

Non-Confidential Summary

Case Studies on Access to Justice in Investor-State Arbitration

May 2023

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Introduction

This project developed nine (9) case studies of investor-state disputes that lead to investor-state dispute settlement (ISDS) cases with a view to identifying ways in which access to justice can be denied to those impacted by international investment activities and ISDS. Based on the case studies, a report was produced that synthesized common access to justice issues. The synthesis also proposes possible responses to address the challenges and barriers to accessing justice.

The report classified the access to justice issues in the case studies into six categories. These categories identify specific ways in which ISDS can prevent individuals and communities affected by foreign investment from advocating effectively for their rights and interests, receiving host State support, and obtaining effective legal remedies for harms caused by investment.

Categories of Access to Justice Issues in ISDS

- **Reduced pathways:** Investment-affected individuals and communities are prevented from participating in an ISDS case.
- **Collateral Attacks:** An ISDS case undermines other legal proceedings in which investment-affected individuals and communities seek relief from harms arising from the investment that is the basis of the case.
- **Chilling, Provoking and Covering:** The threat of ISDS and its costs to the host State prevent or discourage the State from enacting policies that would otherwise protect or provide relief to investment-affected individuals and communities.
- **Criminalization and Repression:** Human rights defenders and other local advocates on behalf of investment-affected individuals and communities are subject to physical violence or criminal proceedings by the host State or actors on behalf of the investor to dissuade them from opposing the investment or seeking relief from harms the investment has caused.

- Limited legal recourse: Investment-affected individuals and communities are denied domestic legal avenues to pursue their human rights and other complaints as a result of an ISDS case.
- Lack of Free, Prior and Informed Consent (FPIC): Investment-affected individuals and communities are denied their right to FPIC in relation to an investment or the manner in which an investment is made through inadequate or non-existent consultation in relation to the investment.

Reform Options to Improve Access to Justice

The report identified three avenues through which States could enhance access to justice in ISDS for investment-affected individuals and communities based on the case studies. First, States could seek to negotiate new International Investment Agreements (IIAs) or amend old IIAs to clarify how investors' actions can be taken into account to limit state liability and damages in ISDS, such by precluding liability where an investor does not have "clean hands" or reducing damages to the extent that the investor's conduct contributed to its loss. Second, States can seek changes to IIAs and arbitration rules to permit the participation in ISDS cases of investment-affected individuals and communities in a broader range of circumstances and in a manner that would allow them to assert their rights and interests more effectively. Last, States may opt out of IIAs altogether or seek to renegotiate them to eliminate ISDS, leaving investor protection to be addressed in other forums.