor relations

Relations between communities and investors are also important – for example, because national law may require businesses to consult communities and because the long-term viability of an investment often depends, at least in part, on its perceived social license to operate within a community. There is growing experience with community development agreements that contractualise the relationship between the investor and communities (Loutit *et al.* 2016).

In the cases reviewed, the nature of community-investor relations varied considerably, partly depending on the nature of the business and its relationship with government. While some cases concerning new extractive industry projects raised issues of consultation, some land reform cases involved investors who had lived or operated near the communities for a very long time.

In some cases, the investors suffered human rights violations on the part of public authorities, such as violence and racial discrimination, and including as a result of the authorities' failure to protect the investment from violent acts by local groups.⁷

2.2 How community issues may be at stake in arbitrations

As discussed in Section 1, investor-state arbitration provides one avenue for businesses to challenge state conduct. Typically, the investor claims that the state breached its legal obligations, established by national law, an investor-state contract and/or an international treaty to protect foreign investment (see Box 2). In other words, investor-state arbitration is designed to settle bilateral disputes between one or more investors and a state.

Yet Section 2.1 established that investment disputes can involve important community dimensions – including enjoyment of fundamental human rights. Investors cannot use investor-state arbitration to challenge the action of local communities as such. But a dispute between the investor(s) and the state may be rooted, at least in part, in disputes involving communities.

6 However, the *Burlington* tribunal deemed inadmissible the investor's claims relating to the oil block that was at stake in the human rights case. This was because the investor did not observe procedural requirements when it submitted the claim (case document 5A, para 340).

7 For example, case document 4B (paras 110–115, 445, 448, 645, 652–657, 918–920).

Through arbitration, for example, a business could seek protection of investments that a community deems to have been approved without adequate consultation or to undermine their rights to property, food, housing or a healthy environment. To understand the facts of the case, the arbitral tribunal may have to review actions that a community has taken to protect its rights or advance its interests. And arbitration could have a direct bearing on the rights of communities – for example, where tribunals ordered governments to take measures to suspend the enforcement of court judgments the communities obtained against the investor.

Organisations representing communities have sometimes made particularly explicit this community dimension to the investor-state dispute. For example, in an arbitration concerning mining in El Salvador, organisations representing communities argued that the case was 'fundamentally not a dispute between [the investor] and the Republic, but rather between [the investor] and the independently-organized communities who have risen up against [the investor's] projects.'⁸

Box 2. International investment treaties: key concepts

International investment treaties aim to promote investment flows between the state parties. They include bilateral and regional treaties and free trade agreements that contain an investment chapter. Most treaties establish state obligations to protect investments by nationals of other state(s) within their territory; a growing minority also cover investment liberalisation.

While specifics can vary significantly, many investment treaties feature broadly similar provisions. Widely used clauses include provisions requiring states to compensate investors at market value if they expropriate investments, and to treat foreign investors or investments no less favourably than national investments or those of other state nationals.

Other commonly used treaty clauses guarantee an investor's ability to transfer capital in and out of the country and require states to provide investors with 'full protection and security' (usually interpreted as requiring states to take steps to protect the physical integrity of foreign investment, this has also been interpreted more broadly to include legal protection) and 'fair and equitable treatment' (usually interpreted as requiring states to protect the legitimate expectations investors had when they made the investment, provide stability and predictability of the legal framework, and ensure propriety in judicial proceedings).

Most investment treaties allow investors to bring disputes to international investor-state arbitration if they consider the state has breached its treaty obligations.

Types of community dimension

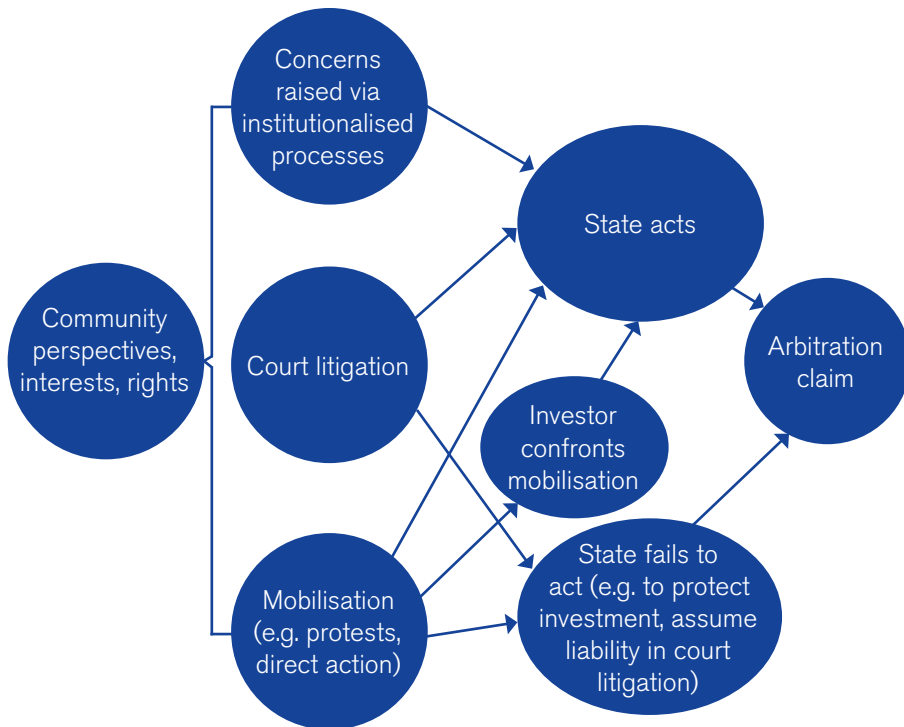
The cases reviewed presented extremely diverse facts and legal issues, but also some recurring types of community dimension. Figure 1 shows how the factual circumstances of the arbitrations reviewed provided the basis for identifying

8 Case document 11A, p2.

some stylised events, varying combinations of which produce the different types of community dimension. These can overlap and coexist in the factual fabric of the same arbitration. Broadly speaking, several of the cases reviewed can be classified into two main types:

- Where states took action, at least in part or in the rhetoric, in response to community concerns, or more generally to the situation, triggering the investor's arbitration claim, and
- Where states failed to take action they may have been legally obliged to take.

Figure 1. Community perspectives: towards a typology



Type 1: State acted to address community concerns, triggering the arbitration claim

In several of the cases reviewed, communities raised concerns in the context of investment approval procedures – for example, highlighting the cultural or spiritual importance of sites during consultation exercises,⁹ or voicing concerns about possible social and environmental effects during impact assessments.¹⁰

⁹ Case document 9D (paras 111–114, 126–127).

¹⁰ See, for example, Joint Review Panel (2007, pp5, 14, 38) in relation to Case 19.

In one case, a community organisation allegedly applied for the establishment of a natural park in the project area;¹¹ in another, local farmers filed complaints during project implementation to alert the authorities about alleged environmental contamination.¹² Community complaints relating to environmental or other compliance issues during the implementation phase also emerged in other arbitrations.¹³

In at least 11 of the cases reviewed, local action was found to have escalated into public protests or mobilisation by indigenous peoples,¹⁴ local groups,¹⁵ residents,¹⁶ and NGOs acting on behalf of communities.¹⁷ Mobilisation was triggered by concerns about: the adequacy of consultation;¹⁸ alleged impacts on land, resources and territories;¹⁹ environmental issues;²⁰ public health;²¹ or more generally the nature of community-investor relations.²²

In several cases, public authorities claimed to follow up on the concerns or aspirations raised via formal proceedings and/or public protests, or otherwise to respond to the situation, taking action that the investor challenged in arbitration,²³ or that otherwise formed part of the factual fabric of the arbitration.²⁴ This included action by both central and local government, because states are internationally responsible for the conduct of local authorities within their jurisdiction.²⁵

The measures investors challenged in arbitration included refusals to issue or renew permits, licences or concessions,²⁶ and steps to terminate or take over a project.²⁷ Investors often disputed the relevance of the state's community-related arguments, and they claimed that measures either breached expropriation clauses and/or fair and equitable treatment clauses in applicable investment treaties.

11 According to arguments by the state in the pending Case 8 (document 8B, para 15). The investor pointed to alleged irregularities in the process, and to community support for the investment (document 8A).

12 Case document 12B (para 335). The ensuing government inspection found no evidence of contamination. See also paras 429–430, 435–440. On environmental dimensions in investor-state arbitration, see, for example, Behn and Langford (2017).

13 See, for example, case document 17A (paras 107–108).

14 For example, case documents 2A (para 1) and 2C (paras 63–66, 73).

15 For example, case documents 1A (paras 194–208, 587), 7A (paras 4.12, 4.32–35, 4.45, 4.52, 4.57, 4.69, 4.72, 4.82, 4.87, 4.95, 4.107, 4.111–112, 4.115, 4.141, 4.154–155, 4.195–195), 10A (para 92) and 17A (paras 42, 49, 105(4)–(5), 106–110, 127–144).

16 For example, case document 16A (paras 12, 16, 33–41).

17 See, for example, the *amicus curiae* arguments in case document 11A, pp4–6.

18 For example, case document 7A (para 6.40).

19 For example, according to case document 11A, pp6, 8.

20 For example, case documents 10A (paras 86, 98, 106), 13A (para 26) and 17A (paras 97, 125).

21 For example, case document 17A (para 125).

22 As argued, for example, in case document 11A (p5).

23 Case documents 9D (paras 168, 174–177, 796), 13A (para 220), 17A (paras 112–128, 149–150).

24 Case documents 12B (para 335) and 5B (paras 520, 613).

25 See, for example, case documents 1A (para 569) and 10A (para 73).

26 Case documents 10A (para 50), 11B (paras 11, 640), 16A (paras 16, 20, 44, 51, 54) and 17A (para 39).

27 Case document 7A (paras 1.8, 1.111–1.113, 1.122–1.123).

In one pending case, local residents initiated legal action against an investor to seek compensation for alleged environmental harm. National courts ordered the investor to pay a substantial amount in compensation; and the investor brought an arbitration claim against the state, claiming that the conduct of the courts, and of the government itself, violated investment law.²⁸ It is worth recalling that, under international law, a state is responsible for the conduct of all its organs, including the judiciary.

Type 2: When confronted with community action, the state failed to act

In a few cases, the investor resorted to arbitration to challenge, at least in part, the alleged failure of authorities to adopt measures the investor claimed they were legally required to take in the face of local mobilisation. This was the case, for example, where local groups in Venezuela and Zimbabwe occupied farms in the context of agrarian reform programmes, leading investors to claim, among other things, that public authorities failed to guarantee the investment's physical security.²⁹

In another case, after local residents in Peru sued the investor in the United States over alleged environmental harm, the investor claimed against the government on the basis that it had allegedly failed to assume liability for this third party claim as contractually required.³⁰

Allegations of intimidation or repression

An additional aspect concerns allegations of intimidation or repression towards the communities. These issues featured particularly in one of the cases reviewed. The case concerned the termination of mining concessions in Ecuador. The facts were highly disputed between the parties. The investor argued that extensive community consultations delivered largely favourable comments, while the state disagreed that the communities supported the project.³¹

The events noted by the arbitral tribunal included episodes of violence affecting community-investor relations in one of the concessions,³² with the state claiming that authorities had to take action to restore public order.³³ The tribunal found that the state breached applicable investment treaty standards,³⁴ but it also ascribed 'contributory negligent acts and omissions and unclean hands' to the company, reducing the compensation it awarded by 30 per cent.³⁵

28 Case documents 6A (paras 67–69) and 6B (paras 4.2, 4.12). Litigation in the United States brought up evidence of impropriety in the conduct of the judicial proceedings.

29 Case documents 4B (paras 113–114) and 18A (paras 62–68, 80–82).

30 Case documents 14A (paras 2(iv), 35–40, 56–57) and 14B (sections II.E, IV.A–B).

31 Case document 7A (paras 1.102–1.103)

32 Case document 7A (paras 4.1–4.352).

33 Case document 7A (paras 1.108, 5.36).

34 Case document 7A (paras 6.52–6.85).

35 Case document 7A (paras 6.97–6.99, 6.133).

2.3 Channels for advancing community perspectives

Having explored the substantive issues that can link community perspectives to investor-state arbitration, this section outlines the procedural channels through which these perspectives were advanced in the arbitral proceedings.

Amicus curiae submissions

Following various reforms since the mid-2000s and depending on applicable rules, third parties – so, the communities or organisations that support them – may be able to make submissions to the arbitral tribunal. These are called *amicus curiae* (friend of the court) submissions.

This trend includes arbitrations held under the rules of the International Centre for Settlement of Investment Disputes (ICSID),³⁶ or in certain conditions under the rules of the United Nations Commissions on International Trade Law (UNCITRAL),³⁷ and arbitrations based on investment treaties that allow for *amicus curiae* submissions.

While conditions for making submissions vary, they generally require petitioners to have a significant interest in the dispute and to be able to assist the tribunal to decide on a legal or factual issue – for example, by offering a different perspective on disputed facts or on the interpretation of the relevant law.

Resource and expertise requirements can act as powerful obstacles for grassroots groups' ability to make *amicus curiae* submissions (Odumosu 2007b) and the significant barriers that vulnerable communities face in accessing remedies have been widely documented (see, for example, Doyle 2015b). That said, there is growing experience with *amicus curiae* submissions, including from actors in low- and middle-income countries.

NGOs and/or indigenous or local communities have made submissions in six of the cases reviewed. These submissions highlight local experiences and perspectives, and often refer to international human rights law. Arbitral tribunals refused to accept four *amicus curiae* submissions, in cases concerning:

- water service privatisation in Bolivia;³⁸
- land redistribution in Zimbabwe;³⁹
- petroleum operations in Ecuador;⁴⁰ and
- a mining project in Peru.⁴¹

36 ICSID Rules of Procedure for Arbitration Proceedings, Rule 37(2).

37 The UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration apply to investment treaties concluded after 1 April 2014. States that are parties to the 2014 Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration have expressed consent for the UNCITRAL Rules on Transparency to apply to investment treaties concluded before 1 April 2014. The convention is due to come into force in late 2017, but only a few states have ratified it so far.

38 Case document 2B.

39 Case document 4A.

40 Case document 6C.

41 Case document 3H. The same tribunal accepted a separate *amicus curiae* submission.

The tribunals accepted *amicus curiae* submissions in three of the cases reviewed.⁴² One concerned a challenge to environmental measures adopted in relation to a mining project impacting on lands that host the sacred sites of a native tribe in the US. The tribe made an *amicus curiae* submission arguing that the area included a sacred trail and formed part of their ancestral land base, even though they did not legally own the land. They called on the tribunal to uphold their cultural and spiritual rights.⁴³

In another mining case, a coalition of NGOs and grassroots organisations in El Salvador made *amicus curiae* submissions calling on the arbitral tribunal to consider 'the collective property rights of indigenous communities to their lands and territories' and those communities' right to live in a healthy environment. The submission argued that '[i]nternational law on foreign investment, including investment arbitration, should not constitute an obstacle to the attainment of sustainable development'.⁴⁴

In a third (pending) mining case, an *amicus curiae* submission by a Peruvian grassroots organisation and a legal advisor offered input on the 'relationship between international standards of human rights and due diligence applicable to business and investors'.⁴⁵ In their request, the petitioners highlighted the implications the dispute could have 'for the people and communities of the region [...] and for the respect for their rights to land, water and to be informed and consulted on the use of these resources'.⁴⁶

These examples illustrate the basic workings of *amicus curiae* submissions as a channel for bringing community perspectives to the attention of a tribunal. The effectiveness of this channel is assessed in Section 3.

Party submissions

In at least seven arbitrations,⁴⁷ states referred to community issues as part of their defence strategies – for example, claiming that the measures they took were necessary to respond to social and political unrest.⁴⁸

In one pending case where unrest was alleged to have occurred, the Bolivian government claimed that closing the project was necessary to restore public order. The government's counter-memorial discusses at length the right to self-determination of the indigenous peoples impacted by the project and their right to safeguard the environment on their sacred mountains.⁴⁹

42 In one of the cases reviewed, the tribunal accepted one submission and rejected another.

43 Case documents 9A and 9C, pp2–8.

44 Case document 11C (section iii(iv)–(v)).

45 Case document 3F, pp12–16.

46 Case document 3E, p2.

47 Case document 7A and Cases 10, 11, 17 and 19. See also the pending Cases 3 and 15.

48 Case documents 17A (paras 46, 49–50) and 15B (para 348).

49 Case document 15B (paras 32–177, 192–209, 300–324, 355–357).

Even in the absence of unrest, the US and Canadian governments have argued that their actions were necessary to uphold the rights or interests of local communities or indigenous peoples, including by safeguarding the natural environment.⁵⁰ State arguments highlighting community dimensions may reflect a genuine concern about the welfare of communities. But the possibility cannot be ruled out that reference to community issues may mask pursuit of other policy goals.

In at least three cases, investors made arguments regarding community dimensions. This included emphasising community support for the project and disputing claims of poor community engagement in Peru and Bolivia,⁵¹ alleging improper conduct on the part of activists in Canada,⁵² and highlighting their own social investments in community projects in Peru.⁵³

It is significant that the parties sometimes point to community perspectives, as the ability of people who are not party to proceedings to raise community issues is procedurally more constrained. In one case concerning land reform in Zimbabwe, the tribunal declined to accept an *amicus curiae* submission raising human rights issues partly because the parties themselves had not raised those issues, thus making the submission outside the scope of the dispute.⁵⁴ So, by discussing community perspectives, the parties may also make it easier for non-parties to make submissions.

50 Case documents 9D (paras 149, 778–781) and 19A (para 208).

51 See the pending Cases 3 (documents 3A paras 57, 59–60, 62–65, 3C paras 76–80, 98–105, and 3J) and 15 (documents 15A paras 21–26 and 15C paras 16–21).

52 Case document 16A (paras 33–41).

53 For example, case documents 14A (para 34) and 14B (section II.G).

54 Case document 4A (paras 57–60).

3. Considering community perspectives: four problems

This section discusses the ways in which arbitral tribunals considered community perspectives in the cases reviewed. It identifies four interlinked problems that affect the arbitration process, and discusses them in the following sections:

1. Community perspectives tend to receive little attention in arbitral awards.
2. This is partly because the arrangements for communities to make submissions to tribunals do not ensure effective participation.
3. Arguably, it also reflects a gulf between the tribunals' legalistic approach and the complex sociopolitical reality of community relations.
4. This situation can create problems where tensions arise between protecting investments and enabling communities to have their demands met.

3.1 A low priority in arbitral awards

In the arbitrations reviewed, tribunals considered community perspectives to different extents and in different ways. Some explicitly mentioned community concerns in their analyses, including in relation to environmental and public health concerns.⁵⁵ Others investigated the nature and extent of community protests against the investment.⁵⁶

In some cases, community issues had a direct bearing on the outcome of the dispute. For example, in one arbitration concerning Ecuador, the tribunal took account of local complaints – and company responses to them – when assessing the investor's liability as part of an environmental counterclaim filed by the respondent state.⁵⁷

But overall, the investor-state framing of the arbitrations meant that community perspectives tended to remain marginal in the structure of the case and its outcomes. In one arbitration, the parties reached a settlement agreement seemingly in light of jurisdictional considerations unrelated to community dimensions;⁵⁸ another was decided on purely jurisdictional grounds.⁵⁹

Most of the merits decisions reviewed addressed community issues in a few succinct and sometimes scattered paragraphs. In three cases, the tribunals dismissed the relevance of international human rights law arguments put forward by

⁵⁵ For example, case documents 7A (paras 4.96, 4.264–5), 9D (para 8(1)), 10A (para 92), 17A (para 144) and 13A (paras 220, 245).

⁵⁶ Case document 17A (paras 133–144).

⁵⁷ Case document 5B (paras 520–523, 613–615, 820–821).

⁵⁸ Case document 16B.

⁵⁹ Case document 14C.

amicus curiae submissions, so the community perspectives are largely absent from the analysis that the tribunals developed.⁶⁰

The tribunals in two other cases only made a few brief references to community issues; both held that government authorities revoked project permits in response to pressures from local groups, and neither elaborated more fully on the community perspectives.⁶¹

The tribunal in a third case involving the non-renewal of permits conducted a more extensive examination of community protests. But it ultimately deemed that they had not created a serious enough crisis or emergency to warrant the government's response.⁶²

In another award concerning agrarian reform in Venezuela, community issues emerge in the discussion of the authorities' alleged failure to protect investment from 'indigenous squatters'. Again, there is little analysis of the nature of relations on the ground.⁶³

The upshot is that community perspectives tend to stay in the background. The focus is on the relationship between the investor(s) and the state. In some cases, community relations are considered to be part of the problem – a factor that pushed the authorities to take measures that adversely affected the investment.

A concern about not exceeding the tribunal's jurisdiction seems to underlie this attitude, at least in part, and some awards explicitly mention concerns about sticking to the specific mandate of the tribunal.⁶⁴ But while arbitral tribunals may face normative constraints in their ability to consider community perspectives, international law requires them to take account of 'any relevant rules of international law applicable in relations between the parties' when interpreting investment treaties.⁶⁵ This could include international human rights norms.

One challenge is that states may not effectively argue community issues, providing limited opportunity for the tribunal to consider them. As the legitimate political authority within their jurisdiction, governments would be expected to be well placed to defend the interest of their population. But in practice they are not always willing or able to articulate community perspectives in arbitral proceedings.

This may be because the government legal team lacks expertise in relevant areas of law, particularly human rights law. More fundamentally, governments may have a different viewpoint from communities, particularly when an investment involves tensions between the two. As discussed in Section 2, state action violating the

60 Case documents 4A (paras 57–60), 9D (para 8(1)–(2)), 11D (para 3.30, but in this case the lack of authorisations from landowners was an important element in the tribunal's decision).

61 Case documents 10A (paras 46, 92) and 13A (paras 13, 26, 220, 252).

62 Case document 17A (paras 133–144). See also Odumusu (2007b) and Schneiderman (2010).

63 Case document 18A (paras 62, 63–65, 67(iii), 80, 409).

64 See, for example, case document 9D (para 8).

65 Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties.

human rights of communities may be among the root causes of a dispute – for example, where authorities approved the investment without consultation.

As pointed out by one *amicus curiae* petitioner in a pending arbitration, ‘the legal representatives of the disputing Parties have a vested interest in presenting the perspectives of the Parties themselves, which likely do not cover the full breadth of perspectives regarding the facts or legal issues in dispute’.⁶⁶

Two of the awards reviewed establish important exceptions to this limited weight given to community perspectives in arbitral proceedings. In one case concerning the termination of mining concessions in Ecuador, the tribunal devoted a significant part of the award to community issues,⁶⁷ concluding that the investor’s local representatives had become involved with violent acts toward the communities opposing the project. The tribunal ascribed this to negligence, rather than wilful conduct, of senior management.⁶⁸

The language used in this award suggests that the tribunal took community perspectives seriously. But ultimately, its analysis and finding resulted in a 30 per cent reduction of compensation due to the investor. The tribunal did clarify that the consequences would have been ‘much graver for the Claimant’s case’ had there been proof of wilful conduct.⁶⁹

Another case that involved extensive discussion of community issues hinged on the notion of ‘community core values’, which authorities used in the context of an environmental impact assessment. But, as discussed further below, these discussions primarily involved a critique of the use of that notion.⁷⁰

3.2 The limited effectiveness of *amicus curiae* submissions

As discussed in Sections 2.3 and 3.1, the limited attention that several arbitral awards devoted to community perspectives partly reflects the fact that tribunals typically decide the case based on the facts presented and the arguments developed by the parties – that is, the investor and the government.

Amicus curiae submissions from grassroots groups and NGOs provide an opportunity for neglected issues to become part of the proceedings. The reforms that enabled these submissions constituted a significant development in the space for communities to engage with investor-state arbitration. At the same time, commentators have noted the limitations of *amicus curiae* submissions as a vehicle for influencing arbitration outcomes (for example, Harrison 2009; Wieland 2011).

66 Case document 31, p2.

67 Case document 7A (paras 4.125–304).

68 Case document 7A (paras 6.99–100).

69 Case document 7A (paras 6.100, 6.133).

70 Case document 19C (paras 450–454, 502–543).

The arbitrations reviewed, while few, provide some insights on these points. Evidence on some of these cases suggests that *amicus curiae* submissions can have important effects outside the arbitral proceeding – for example, by helping to catalyse community mobilisation (Orellana *et al.* 2015). But the focus here is on their role in the arbitral proceedings.

First, when deciding whether to accept submissions, tribunals enjoy considerable discretion. As discussed in Section 2.3, three tribunals in the arbitrations reviewed accepted submissions, and four tribunals rejected them.⁷¹

In one case, links between grassroots activists and national politics resulted in the tribunal rejecting the *amicus curiae* submission, partly because the tribunal deemed the petitioners not to be sufficiently independent of the parties.⁷² Compared to other arbitrations, this decision took a narrower interpretation of the independence criterion: one that could arguably restrict opportunities for organisations representing community interests to make submissions.

As some commentators noted, in real-life situations petitioners with a significant interest in the case are unlikely to ever be a completely impartial ‘friend of the court’ (Schadendorf 2013). More generally, and from a human rights perspective, some alignment between state and *amicus curiae* positions should be expected, because the state has a duty to protect the rights of people affected by commercial investments.

Second, and in procedural terms, making a written submission does not amount to full-fledged participation in arbitral proceedings; and petitioners face significant restrictions when drafting submissions. Even where tribunals had accepted submissions, the *amicus curiae* petitioners often had no or limited access to case documents or the hearings.

This may have affected their ability to make informed submissions and ultimately the willingness of tribunals to consider those submissions. For example, in deeming it ‘unnecessary’ to engage with the key arguments contained in an *amicus curiae* submission, one tribunal noted that the petitioners were ‘not privy to the mass of factual evidence adduced in this arbitration’s third phase, including the hearing’.⁷³

Third, arbitral tribunals are not obliged to engage with arguments raised in *amicus curiae* submissions. None of the tribunals in the awards reviewed fully engaged with those arguments. In one mining case from El Salvador, the tribunal accepted the submission but deemed it ‘unnecessary’ and ultimately ‘inappropriate’ to consider its human rights arguments.⁷⁴

71 Case document 2B rejecting one of the submissions preceded the reforms in arbitration rules to facilitate *amicus curiae* submissions.

72 Case document 4A (paras 54–56).

73 Case document 11D (para 3.30).

74 Case document 11D (para 3.30).

In a US mining case, the tribunal referred sympathetically to the *amicus curiae* submission from a native tribe, but ultimately fell short of fully elaborating on the human rights dimensions the petitioners pointed to.⁷⁵ A third case where the tribunal accepted an *amicus* submission is still pending.⁷⁶

A larger pool of arbitrations would need to be analysed before any firm conclusions could be drawn. But these considerations provide a cautionary tale on the effectiveness of the *amicus curiae* submissions in influencing arbitration outcomes. This lends support to some earlier analyses (such as Harrison 2009 and Wieland 2011). United Nations human rights experts have criticised tribunals' limited willingness to consider human rights arguments, including those articulated in *amicus curiae* submissions (see, for example, Tauli Corpuz 2016). In effect, the main contribution of cumulative submissions over the years has been to formally document the existence of community dimensions in arbitral proceedings.

3.3 Lawyers and the 'real, messy world' of community relations

The cases reviewed point to a gulf between the tribunals' legalistic approaches and the complex sociopolitical reality that often characterises community relations. This gulf could make it more difficult for community perspectives to receive due consideration in arbitral awards.

Law and politics

Historically, investor-state arbitration emerged out of a concern to 'depoliticise' investment disputes, placing their settlement within the purview of legal adjudication. As would be expected, arbitral jurisprudence emphasises the legal, technical dimensions of disputes. But it also struggles to understand and address the inevitable political dimensions (Odumosu 2007a and 2007b, Phillips Williams 2016).

Some arbitral tribunals scrutinised the 'politicisation' of the ways in which authorities have handled investment. They found that governments took social or environmental measures for political ends, pointing to a mismatch between stated and real motivations.⁷⁷ The tribunals criticised government action taken 'under pressure' from the public,⁷⁸ and characterised community mobilisation as a 'political problem'.⁷⁹

Arbitral tribunals have particularly taken issue with inflammatory statements, political rallies and action taken against the backdrop of electoral campaigns.⁸⁰ Given

⁷⁵ Case document 9D (paras 8.1 and 8.2).

⁷⁶ Case document 3G.

⁷⁷ See, for example, case documents 1A (paras 192–297, 610, 624, 647–648), 17A (paras 42–43, 125(2), 129, 131) and 13A (para 220).

⁷⁸ For example, case documents 13A (paras 220, 249–252) and 17A (paras 124–133, 149).

⁷⁹ Case document 17A (para 129).

⁸⁰ For example, case document 1A (paras 580–610).

this trend in arbitral jurisprudence, claimants have sometimes referred to political motivations when challenging state conduct.⁸¹

Depending on the circumstances, the interplay of politics can put pressure on the rule of law and it is understandable that tribunals tasked with reviewing state conduct would scrutinise these aspects. Some of the arbitrations reviewed involved situations where political considerations underpinned departures from legal procedures and even violence towards investors or their assets, as in Zimbabwe's controversial land reform programme.⁸²

At the same time, investments in sensitive sectors – such as land and natural resources – can raise highly emotive and inherently political issues, especially where natural resources provide an important basis for rural livelihoods and social identity. Mobilisation of political figures, in government or opposition, is a legitimate avenue for rights assertion within democratic systems and a common strategy for communities to contest investments. This is particularly the case where national law provides limited legal avenues for formal contestation and where communities face significant barriers to engaging with the legal system.

In principle, a public authority taking social or environmental measures in response to community concerns would reflect effective relations of political accountability, with those who manage public affairs responding to the needs and aspirations of their constituents. For this reason, some commentators have criticised arbitral tribunals for misunderstanding the nature of the political process (Schneiderman 2010), which would ultimately affect the ability of tribunals to consider the strategies that communities deploy to assert their rights.

Lawyers and socio-environmental experts

One arbitration that involved extensive discussion of community perspectives hinged on an environmental impact assessment for a quarry and marine terminal in Canada.

Canadian authorities refused to approve the project, upon recommendation from a 'Joint Review Panel' (JRP), which had been established as part of the social and environmental impact assessment. In recommending against project approval, the JRP placed a strong emphasis on the notion of 'community core values', which it defined as 'beliefs shared by individuals within groups' (Joint Review Panel 2007:96).

The JRP found that the relevant community had an 'exceptionally strong and well-defined vision of its future' (Joint Review Panel 2007:4) with core values among community members 'reflect[ing] their sense of place, their desire for self-reliance, and the need to respect and sustain their surrounding environment' (Joint Review Panel 2007:66).

81 For example, case documents 20A (paras 29–30) and 20B (paras 335–338, 621–622).

82 Case document 4B (paras 110–115, 445, 448, 645, 652–657, 918–920).

Based on expert evidence and public consultations, the JRP concluded that the project would have a significant adverse effect on these community core values, because it 'would almost certainly change, in a significant manner, local perceptions of community character and identity, while also producing severe and lasting repercussions that might directly affect social networks and community cohesion, and that would be impossible to mitigate' (Joint Review Panel 2007:70).

After the government refused to approve the project, the investor filed an arbitration claim to seek damages. The tribunal criticised several aspects of the JRP report, particularly the robustness of its approach and its use of the concept of 'community core values'.⁸³ The tribunal found that:

- domestic legislation did not explicitly provide for the core community values standard;
- this standard was unclear and open to different interpretations; and
- the investor had not been given advance notice that this standard would be applied.

The tribunal concluded that the JRP acted in an arbitrary manner and that Canada had breached the North American Free Trade Agreement's fair and equitable treatment standard.⁸⁴

It is hard to assess factual circumstances based on legal documents alone, and it is possible that the public authorities' overall conduct in this case did raise issues about the way the investment was treated. At a more general level, however, this award arguably points to a gulf between the tribunal's legalistic approach and the technical and participatory approaches taken by the experts who conducted the assessment.

This point emerges in the dissenting opinion filed by one member of the arbitral tribunal.⁸⁵ The dissenting arbitrator argued that an impact assessment panel 'is generally made up of scientists and environmental experts and not necessarily lawyers', and that certain aspects of its approach 'may perhaps have been more meaningful to the scientists on the panel than to lawyers'. The dissenting arbitrator noted that considering impacts on the human environment was part of the JRP's mandate and in line with impact assessment practice, and that the JRP used the notion of community core values to capture these aspects.

Arguably, the majority approach in this case could place a significant burden on entities and professionals involved in investment decision making who may not be well-versed in the language and practice of law. One question is whether such arbitral interpretations could encourage a process of juridification in impact assessments and decision making more generally, with lawyers taking a more prominent role.

83 Case document 19C (paras 502–547).

84 Case document 19C (paras 591–604).

85 Case document 19B (paras 13, 46, 51).

Although this development could contribute to more legally robust impact assessments, it might also create tensions with emerging trends in impact assessment, such as the growing emphasis on public participation and considering social, cultural and spiritual dimensions in ways that are tailored to affected communities (for example, CBD 2004). The development might also result in impact assessments downplaying community dimensions if their fuller consideration could expose authorities to arbitration claims.⁸⁶

3.4 Community rights and investment protection

'Chilling effect'

Several of the cases reviewed represented 'community wins', in that the public authorities acted on community concerns and investors responded by filing the arbitration claim. The arbitral proceedings typically centred on whether the state should compensate the investor and how much it should pay.

The arbitral tribunals recognised that states can take measures to address community concerns, but stressed that they must do so in ways that comply with their investment law obligations. Several tribunals found that government action violated applicable investment protection standards because it was taken without 'due process';⁸⁷ the authorities failed to prove real or potential threats to people or the environment;⁸⁸ or the measures were deemed disproportionate.⁸⁹

The tribunals' ordering states to compensate investors affects how the costs of public action are shared between governments and businesses, and as such it raises important issues of public policy. But even more significant would be cases where public authorities refuse to meet the communities' demands out of fear of arbitration claims.

In these situations, the prospect of costly legal proceedings and potentially large compensation bills would create a 'chilling effect' on public action to address community concerns. These cases are harder to document – it is easier to identify the instances where authorities did act, resulting in publicly known arbitrations. More socio-legal research is needed to shed light on these issues.

But reports related to the cases reviewed suggest that, on some occasions at least, concerns about costly arbitration proceedings were a factor in government responses to local advocacy. In one pending arbitration stemming from a mining project in Peru, for example, Taj (2014) reported that the Peruvian government had 'hope[d] to ease local opposition to [the] silver mine and avoid a costly legal

86 As argued by the dissenting arbitrator in case document 19B (para 51).

87 Case documents 7A (paras 6.51–6.66) and 19C (paras 580–602).

88 Case documents 10A (paras 90–91), 13A (para 245) and 17A (paras 124–133).

89 Case document 17A (paras 122–151).

battle with the company'.⁹⁰ Ultimately, the dispute was not resolved and the investor brought the arbitration claim.

In another case concerning a mining venture in El Salvador, local advocacy escalated into a national campaign for legislation banning metals mining. The government denied permits for the venture to go forward, but the proposed legislation was stalled. A study drawing on stakeholder interviews found that this was partly because of the arbitral proceeding (Philipps Williams 2016).⁹¹

The study concluded that 'uncertainty regarding the outcome of the arbitration, the possible detrimental effect of passing legislation while proceedings are ongoing, and the fear that additional arbitration cases could be triggered by an outright ban have discouraged the state from pursuing anti-mining legislation' (Philipps Williams 2016:47). After the tribunal dismissed the arbitration claim, El Salvador's parliament passed a law banning metals mining (Webber 2017).

In two other cases, concerns about a possible chilling effect on government action were voiced in the arbitral proceedings. In a case concerning Bolivia, *amicus curiae* petitioners mentioned concerns that an award in favour of the claimant could create a 'disincentive' for authorities to act in the public interest.⁹² In another arbitration concerning Canada, one arbitrator raised the concern that the approach taken by the majority of the tribunal could have a chilling effect on impact assessment processes.⁹³

Protection standards and capacity gaps

Investment protection standards – such as 'fair and equitable treatment' and 'full protection and security' – involve broad formulations. One important question is how tribunals interpret and apply these standards. Some early tribunals sought to clarify the implications of these standards – for example, holding that fair and equitable treatment requires states 'to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor'.⁹⁴

For investments that require approval from, and ongoing relations with, multiple government agencies at local and national levels, consistency in public action can prove difficult to achieve. This is particularly so in low- and middle-income countries where capacity challenges may be more acute. Public authorities may not be equipped to tackle technically complex and politically sensitive community dimensions in ways that would not expose them to arbitration claims.

90 This report relates to the pending Case 3.

91 This research relates to Case 11.

92 Case document 2A (paras 21, 27).

93 Case document 19B (paras 48, 51).

94 Case document 17A (para 154). Some later tribunals adopted different and in some cases less demanding standards.

Claims and counterclaims

In two arbitrations stemming from the same investment project in Ecuador, two members of the consortium running the project brought separate arbitration claims in response to tax regime changes and ultimately the takeover of commercial operations. In each of these two parallel cases, the government filed a counterclaim seeking damages for alleged environmental contamination.⁹⁵ The issue had formed the object of local complaints during project implementation.⁹⁶

A state's ability to make such environmental counterclaims might enable them to advance what is, at least in part, a community interest. But there are questions about whether a government's counterclaim fully aligns with a community's understanding of events, particularly where the authorities were not responsive to community concerns at the time of the events. Therefore, whether tribunals consider community perspectives remains a significant issue. The relevant arbitral decisions discuss the local complaints only briefly, but they draw significant inferences from the way the companies responded to those complaints.⁹⁷

Ultimately, a successful counterclaim might enable a government to obtain compensation or secure a reduction in the compensation they owe to the investor. But important questions remain (Johnson and Skartvedt Guven 2017): for example, how to ensure that any payments are disbursed to those most directly affected and that environmental counterclaims are not 'sacrificed' in a global settlement that also deals with an investor's claims on possibly unrelated issues?

Also, what safeguards exist to ensure that any settlement adequately deals with damage the communities suffered, and would a settlement prevent communities from seeking remedy if they consider the investor-state agreement inadequate?

95 Case documents 12A, 12B and 5B.

96 Case documents 12B (para 335, and more generally paras 429–430, 435–440) and 5B (paras 520–523, 613–615, 820–821).

97 Case document 12B (paras 429–434).

4. Conclusion and ways forward

4.1 Key findings

Commercial investments can have far-reaching implications for the rights and interests of affected communities. The 20 cases reviewed in this report highlight how community rights and interests can be at stake in investor-state arbitration.

In several of the arbitrations reviewed, community action to articulate perspectives, advance interests or protect rights appears to have prompted public authorities to take measures, which in turn triggered the investor's claim. In other cases, the investor claimed that the authorities failed to protect their investment in the face of local mobilisation, or to assume liability for environmental litigation the communities initiated.

This situation raises questions as to whether the international investment regime can properly handle today's often complex and multi-faceted investment disputes. The cases highlight the limitations of investor-state arbitration in considering community perspectives.

Consistent with the structure of investor-state arbitration, the proceedings tend to be primarily centred on the relationship between investor and state, with resulting awards tending to pay little attention to community perspectives. These typically remained in the background; in some cases, community relations were cast as being part of the problem.

This trend partly reflects the legal constraints that tribunals face, but also communities' limited access to opportunities for framing the dispute. Indeed, the procedural arrangements for communities to bring issues to a tribunal's attention present limitations – for example, because they leave tribunals with extensive discretion on whether to accept the submissions and consider the arguments therein.

As a result, community issues mainly surfaced in the arbitrations through the prism of the disputing parties themselves, particularly the state. This can affect the way in which community issues are framed. While the state has the mandate to represent the interests of its population, it may not be willing or able to effectively argue community issues.

And at times it can be the authorities' failure to consider community rights that is the root causes of the dispute – for example, official approval of an investment without prior consultation can trigger community protests, state action (or inaction where action was required), and ultimately an investor-state dispute.

There are also tensions between the mindsets and approaches of the lawyers on the arbitral tribunals, and the 'messy' real world of community relations, where

the politics can be complex and solutions may require interventions to address technical issues and promote public participation in contested terrains. Capacity constraints may be at play, and the officials delivering these interventions may not be familiar with legal concepts and language. This could increase the risk that public action to address community issues may expose states to successful arbitration claims.

Taken together, these circumstances tend to undermine the effectiveness of investor-state arbitration in considering community perspectives. This problem is particularly pressing where community rights and investment protection come into direct contest.

Commentators, *amicus curiae* petitioners and one sitting arbitrator have expressed concern that the tribunals' approaches might make it more difficult for communities to obtain what they seek from the public authorities that represent them. While methodological challenges constrain systematic evidence of this 'chilling effect', available evidence suggests that the concern should be taken seriously.

4.2 Systemic reform needed

These findings point to a need for systemic reform to ensure the rights, interests and perspectives of communities receive fuller consideration in investment processes. While this report focuses on dispute settlement, addressing these issues requires looking beyond arbitration alone. By the time a dispute reaches an arbitral tribunal, a web of treaties, laws and contracts has already delineated the legal framework the tribunal must consider.

Where problems are rooted in shortcomings of the domestic legal system, national law reform to strengthen the substantive and procedural rights of communities in investment approval processes, including through FPIC where relevant, could help to prevent disputes from escalating after decisions have been made (Perrone 2016).

International law also provides arenas for thinking through the substantive rules upstream of any arbitration. This may include properly considering the costs and benefits of signing international investment treaties as well as recalibrating investment protection standards and rebalancing investor rights and obligations when drafting international investment treaties. It would also involve improving the interface between such treaties and international human rights law, for example through investment treaty clauses explicitly excluding investments that violate human rights norms from legal protection.

International human rights law will likely provide the main arena for communities to obtain international law redress in investment processes. Human rights law contains relevant norms, and human rights recourse institutions have specialist expertise to handle human rights issues. But insofar as community dimensions exist in investor-state dispute settlement, questions arise as to how community perspectives can be properly considered.

Incremental reforms to investor-state dispute settlement could involve ensuring that counsel for governments has the expertise to articulate community perspectives – including those based on international human rights law – and that arbitral tribunals have the expertise to consider these issues where the dispute requires.

But there is also arguably a need and opportunity to rethink more ambitiously arrangements for settling investment disputes. In recent years, a backlash against investor-state arbitration saw extensive public mobilisation, particularly in high-income countries. Discussions are now underway about reforms to the ways investment disputes are settled.

For example, the European Union (EU) proposed the establishment of an investment court system (ICS). This was integrated into the Canada-EU Comprehensive Trade and Investment Agreement, and the two parties have since initiated discussions about a possible multilateral investment court (European Commission 2016).

Although they have yet to clarify the details of this initiative, some features of the proposed ICS present significant continuity with the current system. The ICS's framing as a mechanism to settle disputes between investors and states is likely to provide limited opportunities for community perspectives to be taken seriously.

This report's findings indicate that any reforms to investor-state dispute settlement should consider arrangements for communities to put forward their perspectives. This would most likely require going beyond the narrow confines of *amicus curiae* submissions, by giving communities a legal right to intervene in proceedings and possibly to advance their own grievances.

Some experts have already put forward proposals along these lines – such as granting third parties the right to join proceedings if they have a reasonable claim of potential injury from an existing dispute (Wieland 2011); and a multilateral approach to investment-related dispute settlement that would enable integrated consideration of multiple grievances, including from communities (IISD 2016).

Implementing such proposals would require tackling significant conceptual and practical issues, including, for example: how communities are represented; how they are sheltered from the risks associated with legal proceedings; and how the system would intersect with international human rights law and institutions. There is little sign of the political support necessary to translate such proposals into action.

But this report shows that the issues require urgent policy action. It suggests that, if effective mechanisms are not developed, community perspectives are unlikely to receive the attention they deserve. In the longer term, the perceived legitimacy of international systems for settling investment-related disputes will partly depend on their ability to take community perspectives seriously and to accord the appropriate weight to the rights and interests of communities.

Appendix 1. Cases and case documents cited

Table 1. Numbered list of cases and case documents cited, with reference numbers

CASE DETAILS		DOCUMENT DETAILS	
Reference number and case title	Reference number and document title	Date	
1 Abengoa SA y COFIDES SA v. Estado Unidos Mexicanos (ICSID Case ARB(AF)/09/2)	1A Laudo (Award)	18 April 2013	
2 Aguas del Tunari, SA v. Republic of Bolivia (ICSID Case ARB/02/3)	2A Petition of La Coordinadora para la Defensa del Agua y Vida, La Federación Departamental Cochabambina de Organizaciones Regantes, Semapa Sur, Friends of the Earth-Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sánchez and Congressman Jorge Alvarado to the arbitral tribunal	29 August 2002	
	2B Letter from the Tribunal to Earth Justice, Counsel for Petitioners	29 January 2003	
	2C Decision on respondent's objections to jurisdiction	21 October 2005	
	2D Declaration of José Luis Alberro-Semerena [dissenting opinion]	21 October 2005	

CASE DETAILS		DOCUMENT DETAILS	
Reference number and case title	Reference number and document title	Date	
3	Bear Creek Mining Corporation v. Republic of Peru (ICSID Case ARB/14/21)	29 May 2015	
		6 October 2015	
		8 January 2016	
		9 June 2016	
		9 June 2016	
		9 June 2016	
		9 June 2016	
		21 July 2016	
		21 July 2016	
		3 August 2016	
		18 August 2016	

^a This document is not included in the online repositories searched but is available at <http://ccsi.columbia.edu/work/projects/participation-in-investor-state-disputes/>.

CASE DETAILS		DOCUMENT DETAILS	
Reference number and case title	Reference number and document title	Date	Date
4 Bernhard von Pezold and others v. Zimbabwe (ICSID Case ARB/10/15)	4A Procedural Order No 2	26 June 2012	
	4B Award	28 July 2015	
5 Burlington Resources, Inc v. Republic of Ecuador (ICSID Case ARB/08/5)	5A Decision on jurisdiction	2 June 2010	
	5B Decision on liability	14 December 2012	
	5C Decision on counterclaims	7 February 2017	
6 Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador (PCA Case 2009-23)	6A Claimant's notice of arbitration	23 September 2009	
	6B Submission of Amici, Fundación Pachamama and International Institute for Sustainable Development	5 November 2010	
	6C Procedural Order No 8	18 April 2011	
	6D First interim award on interim measures	25 January 2012	
	6E First partial award on Track 1	17 September 2013	
7 Copper Mesa Mining Corporation v. Republic of Ecuador (PCA Case 2012-2)	7A Award	15 March 2016	

CASE DETAILS		DOCUMENT DETAILS	
Reference number and case title	Reference number and document title	Date	Date
8	Cosigo Resources, Ltd, Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc v. Republic of Colombia (UNCITRAL)	8A Notice of demand and demand for arbitration and statement of claim 8B Respuesta de la Republica de Colombia a la solicitud de arbitraje de las demandantes	19 February 2016 19 March 2016
9	Glamis Gold, Ltd. v. United States of America (UNCITRAL)	9A Application for leave to file a non-party submission, submission of the Quechan Indian Nation 9B Submission of non-disputing parties Sierra Club and Earthworks 9C Non-party supplemental submission, Submission of the Quechan Indian Nation 9D Award	19 August 2005 16 October 2006 16 October 2006 8 June 2009
10	Metalclad Corporation v. United Mexican States (ICSID Case ARB(AF)/97/1)	10A Award	30 August 2000

CASE DETAILS		DOCUMENT DETAILS	
Reference number and case title	Reference number and document title	Date	
11	Pac Rim Cayman LLC v. Republic of El Salvador (ICSID Case ARB/09/12)	11A Application for permission to proceed as <i>amici curiae</i>	2 March 2011
		11B Claimant Pac Rim Cayman LLC's memorial on the merits and quantum	29 March 2013
		11C Submission of <i>amicus curiae</i> brief on the merits of the dispute	25 July 2014
		11D Award	14 October 2016
12	Perenco Ecuador Limited v. Republic of Ecuador (ICSID Case ARB/08/6)	12A Decision on remaining issues of jurisdiction and liability	12 September 2014
		12B Interim decision on the environmental counterclaim	11 August 2015
13	Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia (ICSID Case ARB/06/2)	13A Award	16 September 2015
		13B Partially dissenting opinion, Professor Brigitte Stern	7 September 2015
14	Renco Group Inc v. Republic of Peru (UNCT/13/1)	14A Claimant's amended notice of arbitration and statement of claim,	9 August 2011
		14B Claimant's memorial on liability	20 February 2014
		14C Partial award on jurisdiction	15 July 2016
		14D Final award	9 November 2016

CASE DETAILS		DOCUMENT DETAILS	
Reference number and case title		Reference number and document title	Date
15	South American Silver Limited (Bermuda) v. Plurinational State of Bolivia (PCA Case 2013-15)	15A Claimant's notice of arbitration	30 April 2013
		15B Objections to jurisdiction, admissibility and counter-memorial on the merits	31 March 2015
		15C Claimant's post-hearing brief	31 October 2016
		15D [Respondent's] Post-hearing brief	31 October 2016
16	St Marys VCNA, LLC v. Government of Canada (UNCITRAL)	16A Notice of arbitration	14 September 2011
		16B Consent award	29 March 2013
17	Técnicas Mediambientales Tecmed SA v. United Mexican States (ICSID Case ARB(AF)/00/2)	17A Award	29 May 2003
18	Vestey Group Limited v. Bolivarian Republic of Venezuela (ICSID Case ARB/06/4)	18A Award	15 April 2016

CASE DETAILS		DOCUMENT DETAILS	
Reference number and case title	Reference number and document title	Date	
19	William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada (PCA Case 2009-04)	19A Government of Canada counter-memorial	9 December 2011
		19B Dissenting opinion of Professor Donald McRae	10 March 2015
		19C Award on jurisdiction and liability	17 March 2015
20	Windstream Energy LLC v. Government of Canada (PCA Case 2013-22)	20A Amended notice of arbitration	28 January 2013
		20B Memorial of the claimant	19 August 2014
		20C Counter-memorial	20 January 2015
		20D Award	27 September 2016

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Knowledge
Products

Research Report

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The governance of the global economy has been at the centre of extensive and often polarised debates. International arbitrations to settle investment disputes between businesses and states – a system commonly referred to as ‘investor-state arbitration’ – have come to crystallise wider concerns about the balance of public and corporate interests in economic governance.

Although these proceedings pit an investor against a state, the underlying dispute often also involves communities affected by, but not party to, the arbitration. Issues that have surfaced in such cases include concerns about communities’ enjoyment of human rights, their access to land and natural resources, exposure to environmental harm and public authorities’ responsiveness to community demands.

This report examines whether and how investor-state arbitral tribunals consider community perspectives, interests and rights in their settlement of investment disputes. Based on information from online global databases, it identifies 20 arbitrations where some form of community action was part of the facts of the case and was reflected – albeit partially and cursorily – in publicly available case documents. The analysis highlights the need to rethink arrangements for settling investment-related disputes.

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