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Beyond Amicus Curiae: Enhancing NGO Roles in ICSID Environmental Disputes

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Abstract. This study examines how non-governmental organizations (NGOs) can play a more influential role in investor-state arbitration, particularly in disputes over environmental and climate change under the auspices of the International Centre for Settlement of Investment Disputes (ICSID). It argues that while the 2022 ICSID Arbitration Rules have made notable progress by offering more transparent and clearer procedures for third-party participation, NGOs' influence remains constrained, and their impact is often limited. By exploring two landmark cases, Biwater Gauff v. Tanzania and RWE v. Netherlands, the paper demonstrates that although NGO participation has contributed to raising awareness of public and environmental issues, it has had only a negligible effect on the final arbitral results. The study also suggests improving Article 67 to facilitate NGOs' submissions in cases involving climate change or human rights, and expanding Article 68 to include NGOs' ideas for treaty interpretation. These reforms would enhance the fairness and transparency of the arbitration process, ensuring ICSID decisions align more closely with environmental and public interest objectives.

Keywords: NGO Participation, ICSID Rules, amicus curiae, Investment Arbitration,Climate Disputes

1. Introduction

With the continuing worsening of the global climate crisis, investment disputes stemming from the contradiction between the protection of the environment and economic development have prompted researchers to put more emphasis on the social impact of arbitral awards. Historically, the Investor-State Dispute Settlement (ISDS) system, especially the International Centre for Settlement of Investment Disputes (ICSID) form, remained focused on the bilateral interaction between foreign investors and host states. The latter often precluded effective involvement by affected communities or civil society parties. Yet, non-state parties (NSPs) or NGOs play an active role in upholding public interest. They have special skills in figuring out how something will affect the environment and society, and they care about protecting human rights, things that don't usually come up in the usual investor–state model.

From a legal point of view, the ICSID system does let third parties get involved through amicus curiae submissions, but only to a certain extent. Nevertheless, procedural and institutional constraints frequently undermine the substantive significance of such engagement. This paper

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asserts that the ICSID Rules of 2022 unequivocally signify progress towards enhancing transparency and establishing a more formal submission process for non-parties. Nevertheless, shortcomings persist despite these improvements. This research examines seminal cases and the evolution of the law, focusing on the impact of NGO participation on the fairness and legitimacy of climate-related arbitration. It also calls for sweeping changes to make these proceedings more open to everyone.

2. Previous research: NGO participation in ICSID arbitration

As people become more aware of how important NGOs are, scholars are paying more attention to the fact that third parties, such as NGOs and concerned communities, are not allowed to participate in ICSID arbitration. The criticism is that the current system only allows limited ways for people to get involved, like amicus curiae submissions, which are only allowed if the arbitrator decides they are. This paper critically examines the current ICSID framework, the consequences of ineffective third-party participation, and the proposed revisions aimed at enhancing the influence and efficacy of NGOs.

3. The effect and feasibility of NGOs participation in ICSID

The ICSID Arbitration Rules [1] actually contain special provisions for third-party participation. Rule 65(1) may allow outsiders other than the disputing parties and their representatives to attend the hearing as observers. Rule 67 also allows for the submission of written statements by non-disputing parties, but this would need the clearance of the tribunal as well as the disputing parties—a procedural barrier that is quite high. Rule 68(1) also allows third parties for matters of interpretation of the treaty to submit views. Nevertheless, the system does not set out coherent eligibility criteria for the participation of non-disputing parties, and the extent of acceptable involvement is limited.

Indeed, Cotula [2] asserts that the current ICSID framework remains ill-suited for resolving climate-related disputes, particularly due to the limited opportunities for third-party participation in arbitration procedures. As noted by Lorenzo Cotula [2], international investment arbitration often adopts a pro-investor stance in its adjudicatory practices, creating both a regulatory chilling effect and financial disincentives that significantly limit governmental autonomy. These constraints diminish states' capacity and political will to formulate and implement robust climate measures, consequently posing systemic obstacles to worldwide climate change initiatives. Additionally, ongoing efforts to reform international investment treaties and the ISDS mechanism have thus far failed to adequately address these critical issues [2]. Cotula further highlights that domestic legal systems often afford procedural protections to third parties whose rights or interests are implicated in a dispute—for instance, through the right to intervene in proceedings [2]. He explains that, in contrast, international investment law prioritizes the bilateral investor-state relationship, permitting third-party involvement only through narrowly defined, discretionary submissions subject to tribunal approval [2]. Consequently, t the capacity for third parties to engage in and influence arbitration outcomes remains severely constrained.

In addition, Hornkohl and Melikyan [3] assert that the legitimization of ISDS mechanism necessitates the establishment of a robust procedural framework to integrate third parties into proceedings where their interests are implicated. They contend that such participation is conducive to ensuring that public interests are adequately represented and that arbitrators are apprised of essential technical expertise and empirical data prior to rendering decisions [3]. They further examine the substantive linkage between third-party procedural integration and the advancement of sustainable development objectives, emphasizing that procedural rules crucial for actualizing

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sustainable development-related provisions encompass participatory transparency within ISDS, information accessibility, access to justice, and the engagement of non-disputing third parties [3]. Additionally, they observe that the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on ISDS Reform has acknowledged an emerging consensus on the necessity of enhancing the direct involvement of affected third parties, reflecting a broader institutional recognition of the need to recalibrate the procedural architecture of ISDS to align with principles of democratic accountability and substantive equity [3].

Similarly, Ishikawa [4] emphasizes that investor-state investment disputes exert a profound implications on both the disputing parties and the broader public, given that "decisions and pronouncements of tribunals will 'have implications that go far beyond commercial impacts to such public policy objectives as the protection of the environment and public health and safety'". In this case, it is imperative to facilitate the participation of affected third parties in the arbitration process. It is also noteworthy that NGOs perform essential functions in addressing environmental concerns, evidenced by their frequent submissions of amicus curiae briefs in investment treaty arbitration [4]. Nonetheless, Ishikawa [4] underscores that significant limitations on third-party involvement persist, given that amici possess no substantive rights within arbitral procedures. Moreover, even when amicus curiae submissions are admitted, tribunals are under no obligation to incorporate such perspectives into their awards [4].

Consequently, Levine [5] delved into the role of amicus curiae in international investment arbitration, emphasizing the significance of integrating third parties into dispute settlement procedures due to the prevailing lack of public openness and scrutiny in existing arbitration mechanisms, which contributes to the delegitimization of private decision-makers [5]. Levine further contends that "there may in fact be instances where third-party involvement actually serves both to improve the legal quality of the award and to assist in the systemic development of international investment law as a whole" [5]. In the case of Glamis Gold Ltd. v. United States of America, the amicus curiae appeared to possess a more direct interest in the outcome of the proceedings than NGOs involved in prior cases [5]. Levine [5] also advocates for the tribunal to consider extending broader participation rights for third parties, including a more effective legal recourse and enhanced involvement, rather than solely submitting amicus briefs.

The extant literature consistently underscores the importance of third-party participation and its potential influence on the ISDS procedure. Nevertheless, the modalities for such engagement remain confined to the submission of legal opinions, with no clearly defined provisions regulating the participation of non-state entities within the ICSID framework. In this case, further research is warranted to examine the beneficial impacts of enhanced involvement by non-state actors, such as non-governmental organizations and affected communities, in ICSID proceedings, as well as to explore viable mechanisms to facilitate such inclusion.

4. Case study

Case 1: Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania [6]

Case 2: RWE AG & RWE Eemshaven Holding II B.V. v. Netherlands [7]

This section evaluates whether and to what extent increased participation of non-state actors, particularly non-governmental organizations (NGOs), within the ICSID framework influences the outcomes of investment disputes related to climate change. Four hypotheses are formulated to address this inquiry.

The aforementioned two cases aptly align with the research question posed central to this study. Drawing upon these cases, the following analysis will assess the validity of the proposed hypotheses

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below.

4.1. H1: greater participation of NGOs would not lead to improved outcomes in climate-related disputes

This hypothesis posits that NGOs' increased participation does not exert a significant positive influence on arbitration outcomes in climate-related investment arbitration, thereby casting doubt on the practical utility and efficacy of such involvement mechanisms.

Case 1: Although five NGOs were granted permission to submit amicus curiae briefs in this case, their involvement did not substantively impact the tribunal's final award. While the tribunal recognized Tanzania's breach of the applicable bilateral investment treaty, it attributed the absence of compensation to the investor's mismanagement and failure to fulfill contractual obligations. The NGOs' submissions addressing public interest and environmental issues were formally acknowledged, yet they ultimately bore no impact on the outcome, owing to procedural constraints —such as restricted access to documents, hearings, or critical evidence [6]. This case demonstrates NGO participation rights in ICSID's limited procedural framework cause minimal effect. NGO participation this time was not effective for affected communities, but continued evolution of more effective procedural protection for the future may better advance public interests.

Case 2: In the RWE v. Netherlands case [7], the European Center for Constitutional and Human Rights (ECCHR) attempted to submit amicus curiae briefs covering climate and human rights elements of the investor's arguments. The arbitration, however, remained suspended and eventually closed prior to the tribunal making a decision regarding ECCHR's submission. As a result, ECCHR could not impact the procedure or final result. The case never meaningfully dealt with the issue of climate change, and the coal phase-down policy remained supported by domestic court decisions, with no NGO contribution. This case illustrates how procedural barriers may deny NGO participation, and how, even when NGOs try, early case closure or institution-based barriers may deny their contribution from reaching outcomes.

4.2. H2: increased involvement of non-state actors may result in more balanced ICSID awards for environmental suits

The second supposition holds that rising involvement by non-state players makes ICSID awards more equitable. This is done by facilitating the tribunals to get more accurate and diversified information about the effects of the investment activities on the climate.

Case 1: The amicus curiae briefs provided the tribunal with highly insightful remarks regarding the public interest aspects of the case. Though procedural rights were limited, the NGOs in question adequately raised environmental and social impacts extending well beyond the investor-state claim. This implies that by gaining wider access to evidence and hearings, the tribunal potentially made a more comprehensive evaluation of human and ecological impacts. NGO participation demonstrates how third parties may assist in achieving a balance between public and regulating interests for the environment. To this extent, enabling wider opportunities for participation may result in awards which better balance investor protection and sustainable development as well as the well-being of communities.

Case 2: ECCHR aimed at submitting expert comments on how paying compensation to investors from the coal phase-out policy may slow down climate actions and do damage to public interests. Although the case closed without an award and their filing remained unaddressed, this contribution highlights the possible benefit of the same. If the tribunal had included these submissions, it may

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well have reached a more balanced evaluation of the policy impacts upon society and a more equitable determination of regulatory and investors' interests. This case illustrates how effective NGO involvement may improve the fairness and legitimacy of arbitration through the provision of climate expertise, facilitating the harmonization of results with public interest and sustainable development goals.

4.3. H3: formal third-party access for NGOs to ICSID arbitral proceedings would improve the neutrality of environmental dispute awards

It posits that NGO participation in court proceedings would enhance the arbitral fairness. As third-party participants, NGOs facilitate the incorporation of public interest and environmental issues into the proceedings. This enhances the legitimacy and equilibrium of ICSID arbitral proceedings.

Case 1: NGOs' capacity to influence tribunal reasoning was constrained by limited procedural rights. Had they enjoyed full participation—including evidence access, hearing attendance, and expert testimony—the tribunal could have better assessed the dispute's environmental and social impacts. Such enhanced involvement would promote fairer proceedings and ensure awards balance investor-state interests with community welfare and ecological sustainability.

Case 2: The procedural conclusion of the case, made without consideration of NGO submissions, reveals how ICSID rules limit effective third-party involvement. Encompassing NGOs as a full part of the process, including by presentation of evidence, contribution of climate science, and attendance at hearings, would have given the tribunal a more nuanced factual foundation for the balancing of public and investor interests. This inclusion would be especially valuable in climate cases, wherein multiple, highly interrelated scientific-policy interactions require unique, multidimensional insight.

4.4. H4: NGOs' right to bring direct claim would improve the fairness of ICSID environmental awards

It proposes the removal of NGOs' dependence for initiating actions on party agreement as a means whereby NGOs would be free to pursue larger public interests.

Case 1: The limited function of NGOs like the Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD) shows they cannot bring claims unilaterally—a privilege for states and investors only. Giving NGOs the power to bring public interest-based disputes would enable them to raise environmental impacts from the outset, bypassing narrow investor-state claims. This would enable the tribunals to consider community opinion earlier, providing a balanced and context-appropriate award.

Case 2: Since ECCHR wanted to come as amicus curiae, it could not impact the narrow focus of the dispute for the claim for expropriation by RWE. The amicus curiae submission by the organization highlighted the risk implications for the investors' arguments [8], but the arguments were not discussed substantially. If NGOs could initiate disputes, as for example by granting them the right to challenge investment claims threatening climate mitigation policies, that would enable them to provide the tribunals with expert environmental law and human rights expertise. The procedure would provide the tribunals with a better understanding of the case's social and environmental impacts, rendering the process more equitable and procedurally legitimate. The allowance of NGOs to initiate claims would ensure ICSID awards account for public interests in the climate as well as for investor protection from the beginning.

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However, while this approach would secure the complete integration of NGOs into arbitration proceedings, it violates established international legal standards governing claimant eligibility. As a result, the adoption of such a mechanism remains highly unlikely under existing frameworks. Alternative pathways must therefore be investigated to strengthen the role of NGOs in dispute settlement and improve the protection of public and environmental interests within the ISDS system.

5. Biwater Gauff Ltd. v. Tanzania

5.1. Description

In 2003, Tanzania signed a contract with Biwater Gauff and its subsidiary, City Water, for the operation and management of water and sewerage services in Dar es Salaam, with financial support arranged through the World Bank. Due to flaws in the procurement process and subsequent mismanagement, the project faced serious financial difficulties, leading to insolvency within 18 months. After failed renegotiation attempts in 2005, Tanzania's Water and Sewerage Authority ended the contract and carried out a compulsory seizure of City Water's assets. Biwater challenged these measures as amounting to unlawful expropriation under the relevant bilateral investment treaty. Approximately two months after the termination, Biwater formally initiated arbitration proceedings against Tanzania under the auspices of ICSID.

After several months of proceedings, the tribunal concluded that Tanzania had violated multiple provisions of the United Kingdom–Tanzania Bilateral Investment Treaty (BIT), including those pertaining to unlawful expropriation, fair and equitable treatment, full protection and security, and prohibiting unreasonable and discriminatory measures. Nonetheless, the tribunal awarded no monetary compensation to Biwater, as it failed to establish a direct causal link between Tanzania's treaty breaches and the alleged financial losses. The tribunal determined that Biwater's own operational mismanagement had significantly contributed to the project's failure, thereby precluding an award of damages.

The tribunal ruled that each party was to bear its own legal costs and that the arbitration costs were to be split equally.

5.2. Application of law

In this case, five NGOs—CIEL, IISD, Lawyers' Environmental Action Team (LEAT), Legal and Human Rights Centre (LHRC), and the World Conservation Union (IUCN)—jointly petitioned for leave to participate as amici curiae status pursuant to ICSID Arbitration Rule 37(2).

The petitioners emphasized the significant public interest dimension of the case, notably the human right to water and the potential environmental consequences of water services privatization. Beyond their substantive submissions, they also requested access to the key arbitration documents and sought permission to observe the oral hearing.

While the tribunal accepted the amicus curiae submission, it substantially constrained the ability of the non-governmental organizations to contribute meaningfully to the proceedings by limiting their access to case-specific documents and factual evidence. The tribunal rejected the amici's requests to review submissions filed by the disputing parties and to attend the oral hearings. In its reasoning, the tribunal noted that, under the ICSID Arbitration Rules, it lacked the authority to grant third-party attendance at hearings without the consent of the parties, which the claimant had explicitly withheld.

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The application of ICSID Arbitration Rules 37(2) in Biwater Gauff Ltd. v. Tanzania, illustrates that the 2006 version of the Rules offered opportunities for non-disputing parties—particularly those similarly affected as the principal parties—to participate in arbitration proceedings, thereby contributing to the protection of their interests and the advancement of broader public concerns. Nevertheless, even under the revised Rule 37(2), non-disputing parties have not attained substantive participatory rights; for instance, they continue to be denied access to core arbitration documents and are excluded from attending hearings absent party consent.

According to Martinez [9], the transparency standards established by ICSID for non-disputing party participation procedures are relatively limited. This issue is exemplified in Biwater Gauff Ltd. v. Tanzania, where amici curiae faced significant difficulties in obtaining essential arbitration documents. In contrast to ICSID Arbitration Rule37(2), Article 3 of the UNCITRAL Rules on Transparency imposes more extensive disclosure obligations, including requirements for public access to written submissions, transcripts of hearings, exhibit lists, expert reports, witness statements submitted in the proceedings, and arbitral awards [9].

5.3. Relevance to the research

This case represents the progressive enhancement of procedural rights for affected third parties under the ICSID Arbitration Rules, beginning with the 2006 version, which formally enabled their participation, while also revealing persistent limitations—particularly under the original Article 37(2), which has since been revised in the 2022 Rules. Compared to the 2006 version (Article 37(2)), the 2022 Rules offer clearer standards, enhanced transparency requirements, and expanded opportunities for engagement by civil society organizations. Nonetheless, NGOs continue to face substantial procedural obstacles.

Moreover, although this case is not directly linked to climate change issues, it demonstrates that in disputes involving significant public interest considerations (such as access to essential water resources and environmental protection), allowing third parties—particularly NGOs—to participate in arbitration can enable tribunals to more fully incorporate public welfare concerns into their deliberations. Such inclusion contributes to a more balanced assessment of competing interests and enhances the overall fairness and perceived legitimacy of the resulting award.

As demonstrated in Biwater Gauff Ltd. v. Tanzania, even when NGOs are allowed to participate, procedural barriers—such as being excluded from hearings and having limited submission rights—can significantly reduce their ability to influence arbitral results. If ICSID reforms were to expand participation rights beyond simply submitting written statements—for example, by providing access to evidence, allowing attendance at hearings, and ensuring updates on procedural progress—NGOs and affected communities could more effectively contribute specialized expertise and protect the interests of vulnerable groups. Such enhanced involvement would support tribunals in striking a balance between investor protection and the preservation of states' regulatory autonomy necessary for climate action.

6. RWE v. Netherlands

6.1. Description

In this case, the German utility company RWE initiated proceedings against the Netherlands in response to its 2019 Coal Prohibition Act. The legislation mandates the phase-out of coal usage in power generation by 2030—or by 2025 for less efficient plants—without providing compensation to

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operators. RWE argued that the measure constituted an indirect expropriation and breached the fair and equitable treatment standard under the Energy Charter Treaty (ECT). In June 2021, the company formally submitted a request for arbitration to ICSID, seeking compensation amounting to €1.4 billion.

Concurrently, the Netherlands initiated proceedings before German courts seeking to preclude the arbitration, asserting that intra-EU investor-state arbitration is impermissible under European Union law. In September 2022, the Cologne Higher Regional Court declared the ICSID case inadmissible, a decision partially upheld by the German Federal Court of Justice in July 2023. In the wake of these judicial determinations, RWE requested the termination of the arbitration proceedings in October 2023.

On 12 January 2024, the ICSID tribunal issued a procedural order recognizing the discontinuance of the proceedings and ruled that each party shall bear its own costs. The tribunal did not rule on the merits of the case, thereby leaving the Netherlands' coal phase-out policy unchallenged at the international level and avoiding any award of compensation to RWE.

6.2. Application of law

When the arbitration began, the ICSID Arbitration Rules had not yet been updated. Thus, in RWE v. Netherlands, NGOs sought participation under Article 37(2) of the 2006 Rules. Their application reflected growing civil society engagement in climate arbitrations, but the tribunal never ruled on its admissibility due to the case's early suspension and termination. This outcome shows both the potential and constraints of NGO participation in ICSID.

6.3. Relevance to the research

In RWE v. Netherlands, NGOs requested to file an amicus curiae brief, but the tribunal neither admitted nor assessed it due to the case's discontinuation before an admissibility decision. This shows that procedural rules like Article 37(2) cannot guarantee that climate issues are included in investment arbitration. Even when NGOs raise major public concerns, their input risks being marginalized—through early termination or tribunal discretion—diminishing climate considerations in final awards.

In light of the procedural vulnerability and discretionary nature of NGO rights under the 2006 ICSID Rules, as displayed in this case, future reforms should more effectively institutionalize the independent participatory rights of NGOs. This would serve to safeguard the public interests these entities represent and help prevent climate measures from being undermined by investor claims.

6.4. Comparison of laws

It is pertinent to note that both examined cases were adjudicated under the 2006 ICSID Arbitration Rules. Thus, in the following sections, the differences between the 2022 and 2006 versions of the Rules will be discussed to explore the advancements and long-standing shortcomings that constrain third-party participation.

A notable procedural refinement in the 2022 ICSID Arbitration Rules is the clearer regulation of the procedure for submissions by non-governmental organizations. Under the 2006 Rules, the participation of NGOs was governed by Article 37(2), which allowed tribunals to accept submissions from non-disputing parties but offered minimal procedural guidance. Submissions differed significantly, and no time limit was imposed for tribunal rulings. The 2022 Rules address

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these shortcomings through Article 67, which prescribes mandatory content of applications (applicant's interest in the dispute, the issues to be addressed, disclosure of independence and affiliations, and sources of financial support) and requires a reasoned decision within 30 days of the final written submission. This reform collectively contributes to a more predictable and accessible mechanism, thereby fostering broader and more substantive NGO engagement.

A further substantive advancement resides in the enhanced provisions for transparency and public participation. Under the 2006 framework, the publication of awards was contingent upon the mutual consent of the disputing parties pursuant to (Article 48(4)), which frequently left NGOs and other stakeholders with limited insight into case developments. The 2022 Rules mark a decisive shift toward greater openness: Article 62 introduces "deemed consent" to award publication unless a party objects within 60 days; Article 65 presumes that hearings shall be public by default, subject to any party objection, while Articles 63 to 64 facilitate the systematic publication of procedural orders and written submissions. Collectively, these measures enable NGOs to monitor proceedings more effectively, ground their amicus curiae interventions in a more informed understanding of the case, and bolster the accountability of a dispute resolution process that increasingly addresses matters of significant public concern, such as climate regulation.

Relative to the 2006 Rules, the 2022 framework grants NGOs broader participatory rights and improved access to case materials and outcomes, thereby strengthening transparency and the legitimacy of arbitration between investors and states.

7. Recommendation

Based on the foregoing analysis, and with the objective of more effectively safeguarding the procedural rights of non-governmental organizations in arbitration—particularly in cases implicating climate change—the following amendment to Article 67 of the 2022 ICSID Rules is proposed: introduce a rebuttable presumption in favor of admitting submissions from NGOs, especially in disputes involving climate change, human rights, or environmental regulation. Under such a framework, a tribunal should be permitted to reject an application only upon providing a reasoned decision demonstrating that the submission would cause substantial prejudice to the rights of a party or would otherwise unduly disrupt the fair and efficient conduct of the proceedings.

Moreover, Article 68's scope should be expanded. Now, it only permits treaty parties to provide interpretations while denying NGOs access through this route. The reforms would enable NGOs with well-defined mandates for public interest—above all, environmental and climate change NGOs—to submit views regarding treaty interpretation. Their involvement would ensure interpretations accommodate public interests by informing them of requirements for sustainability and compliance with human rights, as well as views from states.

Disputing parties should not be bound by NGO-proposed treaty interpretations, preserving arbitration integrity. Yet such submissions can provide valuable perspectives that deepen the tribunal's understanding of the legal context. This informed participation would enhance award legitimacy and fairness, while improving alignment between arbitration outcomes and international climate and sustainability obligations.

8. Conclusion

This paper argues that although ICSID has increased recognition of the potential of non-state actors, NGOs continue to face procedural impediments affecting effective participation. Cases Biwater Gauff v. Tanzania and RWE v. Netherlands demonstrate that although amicus curiae submissions

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afford some access, NGOs' impact remains constrained by procedural constraints. Contrary to assertions that increasing NGO participation is undesirable or of doubtful benefit, evidence affirms that submissions by NGOs supply necessary specialist expertise and public-interest voices for reasonably resolving climate disputes. Though the 2022 ICSID Rules augmented procedural clarity, they continue not to provide for effective non-state actor participation. Future change would do well to prioritize real change, for instance, by revamping Article 67 for the insertion of a rebuttable presumption favoring NGO submissions. This would improve the system's legitimacy and align outcomes more suitably with environmental and climate justice objectives without unfairly prejudicing investor rights.

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