

# Hearing the Voiceless: Innovations from Local and International Tribunals

Discussion Paper  
Judicial Roundtable on Legal Empowerment &  
Access to Justice

McGill University, 21 November 2011

Patrick Reynaud, Sébastien Jodoin, Prof. Konstantia Koutouki  
& Cassandra Porter



**The International Development Law Organisation (IDLO)** is an intergovernmental organization that promotes legal, regulatory and institutional reform to advance economic and social development in transitional and developing countries. Founded in 1983 and one of the leaders in rule of law assistance, IDLO's comprehensive approach achieves enduring results by mobilizing stakeholders at all levels of society to drive institutional change. Because IDLO wields no political agenda and has deep expertise in different legal systems and emerging global issues, people and interest groups of diverse backgrounds trust IDLO. It has direct access to government leaders, institutions and multilateral organizations in developing countries, including lawyers, jurists, policymakers, advocates, academics and civil society representatives.

IDLO conducts timely, focused and comprehensive research in areas related to sustainable development in the legal, regulatory, and justice sectors. Through such research, IDLO seeks to contribute to existing practice and scholarship on priority legal issues, and to serve as a conduit for the global exchange of ideas, best practices and lessons learned. IDLO produces a variety of professional legal tools covering interdisciplinary thematic and regional issues; these include book series, country studies, research reports, policy papers, training handbooks, glossaries and benchbooks. Research for these publications is conducted independently with the support of its country offices and in cooperation with international and national partner organizations.

Contact Information:

Prof. Marie-Claire Cordonier Segger  
Viale Vaticano, 106, 00165 Rome, Italy  
Tel: +39 06 4040 3200  
Fax: +39 06 4040 3232  
Email: [mcordonier@idlo.int](mailto:mcordonier@idlo.int)  
[www.idlo.int](http://www.idlo.int)

---

The mission of the **Centre for International Sustainable Development Law (CISDL)** is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

With the International Law Association (ILA) and the International Development Law Organisation (IDLO), under the auspices of the United Nations Commission on Sustainable Development (UN CSD), CISDL chairs a Partnership Initiative, International Law for Sustainable Development that was launched in Johannesburg at the 2002 World Summit for Sustainable Development, to build knowledge, analysis and capacity about international law on sustainable development.

Contact Information:

Mr. Patrick Reynaud  
CISDL Senior Manager  
Faculty of Law, McGill University  
3644 Peel St., Montreal, Quebec, H3A 1W9 Canada  
Tel: (+1) 514 398 8918  
Fax: (+1) 514 398 4659  
Email: [preynaud@cisdl.org](mailto:preynaud@cisdl.org)  
[www.cisdl.org](http://www.cisdl.org)

## TABLE OF CONTENTS

<b>INTRODUCTION .....</b>	<b>2</b>
<b>A LEARNING FRAMEWORK FOR UNDERSTANDING LEGAL EMPOWERMENT .....</b>	<b>3</b>
1. Legal Empowerment as a Process of Social Change .....	3
2. A Learning Framework for Understanding Legal Empowerment .....	3
3. Implications of a Learning Framework for Understanding Legal Empowerment.....	5
4. Application to REDD+ Readiness Efforts.....	6
<b>LEGAL EMPOWERMENT AND INDIGENOUS VOICES .....</b>	<b>8</b>
1. The Importance of Empowering Indigenous Voices in the Legal Landscape .....	8
2. The Case Law .....	9
3. Conclusions .....	14
<b>LEGAL EMPOWERMENT IN INTERNATIONAL COURTS AND TRIBUNALS .....</b>	<b>15</b>
1. Legal Empowerment for Sustainable Livelihoods .....	15
2. Access to Information in the European Court of Human Rights.....	16
3. Leave to Appeal as a Poor Person in the Caribbean Court of Justice .....	17
4. Struggling for Transparency in the International Centre for the Settlement of Investment Disputes .....	18

## LEGAL DISCUSSION PAPER

### Hearing the Voiceless: Innovations from Local and International Tribunals A Judicial Roundtable Dialogue

#### Introduction

The Commission for the Legal Empowerment of the Poor, chaired by Madeleine Albright and Hernando de Soto, released in 2008 a comprehensive Report on Legal Empowerment of the Poor (LEP).<sup>1</sup> Following the Report, the United Nations General Assembly acknowledged the importance of LEP in terms of its poverty eradication goals and initiatives.<sup>2</sup> An important emphasis of the LEP Commission Report is that over 4 billion people are “robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law.”<sup>3</sup> This Legal Discussion Paper sets out, mainly in a descriptive manner, a conceptual context and examples for innovative approaches to legal empowerment in local and international tribunals, as a background paper for a discussion on the most promising ways in which the judiciary can engage with the LEP agenda.

The first part emphasizes the central role played by social learning in the context of legal empowerment initiatives. Learning is a key micro-level aspect of legal empowerment, which has often been overlooked in legal empowerment initiatives that tend to focus on macro-level associations between legal empowerment and development outcomes. Learning is central to ensuring that vulnerable groups possess the skills, knowledge and social motivation to engage with the formal judicial system to protect their rights and seek justice. REDD+ is explored as a recent international initiative where legal empowerment as a process of learning is key to successful outcomes.

The second part specifically examines the empowerment of indigenous voices in the legal landscape, focusing on legal empowerment and the concept of reconciliation. The authors emphasize that reconciliation can be achieved by bringing indigenous laws, largely ignored in the past, into the formal legal realm. The essay analyses innovative examples of international and Canadian case law, where courts have made space for indigenous law in the process of adjudication. The establishment of alternative courts by and for indigenous peoples is also explored as a way forward in terms of legal empowerment and self-governance.

The third and final part describes three examples of recent innovations and challenges in terms of legal empowerment for sustainable livelihoods in international courts and tribunals. The role of courts in terms of legal empowerment in this context focuses specifically on access to information and access to justice. This essay examines recent progress in terms of access to information in the European Court of Human Rights, the innovative right to appeal as a poor person guaranteed by the Caribbean Court of Justice and the challenges in terms of transparency in the International Centre for the Settlement of Investment Disputes.

---

<sup>1</sup> “Making the Law work for everyone” Report on the Commission on Legal Empowerment of the Poor, Volume I, 2008.

<sup>2</sup> UNGA Resolution A/C.2/64/L.4/Rev.2, 3 December 2009.

<sup>3</sup> *Supra* note 1, at 1.

# A Learning Framework for Understanding Legal Empowerment

Sébastien Jodoin<sup>4</sup>

## 1. Legal Empowerment as a Process of Social Change

Legal empowerment is generally conceived as a *process of change* that is meant to lead to concrete improvements in the ability of the poor “to use the law to advance their rights and their interests as citizens and economic actors.”<sup>5</sup> The effectiveness of legal empowerment initiatives thus rests on their ability to go beyond mere changes in the formal legal system to focus on the multifaceted and broad solutions that can strengthen the agency of the poor in their relations with the state, market forces, and each other. In essence, legal empowerment should provide the “means of helping disadvantaged groups to gain greater control over their lives.”<sup>6</sup>

Although they display a laudable commitment to a broad conception of change, the proponents of legal empowerment generally lack a compelling causal account of the way in which law can actually lead to changes in power asymmetries and consequent improvements in the lives of the poor. For the most part, the intellectual foundations of the legal empowerment framework rest on an extensive body of empirical research in law and economics that argues that strengthening legal rights and access to justice can provide the essential enabling conditions for fighting exclusion and alleviating poverty.<sup>7</sup> One key limitation of this literature however is that it has focused on macro-level associations between legal empowerment and development outcomes and has not identified the micro-level causal mechanisms through which legal empowerment can actually deliver social change that is beneficial for the poor.<sup>8</sup>

In this brief discussion paper, I argue that learning provides a key micro-level causal mechanism for understanding the concept of legal empowerment and lay out key implications that result from understanding legal empowerment as learning, with specific reference to efforts aimed at operationalizing the global REDD+ mechanism in development countries.

## 2. A Learning Framework for Understanding Legal Empowerment

---

<sup>4</sup> Sébastien Jodoin is a Lead Counsel with the Centre for International Sustainable Development Law, a Trudeau Scholar at the Yale School of Forestry & Environmental Studies, a Fellow of the Canadian centre for international justice, and an Associate Fellow of the McGill Centre for Human Rights and Legal Pluralism.

<sup>5</sup> UN Secretary-General, Legal empowerment of the poor and eradication of poverty, A/64/133, 13 July 2009, para. 3. See also Commission on the Legal Empowerment of the Poor, *Making the Law Work for Everyone*, 2008, at 26; Stephen Golub, “What is Legal Empowerment? An Introduction,” in Stephen Golub, ed., *Legal Empowerment: Practitioners’ Perspectives* (Rome, Italy: IDLO, 2010) 9 at 13.

<sup>6</sup> Stephen Golub, “Less Law and Reform, More Politics and Enforcement: A Civil Society Approach to Integrating Rights and Development” in Philip Alston and Mary Robinson, eds., *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: OUP, 2005) 297.

<sup>7</sup> Kevin E. Davis and Michael Trebilcock, “The Relationship Between Law and Development: Optimists versus Skeptics” (2008) 56 *American Journal of Comparative Law* 895.

<sup>8</sup> Rohini Pande & Christopher Udry, “Institutions and Development: A View from Below,” Yale University Economic Growth Center Discussion Paper no 928, 2005.

Although policy-makers only implicitly acknowledge this, the concept of legal empowerment is ultimately about social learning – a deep form of learning through which individuals change some of their fundamental beliefs and attitudes as a result of their interactions with others.<sup>9</sup> In the context of legal empowerment, social learning must focus on understandings of how legal institutions, structures and behaviours reinforce cycles of poverty and ultimately how these cycles can be broken. Such social learning must involve both legal authorities and poor communities, ensuring that enhanced access to legal rights is accompanied by actual changes in legal practices and outcomes.

In their focus on reforming legal systems and enhancing access to legal services, legal empowerment initiatives can be seen as a form of policy-oriented learning,<sup>10</sup> an iterative and dynamic process through which legal authorities and poor communities acquire knowledge about the nature of the problems and challenges relating to legal exclusion, participate in experimentation to improve the ability of law to deliver positive outcomes for the poor, and develop and implement innovative solutions for legal empowerment. When successful, legal empowerment initiatives will bring legal authorities in particular to rethink their approach to the problem of legal exclusion and change their attitudes toward poor communities, thereby leading to actual changes in the way in which these authorities work with the poor to enhance their ability to use law. On the other hand, if legal authorities fail to change their conceptions of their relationship with the poor, legal empowerment initiatives may remain at the surface of formal law and may fail to lead to concrete changes in how law is practiced and enforced. The depth of learning by legal authorities will determine whether legal empowerment results in policy learning or policy failure.<sup>11</sup>

In their focus on enhancing the capacity and agency of the poor, legal empowerment initiatives also seek to stimulate multi-party processes of social learning by and between legal authorities and poor communities.<sup>12</sup> The key focus in this context is whether legal empowerment initiatives manage to lead to information transfer between legal authorities and poor communities, generate shared experiences that generate new understandings and expectations of relationships and patterns of behaviour, and generate actual empowerment, defined as “the opportunity for organizational members to use valued skills and abilities towards important goals, to gain self-confidence and to engage in co-ownership of projects.”<sup>13</sup> These are necessary to ensure that poor communities possess not only the skills and knowledge, but the social motivation to engage with formal legal authorities, structures, and services to protect their rights and seek justice.

---

<sup>9</sup> Peter A. Hall, “Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain” (1993) 25 *Comparative Politics* 275. See generally Albert Bandura, *Social Learning Theory* (Englewood Cliffs, NJ: Prentice Hall, 1977).

<sup>10</sup> Colin Bennett and Michael Howlett, “The lessons of learning: Reconciling theories of policy learning and policy change” (1992) 25 *Policy Sciences* 275.

<sup>11</sup> Peter J. May, “Policy Learning and Failure” (1992) 12 *Journal of Public Policy* 331.

<sup>12</sup> Renée Bouwen and Tharsi Taillieu, “Multi-party collaboration as social learning for interdependence: developing relational knowing for sustainable natural resource management” (2004) 14 *Journal of Community & Applied Social Psychology* 137.

<sup>13</sup> *Ibid.* at 138.

In sum, when legal empowerment stimulates positive learning by and between these two groups, it can lead to lasting and meaningful changes in legal and social relationships and practices, with enhanced opportunities and outcomes for the poor. Conversely, in the absence of learning or in the presence of incomplete learning, changes in formal access to justice and legal protections are unlikely to lead to improvements in the lives of the poor. This causal relationship is summarised in the diagram below.

### A Learning Framework for Understanding Legal Empowerment



### 3. Implications of a Learning Framework for Understanding Legal Empowerment

There are four broad implications that flow from understanding legal empowerment as learning:

- Legal empowerment initiatives that do not generate positive learning by and between legal authorities and poor communities are unlikely to lead to lasting changes in addressing power asymmetries, legal exclusion, and socio-economic marginalisation.
- The different components of legal empowerment, including legal reforms, enhancements in access to legal services, community capacity-building, and judicial training, should all be seen as a broader, long-term process of policy and social learning by state authorities, communities, international partners, and other actors.
- The design, planning, and implementation of legal empowerment programming should maximize opportunities for learning, including learning by legal authorities that leads to changes in laws, policies, practices, and attitudes, learning by the poor that leads to changes

in their ability to use law to improve their lives, and learning by international partners that leads to changes in their assistance and support.

- The effectiveness of legal empowerment should be monitored and evaluated, in part, through the use of learning assessment methodologies.

#### 4. Application to REDD+ Readiness Efforts

REDD+ is a nascent international mechanism that would provide developing countries with positive incentives, through public and/or private sources of international funding, for reducing emissions from deforestation and forest degradation and for ensuring the conservation, sustainable management, and enhancement of forests and forest carbon stocks.<sup>14</sup> REDD+ thus provides an opportunity for developing countries to improve their forestry governance and to alleviate poverty among rural and forest dependent communities.

The recent *Cancun Agreements* adopted by the Conference of the Parties to the UNFCCC in December 2010 represent a breakthrough for the eventual establishment of a REDD+ mechanism, committing developed states to providing funding for developing countries to contribute to mitigation actions in the forest sector and moving forward on a work programme to operationalise REDD+ schemes, resolve methodological difficulties, and bring them to scale.<sup>15</sup>

In the lead up to the full establishment of the mechanism at the global level, developing countries are undertaking REDD+ readiness efforts aimed at resolving the financial, technical, and legal barriers to the implementation of REDD+ at the national and local level. Among other regulatory and legal issues, the effective operation of the REDD+ mechanism in a given country requires consideration of the nature and scope of forest property, tenure, and access rights, the ownership of carbon rights and credits, the participation, engagement and rights of local and Indigenous communities, and the distribution of shared benefits derived from REDD+ measures and funding.<sup>16</sup> In this context, enhanced legal rights and access to justice mechanisms are generally presented as solutions that can enable communities to access climate finance opportunities for sustainable land and forest

---

<sup>14</sup> For an overview of the REDD+ regime, see Arild Angelsen, ed., *Realising REDD+. National Strategy and Policy Options* (Bogor, Indonesia: CIFOR, 2009).

<sup>15</sup> See Annex I: Guidance and safeguards for policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries, Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention, adopted by the Conference of the parties to the UNFCCC, 16th Session, 4 December 2010 [*Cancun Agreements*, Annex I].

<sup>16</sup> John Costenbader, ed., *Legal Frameworks for REDD Design and Implementation at the National Level* (IUCN Environmental Policy and Law Paper 77, 2009); Arild Angelsen, *Moving Ahead with REDD. Issues, Options and Implications*, CIFOR, 2008; Ross Clarke, "Moving the Redd Debate from Theory to Practice: Lessons Learned from the Ulu Masen Project," (2010) 6 *Law, Environment and Development Journal* 36.

management and thus “produce a triple dividend: improving livelihood security, stimulating economic development, and reducing concentrations of greenhouse gases.”<sup>17</sup>

However, much of the existing literature and policy thinking on REDD+ readiness efforts emphasises the importance of clarifying and securing rights and benefits in the structure and delivery of REDD+, without addressing the ability of such reforms to lead to actual changes in outcomes for local communities. As such, most of the proposed legal and institutional arrangements for REDD+ in different countries have focused on the provision of formal rights and protections, without consideration of the ways to provide communities with the capacity, agency, and knowledge to access the benefits of these rights and protections.<sup>18</sup> In this way, they repeat the mistakes of previous legal empowerment initiatives in the context of natural resource governance, where poor and marginalised communities have been accorded resource rights, but not access to the benefits of these rights, by legal authorities committed to retaining control over resources.<sup>19</sup> These are in effect bandaid solutions that avoid solving the governance problem by developing rights that fail to be realized on the ground.

An understanding of legal empowerment as a process of learning could significantly enhance existing approaches to REDD+ readiness by focusing on the ability of different legal empowerment interventions to generate opportunities for positive social learning by and between legal authorities and poor communities. In fact, many leading REDD+ readiness efforts have been explicitly set up as iterative processes for learning and have included extensive consultations, community-level capacity-building, multi-sectorial working groups, and community-based demonstration projects. Despite this promise, in the end, whether or not REDD+ can deliver benefits for poor communities will depend in large part on whether legal authorities and poor communities have learned from one another and have durably transformed their relationships and practices.

---

<sup>17</sup> U.N. Secretary-General, *Legal empowerment of the poor and the eradication of poverty*, UN Doc. A/64/133, 2009, para. 9.

<sup>18</sup> See, e.g., Tom Griffiths and Francesco Martone, “Seeing ‘REDD’? Forests, climate change mitigation and the rights of indigenous peoples and local communities,” Forest Peoples Programme, May 2009, available at: <[http://www.rightsandresources.org/documents/files/doc\\_923.pdf](http://www.rightsandresources.org/documents/files/doc_923.pdf)>.

<sup>19</sup> Jesse Ribot and Nancy Lee Peluso, “A Theory of Access,” (1998) 68(2) *Rural Sociology* 153.

## Legal Empowerment and Indigenous Voices

Prof. Konstantia Koutouki & Ms. Cassandra Porter<sup>20</sup>

### 1. The Importance of Empowering Indigenous Voices in the Legal Landscape

The historical and persistent failures of dominant legal regimes for indigenous peoples, and the results of such failures, are abundant and well-documented. Around the world, indigenous peoples are disproportionately affected by poverty, health and social problems, incarceration, violence and a variety of rights violations.<sup>21</sup> Yet some Canadian and international case law underlines how the law *can* be made to work for indigenous peoples, by empowering indigenous voices in the legal landscape. Overwhelmingly, these indigenous voices are calling for the right to exist, to thrive, to continue into the future as Indigenous peoples with distinct cultures, spirituality, languages and traditional ways of life and to self-determination.<sup>22</sup>

The concept of reconciliation, as a process of balancing the interests and claims of states and indigenous peoples, has emerged internationally as a possible approach to achieving the goals sought by indigenous peoples around the world. The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the UN General Assembly in 2007 and was touted by UN Secretary-General Ban Ki-moon as “a momentous opportunity for states and indigenous peoples to strengthen their relationships [and] promote reconciliation.”<sup>23</sup> Justice Binnie of the Supreme Court of Canada stated in *Mikisew Cree* that “[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.”<sup>24</sup>

But how can such a reconciliation be achieved? In practical terms, one way of working towards reconciliation is to bring indigenous laws, largely ignored in the past, into the legal realm. Doing so can ensure that indigenous peoples are judged by their own laws, according to their own values, and can therefore more meaningfully engage with the law. Decisions in domestic Canadian and international law seek to do this in three main ways—through recognition, sharing the space and allowing for alternatives. Some judges have taken the initial step of recognizing the continued existence of indigenous laws, customs, values and traditions, and of acknowledging their inherent value. Others have freed up spaces within mainstream legal institutions where indigenous laws are able to operate and thrive. Still

---

<sup>20</sup> Konstantia Koutouki is a Professor at the Université de Montréal and the Lead Counsel for Natural Resources at the Centre for International Sustainable Development Law. Cassandra Porter is a member of the joint Centre for International Sustainable Development Law – International Development Law Organisation Legal Research Group.

<sup>21</sup> UNDP, *Making the law work for everyone – Volume 1 – Report of the Commission on the Legal Empowerment of the Poor* (New York, Commission on Legal Empowerment of the Poor, 2008).

<sup>22</sup> *State of the World's Indigenous Peoples*, ST/ESA/328, UNFPII (14 January 2010)

<sup>23</sup> UN, *Background Note: Reconciliation between states and indigenous peoples highlighted on International Day*, online: International Day of the World's Indigenous Peoples <<http://www.un.org/events/indigenous/2008/bkgd.shtml>>.

<sup>24</sup> *Mikisew Cree First Nation v Canada* (Minister of Canadian Heritage), [2006] 3 SCR 388, 2005 SCC 69, at para 64 [*Mikisew Cree*].

others advocate for institutions that will allow indigenous laws to operate more or less independently from the dominant legal systems.

## 2. The Case Law

### a) *Recognition of Indigenous Laws*

In Canada and internationally, courts are beginning to recognize the continued existence of indigenous laws, and to affirm their inherent value. Canadian indigenous scholar John Borrows points out that Indigenous peoples' laws still exist and "hold modern relevance for themselves and for others, and can be developed through contemporary practices." As such, he argues, they should be recognized and affirmed as, in this case, forming part of Canadian law and constituting an enriching force within it.<sup>25</sup> Section 35(1) of the Constitution Act of 1981 provides a space for these laws, by broadly recognizing and affirming the "existing aboriginal and treaty rights of the aboriginal peoples of Canada."<sup>26</sup> Since that time, a few Canadian judges have been particularly outspoken concerning the status of indigenous legal traditions. For example, ruling in a class action in response to the Indian Residential School settlement, Justice Kilpatrick of the Nunavut Court of Justice brings notions of Inuit justice into the courtroom, as he mentions their importance in any response to residential schools. He writes:

"The Inuit understand justice to be a dynamic human process. It is 'doing justice' that is important. Justice is a process that restores harmony and balance to relationships that are damaged. Success is not measured solely by the size of an individual's damage award, but by the number of survivors and their families who can be reconciled with their past. The Inuit expression of justice is multi-dimensional and encompasses the interests and needs of all who are affected by the problem at issue."<sup>27</sup>

Other Canadian judges have highlighted the extensive work that needs to be done, inside and outside of the courts, in order for these laws to be recognized. Justice Vickers in *Tsilhqot'in*, a case before the British Columbia Supreme Court, underlines what he sees as the importance of his judgment in the Aboriginal title claim before him:

... this judgment features Tsilhqot'in people as they strive to assert their place as First Peoples within the fabric of Canada's multi-cultural society. The richness of their language, the story of their long history on this continent, the wisdom of their oral traditions and the strength and depth of their characters are a significant contribution to our society. Tsilhqot'in people have survived despite centuries of colonization. The central question is whether Canadians can meet the challenges of decolonization.<sup>28</sup>

In this statement, Justice Vickers acknowledges the distinctive nature of indigenous traditions and calls upon Canadians to appreciate the potential contribution of these traditions to Canadian culture. Although he is trying to do his part to recognize indigenous

---

<sup>25</sup> John Borrows, *Canada's Indigenous Constitution*. (Toronto: University of Toronto Press, 2010) at 9-11. [*Constitution*]

<sup>26</sup> *Constitution Act* 1982, being Schedule B in the *Canada Act 1982 (UK)*, 1982, c 11.

<sup>27</sup> *Ammaq et al. v. Canada (Attorney General)*, 2006 NUCJ 2 at para 62.

<sup>28</sup> *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, at para 20 [Tsilhqot'in].

perspectives, he also makes it clear that this task is more appropriately done outside “the adversarial milieu of a courtroom.”<sup>29</sup>

Internationally, the protections for indigenous rights to their cultures (of which legal systems form a part) are becoming more robust. Indigenous legal systems are recognized in the Universal Declaration on Indigenous Rights. Article 5 states that “[i]ndigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”<sup>30</sup> The International Labour Organization Convention 169 (Convention concerning indigenous and tribal peoples in independent countries)<sup>31</sup> provides an array of measures to empower indigenous peoples, from recognition to the right to their culture and way of life to the consultation and participation of indigenous peoples in policy and development issues that touch their communities. Article 27 of the *International Covenant on Civil and Political Rights* states that “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”<sup>32</sup> The article has been used in several cases to force states to recognize and protect collective indigenous rights to their cultures.<sup>33</sup> James Anaya indicates that both the Human Rights Committee and the Inter-American Commission on Human Rights of the Organization of American States have understood this international norm of cultural integrity to “cover all aspects of an indigenous group’s survival as a distinct culture,” including “economic or political institutions and land use patterns, as well as language and religious practices”<sup>34</sup> and extends “special legal protections” to these institutions.

In the landmark 2001 case of *Awas Tingni v. Nicaragua*<sup>35</sup> before the Inter-American Court of Human Rights, the court found that Nicaragua, by denying that the Awas Tingni held either legal title or ancestral rights to a certain tract of land, were violating certain provisions of the American Convention on Human Rights. Nicaragua was ordered to “carry out the delimitation, demarcation and titling of the corresponding lands of the members of the *Awas Tingni Community*, within a maximum term of 15 months, with full participation by the Community and *taking into account its customary law*, values, customs and mores” (emphasis

---

<sup>29</sup> *Tsilhqot’in*, *supra* note 8 at para 1357.

<sup>30</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution*, UNGAOR, 61<sup>st</sup> Sess, Supp no 49, UN Doc A/RES/61/295, (2 October 2007)

<sup>31</sup> *Convention (No. 169) concerning indigenous and tribal peoples in independent countries*, 27 June 1989, 1650 UNTS 383, 72 ILO Official Bull 59 (entered into force 5 September 1991).

<sup>32</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1996, 999 UNTS 171 (entered into force 23 March 1976).

<sup>33</sup> See, for example: *Chief Bernard Ominayak and Lubicon Lake Band v. Canada* (1984), UN Human Rights Committee, CCPR/c/38/D/167; *Kitok v. Sweden* (1988), Communication No. 197/1985, UN Doc Supp No 40 (A/43/40) at 221; *Sandra Lovelace v. Canada* (1981), Communication No. R.6/24, UN Doc Supp No 40 (A/36/40) at 166.

<sup>34</sup> James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 2004) at 134.

<sup>35</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), Inter-Am Ct HR (Ser C) No 79 at para 103(k) [Awas Tingni].

added).<sup>36</sup> In other words, although the case mainly concerns a question of land rights, indigenous laws and customs were also recognized and brought into the decision. The International Court of Justice Advisory Opinion on Western Sahara recognized that the presence of the Sahrawi meant that the territory was not *terra nullius*.<sup>37</sup> Overall, these cases paint a picture of Canadian and international laws that are beginning to recognize the existence and value of indigenous rights and, more specifically, indigenous legal orders.

*b) Sharing the space: Providing forums for indigenous laws and ways of knowing within legal systems*

Beyond the initial step of judicial recognition, some Canadian and international cases also point to the possibilities for making a space within the dominant legal system for indigenous laws to operate. One example of how this has been done in Canada is by expanding the rules of evidence in order to accommodate different forms of evidence, such as oral testimony, into the courtroom. In *Mitchell v. MNR*, McLachlin CJ writes that “it is imperative that the laws of evidence operate to ensure that the aboriginal perspective is ‘given due weight by the courts’.”<sup>38</sup> By improving the rules to make these different forms of evidence admissible, judges are thereby allowing indigenous legal perspectives to operate more freely in the courts. Another approach to creating legal spaces where indigenous perspectives can be heard is through the establishment of alternative processes within judicial institutions that can be adapted to the needs of indigenous peoples. The 1992 case *R v. Moses* concerned a 26-year old indigenous man who plead guilty to a breach of probation for carrying a weapon for the purpose of assaulting a police officer and of theft. In that case, Stuart J. of the Yukon Territorial Court advances a powerful argument for the kind of sentencing circle that was used in that case. He argues that there needs to be a recognition of “the fundamental difference between Aboriginal and western cultures.” He writes that if “we genuinely seek [indigenous] partnership in resolving crime, a process that fairly accommodates both value systems must emerge. The circle has the potential to accord greater recognition to Aboriginal values, and to create a less confrontational, less adversarial means of processing conflict.”<sup>39</sup> Also in the criminal law context, *R v. Gladue*<sup>40</sup> explains that judges are required under section 718.2(e) of the Criminal Code to consider “all available sanctions other than imprisonment that are reasonable in the circumstances,” and to pay “particular attention to the circumstances of aboriginal offenders.”<sup>41</sup> The section encourages sentencing judges to employ restorative approaches to sentencing, in particular when indigenous peoples are involved. A few jurisdictions have even created Gladue courts, available to self-identifying indigenous peoples, in order to facilitate this somewhat non-conventional approach to sentencing.

In other situations, formal institutions have been established which allow for but do not require the inclusion of indigenous legal perspectives. The Saskatchewan Human Rights Commission’s rules are flexible enough to allow for the use of talking circles led by an

---

<sup>36</sup> *Avas Tingni*, *supra* note 15 at para 173.

<sup>37</sup> *Western Sahara*, Advisory Opinion [1975] ICJ Rep 12.

<sup>38</sup> *Mitchell v. MNR*, [2001] 1 SCR 911, 2001 SCC 33 at para 37.

<sup>39</sup> *Regina v. Moses*, [1992] 3 CNLR 116, 71 CCC (3d) 347.

<sup>40</sup> *R. v. Gladue*, [1999] 1 SCR 688.

<sup>41</sup> *Criminal Code*, RSC 1985, c C-46 s 718.2(e)

Elder.<sup>42</sup> Through Federal Court Rules 383 to 385, cases get sent to case management or dispute resolution, where a judge or prothonotary can “fix and conduct any dispute resolution or pre-trial conference that he or she thinks is necessary.”<sup>43</sup> At this point, if the parties agree, a dispute resolution approach involving indigenous perspectives, laws and Elders can be introduced. Meanwhile, the Quebec Code of Civil Procedure indicates that a presiding Superior Court judge may, at the request of the parties, convene a “conférence de règlement à l’amiable.”<sup>44</sup> This conference aims to bring together the parties so that they can communicate, negotiate, identify their interests and positions and come up with a mutually satisfactory resolution.<sup>45</sup> Although it is not specified in the rules, this forum could also provide a space outside of the formal and adversarial court setting where indigenous legal perspectives could operate more easily.

The general principles of international law give less direction as to how a space for indigenous perspectives can be carved out in legal forums. However, cases from the European Court of Human Rights on matters not concerning indigenous peoples have argued that the right to life and the respect for private life and property is not just a negative right, but that it imposes positive duties on governments to take appropriate action to secure these rights<sup>46</sup>. If extended to the context of the recognition of indigenous cultures under international law that is outlined above, these decisions could be read as guarantees of effective remedies when indigenous rights are violated, which could include, in the case of violations of indigenous culture, including indigenous approaches to justice within the dominant legal system. Likewise, a General Comment on Article 27 of the ICCPR indicates that the article may require certain states to take “positive legal measures to ensure the effective participation of members of minority communities in decisions which affect them ... The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.”<sup>47</sup> Such positive measures could include making space for indigenous laws within a given legal system. Clearly, domestic and international laws are increasingly bringing indigenous voices into the decision-making arena, but have also found the value in doing so.

*c) Alternatives: Establishing alternative courts by and for indigenous peoples*

An alternative way of ensuring that indigenous laws are not just recognized, and not just given space, but actually given the opportunity to thrive, is to allow for the existence of alternative courts and legal processes that are by and for indigenous peoples. These institutions can maintain a certain independence from the dominant legal system, while nonetheless feeding into it if needs be. In Canada, the recognized right of self-government supports enabling the creation of such institutions for indigenous peoples. In *Cameron et al v.*

---

<sup>42</sup> *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s. 28(1).

<sup>43</sup> *Ibid.* at Rule 385(1)(c).

<sup>44</sup> Quebec Code of Civil Procedure, RSQ, c-C25 at 151.15.

<sup>45</sup> *Ibid.* at 151.16.

<sup>46</sup> *Guerra and others v. Italy*, No 14967/89 [1998] ECHR 7.; *Lopez Ostra v. Spain*, No 16798/90 [1994] ECHR 46.

<sup>47</sup> Human Rights Committee, *General Comment 23*, Article 27 (50<sup>th</sup> session, 1994), UN Doc HRI/GEN/Rev.6 at 158 (1994).

*AG British Columbia and Nisga'a Nation et al.*, Justice Williamson of the British Columbia Supreme Court explicitly acknowledges this right, noting that it is constitutionally guaranteed by section 35.<sup>48</sup>

Examples of such parallel legal systems in Canada include the Tsuu T'ina and Siksika Nations in Alberta. The Tsuu T'ina First Nations Court and Peacemaking was implemented in consultation with the Tsuu T'ina, provincial and federal justice agencies. It was an attempt to address some of the inadequacies of the mainstream justice system in reducing conflicts in the community.<sup>49</sup> Conceived of and constituted by indigenous peoples, the court operated as both a regular provincial court or, for those who elected to participate, as a peacemaking. Therein, the peacemaker would convene a circle composed of those involved in the conflict, community members and always an Elder, who would discuss and decide the appropriate reparations and actions that should be taken, and verify that these were carried out. In this way, the court represented a blend of Canadian criminal law and indigenous justice practices.<sup>50</sup> The Siksika also operate their own traditional mediation process, or Aiskapimohkiiks, in relation to child protection and family issues before the Siksika Provincial Court. A trained Siksika mediator, in consultation with a Siksika Elder, conducts these mediations. The case is either resolved through mediation, or sent to arbitration within the same court.

The right of indigenous peoples to self-government, and by extension the right to govern one's legal affairs (albeit subject to some territorial control by the state) is widely recognized in international law as well.<sup>51</sup> Parallel courts based on indigenous justice principles can also be found in, among other places, the United States. All tribes are granted concurrent jurisdiction over enumerated felony crimes under the Major Crimes Act, within the limits of the Indian Civil Rights Act's provision on sentencing. Therefore, conflict is addressed according to indigenous justice principles, through family or community forums, as well as through traditional, quasi-modern and modern tribal courts.<sup>52</sup> John Borrows suggests that these "tribal courts are vital sites for the reproduction and harmonization of law in their sphere of influence."<sup>53</sup> Such institutions provide concurrent indigenous approaches to justice, thereby guaranteeing a strong and growing voice for indigenous peoples within legal systems. In fact Claire L'Heureux-Dube, discussing bijuralism, states that, "some have, moreover, predicted that the federal government may in the future have 'a preoccupation with harmonizing federal law with aboriginal law.' That is a fascinating story but best left for a future lecture on trijuralism."<sup>54</sup>

---

<sup>48</sup> Campbell v. British Columbia, 2000 BCSC 1123 at 137.

<sup>49</sup> Alberta Legislative Assembly, A New Direction: Report of the Review team established to study the Tsuu T'ina Nation Proposal for a First Nation Court (September 1998) (Chair: Karen Kryczka, M.L.A.).

<sup>50</sup> Justice LST Mandamin, in consultation with Ellery Starlight and Monica One-spot. "Peacemaking and the Tsuu T'ina Court" in Wanda D. McCaslin, ed., *Justice as Healing: Indigenous Ways, Writings on Community Peacemaking and Restorative Justice from the Native Law Centre* (St. Paul, MN: Living Justice Press, 2005) 349.

<sup>51</sup> Federico Lanzerini, "Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples" (2006) 42 Texas International Law Journal at 181-2.

<sup>52</sup> Ada Pecos Melton, "Indigenous justice systems and tribal society." (Nov-Dec 1995) 79:3 *Judicature* 126 at 132

<sup>53</sup> Constitution, supra note 5 at 210.

<sup>54</sup> C. L'Heureux-Dube, "Bijuralism: A Supreme Court of Canada Justice's Perspective" (2002) 62 La. L. Rev. 449 at 453

### **3. Conclusions**

Many challenges exist in the struggle to recognize, make space for and establish institutions for the empowerment of indigenous legal voices. For instance, although legal efforts to recognize indigenous laws may prove fruitful, politics can play a significant and difficult to predict role in the realm of rights recognition, and may quickly undo any gains that have been made by the courts. Also, jurisdictional and constitutional issues can easily arise as indigenous judicial approaches are increasingly recognized within mainstream justice institutions, and these must be carefully managed or, if possible, avoided. Yet despite these challenges, indigenous people are being heard more and more loudly about their unique legal systems, and their importance in building a just society.

# Legal Empowerment in International Courts and Tribunals

Patrick Reynaud<sup>55</sup>

## 1. Legal Empowerment for Sustainable Livelihoods

International Courts and Tribunals have an important and sometimes overlooked role in terms of legal empowerment of vulnerable and marginalized populations. This short essay will present an introduction to some of the challenges and innovative practices in terms of legal empowerment in International Courts, through an examination of legal empowerment processes in the European Court of Human Rights (ECHR), the Caribbean Court of Justice (CCJ) and the International Centre for the Settlement of Investment Disputes (ICSID).

The analytical framework with which we will examine judicial innovations and challenges is that of legal empowerment for sustainable livelihoods. The sustainable livelihoods approach “moves the focus of poverty away from the ‘needs’ of the poor and towards their energies, talents, knowledge and adaptive strategies.”<sup>56</sup> This does not signify that public institutions should leave vulnerable populations to fend for themselves. Rather, and of particular significance in the judicial context, vulnerable populations have a right to supportive State policies and assistance that goes beyond the prevention of marginalization.<sup>57</sup> The right and the opportunity to pursue a livelihood through participation in decision-making and legal empowerment is the cornerstone of the sustainable livelihoods approach, and one where the judiciary can make a significant difference. Effective participation in decision-making requires access to information, and access to justice is a precondition of legal empowerment.

Useful elements in terms of promoting sustainable livelihoods through the judiciary include proactive steps to ensure access to justice for vulnerable communities. This entails addressing systemic issues, rather than the narrower complaints of those able to access the justice system.<sup>58</sup> Alternative mechanisms for redress, characterised by lower costs and simplified procedure, can also be effective tools in terms of access to justice. Issues linked to the overall transparency and accountability of judicial institutions and procedures, as well as access and presence of civil society in the judicial context, are also key elements.<sup>59</sup> In the international legal context, public participation and access to justice was identified as a principle of sustainable development in the 2002 New Delhi Declaration of the International Law Association. This principle is enshrined in the 1998 *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental*

---

<sup>55</sup> Patrick Reynaud is the Senior Manager of the Centre for International Sustainable Development Law, and a Legal Specialist at the International Development Law Organisation.

<sup>56</sup> Ashfaq Khalfan, ‘Promoting Sustainable Livelihoods and Conflict Prevention through Legal and Judicial Reform’ in Marie-Claire Cordonier Segger & Judge C.G. Weeramantry (eds) *Sustainable Justice* (Leiden: Martinus Nijhoff Publishers, 2005) 479, at 483.

<sup>57</sup> Kristin Helmore & Naresh Singh, *Sustainable Livelihoods: Building on the Wealth of the Poor* (Bloomfield: Kumarian, 2001) at 1-4.

<sup>58</sup> Khalfan, *supra* note 51, at 481.

<sup>59</sup> *Ibid* at 482.

*Matters*<sup>60</sup> (*Aarhus Convention*). This treaty emphasizes the importance of access to information, public participation in decision-making, and access to justice in environmental matters.<sup>61</sup> The remainder of this essay will consider examples of how judicial approaches to sustainable livelihoods have fared in international courts.

## 2. Access to Information in the European Court of Human Rights

The ECHR was established in 1959 under Article 19 of the *European Convention on Human Rights*.<sup>62</sup> The court held its first session in February 1959, and by 2008 had rendered its 10,000<sup>th</sup> judgment. Any persons who feel that their rights have been violated under the *Convention* can start proceedings against a State that is party to the *Convention*. Parties are members of the Council of Europe, which is distinct from the European Union.

Access to information under the *Convention* is guaranteed under the procedural requirements of Article 2 (the right to life) as well as Article 8 (the right to privacy). In *McGinley and Egan*<sup>63</sup> the ECHR found that when public authorities engage in hazardous activities which might involve hidden adverse risks to health, they must establish an effective and accessible procedure to enable individuals to seek all relevant information. This case involved British military personnel who allegedly suffered adverse health consequences from exposure to radiation in the course of nuclear testing. The court chose to establish a proactive requirement for States to empower individuals who are at risk because of circumstances linked to State activities. Overall, the court emphasized that the State must respond in a manner proportionate to the degree of risk suffered by the individual, which in these circumstances were high.

More recently, in *Társaság a Szabadságjogokért v. Hungary*, the Hungarian Civil Liberties Union brought a case against Hungary after the Hungarian Constitutional Court refused to divulge the content of a Parliamentary complaint.<sup>64</sup> The ECHR emphasized that “it cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information.”<sup>65</sup> Most notably, the ECHR noted the important role of civil society organisations such as the Civil Liberties Union in the democratic process, and the vital aspect of access to information in terms of fulfilling this role. If organisations are barred from accessing materials from public debates, “they may

---

<sup>60</sup> This regional convention is open to participation by members or consultative members of the UNECE (including North America and the former Soviet States of Central Asia). An annex lists the activities and installations in respect of which public participation provisions apply, including refineries, power stations, nuclear reactors and installations, smelters, chemical plants, mines and waste management installations. It applies not just to transboundary activities, but also to national activities

<sup>61</sup> See [http://cisdl.org/tribunals/principles005\\_001.htm](http://cisdl.org/tribunals/principles005_001.htm) for further discussion of the sustainable development principle of ‘openness’ in international law.

<sup>62</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5, art. 6 [*Convention*].

<sup>63</sup> *McGinley and Egan v. The United Kingdom* (case no.10/1997/794/995-996) 9 June 1998

<sup>64</sup> (case no. 11721/04) 14 April 2009.

<sup>65</sup> *Ibid* at para. 27.

no longer be able to play their vital role as “public watchdogs” and their ability to provide accurate and reliable information may be adversely affected.”<sup>66</sup>

The ECHR has arguably interpreted the *Convention* in a manner that prevents States from withholding information from the public, and at times may even involve a proactive element of disclosure. As mentioned above, access to information is a precondition of the participatory decision-making process in the context of the sustainable livelihoods approach. Vulnerable populations will often form community organisations and other grassroots movements in order to ensure that their voice is heard in the public debate. The ECHR has in this context taken some steps to ensure that such organisations will benefit from accurate and reliable information, which can form a basis to support or contest the decisions of policymakers.

### 3. Leave to Appeal as a Poor Person in the Caribbean Court of Justice

The CCJ is a much younger judicial body than the ECHR, and was created under the *Revised Treaty of Chaguaramas* in 2001.<sup>67</sup> This court has an unusual hybrid role, as it functions both as a regional court, interpreting the *Treaty*, as well as a final appellate court for several CARICOM States, thereby replacing the Judicial Committee of the Privy Council in the United Kingdom. The establishment of the CCJ as a final appellate court reflected a need for judges having internalized the values informing the content of Caribbean social reality.<sup>68</sup>

In early judgments under its original jurisdiction, the CCJ was quickly confronted with the issue of access to justice. In fact, the very first case heard by the CCJ concerned the grant of a special leave to appeal.<sup>69</sup> The CCJ affirmed its authority to hear cases even if there was no appeal as of right and no basis for the court below to grant an appeal, if a possibility of a substantial miscarriage of justice or an egregious error in law was present.<sup>70</sup>

The CCJ Rules involve an interesting innovation meant to facilitate access to justice for low-income groups. Article 10.17(3) states that: “A party to whom leave has been granted to appeal or to defend an appeal as a poor person, shall not be required to provide security for costs or to pay any Court fees.” Leave to appeal as a poor person is granted if the worth of the applicant’s assets are below an amount stated in the Court Rules, or if the court is satisfied that the applicant is unable to provide the security required by the Court Rules. In *Ross v. Sinclair*, the CCJ, ruling for the first time on this topic, affirmed its residual authority to grant leave to appeal as a poor person notwithstanding any decision on provision of security by the courts below.<sup>71</sup> In effect, this signified that an order by the CCJ granting leave to appeal as a poor person would automatically annul any order below as to security. It is

---

<sup>66</sup> *Ibid* at para. 38.

<sup>67</sup> *Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy*, July 5, 2001 [Treaty].

<sup>68</sup> Caribbean Community Secretariat, *The Caribbean Court of Justice: What it is and What it Does* (April 2000) available at <http://www.moj.gov.jm/pdf/ccjustice.pdf>

<sup>69</sup> *Barbados Rediffusion Services Limited v. Mirchandani* (CCJ Application No. AL 0001 of 2005).

<sup>70</sup> *Ibid* at para. 43.

<sup>71</sup> (*CCJ Appeal No. CV 13 of 2007*), at para 21-22 [Ross].

important to note that leave to appeal as a poor person here does not cover the cost of legal services.

Due to the recent establishment of this court, it is difficult to assess the effect that this new mechanism has on access to justice for vulnerable groups. In *Ross*, the court noted that the appellant, who was “blind and virtually penniless,” was unable to bring her case to the CCJ without the special leave to appeal as a poor person. However, her case depended “on the services of competent and public-spirited attorneys” working on a *pro bono* basis.<sup>72</sup> Nonetheless, this provision in the CCJ rules does represent an effort to facilitate access to the highest court of the Caribbean, and thereby legally empower low-income groups.

#### **4. Struggling for Transparency in the International Centre for the Settlement of Investment Disputes**

International instruments aiming at the protection of investment, the most common being bilateral investment treaties, now “systematically provide for the right of a foreign investor to claim directly against a host State for violations of treaty provisions.”<sup>73</sup> ICSID was established in 1965 under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*.<sup>74</sup> Currently, 147 States have ratified the *ICSID Convention*. ICSID offers States “procedures for the conciliation and arbitration of investment disputes they may have with individuals or companies that qualify as nationals of other Contracting States.”<sup>75</sup>

Generally, investment treaties will provide a prohibition on uncompensated expropriation, as well as an obligation by the host State to provide ‘fair and equitable’ treatment to all investors. Such provisions have caused controversy, especially when a measure taken by a State in order to protect the environment or enhance social wellbeing conflicts with an obligation towards a foreign investor, leading to compensation for the investor. This phenomenon has been referred to as ‘regulatory chill.’<sup>76</sup> As such, the settlement of investor-State disputes under ICSID can have direct effects on a State’s capacity and willingness to regulate to promote environmental protection, for example, or enact social policies benefitting vulnerable populations.

Civil society organisations have for a long time criticised ICSID procedures for their lack of transparency. Traditionally, the participation of third parties to ICSID disputes, as well as access to the hearings and to documents submitted in the context of the case, was contingent on the permission of the parties. In the *Suez* case, the ICSID arbitral tribunal

---

<sup>72</sup> *Ibid* at para. 25.

<sup>73</sup> Fabien Gélinas, ‘Investment Tribunals and the Commercial Arbitration Model: Mixed Procedures and Creeping Institutionalisation’ in Marie-Claire Cordonier Segger and Markus Gehring (eds) *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005).

<sup>74</sup> [*ICSID Convention*]

<sup>75</sup> Antonio R. Parra, ‘The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes’ (2007) *Foreign Investment Law Journal* 55, at 55-56.

<sup>76</sup> Eric Neumayer, ‘Do Countries Fail to Raise Environmental Standards? An Evaluation of Policy Options Addressing ‘Regulatory Chill’ (2001) 4 *International Journal of Sustainable Development* 231.

made a bold move towards a relative degree of transparency in investor-State proceedings, by allowing the submission of *amicus curiae* briefs from interested third parties without necessarily the consent of the parties.<sup>77</sup> This decision was codified through an amendment of ICSID Arbitration Rule 37 in 2006. A suggestion to relax the rules relating to the access of third parties to ICSID Arbitral Tribunal hearings, however, proved too controversial.

The amended Rule 37 was first applied by an Arbitral Tribunal in the *Bewater Gauff* case.<sup>78</sup> Here, a group of NGOs including the Center for International Environmental Law and the International Institute for Sustainable Development presented a petition to the Arbitral Tribunal to be accepted as *amicus curiae* and submit briefs to the Tribunal. The NGOs also requested the right to attend the hearings and to access all documents presented by the parties. The case involved concerns regarding access to drinking water in the context of privatisation, and the NGOs contended that it had wide implications for developing countries contemplating the privatisation of water or infrastructure services.<sup>79</sup> Tanzania presented no objection to the NGOs requests, while Bewater Gauff objected on all counts, arguing that ‘no environmental issues arise for determination in this case and that the arbitration raises no issues of sustainable development.’<sup>80</sup> Despite the objections of Bewater Gauff, the Arbitral Tribunal opted to accept the *amicus curiae* brief, noting the strong public interest component in this case.<sup>81</sup> However, the Tribunal considered itself bound by article 32(2) of the ICSID Arbitration Rules, and acknowledging the objection of one of the parties denied both access to the hearings and to the documents to the NGOs.

Despite the recent progress with regard to third party intervention, ICSID Arbitration Rules as interpreted by the Arbitral Tribunals still severely constrain the ability of vulnerable populations to have their voice heard and to access information in the context of investor-State disputes. This is particularly problematic considering the disproportionately large burden that vulnerable populations can bear in relation to the negative social or environmental effects of these disputes, especially in developing countries.

### ***Conclusion***

Through these examples, it appears that international courts and tribunals are sensitive to the public policy repercussions of their decisions, and willing to innovate through procedural mechanisms in order to facilitate access to information and access to justice for vulnerable populations. Such innovations promote sustainable livelihoods by enhancing the participation of vulnerable groups in decision-making and facilitating legal empowerment. Significant procedural challenges still remain especially at ICSID, where the lack of transparency in the hearings process is arguably problematic. It is also important to emphasize that although procedural mechanisms for legal empowerment can be conducive

---

<sup>77</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, 19 May 2005 (ICSID Case No. ARB/03/19).

<sup>78</sup> *Bewater Gauff (Tanzania) Limited v. United Republic of Tanzania*, Procedural Order No. 5 of February 2, 2007 (ICSID Case No. ARB/05/22)

<sup>79</sup> *Ibid* at para. 12.

<sup>80</sup> *Ibid* at para. 34.

<sup>81</sup> *Ibid* at para. 50.

to positive substantive outcomes for vulnerable groups, they are by no means a guarantee of just substantive outcomes. For instance, increased NGO participation at ICSID may ensure that the arbitral tribunals are exposed to the concerns of vulnerable groups. However, the outcome of these cases will remain largely determined by the substantive legal reasoning adopted by the adjudicators.