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A Call for Proactive Approaches in ISDS Arbitral Practice and Procedure

Engaging with local communities in environment-related disputes

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Introduction

1. Criticism of the investor-State dispute settlement ("ISDS") mechanism has grown over the past decades, leading to ongoing discussions and efforts to make adjustments, or even fully reform ISDS. The Centre for International Law's Working Paper 1, released in September 2024, provided a mapping exercise of ongoing discussions, possible options and reform initiatives.[1] Many of the reform proposals currently under discussion, particularly on a procedural level within the framework of UNCITRAL Working Group III, are expected to gradually reshape the architecture of ISDS. At the treaty-making level, in the new International Investment Agreements ("IIAs"), there is a clear push to rebalance the rights and obligations of investors with the sovereign right of States to regulate in the public interest,[2] particularly in areas such as public health, sustainable development, and environmental protection.[3] This shift in treaty language is now supported by broader normative developments. The recent advisory opinions from the International Court of Justice and the Inter-American Court of Human Rights affirm that States have an obligation to prevent environmental harm and protect human rights related to a healthy environment. By extension, they have a corresponding duty to regulate in the public interest.

2. These authoritative pronouncements of international courts are expected to drastically reinforce the ongoing shift in investment treaty language. However, treaty reform remains a gradual and incremental process, and it will take time before the majority of IIAs align with the language and standards found in the new generation of treaties. In the meantime, and likely for years to come, the agreements being arbitrated remain

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[1] CIL IDR Working Paper 1, *The Resolution of intractable Investor-State Disputes, Ways Forward* (Dr Nilufer Oral, Celine Lange).

[2] For instance, the Morocco - Nigeria Bilateral Investment Treaty (BIT). Article 24 of this BIT states that investors "should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices." Another example is the African Continental Free Trade Area (AfCFTA) Investment Protocol. See Muhammad Siddique Ali Pirzada, "The AfCFTA Investment Protocol: A New Age for Regional Investment and Dispute Resolution", Harvard International Law Journal, April 2025.

[3] Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes*, 2022, OUP, p. 1: "A textbook summary of how international investment law developed over the past fifty years may go something like this. States signed thousands of largely similar international investment agreements (IIAs) to protect the property of their investors abroad. Most of these IIAs allowed foreign investors to sue host states via investor-state dispute settlement (ISDS) for treaty breaches. ISDS was barely used until the late 1990s. When ISDS claims finally surged, states realized that their treaties offered greater investment protection than intended. States reacted by narrowing the commitments offered in newly concluded agreements. This backlash against investment arbitration resulted in a “new generation” of IIAs that rebalanced investment protection and host state regulatory autonomy."

predominantly from the older generation, lacking explicit carve-outs or provisions that address the responsibilities of investors and sustainable development in the host State, including at the level of local communities. Local communities often bear the direct social, economic, and environmental consequences of investment projects and thus occupy a crucial position in investor-State disputes and any dispute resolution process that may result from them. An emerging awareness is taking shape that giving due consideration to their stakes can lead to outcomes that better balance investor protections with broader public interest objectives. This issue has been receiving increasing attention both in academic research[4] and more broadly in civil society,[5] including in the documentary film *The Tribunal.*[6]

3. Investment disputes often involve environmental issues, and increasingly climate change-related issues, which by their very nature have local impacts that extend beyond the immediate disputing parties. For instance, the *Roșia Montană* arbitration concerned an open-cut gold and silver mine in Romania which, as research highlighted, [7] posed a threat to the environment and to the residents of the *Roșia Montană* commune, in particular because of the use of cyanide leaching to extract the gold and silver. While investor-State disputes often implicate local communities in relation to natural resources (such as water[8]), the relevance of these communities' interests is frequently overlooked in the ISDS context or disregarded as a matter not directly in dispute between the parties. Research has shown that in many ISDS cases the voices of those who are central protagonists in foreign investment projects and most directly affected by the investment are systematically absent from the arbitration process[9], remaining in the blind spot of the

[4] Stephanie Triefus, *International Investment Law: Taking Local Community Rights seriously*, Praemium Erasmianum Foundation, 2025. See also Emilia Onyema, "Corruption, Access to Arbitration for Local Communities: Mitigating the Cost of Corruption and Providing Access to Justice for Local Communities", , *The International Journal of Arbitration, Mediation and Dispute Management* (2024), Issue 4, pp. 536-554.
[5] See Special Issue of the Investment Treaty News by the International Institute for Sustainable Development (IISD), September 2025.
[6] "The Tribunal" (2024), a documentary film created by Dr Malcolm Rogge in partnership with the Columbia Centre on Sustainable Investment. See CIL IDR Working Paper 1, page 5. Also see Lorenzo Cotula and Ladan Mehranvar, "How a documentary film can help UNCITRAL Working Group III think through ISDS reform", EJIL: Talk!, April 2024.
[7] Stephanie Triefus, *International Investment Law: Taking Local Community Rights seriously*, Praemium Erasmianum Foundation, 2025.
[8] See for instance *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, or *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3.
[9] For instance, David Schneiderman, "The Coloniality of Investment Law", University of Toronto Research Paper, 2019.

ISDS regime.[10] The *Roșia Montană* arbitration[11] illustrates how, although local communities were clearly central to the dispute, "their stories, rights and interests [were] peripheral to the dispute resolution process. It is rare for local community witnesses to be called to give evidence, and when they do, their participation is strictly within the traditional boundaries and rules of the system."[12]

4. Addressing the asymmetry of investment treaties on a substantive level, as discussed above, is by nature a slow-moving process. There is furthermore no guarantee that the "new generation" treaties will necessarily translate into a meaningful inclusion of local voices in arbitral proceedings. Against this backdrop and given the time-sensitive character of environmental or climate change-related disputes, this Paper is looking at the procedural avenues available to make immediate practical adjustments. It explores how the management of proceedings can be leveraged to ensure that the stakes and concerns of impacted local communities - where relevant to the dispute - are duly identified, considered, and reflected in the arbitral process.

5. In CIL-IDR Working Paper 2 (the "Paper"), a "local community" is understood as "a group of people who are connected to a particular locality and do not have the power to exercise governmental authority."[13] Such groups, residing in proximity to investment projects, might see their livelihood, environment, or social conditions affected, directly or indirectly, by the project's implementation or operation and their interests are often central in ISDS disputes. However, contrary to common assumptions, their interests are not necessarily represented by the host State in investor-State disputes. In a 2018 study on foreign investments in the extractive sector in Latin America, the representatives from five Colombian local communities who were interviewed shared that they considered the State to be the main responsible not only for the investment projects but also for the related violation of their rights, and lamented that very few governmental agencies had looked after their local interests.[14] In some cases, these interests are not even properly identified, let alone brought to the attention of the tribunal.

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[10] Nicolas M. Perrone, "The 'Invisible' Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime", *AJIL Unbound*, 113, 2019.
[11] *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31.
[12] Stephanie Triefus, *International Investment Law: Taking Local Community Rights seriously*, Praemium Erasmianum Foundation, 2025.
[13] Lorenzo Cotula, "Community perspectives in investor-state arbitration", International Institute for Environment and Development, 2017.
[14] Nicolas M. Perrone, "Local communities, extractivism and international investment law: the case of five Colombian communities. *Globalizations*, *19*(6), 837–853, 2022.

6. A tribunal that overlooks this broader context risks rendering a decision that may be formally sound in legal terms but practically ineffective in addressing the underlying issues in a sustainable manner. Such awareness on the part of the tribunal is of particular importance where potential underlying issues have not been touched upon by the parties. When raising these issues on its own motion, a tribunal will have to explain why they are relevant to the dispute and accordingly, how doing so does not amount to improper conduct. While acknowledging that taking these local interests into account may not ultimately alter the tribunal's decision, doing so affirms the principle that arbitration is, in terms of procedural fairness and like any judicial process, a mechanism for delivering justice.[15] This may contribute to ensuring that relevant public interest concerns are meaningfully considered in ISDS cases. This Paper examines how a more proactive procedural engagement of tribunals with local communities' interests could support this aim. The Paper seeks to demonstrate that, contrary to prevailing assumptions, arbitral tribunals are empowered, under existing procedural frameworks and through the exercise of their procedural discretion, to take on a more proactive role in that respect. This evolution in approach would be developed in close consultation with the parties, with the intention not of diminishing their role, or undermining their freedom to plead their cases as they see fit, but of fostering more meaningful dialogue on these important issues.

7. The Paper will address the following issues: **(I)** Defining the contours of the proposed approach; **(II)** Outlining how the suggested conduct of proceedings can be anchored in existing ISDS legal frameworks; **(III)** Dispelling perceived disincentives to adopting such a procedural shift, while highlighting the real incentives that all ISDS stakeholders could be encouraged to explore.

I. Defining proactive arbitral conduct in ISDS proceedings

8. The proposed approach rests on two key pillars: first, the early establishment of proactive case management, and second, the use of tools designed to provide a

[15] Professor Emilia Onyema's Roebuck lecture 2024 (Ciarb, 2 July 2024), transcript, page 6:
"Arbitration is a judicial process through which parties privately resolve their disputes […]. If arbitration is a judicial process, it follows that its ultimate aim should be to deliver justice, in the sense of procedural fairness (…)"
"(…) we may want to take another look and again, ask ourselves, what is this process of arbitration about? I suggest that it is justice delivery. If that is correct, how just is that process? If the primary individuals, the local communities or citizens who are directly impacted by the consequences of the transaction leading to the arbitration are excluded from the arbitration process?"

comprehensive understanding of the dispute, including the interests of local communities with a stake in the matter in dispute. At the beginning of the proceedings, it is proposed that ISDS arbitrators actively, and in consultation with the parties, consider the existence of local communities potentially impacted in the dispute and the appropriate procedural management of the case in that respect. Where relevant, arbitrators can then determine whether, and if so how, to engage with them.

1. Defining proactive case management at the outset of the proceedings

i. Local communities and the design of ISDS

9. Due to its procedural design, the current ISDS system is not well suited to consider issues beyond what is presented to the tribunal by the disputing parties. In an investor-State dispute, the interests that are represented are those of the State and the investor and they define the contours of the legal dispute, potentially leaving out important dimensions of the broader conflict that could bear on the resolution of the case. Additional reasons might explain why affected communities are left out of arbitral proceedings. For instance, respondent States do not always effectively factor in local communities impacted by an investment due to limited resources or political considerations.[16] Moreover, it is overly idealistic to assume that affected communities will always have their voices adequately heard through the disputing parties.[17] As for the foreign investors, while it is true that, in the context of evolving responsible business conduct standards, they are increasingly expected to consider the social and environmental impacts of their operations, this expectation is not always fully met, either in the planning and implementation phases of a project, let alone in the context of a dispute with a State. While parties can be encouraged to more actively identify and acknowledge the existence of local stakes, it is unreasonable to expect them to incorporate perspectives that may significantly diverge from their own in the context of a dispute.[18]

[16] See on this also the submission to UNCITRAL Working Group II by CCSI, IIED and IISD, dated 15 July 2019, p. 6, referring to the possibility that Respondent States may be unwilling to make concessions or advance arguments in ISDS that third parties could use against them in parallel or subsequent legal proceedings concerning harms suffered by those third parties.

[17] Stephanie Triefus challenges the assumption that States always act in the interest of their people. Stephanie Triefus, *International Investment Law: Taking Local Community Rights seriously*, Praemium Erasmianum Foundation, 2025.

[18] In practice, it remains crucial to properly inquire as to possible link between these communities and both disputing parties. Such linkage is already typically a matter which needs to be disclosed in the framework of *amicus curiae* submissions. In *Glamis Gold v. USA*, the Quechan Indian Nation, a tribe that claimed that

10. The present paper will not focus on all entities which may legitimately wish to interact or, where possible, intervene in the proceedings. For non-disputing treaty parties that have an interest in the dispute, there are already various mechanisms in place allowing them to interact with the tribunal, having the possibility to make submissions under various instruments.[19] Similarly, the existing procedure of *amicus curiae* already allows a much larger group of non-disputing parties to submit a brief.[20] The present Paper will exclusively focus on affected communities and build on existing instruments and the tribunal's inherent power to conduct the proceedings, in order to take into account and address with concrete proposals, the possibility that these communities present their positions before the tribunal.

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a mining project would adversely impact its ancestral lands, disclosed that it had received "federal grants to support some of its governmental programming". This did not prevent the tribunal from accepting the submission as *amicus curiae*. See *Application for Leave to File a Non-Party Submission, Submission of the Quechan Indian Nation*, 19 August 2005, p. 2.

See also, Thomas Wälde, "Equality of arms in investment arbitration: procedural challenges", in Katia Yannaca-Small (Ed.), *Arbitration under international investment agreements: a guide to the key issues*, OUP, 2010, p. 178. The author considers that the submission of *amicus curiae* briefs by NGOs - typically aligned against the Claimant - places an additional burden on the latter, who must review and attempt to rebut their content. Such briefs may also, directly or indirectly, cast doubt on the investor's character or the social legitimacy of their conduct, often without presenting substantiating evidence or being subject to cross-examination. In *Biwater-Gauff v. Tanzania*, the tribunal sought to mitigate both the influence of external campaigning against the Claimant and the risk of collusion between activist NGOs and the host government by issuing a set of rules resembling a Code of Conduct that addressed, among other matters, public disclosures and positioned the Tribunal as an approval authority for such communications. See *Biwater-Gauff v. Tanzania*, Procedural Order No. 3, September 29, 2006, which refers, at para. 163, to the need both to prevent a further aggravation of the dispute and to preserve an "even playing field for the parties."

[19] State parties to a treaty which are not parties to the dispute may have a right under that treaty to make submissions on a question of application or interpretation of the treaty.

[20] One example is that of the amici briefs submitted by the European Commission to several ISDS tribunals. The European Commission's amicus participation arguably differs from the participation of the traditional *amici curiae* in ISDS. The Commission's submissions appear to be more carefully considered by tribunals, as demonstrated by the fact that they are also more prone to be explicitly discussed in awards. See also, Olga Gerlich, "More Than a Friend? The European Commission's Amicus Curiae Participation in Investor-State Arbitration" in Giovanna Adinolfi et. al. (eds) *International Economic Law*: *Contemporary Issues*. 2016, Springer, pp. 253-269. The author argues that the European Commission's *amicus curiae* participation in fact more closely resembles intervention and may mark a development in third party participation in international investment arbitration.

ii. An early definition of the tribunal's procedural approach in consultation with the parties

11. Tribunals typically define their procedural approach at an early stage of the proceedings and after consultation with the parties. This commonsense practice is in fact often required by arbitration rules themselves.[21] From the outset, a tribunal can consider raising on its own initiative the possible relevance of broader issues. This can be addressed during the initial case management conference and formalised, where appropriate, in a traditional Procedural Order No. 1, which serves as the foundational statement of procedural conduct. In raising the possible relevance to the dispute, at the outset, of issues such as the environmental or societal impacts of the investment and/or the dispute, a tribunal communicates its intention to remain open to considering the perspectives of non-party stakeholders, where procedurally appropriate.

12. By signaling its general orientation and procedural posture at an early stage of the proceedings, a tribunal ensures that its approach is transparent and does not come as a surprise to the parties. ISDS tribunals are aware of the structural limits imposed by jurisdiction and party consent, including the possibility that meaningful engagement with concerned communities may be constrained where parties are unwilling to cooperate. This Paper encourages tribunals to make full use of all available procedural tools, noting that only a constructive dialogue with the parties, initiated by the tribunal yet never imposed upon the parties, can prove both effective and appropriate. Meaningful engagement with counsel and party representatives, accompanied by a clear affirmation that the tribunal will faithfully adhere to its mandate to resolve the legal dispute at hand, is necessary for this approach to be acceptable in practice.

2. Tools to gain a holistic view of the dispute

13. This section will outline the various tools available to arbitrators which can be utilised once broader community interests have been found to be at stake. Use of these tools will enable Tribunals to gain a comprehensive understanding of the factual backdrop on which the legal disputes rest.

[21] Most arbitration rules require a mandatory initial case management conference. See the comparative table in Annex 1 to this Paper.

i. Case Management

14. Tribunals may enhance their case management by adopting a more dynamic and engaged approach throughout the proceedings. Regular and direct consultations with the parties should serve as a central mechanism for the tribunal to facilitate its work and progressively develop a deeper understanding of the dispute. In that regard, the 2022 amendments of the ICSID Arbitration Rules, with the new Rule 31, further empowers parties and tribunals to actively manage the case to achieve an expeditious proceeding through intermediate case management conferences.[22] While many procedural rules encourage issue-narrowing through such conferences, tribunals do not always convene them. Yet such dialogue is essential for procedural efficiency, but also an avenue for the tribunal to identify whether community interests are at stake. The existence of affected communities may not necessarily be raised during the initial case management conference when the contours of the parties' positions are not yet well developed. However, tribunals can begin shaping a broader perspective from the very outset of the proceedings. This entails taking an active role early on requesting clarifications where needed and seeking targeted information without waiting until the hearing phase. By doing so, a tribunal can ensure that its decision is grounded in a comprehensive understanding of the dispute in its full context. This process can be supported by regular summaries provided by the parties, which can facilitate specific questions or requests for clarification from the tribunal as the case progresses. A useful example in this regard can be found in the practice of the International Court of Justice (ICJ), where the Practice Directions provide that each party is to set out a short summary of its reasoning at the end of each written pleading.[23]

ii. Underutilised evidentiary tools

15. It is equally important to emphasise the value of classical evidentiary tools. For the most part, applicable rules already foresee the set of instruments discussed below which remain frequently underutilised in practice.

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[22] See ICSID Working Paper on the Amendment of the ICSID Rules (3 August 2018), para. 201. A tribunal is encouraged to convene for instance a case management conference after the first round of pleadings to guide the parties with regard to the scope, subject matters and questions to be covered in the parties' second round of pleadings in order to help the parties to focus their pleadings.

[23] ICJ Practice Direction II.

16. A recent study conducted on fact-finding in international arbitration considered the emergence of a transnational law of fact-finding. The study's conclusion includes a summary of rules which highlight the possibility of "proactive case management" as well as the tools which are discussed in this section.[24]

17. The proactive use of these tools can play a critical role in strengthening the fact-finding process, particularly in complex disputes with environmental dimensions such as those linked to climate change. These tools include, among others:

- the ability to request information not originally produced or sought by the parties, especially where new insights may arise from *amicus curiae* submissions or other non-party inputs.
- the calling by the tribunal of witnesses who provided witness statements but were not called by either party.
- in some cases, tribunals may seek procedural arrangements to shield witnesses or experts from undue party influence, thereby preserving the integrity of the testimony.[25]
- the appointment by the tribunal of independent experts to assist in evaluating for instance technical or scientific matters.
- the conduct of site visits at the tribunal's initiative.[26]

iii. Enhanced use of amicus curiae *submissions*

18. Admittedly, applications to submit *amicus curiae* briefs are no longer exceptional in ISDS. A comprehensive 2018 study identified over 50 ISDS cases in which petitions were filed to submit an *amicus curiae* brief.[27] The study in question generally concludes that *amici curiae* help to fill information gaps, provide legal analysis, point to relevant laws and interpretations, convey impact analysis and contextual information and may highlight the

[24] Julian Bickmann, *Fact-Finding in International Arbitration: The Emergence of a Transnational Lex Evidentiae*, 2022, Kluwer Law International, pp. 181-188.

[25] In the *Enrica Lexie* arbitration between Italy and India, for example, the tribunal indicated which witnesses it wished to see appear at the hearing and directed the parties to have no contact with those witnesses in the meantime. All logistical arrangements relating to the witnesses' appearance were handled by the Permanent Court of Arbitration, which administered the arbitration.

[26] See CIL Working Paper 1 at page 16 on the advantages and downsides of site visits.

[27] Astrid Wiik, *Amicus Curiae Before International Courts and Tribunals*, 2018, Nomos. See Annex I: Cases with *amicus curiae* involvement.

various interests involved.[28] Crucially, the study, however, also concludes that *amicus curiae* participation remains in any event too sporadic to alleviate genuine systemic concerns that may exist.[29]

19. This Paper envisages two ways to make more proactive use of this tool. Firstly, a proactive invitation, by the tribunal, to engage at the appropriate stage of the proceedings, ideally highlighting the need for factual input on designated issues. Secondly, the possibility to further engage with *amici curiae* during hearings.

20. With respect to the first avenue, it should be emphasised that a tribunal-driven invitation to engage, directed towards affected communities, would not in any event exclude or prevent other actors from submitting a request to participate as *amicus curiae* under existing procedural frameworks such as ICSID's.[30] In this sense, the approach advocated herein builds on the existing framework of provisions on *amicus curiae* participation, merely enhancing its current practical application. The tribunal must, of course, remain vigilant in preserving the equality of arms between the parties and maintain a general openness toward all petitioners; the sole purpose of such an invitation is to ensure that affected communities are not excluded from engaging with the Tribunal simply due to limited awareness or insufficient resources.

21. On the logistical front, arbitral institutions and tribunal secretaries already play a crucial role in supporting ISDS tribunals.[31] Given this established position - and the fact that they are accepted, if not expressly chosen, by the parties - they are also well placed to further support tribunals in their outreach efforts. In current practice, when tribunals have issued orders on *amicus curiae* submissions, their publication on the ICSID website

[28] Astrid Wiik, *Amicus Curiae Before International Courts and Tribunals*, 2018, Nomos, p. 571.
[29] Astrid Wiik, *Amicus Curiae Before International Courts and Tribunals*, 2018, Nomos, p. 572. The author concludes that as currently administered, *amicus curiae* is simply ill-suited to address concerns pertaining to adjudicative legitimacy or to effectively represent the public interest.
[30] See ICSID Arbitration Rules (Rule 67: Submission of Non-Disputing Parties).
[31] For instance, to publicise calls for *amicus curiae*. See e.g. the Permanent Court of Arbitration's press release dated 13 March 2025 in the case *KN-Holding LLC & Severgroup LLC v. France*: "The parties to the dispute have agreed, as mentioned in Paragraph 11.5 of Procedural Order No. 2 dated 15 April 2024, that the Tribunal may receive *amicus curiae* submissions. The Tribunal invites applications for leave to file *amicus curiae* submissions to be submitted by e-mail to bureau@pca-cpa.org no later than Thursday, 10 April 2025." Available at: https://docs.pca-cpa.org/2025/03/779fc6a7-2022-13-20250313-pca-press-release.pdf.

has often appeared to yield limited results.[32] To address issues of awareness, access, and resource constraints, the provision of additional materials - whether online or in print - could help broaden the reach of such invitations. These materials, potentially incorporating visual elements,[33] might include general information about the proceedings, the ISDS framework, and the composition of the arbitral tribunal.

22. Such an invitation to potentially affected communities should be issued with sufficient lead time to allow them to familiarise themselves with the process and the conditions for submitting a brief. Critically, the success of such invitation does not only presuppose an effective and early outreach: it further requires that communities receive instructions as to how to make proper submissions in arbitral proceedings. In other words, the invitation should contain the necessary requirements and procedural steps to submit an *amicus curiae* brief, with comprehensive and clear guidelines.[34]

23. It bears noting that, while the tribunal's first port of call may be to inquire whether the parties believe there are non-disputing actors with a relevant interest who should be invited to make submissions, it would be overly optimistic - as previously noted - to assume that the interests of affected communities will always be adequately represented by the parties themselves. This does not preclude input from the parties; on the contrary, their assistance in identifying potentially relevant community interests can be valuable, and they should have the opportunity to express their views on whether such interests are present in the case at hand.

24. The final determination on whether to accept an *amicus curiae* submission - whether made in response to a prior invitation or submitted independently under the "classical" framework - will, in all cases, remain within the discretion of a tribunal. This decision is to be made in accordance with the relevant requirements under the applicable procedural rules governing *amicus curiae* participation.[35] These are typically the existence of a

[32] For instance, in *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), no submissions were received further to the tribunal's invitation to submit an application (see award at 1.24.) available on ICSID's website.

[33] See for instance, Rouven Bodenheimer, "The Tribunal Visualized Approach: Improving Proceedings by Visualized Case Introduction", in Maxi Scherer (ed), *Journal of International Arbitration*, Kluwer Law International 2024, Volume 41(4), pp. 461-486. See also Lodovica Raparelli, "Beyond Words: The Role of Visuals in Enhancing International Arbitration", Kluwer Arbitration Blog, 25 June 2024.

[34] These communications may need to be translated into the community's language. In addition to the accessibility requirements, this is another reason why they should be kept concise. The PCA press release mentioned in footnote 31 is in this sense too succinct and does not explain the procedure.

[35] See for instance ICSID Arbitration Rule 67.

significant interest in the dispute's outcome and the ability to offer a distinct perspective, specialised knowledge, or insight that may differ from that of the disputing parties. It may be reasonably assumed that affected communities, as understood in this Paper, meet both criteria because they have a direct stake in the outcome of the dispute and can provide unique, context-specific insights that are unlikely to be fully represented by the disputing parties.

25. The second proposed avenue for enhancing the *amicus curiae* mechanism lies in the possibility of allowing a tribunal to orally engage with *amici* during the hearing phase. The aforementioned study concludes that *amicus curiae* participation in international dispute settlement predominantly takes the form of written submissions. In many instances, when *amici* requested the opportunity to participate orally, tribunals did not grant the request.[36] This raises a pertinent question: is the prevailing emphasis on written contributions justified?[37] Oral submissions may indeed offer added value, and direct questioning could yield insights beyond those obtainable through supplementary written submissions. Understandably, arbitrators should carefully consider whether oral participation imposes an undue burden on the parties, particularly in terms of time and cost, as it may necessitate responses to additional arguments or extended hearings and post-hearing submissions.[38] However, it seems that there is no valid reason to exclude oral participation from the outset.

26. Such an enhancement offers two distinct benefits. First, it enables a tribunal to question the *amici* directly on the content of their written submissions, thereby deepening the evidentiary or contextual value of such contribution. Second, the opportunity for oral engagement strengthens the perceived legitimacy of the proceedings by affording *amici* a more tangible opportunity to be heard, in addition to the filing of a written brief. At all times, the parties evidently retain the right to engage with the *amici* during such proceedings, should they wish to do so. It must be noted that sometimes the concerns raised by affected communities may be directed not only at the investor, but equally at the host State - for instance, for authorising, licensing, or failing to prevent activities that have caused them harm.

[36] See *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01 - tribunal's letter dated 5 October 2009. The dispute concerned the mining rights of a foreign investor. The petitioner NGOs lived in the vicinity of the proposed mine and other exploration areas.
[37] Astrid Wiik, *Amicus Curiae Before International Courts and Tribunals*, 2018, Nomos, pp. 330-331.
[38] Astrid Wiik, *Amicus Curiae Before International Courts and Tribunals*, 2018, Nomos, p. 331.

Summary of Proposed Recommendations:

- ***Encourage early procedural dialogue**: tribunals to proactively raise, via case management, the potential relevance of social and environmental impacts on local communities to the dispute and reflect this openness in Procedural Order No. 1.*

- ***Utilise underused procedural tools**: tribunals to actively employ existing evidentiary mechanisms, such as requesting additional information, calling independent experts or witnesses, and conducting site visits, to develop a fuller factual record.*

- ***Enhance the role of* amicus curiae**:

  - *Proactively invite submissions: tribunals to issue targeted invitations for amicus briefs from potentially affected communities, accompanied by clear guidance and sufficient lead time.*

  - *Facilitate oral engagement: where appropriate, tribunals to consider allowing amici to participate in hearings, subject to procedural safeguards and party input.*

- ***Leverage institutional support**: tribunal secretaries and arbitral institutions to assist with outreach, including disseminating information and supporting logistical aspects of communities' participation.*

- ***Maintain party dialogue and tribunal neutrality**: throughout the proceedings, tribunals to balance proactive engagement with procedural fairness and party consent, ensuring that outreach efforts do not undermine the tribunal's impartiality and independence.*

II. Arbitral conduct of the proceedings in existing ISDS procedural frameworks

27. It is important to recall that, just as any form of international arbitration, ISDS is rooted in party autonomy and consent[39] and arbitrators derive jurisdiction only from the agreement of the parties. Consequently, it cannot be ruled out that the disputing parties may wish to limit or even reject the approach proposed in this Paper. However, for such opposition to be decisive, it would have to come from both parties. Admittedly, such joint opposition is likely to be rare in practice, but where it does occur, the tribunal would be precluded from adopting this approach.

28. In any event, party autonomy is never absolute. In the realm of international commercial arbitration, an exception to the parties' "ultimate procedural autonomy" is unmistakably recognised where the parties' agreement on arbitral procedures would itself violate mandatory rules of procedural fairness and equality.[40] The same evidently applies to ISDS. In fact, arbitration agreements often incorporate institutional rules which themselves grant arbitrators the authority to ensure such proper conduct of arbitral proceedings.[41]

29. There is no harmonised framework for the conduct of ISDS proceedings, which are governed by different sets of procedural rules, with multiple arbitration institutions playing a role in their administration. While ICSID (the International Centre for the Settlement of Investment Disputes) remains the predominant institutional framework, other institutions, including the PCA, SCC and ICC,[42] also frequently administer ISDS disputes. This part will examine the legal frameworks of ICSID, PCA, SIAC, SCC and ICC, alongside the UNCITRAL Arbitration Rules, which are commonly employed in *ad hoc* ISDS proceedings. The UNCITRAL Model Law on International Commercial Arbitration will also

[39] This is also true in international commercial arbitration and interstate arbitration. See Manuel Indlekofer, *International Arbitration and the Permanent Court of Arbitration*, International Arbitration Law Library, Volume 27, Kluwer Law International 2013, p. 132: "The consensual element is not only of relevance for the ignition of the arbitral proceeding itself, but is also carried on through the entire arbitral process: the establishment of the arbitral tribunal, the applicable rules of procedure and the applicable law for the Tribunal's award are all left to the disputing parties to decide."

[40] Gary B Born, *International arbitration: law and practice* (2021), §15.01.

[41] See for instance Rule 1 ICSID Arbitration Rules providing that the tribunal shall apply any agreement of the parties on procedural matters to the extent that it does not conflict with the ICSID Convention.

[42] Permanent Court of Arbitration (PCA), Stockholm Chamber of Commerce (SCC), International Chamber of Commerce (ICC).

be taken into account,[43] given its widespread adoption - either verbatim or with minor variations - as the national arbitration law in numerous jurisdictions.[44]

30. It is suggested that existing ISDS procedural frameworks align seamlessly with the approach discussed in this Paper since most of the tools mentioned above are already envisaged therein **(1)**. In any event, a comparative analysis of the main procedural frameworks reveals that, even where these tools are not specifically foreseen, ISDS frameworks still allow them to be used by arbitrators **(2)**.

1. Several of the tools necessary to support the approach outlined in this Paper are already directly available, explicitly or through established practice

31. The table in Annex 1 provides an overview of procedural tools that are already incorporated into various institutional arbitration rules. These tools may be considered available in two ways: they may be *explicitly* available (in green colour in the table), where the applicable rules make direct reference to them; or they may be *available through established practice*, where - although not expressly mentioned - it is widely accepted that the tool is encompassed by a specific provision, other than a general clause on arbitral discretion. For instance, it is undisputed that both ICC and ICSID arbitral tribunals have the authority to call a witness for examination at the hearing on their own initiative. The ICC Rules expressly provide[45] for this possibility for the arbitral tribunal, while by contrast,

[43] The UNCITRAL Model Law, much like various domestic arbitration statutes, does not seek to provide an exhaustive enumeration of procedural tools in the manner that institutional arbitration rules may more typically do. In light of this distinction, it was deemed unnecessary for the purpose of this Working Paper 2 to consult the UNCITRAL Model Law for the purpose of identifying the procedural tools listed in the table. Nevertheless, the UNCITRAL Model Law will remain central to the subsequent analysis - particularly when assessing whether tools not expressly mentioned may nonetheless be employed under the general procedural discretion afforded to arbitral tribunals.

[44] Even if, as with any legal instrument intended for application by a broad range of actors - here, primarily domestic courts - a challenge lies in achieving consistent and truly uniform interpretation across different legal systems. See e.g. Dean Lewis, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Australia, Hong Kong and Singapore*, Kluwer Law International (2016), p. 188. By its very nature, being a model law and not a convention or treaty, the UNCITRAL Model Law will in any event never achieve absolute textual uniformity and will furthermore never, except in a utopian world, achieve absolute applied uniformity. The author of the study however concludes that the model law has effected a degree of convergence of the arbitration laws of Hong Kong, Singapore and Australia.

[45] Article 22(2) of the ICC Rules (2021): "The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned".

the ICSID Arbitration Rules do not specify who may call a witness.[46] Nevertheless, it is generally accepted that an ICSID tribunal may, under its procedural powers, call a witness for examination which has not been called by any party[47] - even if a tribunal always faces the practical issue of its lack of power to compel the appearance of witnesses.

2. ISDS arbitrators' inherent power to use additional tools

32. The following section examines whether, when the procedural tools are not directly available within the ISDS frameworks, arbitrators may, nevertheless, make use of them by relying on their inherent procedural powers to conduct the proceedings. Implied procedural powers are those powers not expressly stated in the arbitration agreement or applicable rules, but which are understood to arise from the tribunal's duty to conduct fair and efficient proceedings[48] and from its discretionary powers - provided that they are exercised within the limits of party consent and do not exceed the tribunal's mandate.[49]

33. Each legal framework will be considered specifically: ICSID Arbitration (i), arbitration pursuant to the UNCITRAL Arbitration Rules and specifically the UNCITRAL Rules on

[46] Article 38(2) of the ICSID Rules (2022): "A witness who has filed a written statement may be called for examination at a hearing".

[47] Stephan Wilske & Björn P. Ebert, *ICSID Rules and Regulations 2022: Article-by-Article Commentary,* Article 38(2), para. 29. The disputing parties and the tribunal are entitled to request the examination of a witness but are not under an obligation to do so. The Commentary refers to ICSID Working Paper #1 on the Amendment of the Rules, p. 201 para. 430.
While the general rule foreseen in ICSID Arbitration Rule 38(2) is that witnesses may only be examined after a written statement has been filed, this requirement is not absolute. Under Rule 36(3), the Tribunal may "[…] call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding." In that sense, tribunals might call upon a party to produce more evidence, and the party might request that a witness who had not submitted written witness statements be presented at a hearing. (Wilske/Ebert at 380). More generally, while "In the majority of instances, tribunals have directed their calls for evidence to the parties" (…) "There is nothing that would prevent a tribunal from directly inviting a witness to appear before it and to testify" (Article 43 in Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds. *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*).

[48] International Law Association, Report for the Biennial Conference in Washington D.C., April 2014, ("the 2014 ILA Report"), *Inherent Powers of Arbitrators in International Commercial Arbitration*. The 2014 ILA report discusses the various situations and circumstances where such powers may be relevant to international commercial arbitration, based on analogues drawn primarily from the ISDS context.

[49] In the early 2000s, an ISDS tribunal denied the request of a would-be *amicus curiae* to attend proceedings as the then applicable arbitration rules clearly conditioned the tribunal's discretion over the attendance of non-parties on the consent of the parties, and such consent was absent in that case. See *Aguas Provinciales de Santa Fe S.A., Suez Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae (17 Mar. 2006), § 6-7.

Transparency (ii), arbitration pursuant to the PCA Arbitration Rules (iii), arbitration pursuant to the SIAC Investment Rules (iv), arbitration pursuant to the SCC Arbitration Rules (v) and arbitration pursuant to the ICC Arbitration Rules (vi). Lastly, the UNCITRAL Model Law will also be considered (vii).

i. ICSID Arbitration

34. The conduct of ICSID proceedings is governed by Article 44 of the ICSID Convention and Article 3(1) of the ICSID Arbitration Rules. During the drafting of the ICSID Convention, the possibility of allowing tribunals to establish their own procedural framework was considered. However, this approach was ultimately deemed impractical and was therefore rejected.[50] ICSID proceedings are thus largely predetermined in the applicable ICSID instruments. Nonetheless, Article 44 of the ICSID Convention explicitly recognises the arbitral tribunal's discretion to fill procedural gaps in the absence of specific provisions in the Convention, Arbitration Rules - or permissible derogations therefrom as may be agreed upon by the parties.[51] ("*If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question*.") Tribunals are therefore granted what is often referred to as a "residual" or "gap-filling" discretion, reinforcing their role as the central procedural authority in the absence of express direction.

35. ICSID tribunals have relied on Article 44 of the ICSID Convention for a series of matters which were not explicitly provided in the Convention and the Rules, namely the power to stay proceedings pending a determination by another competent forum of a relevant issue,[52] the power to accept *amicus curiae* submissions,[53] the power to entertain mass claims[54] or the power to reopen and reconsider a decision.[55] The issues discussed in this Paper - procedural adjustments to better account for the concerns of affected local communities in investor-State arbitration - could, in principle, be addressed by tribunals under Article 44 of the ICSID Convention, provided party equality, due process and procedural integrity are maintained.

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[50] Commentary on the ICSID Convention (thereafter "Commentary"), Art. 44, §60, p. 967.
[51] Commentary, Art. 44, §1, p. 951. Any violation of the procedural provisions of the Conventions may expose an ICSID award to the annulment procedure. See Art. 52(1)(d) ICSID Convention.
[52] Commentary, Art. 44, §65, p. 968. *SGS v Philippines.*
[53] Commentary, Art. 44, §66, p. 968. *Suez and Vivendi v Argentina.*
[54] Commentary, Art. 44, §71, p. 970. *Abaclat and others v Argentina.*
[55] Commentary, Art. 44, §86, p. 974. *Chartered Bank v TANESCO.*

36. Due to the self-contained nature of the ICSID system, annulment of an ICSID award rendered pursuant to the ICSID Convention and the Arbitration Rules may only be pursued before an ICSID *ad hoc* committee ("Annulment Committee"). Among the limited grounds for annulment contained in Article 52 of the Convention, only one appears relevant[56] for the situation in which an ICSID tribunal would have resorted to a procedural tool[57] not explicitly envisaged by the Convention or the Arbitration Rules. This ground is "a serious departure from a fundamental rule of procedure" (article 52(1)(d) of the Convention[58]). For such a situation to constitute a ground for annulment, two conditions must be met: the departure must be serious, and the procedural rule departed from must be fundamental.[59] Annulment Committees have interpreted "serious" as causing material prejudice to a party and/or potentially affecting the outcome of the award.[60]

37. While the ICSID Convention clearly sets a high threshold for annulment on such procedural grounds, it offers no concrete guidance as to how these criteria should be applied in practice.[61] Annulment Committees have confirmed that mere proof of a procedural impropriety in the proceedings before the tribunal will not be enough.[62] While allegations of a serious departure from a fundamental rule of procedure have been raised in nearly all annulment proceedings, they have led to annulment, in whole or in part, in

[56] While Art. 52(1)(b) may at first sight appear relevant, it is however recognised that a manifest excess of power is understood to relate to situations in which a Tribunal wrongly concluded that it lacked jurisdiction, wrongly upheld jurisdiction, failed to apply the proper law on the merits (specifically in relation to Art. 42(1) of the Convention), decided the dispute *ex aequo et bono* without party authorization. The situation envisaged in this paper concerns procedural tools and thus seems only to be relevant for the ground in Art. 52(1)(d) relating to a fundamental rule of procedure.

[57] See Annex 1 to this Paper.

[58] Article 52 of the ICSID Convention: "Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based."

[59] Importantly, there was a general consensus at the drafting stage that not all rules of procedure contained in the Arbitration Rules would fall under the concept of "fundamental rules." Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds. *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* ("Commentary"), Art. 52, §332, p. 1312.

[60] See *Klöckner v. Cameroon* (Annulment Committees, 3 May 1985 and 17 May 1990), and *Amco Asia v. Indonesia* (Annulment Committee I, 16 May 1986).

[61] Commentary, Art. 52, §332, p. 1312.

[62] Commentary, Art. 52, §334, p. 1312, referring to *MINE v Guinea* (Annulment) and *Wena Hotels* v *Egypt* (Annulment). See also ICSID Background Paper on Annulment (2024), §104-107.

only four cases as of March 2024.[63] There is no reason to believe that the use of any of the tools identified above and in Annex 1 to this Paper, when applied appropriately, would compromise the integrity of the proceedings or meet the threshold for annulment under the Convention. An ICSID tribunal may thus consider employing such tools with confidence, provided it consults the parties, keeps them adequately informed, and ensures that each side has a fair opportunity to be heard. In this vein, an award was not annulled where a tribunal invited the parties to make submissions on an additional provision of the applicable treaty, even after the oral phase had been closed.[64] This proactive attitude was acceptable since both parties were heard on the matter. Differently, yet equally relevant, is an Annulment Committee's decision not to annul an award where a tribunal refused to allow one party to call its own witness to appear at the hearing for questioning. Absent agreement by the parties, the Annulment Committee found that the tribunal's decision did not infringe on the party's right to be heard.[65]

ii. Arbitration pursuant to the UNCITRAL Arbitration Rules and the UNCITRAL Rules on Transparency

38. The UNCITRAL Arbitration Rules recognise a tribunal's discretion to conduct the proceedings "as it considers appropriate" and subject to the procedural regulations found in the Rules and in particular the need to provide a fair and efficient process.

[63] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (annulled in full); *Victor Pey Casado and President Allende Foundation v. Republic of Chile* ("*Pey Casado I*") (partially annulled); *Amco Asia Corporation and others v. Republic of Indonesia* ("*Amco II*") (supplemental decision and rectification); *TECO Guatemala Holdings LLC v. Republic of Guatemala* ("*TECO I*") (partially annulled); *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* (annulled in full). See ICSID Background Paper on Annulment (2024), The annulment in whole or in part was based on the following arguments: lack of impartiality, violation of the right to be heard, absence or abuse of deliberation among the arbitrators, violation of the rules of evidence, violation of rules of representation, and delay. Commentary, Art. 52, §348, p. 1316.

[64] Commentary, Art. 52, §371, p. 1323, referring to *Tenaris v Venezuela II* (Annulment).

[65] Commentary, Art. 52, §387, p. 1326, referring to *Pey Casado v Chile* (Annulment).

Article 17(1) of the UNCITRAL Arbitration Rules (2021)
Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

39. The UNCITRAL Transparency Rules similarly recognise in Article 1 the discretion and authority of the arbitral tribunal to apply and, where necessary, adjust the rules.

Article 1(2)(b) of the UNCITRAL Transparency Rules (2013)
The arbitral tribunal shall have the power, besides its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case, after consultation with the disputing parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.

40. In contrast to the ICSID system, awards rendered under the UNCITRAL Rules - as well as those issued under the PCA, SIAC, SCC, and ICC Rules - are subject to annulment exclusively by the domestic courts of the seat of arbitration. Accordingly, the question of annulment in relation to these regimes will be addressed in the final section (**vii**) below, with reference to the grounds for setting aside found in the UNCITRAL Model Law.

iii. Arbitration pursuant to the PCA Arbitration Rules

41. The PCA Arbitration Rules are based on the 2010 UNCITRAL Arbitration Rules and thus also explicitly recognise the arbitral tribunal's discretion to conduct the proceedings "as it considers appropriate" and subject to the procedural regulations found in the Rules.

Article 17(1) of the PCA Arbitration Rules (2012)
Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

iv. Arbitration pursuant to the SIAC Arbitration Rules

42. The SIAC created a distinct set of rules to be applied in investor-State disputes. Although the SIAC has not yet administered ISDS cases and the rules have not been utilised yet, it is notable that tribunal discretion is expressly incorporated. Both Article 16(1) of the SIAC Investment Arbitration Rules and Article 32(1) of the SIAC Arbitration Rules provide that the tribunal shall conduct the arbitration "in such manner as it considers appropriate".

Article 16(1) of the SIAC Investment Arbitration Rules (2017)
The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute.

v. Arbitration pursuant to the SCC Arbitration Rules

43. Unlike other arbitral institutions, such as the SIAC, which have opted to develop separate rules for ISDS cases, the SCC has introduced targeted adjustments within its existing rules. As a result, the general provision found in Article 23 of the SCC Rules applies and the Tribunal shall conduct the arbitration in such manner as it considers appropriate, subject to the SCC Rules and any agreement between the parties.

Article 23 of the SCC Arbitration Rules (2023)

The arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate, subject to the Arbitration Rules and any agreement between the parties.

In all cases, the arbitral tribunal shall conduct the arbitration in an impartial, efficient, and expeditious manner, giving each party an equal and reasonable opportunity to present its case.

vi. Arbitration pursuant to the ICC Arbitration Rules

44. While the majority of ICC arbitration cases still arise from commercial disputes, a growing number of investment treaty-based arbitrations have also been initiated under the ICC Arbitration Rules.[66] Like the SCC, the ICC has introduced targeted adjustments regarding investment arbitration within its arbitration rules, particularly concerning the appointment of arbitrators in disputes involving a State or a State entity. In parallel, the ICC Court has established specialised practices for treaty-based cases, though none of these pertain to the conduct of proceedings, which remains governed by the general ICC framework as discussed in this section.[67] Pursuant to Article 22(1) of the ICC Rules, in the absence of a contrary agreement by the parties, arbitrators are free to adopt such procedural measures as they consider appropriate.

Article 22(1) of the ICC Arbitration Rules (2021)

In order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties. Such measures may include one or more of the case management techniques described in Appendix IV.

[66] The total number of investor-State disputes administered under the ICC Arbitration Rules since 1996 is 48. ICC Dispute Resolution 2024 Statistics, page 8.

[67] Andrea Carlevaris and Joel Dahlquist Cullborg, "Investment Treaty Arbitration at ICC", *ICC Dispute Resolution Bulletin* 2017(1), p. 25. These practices relate to the fixing of the place of arbitration, the preliminary screening of jurisdictional objections, the availability of emergency arbitration, the constitution of arbitral tribunals, and the exercise of its role as appointing authority.

Article 22(4) of the ICC Arbitration Rules (2021)

In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

vii. The UNCITRAL Model Law

45. Pursuant to Article 19 of the UNCITRAL Model Law and subject to its provisions, the parties are free to agree on the procedure to be followed by the tribunal. It is only failing such agreement that a tribunal "may" conduct the arbitration in such manner as it considers appropriate.

Art. 19 of the UNCITRAL Model Law

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

46. Importantly, under this provision, where the parties have ultimately selected a set of rules which does not allow them to impose an agreed procedure on the Tribunal, they will be deemed to have accepted this increased arbitral discretion.

47. To conclude on this matter, it is necessary to consider the possible setting aside of UNCITRAL, PCA, SIAC, SCC or ICC awards before domestic courts. While a review of the domestic laws of arbitral seats is outside of the scope of this paper, the UNCITRAL Model Law can be employed as a good indication of the typical grounds for annulment. Here again, there is nothing in the grounds of annulment that represents a serious obstacle to the approach proposed in this Paper. Only two grounds for annulment could *prima facie* be relevant for the envisaged scenario where an arbitral tribunal opts for a procedural tool not explicitly provided for in the rules, i.e. the grounds found in Article 34 of the UNCITRAL Model Law concerning proper notice of the arbitral proceedings or the agreement of the parties on the arbitral procedure.[68]

[68] See Article 34(2)(a)(ii) and Article 34(2)(a)(iv) in bold below.
Art. 34 of the UNCITRAL Model Law: "An arbitral award may be set aside by the court specified in article 6 only if:

48. As previously concluded with respect to the annulment of ICSID awards, the approach proposed in this Paper does not affect a party's right to present its case, nor does it override any agreement by the parties to exclude specific procedural tools, where such agreement exists. In this light, concerns that proactive procedural management of the kind discussed here could compromise the integrity of the proceedings or lead to annulment appear overstated. [69]

→ ***Summary***

- ***Procedural tools that are not specifically mentioned in the ISDS framework may still be used****, relying on tribunals' inherent powers to ensure fair and efficient proceedings.*
- ***Most ISDS frameworks provide tribunals with discretion to conduct proceedings*** *"as they consider appropriate," subject to basic procedural safeguards*
- ***ICSID tribunals possess "residual" discretion to address procedural gaps****, as long as party equality and due process are preserved.*

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a. the party making the application furnishes proof that:
(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
(ii) **the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings** or was otherwise unable to present his case; or
(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
(iv) the composition of the arbitral tribunal or **the arbitral procedure was not in accordance with the agreement of the parties**, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
b. the court finds that:
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
(ii) the award is in conflict with the public policy of this State."

[69] In fact, the same reasoning necessarily applies to the possible review of the award by courts at the enforcement and recognition stage. The grounds for recognition and enforcement found in the UNCITRAL Model Law are in this regard identical. See Art. 36(1)(a)(ii) and 36(1)(a)(iv). These grounds are mirrored in Art. V(1)(b) and V(1)(d) of the New York Convention. Lastly, ICSID awards are not subject to any further review by domestic courts at the enforcement stage. See Art. 54 of the ICSID Convention.

- ***The annulment of ICSID awards is rare*** *and there is little indication that the use of any of the suggested tools would meet the threshold for annulment.*

- ***A comparative analysis confirms that existing ISDS frameworks contain no significant barriers*** *to the kind of proactive procedural management proposed in this Paper.*

III. Perceived disincentives versus real incentives

49. Without significant barriers, as just discussed, arbitrators are well positioned to adopt a more proactive procedural management to ensure that the environmental concerns of impacted local communities - where relevant to the dispute - are properly considered in investor-State arbitration proceedings. While we have already discussed how this might contribute to the broader goal of meaningfully addressing public interest concerns in investor-State disputes, the next question is: what are the immediate, practical incentives and disincentives for tribunals to take such an approach?

50. A procedural shift in practice demands a change in perspective. The challenge lies in fostering the necessary motivation and momentum for ISDS stakeholders to collectively engage in this shift. To support them, it is necessary to address concerns about disincentives which may sometimes be perceived as insurmountable **(1)**. It will then be suggested that the evolving role of arbitral practice in the international legal order further supports the need for this procedural adjustment **(2)**. Finally, potential avenues for embedding and normalising proactive approaches within the arbitration community will be explored **(3)**.

1. Dispelling perceived disincentives

51. The structural constraints associated with the arbitration market - related to arbitrators' appointments by the parties - are often perceived as incompatible with more proactive tribunals. A key challenge lies in the fact that, despite longstanding debate over the appropriate role of arbitrators, there remains no clear consensus.

i. The competitive and reputation-based arbitration market

52. Arbitration, and particularly ISDS, operates within a competitive market[70] where arbitrators must undergo a designation and appointment process for each new case. Given this recurring selection process, an arbitrator's reputation becomes a crucial determinant of that individual's professional success, often shaping their opportunities for future appointments.[71]

53. While the notion of "reputation" undoubtedly includes professional qualities and qualifications, expertise, and legal acumen, the prior track record of an arbitrator is meticulously scrutinised by appointing parties. The underlying concern is clear: all things being equal, parties prefer to appoint arbitrators whose decisions are more predictable, minimising the risk of unexpected outcomes. While the very existence of a "predictable arbitrator" is questionable,[72] the reality is that any perceived unpredictability will act as a deterrent to appointments.

54. This emphasis on predictability may be considered as inherently discouraging arbitrators from taking novel or proactive approaches that might be perceived as unconventional or too risky by appointing parties. This reluctance[73] can be mitigated by increasing transparency - for example, through the use of a case management questionnaire completed by arbitrators during the selection phase, which allows parties

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[70] Bruno Guandalini, Economic Analysis of the Arbitrator's Function, *International Arbitration Law Library*, Vol 55, Kluwer Law International, 2020, pp. 71-128, see Chapter 2: "Identifying the Market for Arbitrators". Existing arbitrators' marketing has no other purpose than building a good reputation which is the most effective weapon in the battle of the (quality-based) market for arbitrators. See Sergio Puig, "Social Capital in the Arbitration Market", 25, 2 *European Journal of International Law* 387-424 (2014).

[71] Reputation is precisely defined as an expectation of quality regarding the service consumed by the parties to the conflict. This quality encompasses at least two essential dimensions: the predictability of the decision for the parties and its alignment with their needs. In the absence of any objective definition or measurement of this quality, an arbitrator's individual reputation thus serves as a substitute for a more formal assessment of quality. See Sophie Harnay, "Réputation de l'arbitre et décision arbitrale : Quelques éléments d'analyse économique", *Revue de l'Arbitrage*, 2012(4), p. 763; Referring to MacLeod, W.B. (2007), "Reputations, Relationships, and Contract Enforcement", *Journal of Economic Literature*, 45, 595-628. Proposals for a decentralised reputation management system are unlikely to be implemented. See "Reputation Arbitration: Building a Decentralized Reputation System for Arbitrators?" Mauricio Duarte, Kluwer Arbitration Blog, 17 March 2023.

[72] Stephan Wilske and Chloë Edworthy, Chapter II: "The Arbitrator and the Arbitration Procedure, The Predictable Arbitrator: A Blessing or a Curse?", in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Yearbook on International Arbitration* 2017, p. 90.

[73] Ema Vidak-Gojkovic, Lucy Greenwood and Michael McIlwrath, "Puppies or Kittens? How To Better Match Arbitrators to Party Expectations", *Austrian Yearbook on International Arbitration*. 2016 pp. 61-74.

to better understand an arbitrator's procedural approach and thereby reduce uncertainty.

55. Arbitration practice already illustrates how a pool of arbitrators, however small, who embrace a more community-conscious role could potentially shape the evolution of the system. For instance, the now widely accepted practice of *amicus curiae* participation was initially pioneered by proactive tribunals recognising the importance of broader stakeholder engagement, well before it was formally codified in arbitration rules.[74] This shows that meaningful changes can occur when a few actors take the lead, setting precedents that others eventually adopt.

56. A key aspect to consider is the role of the presiding arbitrator, which is a crucial factor in tribunal dynamics. While the tribunal as a whole determines the conduct of the proceedings, the presiding arbitrator often plays a pivotal role in setting the tone and direction of the process.[75] It is rather common for her or him to be granted specific powers in relation to decisions of procedure.[76] As the "conductor of the arbitral orchestra", the presiding arbitrator's role is "pivotal in ensuring a smooth-running and fair arbitration."[77]

57. Presiding arbitrators, especially the more experienced ones, may be more inclined than younger arbitrators, who are still making a name for themselves, to adopt a proactive stance without fearing reputational damage. However, while presiding

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[74] Patrick Dumberry, "The Admissibility of Amicus Curiae briefs in the Methanex case: A Precedent likely to be followed by other NAFTA Chapter 11 arbitral tribunals", ASA Bulletin, 2001, Vol 19(1), pp. 74-85. The author rightly questioned the effect of a NAFTA Tribunal allowing *amicus curiae* for the first time: "It remains to be seen whether this Award will have significant consequences for other types of investor-State arbitration mechanisms." See, *Methanex v USA*, Decision on Petitions from Third Persons to Intervene as Amicus Curiae, 15 January 2001.

[75] Eric Leikin and Clemens Treichl, "Pick Your President: Why and How Parties Should Seek to Agree on a Presiding Arbitrator", in William W. Park (ed), *Arbitration International*, Vol 37(1), pp. 121-152, Section 2.3 2.3 Role of Presiding Arbitrators. The presiding arbitrator plays a crucial role in both procedural management and decision-making, ensuring due process, enforcing procedural rules, and guiding deliberations. While decisions are generally made by majority vote, some rules even grant the presiding arbitrator a casting vote in case of a tie.

[76] Sébastien Besson, Chapter 35: "The Role of Party-Appointed Arbitrators versus That of the Chairperson", in Stefan M. Kröll, Andrea Kay Bjorklund, et al. (eds), *Cambridge Compendium of International Commercial and Investment Arbitration*, 2023, Sections 35.3.2 and 35.3.5. See for instance ICSID Arbitration Rule 32 (2022) providing that "[t]he President of the Tribunal shall determine the date, time and method of holding a hearing after consulting with the other members of the Tribunal and the parties."

[77] N. Kaplan and K. Mills, "The Role of the Chair in International Commercial Arbitration", in M. C. Pryles and M. J. Moser (eds.), *Asian Leading Arbitrators' Guide to International Arbitration* (Juris, 2007), p. 119.

arbitrators often play a pivotal role, responsibility for considering broader community interests rests collectively with all tribunal members. If the tribunal makes it clear from the outset that community concerns will be carefully considered throughout the arbitration, it empowers co-arbitrators to raise these issues later in the proceedings if the presiding arbitrator happens to overlook them.

58. The above points to a broader structural challenge in ISDS: a tension between two competing dynamics. On the one hand, there is a preference for preserving the status quo by strictly adhering to established procedural frameworks, sometimes without fully considering the specific context of each case. On the other hand, there is increasing awareness of societal expectations and the need for tribunals to adopt a more proactive role in disputes that involve broader public interests. The effectiveness of the suggested approach lies in tribunals embracing proactive engagement, not as a challenge to the parties, but as a means of fostering constructive dialogue and reaching a more balanced resolution of the dispute. If parties understand that such engagement serves to strengthen the arbitration process rather than undermine their respective positions, concerns about unpredictability or bias are likely to diminish, reducing hesitation in appointing arbitrators who adopt this approach.

ii. The perception of arbitral institutions' limited role

59. While some ISDS proceedings operate on an *ad hoc* basis, institutionally administered cases constitute the vast majority.[78] A traditional - and arguably outdated - view would assume that institutions may be reluctant to engage with matters of oversight and the conduct of proceedings because they are, in nature, administrative and non-judicial.[79] However, this perception does not accurately reflect the reality. While institutions clearly do not decide cases, they play a significant role that goes beyond pure case management: the PCA and ICSID secretariats, for instance, closely follow the work of tribunals, and the ICC Court [80] scrutinise awards before they are released to the parties.

60. Arbitral institutions have also progressively taken on a more active role in shaping the appointment of arbitrators. While traditionally viewed as neutral administrative bodies,

[78] As of March 2025, the UNCTAD database records only 73 ISDS cases without any administering institution. ICSID alone totals 864 cases followed by the PCA with 257 cases.

[79] On this "traditional view", see Rémy Gerbay, *The Functions of Arbitral Institutions*, International Arbitration Law Library, Vol 38, Kluwer Law International, 2016.

[80] And to a more limited extent the SIAC Court.

institutions are now implementing policies that exceed mere procedural facilitation.[81] Institutions are increasingly recognising their responsibility in ensuring not just procedural efficiency but also the legitimacy of the arbitral process. This shift is particularly evident in their efforts to diversify the pool of arbitrators,[82] promote transparency,[83] or provide subtle but structured guidance in the selection of arbitrators with particular expertise.[84]

61. One of the most visible policy changes in recent years is the push for greater diversity in arbitrator appointments. The historical and chronic "diversity deficit" in terms of gender, geography, and professional background among arbitrators is largely acknowledged.[85] To address this, institutions have introduced initiatives such as the ICC's "Equal Representation in Arbitration Pledge" and the London Court of International Arbitration's commitment to gender diversity in appointments.[86] The underlying rationale is that a broader, more representative arbitrator pool enhances the legitimacy and credibility of arbitration as a dispute resolution mechanism. These very considerations of legitimacy and credibility also call for appointing more proactive and community-conscious arbitrators.

62. In practice, arbitral institutions play a particularly significant role in cases where party-appointed arbitrators cannot be agreed upon. Most institutions maintain informal databases of arbitrators and often provide shortlists when making appointments (see ICSID's Panels of Arbitrators).[87] While these shortlists are ostensibly neutral, they reflect the institutions' policies and priorities, subtly shaping the market for arbitrators. By including more diverse candidates, institutions influence which arbitrators gain visibility

[81] See for instance SCC Policy on appointment of arbitrators or SIAC Code of Ethics for Arbitrators.
[82] The 2025 ICSID Statistics include statistics on appointments made by ICSID and by the parties, by gender.
[83] See for instance "New Policies and Practices at ICC: Towards Greater Efficiency and Transparency in International Arbitration", *ICC Dispute Resolution Bulletin* 2016 No. 2, p. 10.
[84] The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment provide for the establishment of a specialised list of arbitrators considered to have expertise in this area. The Rules also provide for the establishment of a list of scientific and technical experts who may be appointed as expert witnesses pursuant to these Rules. Parties are, however, not obliged to choose arbitrators and experts from these panels.
[85] Andrea K. Bjorklund, Daniel Behn, Susan Franck, Chiara Giorgetti, Won Kidane, Arnaud de Nanteuil, Emilia Onyema, "The Diversity Deficit in International Investment Arbitration", Academic Forum on ISDS Concept Paper 2020/1, 21 January 2020.
[86] In 2024, the London Court of International Arbitration (LCIA) released Equality, Diversity, and Inclusion Guidelines.
[87] The ICSID Convention entitles each Member State to designate up to four persons to the Panel of Arbitrators. The designees of a Member State may be of any nationality. They serve for a renewable term of six years.

and experience, ultimately affecting their likelihood of future appointments. Historically, appointing parties have favoured well-known arbitrators with extensive prior experience in similar disputes. However, institutional policies have gradually shifted focus toward additional considerations, such as a candidate's ability to manage proceedings efficiently, their familiarity with the subject matter, their openness to evolving procedural practices and various diversity considerations. This broader perspective should encourage the appointment of arbitrators who are not only legally sound but also capable of handling complex disputes in a way that is responsive to contemporary concerns, including public interest considerations when States are involved.

iii. The prevailing mindset shaped by the habit of adversarial proceedings

63. Another perceived challenge in advocating for a more community-conscious and proactive approach in ISDS is the reluctance - sometimes even strong resistance - toward incorporating inquisitorial elements into arbitral proceedings. A commonly held belief, particularly in the ISDS context, is that arbitration is necessarily and fundamentally adversarial - centered on the dispute between two parties - and that arbitrators should refrain from assuming an overly active role. This perception does not stem from the inherent nature of arbitration but is often shaped by prevailing legal traditions and professional training, particularly in systems influenced by common law, where adversarial procedures are more established and deeply embedded. [88]

64. A closer examination earlier in this Paper has highlighted arbitrators' inherent procedural powers, for instance to independently request evidence and determine the applicable law on their own, rendering any resistance to a more engaged tribunal approach difficult to justify. Tribunals also regularly pose questions to the parties, witnesses and experts (as well as to non-disputing parties whose participation has been admitted). The primary assumption that arbitration must be strictly adversarial does not in any event reflect the nature of the process. Arbitration is not bound by adversarial principles in the way that common law litigation might be. In actual fact, arbitration rules already blend both adversarial and inquisitorial features. Acknowledging this flexibility is

[88] See already some thirty years ago, Guillermo Aguilar Alvarez, "To What Extent Do Arbitrators in International Cases Disregard the Bag and Baggage of National Systems?", in Albert Jan van den Berg (ed), *ICCA Congress Series No. 8* (Seoul 1996), Kluwer Law International 1998, p. 149: "Although an abyss no longer lies between the Common and Civil Law systems, their procedural operation is still quite different. Just as the Civil Law lawyer continues to be overwhelmed by the prospect of discovery, the average Common Law lawyer still agonizes over the best way to approach an inquisitorial arbitrator."

essential to addressing hesitations toward a more proactive tribunal. Theoretically, no argument supports the claim that parties cannot adopt a more openly inquisitorial approach in arbitration.

65. The *Prague Rules on the Efficient Conduct of Proceedings in International Arbitration*[89] demonstrate how openly inquisitorial elements can be incorporated into arbitration procedures. These rules, designed to promote efficiency, encourage arbitrators to take a more active role in managing proceedings, gathering evidence, and identifying applicable law. Their mere existence underscores that an inquisitorial approach is *per se* not incompatible with arbitration - it is simply a matter of procedural design and agreement between the parties on the rules governing the arbitration. Admittedly, the Prague Rules have not been popular in practice[90] but the reason is not one of legal inadequacy.[91] Rather, it may be advanced that counsel, and perhaps arbitrators, have simply continued to adhere to well-established practices, including by reference to instruments such as the IBA Guidelines on the Taking of Evidence.[92]

66. A common concern about proactive arbitrators is that their approach might affect parties' rights. However, as noted earlier, a proactive tribunal as described in this Paper continues to uphold procedural fairness throughout the process. Arbitrators are merely encouraged to make full use of their existing powers while ensuring procedural fairness.[93]

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[89] The Prague Rules were developed by a working group of international arbitration experts and launched in 2018.

[90] Monique Sasson, "Is there a Usable 'Civil Law Approach' to Document Production in International Arbitration?", in *The International Journal of Arbitration, Mediation and Dispute Management*, 2024, Vol 90(2), pp. 136-156. The author notes that despite the attention that the Prague Rules received in many arbitration conferences throughout 2019 and into 2020, it is difficult to find cases in which the Prague Rules were adopted in any manner (guidance or otherwise).

[91] Tellingly, the rules were initially labelled "Inquisitorial Rules on the Taking of Evidence in International Arbitration" and later simply renamed "Prague Rules on the Efficient Conduct of Proceedings in International Arbitration." One of the reasons advanced for the low uptake of the Prague Rules is their restrictive approach to discovery and document production, as compared with the widely established IBA Rules on the Taking of Evidence in International Arbitration. See Markus Altenkirch, Malika Boussihmad, "The Prague Rules – Inquisitorial Rules on the Taking of Evidence in International Arbitration", Global Arbitration News Blogpost, May 2018.

[92] The IBA Guidelines on the Taking of Evidence in International Arbitration are a widely recognised set of procedural recommendations developed by the International Bar Association (IBA) to assist parties and tribunals in managing the collection, presentation, and evaluation of evidence in international arbitration proceedings. They were first adopted in 1999 and later revised in 2010 and 2020 to reflect evolving arbitration practices.

[93] It is worth noting that arbitral rules and national legislations do not mandate adversarial proceedings. For instance, Article 182(3) of the Swiss Federal Act on Private International Law only requires the arbitral tribunal to grant each party a reasonable opportunity to respond to the opposing party's arguments, examine and challenge evidence, present rebuttal evidence, and address any factual or legal considerations

Proactivity should be seen as a means of ensuring that arbitration remains efficient, fair, and responsive to the broader implications of investor-State disputes. If "adversarial" refers to a legal process in which parties, through their counsel, present facts and legal arguments to defend their cases, this is not inherently incompatible with a tribunal conducting proceedings in a way that considers broader implications. However, if "adversarial" is understood as a purely antagonistic process, driven solely by the parties' conflict and where arbitrators only rely on what counsel present without asking questions, then there is limited scope to address the wider implications of the case.

67. In this context, resistance to inquisitorial elements often stems from what is commonly referred to as arbitrators' "due process paranoia." Such paranoia typically leads arbitrators to refrain from any decision which may be challenged by a party, with the risk of being set aside, due to an alleged violation of the parties' due process rights. An (explicit or implicit) obligation in arbitral rules for the tribunal to take all reasonable steps to ensure the enforceability of the award may also explain this paranoia: an unwelcomed smudge on an arbitrator's track-record is to be avoided at all costs.[94] The parties' due process rights are enshrined in all arbitration rules and domestic legislations, yet the extent to which due process paranoia is warranted ultimately depends on how domestic courts, as the final arbiters of due process, approach their review. As a comprehensive review of case law across various jurisdictions demonstrates, State courts seldom interfere with arbitrators' procedural discretion and thus any concern that domestic courts may unduly interfere with tribunals' procedural decisions appears unfounded.[95]

68. Finally, it may be argued that the main disincentive to a more proactive tribunal is the reluctance of counsel and the parties themselves, who may prefer a predictable, party-driven process where they retain a high degree of control. A more proactive tribunal may be perceived as challenging such control. This may call for a gradual shift in perspective,

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raised by the tribunal itself. See Joachim Knoll, Chapter 2, Part II: "Commentary on Chapter 12 PILS, Article 182 [Procedure: principle]", in Manuel Arroyo (ed), Arbitration in Switzerland: The Practitioner's Guide (Second Edition), Kluwer Law International, 2018, p. 145.

[94] Klaus Peter Berger and J. Ole Jensen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators", *Arbitration International*, 2016, Vol 32(3), p. 420.

[95] Ibid, pp. 423, 428. Specifically, a review of case law establishes the general rule that State courts do not interfere with international arbitrators' procedural management decisions, a principle that can be likened to the discretion afforded to corporate directors and referred to as the Procedural Judgment Rule. Under this rule, courts will not second-guess an arbitrator's procedural decisions as long as they are based on a bona fide assessment of the case and are reasonable under the circumstances, thereby creating a safe harbor that shields arbitrators' procedural discretion from judicial intervention.

particularly among practitioners who are more accustomed to strictly adversarial approaches. Ideally, counsel who prioritise their client's best interests and long-term relationships would also value a thorough process that addresses all relevant aspects of the dispute to achieve a durable and effective resolution. However, in some cases, counsel may determine that opposing a more inclusive approach toward non-disputing parties better serves their client's immediate interests.

iv. Additional delays and costs

69. A rather commonsense objection to a more proactive role for arbitrators is the concern that it will lead to increased costs for the parties. The reasoning is that additional procedural steps - such as inviting *amicus curiae* participation or requesting additional clarifications - could lengthen proceedings and require additional resources. However, this perception does not necessarily hold when examined in light of the overall cost structure of ISDS and available cost-management mechanisms.

70. Firstly, in most ISDS cases, party costs - covering legal representation, expert witnesses, and other expenses - far exceed arbitrators' fees and costs and administrative expenses. The tribunal's fees, while an essential component, represent a fraction of the overall cost structure.[96] Thus, concerns about arbitrator proactivity leading to cost increases should be weighed against the far greater financial commitments already borne by the parties in the form of legal representation and evidence preparation. The behaviour of the parties and their legal counsel - often a major factor in procedural complexity and costs - was already flagged in the ongoing reform initiatives before UNCITRAL's Working Group III.[97]

71. Institutions and tribunals have various tools at their disposal to ensure that arbitration remains cost-effective, even in cases where arbitrators adopt a more proactive role. Many institutions allow for cost caps, particularly concerning arbitrators' fees. Additionally,

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[96] Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (2019), Oxford University Press, Chapter 6, p. 208. Professor Franck found that the average cost for investors' counsel was about US$5 million (in 2011 adjusted dollars), which was somewhat similar to the costs for respondent States, which averaged roughly $4.1 million. By contrast, the average tribunal and administrative costs were about US$600,000 to 800,000.

[97] Note by the UNCITRAL Secretariat "Possible reform of investor-State dispute settlement (ISDS) — cost and duration" A/CN.9/WG.III/WP.153, 31 August 2018, paras. 82-86. Ineffective costly case management was also attributed to "The perceived reluctance by tribunals to act decisively in certain situations for fear of being challenged, or of the award being set aside or annulled" (para. 91).

proactive tribunals can improve procedural efficiency by streamlining evidence submission, guiding parties toward more focused arguments, and preventing unnecessary procedural disputes, potentially offsetting any additional costs their engagement might generate.

72. Rather than seeing arbitrator proactivity as an added cost, it should be reframed as an essential tool for more effective and cost-efficient management of the proceedings. By actively engaging, arbitrators can help prevent unnecessary complications, minimise inefficiencies, and promote fairer outcomes. This perspective effectively counters the notion that greater arbitrator involvement inherently leads to higher expenses.

2. Arbitrators are called to resolve disputes, not just decide legal questions

73. Arbitration, particularly ISDS, does not operate in a vacuum. Given its significant impact on global governance - understood as principles, norms, rules, institutional mechanisms and practices guiding and regulating international affairs - ISDS arbitrators have already begun to realise that their role extends beyond merely applying legal principles to the narrow claims of the disputing parties. This is for instance evident in the way arbitral tribunals seek to maintain a certain degree of coherence and predictability by taking into account arbitral precedents despite the absence of a *stare decisis* rule in ISDS. ISDS tribunals effectively "craft and concretise dispute-overarching standards of treatment for foreign investments with prospective effects on non-parties by establishing a system of (persuasive rather than binding) precedent".[98]

74. Demands for greater transparency and accountability of ISDS arbitrators in the exercise of their role, particularly in matters of public interest, are not new but have gained increased attention In recent years[99] in the face of the backlash against investment arbitration mentioned earlier.[100] In line with these expectations, a more community-

[98] Stephan W. Schill, "Legitimacy of Investment Arbitration" in Stefan M. Kröll, Andrea Kay Bjorklund, et al. (eds), *Cambridge Compendium of International Commercial and Investment Arbitration*, 2023, Section 60.2.3. This impact is clear considering how ISDS influences the behaviour of both investors and States more generally even where they are neither directly involved nor affected by a concrete arbitration case.

[99] The questioning has become in itself an academic subject. See recently on this Crina Baltag and Mark Feldman (eds), *Reforming Arbitration Reform: Emerging Voices, New Strategies and Evolving Values*, 2024, Kluwer Law International. In the authors' view, there exists an imperative need to critically consider the legitimacy of international arbitration in the context of how new strategies and voices, evolving values, emerging rule-makers and the need for genuine inclusion (which requires awareness of intersectional identities) can lead to a new age of international arbitration.

[100] See footnote 3.

conscious and context-sensitive handling of proceedings may be warranted. Without such an approach, arbitration remains vulnerable to the risk of being perceived as an insular mechanism detached from broader societal concerns, and at risk of being perceived as unbalanced and unfair.

75. While parties expect tribunals to decide on the issues in dispute between them, effective dispute resolution might require more. As highlighted earlier, the view that arbitrators should take a broader, more contextual view of the issues at stake in investor-State disputes is gaining traction. This perspective may prove increasingly important to sustaining the credibility of investment arbitration as a legitimate forum for resolving disputes that often involve significant public interest concerns. It calls for going beyond a strict contractual or treaty-based analysis to recognise the wider legal, economic, and social contexts in which such disputes arise. In doing so, arbitrators can contribute to more durable outcomes and help prevent future disputes. Furthermore, an award that does not achieve a sustainable resolution may give rise to enforcement challenges, undermine the credibility of the arbitration system, and leave underlying tensions unresolved even after the tribunal has issued its decision.

76. Parties and affected stakeholders must be able to perceive the arbitration process as procedurally[101] fair, transparent, and accessible. These qualities are reinforced when a tribunal proactively engages with the realities of a dispute - ensuring that relevant voices and perspectives are accounted for. Community members featured in the documentary *The Tribunal*[102] in the context of the *Copper Mesa v. Ecuador* case[103] expressed that, in their view, the arbitration process should have been more transparent and accessible to the public. They also regretted what they described as "a complete lack of knowledge of the process" and of the decision-makers involved.

77. This Paper advocates for a more community-conscious and proactive approach by tribunals, in particular on environmental and climate-related issues. However, this Paper does not suggest that arbitrators are under a legal obligation to adopt this proactive approach. Rather, it proposes that this approach aligns with best practices in contemporary arbitration and contributes to the system's long-term legitimacy. Elevating

[101] Substantive legitimacy, on the other hand, is achieved when the outcome of the arbitration is viewed as just and reasonable within the larger context of global governance. This falls outside the scope of this Paper.
[102] "The Tribunal" (2024), a documentary film by Dr Malcolm Rogge, in partnership with the Columbia Centre on Sustainable Investment. Available at https://ccsi.columbia.edu/thetribunal
[103] *Copper Mesa v. Ecuador* (PCA Case No. 2012-2), Award dated 15 March 2016.

this approach to a legal duty, however, could risk over-formalising what should remain a flexible and context-sensitive exercise of discretion.

Summary

- ***Early transparency about arbitrators' procedural style can reduce concerns*** *about unpredictability and reputation.*
- ***Experienced presiding arbitrators play a key role*** *in leading proactive approaches.*
- ***Arbitral institutions can be instrumental in appointing*** *more proactive and community-conscious arbitrators.*
- ***Arbitration is not adversarial by nature. A proactive tribunal does not infringe on party autonomy and parties' rights****; it makes full use of its existing powers while ensuring procedural fairness.*
- ***Cost concerns about proactivity are often overstated****; proactive case management can improve efficiency.*
- ***A sustainable resolution of a dispute*** *can help prevent enforcement challenges and the persistence of unresolved conflicts.*
- ***Community-conscious arbitration is a best practice****, not a legal duty.*

Conclusion

78. Although local communities often bear the brunt of foreign investment-related impacts, they remain excluded from the arbitration process as their participation is constrained by the traditional party-driven structure of investor-State dispute settlement. This disconnect, now increasingly documented in academic literature and research, raises pressing questions about how ISDS can better reflect the full context of the disputes it is tasked with resolving.

79. This Paper has demonstrated that arbitral tribunals, within existing ISDS procedural frameworks, possess the discretion and tools necessary to adopt a more proactive and community-conscious approach to managing proceedings. By engaging early and meaningfully with local communities and broader social and environmental concerns, tribunals can enhance the fairness, transparency, and perceived legitimacy of investment arbitration without compromising party autonomy or procedural neutrality. The proposed shift towards proactive arbitral conduct - encouraging early dialogue, employing underused procedural mechanisms, and facilitating meaningful participation by affected stakeholders - responds to increasing calls for investment arbitration to acknowledge the local context of disputes.

80. This Paper has also confronted several possible disincentives to such procedural evolution. It examined the competitive and reputation-driven nature of the arbitration market, which can discourage arbitrators from adopting less conventional, proactive approaches. The Paper also highlighted how arbitration institutions, far from being mere administrative bodies, can play an active role in shaping the procedural culture of ISDS, including through appointments and support mechanisms. The Paper also addressed the prevailing adversarial mindset in arbitration, which often creates resistance to more inquisitorial or participatory elements in proceedings, despite the procedural flexibility that ISDS frameworks allow. Lastly, the Paper responded to concerns that a more engaged tribunal would increase the time and cost of proceedings, arguing instead that well-managed proactivity can enhance procedural efficiency and lead to more durable and legitimate outcomes.

81. If we consider future pathways to further encourage the adoption of this approach, fostering best practices may be most effectively achieved through positive incentives, particularly by recognising those who already engage thoughtfully with disputes involving local environmental and social impacts. By acknowledging individuals or institutions that exemplify such engagement, a virtuous cycle can be fostered, encouraging others to follow suit. Academia, without assuming a formal mandate, can play a meaningful role by documenting and analysing emerging trends. Research projects or surveys that examine arbitral openness to the environmental and social concerns of affected communities can enrich the field and contribute to the development of informal benchmarks or typologies.

82. Another important channel for advancing the generalisation of this approach is its integration into ongoing reform agendas. While, as this Paper has demonstrated, the current ISDS framework does allow for a more proactive consideration of public interest, embedding this approach more formally and systematically into treaty design and

institutional rules could help shift it from an exception to a standard practice. Diplomatic and professional communities can play a key role by including the procedural tools discussed in this Paper in negotiations for new treaties, as well as in the reform of existing arbitral frameworks. Institutions can also contribute in tangible ways - for example, by developing a model Procedural Order that reflects best practices for integrating relevant community interest considerations into ISDS proceedings from the outset. Such a "template" would provide arbitrators with a concrete reference point, reducing uncertainty and encouraging the adoption of these practices across various institutions.

83. The procedural shift proposed in this Paper is both practical and immediately implementable. It does not rely on systemic overhaul or treaty renegotiation, yet it can materially enhance the legitimacy of ISDS proceedings. Encouraging early procedural dialogue, deploying underused tools, and facilitating stakeholder participation can help align arbitration practice with the growing expectations of civil society, and in particular local communities who are affected by foreign investment projects and the related disputes. This concrete shift is especially pressing in disputes with environmental or climate-related implications, where the urgency and stakes for public interest are high.

84. This Paper seeks to provide an operational blueprint for ISDS arbitrators who seek to resolve disputes not in isolation, but with greater attentiveness to context. At the same time, this Paper has intentionally focused exclusively on the procedural sphere - a starting point, not an end. Future research could examine how a similarly proactive and context-attuned approach may inform the application and interpretation of the applicable law itself by tribunals. Though beyond the scope of the Paper, this complementary line of inquiry is important to anchoring the procedural evolution proposed here within a coherent and enduring transformation of arbitral practice.

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Annex 1 - Overview of the tools available in institutional arbitration

	ICSID Convention & Rules (2022)[104]	UNCITRAL Rules (2021)	UNCITRAL Transparency Rules (2013)	PCA Rules (2012)	SIAC Rules (2017)	SCC Rules (2023)	ICC Rules (2021)
Issuing a targeted invitation/call for amicus curiae *submissions*	Rule 67 neither foresees nor prohibits such invitation. The contemplated logic is one where the tribunal receives applications and decides. NB: Rule 68 on non-disputing treaty parties explicitly foresees an invitation by the tribunal	See Transparency Rules	Art. 4 neither foresees nor prohibits such invitation. The contemplated logic is one where the tribunal receives applications and decides. NB: Article 5 on non-disputing treaty parties explicitly foresees an invitation by the tribunal.	Not addressed.	Rule 29(2) provides that the tribunal may, after considering the views of the parties and having regard to the circumstances of the case, invite written submissions from a non-disputing party.	Article 3(4) of Appendix III provides that, after party consultation, the tribunal may invite a Third Person to submit written observations. No adverse inference shall be drawn from a lack of submission or response.	Not addressed.
Independent questioning of amicus curiae *during a hearing*	Rule 67 mentions only written submissions. There is no reference to such participants for the hearing.	There is no reference to such participants for the hearing. See Transparency Rules	Art. 4 mentions only written submissions.	Not addressed.	Rule 29(7) provides that the arbitral tribunal may, either on its own initiative or at the request of a party, decide to hold a hearing to allow elaboration on, or examination of, the written submission.	Article 3(7) of Appendix III allows the tribunal to request further details including through examination in a hearing.	Not addressed.

Requesting the parties to produce specific evidence	Rule 36(3) empowers the tribunal to call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding.	Art. 27(3) empowers the tribunal to call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding.	N/A	Art. 27(3) empowers the tribunal to call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding.	Rule 24 empowers the Tribunal to call upon a party to produce documents if it deems it necessary, unless otherwise agreed by the parties or prohibited by mandatory rules of law application to the arbitration.	Art. 31(3) "exceptionally" empowers the tribunal on its own motion to call upon a party to produce documents or other evidence if it deems it necessary.	Art. 25(4) empowers the tribunal to call upon a party to produce additional evidence at any stage of the proceeding.

[104] It should be noted that under Article 44 of the ICSID Convention, "If any question of procedure arises which is not covered by this Section [*Powers and Functions of the Tribunal*] or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question".

Independent calling of witnesses	Rules 38(2) and 38(4) empower the tribunal to call a witness and ask questions.	Art. 28(2) empowers the tribunal to call a witness and ask questions.	N/A	Art. 28(2) empowers the tribunal to call a witness and ask questions.	Rule. 22(1) and 22(3) empowers the tribunal to call a witness and ask questions.	Rule. 33(3) provides that witnesses on which a party seeks to rely shall attend the hearing, unless otherwise agreed by the parties.	Art. 25(2) allows the tribunal to decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.
Appointment of independent experts	Rule 39(1) empowers the tribunal to appoint independent experts unless the parties agree otherwise.	Art. 29(1) empowers the tribunal to appoint independent experts after party consultation.	N/A	Art. 29(1) empowers the tribunal to appoint independent experts after party consultation.	Rule 23(1) empowers the tribunal to appoint independent experts unless the parties agree otherwise.	Art. 34(1) empowers the tribunal to appoint independent experts after party consultation.	Art. 25(3) empowers the tribunal to appoint independent experts after party consultation.

Conducting site visits at own initiative	Rule 40 empowers the tribunal to perform a site visit on its own initiative or upon a party's request. The parties have the right to participate.	Not addressed.	N/A	Art. 27(3) empowers the tribunal to perform a site visit, after party consultation.	Not addressed.	Not addressed.	Not addressed.

Multiple Case Management Conferences	Rule 29 refers to a mandatory "First Session" and Rule 31 provides that the tribunal "shall convene one or more case management conferences" to identify uncontested facts, clarify and narrow the issues in dispute or address any other procedural or substantive issue related to the resolution of the dispute.	Not addressed. NB: A case management conference is referred to explicitly in the UNCITRAL Expedited Arbitration Rules in Art. 9 as one possible means to "consult the parties" promptly after and within 15 days of the tribunal's constitution.	Not addressed. NB: A case management conference is referred to explicitly in the UNCITRAL Expedited Arbitration Rules in Art. 9 as one possible means to "consult the parties" promptly after and within 15 days of the tribunal's constitution.	Not addressed. NB: A case management conference is referred to explicitly in the UNCITRAL Expedited Arbitration Rules in Art. 9 as one possible means to "consult the parties" promptly after and within 15 days of the tribunal's constitution.	Art. 16(3) refers to a mandatory "preliminary meeting with the parties" organised by the tribunal. Pursuant to Art. 16(7), the Court may, at any stage of the proceedings, request the parties and the tribunal to convene a meeting to discuss appropriate and efficient procedures.	Art. 28(1) refers to a mandatory initial case management conference. Art. 28(5) foresees a possibility to hold additional conferences as deemed appropriate by the tribunal.	Art. 24 refers to a mandatory initial case management conference but also foresees a possibility to hold additional conferences where necessary.